The System of the Warsaw Convention on Liability in International Carriage by Air

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1. INTRODUCTION

The rules of the Warsaw Convention of 1929 are well known and still being all over the world. It is undoubtedly the most widely accepted private international law treaty with some 130 parties[1].

It is also one of the most generally criticized and its treaties and revision has been a current theme since 1935.

Nonetheless, it was always considered to be in the general interest of all concerned, governments, passengers, shippers and airlines to maintain a uniform system while improving it in response to the economic, social, legal and policy developments in the field of international transport by air. The air carrier's liability limit for passenger injury or death was originally, and still is today, one of the main criticisms. It was also soon recognized that several other provisions of the Warsaw Convention required clarification and adjustment including, inter alia the civil law concept of "dol", embodied in Article 25, which had no equivalent in the Anglo-Saxon legal system.

The Warsaw Convention of 1929, though amended many times during the past several decades, is the sole convention which contains private-law-based regulations on air carriers, and has therefore played a very important role in establishing an international legal system for international carriage by air. The Warsaw Convention established a set of international principles to promote uniformity in resolving legal claims arising out of contracts for International Air Carriage.

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[1] Huguette Larose, *"Modernization of the Warsaw-Hague System of Airline Liability in International Air Transportation"*, Liber Amicorum of N. M. Matte, (1989), at 173.

The Warsaw System consists of the Warsaw Convention, the Hague Protocol, the Guadalajara Supplementary Convention, the Montreal Inter-Carrier Agreement, the Guatemala Protocol, and the Montreal Additional Protocols, No. 1, No. 2, No. 3, and No. 4. The Warsaw Convention imposes the burden of proof on the air carrier instead of on the victims, thus presuming the air carrier's fault for personal or property damages caused during international carriage.

The sum of the compensation for damage on a carrier's liability for the death or personal injury of each passenger is limited to the sum of 125,000 Francs Poincaré, that is approximately US $ 8,300, under the Warsaw Convention, the sum of 250,000 Francs Poincaré, that is approximately US $ 16,600 under the Hague Protocol, the sum of US $ 75,000 (US $ 58,000 exclusive of legal fees and costs) under the Montreal Inter-Carrier Agreement, the sum of US $ 100,000 under the Guatemala City Protocol and the sum of 100,000 SDR under the Montreal Additional Protocol No. 3[2].

As a fundamental principle of the air carrier's liability in the international convention and protocols, for instance in the Warsaw Convention and the Hague Protocol, the principle of limited liability and a presumed fault system has been adopted. Subsequently, the Montreal Inter-carrier Agreement of 1966, the Guatemala City Protocol, the Montreal Additional Protocol No. 3, and the Montreal Additional Protocol No. 4 of 1975 maintained the limited liability, but substituted the presumed liability system by an absolute liability, that is, strict liability system.

The Warsaw Convention has been amended many times during the past sixty five years in order to increase the maximum amount of liability for damage sustained in the case of death or injury of a passenger, because of an increasing desire to protect passengers damaged during an international flight.

In the international legal system for air transportation, the Warsaw Convention has played a major role, and has been amended many times in consideration of the rapid development of air technology, changes of social and economic circumstances, difficulties in proof and discovery of facts, need for the protection of a victim or an injured party and so on. Some amendments became effective, but others are still not effective. As a result, the whole international legal system for air transportation is at present complicated and tangled.

2. THE AIR CARRIER'S LIABILITY UNDER THE WARSAW SYSTEM

The Warsaw System consisted of the Warsaw Convention of 1929, the Hague Protocol of 1955, the Guadalajara Convention of 1961, and the Montreal Additional Protocol No. 1, No. 2, No. 3 and No. 4 belongs to the field of the International private air law.

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[2] Doo Hwan Kim, *Some Considerations of the Draft for the Convention on an Integrated System of International Aviation Liability*, Vol. No.3, Journal of Air law and Commerce, at 765, (1986); Doo Hwan Kim, *Some considerations on the Civil Liability of the Compensation for Damages of the Air Carrier*, Vol.3, Soong Sil Law Review(1987), at 13.

Although the Warsaw system and its attempts at the unifying the rules of aviation enjoys a worldwide reputation, its main points may be briefly summarized hereunder for the purpose of this essay. As a fundamental principle of the air carrier's liability in the international convention and protocols, for instance, in the Warsaw Convention and the Hague Protocol, the principle of limited liability and a presumed faulty system has been adopted.

The Warsaw Convention imposes the burden of proof on the air carrier instead of on the victim, thus presuming the air carrier's fault for personal or property damages caused during international carriage[3]. However, recently the liability limitation's amount of air carriers to personal damages is trending to increase in order to protect the victims[4].

Meanwhile, states party to the Warsaw Convention and/or subsequent amendments hereof were concerned by the prospect of not having an official price of gold as a result of the modification of the Articles of Association of the International Monetary Fund (IMF). Montreal Protocol No. 4 was to complement the Guatemala City Protocol by revision of the liability limits for cargo under the Warsaw-Hague Convention, while the Montreal Additional Protocol No. 1, No. 2 and No. 3 changed the unit for computing the limits of the carrier's liability under the Warsaw Convention, the Warsaw-Hague Convention and the Warsaw-Hague-Guatemala Convention into Special Drawing Right (SDR), the IMF artificial unit of account is based on a basket of leading currencies.

3. THE WARSAW CONVENTION OF 1929

(1) Division of the Convention

The Warsaw Convention is divided in five chapters (forty one articles). The first chapter (articles 1-2) regulates the definitions and the scope of the Convention. The second chapter (articles 3-16) deals in general with transportation documents. The third chapter (articles 17-30) is concerned with the international air carrier's liability. The fourth chapter (article 31) contains provisions relating to combined transportation, while the fifth chapter (articles 32-41) comprises the general and final provisions. It follows that its key points of aims are twofold, i.e.;

(1) to regulate the international air carrier's liability; and
(2) to regulate the documents of international air transportation.

These diverging national backgrounds have not been entirely overcome by the uniform text because certain provisions are still the object of divergent and contradictory interpretation by the courts of the various contracting states[5].

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[3] Cf. Art. 20(1) of the Warsaw Convention: *"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures"*.

[4] Andreas F. Lowenfeld, *Aviation Law*, Matter Bender(1974), at 188-189.

[5] N. M. Matte, op. cit., at 17.

The international character of air transportation depends on an agreement between the parties to a contract of carriage, rather than on the factual crossing borders, and is common to contracts for transportation where the airports of departure and destination are placed within two States which are parties to the Convention, or to the carriage within one State, if there is an agreed stopping place in the territory of another state[6].

Transportation performed by several successive air carrier is treated as one single transportation if so regarded by the parties to the contract, and will be considered as international carriage even if one part of the journey is performed entirely within the territory of the same State[7]. As time went by and aviation began expanding on a large scale, the Warsaw Convention had to be amended or added to on a number of occasions in order to be kept up to date.

(2) The Air Carrier's Liability

(A) The adoption of the presumed fault liability

The Warsaw Convention is fundamentally based on the principle of the presumed fault liability for the personal and property damage caused by aircraft accident. Articles 17-18 of the Warsaw Convention regulates the international air carrier's liability to compensation for damages sustained to the passengers or cargo which they are carrying.

In accordance with Article 17, the air carrier is liable for personal damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger if the accident which caused the damage so sustained took place on board of the aircraft or in the course of the operation of embarking or disembarking. Article 17 of the Convention speaks of bodily injury. Does bodily injury also include mental injury?

In the American case of Rosman v. Trans World Airlines[8] it was held that only mental injury directly resulting from bodily injury could be compensated. In Husserl v. Swissair[9] an American court was, however, willing to award compensation for mental injury, irrespective of any link with bodily injury. On the other hand, the air carrier is liable for the destruction, loss or damage of registered baggage or cargo, if the event which caused the damage took place during the air carriage.

This provision appears to create a more severe liability for baggage and cargo. The phrase "during the carriage by air" means the period during which the

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6 Article 2, para. 2 of the Warsaw Convention.

7 Article of the Warsaw Convention, para. 3.; Aleksander Tobolewski, *"Monetary Limitations of Liability in Air Law"*, (1986), at 22-23.

8 Rosman et al. v. TWA and Herman et al. v. TWA, Court of Appeal, New York State, June 13, 1974; Avi. Vol. 13. at 17, 231.

9 G. Miller, *Liability in International Air Transport*, (1977), 126 et seq. Cf. Palagonia et al. v. TWA, New York Supreme Court, County of Westchester, December 28, 1978.

baggage or cargo are in charge of the carrier, whether in an airport, on board of an aircraft, or, in the case of a landing outside an airport, in any place whatsoever. But the period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport.

If such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air under Article 18 of the Warsaw Convention. The carrier is not liable for damage caused by an aircraft accident due to force majeure or fortuitous incident, or by the fault of a third party. The limitation of liability of the air carrier is, on the other hand, compensated by the possibility of insurance, that the passengers and consignors of cargo are able to take out the aviation insurance.

(B) The burden of proof

But the carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damages or that it was impossible for him or them to take such measures (Article 20). As a result, the carrier is liable to prove that no fault on his part has caused the accident. In other words, the carriers have the burden of proof [10].

The Warsaw Convection drafters had adopted the principle of the faulty liability is that the technology of aircraft manufacture and industry was not fully developed in the 1920's and the aircraft itself was a highly risky device of transportation, and, therefore, the heavy burden of air carriers like absolute or strict liability would hinder the development of the aviation industries.

The principle of the reversal of the burden of proof does not apply in cases in which passengers (or their claimants) try to prove "dol", wilful misconduct (gross negligence) on the part of the air carrier (article 25). In using the terms "wilful misconduct", American courts reach the same results as other courts with the idea of dol. In the case of wilful misconduct the burden of proof is on the plaintiff. On the other hand, the air carrier's liability is unlimited if the damage is caused by "dol" or wilful misconduct (gross negligence) committed by him, or one of his agents acting within the scope of his employment[11].

(C) The liability of delay

According to the Warsaw Convention Article 19, the carrier is liable for damages resulted from the late arrival passengers, baggages and goods. The liability of the carrier for delay is the same as for injury and death to passengers and for the loss or damage of goods. IATA has formulated regulations relating to delay requiring the carrier to use his best efforts to carry the passenger and his baggage with reasonable dispatch.

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10 B. G. Jervis, *Aviation Law*, Cambridge(1983), at 2/2-2/8.

11 N. M. Matte, *"Treatise on Air-Aeronautical Law"*, 1981, at p. 380.

(D) Limitation of liability

For the carrier the most important feature of the Warsaw Convention is the limitation placed on his liability by Article 22. The limitation differs with respect to passenger, baggage and cargo. The carrier's liability to each passenger was originally limited to the sum of 125,000 Francs Poincaré (approx. US $ 8,300) by Article 22 of the Convention, while the liability of the carrier for the checked baggage and cargo is limited to a sum of 250 Francs Poincaré (approx. US $ 17) per kilogram, unless the consignor had made, at the time when the package was handed over to the carrier, a special declaration of value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, "unless he proves that the sum is greater than the actual value to the consignor at delivery" (Article 22, para. 2)[12].

4. THE HAGUE PROTOCOL OF 1955

It was added to the Warsaw Convention with the aim of adapting it to the demands of modern transport. The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air was signed at The Hague on September 28, 1955 by 26 States and came into force on August after 30 countries's instruments of ratification had been lodged; hereinafter cited as the Hague Protocol. The Protocol amended the meaning of the term "High Contracting Parties" (Article 1) in view of the post-war decolonization of states. Military transport was excluded from the Warsaw Convention of 1929 (Article IIE).

It simplified the formalities for the issuance of tickets and transport documents by reducing the number of particulars on these documents. The Hague Protocol is an Amendment to the Warsaw Convention of 1929. The Legal Committee of ICAO inherited from CITEJA the task of revising this Convention which regulates the liability of the air carrier to passengers and consignors and which limits the liability except in cases of gross negligence, to a maximum of 25,000 Poincaré gold francs (about US $ 20,000) per person. As a result of the Committee's revision, a Protocol of Amendment to this Convention was adopted by a diplomatic conference at The Hague in 1955; among other things it doubles the existing limits of liability.

5. THE GUALADAJARA CONVENTION OF 1961

The Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier was signed at Guadalajara, Mexico, on September 18, 1961, by eighteen states and came into force on May 1, 1964, the ninetieth day after the deposit of the fifth instrument of ratification; hereinafter cited as Guadalajara Convention. The Warsaw Convention does not contain particular rules

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[12] See also Data Card et al, v. Air Express International et al, Queens Bench Division (Commercial Court), May 28, 1983, Air Law, Vol. H (1984), at 187; I. H. Ph. Diederiks-Verschoor, op. cit., at 68.

relating to international carriage by air performed by a person who is not a party to the agreement for carriage. The Guadalajara Convention was drawn up to provide rules to govern the international carriage by air performed by actual carrier who is not also the contracting carrier. Broadly the object of the Convention was to give to an actual carrier the same rights and liabilities as a contracting carrier under the Warsaw Convention system[13].

6. THE MONTREAL AGREEMENT OF 1966

In so far as the United States were concerned, the question of limits liability for the international air carrier had remained without satisfactory solution. The amount stated in the Warsaw Convention, i. e., 125,000 Francs Poincaré (approx. US $ 10,000), or the amount stated in the Hague Protocol which doubled the ceiling on compensation to 250,000 Francs Poincaré (approx. US $ 20,000) did not assure adequate protection for the air passenger. This amount contrasted quite unfavourably with the amounts awarded by American courts for damage resulting from accident or death sustained in domestic flight.

Therefore, the United States denounced the Warsaw Convention at the end of 1965[14].

For several countries, this move on the part of United States was an ultimatum which had to be taken seriously. Indeed, in view of the overwhelming influence of the United States in the air industry, the other states could no longer disregard this ultimatum which was threatening to undermine the rather solid basis established by ICAO, as well as international cooperation in the industry. IATA took the American position into consideration and consulted its members. After lengthy discussion, this Agreement was signed at Montreal on May 4, 1966. As a result of this non-governmental Agreement, the United States agreed to withdraw its denunciation[15].

According to the terms of this Agreement, the air carriers undertook to include in their conditions of carriage certain clauses which stipulated that, when the point of departure, the point of destination or an agreed stopping place within American territory, in the journey of a passenger, was within the territory of the United States, the limit of liability was increased to US $ 75,000 per passenger in the case of death or bodily harm and to US $ 58,000 exclusive legal fees. Additionally, the air carrier undertook not to invoke Warsaw Convention Article 20 para. 1 which permitted him to avoid all liability, if he could prove that he had take all necessary measures in order to avoid the damage, or that it was impossible for him to do so. Thus, liability was not tied to fault on the part of the air carrier.

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13 Shawcross and Beaumont, *Air Law*, Butterworths (1977), at 363.

14 N. M. Matte, op. cit., at 19.

15 N. M. Matte, ibid, at 19.

7. THE GUATEMALA PROTOCOL OF 1971

The Guatemala Protocol of March 8, 1971, was also meant to be an amendment to the Warsaw Convention. This Protocol, however, has not yet to come into force. As a result of further work in ICAO on the revision of the Warsaw Convention, a diplomatic conference, held at Guatemala City in 1971, adopted a farreaching revision of the provisions of the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955, which pertain to the liability of the air carrier in respect of the international carriage by air of passengers and baggage.

The Guatemala Protocol has adopted the principle of the strict liability in case of the death or personal injury of the passengers[16]. Accordingly, only when the victims have proved that the event which caused death or the wounding for the passenger took place on board the aircraft or in the course of any of the operation of embarking or disembarking, the carrier is liable for the damages[17]. It is recognized that, if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act of ommission of the person claiming compensation, the carrier shall be wholly or partly exonerated from his liability to such person to extent that such negligence or wrongful act or omission caused or contributed to the damage[18].

With regard to baggage transport, the carrier is liable for damage sustained, in the case of the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking, but the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.

Among other things, the Guatemala City Protocol provides for a regime of absolute liability of the air carrier; an unbreakable limit of the carrier's liability in a maximum amount of 1,500,000 Francs Poincaré (US $ 100,000) per person; a domestic system to supplement, subject to specified conditions, the compensation payable to claimants under the Convention in respect of death or personal injury of passengers; a settlement inducement clause; conferences for the purpose of reviewing the passenger limit, and an additional jurisdiction for suits pertaining to passengers and baggage.

Particularly, subject to Article 15 of the Guatemala Protocol, unless before the thirty-first December of the fifth and tenth year after the date of entry into the force of the Protocol, the limit of liability provided in the Protocol shall be increased by an amount of one hundred and eighty-seven thousand five hundred francs (approximately US $ 12,500)[19]. The Protocol will require thirty ratifications before it comes into force.

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16 S. Mastuoka., *On Drafting the Japanese Air Transportation Act*, Journal of Air Law (Kuho), (1974), No.17, at 53-71.

17 Article 4 of the Guatemala Protocol.

18 Article 7 of the Guatemala Protocol.

19 Kim, Doo Hwan, op. cit., at 49-50

8. THE MONTREAL ADDITIONAL PROTOCOL NO. 1, NO. 2, NO. 3 AND NO. 4

(1) Conclusion of Four Protocols

After Guatemala Protocol, both ICAO and IATA considered that a parallel regime should be adopted with respect to the air carrier's liability for cargo as had been adopted for passengers. For some years, the Legal Sub-Committee had been meeting. In October 1974, the Legal Committee of ICAO worked out a draft revision relating cargo. The Diplomatic Conference on Air Law held at Montreal in 1975 and adopted four Protocols for the amendment of the instruments of the System of Warsaw Convention. The Montreal Additional Protocols No. 1, No. 2, No. 3, and No. 4 were to revise the Warsaw Convention, the Hague Protocol, Guatemala Protocol and, especially, the Montreal Additional Protocol No. 4 concerns with carriage of cargo by air.

(2) The Adoption of SDR within Four Protocols

The main purpose of four Montreal Additional Protocols is to convert the account unit of the liability for damage from Francs Poincaré to SDR (Special Drawing Rights).

The object of Additional Protocols, No. 1, No. 2, and No. 3 of Montreal is to introduce in the Warsaw Convention (1929), respectively, the concept of Special Drawing Rights of the International Monetary Fund to replace the "gold clause" expressed in Poincaré gold francs; however, the gold currency unit may be retained by States which are not members of the International Monetary Fund and whose law does not permit the use of Special Drawing Rights. The Warsaw Convention has adopted Gold francs as a currency unit, but since most nations had gradually adopted the managed currency system, it is necessary for us to change from a conventional currency unit to the SDR unit system.

The Special Drawing Rights were introduced to the aforementioned four Montreal Additional Protocols, which are a fixed sum based, since January 1, 1981, on a "basket" of the values five currencies. The Franklin Mint case in particular has caused quite a stir: here a claimant wanted the free market price of gold to be applied. This was rejected by the Court of first instance in a ruling implying that the Warsaw Convention limits would become unenforceable in the USA. The US Supreme Court, though, reversed that decision.

Accordingly, the liability limit sanctioned by the US CAB (approximately US $ 9 per 1b. cargo, based upon the last official gold price) was considered to be consistent with the Warsaw Convention. The case is a clear illustration of the complications arising from the USA not having adhered to the 1975 Montreal Protocols, which introduced the SDR as the monetary unit for quantifying the carrier's liability[20].

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[20] Franklin Mint v. TWA, US Court of Appeals (2nd Circ.), September 28, 1982; Annals of Air and Space Law (1982), Vol. F, at 601; Air Law(1983), Vol. G, at 79; and TWA v. Franklin Mint, US Supreme Court, April 17, 1984; IATA ACLR No. 614, Air Law (1984), Vol. H, at 184.

(3) The Montreal Additional Protocol No. 4

Originally, the Conference was convened to change only provisions relating to the carriage of cargo. This was eventually done in the Montreal Additional Protocol No. 4.

The Montreal Additional Protocol No. 4 was derived from the amendments of the Warsaw Convention of The Hague Protocol. The amendments refer to international carriage of postal items and to the international carriage of cargo. Although the Montreal Additional Protocol No. 4 has adopted most provisions of the Guatemala Protocol, but this Protocol is an independent one from the Guatemala Protocol.

The basic features of the Montreal Protocol No. 4 are simplification of the documents of carriage, introduction of strict liability of the carrier with limited defences and expression of the amount of limit of liability in terms of Special Drawing Rights of the International Monetary Fund. The Montreal Additional Protocol No. 4 had adopted the absolute liability system with regard to material damages of air cargo and also adopted the contributory negligence doctrine of the Anglo-American law[21].

(4) The Prospect of the Ratification of the Montreal Additional Protocols No. 3 and No. 4 by the United States

This Montreal Additional Protocol is a new Draft for the Convention designed to keep up with new developments in aviation operation technology by means of amendment of the Warsaw Convention, the Hague Protocol and Guatemala Protocol.

Originally, thirteen nations including the United States of American and the United Kingdom have signed this Montreal Additional Protocol, but ten more nations have signed this Protocol thereafter by March 31, 1983. Since only nine nations including the Netherlands, Sweden, Brazil, Columbia, Egypt, Portugal, Yugoslavia, Costa Rica, France have acceded to the ratification of this Protocol on a global basis, the Protocol did not come into force yet. But some powers of the world considered now ratification of it, and I emphasize that Korea also have to study on the Protocol in order to ratify it in the future.

The Government of United States has endeavored to pass the Montreal Additional Protocol No. 3 and No. 4 in the US Senate, but the Senate rejected the Additional Protocol No. 3 on the grounds that the maximum limitation of liability of air carrier provided in this Protocol is too low[22]. Nowadays many states are greatly interested in ratifying the Montreal Additional Protocol No. 3 (MAP. 3) and Montreal Additional Protocol No. 4 (MAP. 4), whether the United States ratifies these Protocols or not. The United States had failed in 1983 to give its approval to MAP. 3 and MAP. 4.

Consequently, it was uncertain for many states whether they should go ahead and seek to bring these two Protocols into force without United States, or wait for

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[21] Article 18 and 21 of the Montreal Additional Protocol No. 4.

[22] George N. Tompkins, *The Defeat of the Montreal Protocols in the United States Senate - What next?*, "Lloyd's, Aviation Law," September 15, 1983, at 2-6.

another lead from the United States, or to abandon the Warsaw system altogether[23].

The MAP. 3 contains a provision which permits a state to adopt a Supplemental Compensation Plan that will provide a procedure for swift and efficient compensation of passengers killed or injured in international air transportation. On June 24, 1988, the Department of Transportation of the United States proposed to the Senate to ratify the MAP. 3 and MAP. 4 with a Supplemental Compensation Plan in order to protect US citizens. On November 15, 1989, the Committee on Foreign Relations of the United States Senate held another hearing to discuss the protocols and the provisions of the new Supplemental Compensation Plan.

At the hearing, representatives of the Departments of State, Justice, and Transportation, airline industry leaders as well as spokes-person for various associations of victim's families and prominent trial attorneys presented testimony to this Committee. On June 21, 1990, the Committee voted to report the MAP. 3 and MAP. 4 favourably to the Senate for advice and consent[24]. If the said Protocols are ratified by the Senate, many countries and airlines in the world will be affected by this. We must take note of American air traffic policy in the near future. As it now lies before the United States Senate, the proposed Supplemental Compensation Plan provides in broad terms the following four points:

[1] US $ 500 million per accident per aircraft to pay for economic damages in claims based on personal injury or death, that is, per passenger approximately one million dollar.

[2] Full compensation for economic as well as non-economic damages for US citizens on any international flight covered by the Warsaw Convention, and for non-US citizens if their flight originated in the United States or if the ticket was purchased there.

[3] Absolute liability on the part of the air carrier, thus requiring the claimant to prove only damages.

[4] Underwriting the plan through the commercial insurance market and financing it by a ticket; the surcharge per passenger is now expected to be US $ 5[25].

The purpose of this arrangement has been to provide a uniform international system of rules and practices for the protection of travellers and shippers and its goal is to bring airlines around the world up to a higher and more equitable level of compensation for injury or loss of life, insure quick and reliable recoveries, in most cases within six months, and promote greater efficiency in the handling of cargo and baggage. The Ministries of Transportation and airlines of Asian countries must pay

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23 George N. Tompkins, ibid, at 1-6.

24 101st United States Congress, 2nd Session June 28, Senate Exec. Rept. 101-21, Montreal Additional Protocols No. 3 and No. 4, 1990, at 2-6.

25 Hearing S. 101-533, Montreal Additional Nos. 3 and 4, Ex. B. 95-1, Hearing before the Committee on Foreign Relations, United States Senate, 101st Congress, 1st Session, November 15, 1989, at 33.

continuously attention to the ratification of Protocols No. 3 and No. 4 with Supplemental Compensation Plan by the US Senate in order to establish their new aviation policy.

9. JAPANESE SOLUTION OF 1992

(1) The Adoption of the Unlimited Liability System of Japan's Airlines

Japanese airline firms would become the world's first to remove a ceiling on the amount of compensation granted to victims of accident on international routes. From November 20, 1992, following the Ministry of Transport approval, the ceiling on international routes of 100,000 Special Drawing Rights, or approximately 17 million, will cease to exist. This comes ten years after a decision to remove a similar ceiling on redress to victims on domestic flights[26]. Japan Airlines, All Nippon Airways, Japan Air System and seven other firms operating regular international flights applied to the Ministry of Transport for approval of their plans to remove the ceiling.

Although the compensation ceiling on Japan's domestic routes was lifted in 1982, the lifting of the upper limit on international routes has been delayed because of the need to strike a balance with the limits set by various foreign countries. The Japanese airline companies set the 17 million ceiling on compensation to victims on international routes in 1981. Even though this amount is high by world standards, it has been criticised as too low compared with compensation paid to victims of car accidents.

An international ceiling of about 1.2 million was set in 1929 boosted to about 2.4 million in 1955. However, airline firms were allowed to raise ceiling. Among existing limits, the roughly 18 million implemented by some European airline companies tops the list. US airline firms operate with a compensation ceiling of about 9 million. In an unprecedented move, the airlines of Japan, effective November 20, 1992, amended their conditions of carriage to waive the limitations of liability for Article 17 passenger injury or death provided by Article 22 of the Warsaw Convention/Hague Protocol/Montreal Agreement as to passengers carried on aircraft of the airlines of Japan.

The mechanism for this waiver has been present in Article 22 (1) of the Warsaw Convention since it was adopted over 60 years ago. Dr. George N. Tompkins pointed out that the disparity between the Convention limitations of liability and damage awards in domestic cases, whether as a result of accidents occurring during non-convention carriage or non-aviation accidents, has become very great in Japan in recent years and, indeed, in many other countries, including the United States. The proposed increase in Convention limits contained in the unadopted 20-year old Montreal Additional Protocol No. 3 would not serve to bridge the increasing gap of disparity to any appreciable extent[27].

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[26] Asahi Daily News, November 10, 1994, Tokyo, Japan.

[27] See *Unlimited Liability*, supra note 7, at 1.

The airlines of Japan have waived any applicable limit of liability provided by the Warsaw Convention, the Hague Protocol or the 1966 Montreal Agreement, for passenger personal injury or death which is caused by an accident within the meaning and scope of Article 17 of the Warsaw Convention. With respect to the waiver of the applicable limit of liability, the Warsaw Convention has been reinstated but only for claims that exceed 100,000 SDR. For claims up to 100,000 SDR, the present waiver of the Article 20 (1) defences remains in effect.

The new regime of unlimited liability for the airlines of Japan has come about by a simple amendment to existing conditions of carriage and passenger rules tariffs. If the carrier and the passenger may agree to a higher limit of liability than that set forth in Article 22 of the Convention, then there certainly is no reason why the carrier cannot waive the convention limit entirely and unilaterally.

(2) Legal Relations between Japan's Airlines and the United States

An application to amend the existing conditions of carriage to effect the waiver was granted by the Ministry of Transport of Japan on November 16, 1992 and the amended conditions of carriage became effective on November 20, 1992. The Department of Transportation (DOT) of the United States, on December 30, 1992, effectively endorsed the waiver as being "consistent with the public interest" of the United States, when the US DOT granted All Nippon Airways (ANA), one of the participating airlines of Japan, an exemption from compliance with the regulations and foreign air carrier permit conditions relating to the Montreal Agreement. In granting the exemption, the DOT concluded:

We have decided to grant ANA an exemption from the provisions of 14 CFR Part 203, section 213.7 and the provisions of its foreign air carrier permit and related exemptions, to the extent necessary to allow ANA to remove its limits of liability for passenger injury and death. ANA would continue to waive the defence under Article 20 (1) only for that portion of a claim up to 100,000 SDRs.

While the Agreement 18900 binds the parties to a liability limit of not less than US $ 75,000 under Article 22 (1) of the Warsaw Convention for passenger injury and death, it was not intended to preclude the waiver of the limitations of liability for higher amounts, or to unlimited liability as proposed here, in a manner which would benefit the travelling public in the form of additional protection. Therefore, we find that the relief sought by ANA is consistent with the public interest[28].

Similar exemptions were granted by the DOT on February 11, 1993 to Japan Airlines, Japan Asia Airways, Japan Air Charter and World Air Network, all participating air carriers of Japan.

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[28] George N. Tompkins, *supra* note 7, at 6.

(3) The Motivation and Comments of Japan's Airlines for Adopting the Unlimited Liability System

The motivation for this development in Japan is primarily cultural and ethical. The liability limit for domestic air transportation was abolished in Japan in 1982. In 1981, Japan's airlines had established a limit of liability of 100,000 SDR for international air transportation by conditions of carriage, the same limit established by the Montreal Additional Protocol No. 3 of 1975. By 1992, even 100,000 SDR was regarded as a too low a limit of liability in Japan, although the Montreal Additional Protocol No. 3 had not yet come into force.

The Civil Air Law Research Institute, comprising scholars, officials of the Ministry of Transport of Japan and the Ministry of Foreign Affairs, representatives of the airlines of Japan and the insurance industry, concluded after extensive study that the passenger liability limit for international air transportation should be abolished by amendment to the existing conditions of carriage since it had proved extremely difficult to achieve meaningful amendment to the Warsaw Convention. Furthermore, the current international air transportation limit of liability was considered to be very low when compared with recent damage standards for personal injury and death in Japan in non-international air transportation cases[29].

The waiver of the applicable Convention limit of liability extends only to passengers travelling on aircraft operated by the airline of Japan which has waived the limit of liability by amendment of the condition of carriage approved by the Ministry of Transport of Japan. While it is fair to assume that the airlines of Japan would hope that their action might spur other major international air carriers to do likewise, for the sake of international harmony there is no desire to coerce other carriers to do so, directly or indirectly.

Before commenting further on the Japanese measures, I would like to mention an interesting case which occurred in Italy some years ago, but which had direct relevance to the point under discussion. In a decision handed down on 2 May 1985, the Italian Constitutional Court declared unconstitutional the domestic Italian laws applying the first paragraph of Article 22 of the Warsaw Convention and Article J of the Hague Protocol. According to the Court, the imposition of limits was a violation of Article 3 of the Italian Constitution, which guarantees equality of all citizens, and Article 2, which guarantees the respect of human dignity[30].

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29 Sakamoto Teruo, *The 1992 Initiative of Japanese Airlines on Passenger Liability System*, Essays in Commemoration of Prof. Dr. Doo Hwan Kim's Sixtieth Birthday (1994), Seoul, Korea, at 69; Koicahi Abe, *The So-called Japanese Initiative: Japanese Airline's Abolition of Liability limits for Personal Injury or Death in International Carriage by Air*, The Korean Journal of Air Law (1994), Vol. 6, at 152-155.

30 I. H. Ph. Diederiks-versioner, *New Developments Around the Compensation Limits of the Warsaw Convention*, Essay in Commemoration of Prof. Dr. Doo Hwan Kim's Sixtieth Birthday, at 7 (1994).

What the Court criticised was not the limits themselves but the inadequate compensation for the passenger. Alitalia is not only a party to the Montreal Agreement of 1966, but it had also, in October 1981, unilaterally established a limit of US $ 90,000 on its domestic and international flights.

In the case of Balkan Airlines v. Tammaro, however, a tribunal in Milan (Italy) delivered a decision that ran contrary to the ruling of the Constitutional Court. Dr. Guerreri, commenting on these decisions, agrees that the Constitutional Court had rightly decided that compensation must be adequate and unquestionable whenever the personal integrity or the supreme asset of "life" have been impaired. He asserts that "As the Treaty (of Warsaw) has emanated from a multilateral joint effort, no similar remedy was available, nor could it be considered as, strictly speaking, the provisions of the international Treaty had not been affected by the Court decision, and they stood valid as between all contracting parties."[31]

Faced with this situation, the Italian Government produced a remedy in the form of a Bill with wide-ranging scope, which was in reality intended to repair international relations that had been so seriously impaired. Article 2 of this Bill provides an increase in the liability limit to the level set forth in the Guatemala Protocol, ratified by Italy by Law No. 43 of 6 February 1981. The instruments of ratification were deposited on 26 March 1985[32].

Prof. Dr. I. H. Ph. Diederiks-Vershoor pointed out that in the light of all this, the question arises: Are these actions by Japanese, Italian and other companies to increase the limits of compensation based on the Warsaw system compatible with this system or not? The last sentence of Article 22, para. 1 permits that "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."[33]

According to Korean and Japanese ideas, airlines should not only pay compensation to passengers immediately after an accident, but also so-called "condolence" money to the next-of-kin. Condolence money is a gift to help a dead person's spirit in the hereafter; it is given for the grief and sorrow suffered by the next-of-kin, and it has risen considerably over the years. The total amount of the Korean and Japanese claims in the case of death is calculated on the basis of the loss of earned income, funeral expenses and material damage (baggage, etc.), plus condolence money.

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31 See G.R.Baccelli, *La Convention de Varsovie devant la Constitution*, Annals of Air and Space Law(1985), Vol. I, at 217-226; G. Guerreri, *The Warsaw System Italian Style: Convention Without Limits*, Air Law (1987), Vol. I, at 294-305; *Decision of 25 October 1976*, Air Law, 1987, Vol. K, at 154.

32 See I. H. Ph. Diederiks-Vershoor, *supra* note 7, at 7, see also G. Guerreri, *A Bill on the Limitation of Liability in the International Carriage of Passengers*, Air Law (1985), Vol. J, at 95-96.

33 Id. at 8.

10. IATA INTERCARRIER AGREEMENT ON PASSENGER LIABILITY OF 1995

(1) Summary

The IATA Intercarrier Agreement on Passenger Liability unanimously approved and adopted by the 51st Annual General Meeting of International Air Transportation Association (IATA) in Kuala Lumpur, Malaysia on October 30-31, 1995. The Intercarrier Agreement on Passenger Liability ("ILA") has been signed by 73 foreign air carriers representing over 50 percent of the revenue ton kilometers performed in international air transportation as at October 30, 1996.

The "benign cartel", appears to lead the way to modernizing the international unification of private air law and agreed - subject to approval by the government - on the future interpretation and application of existing international legal instruments.

The companion agreement, the Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA"), also commands broad airline support and is currently being circulated worldwide for signature. The MIA also has been signed by 44 foreign air carriers as at October 30, 1996. It is designed to ensure that, to the maximum extent practicable, a single liability regime, conforming to the principles of the ILA, will be applicable to and from the United States. IATA anticipates that expeditious approval and immunization of these agreements will assist IATA Members in encouraging other airlines involved in the international carriage of passengers to adhere to them.

This IATA initiative deserves all praise since it brings into focus serious shortcomings of the current unified private international air law and shows the willingness of the industry to find solutions beneficial for the consumer.

Given positive US Department action, IATA believes that the vast majority of passenger movements to and from the United States will benefit from tariffs voluntarily incorporating the agreed liability enhancements by their proposed November 1, 1996 implementation date.

The IIA and MIA, taken together, will revolutionize the liability regime in international passenger air transportation. For more than the 60 years that the United States has been a Party to the Warsaw Convention of 1929[34], the international air passenger liability regime has incorporated a trade-off between a liberal standard of recovery based on presumptive fault under Article 17 and a restrictive limitation of liability under Article 17 and a restrictive limitation of liability under Article 22.1 of the Warsaw Convention.

The Warsaw Convention's approximately $10,000 limitation of liability, fixed by the monetary value of gold, Trans World Airlines, Inc. v. Franklin Mint, 466 U.S.

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[34] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 87C (1934).

243 (1984), has clearly not kept pace with the economic losses suffered by passengers and those claiming on their behalf and, when applicable, substantially restricts compensatory damages otherwise recoverable under applicable national law[35].

While the international carriers increased the limitation by intercarrier agreement to $75,000 in the 1966 Montreal Agreement, and the US Department currently accepts that limit in its regulations, there is often a substantial difference between the $75,000 limitation and damages which might be recoverable absent any specified limit.

Extended and extensive US governmental efforts over a lengthy period to deal with that problem by international agreement and/or by the unilateral implementation of a passenger-financed, administratively-complex "Supplemental Compensation Plan" have not succeeded.

The current restrictive limitation of liability has led to extensive "wilful misconduct" litigation under Article 25 of the Warsaw Convention as claimants have sought to foreclose carriers from benefitting from the limitation. While these claimant efforts have at times succeeded[36], success has come only after lengthy and often expensive litigation with a consequent delay in meaningful settlement negotiations and, frequently, particular hardship for those most in need of prompt compensatory awards[37].

The proposed ILA/MIA regime will eliminate the limitation of liability as a barrier to the award of all otherwise recoverable compensatory damages in cases under Article 17 of the Convention. The absence of a liability limitation also will put an end to Article 25 "Wilful Misconduct" litigation in the US and thus greatly expedite resolution of damage claims by settlement or court action.

In addition, the proposed regime, as implemented to/from the United States, will apply a strict liability standard to the amount of any claim not exceeding $100,000 Special Drawing Rights and maintain the presumptive liability standard of Article 17 for amounts claimed in excess of 100,000 SDRs.

In short, the international airlines, pursuant to the discussion authority and immunity conferred by DOT Order 95-2-44, 95-7-15, 96-1-25 and 96-3-46, have developed voluntary agreements which effectively obviate the liability limitation problem under Warsaw which has been the focus of US diplomatic efforts for more than 30 years.

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35 The Hague Protocol of 1955, 478 U.N.T.S. 371, doubled the liability limit of Article 22.1 but was not ratified by the United States. The Guatemala City Protocol of 1971, amended by the Montreal Additional Protocol of 1975 ("MAP.3), would have increased the liability limit to 100,000 Special Drawing Rights but also has not been ratified by the United States.

36 "Wilful Misconduct" under Article 25 was established, for example, in the Pan Am 103 (Lockerbie) and KAL 007 disasters. In Korea Air Lines disaster at Lockerbie, Scotland, on december 21, 1988, 37 F.3d 804 (2d Cir 1994), cert. denied, 115 S.Ct. 934 (1995); In the Korean Air Lines disaster of September 1, 1993, 932 f.2d 1475 (D. C. Cir.), cert. denied, 502 U.S. 994 1991).

37 IATA, Agreement Relating to Liability Limitation of the Warsaw Convention, Docket OST-95-232, July 31, 1996, at 2-3.

By undertaking that resolution through voluntary agreement consistent with Article 22.1 of the Warsaw Convention, the carriers have reinforced the value of the Convention's worldwide harmonization of international air transportation liability rules and documentation[38].

Moreover, by forging agreements of worldwide applicability, the carriers are proposing to enhance the welfare of passengers throughout the international air transportation system regardless of their nationality or the venue in which claims are adjudicated.

Finally, by accepting responsibility for Article 17 claims without the benefit of Article 22.1 limitation, the carriers have undertaken to make and fund the necessary insurance arrangements, thus avoiding surcharge impositions of passengers and/or the need for separate, complex and administratively costly supplemental compensation plans.

The Provisions Implementing the IATA Intercarrier Agreement("IPA") to be included in Conditions of Carriage and Tariffs proposed by the Air Transport Association of America ("ATA") includes specific provisions, consistent with, but more specific and inclusive than the IATA's ILA and MIA Agreements.

(2) The Contents of IATA's ILA, MIA and ATA's IPA

I would like to introduce the contents of the IATA's ILA, MIA and ATA's IPA as the following;

A. The Contents of IATA's ILA

IATA - Intercarrier Agreement on Passenger Liability ("ILA"), October 31, 1995.

Whereas: The Warsaw Convention[39] system is of great benefit to international air transportation; and

Noting that: The Convention's limits of liability, which have not been amended since 1995, are now grossly inadequate in most countries and that international airline have previously acted together to increase them to the benefit of passengers;

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22, paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined

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38 The Convention has more adherents than any other private international law convention, Lowenfeld, *Aviation Law*, 4.15 (2nd Ed., 1981). Its value to the United States is acknowledged in Order 95-2-44.

39 "Warsaw Convention" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended The Hague, 28th September 1995, whichever may be applicable.

and awarded by reference to the of the domicile of the passenger.

2. To reserve all available defences pursuant to the provisions of the Convention: nevertheless, any carrier may defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.

3. To reserve their of recourse against any other person, including right of contribution or indemnity, with respect to any sums paid by the carrier.

4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.

5. To implement the provision of this Agreement no later than November 1, 1996 or upon receipt of requisite government approvals, whichever is later.

6. That nothing in this Agreement shall affect the right of the passenger or the claimant otherwise available under the Convention.

7. That this Agreement may be signed in any number of the counterparts, all of which shall constitute one Agreement, any carrier may become a party to this Agreement by signing a counterpart hereof and depositing in with the Director General of the International Air Transport Association (IATA)

8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the agreement

B. ILA's Explanatory Note

The intercarrier Agreement is an "umbrella accord"; the precise legal right and responsibilities of the signatory carrier with respect to passenger will be spelled out in the applicable Conditions of Carriage and tariff filings.

The carriers signatory to the Agreement undertake to waive such limitations of liability as are set out in the Warsaw Convention (1929), The Hague Protocol (1955), the Montreal Agreement of 1966, and/or limits they may have previously agreed to implement or were required by Governments to implement.

Such waiver by a carrier may be made conditional on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages under the intercarrier Agreement. But this is an option. Should a carrier wish to waive the limits of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a governmental authourity, it may rely on the law of the court which the case is submitted.

The Warsaw Convention system defences will remain available, in whole or part, the carrier signatory to the Agreement, unless a carrier decides to waive them or is so required by a governmental authority.

C. List of Air Carriers signatory to the IATA's ILA

List of Air Carriers Signatory to the IATA - Intercarrier Agreement on Passenger Liability, as at September 30, 1996

1. Aer Lingus plc
2. Aeromexpress
3. Aerovias de Mexico, S.A. de C.V. (Aeromexico)
4. Air Afrique
5. Air Aruba
6. Air Baltic Corporation SIA
7. Air Canada
8. Air Exel Commuter
9. Air France
10. Air Mauritius
11. Air New Zealand
12. Air UK Group Limited
13. Air Vanuatu
14. Alaska Airlines
15. All Nippon Airways Co., Ltd.
16. Allegheny Airlines, Inc.
17. American Airlines
18. American Trans Air, Inc.
19. Augsburg Airways GmbH
20. Austrian Airlines
21. British Airways p.l.c.
22. Canadian Airlines International
23. Cathay Pacific Airways, Ltd.
24. Cimber Air A/S
25. Continental Airlines, Inc.
26. Croatia Airlines
27. Crossair
28. Delta Air Lines, Inc.
29. Deutsche BA Luftfahrtgesellschaft mbH
30. Deutsche Lufthansa AG
31. Egyptair
32. Finnair OY
33. Garuda Indonesia
34. GB Airways
35. Hawaiian Airlines
36. Iberia
37. Icelandair

38. Japan Air System Co., Ltd.
39. Japan Airline Co., Ltd.
40. Jet Airway (India) Pvt, Ltd.
41. Kenya Airways
42. Kiwi International Air Lines
43. KLM Royal Dutch Airlines
44. KLM Cityhopper B.V.
45. Korean Air Lines Co., Ltd.
46. LAPSA, Lineas Aereas Paraguayas
47. Luxair
48. Malaysia Airlines
49. Midwest Express Airlines, Inc.
50. Northwest Airlines, Inc.
51. Pakistan International Airlines (PIA)
52. Piedmont Airlines, Inc.
53. PSA Airlines, Inc.
54. Qantas Airways Limited
55. Reeve Aleutian Airway, Inc.
56. Regional Airlines
57. Royal Air Maroc
58. Saudi Arabian Airlines Corp.
59. Scandinavian Airlines System (SAS)
60. Singapore Airlines, Ltd.
61. South African Airways
62. Swissair
63. TACA
64. TAP, Air Portugal
65. TAT, European Airlines
66. Trans World Airlines, Inc. (TWA)
67. Transavia airlines C.V.
68. Trinidad & Tobago BWIA International
69. United Airlines
70. UPS Airlines
71. USAir, Inc.
72. Varig S.A.
73. VIASA

D. The Content of IATA's MIA

Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA"), May 1996

A. Pursuant to the IATA Intercarrier Agreement of the 31 October 1995, the undersigned carrier agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. [Carrier] shall not invoke the limitation of liability in Article 22 (1)of the

Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

2. [Carrier] shall not avail itself of any defence under Article 20 (1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs [unless option A (2) is used].

3. Except as otherwise provided in paragraphs 1 and 2 hereof, [Carrier] reserves all defences available under the Convention to any such claim. With respect to third parties the carrier also reserves all right of recourse against any other person, including without limitation, right of contribution and indemnity.

B. At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. [Carrier] agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. [Carrier] shall not avail itself of any defence under Article 20 (1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorized by governments concerned with the transportation involved [Amounts and routes to be inserted].

3. Neither the waiver of limits nor the waiver of defences shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article 22 (1) and to the defences under Article 20 (1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payment received from any public social insurance or similar body.

C. Futhermore, at the option of a carrier, additional provisions may be included in its condition of carriage and tariffs, provided they are not inconsistent with this Agreement and are in accordance with applicable law.

D. Should any provision of this Agreement or a provision incorporated in a condition of carriage or tariff pursuant to this Agreement be determined to be invalid, illegal or unenforceable by a court of competent jurisdiction, all other provisions shall nevertheless remain valid, binding and effective.

E. 1. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become Party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association(IATA).

2. Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.

3. The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals

have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October 1995.

This IATA Agreement on Measures to Implement the IATA Intercarrier Agreement were opened for signature of Airlines in May 1996.

E. List of Air Carriers signatory to IATA's MIA

List of Air Carriers Signatory to the Agreement on Measures to Implement the IATA Intercarrier Agreement, as at September 30, 1996

1. Air Baltic Corporation, SIA
2. Air Canada
3. Air France
4. Air New Zealand
5. Alaska Airlines
6. Allegheny Airlines, Inc.
7. American Airlines
8. American Eagle, Inc.
9. American Trans Air, Inc.
10. AMR Combs BJS, Inc.
11. Austrian Airlines
12. British Airways p.l.c.
13. Canadian Airlines International
14. Cathay Pacific Airways, Ltd.
15. Continental Airlines, Inc.
16. Crossair
17. Delta Air Lines, Inc.
18. Deutsche BA Luftfahrtgesellschaft mbH
19. Deutsche Lufthansa AG
20. Finnair OY
21. GB Airways
22. Hawaiian airline
23. Icelandair
24. Kenya Airways
25. Kiwi International Air Lines
26. KLM Royal Dutch Airlines
27. Korean Air Lines Co., Ltd.
28. Luxair
29. Midwest Express Airlines, Inc.
30. Northwest Airlines
31. Piedmont Airlines, Inc.
32. PSA Airlines, Inc.
33. Qantas Airways Limited
34. Reeve Aleutian Airways, Inc.
35. Scandinavian Airlines System (SAA)
36. Singapore Airlines, Ltd.

37. Swissair
38. TAT, European Airlines
39. Trans World Airlines, Inc. (TWA)
40. Transavia airlines C.V.
41. United Airlines
42. UPS Airlines
43. USAir, Inc.
44. Varig S.A.

F. The Contents of ATA's IPA
The Air Transport Association of America ("ATA"). The ATA Provisions Implementing the IATA Intercarrier Agreement ("IPA"), July, 1996

The contents of the IPA Agreement provides that carriers shall be, on a systemwide basis as the following:

1. Not invoke the limitation of liability in Article 22 (l) of the Convention.
2. Not avail itself of the Article 20 (l) defense of carrier proof on non-negligence up to l00,000 SDRs.
3. Reserve other defenses, and the right of recourse, contribution and indemnity with respect to third parties.
4. Agrees that subject to applicable law recoverable compensatory damages may be determined by reference to the law of the domicile or permanent residence of the passenger[40].

The ATA's IPA Agreement also includes a specific notice provision; a provision for withdrawal from the l966 Agreement and substitution of the IPA Agreement for the 1966 intercarrier agreement, in all US DOT regulations and orders, etc., referring to the l966 agreement; and a permissive provision to encourage other carriers to become parties to the ILA, MIA and IPA Agreements.

G. List of US Air Carriers signatory to the ATA's IPA
List of Air Carriers Signatory to the ATA Provision Implementing the IATA Intercarrier Agreement, as at July 31, 1996

1. Alaska Airlines
2. American Airlines (also American Eagle & AMR Combs)
3. American Trans Air, Inc.
4. Continental Airlines, Inc.
5. Delta Air Lines, Inc.
6. Hawaiian Airlines
7. Kiwi International Air Lines

[40] Under this provision the carrier agrees that the law of the domicile may be applied. It does not, however, attempt to bind the claimant to this choice of law. ATA Application, 1st. par., p. 8.

8. Midwest Express Airlines, Inc.
9. Northwest Airlines
10. Reeve Aleutian Airways, Inc.
11. Trans World Airlines, Inc. (TWA)
12. United Airlines
13. UPS Airlines
14. USAir., Inc.

(3) Background

The intercarrier discussions on reform of the Warsaw liability regime were initiated by IATA's petition for discussion authority and antitrust immunity filed on September 24, 1993. That petition was granted by Order 95-2-44 on February 22, 1995 with the US Department of Transportation noting that it had attempted, but failed, to develop governmentally "a uniform international system that allows US victims to receive fair recoveries within a reasonable period of time." Providing guidance to the carriers on the goals the US Department sought to achieve, Order 95-2-44 challenged the airline community to develop in a relatively short period a solution which had eluded governments for more than 30 years.

Between June 19 and June 23, 1995, IATA convened an Airline Liability Conference ("ALC") in Washington D.C., USA. After consultations between the ALC Chairman and Regional Airline Associations concerning the composition of the two Working Groups, the Groups were convened in London on July 25-26 and Washington D.C. on August 7-8, 1995.

The ALC Session provided for a number of specific actions to be taken. Among these were:

- Seeking the extension of antitrust immunity from the US authorities to complete the work of the Conference;
- Establishment by the Conference Chairman of two Working Groups to prepare recommendations for an "enhanced liability package";
- Drafting of on an intercarrier agreement and a plan for an appropriate and effective means to secure "complete compensation";
- Preparation by the Secretariat of "an information paper on expeditious settlement of airline liability claims"; and
- Calling on Governments expeditiously to bring into force 1975 Montreal Additional Protocol No. 4 (on cargo).

All of these matters have been addressed. The antitrust immunity extension request was filed with the US Department of Transportation on 26 June, and the relevant Order was issued by US DOT on 12 July 1995.

The ALC Working Groups were discussed in London as the followings:

- Urgently assess and report on the cost impact for airlines of the recommended enhanced liability package and make specific proposals as to how small and medium

size airlines can be assisted to meet additional costs resulting from possible increased limits; and

• Consider and report on appropriate and effective means to secure complete compensation for passengers, including the Japanese initiative and the US Supplemental Compensation Plan (SCP), in light of discussions at the ALC Session, and taking in particular account the circumstances of small and medium size carriers and submissions made by the Working Groups in July 31, 1995.

The member of the Working Groups decided that, due to the significant interrelationship between the subject matters and their common interest in both mandates, the two Groups should meet jointly. It was also agreed that the meetings should be chaired by the Airline Liability Conference Chairman.

It will be noted that the detailed question and answer period with insurance brokers and subsequent discussion among members of the Joint Working Group led to the following conclusion:

• Despite its attractiveness to the US authorities and some carriers, the SCP was too unwieldy and expensive and, without Montreal Additional Protocol No. 3, a riskprone solution; and

• A solution based on unlimited liability above SDR 250,000 (for the US and elsewhere, as circumstances may require) through "pooled" insurance coverage to be taken out by participating carriers common rated on a per capita basis (e.g. US $ 2.00 per passenger) was put aside on advise from brokers; they stated that "splitting" the unitary coverage of most carriers' current individual policies into two parts (the first part insured individually and the second part-above SDR 250,000-insured jointly), would likely prove more expensive than potential alternatives.

The Joint Working Group agreed to reconvene in Washington D.C. on August 7-8 to continue its deliberations and to try to finalize its recommendations. That Conference focused on the essential problems of the existing liability regime and established working groups whose activities, pursuant to US Department Order 95-7-15, led to development of the ILA. The ILA was endorsed unanimously at the IATA Annual General Meeting ("AGM") on October 31, 1995.

Subsequent to AGM endorsement of the ILA, it became apparent that the US Department of Transportation wished to see the ILA's umbrella provisions spelled out in a specific implementing agreement. IATA then secured additional authorization pursuant to Orders 96-1-25 and 96-3-46 to continue its work and developed the MIA.

Thereafter, IATA and its members have been encouraging to adhere to the ILA and MIA and, for their part, US air carriers have developed a subordinated agreement, the Implementing Provisions Agreement ("IPA") which specifies the form of "special contract" which its signatories will use to comply with the ILA and MIA. IATA understands that the IPA also will be filed for approval and immunization.

As required by the Department's grants of discussion authority, IATA has

filed reports (including complete documentation) of all meeting leading to the development of the ILA and MIA. IATA incorporates these reports by reference in this filing and believes that they provide a complete history of the ILA and MIA.

(4) US DOT Order to Show Cause (Oct. 3, 1996)

A. Summary

By this US Department of Transportation ("DOT") US DOT tentatively approve three agreements between US and foreign air carriers waiving the passenger liability limits of the Warsaw Convention for death or injury in international accidents, and waiving the carrier defense of proof of non negligence under Article 20 (1) of the Convention up to 100,000 SDRs (approximately US $ 145,000) subject to conditions, and subject to certificate and permit conditions to be adopted.

The US Department of Transportation propose to condition the agreements to require application on a systemwide basis and that the agreements are applied with regard to carriers participating in interline operations to and from the United States, and to exclude the application of certain options on flights to and from the United States.

The US Department also propose to adopt certificate and permit conditions to make participation in the two IATA Agreements, as well as the form of the Agreement proposed by the Air Transport Association of America [the Provisions Implementing the IATA Intercarrier Agreement ("IPA")] mandatory for all US and foreign air carriers operating to and from the United States, to make applicable to the United States the most favorable provisions for passengers that are applied by any carrier in any other jurisdiction, and to require that US carriers agree to submit to the courts of the domicile or permanent residence of the passenger (a fifth jurisdiction). The US DOT request comments on alternative measures for the protection of US citizens in circumstances where the fifth jurisdiction might otherwise not be applied.

B. The Applications

By applications filed on July 31, 1996, the International Air Transport Association and the Air Transport Association of America request approval for, and grant of antitrust immunity with respect to the three agreements. These agreements, increasing details of implementation, provide for waiver in their entirety, by carrier parties to those agreements, of the limits of liability applicable under the Warsaw Convention[41]

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[41] Convention for the Unification of Certain Rules Relating to International Transportation by Air with Additional Protocol, concluded at Warsaw, October 12, 1929, entered into force the United States, October 29, 1934, 49 Stat. 3,000; TS 876; 2 Bevans 983; 137 LNT 11. In principal effect the Warsaw Convention limits the liability of carriers for passengers killed or injured in international aircraft accidents to US $ 10,000. Under a 1966 Intercarrier Agreement, carriers operating to and from the United States waived that limit up to US $ 75,000 for journeys to of the Convention, of carrier proof non-negligence. Pursuant to 14 CFR 203 all carriers operating to and from the United States are required to be, and are deemed to be, parties to the 1966 Agreement. Thus the applicable limit to and from the United States is currently US $ 75,000.

to passengers killed or injured in international aircraft accidents[42].

The IATA and ATA Agreements are proposed for application worldwide. The Agreements were negotiated by carriers under discussion authority granted to IATA and ATA by US DOT Orders setting forth guidelines for such Agreement[43].

C. Comments of the Parties

Comments in support of the IATA and ATA Applications were filled by the Association of Trial Lawyers of America (ATLA), the Aerospace lndustries Association (AIA); the International Chamber of Commerce (ICC), and the Victims Familie's Associations (KAL 007; PAA 103; TWA 800).

The Victims Families requested that DOT's approval be subject to conditions with respect to strict liability or the fifth jurisdiction permitting certain actions to be brought in the United States. A comment was also filed by an individual, Sven Brise, Consultant, urging consideration of an alternative plan, in lieu of the agreements filed by IATA and ATA.

In support of its application for approval, IATA argues that the ILA/MIA will eliminate the limitation of liability as a barrier to the award of all otherwise recoverable compensatory damages, and will put an end to the wasteful and costly "wilful misconduct" litigation in the United States which has been necessary to avoid the previously applicable US $ 75,000 limit.

Moreover, it will also provide strict liability up to l00,000 SDRs. Further, the Agreements will apply throughout the International Air Transportation system, regardless of the passenger's nationality or venue in which claims are adjudicated, and will be financed through the carriers insurance, a far less costly means than the previously considered complex Supplemental Compensation Plans. Moreover, as the US Department has previously recognized, important United States foreign policy and international comity interests will be advanced by approving and granting antitrust immunity for the ILA and MIA in that it will facilitate the global enhancement of passenger rights while preserving the benefits otherwise available under the Warsaw Convention.

D. Decision

The US Department tentatively find that the Agreements should be approved, subject to conditions. With their provision for the worldwide waiver of the Warsaw

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42 IATA and ATA, respectively, also request an exemption from various regulations and orders, etc. of the Department that require adherence to the 1966 intercarrier agreement waiving the Warsaw limits to $75,000 to and from the United States, and that the instant agreements may be substituted for the 1966 intercarrier agreement in those regulations and orders, etc.

43 Discussion authority was granted to IATA, ATA, and participating carriers, upon the request of IATA, by Order 95-2-44, and extended by Orders 95-7-15, 96-1-25, and 96-3-46. Discussion authority was granted to ATA, IATA and participating carriers, upon the request of ATA, by Order 95-12-14.

passenger liability limits, the agreements have made a gigantic step toward creating an international liability regime under which carriers properly accept liability for death or injuries of passengers using their services. No longer must passengers suffer decades of litigation in efforts to establish the "wilful misconduct" which was required under the Warsaw Convention for passengers to recover reasonable damages.

Moreover, by providing for coverage of this liability under the carrier's liability insurance, the costly double coverage of the previously considered supplemental compensation plan will be avoided. Clearly, therefore, the agreements are not adverse to the public interest.

The conditions which US DOT tentatively propose to attach to our approval of the ILA, MIA, and IPA include the following:

(a) The optional application of the law of the domicile provision would be made mandatory for operations to, from, or with a connection or stopping place in the United States[44].

(b) The Agreement's optional provision for less than 100,000 SDR's strict liability on particular routes, could not apply for any operations (including interline operations) to, from, or with connections or an agreed stopping place in the United States.

(c) The provision for waiver of the Warsaw passenger liability limit, in its entirety, would be applicable on a systemwide basis.

(d) For transportation to and from the US, the provisions of the agreement would apply with respect to any passengers purchasing interline party carriers not party to the agreements. The carrier ticketing the passenger, or, if that carriers is not a party to the Agreements, the carrier operating to or from the United States, would have the obligation either to ensure that all interlining carriers were parties to the Agreements, as conditioned, or to itself assume liability for the entire journey [See Warsaw Article 30 (1) and (2)].

(e) The inapplicability for social agencies of the waivers of the limit and Article 20 (1) carrier defense of proof of non-negligence shall have no application to US agencies.

The US Department also tentatively propose to amend all US air carrier certificates, all foreign air carrier permits, and any other outstanding authority to operate to or from the United States, to universally apply the Agreements as conditioned to all direct carriers operating to, from or within the United States.

Mandatory participation of all carriers operating to and from the United States has been in effect since the 1966 waiver agreement; all parties were fully aware that

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[44] Paragraph A (4) of the ATA, IPA Agreement, as we interpret it, would meet this requirement. We note that the requirement is that the carrier must agree, at the claimant's option, to application of the law of the domicile or permanent residence of the passenger. We do not, however, intend to direct courts as to which law must be applied, if despite the carrier's agreement and submission, the court should determine that a different law must be applied.

it was the United States' intention to require such participation, and the public interest clearly requires such mandatory participation for the reasonable protection of passengers of airlines operating in international air transportation to and from the United States[45].

(5) Comments of the IATA, Swiss Air and the Korean Air Lines to US DOT Order 96-10.3

A. Comments of IATA

The International Air Transport Association("IATA"), on behalf of the non-US carrier signatories to the ILA and MIA, objects to the conditions the US Department of Transportation("DOT") proposes to impose on the ILA and MIA and, on behalf of all of its non-US members, also objects to the foreign air carrier permit amendments proposed by US DOT Order of 96-10-7[46]. Because the proposed conditions would effect fundamental and substantial changes in the ILA and MIA, prior consents to the ILA and MIA would be "null and void" with respect to the conditioned agreements.

Moreover, non-U.S. carrier signatory is prepared to subscribe to the conditioned agreements proposed in Order 96-10-7. The absence of such consent would leave the US DOT with no rational basis for rewriting foreign air carrier permits to conform to its version of the IIA and MIA. Indeed, any such effort by the US DOT to modify the Warsaw regime by permit amendment would be entirely prescriptive and contrary to international law, the U.S. Transportation Code and sound public policy.

IATA's July 31, 1996 application pointed out that approval and immunization of ILA and MIA could provide significant passenger benefits commencing November 1, 1996 while preserving, and indeed enhancing, the international goodwill necessary to negotiate additional benefits through the intergovernmental treaty-making process at ICAO.

IATA urges the US DOT to bear fully in mind the superiority of international cooperation to needless confrontation, to withdraw the proposed conditions and permit amendments and to proceed immediately with final approval and immunization of ILA and MIA.

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45 Our reference in this order to "international air transportation" refers in this order to "international transportation" (to and from the United States) as defined in the Warsaw Convention. Thus we include interstate operations of an air carrier which carries a passenger on the domestic segment of an international journey. See Warsaw Convention, Article 1(2)(3).

46 The Department has been separately advised in this Docket of the non-U.S. carrier signtories to the IIA and MIA. The U.S. carrier members of IATA are parties to the agreement filed in Docket OST-95-232. As U.S. flag carriers operating under certificate, they are subject to a legal regime different from the regime applicable to non-U.S. carriers. Thus, U.S. flag carrier members of IATA are expressing their views directly to DOT through the Air Transport Association of America (ATA). IATA understand, however, that its U.S. carrier members are equally unwilling to accept the sweeping conditions proposed in order 96-10-7.

In IATA's view, the US DOT has correctly acknowledged that the proposed "world-wide waiver of the Warsaw passenger liability limits" was nothing short then "a gigantic step" in protecting passengers, obviating wasteful litigation and avoiding the costs and complexities of previously-considered supplemental compensation plans.

B. Comments of Swiss Air

Swissair, Swiss Air Transport Company, LTD.("Swissair"), a signatory to the IATA Intercarrier Agreement("IATA') and the Agreement on Measurers to Implement the IATA Intercarrier Agreement("MIA"), hereby objects to the issuance of an order making final the tentative findings conclusions of the Departments in its Order to Show Cause, issued on October 3, 1996 in these proceedings. Swissair fully supports the objections filed by IATA on behalf of the non-US signatories to these agreements (including Swissair).

These comments should therefore be considered as simply supplementary of IATA's comments. While the US Department has tentatively approved the ILA and MIA, it has proposed to condition its approval on the acceptance by the signatories of various additional provisions which it seems to believe will enhance the agreements.

Moreover, the US Department has proposed to amend the foreign air carrier permits of Swissair and the other non-US signatories apparently in an attempt to require them - as a price for flying to/from the United States - to abide by the US Department's version of the ILA/MIA (i.e., as conditioned) even if they do not accept the US Department's conditions to their agreements.

In Swissair's view, a final US DOT Order containing either of these elements would be imprudent and, in many respects, unlawful.

C. Comments of the Korean Air Lines

(a) Objection

The Korean Air has signed both the ILA and MIA on October 30, 1996 and then supports IATA's continuing efforts at reform. In the US DOT's Show Cause Order issued October 3, 1996, the US DOT proposes to approve all three of these agreements, as modified by several substantive changes that the US DOT believes are in the public interest. As one of its conditions of approval, the US DOT proposes to apply the modified ILA and MIA to all non-US carriers operating to, from, or through the U.S. by amending all foreign air carrier permits to reflect its Show Cause Order. The Korean Air objects generally to this attempt to alter its foreign air carrier permit in this manner and objects specifically to several of the changes on which approval of these agreements is conditioned.

(b) Argument

The US DOT proposes to approve the ILA, the MIA, and the IPA and to grant signatory carriers the antitrust immunity necessary to effectuate the provisions of

these agreements on international flights to and from the US. The US Department also proposes to apply these agreements to all non-US carriers by amending all foreign air carrier permits and all other outstanding authority to operate to, from, or through the US.

The Korean Air first objects to the US Department's intention to alter Korean Air's foreign air carrier permit to reflect the provisions of the Show Cause Order. The Show Cause Order states that, because the participation in the 1966 Montreal Agreement[47] was mandatory, carriers had noticed that the US Department would expect continued participation by all carriers in IATA's and ATA's efforts. Yet, until the Show Cause Order was served on October 7, 1996, Korean Air had received no notice that its permit would be significantly altered in accordance with provisions that neither the ILA nor the MIA include.

The US Department appears poised to implement its Show Cause Order as to all carriers, regardless of the sufficiency of the time for comments. Korean Air believes that this is unfair and that it may be inconsistent with the Department's regulations and applicable administrative law.

(c) Enumerated Conditions Attached to the US DOT's Approval of the Agreements.

The US Department proposes to modify the ILA, the MIA, and the IPA through numerous conditions and modifications. Five of these conditions are enumerated. Korean Air has comments on the following three of these conditions.

• Condition (a): The application of the law of the domicile provision, which is optional in the MIA, would become mandatory for operations to, from, or with a connection or stopping place in the US As private agreements among carriers, however, the IIA, the MIA, and the IPA cannot prevail against the laws of foreign sovereigns. The US Department appears to acknowledge that it cannot compel a non-US jurisdiction to apply the law of the passenger's domicile, if, despite a claimant's wishes, that jurisdiction's own procedural law requires otherwise[48].

In addition, many rights available under the laws of a passenger's domicile simply may not exist in that jurisdiction, e.q., the right to a jury trial, and thus cannot be indulged even if the governing law does not specifically prohibit them. Korean Air therefore does not object to this condition but urges the US Department to clarify that the law of the jurisdiction ultimately will prevail in the event of a conflict with the IATA agreements, and that carriers do not lose the protections of their home nations' laws merely because they have signed and implemented these agreements.

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47 The 1966 Montreal Agreement raised the liability limit to US $ 75,000 and provided for strict liability up to that same amount. See Agreement CAB 18900, approved by Order E-23680 (May 13, 1966).

48 See Order 96-10-7 at n.10.

• Condition (c): This condition proposes to waive all limits that currently govern damage awards to claimants for death or injury in international aviation. The ILA and the MIA together do this already. Korean Air objects to the Department's reiteration of this provision for two reasons. First, the US DOT has omitted the words, "recoverable compensatory damages," and this oversight could leave a carrier open to other kinds of damages, e.q., punitive damages, that the IATA agreements do not encompass. These words should be re-inserted. Second, it should be made clear that the word "systemwide" means only international flights covered by the Warsaw Convention itself and excludes non-covered international and domestic flights. Without these changes, condition (c) is unclear and objectionable[49].

• Condition (d): This condition would extend the ILA and MIA to all non-signatory parties that engage in interlining arrangements with carriers that have signed the IATA proposals. Thus, each signatory carrier either would have to: (i) ensure that all its interlining partners have signed the ILA and MIA; or (ii) itself assume liability under the ILA and MIA for damages that arise from its interline partners' flights.

Korean Air objects to this condition. An interlining carrier would have little incentive to sign the ILA and MIA itself, and so the signatory carrier would have to assume liability for that carrier's flights. In effect, then, the US Department's condition would force signatory carriers to police the operations of their interlining partners, often on domestic travel completely unrelated to the Warsaw Convention. IATA's July 31, 1996, Application does not begin to contemplate such a sweeping extension of the Warsaw Convention scheme.

(6) US DOT Order to Approving Agreements (Nov. 12, 1996)

A. Summary

By the aforementioned Order the US DOT Order finalize their Order to Show Cause 96-10-7 to the extent of approving, pendente lite, the ILA, MIA and IPA Agreements filed by IATA and ATA, subject to conditions that:

(a) the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States[50];

(b) the MIA's optional provision for less than 100,000 SDR's strict liability on particular routes could not apply for any operations to, from, or with a connection or stopping place in the United States;

(c) the inapplicability for social agencies of the MIA's waivers of the limit and Article 20 (1) carrier defense of proof of non-negligence shall have no application to US agencies; and

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[49] If the Department in fact intends Condition (c), to go beyond the ILA and the MIA waivers, then Korean Air requests clarification about precisely what this condition means.

[50] Paragraph I (4) of the ATA, IPA Agreement, as we interpret it, would meet this requirement.

(d) the IPA's provision for withdrawal from the 1966 Montreal Interim Agreement shall not be effective at this time. We defer action with respect to other proposed agreement and authority conditions.

B. Decision

The US Department have decided to approve the ILA, MIA and IPA Agreements, pendente lite, subject only to those conditions which are generally accepted. We will defer consideration of all other matters. In the interim, we will exempt all carriers filing Agreements from applicable US DOT regulations and authority conditions only to the extent necessary to implement those agreement in a manner consistent with this order, and to substitute a tariff consistent with the IPA Agreement (exclusive of withdrawal from the 1966 Montreal Interim Agreement).

The objections and comments raise fundamental questions of the scope of the US Department's authority to impose permit and other authority conditions, and the procedures necessary for such imposition. These matters, including the requirements of a liability regime to be applicable to and from the United States and alternatives to the fifth jurisdiction require careful and thorough consideration. All parties agree, nevertheless, that pending such consideration the US Department should accept the Agreements which have been voluntarily filed, in order to implement the gains which have been made. We agree that acceptance on an interim basis will be consistent with the public interest subject to the conditions and limitations set forth below. As we stated in the Show Cause Order, the Agreements are a major step toward a more reasonable international liability regime.

The US Department had anticipated that the conditions we proposed to impose on the Agreement were generally acceptable and most were anticipated by IATA. It appears that in certain respects, US Department may have exceeded the IATA anticipation, particularly in view of the apparent lack of consensus of IATA carriers on some matters. This appears to be particularly the case, as ATA points out on our proposal to require applicability of the Agreements to interlining carriers. Thus we will confine the conditioning of our interim approval of these Agreements to those clearly anticipated Governmental conditions; namely:

(a) The MIA's optional application of the law of the domicile provision would be required for operation to, from, or with a connection or stopping place in the United States[51].

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[51] The "Explanatory Note' to the IATA ILA Agreement states: "Should a carrier wish to waive the limit of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a governmental authority, it may rely on the law of the court to which the case is submitted." As the US DOT Order noted in note 10, page l0, of the US DOT Order to Show Cause 96-10-7, the requirement ie that the carrier agree, at the claimant's option, to application of the law of the domicile or permanent residence of the passenger. We do not intend to direct courts as to which law must be applied, if despite the carrier' agreement and submission, the court should determine that a different law must be applied.

(b) The MIA's optional provision for less than l00,000 SDR's strict liability on particular routes could not apply for operations to, from or with a connection or stopping place in the United States.

(c) The inapplicability, under the MIA, for social agencies of the waivers of the limit and Article 20 (1) carrier defense of proof of non-negligence shall have no application to US agencies.

The US Department also find it necessary to condition the ATA IPA Agreement to provide that carriers may not withdraw from the 1966 Montreal Interim Agreement (DOT Agreement 18900). Without a provision for application to interlining carriers, it appears that the IPA Agreement could possibly be construed as applying only to a carrier actually signing the Agreement. Thus there is no assurance that the new agreement's waivers will apply on an interline segment operated by a non-signatory carrier, even on a Warsaw Journey. In these circumstances, we are unwilling to provide, at this time, that the IPA Agreement shall serve as a withdrawal from the mandated 1966 Montreal Interim Agreement.

The Legal Meeting to consider the IATA reaction to the November 12, 1996, US DOT Order took place in Geneva, Switzerland, on December 16, 1996. The following carriers participated: BT, Air Canada, Air France, Air India (2 Reps.), Air Malta Company, Limited, Air UK, Aerovias Nationales de Colombia, S.A. (AVIANCA), British Airways p.l.c. (2 Reps.), Cathay Pacific Airways, Limited (3 Reps.), Ceskoslovenske Aerolinie, Deutsche BA Luftfahrtgesellschaft mbH (2 Reps.), Egypt Air, IBERIA, Lineas Aereas de España, S.A. (2 Reps.), Japan Airlines, Company Ltd. (3 Reps.), Gulf Air, Deutsche Lufthansa AG, Polish Airlines (LOT), Malaysian Airline System, Scandinavian Airlines System, Swissair, TAP-Air Portugal, US Air, VARIG, S.A. (2 Reps.), Virgin Atlantic Airways, ATA and AITAL. After detailed discussion under the agenda, as sent to Korean Air on December 5, 1996 (REF GCR-070), the participants decided to recommend that the IATA Secretariat filed petition with the US DOT.

Accordingly, IATA intended to file the US DOT in Washington D.C on December 20, 1996, based on the following points agreed at the Legal Meeting of IATA in Geneva:

• IATA Carriers are of the view that:

(1) The Intercarrier liability discussions have achieved their objectives, and the two Agreements (ILA and MIA) represent the maximum extent of achievable consensus. Further reform of the Warsaw System will have to be considered at the intergovernmental level, through ICAO.

(2) The ILA must continue to be approved without any conditions, and the conditions imposed on the MIA by the US DOT must be removed.

(3) The "law of the domicile" provision must continue to be an option available solely to the carrier.

(4) Carriers must be permitted to implement the ILA and MIA, by tariff filings, and be freed from the requirement to adhere to the 1966 Montreal Intercarrier Agreement.

(7) The Movement of ICAO

The Legal Committee of the International Civil Aviation Organization ("ICAO") has been studied the innovation of Warsaw System for long times. The ICAO had composed of Secretariat Study Group on the "Warsaw System".

According to the Council Decision (C-DEC 147/15) of ICAO on March 14, 1996, ICAO had published a Draft New Warsaw Instrument entitled "ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air" (ICAO C-WP/10470 attachment) September 20, 1996.

I would like to introduce the preamble of the aforementioned of the ICAO Draft Convention as the following;

The States Parties to this Convention,

Recognizing the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on October 12, 1929 and other related Instruments to the harmonization of private international air law,

Desirous to modernize and consolidate the Warsaw Convention and related instruments in order to bring them in line with modern day requirements,

Recognizing the importance ensuring protection of the consumer in international air transport and equitable compensation based on the of restitution,

Reaffirming the desirability of an orderly development of modern international air transport operations and the smooth flow of passengers, baggage and cargo,

Convinced that collective State action for a progressive consolidation and further harmonization of uniform rules is the most adequate means of achieving an equitable balance of interests.

According to the ICAO Draft Convention, this Draft Convention has adopted the principle of the limited and presumed faulty liability system as the following:

Chapter B - Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury to Passengers - Damage to Baggage

1. The Carrier is liable for damage sustained in case of death or [personal] [bodily] injury of passenger upon condition only that the event [accident] which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the air carrier is not liable if the death or injury resulted [solely] from the state of health of the passenger, [or from the normal operation of the aircraft, or both].

Article 20 - Extent of Carrier Liability in Case of Death or Injury

The liability of the carrier for damages arising under Article 16, Paragraph 1, shall not exceed 100,000 Special Drawing Rights[52] [unless the damage so sus-

[52] This amount was set as are a tentative figure by the Secretariat Study Group on the "Warsaw System" of ICAO.

tained was due to the fault or neglect of the carrier or of his servants or agents acting within their scope of employment.] [and the air carrier shall not be liable for damages exceeding this amount if he proves that he and his servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures.]

11. REASONS WHY THE WARSAW CONVENTION SHOULD BE AMMENDED

Many economic and social changes have occurred since the Warsaw Convention was effectuated. First, due to the rapid development of science and technology in the aeronautic industry, propeller aircraft transportation has gone. This is the age of transportation by supersonic jet aircraft.

Compensation for damages caused by aircraft accidents has increased in dollar amount as well as in volume. All air carrier's liability should extend to loss of expectation of leisure activities, as well as to damage to property, and mental and physical injuries.

Secondly, when victims are not satisfied with the limited amount for which an airline corporation is liable under the current limited liability system, they tend to bring claims against the manufacturer of the aircraft or the air traffic controller for the balance of the damages which are not thoroughly compensated by the airline corporation. The Warsaw Convention does not cover claims against parties other than the air carriers. Thus, the air carrier may take advantage of the liability limitation, while the aircraft manufacturers or air traffic controllers cannot. This disregards equity or distributive justice.

Thirdly, the liability limitation in the Warsaw System is controversial and questionable. The Warsaw Convention allowed the limitation of air carrier liability because the aircraft business was very dangerous and risky at the time of the Warsaw Convention. It seemed fair and reasonable that the air carrier should not be fully responsible for all the damages caused by an accident, and the passenger should bear part of the risk or damage. In the light of the development in technology and safety of air transportation, this reason for the liability limitation does not exist any more.

Fourthly, because the Warsaw Convention is very complicated, the passengers receiving compensation for damages caused in the same aircraft accident have very different rights according to the jurisdiction in question, even when they have paid the same freight. This discriminates among the passengers and can no longer be justified.

Fifthly, insurance poses a problem. Nowadays almost all the damages resulting from air transportation are covered by insurance. The final and ultimate payer of the premium is the passenger or consignor of cargo[53].

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[53] See *Some Considerations of the Draft*, supra note 2, at 775.

The problems of indemnity in insurance law are closely related to social justice problems. Influenced by the principle of absolute liability, however, the present air law system could not settle air law problems and disputes without a dramatic and comprehensive reform of the Warsaw Convention.

12. THE INTERNATIONAL CONFERENCE FOR THE REFORM OF THE WARSAW SYSTEM

Many amendments have been proposed to each Convention, due to the rapid high-technological developments in aviation, the changes in the social and economic environment, the difficulties in the proof and the discovery of facts, and the need for increasing the protection of injured passengers. As a result, the international legal system for air transposition is at present complicated and tangled. Since the early 1970's, many aviation law professors and lawyers have tried to integrate and simplify the international legal system for air transportation.

There are many changes in economic and social circumstances, because more than half a century has passed since the Warsaw Convention was effectuated. The aircraft industry is a very complicated assembling industry, it utilizes many people in a variety of jobs, including parts manufacturers, air service suppliers, airport employees, air traffic controllers, governmental agencies, and manufacturers or aircraft facilities.

The Legal Committee of the International Civil Aviation Organization has made a resolution which recognizes the need to make new Draft for the Convention, to integrate the Warsaw system and make it less complicated. Professor Bin Cheng, Chairman of the Air Law Committee of the International Law Association (ILA) and Professor Jacqueline Dutheil de la Rochére have made a Draft for the Convention on an Integrated System of International Aviation Liability covering surface damage caused by foreign aircraft during international carriage by air[54].

The Proposal was discussed by many air law professors, specialists and lawyers at the Air Law Session of the 60th Conference of the ILA held in Montreal, Canada, from August 29 to September 4, 1982. The Draft for the Convention was not adopted, but it was decided that it should be under continuous analysis and review by the next Air Law Session of the ILA. The Proposal means the synthesis and unification of contract liability and tort liability within one Convention.

A detailed study of the present position and proposals for renovating the Warsaw system exist already in the form of the Alvor Draft Convention relating to International Carriage by Air, adopted by the Fourth Lloyd's of London Press

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[54] See *Report of the Sixtieth Conference Held at Montreal*, International Law Association, at 553-557 (1982); Bin Cheng, *Sixty Years of the Warsaw Convention: Airline Liability at the Crossroads (Part A)*, Zeitschrift fur Luft-und Weltraunrecht (1989), Vol. 38, No. 4, at 319-344.

International Aviation Law Seminar held in Alvor, Algarve, Portugal, on October 11-16, 1987. The Seminar was attended by 116 executives and legal advisers of governments and of the airline, aviation insurance and aerospace industries, as well as members of the legal profession involved or interested in aviation, from 27 countries[55].

This Alvor Draft Convention Relating to International Carriage by Air has been integrated by the principal content of the Warsaw Convention, the Hague Protocol, the Guatemala Protocol, the Montreal Additional Protocol No. 3 and No. 4 and has also adopted the principle of the limited liability and the absolute liability system.

The ICAO action so far took an unusually circuitous path: rather than proceeding to a Secretariat study followed by Rapporteur's study and report to a special Subcommittee of the Legal Committee[56], the ICAO Council decided to establish a "Secretariat Study Group" of dubious geographic composition[57] "to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the 'Warsaw System'"[58].

At a time of severe budgetary constraints both for ICAO and the contracting states this unusual procedural step would require more explicit justification. At its meeting on February 12-13, 1996, the Study Group reached the predictable conclusions and recommendations. That's action should be taken to develop a new international instrument to consolidate and modernise the Warsaw Convention System and bring it in line with present-day requirements.

The ICAO Council is to consider the Report of the Study Group during ICAO's 147th Session in May-June 1996. Perhaps it would have been more efficient to dispense with the Study Group and to proceed directly to the appointment of a Rapporteur and to the convening of a special Subcommittee: the work could have been advanced by several months and the ICAO international community could have exercised a more effective and timely influence on the implementation of the IATA Intercarrier Agreement and the proposed law-making within the European Union.

The Warsaw System is seriously ailing but the IATA initiative by itself cannot salvage it. It is too early for a requiem for this unification of private air law. It is preferable to see the current challenges as an unfinished symphony, with continuing need for fine-tuning and with no mortality in sight as long as ICAO and its member states keep acting.

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55 S. Miyoshi, *Alvor Draft Convention (Professor Bin Cheng's Draft Convention Amending the Warsaw Convention System)*, Journal of Air Law [KUHO](1990), No. 31, at 3.

56 See *Procedure for the Preparation of Draft Conventions* in Attachment A of Doc 7669 - LC/139/4.

57 With the absence of Latin America, Asia or Central/Eastern Europe, absence of any Spanish or Russian speaker...

58 C-WP/10381; Appendix A to this document contains the Report of the Study Group.

13. CONCLUSION

At the end of this brief survey, one is forced to conclude that, at the moment, we are facing a situation where some countries have no limits of compensation, while others (e.g. the domestic flights of the USA) maintain higher limits than the Warsaw Convention prescribes.

In addition, in domestic air transportation, limits lower than the Warsaw Convention's are occasionally applied. It is of course evident that there are strong links between liability and insurance, and it must also be emphasized that an air carrier's dependence on insurance is often a major factor affecting the compensation limits, especially for carriers in developing countries. But with inflation rampant world-wide, it would seem most commendable, if not indispensable, to raise the limits to a higher uniform level. That would be fairer for passengers choosing to travel by air.

Many economic and social changes have occurred since the Warsaw Convention was effectuated. Science and high-technology in the aeronautic industry has advanced and national incomes have increased. In addition, the value of life and property has increased substantially. The amount of compensation for damage caused by aircraft accident has increased in dollars amount as well as in volume.

When victims are not satisfied with the limited amount for which an airline corporation is liable under the current liability system, they tend to bring claims against manufacturers of the aircraft and airport employees, air traffic controllers or governmental agencies for the balance of their damages which are not thoroughly compensated by the airline corporation.

The damage for which air carriers should be liable, and therefore should compensate, includes loss of expectation of leisure activities because of aircraft accident, as well as damage to or loss of property, mental loss, physical loss, etc. Even the Warsaw Convention does not cover claims against other parties than the air carriers.

The Warsaw Convention is very complicated; passengers receiving compensation for damages caused in the same aircraft have very different rights according to the jurisdiction in question, even though they have paid the same freight. This discriminates among the passengers and can no longer be justified.

In order to find a rational solution to disputes between nations which have adopted differing liability systems in international air transportation, we need to reform the liability of air carriers within the Warsaw Convention dramatically and fundamentally, to unify the liability system among the nations.

The 28th Session of the Legal Committee, ICAO, held in Montreal, May 11-12, 1992, established the following General Work Programme, subject to approval by the Council.

1) Action to expedite ratification of the Montreal Additional Protocol No. 3 and No. 4 of the "Warsaw System".

2) Study of the instruments of the "Warsaw System".

The said Committee elected to reconfirm its concern with the present statutes of the "Warsaw System" by reassigning the highest priority to those items.

It would be advisable for the Legal Committee of International Civil Aviation Organization, as a principal body in the air law field, to produce an international instrument that would serve as a model for domestic legislation. We need to revise the Warsaw system fundamentally, with regard to the liability of air carriers, in order to enact a new Draft for the Convention on an Integrated System of International Aviation Liability as soon as possible.

We would like to recommend the drawing up of the aforementioned new Draft for the Convention on the liability of air carriers to the Legal Committee of ICAO and IATA, to unify the regulations concerning international air transport all over the world.

I propose that we hold a positive discussion about the fundamental revision of the liability system of air carriers within the Warsaw Convention at the coming Session of the Legal Committee. ICAO, and at the Special Legal Committee, IATA, so that we can adapt to the new circumstances of air high technology and economics in a changing era as soon as possible.