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Gilles Lauzon, Q.C., General Counsel
International Aviation Law Secretariat
Department of Justice Canada
284 Wellington Street
Ottawa, ON K1A 0H8

Dear Mr. Lauzon,

Re: Review of the Draft Unlawful Interference Convention and Draft General Risks Convention

I am pleased to provide you with the comments of the National Air & Space Law Section of the Canadian Bar Association (CBA Section) on the draft *Convention on Compensation for Damages to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft* (Unlawful Interference Convention) and the draft *Convention on Compensation for Damage Caused by Aircraft to Third Parties* (General Risks Convention). This letter provides an overview of the legal implications of these Conventions, both generally and in relation to specific provisions. The draft Conventions represent a significant departure from Canadian domestic law in a number of key aspects which are discussed below. The purpose of this letter is to ensure that the Canadian government is aware of these implications, and to point out inconsistencies between the Conventions and technical problems in the text so these may be amended before the text of the Conventions is finalized.

General Overview

At present, claims from third parties for damage arising from aircraft are governed by the domestic law of Canada. Under the common law, victims are required to establish negligence by the operator or other parties to recover damages, or to pursue recourse directly against the perpetrators of an unlawful act. In either case, complex multi-party litigation would ensue. Victims are entitled to seek punitive and aggravated damages in litigation.

Similarly, under the civil law of Quebec, victims must establish the "fault" of the owner, operator or manufacturer of the aircraft debris that caused damages. In establishing the liability of the owner, operator, or manufacturer, there must be a causal connection between the "fault" and the damages.

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Depending on the extent of the damage and the number of claimants, victims may face lengthy and protracted litigation as well as a serious risk that the available insurance, if any, would be insufficient to provide adequate compensation. Moreover, as the law currently stands in Canada, victims who have obtained judgment against a carrier would be in the position of an unsecured creditor with no priority to recover from the operator's assets in case of bankruptcy.

Liability under the General Risks Convention

The General Risks Convention proposes a two-tier scheme of operator liability for damage to third parties whereby:

- the operator is strictly liable up to certain specified insurance limits; and
- for claims in excess of the policy limits, the operator has the burden of disproving negligence in order to keep claims within the policy limits.

Liability under the Unlawful Interference Convention

The Unlawful Interference Convention establishes a three-tiered compensation scheme for victims arising from unlawful interference with aircraft whereby:

- the operator is exclusively and strictly liable up to certain specified insurance limits;
- claims in excess of the liability limits of the operator may be asserted against a Supplementary Compensation Mechanism to a maximum of three billion Special Drawing Rights (SDRs) per event; and
- claims in excess of the first two tiers may be brought against the operator where the operator or its senior management contributed to the occurrence by an act or omission done with intent or recklessly and with knowledge that damage would probably result.

Comments regarding Liability under both Conventions

Both Conventions provide a three-year limitation period within which to assert claims for damages. Claims for punitive and aggravated damages are expressly precluded. The Conventions also significantly increase the minimum liability insurance required of operators over that currently required under the *Canadian Aviation Regulations* and provide a system for preferential payment of wrongful death and personal injury claims in the event total claims exceed the available insurance limits (and in the case of the Unlawful Interference Convention, the Supplementary Compensation Mechanism limits).

The combination of higher insurance limits and strict liability should result in significantly greater compensation to victims and more expeditious resolution of claims. The overall effect of these provisions, if ratified, would be to significantly improve the legal position of victims regarding events arising from unlawful interference with aircraft.

In turn, operators would benefit from the exclusion of claims for punitive and aggravated damages and may benefit from the simplified claims process. In theory, this claims process

should result in shortened litigation and lesser burdens of discovery on the operator, especially where total claims do not exceed the available insurance limits. On the other hand, operators would almost certainly face increased insurance costs due to the significant increase in insurance limits required by the Conventions. They would still face the potential for unlimited liability. In the General Risks Convention, unlimited liability occurs where total claims exceed the available insurance limits and the operator is unable to disprove negligence. In the Unlawful Interference Convention, the limit is broken where the total claims exceed the available insurance limits and the Supplementary Compensation Fund, and it is proven the operator acted recklessly.

Ratification of the Unlawful Interference Convention would also impose burdens on operators not currently found in Canadian law. Under this Convention, all claims arising from unlawful interference are channelled against the operator, which is deemed to be liable only upon a finding that the damage was caused by an aircraft in flight. As a result, operators will face the burden of defending and compensating all claims arising from an event, subject to the limits of its liability insurance. Claims by the operator for contribution and indemnity are permitted but may only be pursued after all victims have been compensated. Moreover, operators could also face additional administrative burdens to fund the Supplementary Compensation Mechanism, including reporting of all flight activity involving passengers and cargo. If the Conventions were extended to general aviation, there would be a significant new administrative burden to track and report flights, in addition to funding obligations.

Comments on Specific Provisions

Definitions

We offer the following comments regarding the definitions in both Conventions:

- **Event –** there is inconsistency between the two Conventions, as "event" is defined only in the Convention on Unlawful Interference. However, liability limits in Article 4 of the General Risks Convention are "per event."

- **Operator –** the definitions in both Conventions are awkward and difficult to follow. The intent appears to be to define the operator as the person who had the lawful right to use the aircraft and had navigational control over the aircraft at the time of the accident. As well, adding a reference to "unlawful interference" in the Unlawful Interference Convention definition has the potential to cause confusion, since the term "operator" is used throughout the Unlawful Interference Convention in contexts unrelated to an event involving unlawful interference. For instance, Article 16(2) is about the obligation of State Parties to ensure operators report flight activity.

- **Third Party** – the definition includes, in the event of a collision between two aircraft, passengers on the other aircraft. This definition, combined with the right to recover damages for mental injury under Article 3, will give broader rights to compensation to passengers for personal injury than are available to passengers under the Montreal or Warsaw Conventions. It is, however, consonant with the domestic law of Canada.

Scope – Unlawful Interference Convention

Article 2 of the Unlawful Interference Convention provides that a State Party may declare the Convention to be applicable to domestic aviation. Such a declaration by Canada would require reporting of domestic passenger and cargo movements under Article 16 when there is at present no system in place for the monitoring and reporting of those flights.

Compensation

Article 3 in both Conventions provides for compensation, including damages for mental injury. Passengers in claims against carriers under the Montreal or Warsaw Conventions have a very limited recovery for mental injury. This could lead to an anomalous result wherein passengers on board each aircraft in a mid-air collision would have greater rights to damages against the operator of the other aircraft than are currently available in a claim against their own carrier.

The definition of mental injury is clear and capable of adjudication under Canadian law as it currently stands. However, it is unclear whether the intent of the Convention drafters is to exclude claims for mental injury by witnesses who were traumatized simply by viewing the event. If that is the intent, the language would be clearer if it read, "Damages due to mental injury shall be compensable only if caused by a recognisable psychiatric illness resulting either from bodily injury or from direct exposure to the likelihood of imminent death or bodily injury *of the claimant*." The Article does not deal with the question of whether damages for mental injury survive the death of the claimant. In the absence of express language in the Conventions, this issue would likely have to be resolved by reference to the applicable domestic law.

Environmental damage is recoverable under this Article in the General Risks Convention. However, it is not defined or constrained in any manner except the application of domestic law and the "direct consequence" requirement.

Limits of Liability – General Risks Convention

Article 4(1) of the General Risks Convention establishes the limits of liability of the operator for each aircraft and event. For the sake of clarity, the Article should specify that the limits apply, except as provided in Article 4(2), to claims based on joint and several liability under Article 6 as well as any claims for contribution and indemnity.

Article 4(2) requires the operator to disprove negligence in order to limit its liability to the available insurance limits as provided in Article 4(1). Where the operator is unable to meet this burden, its liability is unlimited. The effect of this provision needs to be considered in conjunction with Article 5, which gives priority to the death, personal injury and mental injury claims over all others if the "total amount of damages to be paid exceeds the amounts available under Article 4". The term "amounts available under Article 4" is ambiguous if the limits of liability have been broken and could be interpreted to include amounts other than insurance policy limits. Taken together, the two articles have the potential to set priorities over the assets of the operator in a manner which conflicts with domestic bankruptcy and insolvency laws. If the intent is to apply the priority rules to the distribution of the insurance policy limits alone, this should be clearly stated.

Reduced Compensation – General Risks Convention

Article 5 of the General Risks Convention sets out priorities for payment of claims where the total of amount of damages to be paid exceeds the amounts available according to Article 4. As stated above, the priority for amounts in excess of insurance limits is uncertain in a situation where the limits of liability have been broken.

Events Involving Two or More Aircraft

Article 6 of the General Risks Convention specifies:

> Where two or more aircraft have been involved in an event causing damage to which this Convention applies, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party.

However, the Article fails to specify whether an occurrence involving more than one aircraft is considered a single event or multiple events. "Event" is not defined in the General Risks Convention. In the Unlawful Interference Convention, "an event occurs when damage is caused by an aircraft." In a collision, it could be argued that damage caused by each aircraft is a separate event. The effect of this interpretation, when combined with joint and several liability under General Risks Convention Article 6(2), would effectively double the limits of liability insurance applicable.

Both Conventions provide that where two or more aircraft are involved, the operators of those aircraft are jointly and severally liable for any damage suffered by a third party. In this event, "the recourse between them shall depend on their respective limits of liability and their contribution to the damage."[1] It is unclear how this provision would be applied where the limits of liability were broken under the Conventions for one or both operators. As well, an operator's "contribution to the damage" may be disproportionate to the degree of fault. For instance, in a mid-air collision between a Boeing 747 and an executive jet, the former is likely to cause more damage on the ground than the executive jet, irrespective of fault of their operators.

Both Conventions also provide that, "No operator shall be liable for a sum in excess of the limit, if any, applicable to its liability."[2] This is meaningless if the liability limits are broken under the Conventions, and superfluous if they are not. If the intent of this article is to limit the joint and several liability of an operator to its policy limits where the liability limits of another operator have been broken, this should be clearly stated.

Compensation from the Supplementary Compensation Mechanism – Unlawful Interference Convention

The compensation payable by the Supplementary Compensation Mechanism under Article 18 of the Unlawful Interference Convention is limited to three billion SDR per "event". An "event" is defined as occurring "when damage is caused by **an aircraft** in flight". Under this definition, an occurrence involving more than one aircraft could be interpreted as separate events. If the intent

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1 Article 6(2) of the General Risks Convention and Article 5(2) of the Unlawful Interference Convention.

2 Article 6(3) of the General Risks Convention and Article 5(3) of the Unlawful Interference Convention.

is to have the three billion SDR limit apply to an occurrence regardless of the number of aircraft involved, this should be clearly stated.

Article 18(3) of the Unlawful Interference Convention provides that the Conference of Parties may determine that, due to unavailability of insurance in respect of the damage covered by the Convention in certain circumstances, the Supplementary Compensation Mechanism shall pay the damages arising from an event of unlawful interference. The circumstances in which the Conference of Parties may determine unavailability is unduly narrow: circumstances where the insurance is unavailable generally or in relation to a particular operator following an event affecting that operator. It does not appear to contemplate a situation where insurance is unavailable to operators operating in a particular geographic region or for reasons unrelated to an event. Compensation from the Supplementary Compensation Mechanism should be available in those circumstances as well.

Court Costs

It is unclear under Article 7 of the General Risks Convention if a potential award of court costs and other expenses is in addition to or included in the limits of liability in Article 4. This contrasts with the language of Article 21 of the Unlawful Interference Convention, which is clear that these may be awarded notwithstanding the limits on liability. The provisions should be harmonized.

Advance Payments

Under the Conventions, "If required by the law of the State where the damage occurred, the operator shall make advance payments without delay…"[3] It is unlikely that this Article will assist victims, given the broad range of claims permitted and the proposed three-year limitation period. An operator would usually not be in a position to make advance payments until the totality of all claims is known and it is unlikely that a court would order such payments before this time, given the priority to be given to certain claims in the event that liability limits are met.

Insurance

State Parties are required to ensure that operators maintain "adequate insurance or guarantee covering their liability."[4] Given the potential for unlimited liability, it should be clarified how the adequacy of insurance is to be determined.

Exclusivity

Article 28 in the Unlawful Interference Convention is different from its counterpart, Article 12 in the General Risks Convention. First, the phrase beginning "without prejudice…" is at the beginning of the Article in the Unlawful Interference Convention, and at the end in its counterpart. The two articles should be identical to avoid any confusion. Second, Article 28 in the Unlawful Interference Convention includes the phrase, "no claims shall lie against any other person for compensation." We assume this is intentional and that there is no intent to restrict claimants under the General Risk Convention from suing parties other than the operator.

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[3] Article 8 of the General Risks Convention, and Article 6 of the Unlawful Interference Convention.

[4] Article 9 of the General Risks Convention, and Article 7 of the Unlawful Interference Convention.

In addition, Unlawful Interference Convention Article 28(2) states that, "Paragraph 1 shall not apply to an action against an individual who has intentionally committed an act of unlawful interference." It is unclear why the term "individual" is used when the term "person" is defined in the Convention.

Forum

Article 31 of the Unlawful Interference Convention permits actions to be brought only in the State where the damage occurs. In contrast, Article 16 of the General Risks Convention contemplates that an action could be brought in the State in which the operator has its principal place of business. This means that under the latter Convention, there is the potential for actions arising from the same event to be brought in two different fora by different groups of claimants.

Therefore, under the General Risks Convention, there is the potential for inconsistent decisions on critical issues, such as whether the limits of liability can be broken in accordance with Article 4(2). In the case of a mid-air collision between two aircraft, the potential for actions in three different jurisdictions exists. Consideration should be given to specifying the authority of the court to stay cases in their jurisdiction pending decisions in another for the sake of judicial efficiency, or to dismiss these cases on the basis of *forum non conveniens*.

The uncertainty created by this provision in the General Risks Convention may extend to Unlawful Interference Convention cases. If it is unclear whether the accident resulted from an act of unlawful interference, some victims may sue in the State where the operator has its principal place of business, alleging a general risk accident, and others may sue the operator in the State where the damage occurred, alleging unlawful interference. The instances in which this could occur are likely limited but not without precedent. One such case is that of Korean Airlines 007, which was shot down by Soviet aircraft. A lawyer confronted with such a case under these Conventions would likely have to plead both Conventions.

Duties of State Parties – Unlawful Interference Convention

Article 16 of the Unlawful Interference Convention imposes a duty on State Parties to ensure that an operator fulfils its obligations to fund the Supplementary Compensation Mechanism and to ensure that information on the number of passengers and quantity of cargo departing on international commercial flights is reported. This potentially imposes a significant administrative burden on operators, which should be considered as part of Canada's decision whether to endorse the Convention.

Right of Recourse – Unlawful Interference Convention

Article 24(1) provides that the operator shall have a right of recourse against any person who has committed the act of unlawful interference but no claim may be enforced until all claims of victims have been finally settled and satisfied. It is unclear what is meant by the term "enforced." It could mean steps to enforce a judgment of the court or any action taken to assert and prosecute the right of recourse, such as the commencement of proceedings. This should be clarified. If the intent is to prevent the operator from taking steps to assert its right of recourse until all claims of victims have been finally settled and satisfied, this right could be seriously eroded by the passage of the time.

The same applies to the rights of recourse against other parties contemplated by Article 24(2), and the right of recourse of the Supplementary Compensation Mechanism under Article 25.

Recognition and Enforcement of Judgments

The Conventions provide that that recognition of a foreign judgment rendered under the Convention may be refused where recognition or enforcement would be "manifestly contrary" to public policy in the State Party.[5] Under Canadian domestic law, recognition or enforcement of the judgment may be denied where it is contrary to public policy. It is not clear why the Conventions require litigants to discharge the heavier burden of proving that the judgment is "manifestly" contrary to public policy.

Period of Limitation

The three-year limitation period in both Conventions is longer than the two-year period typically found in Canadian domestic law for actions of this nature, and could have a significant negative impact on the expeditious resolution of damages claims and the making of advance payments.

Conclusion

Thank you for the opportunity to comment on these important draft Conventions. We would be pleased to be of further assistance, and welcome any questions you may have about the matters discussed above.

Yours truly,

(Original signed by Kerri A. Froc for Joe Fiorante)

Joe Fiorante
Chair, National Air & Space Law Section

[5] Article 17 of the General Risks Convention and Article 33 of the Unlawful Interference Convention.