



DEPT. OF TRANSPORTATION
DOCKET SECTION

95 AUG 28 PM 3: 14

International Air Transport Association

Washington Office

Montreal | Geneva

July 6, 1995

Mr. Donald Horn
Assistant General Counsel for
International Law
U.S. Department of Transportation
Room 10105
400 Seventh Street, SW
Washington, D.C. 20590

OST-95-232

Re: IATA Conference on Airline
Liability. Dkt. 49152

Dear Mr. Horn:

With reference to DOT Order 95-2-44 issued 22 February 1995, IATA is pleased to file with the Department a report of the Plenary and the two Working Group Sessions of the Airline Liability Conference held in Washington DC 19-23 June 1995.

The Final Report of the Conference Session, attached together with its four Annexes, serves as an accurate **summary** of the discussions and also sets out the future work program agreed to by the Conference Session participants, should the Immunity Order be extended as requested. (A request for extension was formally filed with the Department on 26 June 1995.)

Also attached, for the information of the Department, is a complete set of the advance documentation prepared for the Airline Liability Conference and of all the working papers submitted to the Conference Session.

Should any additional information be required by the Department, IATA is prepared to provide it as expeditiously as possible.

Respectfully submitted,


David M. O'Connor

cc: Mr. Lorne Clark, General Counsel, IATA

Report on Plenary and Working Group Sessions of Washington Airline Liability Conference 19-23 June 1995

The Plenary, having noted its mandate and DOT Order 95-2-44, after a week of discussion and debate adopted the Report of the Conference Session, attached hereto, on 23 June 1995.

The main discussions in Plenary centred on: 1) increasing limits from Warsaw/Hague/Montreal Agreement/Higher Voluntary Limits to SDRs 250,000; 2) providing for periodic increases to take account of inflation; 3) a system for "up front" payments to victims/claimants; 4) where desired/required by carriers or governments, waiver of carrier defenses except "contributory negligence" up to an agreed new limit; 5) where desired/required by carriers or governments, adoption of a means to provide unlimited compensation i.e. beyond any agreed new limit, e.g. through a special Supplemental Compensation Plan (SCP) - especially for the US - funded by a passenger surcharge, or by means of the existing so-called "Japanese Initiative" (JI), the cost of which is included in the ticket price, but in any case retaining Warsaw System defenses above a defined "threshold".

The Plenary established two Working Groups of the Whole, one on the SCP and another on the JI. These reviewed in some detail the respective merits of the two approaches, mainly addressing workability and practicality, and to what extent they could meet the test of prompt and complete compensation on an acceptable liability basis with no per passenger limits.

Subject to receiving an extension of the immunity order, the Conference Session decided that its Chairman should set up two follow-up Working Groups of limited membership to focus on:

- (i) the insurance costs relative to increasing the liability limits, and in particular means of assisting small and medium sized carriers to meet increased costs; and
- (ii) the "third tier" mechanisms (beyond Warsaw/Hague and any agreed new limit) to provide unlimited liability e.g. SCP and JI.

(The Conference Chairman noted that the composition of the two Working Groups would be geographically balanced and each would include at least one US carrier.)

In addition the IATA Secretariat was specifically -

a) requested to seek immediately an extension of the US DOT Immunity Order to allow the Conference to complete its mandate i.e. through Working Groups, consultations etc, and
b) instructed, in consultation with the Legal Advisory Group (LAG), to draft by 31 August 1995 the texts of a

- i) new Inter-carrier Agreement, to replace the 1966 Montreal Agreement but to be potentially applicable world-wide, and
- ii) an optional "add on" for unlimited compensation (including a Supplemental Compensation Plan and any other viable "third tier" proposal)

These texts, after circulation and review, are to be presented to the IATA Annual General Meeting 30-31 October 1995 for endorsement, following which requisite government (including US DOT) approval would be sought.

The Conference also went on record to reaffirm that -

- the Warsaw system must be preserved
- the current limits were grossly inadequate in many jurisdictions
- Governments should act urgently through ICAO to update the Warsaw Treaty regime
- Montreal Aviation Protocol 4 on cargo should be brought into force expeditiously, independently of consideration of Montreal Aviation Protocol 3 on passengers.

Pursuant to the decision of the Conference Session, the IATA Secretariat duly filed with the US Department of Transportation a formal request for an extension of the DOT Immunity Order, with certain modifications as set out in the attached document of 26 June 1995, in order to allow the Conference to complete its work.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

Washington, 19-23 June 1995

TABLE OF CONTENTS

Preparatory Documentation circulated prior to the Conference - see Table of Contents under "Documentation Part I"	Tab 1
Preparatory Documentation circulated at the Conference - see Table of Contents under "Documentation Part II"	Tab 2
Rules of Procedure	Tab 3
Report of the Conference Session	Tab 4
IATA Application to DOT Requesting Extension of Anti-Trust Immunity	Tab 5
Attendance List	Tab 6

NOTE: Documentation in this notebook variously refers to the dates of the conference as 19-23 June and 19-27 **June**. Though originally scheduled to conclude on 27 June, the conference actually ended on 23 June. Documents prepared prior to the conference will show the original conclusion date of 27 June.



International Air Transport Association

IATA Building, 2000 Peel Street, Montreal, Quebec, Canada H3A 2R4
Telephone: (514) 844-6311 Fax: (514) 844-5286 Telex: 05-267627 Cables: IATA MONTREAL

Memorandum

TO: Registered Participants, Airline Liability Conference
FROM: General Counsel and Corporate Secretary
DATE: 26 May 1995
REF:
SUBJECT: **IATA Airline Liability Conference - Documentation, Part I**

With reference to my memorandum dated 13 April 1995, please find attached Part I of the Documentation for the above Conference, to be held from 19-27 June in Washington, D.C. A preliminary Agenda is to be found as Doc. 1 of the Part I.

Part II of the Documentation will be available on site of the Conference as part of the Registration folder which will be handed out to you.

The Conference will be held at the Madison Hotel (Dolley Madison Ballroom), 15th and M Streets Northwest, Washington, D.C. 20005, and is scheduled to start on Monday 19 June at 10:00 hours.

I look forward to seeing you there.

Secretary

Lorne S. Clark
General Counsel and Corporate Secretary

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

Washington, 19-23 June 1995

DOCUMENTATION, PART 1

TABLE OF CONTENTS

	<u>Working Paper No.</u>
US-DOT Order 95-2-44	Item 5, WP 1
IATA Petition seeking antitrust immunity for the discussions	Item 5, WP 2
IATA Application seeking clearance and exemption from the European Commission for the discussion; European Commission letter dated 1 Sept. 1993, granting clearance for the discussions	Item 5, WP 3
Documents concerning the Japanese Initiative on limits of liability	Item 7, WP 1
Documents concerning the proposals of the European Civil Aviation Conference (ECAC)	Item 7, WP 2
Documents concerning the European Union Commission Proposals	Item 7, WP 3
Documents concerning Australian legislation on passenger liability limits	Item 7, WP 4
ICAO Summary on Airline Liability Limits, 31 January 1995	Item 7, WP 5
Italian legislation	Item 7, WP 6
UK Licensing Requirement	Item 7, WP 7

Workina Paper No.

US Economic Regulation 203

Item 7, WP 8

Table of Liability Limits

Item 7, WP 9

Background and Objectives of the Airline Liability
Conference:

Item 7, WP 10

Issue I: Discussion of New Special Contracts

Item 7, WP 11

Issue II: Discussion of Increased Limits of
Liability Under the Convention

Item 7, WP 12

Issue III: Discussion of Conditions of, and
Defenses to, Liability

Item 7, WP 13

Issue IV: Discussion of Agreement to Establish
a United States Supplemental
Compensation Plan

Item 7, WP 14

Report of the Airline Liability Conference

Item 7, WP 15



INTERNATIONALAIRTRANSPORTASSOCIATION

AIRLINE LIABILITY CONFERENCE

DOCUMENTATION, PART I

**19-27 June 1995
Washington, D.C.**

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

Washington, 19-23 June 1995

AGENDA

- 1. OPENING OF THE MEETING**
- 2. ELECTION OF CHAIRMAN, VICE-CHAIRMAN AND RAPPORTEUR**
- 3. ADOPTION OF RULES OF PROCEDURE**
- 4. APPROVAL OF AGENDA**
- 5. REPORT OF THE SECRETARY**
- 6. OPENING STATEMENTS**
- 7. DISCUSSION OF ISSUES RELEVANT TO UPDATING THE AIRLINE LIABILITY SYSTEM**
 - (a) STATUS OF THE WARSAW CONVENTION**
 - (b) DISCUSSION OF NEW SPECIAL CONTRACTS**
 - (c) DISCUSSION OF INCREASED LIMITS OF LIABILITY UNDER THE CONVENTION**
 - (d) DISCUSSION OF CONDITIONS OF, AND DEFENSES TO, LIABILITY**
 - (e) DISCUSSION OF AGREEMENT TO ESTABLISH A UNITED STATES SUPPLEMENTAL COMPENSATION PLAN**
- 8. FOLLOW UP ACTION**
- 9. ANY OTHER BUSINESS**



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

ALC- Item 5
WP 1
page 1

Issued by the Department of Transportation
on the 22nd day of February, 1995

International Air Transport Association:
Agreement Relating to Liability
Limitations of the Warsaw Convention

Docket 49152

ORDER

On September 24, 1993, the International Air Transport Association (IATA) filed an application requesting approval of, and antitrust immunity for, intercarrier discussions concerning the limits and conditions of passenger liability established by the Warsaw Convention (Convention).

IATA states that pending ratification and entry into force of Montreal Protocols Numbers 3 and 4 to the Convention, there is a need for interim passenger liability rules that are adequate to current day standards of compensation. . . The current regime, as embodied in the Montreal intercarrier agreement of 1966 (Agreement) and which covers all carriers serving the United States, establishes a liability limit of \$75,000 for personal injury and death.¹ Adjusted for inflation, IATA notes that this amount would be over \$300,000 in today's dollars. Despite this, adherence to the Agreement's \$75,000 limit continues to be a condition for all carriers to operate to the United States. Against this background, IATA states that air carrier parties to the Agreement need the authority to discuss bringing the Agreement up to date. It states that such discussions may include possible amendments to, or replacements for, this Agreement. IATA states that its request for discussion authority and antitrust immunity is consistent with Department precedent.

¹ The Warsaw Convention, to which the United States became a party in 1934, established a number of uniform rules regarding international air transportation, including in Article 22 an air carrier liability limit of approximately \$10,000 for each passenger injury or death, absent a finding of willful misconduct. The Hague Protocol of 1955, which doubled the liability limit, was not ratified by the United States. Rather, in 1966, the carriers serving the United States agreed to adopt a special contract under Article 22, establishing what remains the current regime (Agreement CAB 18900, approved by Order E-23680, May 13, 1966 (Docket 17325). Under the Agreement's terms, these carriers also agreed not to avail themselves of the defense of non-negligence under Article 20(1) of the Convention for claims under that amount.

No answers were filed in response to the LATA application.

Decision

The Department has decided to grant the requested discussion immunity subject to the conditions described below. The United States has a firmly-established policy that liability limits should be adequate to contemporary standards of compensation and that the current regime needs to be updated to provide sufficient protection to the traveling public. We are granting the application because the discussions proposed by IATA may bring about an interim solution that will serve either until Montreal Protocols 3 and 4 are ratified and enter into force, or until negotiation and entry into force of a new Convention meeting all U.S. requirements.

We may authorize intercarrier discussions and grant them antitrust immunity where we find that the discussions are necessary to meet a serious transportation need or to achieve important public benefits and that such benefits or need cannot be secured by reasonably available alternatives that are materially less anticompetitive. 49 U.S.C. 41308, 41309.

The purpose of the discussions in this case is to secure the important public benefit of a liability regime that reflects contemporary standards of compensation. The discussions are consistent with a strong and long-standing Department policy of seeking a uniform set of passenger liability rules that meet today's needs.

We find that there are no reasonably available alternatives to the requested discussions having a materially less anticompetitive effect. The best alternative, of course, is an international agreement such as the Montreal Protocols and Supplemental Compensation Plan, but it is because that approach has proven to be such a complex and lengthy one, and given the pressing need to have an updated liability regime, that we are entertaining this discussion authority request. Another alternative would be to allow individual carriers to apply to the Department for modifications to their tariffs and conditions of carriage to implement individual new special contracts under Article 22 of the Convention. We do not believe that approach is workable. Some carriers would probably attempt this, while others would not. Those that did would likely offer contracts with different terms from one another. One clear and unacceptable result of such an approach would be that portions of the traveling public would not be adequately protected. A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to abide by. This approach, however, could engender such significant opposition from our trading partners that our ability to implement the plan unilaterally could very well be jeopardized.

² We assume for the purposes of our decision here that the proposed discussions could reduce competition among carriers.

We also find that the requested approval and grant of antitrust immunity to discuss an interim liability regime is appropriately limited in nature and well-calculated to achieve a result consistent with our objective of having in place a liability regime that reflects contemporary standards of compensation. IATA seeks discussions geared toward producing a temporary arrangement, recognizing the immediate need to increase the liability limits through a uniform system of rules. This is fully consistent with our objectives. IATA would announce a place and date for such discussions and has said that it would invite all its member carriers.

IATA requests that we not impose conditions on such discussions that would restrict the ability of the participant carriers to **consider all** options in structuring **2** liability regime. We will not impose conditions **other than those that we consider standard and which we** have set out below. However, we believe that in constructing any intercarrier **agreement**, the participants should seek to reflect the basic objectives which we have pursued in our efforts to secure ratification of the Montreal Protocols and creation of a supplemental compensation **plan**. We have strived for a uniform international system that allows U.S. victims to receive fair recoveries within a reasonable period of time. Specifically, we would expect that any agreement reached by the carriers would be consistent with the following guidelines: first, with regard to passenger claims arising from **international** journeys ticketed in the United States, **passengers** would be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits **2nd** with measures of damages consistent with those available in cases arising in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States.

We have decided to grant the request for discussion authority and antitrust immunity in this order, rather than through **2** show-cause proceeding. **The discussions** sought by the applicants seek to carry out our established public policy goal, the modernization of passenger liability limits. Implementing that goal as soon as possible will redound to the immediate benefit of the traveling public **2nd** therefore provide important public benefits. We are willing to grant antitrust immunity in this instance because, unlike most situations where it has been sought, the purpose of the discussions at issue here is fully consistent with the public interest. Furthermore, any agreement reached by the carriers may not be implemented without our approval, and interested persons will have **an** opportunity to comment on **any** application for such approval.

In addition, to minimize any adverse impact on the public interest, we will condition our approval **2nd** grant of antitrust immunity upon the following express conditions: (1) the discussion authority is limited to 120 days from the date of publication of this order; (2) advance notice of any meeting shall be given to all U.S. and foreign air carriers as well as to the Department of Transportation and the Department of Justice; (3) representatives of the Department of Transportation and the Department of Justice shall be permitted to attend the meetings authorized by this order; (4) IATA shall file within 14 days with the Department **2** report of each meeting held including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary

of the discussions and any proposed agreements; (5) any agreement reached must be submitted to the Department for approval and must be approved before its implementation; (6) the attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan; and (7) the discussions will be held in the metropolitan Washington, D.C. area.

ACCORDINGLY,

1. The Department approves **the request** for discussion authority filed by IATA in this docket, subject to the restrictions listed below, under section 41308 of title 49 of the United States Code, for 120 days from the date of publication of **this order**, for discussions directed toward producing a uniform set of passenger liability limits;
2. The Department exempts persons participating in the **discussions** approved by this order from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code;
3. The Department's approval is subject to the following conditions:
 - (a) Advance notice of any **meeting** shall be given to **all** identifiably interested U.S. air carriers and foreign air carriers, as well as to the Department of Transportation and the Department of Justice;
 - (b) Representatives of the entities listed in subparagraph (a) above shall be **permitted to attend** all meetings authorized by this order;
 - (c) IATA shall **file** within 14 days with the Department a report of each meeting **held including** *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary of the discussions and any proposed agreements;
 - (d) **Any** agreement reached must be submitted to the Department for approval and **must** be approved before its implementation;
 - (e) Attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan;
 - (f) The **Department** shall retain jurisdiction over the discussions to take such further action at any time, without a hearing, as it **may** deem appropriate; and
 - (g) **Any** meetings authorized by this order shall be held **in** the metropolitan Washington, **D.C.** area.

4. Petitions for reconsideration may be filed pursuant to our rules in response to this order;
5. We will serve a copy of this order on all parties served by IATA in this docket, as indicated by the service list attached to its application; and
6. We will publish a copy of this order in the Federal Register

By:

Patrick V. Murphy
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

U.S. DEPARTMENT OF TRANSPORTATION
Washington, D.C.

International Air Transport)
Association: Agreement Relating) Docket
to Liability Limitations of the) Agreement CAB 18900
Warsaw Convention)

APPLICATION FOR APPROVAL OF, AND
ANTITRUST IMMUNITY FOR DISCUSSION AUTHORITY

The International Air Transport Association (**IATA**) hereby requests, pursuant to **sections 412** and **414** of the Federal Aviation Act of 1958, **as amended (Act)**, and **14 CFR Part 303**, **that** the Department **grant its approval** of, and **antitrust immunity** for, **intercarrier discussions** concerning the **limits** and conditions of passenger liability established by the Warsaw Convention, including **specifically Articles 22(1)** and **20(1)** of the Convention, or the **Convention as amended** by the **Hague Protocol**. The intercarrier **discussions** may include possible **amendments** to, or replacements for, the Montreal **intercarrier agreement (CAB 18900)** which is subject to **a grant of antitrust immunity** by the Civil Aeronautics Board dated May **13**, 1966.

Air carriers operating under the **Warsaw Convention** require the flexibility necessary to consider options that would update the operation of the **Convention**, pending entry into **force** of the amendments to the Convention **incorporated in** Montreal Protocols **3 and 4**, which are pending advice **and consent to ratification** in the United States Senate. **This authority is** necessary to address the concerns of the **travelling public and foreign governments** that

support interim action **to develop** national or regional remedies to the existing low limits of liability. As set forth below, the approval and immunity requested here is in the-public interest, and is necessary to secure important public benefits.

I. Background

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention) was signed in 1929. The United States became a party **in 1934**. Currently at least 117 countries are parties to the Convention. **The Warsaw Convention** establishes **uniform** rules as to the rights and obligations between air **carriers and users** of international air **transportation** and **creates** uniformity with **respect** to **transportation documentation such as passenger tickets**, baggage checks, and air way-bills. **Included** in the uniform rules **established** by the **Convention** are **those** which **set** forth the liability of **an** air **carrier** to **its passengers** in **cases** of **death or injury** from an accident. Article 22 of the **Convention** provides that the liability of the air carrier **for passenger injury** or **-death is** limited to approximately \$10,000, which **applies absent** a finding of willful **misconduct**.

Since the **1950s, the** United States has taken the lead in efforts to **modernize** the **Warsaw Convention's** liability rules. In the Hague Protocol Of 1955, the **passenger** limitation **set** forth in Article 22 of the **convention was** doubled, **but** this Protocol was never ratified by the **United** States Senate. **In** 1965, following the

failure of the United States to ratify the Hague Protocol, the carriers serving the United States agreed to adopt a special contract under Article 22 of the Warsaw **Convention** for transportation to, through, or from the United States, establishing a liability limit of \$75,000 for passenger injury and death. Further, the carriers agreed not to avail themselves of the defense of non-negligence under Article **20(1)** of the Convention for claims within **that** limit. This agreement was originally conceived as a **temporary** measure pending negotiation of revisions to the Warsaw Convention now **incorporated in** Montreal Protocols Nos. 3 and 4. This **agreement**, known as the **Montreal intercarrier** agreement, remains in force **today**.¹

Recently the United States Government has been engaged in an effort to ratify Montreal Protocols Nos. 3 and 4 to the **Convention** and to **establish a supplemental compensation system** consistent with Article **35A** thereof. However, the delay in U.S. ratification and the entry into force of the **Montreal Protocols**, which were negotiated in 1975, is a **matter** of concern to the International aviation **community, including** the **governments** of many of the aviation partners of the United States. While IATA remains firmly committed to U.S. ratification of the **Montreal Protocols**, it must also take **steps to maintain** the viability of the Convention's **passenger** liability rules pending **such** ratification and, **thereaf-**

¹ Agreement **CAB 18900, approved by order E-23680, May 13, 1966** (ocket 17325).

ter, the entry into force of the Montreal **Protocols.**² Further, that action must be consistent with framework of the Warsaw Convention, including the recent amendments reflected in those Protocols.

The enhanced limitation set forth in the Montreal intercarrier agreement is considered today to be inadequate to the standards of compensation for many countries. Japanese- flag airlines have applied for and obtained U.S. approval **of** modifications to their tariffs and conditions **of** carriage to implement a new special **contract** under Article 22 of the **Convention.** In effect, Japanese air carriers applied for strict but limited liability **up** to 100,000 **SDRs,** and thereafter **for** unlimited liability on the **basis of presumed, but rebuttable, fault.**³ The application of the Japanese **airlines** required an **exemption from 14 CFR Part 203.** That regulation require⁸ **adherence** to the Montreal intercarrier agreement by all airlines **servng** the United States as a condition of their operating authority.

Initiative⁸ **are also** underway **in Europe** to address the question of airline liability under the **Warsaw system.** In October, 1992, the European **Community** circulated a **consultation** paper on

² The authority **requested** here **is** for the discussion of **special** contract⁸ that would remain in **effect for** a contracting party until the **amendments** included in **Montreal** Protocol No. 3 **become effective** for that party, which necessarily could be after the Montreal Protocol⁸ enter into **force** for the United States.

³ See, e.g., Application of All Nippon Airways Co. Ltd. for an exemption under section 416(b) of the Federal Aviation Act of 1958, as amended, Order 92-12-43 (December 31, 1992).

passenger liability **under the** Warsaw Convention.' Thereafter, the Economic Committee of **ECAC** commenced a study of the operation of the Warsaw system with a view toward developing practical solutions to the problems of the current system. **There appears** to be a consensus among all parties to these efforts -- airlines, insurers, governments and other interested persons -- that interim action to increase the existing limits may be required and that voluntary action by carriers **is** the preferred approach. There is **also** general agreement, however, that this action should not **destabilize** the Warsaw **system** itself.

It **was precisely** this **same** concern in the United States **that** led to the adoption **of the Montreal intercarrier** agreement in 1966. That **agreement was** intended to **constitute** an interim **measure** pending negotiation and U.S. ratification of **amendments** to the Warsaw **Convention that are now** included **in the Montreal** Protocols. **The liability limit** Of \$75,000, **absent Willful misconduct, is** now **itself** outdated and **insufficient**. For **example, if** [●] **djusted for** inflation, that amount would be over \$300,000 **in today's dollars**. **Nevertheless,** the Montreal **intercarrier agreement** continues to operate **under** a grant of **antitrust immunity from** the Civil Aeronautics Board, and air carriers with authority to operate to the United States are required to be a party to the agreement **as** a condition **of** that authority. It is now **necessary,** therefore, to give the air **carriers** party to the **agreement** the authority to consider bringing it up to date pending the entry into force of

⁴ See Attachment **A.**

Montreal Protocols Nos. 3 and 4. In response **to** requests from its member airlines, IATA recently filed a request for Commission authority for **intercarrier** discussions on the passenger liability limits. These discussions were approved by the Commission by letter dated September 1, 1993. Similar authority is required from the U.S. Department of Transportation, however, before these discussions can proceed.

The international airline **community** will continue **to strongly support U.S.** efforts to obtain **ratification** of the Montreal Protocol⁸ and adoption of a **supplemental** compensation system which the United States Government has proposed as a condition of its ratification **of the Protocols. The National Commission to Ensure a Strong Competitive Airline Industry has recommended** ratification of the Protocol⁸ and approval of a **supplemental** compensation plan to **bring** the Warsaw **system up** to date in a **manner** which adequately **serves the interests** of both airlines and **the users** of their **services. **Article 35A** of the Convention, as it **would be** amended **by the Protocols,** gives each contracting **state** the right **to ensure compensation** for its own **passengers commensurate** with its **economic standard** in **excess of the carriers' limit** of liability under the Convention. **Any discussion Of possible amendments to or replacements for the** Montreal intercarrier **agreement would take place in****

⁵ See **Attachment B.**

• **See Attachment C.**

⁷ **Change, Challenge and Competition, A Report to the President and Congress, The National Commission to Ensure a Strong Competitive Airline Industry, August 1993.**

full recognition of the objectives and likely operation of Article 35A once it enters into force.

It is generally recognized that contracting states party to the Warsaw Convention may develop different policies concerning the appropriate levels of, and standards for, compensation for international airline passengers. In this regard, the framework of Article 35A of the Convention, as amended by Montreal Protocol No. 3, allows each **state to** develop a **supplemental** compensation system consistent with its **own** policies, **since** it generally would apply **to** transportation **sold** within its own **territory**. That framework by its terms also tends to avoid conflicts between contracting states in the implementation of **supplemental compensation systems**.

It will therefore be necessary for the airlines to consider **whether** a **framework** for potentially different **special** contracts under Article 22 would **also** be appropriate. This issue would **necessarily** involve **consideration of** the potential effect **of** such contract^s on Interline arrangement^s and other industry practices in order to **ensure** that each **passenger purchases** a ticket for **transportation** with liability rules **that** are **consistent** and predictable **as** possible.

Airlines intend to **consider** in the near future **these** framework **issues** on an **informal** basis and no Department authority is requested or **required** for **this preparatory** work. **The** framework issues that **will** be **considered** involve legal **considerations** relating to the **administration** of the **Convention**, and the **form** of **potential submissions** to **contracting states** for approval **of** any new **special** contract^s that may be developed. Pending **Department** action

on this application, therefore, airlines will limit their consideration of special contracts and avoid any discussion of the potential limits of, and conditions for, their liability to passengers.

The fact **that** preliminary discussions can take place without special discussion authority does not in any way diminish the urgency of Department action on this application. On the contrary **many carriers, and** a number of governments, are anxious to see substantive **discussions** on liability issues by carriers begin **soon**, and carriers **cannot do so without DOT approval** Of **this** application.

**II. Discussion Authority is
Appropriate Under Section 412 of the Act**

Section 412 of the Act empowers the Department to grant authority for intercarrier discussions concerning matters relating to foreign air transportation provided that such discussions are not contrary to the public interest or in violation of the Act. Section 412 (a) (2) (A); Joint Application of Northwest Airlines, Inc. and KLM Royal Dutch Airline, Order 93-1-11 (January 11, 1993) (Order 93-1-U); Agreement Among Members of the International Air Transport Association Concerning Passenger Services Matters, Order 90-1-41 (January 22, 1990) (Order 90-1-41). Discussions regarding the adequacy of existing liability limits for passenger injury or death are intended, among other things, to provide greater protection to the travelling public and will not substantially reduce or eliminate competition. Accordingly, the Department

should grant the discussion authority requested in this application.

Even if discussions concerning the adequacy of existing liability limits could be perceived as adversely affecting competition, such discussions should nonetheless be approved in view of the important public benefits they will confer and the lack of reasonable alternative means for accomplishing these benefits. See, Section 412 (a) (2) (A) (i); Order 93-1-11 at 10 ("The Department may not approve an intercarrier agreement that substantially reduces or eliminates competition unless the Department finds that the agreement is necessary to meet an important transportation need or secure important public benefits that cannot be met or secured by reasonably available alternative means having materially less anticompetitive effects" (emphasis in the original)). In addition to establishing a framework for providing greater protection to the travelling public, such discussions advance international comity and important foreign policy goals that cannot be met or secured by reasonably alternative means having materially less anticompetitive effects. Quite simply, no alternative forum exists in which these issues may be addressed.

Discussion authority will advance important foreign policy and comity considerations. The modernization of the Warsaw Convention's liability limits, as discussed above, has been a consistent policy goal of the United States Government, and the discussion authority and antitrust immunity requested here is clearly in the public interest. Action by air carriers to review the operation of the Warsaw and Warsaw/Hague limits pending entry into force of the

Montreal Protocols will further the realization of the important benefits to **the travelling public that** are the foundation of the Warsaw Convention and U.S. efforts to amend it. Moreover, the benefits derived from increased liability limits will flow not only to individual members of the travelling public, but also to the signatories to the Warsaw Convention.

In addition to providing greater protection to the travelling public and furthering U.S. **foreign** policy goals, discussion authority will **promote** international **comity** by **affirming** the importance of the Warsaw Convention and the need for international cooperation and **uniformity**. The **Warsaw system is** one of the most widely adhered to **multilateral** treaty **systems in** effect in the world today. **It establishes many** of the **uniform** rules that make an **integrated international** aviation **system possible**. Included in **these rules are** provisions related to the liabilities of airlines **to passengers; matters of direct** concern to the **governments** whose **citizens utilize international** air **transportation services. Many** of those **governments** now favor **interim** action to review the limitations of liability reflected **in those rules**.

Discussion authority **should** be **granted** under **section** 412. **Discussion** of these **matters is not** adverse to the public interest, is not in **violation** of the Act, and **is** not likely to **substantially** reduce **competition**. **Moreover, even if such discussions could be** perceived as adversely affecting **competition, discussion** authority is **nevertheless appropriate** in view of the **important public** benefits that will **result** from **such discussions**.

III. Antitrust Immunity for Discussions
is Proper Under Section 414 of the Act

Section 414 of the Act provides in pertinent part:

In any order made under section . . . 412 of this Act, the Board may, as part of such order, **exempt** any person effected by such order from the operations of the "antitrust laws" . . . to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and those transactions necessarily contemplated by **such** order, except **that** the Board may not **exempt** such person unless it determines **that** the **exemption** is required in the public interest. **Notwithstanding** the preceding **sentence**, on the **basis** of the findings required by **subsection (a) (2) (A) (i) of section 412, the Board shall, as part of any order under such section which approves any . . . request . . . exempt any person affected by such order* from the operation⁸ of the "antitrust laws" . . . to the extent necessary to enable such person to proceed with the transaction specifically approved by the Board in such order and with those transactions necessarily contemplated by such order.⁹**

49 App. USC 1384. (emphasis added). Thus, where discussion authority is granted under subsection (a) (2) (A) of § 412 the Department may, at its discretion, grant antitrust immunity.⁹ See also Order 93-1-11. Where discussion authority is granted under subsection (a)(2) (A)(i), however, such authority must be accompa-

⁸ On January 1, 1985, the Board's authority under sections 412 and 414 was transferred to the Department of Transportation. 49 U.S.C. App. S 1551 (b) (C).

⁹ Section 412 (a) (2) (A) provides in pertinent part: "The Board, . . . shall by order approve any **contract**, agreement, or request, or **any** modification or cancellation thereof, **that** it does not find to be **adverse** to the public interest, or in violation of this **Act**."

nied by section 414 antitrust immunity.¹⁰ See also Agreement Among Members of the International Air Transport Association Cargo Services Matters, Order 89-10-52 (October 27, 1989) (Order 89-10-52).

- i. Antitrust Immunity is appropriate for Discussions Approved Under Subsection (a) (2) (A) of Section 412 of the Act

The **Department** will not grant immunity for transactions that do **not** substantially reduce competition absent a strong showing **that antitrust immunity** is required in the **public interest**, and **that** the parties will not proceed with the transaction without such **immunity**. Order 93-1-11. The antitrust **immunity** requested here should be granted because the **proposed discussions** are **in** the public interest and will not **proceed** absent **such immunity**.

The analysis for determining whether **antitrust immunity** is in the public interest is **similar** to the public interest analysis conducted in connection with **Section 412** of the Act. **Id** at 11. Specifically, **in determining whether antitrust immunity** should be granted, the **Department considers** the **interests** of the travelling public, the foreign policy goal⁸ of the United States, **and** the

¹⁰ **Section 412 (a) (2) (A) (i)** provides in pertinent part:

The Board may **not** approve or, after periodic **review**, continue its approval of any **such** contract, agreement, or **request**, or **any modification** or cancellation thereof, which substantially reduces or eliminates **competition**, unless it **finds** that the contract, agreement, or request is necessary to meet a **serious transportation** need or to **secure important public benefit**⁸ including **international comity** or foreign policy consideration, **and it does not find** that **such** need can be **met** or **such** benefits can be **secured by reasonably available alternative means having** materially less **anticompetitive effects**.

advancement of international comity. See e.g., Order 93-1-11. As discussed more fully above, an **examination** of each of these factors dictates in favor of granting antitrust **immunity** for discussions concerning liability **limits** for passenger injury or death. Antitrust immunity **for**, and agreements arising **from**, such discussions will further U.S. foreign policy goals, advance international comity and benefit the **travelling** public.

Although discussions concerning liability limits are not likely to **"substantially reduce competition,"** the Department should nevertheless **approve** this application because **such** discussions are in the public interest and will **not** proceed absent **antitrust immunity**. The Montreal intercarrier agreement continues to operate under a **grant of antitrust immunity** under section 414 of the **Act**. Given the fact that any **discussion** of these **issues** will inevitably include modifications to that agreement, participants to such **discussions** may **risk** a general **antitrust** Challenge. Consequently, **IATA members** are unwilling to proceed **with discussions** absent **antitrust immunity**.

If discussion authority is granted under subsection (a) (2) (A) of section 412 of the Act, **antitrust immunity should** be granted under section 414 in view of the fact that **discussions** are in the public **interest and will not proceed absent such immunity**.

- ii. Antitrust Immunity is appropriate for Discussions Approved Under Subsection(a) (2) (A) (i) of Section 412 of the Act

Where discussion authority is approved pursuant to subsection (a) (2) (A) (i) of section 412 of the Act, such approval **must** be accompanied by antitrust **immunity**. Section 414; Order **89-10-52** at **7** ("[W]here an **anticompetitive agreement** is approved in order to attain other **objectives**, the **conferral of antitrust immunity** is mandatory under the Federal Aviation Act, as **amended.**"). Accordingly, if the **discussion authority requested here is granted under Subsection (a) (2) (A) (i) of section 412, such authority must be accompanied by antitrust immunity pursuant to section 414.**

IV. Conditions

If **discussion authority is granted under section 412, the Department may include the standard condition** relating to **government observers and the requirements that all agreements must be filed for prior approval.** It **should not, however, contain any conditions that would restrict the ability of airlines to consider all possible options relating to the implementation of Article 22 and 35A of the Convention. Notwithstanding its mandatory incorporation into 14 CFR Part 203, the Montreal intercarrier agreement is, in its conception and character, a voluntary agreement, consistent with the operation of Article 22 itself. Accordingly, carrier must be free under IATA auspices to consider various options relating to the implementation of Article 22 to develop recommendations that will satisfy the concerns of all governments.**

This flexibility, of course, would be subject to the requirement that any agreement be submitted to the Department for review and approval prior to implementation.

V. Conclusion

For the foregoing **reasons**, the International Air Transport Association respectfully requests that its application for discussion authority be approved under section 412 of the Act, and **that** member activities constituting participation in such **discussions**, whether **in person** or by **any other means**, be **immunized** from application of the **antitrust** laws under section 414 of the Act.

Respectfully submitted,

DAVID O'CONNOR
Regional Director, U.S.
International Air
Transport Association
1001 Pennsylvania Avenue
Suite 285
Washington, DC 20004
202/624-2977


WARREN L. DEAN
Dyer, Ellis, Joseph & Mills
600 New Hampshire Avenue, N.W.
Suite 1000
Washington, DC 20037
202/944-3000

**Attorneys for the International
Air Transport Association**

September 24, 1993

CERTIFICATE OF SERVICE

A copy of the International Air **Transport** Association's Application for Approval of, and Antitrust **Immunity** for, Discussion Authority has been **served** on this 24th day of **September** 1993, by first-class mail, postage, prepaid on the following persons:

Mr. James Tarrant
Deputy **Assistant** Secretary for
Transportation Affairs
Department of State
2201 C Street, **N.W.**
Washington, D.C. 20520
(202) 647-4045

Mr. Mark C. Schechter
Chief, **Transportation, Energy**
& Agriculture Section
Antitrust Division
Department of Justice
555 **Fourth** Street, **N.W.**
Washington, D.C. 20001
(202) 307-6349



Warren L. Dean



International Air Transport Association

IATA CENTRE, ROUTE DE L'AEROPORT 33, P.O. BOX 672
CH-1215 GENEVA 15 AIRPORT, SWITZERLAND
TELEPHONE: (022) 799 25 25 • TELEX: 415586 • CABLES: IATA GENEVA

MEMORANDUM

ALC- Item 5
WP 3
page 1

TO: Members of the Legal Advisory Group

COPY: All General **Counsel**

FROM: Director Legal Services - Geneva

REF: **G/3069/JW/mdm/GC393.doc**

DATE: 26 October 1993

SUBJECT: WARSAW LIABILITY SYSTEM

At its **157th** meeting held on **28** May 1993, the **IATA** Executive Committee received a report on developments in Europe and Japan with **regard** to the urgent need to reform and **modernise** the Warsaw System. The Committee noted that IATA had long **advocated** ratification of **the Montreal Protocols and, through** its Member airlines, had **repeatedly urged governments to bring these instruments into force.***

The Executive Committee also noted that while the U.S. Administration remains committed to the ratification of the Montreal Protocols, government initiatives in Europe, through ECAC and by the Commission of the European Community, sought to develop a solution to the urgent problem of increasing liability limits for passenger death or injury, in the short term, within 8s large a group of European states as possible, without destabilising the Warsaw system as a whole.

In this context, **the Executive Committee agreed** that the **IATA** Secretariat should **seek appropriate authority both** from **the U.S. Department of Transportation and the European Commission, to permit airline discussions on the revision of liability limits, without undermining the integrity of the Warsaw régime.**

.../2

*As evidenced by **Resolutions** adopted at **Annual General Meetings** of the Association in **1976, 1978, 1981, 1982 and 1984.**

For your information, please **find** attached the following:

- (1) Application filed with the European Commission (**DGIV**) on 13 August 1993;
- (2) Letter **from DGIV** dated 1 September 1993 in response to **IATA's** application;
- (3) **IATA** application to the U.S. **DoT** dated 24 September 1993 for **approval** of, **and** antitrust **immunity** for. discussion **authoritv without its attachments.** See Attachment B of Agenda Item 2



John M. Wilson

Attachments



International Air Transport Association

PIERRE J. JEANNIOT, O.C.

MONTREAL / GENEVA

DG 1200

13 August 1993

Dr. John Temple Lang
 Directorate-General for Competition - DG IV
 Commission of the European Communities
 150, Avenue de Cortenberg
 B-1049 Brussels
 Belgium

Dear Dr. Temple Lang,

I have the honour, on behalf of the International Air Transport Association and on behalf of its Member Airlines as listed in Annex I, hereby to apply for negative clearance for inter-carrier consultations on passenger liability limits, as explained in more detail in Annex II, and, to the extent that such negative clearance cannot be granted, for an exemption under Article 85(3) of the Treaty establishing the European Economic Community.

I also enclose in Annex II the information required by the Commission. I remain at your disposal to provide any further information you might request.

In view of the large number of putative, acknowledgement of receipt to IATA can be considered as acknowledgement of receipt to its co-applicant Members.

Sincerely,

ANNEX I

This form must be accompanied by an annex containing the information specified in the attached Complementary Ntwc.

The form and annex must be supplied in fourteen copies (two for the Commission and one for each Member State). Supply three copies of any relevant agreement and one copy of other supporting documents.

Please do not forget to complete the Acknowledgement of Receipt annexed.

If space is insufficient, please use extra pages, specifying to which item on the form they relate.

FORM AER

TO THE COMMISSION OF THE EUROPEAN COMMUNITIES

Directorate-General for Competition
200, rue de la Loi
B-1049 Brussels

- A. Application for negative clearance pursuant to Article 3 (2) of Council Regulation No 3975/87 of 14 December 1987 relating to implementation of Article 85 (1) or of Article 86 of the Treaty establishing the European Economic Community.
- B. Application under Article 5 of Council Regulation No 3975/87 of 14 December 1987 with a view to obtaining a decision under Article 85 (3) of the Treaty establishing the European Economic Community.

Identity of the parties

1. Identity of applicant

Full name and address, telephone, telex and facsimile numbers, and brief description of the undertaking(s) or association(s) of undertakings submitting the application.

For partnerships, sole traders or any other unincorporated body trading under a business name, give, also, the name, forename(s) and address of the proprietor(s) or partner(s).

Where an application is submitted on behalf of some other person (or is submitted by more than one person) the name, address and position of the representative (or joint representative) must be given, together with proof of his authority to act. Where an application or notification is submitted by or on behalf of more than one person they should appoint a joint representative. (Article 2 (2) and (3) of Commission Regulation No 4261/88).

International Air Transport Association
IATA Centre
P.O. Box 672, Route de l'Aéroport 33
CH-1215 Geneva 15 Airport, Switzerland
Tel: (41 22) 799 2525
Fax: (41 22) 798 3553
Telex: 415586

188 Active and 128 Associate Members of IATA listed in Annex I to this Application

Proof of authority of IATA to act on behalf of its Members is on file with the Commission

2. Identity of any other parties

Full name and address and brief description of any other parties to the agreement, decision or concerted practice (hereinafter referred to as 'the

not applicable

State what steps have been taken to inform these other parties of this application.

(This information is not necessary in respect of standard contracts which an undertaking submitting the application has concluded or intends to conclude with a number of parties.)

Purpose of this application (see Complementary Note)

(Please answer yes or no to the questions)

Are you asking for negative clearance alone? (See Complementary Note — Section IV, end of first paragraph — for the consequence of such a request.)

No

Are you applying for negative clearance, and also applying for a decision under Article 85 (3) in case the Commission does not grant negative clearance?

Yes

Are you only applying for a decision under Article 85 (3)

No

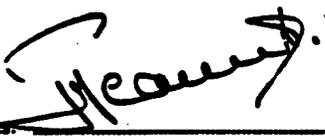
Would you be satisfied with a comfort letter? (See the end of Section VII of the Complementary Note).

Yes

Write nothing in this margin

The undersigned declare that the information given above and in the 8 pages annexed hereto is correct to the best of their knowledge and belief, that all estimates are identified as such and are their best estimates of the underlying facts and that all the opinions expressed are sincere. They are aware of the provisions of Article 12 (1) (a) of Regulation (EEC) No 3975/87 (see attached Complementary Note).

Place and date Geneva, 12 August 1993

Signature: 

Pierre J. Jeannot, O.C.

Director General

COMMISSION
OF THE
EUROPEAN COMMUNITIES

Brussels

Directorate-General for Competition

To

The Director General
International Air Transport Association
IATA Centre
P.O. Box 672, Route de l'Aéroport 33
CH-1215 Geneva 15 Airport, Switzerland

ACKNOWLEDGEMENT OF RECEIPT

(This form will be returned to the address inserted above if the top half is completed in a single copy by the person lodging it)

Your application dated: 12 August 1993

concerning: Inter-carrier consultations on passenger liability limits

Your reference: _____

Parties:

1. IATA and its 126 Members listed in Annex I to the Application
2. dated 12 August 1993 and others

(There is no need to name the other undertakings party to the arrangements)

(To be completed by the Commission.)

was received on: _____

and registered under No IV/AER/ _____

Please quote the above number in all correspondence

Provisional address:
200, rue de la Loi
B-1049 Brussels

Telephone:
Direct line: 235.....
Telephone exchange: 235 11 11

Telex:
COMEU B 21877

Telegraphic address:
COMEUR Brussels

216 Members (188 Active and 28 Associate) on 22nd July 1993

* Tariff Coordination Members (97)

** Non-voting Tariff Coordination Members

ACTIVE MEMBERS

ZY	ADA-Air	TI	Baltic International Airlines
JP*	Adrir Airways	BG	Biman Bangladesh Airlines
EI*	Aer Lingus p.l.c.	VB	Birmingham Europrn Airways Ltd.
SU*	Aeroflot - Russian International Airlines	BU	Braathens S. A. F. E.
AR*	Aerolinrrs Argentinas	BA*	British Airways p.l.c.
AM	Aerovias de México S.A. de C.V. (AEROMEXICO)	BD	British Midland Airways Ltd.
AV*	Aerovias Nacionales de Colombia S.A. (AVIANCA)	BC	Brymon Airways
VE	Aerovias Venezolanas S.A. (AVENSA)	II	Business Air Ltd.
ZL	Affretair (PVT) Ltd.	UY*	Cameroon Airlines
RK*	Air Afrique	C P	Canadian Airlines International Ltd.
AH*	Air Algérie	CX	Cathay Pacific Airways Ltd.
UU	Air Austral	OK*	Ceskoslovenske Aerolinie (CSA)
BP	Air Botswana Corporation	NN	Commercial Airways (Pty.) Ltd. (COMAIR)
SB	Air Caledonie International	MX	Compañia Mexicana de Aviación S.A. de C.V. (MEXICANA)
AC*	Air Canada	DD	Conti-Flug
AF*	Air France	CO	Continental Airlines Inc.
GN*	Air Gabon	OU*	Croatia Aitlinrs
IT*	Air Inter (Lignes Aériennes Intérieures)	LX*	Crossair
JM	Air Jamaica Ltd.	CY*	Cyprus Airways Ltd.
VD	Air Liberte S.A.	DA	Dan-Air Services Ltd.
FU	Air Littoral	DL*	Delta Air Lines Inc.
MD	Al t Madagascar	DI	Deutsche BA Luftfahrtgesellschaft mbH
QM*	Air Malawi Ltd.	LH*	Deutsche Lufthansa A. 6. (LUFTHANSA)
KM*	Air Malta Company Ltd.	MS*	Egyptair
CW	Air Marshall Islands	LY*	El Al Israel Aitlins Ltd.
NN	Air Martinique	EK	Emirates
MK	Air Mauritius	CU*	Empresa Consolidada Cubana do Aviación (CUBANA)
SW	Air Namibia	PL	Empresa de Transporte Aéreo del Perú (AEROPERU)
NZ*	Air New Zealand Ltd.	EU*	Empresa Ecuatoriana de Aviación S.A. (ECUATORIANA)
PX*	Air Niugini	OV	Estonian Air
FJ	Air Pacific Ltd.	ET*	Ethiopian Airlines Corporation
HM	Air Seychelles Ltd.	RN	Euralair International
TC*	AirTanzaniaCorporation	OY	European Air Transport
VK	Air Tungaru Corporation	NS	Eurowings AG
UK*	Air U.K.	FM*	Federal Express Corporation
PS	Air Ukraine International	AY*	Finnair Oy
NF	Air Vanuatu	GA*	Garuda Indonesia
QC*	Air Zaire	GT	GB Airways
UM	Air Zimbabwe Corporation	GH*	Ghana Airways Corporation
AI*	Air-India	GF	Gulf Air Company 6. S. C.
UL	AirLanka Ltd.	KA	Hong Kong Dragon Airlinrs Ltd. (DRAGONAIR)
AS	Alaska Airlines Inc.	AG	Hunting Cargo Airlines
AZ*	Alitalia - Linee Aeree Italiane S.p.A.	IB*	IBERIA (Lineas Aéreas de España S.A.)
NH*	All Nippon Airways Co., Ltd.	FI*	Icelandair
LH	ALM (Antillean Airlines)	IC*	Indian Airlines
DY*	ALYEMDA - Yemen Airlines	IR*	Iran Air, The Airline of the Islamic Republic of Iran
HP*	America Vest Airlines, Inc.	IA	Iraqi Airways
AA*	American Airlines Inc. .	LN	Jamahiriya Libyan Arab Airlines
IW	ADM-Minerve S.A. d.b.a. ADM French Airlines		
FG*	Ariana Afghan Airlines Co. Ltd.		
OS*	Austrian Airlines		
AO	Aviación y Comercio, S.A. (AVIACO)		
LZ*	Balkan Bulgarian Airlines		

JD	Japan Air System Co. Ltd.	SD*	Sudan Airways Company Ltd.
JL*	Japan Airlines Co. Ltd.	SR*	Swiss Air Transport Co. Ltd. (SWISSAIR)
JY	Jersey European Airways	RB*	Syrian Arab Airlines
JU	Jugoslovenski Aerotransport (JAT)	DT"	TAAG - Linhas Aéreas de Angola (ANGOLA AIRLINES)
KQ*	Kenya Airways Ltd.	TA	TACA International Airlines S.A.
KL*	KLM Royal Dutch Airlines	TP*	TAP - Air Pottugal
KE'	Korean Air	IJ*	TAT European Airlines
KU*	Kuwait Airways Corporation	TG*	Thai Airways International Ltd.
7Z	Laker Airways (Bahamas) Ltd.	FF	Tower Air Inc.
TM*	LAM - Linhas Aéreas da Moçambique	TL*	Trans-Mediterranean Airways S.A.L. (TMA)
NG*	Lauda Air Luftfahrt AG	TV*	Trans World Airlines Inc. (TVA)
QL	Lesotho Airways Corporation	HV	Transavia Holland B.V. d/b/a Transavia Airlines
UC	LADECO S.A.	TR*	Transbrasil S.A. Linhas Aéreas (Trans Brasil)
LA*	Linea Aérea Nacional-Chile S.A. (LAN-CHILE)	GD	Transporter Aereos Ejecutivos S.A. de C.V. (TAESA)
LR	Liners Aéreas Costarricenses S.A. (LACSA)	GM	Trek Airways (Pty) Ltd. d.b.a Flitestar
PZ	Liners A&teas Paraguayas - W	BW	Trinidad & Tobago (MA International) Airways Corp.
TE	Lithuanian Airlines	TU*	Tunis Air
LB	Lloyd Mero Boliviano S.A. (LAB)	TK*	Turkish Airlines Inc.
LC	Loganair Ltd.	UA*	United Airlines
LT	LTU - Lufttransport-Unternehmen GmbH & co. KG.	5X	United Parcel Service
LG'	Luxair	US	USAir, Inc.
DM	Maersk Air	RG*	VARIG S.A. (Viação Aérea Rio-Grandense)
MH	Malaysian Airline System Berhad	VA*	Venezolana Internacional de Aviación S.A. (VIASA)
GE	Malmö Aviation AB	V P	Viação Aérea Sao Paulo S.A. (VASP)
MA*	MALEV - Hungarian Airliner Public Ltd. Co. (MALEV p.l.c.)	VS*	Virgin Atlantic Airways
JE	Manx Airlines Ltd.	FV	Viva Air
IG	Meridiana S.p.A.	IY*	YEMENIA Yemen Airways
HE=	Middle East Airlines Airlinab (MEA)	QZ*	Zambia Airways Corporation Ltd.
NX	Nationair Canada	ZA	ZAS Airline of Egypt
WT*	Nigeria Airways Ltd.		
KZ*	Nippon Cargo Airlines (NCA)		
NW*	Northwest Airlines Inc.		
OA*	Olympic Airways, S.A.		
PK*	Pakistan International Airlines Corp. (PIA) --		
PR*	Philippine Airlines Inc.		
PU*	PLUNA - Primeras Líneas Uruguayas de Navegación Aérea		
LO*	Polskie Linie Lotnicze (UT)		
PH*	Polynesian Airlines Ltd.		
NI*	Portugalia S.A.		
MZ	P.T. Merpati Nusantara Airlines		
SC	P.T. Sempati Air		
QF*	Qantas Airways Ltd.		
RO	Romanian Air Transport S.a., TAROM		
AT*	Royal Air Maroc		
BI	Royal Brunei Airlines		
RJ*	Royal Jordanian		
ZC	Royal Swazi National Airways Corp. Ltd.		
WR	Royal Tongan Airlines		
FR	Ryanair Ltd.		
SN*	SABENA		
SV*	Saudi Arabian Airlines Corp. (SAUDIA)		
SK=	Scandinavian Airlines System (SAS)		
SQ	Singapore Airlines Ltd.		
JZ	Skyways AB		
EY*	Société Nouvelle Europe Aero Service		
IE	Solomon Airliner		
HH	Somali Airlines		
SA*	South African Airways (SAA)		

ASSOCIATE MEMBERS

HS Air North
VT Air Tahiti
AQ Aloha Airlines, Inc.
AN** Ansett Australia
ZQ Ansett New Zealand
AU Austral Líneas Aéreas S. A.
TN** Australian Airlines Ltd.
YH Compass Airlines
EW Eastwest Airlines (Operations) Ltd.
4s East West Airlines
IH Falcon Aviation AB
Yc Flight West Airlines Pty. Ltd.
ZL Hazelton Airlines
KD Kendell Airlines
TH LAR Transngional (Linhas Regionais S.A.)
LF Linjeflyg AO
DW Lufthansa CityLine GmbH
NM Mount Cook Airlines
ZW Pacific Midland Airlines Ltd.
FA Safair Freighters (Pty.) Ltd.
SP SATA Air Acons
6J Southeast European Airlines
PI Sunflower Airlines Ltd.
OF Sunstate Airlines (Qld) Pty. Ltd.
JQ Trans-Jamaican Airlines Ltd.
RL Ultrair, Inc. d.b.a. Airline of the
Americas
PC Vayudoot Ltd.
WF Wideroe Flyveselskap A/S

Further Information

1. **Brief description of the intended activity**

- 1.1 In October 1992, the EC Commission sent a consultation paper to interested parties, including IATA, inviting airline views and comments on possible Community regulatory action to improve and harmonise for aircraft • ccidmte the airline liability limits for death or personal injury of passengers (Warsaw Convention).
- 1.2 In the comments which were submitted to the Commission, IATA • clcnowltdgtd the need for incrtaeed liability limits, which currently art too low for induetrialietd countries in respect of death or personal injury of passengers in aircraft accidmto. Rtvtrthltee, IATA Member carriers remain committed to the Warsaw Convention instruments, in the framework of which a permanent solution should be • onght.
- 1.3 In the meantime, and u • □m.♦♦♦ of diecueueeione within the industry u vlll u with governments, Member carriers of IATA believe that inter-carrier diecueueeione should be held in order to consider the possibility of reaching inter-carrier agreement on voluntary higher liability limits by way of special contract0 in the sense of Article 22 of the Warsaw Convention.
- 1.4 It is considered that ouch inter-carrier discussions, which could be held under ♦zmm • ♦m □xny ♦ oIATA and which would be open to all interested Member carriers on • □□♦♦♦♦ basis, would, if mcceeful, • dree en important concern of the travelling public, governmental • zthoritiu u vell u of the industry itself, namely to • chieve en adequate increase of liability limits in the near future, while retaining the possibility of formal amendment of the Warsaw system by governmental action in tht medium term.

2. **Market**

- not applicable.

3. **Full details of the parties**

- 3.1 IATA is a trade association composed of 188 Active and 28 Associate Members, which UC listed in Annex I to this application. While the Active Members operate international • beduled serv:ces, the Associate Members operate domestic

scheduled services. Despite a significant increase in recent years in the number of Member airlines that are privately-owned in whole or in part, it is still the case that a majority of Members are wholly or partly-owned by governments, including those of member States of the European Community. Details on ownership of each Member can be provided upon request.

4. **Full details of the arrangements**

4.1 **The Warsaw Convention of 1929 (Convention for the Unification of Certain Rules Relating to International Carriage by Air, LNTS Volume 137, page 11) provides in its Article 22 that the liability of the air carrier for injury or death of a passenger is limited to 125,000 Poincaré gold francs, which is equivalent to approximately 8,300 USD. This limitation was raised in the so-called Hague Protocol of 1955 to the sum of 250,000 Poincaré gold francs, equivalent to approximately 16,600 USD. However, the Hague Protocol has not been ratified by the same number of States which had signed and ratified the Warsaw Convention. Important nations, such as the United States, have remained party to the original Warsaw Convention only. Subsequent attempts to raise the liability limit in order to keep in step with inflation, while maintaining uniformity among States, have failed: the Guatemala City Protocol of 1971 has remained a dead letter, the Montreal Protocols Nos. 3 and 4, signed in 1975, have been the subject of on-going efforts to achieve the necessary number of ratifications throughout the 1980's up to the present day. In particular, the United States Senate continues to have this matter on its agenda, with presently unclear prospects as to whether the required two-thirds majority in the Senate can be achieved.**

4.2 **The delay in U.S. action to ratify the Montreal Protocols Nos. 3 and 4 to the Warsaw Convention has effectively delayed ratification action also in other countries including major aviation partners of the United States. As a result, various parties have considered alternative action to achieve an adequate update of passenger liability limits. For example, in 1992, Japanese air carriers have proceeded to modify their tariffs and conditions of carriage to implement a new special contract under Article 22 of the Warsaw Convention, after having applied for and obtained governmental approval. The new special contract provides for strict but limited liability up to 100,000 SDRs and thereafter for unlimited liability on the basis of presumed, but rebuttable fault.**

4.3 **The Japanese carrier agreement is not the first precedent of this type. All major international air carriers operating to and from the United States agreed in the so-called Montreal Agreement of 1966 (CAB Agreement 18900) by way of a special contract under Article 22 of the Warsaw Convention to**

voluntarily raise applicable liability limits to 75,000 USD for passenger injury and death. Further, the carriers agreed not to avail themselves of the defense of non-negligence under Article 20, paragraph 1 of the Warsaw Convention for claims within the Montreal Agreement limit.

- 4.4 **This Agreement was prepared and finalised with the approval of the U.S. authorities, including the competent antitrust authorities, and was thereafter made a requirement for each international air carrier serving the United States in order to obtain a license from the U.S. authorities.**
- 4.5 **Although at that time the Montreal Agreement was intended to be an interim measure pending negotiation and U.S. ratification of the amendments to the Warsaw Convention, which were later included in the Montreal Protocols of 1975, the Agreement has effectively continued to be in force due to the failure of subsequent efforts to update the Warsaw system. The Montreal Agreement continues to operate under the grant of antitrust immunity from the former Civil Aeronautics Board (CAB), now the U.S. Department of Transportation (DOT).**
- 4.6 **The international airline community has supported strongly all efforts to obtain ratification of the Montreal Protocols, and has actively assisted in the preparation of a Supplemental Compensation Plan which the U.S. has proposed as a condition of its ratification of the Protocols. The Plan, which is generally consistent with Article 35a of the Convention as it would be amended by the Montreal Protocols, gives each Contracting State the right to provide compensation for its own passengers in addition with its own standard over and above the carriers' limit of liability under the Convention.**
- 4.7 **As IATA has indicated in its comments on the Consultation Paper of the EC Commission, mentioned above, there is general consensus that the limits of liability incorporated in the Warsaw system are seriously out of date. There also seems to be now a consensus that the Warsaw system should be preserved as an appropriate framework for the settlement of claims arising from airline accidents. However, further delay in government action on the ratification of the Protocols has prompted the airline community to consider the solution of a voluntary interim agreement on higher limits, possibly along the lines of the Montreal Agreement of 1966, either by modifying its geographical scope and the amounts of its liability limits, or by way of a new agreement. As an alternative, combination of the above with a supplemental system under Article 35a of the Convention could also be considered.**

4.8 As explained above, **since** the framework of liability limits already exists, the principal purpose of the notified **discussions is** to raise such limitations. **In view** of this fact, carriers which decide to participate in the notified discussions will, if such discussions are **successful, be less restricted in their ability to** compensate airline accident victims than at present. **Furthermore,** it should be emphasised that airline participation in the notified discussions will be entirely voluntary.

5. **Reasons for negative clearance**

5.1 **It is submitted** that inter-carrier **discussions on passenger liability limits** would have no restrictive effect on competition within the **common market** in the **sense** of Article 85, paragraph 1 of the Treaty of Rome. As explained above, the **main objective would be to raise** the liability limits and therefore to **ease presently existing restrictions**. **Furthermore,** the **discussions** deal with a subject which does not constitute a commercial factor in the **services** which airlines provide for **their passengers**. **Carriers do not compete on the basis of passenger liability limits and passengers do not make a choice in the airline on which they wish to fly on the grounds of the passenger liability limit. Finally, it must be emphasised that the notified discussions will not extend beyond the subject matter described above.**

5.2 The nature and the subject of the **notified inter-carrier discussions is** therefore **not** capable of producing effects which may prevent, restrict or distort competition within the **common market** to any appreciable extent.

5.3 **It is further submitted** that in any event, in view of the above, the **notified discussions will not** affect trade between Member States to any appreciable extent.

6. **Reasons for exemption under Article 85, paragraph 3**

6.1 The principal objective of inter-carrier **discussions on passenger liability limits** would be **to** **achieve an appropriate increase in such liability limits for the benefit** of victims of airline accidents. **Consistent with the desire of the industry to** **develop a system which** **provides for rapid and fair compensation of air accident victims, inter-carrier discussions would also consider possible mechanisms to** **achieve** those objectives. **It is therefore submitted that such inter-carrier discussions would contribute to improving the distribution of the air transport product.**

6.2 **Such discussions** would also allow **consumers** a fair share of the resulting benefit. since the object of the discussions is **to increase** passenger liability limits to the obvious benefit of consumers, this **requirement** is certainly met.

6.3 It is clear that **such** discussions would not impose on the parties concerned **restrictions** which are not indispensable to the attainment of these objectives, since participation would be voluntary, and participants would be free to **seek** individual solutions if they so wish. Moreover, **as stated above, the discussions will be limited to the subject** of passenger liability limits and the **mechanisms** necessary to achieve rapid and fair **compensation** of air accident victims.

6.4 It would also be obvious that the notified **discussions** would not afford the parties the possibility of eliminating competition **in respect of a substantial part of the air transport market** in question.

7. Other information

7.1 A similar application for authority to hold inter-carrier **discussions will also shortly be filed with the responsible U.S. antitrust authority, the Department of Transportation (DOT).**

7.2 Furthermore, an exchange of correspondence between **Mr. John Temple Lang, Directorate General for Competition, EC Commission and Mr. Pierre Jeannot, IATA Director General** took place on 23 June and 02 July 1993. In his letter, Mr. Temple Lang gave IATA assurances that an application for inter-carrier **discussions would be considered expeditiously.**

7.3 We are at your disposal to provide any further information you might request.



COMMISSION
OF THE EUROPEAN
COMMUNITIES

01. IX. 1993

Brussels,

IV-D-3

International Air Transport Association
Attn. Mr Pierre J. Jeannot,
Director general
Route de l'Aéroport 33
B.P. 672
CH - 1215 Genève 15 Aéroport

Dear Sir,

Re: Case IV/34829
Discussions on airline liability limits for death or personal injury of passengers.

I refer to your letter dated 13 August 1993 and the enclosed form AER, by which you applied for narrative clearance and exemption in respect of inter-carrier consultations on passenger liability limits.

I should first advise you that, since the subject-matter of the application is not directly related to the provision of air transport services but extends to the ancillary area of liability for the provision of such services, and in accordance with Article 3(8) of Regulation No 4261/88, it appears appropriate to examine your application on the basis of Regulation No 17 rather than Regulation No 3975/87. This will not affect the substantive assessment of your application but merely modifies the procedures to be followed. In particular, under Regulation No 17 there is no need to publish a summary of your application and invite comments from third parties. I trust this re-qualification of your application meets with your approval.

On the basis of the information provided in your application, we have now completed a preliminary examination of this case. This assessment has not revealed the existence of any grounds under Article 85(1) for further action on the part of the Commission in respect of the subject-matter of the application.

That view is taken particularly on account of the fact that discussions on liability are unlikely to have a significant impact on competition in air transport markets, and in consideration of the temporary nature of any inter-carrier agreement on liability pending amendment of the Warsaw Convention. It is also understood that participation in the discussions is voluntary and that the outcome of the discussions will not be binding on participants.

I **should** be grateful if **you** could keep us informed of progress made during those **discussions**.

You **have** indicated **that** you **can** agree to **the** application under **consideration** beiiig dealt with by means of a comfort letter. The **file** will thus be closed. However, the case could be reconsidered if the factual or legal situation undergoes substantial changes. Naturally, any **reopening** of the file would be without prejudice to the legal consequences of the application, particularly as regards **the** immunity from fines provided by Article **15(5)** of Regulation No 17.

Yours faithfully,

A handwritten signature in black ink, reading "John Temple Lang". The signature is written in a cursive style with a long, sweeping flourish extending to the right.

John Temple Lang
Director

from:

ICAO Library
1000 Sherbrooke St. West
Montreal, Quebec H3A 2R2
Canada

Japan's airlines, in a decisive unilateral act, have acted to amend one of air transport's more embarrassing issues. They have amended their conditions of carriage to waive the limitations of liability for passenger death or injury provided by Article 22 of the Warsaw Convention/Hague Protocol for international passengers on aircraft operated by them. The amendments, approved by Japan's Ministry of Transport, became effective on 20 November 1992.

The form of the amendment is simple. It provides that Japan's airlines will not apply the Article 22(1) limits (increased previously by special contract to

Insurance

Japanese airlines have unilaterally opted for unlimited passenger liability.

Peter Martin examines the background, and Trevor French gauges the market's opinion.

parties, before victims are compensated.

If Pan American, for example, had had an amendment of this kind in force at the time of Lockerbie four years ago, the victims' families would not have found it necessary to prove wilful misconduct against Pan American in the New York courts before being entitled to receive damages in excess of the applicable Montreal Agreement limit of US\$75,000. Wilful misconduct litigation in many other aircraft accident cases since would have been avoided had other airlines engaged in international carriage taken a similar step.

A good example is the recently settled Avianca Cove

Blown cover

SDR100,000, or about \$139,000 at present) in defence of any claim arising out of the death, wounding or bodily injury to their passengers. The defence of having taken all necessary measures to avoid the accident (Article 20 (1)) is not waived in connection with claims over and above SDR100,000, but is abandoned in respect of claims valued at less than that amount.

In other words, Japanese airlines retain the Montreal Agreement system of strict liability up to SDR100,000 and must prove freedom from negligence in respect of claims in excess of that sum if they are to escape further liability. Bearing in mind how difficult, not to say impossible, it is for airlines to prove they have taken all necessary measures to avoid accidents, the notional right of self defence does not mean much except in relation to issues of contribution and subrogation, but it is nevertheless more than a token.

For most practical purposes, therefore, full damages will be subject to proof of loss only. There will no longer be any need to prove either the wilful misconduct of the carrier, or indeed the negligence of the manufacturer or other third

party, also in New York. That related to a January 1990 accident in which wilful misconduct was strongly alleged in addition to air traffic control liability after an aircraft ran out of fuel before it could land at John F Kennedy Airport. We have to hope now that many other airlines follow Japan's lead, and do so quickly.

IATA members have known of the possibility of increasing limits by special contract since the Warsaw Convention more than 60 years ago and, certainly, since the Montreal Agreement 1966 effectively imposed the currently enhanced limit of US\$75,000 for carriage to, from, and with an agreed stopping place in the United States.

If pressed, many airlines say they have not moved individually because they have been hoping against hope, for nearly 22 years, for the implementation of first the Guatemala Protocol or its successor Montreal Additional Protocol 3 (MAP3), which would have had the effect of increasing limits to a still modest SDR100,000 and removing the possibility of breaking that enhanced limit for wilful misconduct.

But nothing has happened. The proposed increase still

languishes in the US Senate, unadopted, and would in any event not serve to bridge the increasing gap between available and expected damages to any material extent. The accompanying proposal for a supplemental compensation plan (SCP) in the US, providing for additional compensation above the Convention limits for a clearly defined and narrow group principally of US passengers, is viewed by many experts as fatally flawed.

The general view is that MAP3 and the SCP are dead in the water. Will other airlines now move as Japan's have? Many still cite the allegedly unacceptable additional insurance cost as an impediment to what most agree is a simple and effective solution. These are hard times, and additional expense is taboo. But is this concern legitimate? It is possible to argue that the additional premiums are hardly worth discussing when compared with, for example, fuel, maintenance, labour, marketing or other essential costs.

Airlines are right to point out that there is no immediately obvious advantage to be gained from this additional 'non-essential' expenditure. They can hardly advertise on the basis that they pay more if they kill you! But the waiver of limits will be of inestimable value if an airline has an accident. Failure to meet this reasonable additional expense can no longer be justified on any economic ground, and may well bring severe criticism if an airline has failed to provide enhanced cover and then suffers an accident.

One issue is the effect of the Japanese move on other airlines with which they have code-sharing or other operating agreements. It would be intolerable, some say, if passengers sitting side by side on an aircraft were subject to different contractual terms. But this is not new: successive carriage as part of a contract of carriage to and from the US by a carrier not a part of the Montreal Agreement has always borne this risk. The pressure for non-participating carriers to adopt the Japanese solution is now a commercial reality, and many other carriers realise this and are seeking insurance quotations accordingly.

Can the insurance market

Failure to meet this reasonable additional expense can no longer be justified on any economic ground, and may well bring severe criticism if an airline has failed to provide enhanced cover

cope? Combined single limit policies of as much as \$1.5 billion are currently being underwritten with no apparent capacity difficulties. \$1 billion should be more than enough to cover unlimited liability damages in even the worst cases. Although there may be perceived to be some outside risk of underinsurance for an airline and its shareholders, that risk is so small it can be discounted (providing the right combined single limit is chosen).

It is very much to be hoped that the example set by Japanese airlines will be followed, and followed willingly, by many others. Certainly, nobody likes being forced to take an expensive decision because others have done so first. But there is probably now no longer any choice.

The test will come next time an accident occurs and the airline concerned, and its insurers, seek to respond according to the anachronistic limits to Warsaw/Hague, or the 'standard' SDR100,000 special contracts. ■ Peter Martin is head of the aviation department of London solicitors Frews Chetwaley, and was one of the advisors to Japanese airlines on the changes of conditions.

Premium pricing

Underwriters largely welcome the Japanese airlines' move, and believe the market will cover the greater exposures. But there is some disagreement as to how much of the industry will opt for no-limit liability, and how much will simply raise limits. It is also unclear how a wide-scale move to higher passenger liability levels will affect premiums.

Personal liability rating levels had soared 85 per cent to \$650 million in 1991, and another 33 per cent to \$900 million in 1992, says Jacques Mercier, aviation underwriter with the French group Canal. That was an attempt to reduce the growing gap between payments and premium income. The major impetus for this came in 1989, when two early accidents meant that probable payments had absorbed the entire year's premium income by January 9.

Further increases were likely for 1993 nonetheless anyway, and Mercier believes it will be hard to identify exactly how much is due to increased exposure. 'Airline accidents are not that frequent, as trends are difficult to spot. But this will, by itself, increase premiums. And it should.'

By how much? No-one's saying yet. But it seems probable that for a major airline, which already has significant exposure to high-value societies like Japan, the US and Europe, the increase in death or injury liability premium need be no more than around 5 or 7 per cent. Given that most airlines' insurance costs are less than 1 per cent of total costs, and personal liability costs less than half that, cost is unlikely to be an issue for the majors.

But a trend to increased cover will certainly increase the differentials between airlines' limitations of liability, ranging from those which choose to stick with current special contract levels to those (like Japan's) which opt for unlimited liability. This may indeed lead to difficulties, says Ross Marland, legal officer at British Aviation Insurance Group (BAIG). These differentials have

long existed anyway, although to a lesser degree. But Marland says two increasingly common service types—the code-shared flight, and successive carriage with through ticketing—will lead to a passenger expecting the liability of the carrier issuing the ticket (which in the case of a Japanese airline would be unlimited) to extend throughout all sectors.

In the event of an accident, the courts are likely to assume that no-limit cover extends through all sectors. 'I think the second carrier will be saddled with unlimited liability, like it or not, because of the legal difficulties of arguing otherwise. That's a lawyer's view, driven by a consumer view, which will quickly become a court's view,' says Marland.

This will probably drive airlines to opt for unlimited liability even if they have very little direct exposure to high value markets, and for those airlines premium rises in percentage terms will be greater. In addition, many airlines will realise that anything short of unlimited liability will still lay them open to expensive legal action.

The chance to minimise legal action is a major factor in the insurance market willingness to support higher liability levels, believes Rolf Mueller-Rostin of DeWag Aviation Insurance of Cologne. 'The underwriting market is ready to insure this new risk, and is hoping that it will do away with a lot of litigation.'

The International Air Transport Association (IATA) had already set up a working group to examine the increasingly low special contract liability levels, but the unilateral move by Japan's airlines has preempted any IATA position. IATA is still thought to favour a uniform limit, but that now appears highly unlikely.

Also still uncertain is the response of US legal interests, which have long wanted universal unlimited liability, and whose campaign for this has delayed US ratification of the Montreal Additional Protocol 2. The US domestic market, like Japan's, has long had unlimited liability anyway, and US carriers are likely to be amongst the first to follow Japan's lead. ■ Trevor French

Japan Airlines' Amended Conditions of Carriage

'16(C)(4) (a) JAL agrees in accordance with Article 22 (1) of the Convention that as to all international carriage hereunder as defined in the Convention:

- (i) JAL shall not apply the applicable limit of liability based on Article 22(1) of the Convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention. Except as provided in paragraph (ii) below, JAL does not waive any defense to such claims as is available under Article 20(1) of the Convention or any other applicable law.
- (ii) JAL shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, avail itself of any defense under Article 20(1) of the Convention up to the sum of 100,000 SDR exclusive of the costs of the action including lawyers' fees which the court finds reasonable.

(b) Nothing herein shall be deemed to affect the rights of JAL with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding or other bodily injury of a passenger.'

'16(C)12 JAL shall not be liable in any event for any consequential or special damage or punitive damages arising from carriage subject to these Conditions of Carriage and applicable tariffs, whether or not JAL has knowledge that such damage might be incurred.'

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Use case
cc: 3401-A/Full

Issued by the Department of Transportation
on the 30th day of December, 1992.

RECEIVED DEC 31 1992

Application of
ALL NIPPON AIRWAYS CO., LTD.
for an exemption under section 416(b)
of the Federal Aviation Act of 1958,
as amended

Docket 48495

ORDER

Summary

In this order we are granting All Nippon Airways Co., Ltd. (ANA), a foreign air carrier of Japan, an exemption, to the extent necessary, to allow ANA to remove certain limitations on its liability for passenger injury and death in favor of unlimited monetary liability.

Application

By application filed November 20, 1992, ANA requests an exemption from the provisions of 14 CFR Part 203, section 213.7 and the conditions of its foreign air carrier permit and related exemption authorities, to the extent necessary, to allow ANA to remove certain limitations of liability as specified in a revision to its international passenger rules and fares tariff No. NH-1. Specifically, ANA proposes to remove its limits of liability for passenger injury and death.

Background

By Order 87-11-27, we issued ANA a foreign air carrier permit authorizing it to engage in scheduled foreign air transportation of persons, property and mail between Japan and specified points in the United States. 1/ The continued effectiveness of ANA's permit and exemption authority is specifically conditioned on, among other things, ANA's compliance with the requirements of 14 CFR Part 203, concerning waiver of Warsaw Convention liability limits and defenses. 2/

Part 203 requires, among other things, that all U.S. and foreign

1/ ANA also holds various exemptions to perform combination services between points in Japan and specified points in the United States. See Dockets 47405, 47659 and 47216.
2/ See Order 87-U-27, condition 1.

air carriers waive the passenger liability limits and certain carrier defenses in the Warsaw Convention and Hague Protocol, in favor of a higher limit of liability embodied in Civil Aeronautics Board (CAB) Agreement 18900. 3/ Participation in Agreement 18900 constitutes a special agreement between the carrier and its passengers as a condition of carriage that a liability limit of not less than \$75,000 shall apply under Article 22(1) of the Warsaw Convention for passenger injury and death, and that the carrier shall not avail itself of the defense of proof of non-negligence under Article 20(1) of the Convention. 4/

Section 213.7 of the Department's rules requires the holder of a foreign air carrier permit to maintain in effect and on file with the Department a signed counterpart of CAB Agreement 18900 (OST Form 4523, formerly CAB Form 263), and a tariff that includes its provisions.

Decision

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 defense under Article 20(1) only for that portion of a claim up to 100,000 SDRs. 5/

While Agreement 18900 binds the parties to a liability limit of not less than \$75,000 (US) 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.

ACCORDINGLY,

1. We grant All Nippon Airways Co., Ltd. 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 certain limitations of liability in its international rules and fares tariff No. NH-1;

3/ CAB Agreement 18900 was approved by CAB Order E-23680, dated May 13, 1966.

4/ Under the Warsaw Convention and Hague Protocol, the liability of a carrier for death or personal injury to passengers is limited in most cases to approximately US \$10,000 or US \$20,000.

5/ Special Drawing Rights of the International Monetary Fund (one SDR currently equals approximately US \$1.40). ANA's counterpart to CAB Agreement 18900, filed September 24, 1982, remains in effect and on file with the Department in Docket 17325.

2. The exemption granted above will be effective on the ^{service} date of this order and will remain in effect until further ^e order of the Department; and

3. We will serve a copy of this order on All Nippon Airways Co., Ltd.; the Ambassador of Japan in Washington, D.C.; Japan Air Lines Company, Ltd.; Japan Air Charter Co., Ltd.; Japan Air System Lines Company, Ltd.; Japan Asia Airways; Nippon Cargo Airlines Company, Ltd.; World Air Network Co., Ltd.; and the Department of State (Office of Aviation).

By:

Jeffrey N. Shane
Assistant Secretary for Policy
and International Affairs

(SEAL)



SECRETARIAT
3 bis, Villa Emile Bergerat
92522 Neuilly-sur-Seine Cedex
France

ALC- Item 7
WP 2
page 1

When replying, please quote :
Référence à rappeler dans la réponse :

No, 136E
27/6/94

PRESS RELEASE

ECAC TAKES STEPS TO RAISE
PASSENGER LIABILITY LIMITS OF EUROPEAN AIR CARRIERS

Paris, 27 June 1994. The liability limits which air carriers in Europe are obliged to assume under the Warsaw System for passengers who are victims of aircraft accidents have remained unchanged since the early 1970s.

In a move aimed at improving the situation, ECAC¹ has adopted a recommendation, the main aim of which is to increase to 250 000 Special Drawing Rights (some 340 000 ECU or 2.25 million French Francs) the liability limit for damage suffered in the case of death or injury. This would restore the real value of the limits established in the 1970's.

The long waiting periods associated with the settlement of claims has been a major source of criticism of the Warsaw System. In an effort to speed up payments, the ECAC recommendation provides that a lump sum of up to 10% of the liability limit will be payable within 10 days of the accident. Payment of the uncontested part of a claim is to be made within three months.

¹ The European Civil Aviation Conference (ECAC) is an intergovernmental organization whose objective is to promote the continued development of a safe, efficient and sustainable European air transport system. Founded in 1954, it is now composed of the following 32 Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom.

Because of the legal complexities of revising liability limits by way of international legal instruments, ECAC is, as a first step, addressing its recommendation to European airlines and inviting them to adopt the new liability limits on a voluntary basis. More binding measures may follow in due course.

The new arrangements have been developed in consultation with the Association of European Airlines and in close collaboration with the European Commission. They were adopted at ECAC's Triennial Session which took place in Strasbourg last week (22-24 June 1994).

Note : For further information, contact the ECAC Secretarial (Mrs M. Barbin)
Tel.: 46 41 85 45.

- E N D -

APPENDIX 10

RECOMMENDATION ECAC/16-1

AIR CARRIERS' LIABILITY WITH RESPECT TO PASSENGERS

THE CONFERENCE

RECOGNIZING

that the international air carrier liability system based on the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 serves the best interests of all those who participate in international civil aviation, as well as those who are affected by it.

RECALLING

that the international air carrier liability system has in the past been updated in the light of legal and economic developments.

CONSIDERING

that a consensus has been found within ECAC that certain elements of the international air carrier liability system should be improved,

NOTING

that such improvement of the international air carrier liability system should if possible concern all States whose airlines participate in international civil aviation.

The CONFERENCE adopts the following RECOMMENDATION

PART I
GENERAL

PURPOSE

1. The purpose of this Recommendation is to propose a means for updating certain elements of the international air carrier liability system with respect to passengers.

DEFINITIONS

- 2.1 **"Inter-carrier Agreement"** means an arrangement between air carriers, concluded on a voluntary basis, in anticipation of a future formal agreement under the law on international treaties.
- 2.2 **"International air carrier liability system"** means the Convention for the Unification of certain Rules relating to International Carriage by Air, signed in Warsaw on 12 October 1929, together with all international instruments, which build on and are associated with it, as well as the Montreal Inter-carrier Agreement, dated 4 May 1966.
- 2.3 **"Liability limit"** is as defined in Article 22 of the Warsaw Convention.
- 2.4 **"Special drawing right"** means the special drawing right laid down by the International Monetary Fund.
- 2.5 **"Uncontested part"** means the part of a claim not disputed by either party.

SCOPE

3. The measures contained in this Recommendation should be taken in the interest of all parties who participate in international air transport, irrespective of the nationality of the air carrier in question and of the aircraft used, insofar as, the aircraft has a point of origin, point of destination or agreed stopping place within the territory of an ECAC Member State.

PART II

RECOMMENDATION TO THE ECAC MEMBER STATES

4. The ECAC Member States are urged to update **certain** elements of the **international air carrier liability** system.

To this end, they are called upon :

- 4.1 to **encourage any air carrier licensed** by them, or under **their** supervision or **control**, to **establish** an **inter-carrier** Agreement **with** the recommended basic **elements**, as set out in **Part III**: **within** one year of the **adoption** of the **recommendation**;
- 4.2 to undertake, **if** necessary, **faint** efforts to Implement the **recommended** basic elements in a statutory, regulatory or other **binding** manner;
- 4.5 to urge other **international institutions** to update **certain elements** of the **international air carrier liability** system in such a way as to be **binding** under the law of **international treaties**, **taking into** account the **recommended basic** elements;
- 4.4 to encourage **carriers** from third States which **have** a point of **origin**, **point** of destination or agreed **stopping** place **within** the territory of an ECAC Member State to also **participate** in the **inter-carrier** Agreement.
-

PART III

RECOMMENDATION TO THE AIR CARRIERS
AND THEIR ASSOCIATIONS

- 5.1 The air carriers and their **associations** are called upon to update certain elements of the existing international air carrier liability system by means of an **inter-carrier Agreement**, and to Incorporate the provisions of the latter in their **General Conditions of Carriage**, as well as to **inform the travelling public** in the appropriate form.
- 5.2 The **inter-carrier Agreement** should comprise at least the following basic elements:
- 52.1 The carrier **shall** pay **compensation** to the passenger, or **the passenger shall be entitled to compensation**, for death or **injury** under the applicable law;
- 52.2 the liability limit for damage in the case of death or **injury shall be at least 250 000 special drawing rights per passenger**;
- 52.3 the liability limit shall be reviewed not later than **three years** after the entering into force of the **inter-carrier Agreement**, and subsequently **every** three years:
- 52.4 the passenger who has suffered the damage, or those **entitled to compensation**, shall **receive** the uncontested part of the **claim** as soon as possible, and at the latest **within three months** of the **claim being** made:
- 52.5 the passenger who has suffered the damage, or those dependants **entitled to compensation**, shall **receive** a **lump sum** from the **carrier within** ten days of the **event during which the damage occurred; the lump sum shall be up to 5 per cent of the liability limit according to the injury incurred** and up to **10 per cent** in the case of death; the lump sum may be offset **against** any subsequent sums paid on the basis of **carrier liability** but **is not returnable** under any **circumstances**.

2. This **Regulation** shall not apply to air carrier **liability** in case of **accidents with respect:**
 - to passenger's baggage.
 - to cargo.
 - to delays

Article 3:

1. An air *carrier* shall pay compensation for death or **injury actually suffered to the** persons entitled to compensation, according **to** this Regulation
2. **The** liability limit for compensation under **paragraph 1** shall be at least 600,000 ECU.
3. No liability limit **shall** apply in case of **wilful** misconduct or *an* act of omission **of the carrier** or of his agents with the intent to cause damage or **recklessly**, and with the knowledge that damage would probably **result**, to the extent that, in the event of **wilful** misconduct or an act of omission of the agents, it is proved that they **were**, acting in their **professional** capacity.

Article 4:

Persons entitled **to** compensation shall receive the uncontested part of the claim **without** delay **and at** any rate **not** later than three months of the claim being made.

Article 5:

1. **Persons entitled** to compensation shall **receive** a lump sum from the carrier **without** delay and **not** later than ten days **after** the event during which **the** damage occurred. The lump **sum** shall be 10% of the liability limit.
2. **The lump sum may be** offset against any subsequent sum to **be paid in** respect of liability **of the** air carrier, but is not **returnable** under any circumstances.

Article 6:

1. **The air carrier** shall at **all** times be able to demonstrate to the Member State **responsible for** the operating **licence** that it is adequately insured **according** to the **obligations of** this Regulation.
2. **Adequate information** on the requirements referred to in **articles 3.4 and 5 shall on request be given** to passengers at the **carrier's** agencies, check-in counters and **reference to them shall be** made on the ticket document.

5.3

Carriers party to this inter-carrier Agreement shall notify their accession and withdrawal to their Civil Aviation Authorities and ECAC.

Preliminary Proposal for a
COUNCIL REGULATION
on air carrier liability in case of air accidents

(presented by the Commission)

Proposal for a

a

COUNCIL REGULATION
on air carrier liability in case of air accidents

EXPLANATORY MEMORANDUM

A. GENERAL, POINTS --

1. **The question of air carrier liability in case of air accidents in international carriage by air is basically governed by the 1929 Warsaw Convention (WC) for the Unification of Certain Rules relating to International Carriage by Air, and a number of other instruments which, together with the Convention, is generally referred to as the Warsaw System¹ (WS). The WC was established in order to provide a worldwide, system of standards and rules for liability of passengers and cargo in the event of an accident, loss of baggage and delay for international air transport. It included, inter alia, the very basic provision that the airline is presumed to be liable (art.17) but that liability is generally limited (art.22) to about US \$10,000 as a maximum. The WC attempted to balance the interests of the parties directly involved in the transportation process: the air carriers and the passengers. By doing so, it sought, as well, to protect an infant industry against excessive liability payments and thus to keep insurance premiums at acceptable levels.**
2. **The WS has won broad acceptance in so far as it represents a workable attempt to eliminate, or at least reduce, problems of conflict of law and jurisdictions by means of an international uniform law. However, it is by now generally admitted that the WS no longer realises sufficiently its initial economic objectives.**
3. **Firstly, the general concern shared worldwide, at least by industrialised countries, is that the liability levels currently in force² for death and injury of passengers under the WC instruments, and even those contained in the Montreal Protocol n°3³ (MP3), are much too low in terms of reasonable consumer protection levels, considering today's economic and social standards. Furthermore, limits differ according to the ratified official levels, government imposed levels and voluntary arrangements of air carriers creating distortions of competition even within the EU, and generating uncertainty and**

a

a

¹ In addition to the initial Warsaw Convention (WC!) the other instruments include the 1955 Hague Protocol, the 1961 Guadalajara Convention, the 1966 Montreal Intercarrier Agreement (MIA), the 1971 Guatemala City Protocol and the four Protocols signed at Montreal in 1975. The Guatemala City Protocol and the four Montreal Protocols are not into force yet, due to an insufficient number of countries having ratified these instruments.

² The Hague Protocol updated the maximum limit of compensation to about US \$ 20,000. The MIA raised the limits further for journeys implying the US to US \$ 75,000.

³ MP3 intends to increase the limit further to 100,000 SDR (Special Drawing Rights) in order to take into account the effects of currency fluctuations.

lack of **transparency** for passengers in relation to the obligations of air carriers.

4. Secondly, the system suffers from a lack of an **adaptation** mechanism, taking account of the impact of inflation and **the** development of real income. Even the Montreal Protocols, having noticed the disruption **between** inflation and **the** limits that remain **fixed** in monetary terms, does not solve this problem. Indeed, since 1970, **the** suggested MP3 limit has lost some 80% of its purchasing value.
5. **The** Montreal Protocols intend to combine uniform compensation limits at worldwide level with the possibility for governments of the signatory States to impose mandatory passenger paid supplemental compensation schemes. However, the Montreal Protocols have gained insufficient support, therefore failing to provide the necessary global framework within which **the** supplemental compensation schemes can be introduced. **Moreover**, until recently **the** United States has **been** reluctant to commit itself to the **Montreal** Protocols. This has added to the fragmentation and confusion over the **manner in** which the **WS** can **be** reinforced and rendered **more** compatible with current economic, social and financial **circumstances**. **Recently**, the US administration has again **confirmed** the US commitment to the principle of **ratifying** the MP3. **However**, it has not yet **formalized** its views **on** how to **proceed**. At least, it remains doubtful whether the Congress will share the opinion of the administration.
6. At the same time, **European countries increasingly** feel that MP3 is out of date. Although many **Western European countries** have **been the** main proponents of **MP3**, **other** countries **like Germany** and **France** for constitutional and other reasons are not able to **ratify** it. **Indeed**, if ratified, MP3 would introduce **the** "strict liability concept", namely **the** absolute **unbreakability** of **the** limit - even when a passenger's **injury** or **death** is intentionally inflicted by the **carrier**. The general **feeling** within **the European Union** is that adopting a MP3 which is **20 years** old would **be** a retrograde **step**. **This divergence in view** only adds to **the** current **confusion**.
7. Against this background the Commission **felt** that a basic **reappraisal** of the present situation was required. To this **end** it commissioned in 1989 a **study**⁴ in **order to have** a **full** account of **the state** of **ratification**, **legislation** and **practices** in **the** field of air carriers' liability in **the EC Member States** as **well** as in other countries. **The results** of that analysis **lead** in March 1991 to a study on the **"Possibilities of Community action to harmonise limits of passenger liability and increase the amounts of compensation for international accidents victims in air transport"**⁵. **Based on the** conclusions of **the report**, the Commission **issued** a Consultation **Paper** entitled, "Passenger **liability** in **aircraft** accidents - Warsaw Convention and Internal **Market requirements**"⁶. The Consultation **Paper**, while **acknowledging the need** to **increase**

⁴ 'La responsabilité du transporteur aérien à l'égard des passagers et des expéditeurs de marchandises', J. Naveau, June 1989, updated in September 1989.

⁵ Study delivered the 15 September 1991, by Sven Brise, Consultant.

⁶ Ref: VII.C.1 - 174/92-8

and **harmonise the** limit of air **carrier** liability for passenger injury and death in Member States, was intended to promote a discussion on how this might best be done within the European Union framework. Several **organisations** and interested parties communicated their views to the Commission. They expressed the opinion **that** an increase of the limits up to amounts between 300,000 and 500,000 SDR is urgently required and that any limits should be subject to regular updating in line with inflation rates. However, increased limits should **apply to** all air transport within, to, and from the Community, irrespective of the nationality of the airline concerned. As far **as** the procedures were concerned, opinions were divided between adopting a regulatory approach - for example by means of a modified licensing requirement for insurance - or a voluntary inter-carrier agreement.

8. A "Round Table" with **Member** States and interested **parties** took place on the **23.3.1993**. It confirmed these elements and recommended that a study on the cost implications of different limits and the impact of increased limits on litigation costs be commissioned. The Commission launched such a study⁷, the results of which **were** available by February **1994**. Its main conclusions **were** that the way the **insurance** market will respond to an **increase** in mandatory liability limits, would depend on the state of the market at the time of introduction. **Increases** in **premiums** would **be** based on the perceived exposure of both the individual carrier and the **whole** market. **Certainly**, some air carriers will have to **bear** more substantial **increases** than **others**. **On the** whole, however, it is perceived that the market **will react in** a moderate way. If **the** limits **are sufficient** to accommodate claims, some reduction in **plaintiff's** costs would be likely to result, since some plaintiffs would **be** dissuaded from litigating. **Insurers** and other interested **parties** **seems** to be generally confident that capacity would be available **irrespective** of the level of the limit chosen.
9. Parallel to the Commission's efforts, ECAC strived towards the establishment of an interim system that could **be** adopted, at least in Europe and, if **possible**, in major aviation States. This work has led to a formal Recommendation in which **the** Member State of the **Union** joined and which was adopted by the Triennial **meeting** of ECAC (**22-24** June). The aim of **the** Recommendation is to increase **limits to at** least SDR 250,000, approximately **the equivalent** of the SDR 100,000 limit of 1975 once adjusted for inflation, as **well** as to speed up **the** settlements of claims. The ECAC Recommendation urges air carriers, operating to, from, and within **Europe** to conclude a voluntary agreement containing **the** key elements of **the** **scheme**. A task force of Community and ECAC airlines within the Association of European Airlines (AEA), is currently considering such a step. However, in order to discuss such a system amongst themselves, air carriers claim that **they need** US antitrust immunity, even before an agreement is **submitted**. The Commission **services gave the** air **carriers the "green light"** to initiate such discussions, without prejudice to **its** outcome. Indeed, **once** the agreement would **be** adopted it would still **require a clearance** under the competition **rules** of the EC Commission. IATA **has presented** to **the** US **authorities a request** for antitrust immunity, which has not received any answer yet.

⁷ "The cost implications of higher mandatory compensation limits for passengers involved in air accidents" **Frere Cholmeley Bischoff**, delivered on **February 1994**.

This has, so **far**, delayed the ECAC initiative from having any **practical effects**.

10. Against this background, and considering the conclusions of both studies mentioned above, the Commission is of the opinion that action should be taken quickly in order to remove discrimination **within** the EU, to restore a fair **situation** for **consumers** and to **pre-empt** any further confusion. In doing so the Commission has taken **into** account the following elements:

- The WS, despite its deficiencies, provides a uniform basis enjoying a worldwide recognition for the settlement of claims to passengers in aviation accidents. **Therefore**, any attempts to improve **the** current situation should maintain the basic elements of the liability system in **force**.

- It **seems** clear that in the context of the Internal Market where market conditions are relatively homogenous, the current mandatory limits constitute an anachronism. On the **one hand** many of them **are** unacceptably low in terms of reasonable minimum consumer protection. On the other hand, mandatory limits differ considerably **from** country to country so **that** the rights of passengers vary as a function of **departure** point, type of **service** (domestic or **international**) **etc.** Consequently, air carrier's **insurance costs differ** accordingly; creating distortions of competition within the EU, generating uncertainty and lack of transparency in relation to the mandatory obligations of air carriers. Therefore, the **system** should guarantee **equal** treatment between different carriers and types of operations in order to avoid distortion of **competition**.

- Aviation is not anymore an **infant** industry in need of protection. It has made impressive economic and technological progress. **In** 1993, air carriers of the 182 **member States** of the **International Civil Aviation Organisation (ICAO)** carried about 1 billion passengers on scheduled flights. This **has** been accompanied by enormous growth in airline companies and their **revenues**. Current **financial** strains should not be used as an excuse for escaping from the **task to ensure a fair balance of interests between passengers and air carriers**.

- According to the studies referred to above, an **increase in** the **passenger** limit to **ECU** 600,000 would have minimal cost implications, because **liability** insurance costs represent, on average, a fraction of one percent of air carriers **overall** costs. Although, an increase of **the limit** will only **represent** a minimal **increase in costs⁸ of insurance** premium - of the order of ECU 0.2 only for a passenger journey of about 1,000 **kilometres** - air carriers **will**, understandably, be reluctant to accept a substantial **increase of** the compensation limits. Their **reluctance** depends not only on the current **difficult financial** situation, but **also on** the **mere** fact that the rate of **increase** would

⁸ It is worthwhile noting that **great advances in aviation safety since 1929 allow aviation to qualify as the safest way to travel; the average number of passengers fatalities in recent years has been less than 700 per annum. This situation contributes all the more X0 the current low premium levels.**

probably vary among carriers. Indeed, larger air carriers may **be** in a stronger bargaining position to negotiate **favourable** rates and the impact of their costs will be all the **less** significant. Any envisaged system should, therefore, facilitate an **efficient** organisation of the relevant insurance markets and **the** financial risks attached to it must **be** foreseeable and strike a fair balance **between** different interests.

- If a limit is prescribed it should be a minimum allowing carriers to offer **more** generous terms if they wish.

- A priori, compensation amounts should probably be in line with the levels of compensation actually paid to victims in non-aviation accidents in industrialized **countries**⁹.

- **Simple** and speedy procedures should **be** guaranteed. It is intolerable that victims or their relatives should have to wait for the results of lengthy litigations. Therefore, passengers or **next** of kin should **receive** from the **carrier** on the one hand, the uncontested part of the claim and on the other hand, a lump sum (a certain percentage of **the liability** limit) as soon as possible.

- So far, considering the **complexity** of the current liability limits, it is impossible for a passenger to make an informed decision whether to **chose** a personal accident **insurance** or **not**. Therefore, for **the** sake of transparency, **any new system must guarantee that passengers are fully aware of their** statutory rights in order **to be** able to determine quickly whether they **wish** to take any individual supplementary **insurance**.

- Any **envisaged** system should apply not only to in&national carriage by Community carriers, but also to domestic **carriage** within the Community.

- It would be preferable that all carriers serving a point in the Community adopt **the** same system. [A monitoring of third country's carriers application will **be** assured through **proper** control by **the** Member States of the **Community airport where the carrier is operating or on this basis, third country carriers not observing Community rules will be requested to properly and clearly inform passengers accordingly.]**

11. **These** elements and **concerns** prompted **the Commission** to propose a Regulation which **increases the limits of compensation in case of air accidents and provide for**

⁹ For instance, a 40 year old executive **earning** ECU 97,082 a year, survival by a wife and two young children, could anticipate **compensation** of about ECU 647 218. If killed in a road traffic accident, this would be fully recoverable. If killed on board an aircraft operated by a carrier which has contracted for limits **within** the WS (US \$ 20,000), the **recovery** could be as embarrassingly low as ECU 17,647. **less than 3% of the full value of the claim!** (The Journal of Personal Injury Litigation, 2nd issue, NIGEL P. TAYLOR)

speedy and **simple** procedures.

B. JUSTIFICATION OF THE ACTION

12. The **Community** action envisaged can be analysed in terms of subsidiarity principles by answering the following questions:

*a) **What are the objectives of the proposal in relation to the obligations of the Community and what is the Community dimension of the problem (for instance how many Member States are involved and which is the solution so far)?***

Article 7 of Council Regulation **(EEC) N° 2407/92** requires air carriers to **be** insured to cover liability in case of accidents, in particular in respect of passengers, luggage, cargo, mail and third parties. The regulation does not provide, however, **the** modalities to comply with this provision. **So far** under the international instruments in force, current mandatory limits of compensation in case of air accidents are **extremely** low, resulting sometimes in ridiculous amounts considering the **economic** and social **standards** of most **industrialised** countries. Despite **several** attempts of different international **fora**, **the** situation has not improved since the Hague Protocol signed in 1955, except for flights involving the US. The last attempt, namely the Montreal Protocol **n°3 (MP3)** of 1975, has still not gathered a **sufficient** number of signatures for its entering into force. Moreover, after 20 years, the MP3 is outdated and does not provide a solution to the **current** situation. **Finally**, the most recent Recommendation by **ECAC** is in danger to abort. Indeed; the **Recommendation** depends on the good will of **the** US authorities to **give** an antitrust immunity' to European carriers in order to **discuss** an inter carrier agreement. Such an **agreement** is recommended by **ECAC** and would **increase** the limits **to** at least **SDR 250,000**. So far, the US authorities have not shown any sign to grant such an immunity. Consequently, there is an urgent need to restore the balance between the interests of the carriers **and** those of consumers.

*b) **Does the envisaged action relate to an exclusive competence of the Community or a competence shared with the Member States?***

*c) **Which solution is most efficient in comparison between Community measures and measures of the Member States?***

Since air **transport** is overwhelmingly a **trans-border** activity! and since **carriers** increasingly **transport** passengers of different nationalities, such an improved **limit** can best be addressed at the Community level. It should be emphasised **that** the **current system** is extremely complex. Indeed, the Warsaw Convention is ratified by two third of the **States** at the world level, while a **third** of them has ratified the Hague Protocol.

*d) **What added value does the proposed Community action provide and what are the costs of no action ?***

The added value of the Community action lies in the improvement of the protection of the air users when the current liability limits have been increased to reasonable levels. It will also provide the passengers with speedy and simple **procedures**. The costs of no action would be **insufficient** and discriminatory protection of the air passengers in case of air accidents.

e) What kind of action are at the disposal of the Community (recommendation, financial assistance, regulation, mutual recognition...)?

Since the results **desired** by the action would need to apply to air carriers operating transborder **traffic** to a **very** large **extent** and with passengers of many different nationalities, a Regulation would probably represent the best legal instrument.

*f) Is **uniform** regulation necessary or is it **sufficient** to **draft** a directive which outlines the **general objectives** while **execution** is **left** to the Member States?*

A **uniform** action is necessary in order to provide a system that **will** guarantee **equal** protection for all air passengers **within** the Community, avoiding on the one hand discriminatory **treatment** and uncertain situations and on **the** other hand unfair distortion of competition among carriers.

Proposal for a
COUNCIL REGULATION
on air carrier liability **in case** of air accidents

THE COUNCIL OF THE EUROPEAN **COMMUNITIES**

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission,

In cooperation with the European **Parliament**,

Having regard to the opinion of the Economic and Social Committee,

Whereas for the protection of users and other parties concerned it is important to ensure that air **carriers** are **sufficiently** insured in respect of liability risks;

Whereas **in Council Regulation (EEC) N° 2407/92** air carriers are requested to be adequately insured in respect of liability risks in case of air accidents:

Whereas **existing mandatory** compensation limits are much too **low**, considering today's economic and social standards, and are **therefore**, not applied in **numerous instances** and need to be increased significantly;

Whereas existing divergence of mandatory requirements along **nationality** criteria and/or **type** of air **traffic - domestic/international -** creates distortions within the internal market;

Whereas it is **necessary** to avoid lengthy litigation or claims process;

Whereas passengers and those entitled for compensation should **benefit from** legal clarity in the event of an accident, whereas they must be **fully informed** beforehand of the applicable **rules**;

Whereas **all** air carriers should apply the same minimum insurance standards;

Whereas it is **desirable that** third country's carriers offer equivalent treatment to that of community carriers;

Whereas the limits **set** in this Regulation must be allowed to **evolve in** harmony with economic **developments**,

Whereas this Regulation represents an intermediate measure **while** waiting for the upgrading of existing **International** Conventions;

HAS ADOPTED THIS **REGULATION**:

Article 1:

For the purpose of this Regulation:

- (a) "air carrier" means an air transport undertaking in the sense of Council Regulation (EEC) N°2407/92;
- (b) "liability" means the carrier obligation to make good damage in event of death, **injury** or any other bodily harm suffered by a passenger as a result of an accident on board of an aircraft or during embarkation or disembarkation;
- (c) "liability limit" means the maximum **amount**, including lawyers' fees; an air carrier will have to pay in respect of the justified claims of an air passenger,
- (d) "persons entitled to compensation" means the victims **and/or persons**, who in the light of the applicable law, are entitled to represent the victims in **accordance** with a legal provision, a court decision or in accordance with a special contract;
- (e) "compensation" means the countervailing amount due to offset the **loss** or damage incurred in case **of air** accidents;
- (f) "lump **sum**" means an advance payment to the passenger or person entitled for compensation to enable them to meet **their** most urgent needs, without **prejudice** to the speediest possible settlement of full **compensation**;
- (g) "**uncontested** part of the claim" means the part of the claim not disputed by other parties within a period of three months;
- (h) "ECU" means the ECU adopted in drawing up the 'general budget of the European Communities in accordance with articles 207 and 209 of the Treaty.
- (i) "existing **international** passengers air **carrier** liability system" means the Convention for the Unification of **certain** Rules relating to International Carriage by air, signed in Warsaw on 12 **October** 1929, together with all international instruments - the **1955** Hague **Protocol**, the 1961 Guadalajara Convention, the 1971 Guatemala **City Protocol** and the four Montreal Protocols -, which **are build** on and associated with it.

Article :

1. This Regulation defines the obligations of an air carrier to cover liability in ease of accidents **with** respect of passengers and the obligations in the sense of article 7 of Council **regulation (EEC) N° 2407/92** in relation to adequate insurance.

3. Air **carriers** established outside the Community and not meeting **the requirements** referred to in articles **3,4** and 5 shall at the time of purchase expressly and clearly **inform** the passengers thereof. The fact that the is indicated on the ticket document” does not constitute **sufficient** information.

Article 7:

Once a year Member States authorities shall notify the third country list of air carriers not complying with **the** rules of this Regulation to the Air Transport User **Organisations concerned** and to the Commission, which shall make them available to the **other Member states**.

Article 8:

- (a) The Commission may, **after** consulting the Member States, increase as appropriate the values referred to in article 3 if economic developments indicate the necessity of such a decision. Such changes shall be published in the **Official Journal of the European Communities**.
- (b) Any **Member State** may refer the Commission’s decision to the Council within a time limit of one month. The Council, acting by qualified majority, may in exceptional circumstances take a different decision within a period of one month.

Article 9:

Persons entitled to compensation in the case of air accidents which take place within the Community, **shall** bring action for **liability before** one of the **following** courts that shall rule in accordance **with** the provisions of **this Regulation**:

- Courts of **the Member State where** the air carrier has its corporate **headquarters**;
- **Courts** of the Member State **where** the ticket was issued;
- before **the courts** of the Member State **of** destination
- Courts of the Member State where the passenger has **its residence**¹¹

¹⁰ alternative possibility ‘An air **carrier** established outside the Community **shall at all times be able on request** to demonstrate to **the Member State in which it uses an airport that it is adequately insured according** to the obligations of this Regulation.

¹¹ **OR**
‘Persons entitled to compensation in the **case of air accidents, which take place within the Community, shall bring their action for liability according** to the provisions of this **Regulation before the courts of the Member State where the air carrier has its corporate headquarters**’.

OR
‘Persons entitled to **compensation in the case of air accidents, which take place within the Community, shall bring their action for liability according** to the provisions of this **Regulation before the courts of**

Article 10:

The beneficiaries of rights arising under Articles 3.4 and 5 cannot **renounce these** rights **by** contractual or any other means.

Article 11:

1. The existing international passengers' air carrier liability' system is otherwise not affected by this Regulation.
2. Member States shall **take** all the **necessary** steps in order **to** avoid **incompatibility between** this Regulation and the provisions contained in related international agreements.

Article :

This Regulation **shall** enter into **force** six **months** after the date of its **publication** in the *Official Journal of the European Communities*.

This Regulation **shall be** binding in its entirety and directly applicable **in** all Member **States**

the Member State where the **passenger** has its residence'.

IMPACT ASSESSMENT

IMPACT OF THE PROPOSAL ON BUSINESSES AND IN PARTICULAR SMALL AND MEDIUM-SIZED BUSINESSES

TITLE OF PROPOSAL:

Council Regulation on air carrier liability in case of air accidents

DOCUMENT REFERENCE NUMBER:

THE PROPOSAL:

IMPACT ON COMPANIES

1. Who will be affected by the proposal?

Which business **sectors**?

Air carriers.

What sizes of company?

The European market **structure** is essentially **centred** on large companies which represent 65.4% of the market. Charter companies **represent** 26.7% of the **European aviation market**. **Small** and medium sized enterprises represent **only** 0.5% of the market, with regional air carriers sharing 0.4% of the overall market and general aviation **carriers** - namely taxi operators **and** corporate operators - **representing** 0.1% on the whole?

Are these companies located in specific geographical areas of the **Community**?

No

2. What action must companies take in order to comply with the proposal?

Council Regulation **(EEC) 2407/92** already requires all holders of operating licenses to have liability insurance, the amount of **cover** has been **left** so far to the discretion of Member States. To comply with this Regulation, air carriers **will** have to renegotiate their liability insurance to allow passenger **liability** lit to **increase** to a minimum of ECU 600,000. **Measures** will have to be taken in order to guarantee

¹² "The competitiveness of the European Community's air transport industry" Study by AVMARK Inc., prepared for the Commission, 28 February 1992.

quick compensation and speedy procedures.

3. What is the likely economic outcome of the proposal?

a

On investments and the creation of new companies:

N o n e

On jobs:

None

On company competitiveness:

The aviation insurance' market will react by increasing somewhat the amount of premiums air carriers will have to pay. The **rate of increase** will **vary** according to the state of the market at the time, to the particular characteristics of the air carriers and to **the** particular bargaining power of the airline to renegotiate its premium. **Accordingly** regional carriers and general aviation operators would be **likely** to bear a higher proportional increase due to their weaker bargaining power. This situation may, however, be overcome through the tightening of the cooperation among these airlines. Charter air carriers will be affected by a lesser degree.

Moreover, current liability insurance costs for European air **carriers** generally comprise about 0.1% to 0.2% of total operating costs. With a **limit** of ECU 600,000, **increased** insurance costs would comprise about 0.1% to 0.35% of total operating costs.

4. Does the proposal contain any measures intended to take account of the specific situation of small and medium-sized businesses?

. Not necessary.

5. List of bodies consulted on the proposal and having explained their basic situation

Member State government experts have expressed wide agreement on the need to increase the current limits, to guarantee speedy and simple procedures in case of air accidents and to cover all air transportation inside the Community and to and **from** the Community, **irrespective** of **the** nationality of the airline concerned.

All concerned **organisations** have **been consulted**. Although all of them **agreed** on the need to upgrade the system while keeping the essential elements of the **international** system currently into force, they **disagreed** on the approach to adopt. **AEA** and **IATA** expressly **preferred** an **intercarrier agreement**.



International Air Transport Association

IATA Building, 2000 Pcel Street, Montreal, Quebec, Canada H3A 2R4
Telephone: (5 14) 844-MI 1 Fax: (5 14) 844-5286 Telex: 05-267627 Cables: IATA MONTREAL

Memorandum

TO: Registered Participants, Airline Liability Conference
FROM: General Counsel and Corporate Secretary
DATE: 19 June 1995
SUBJECT: IATA Airline Liability Conference - Documentation, Part I

This relates to Item 7, WP 4 of Documentation Part I. We have been advised that the attached paper has superseded the former paper regarding the Australian draft legislation on Passenger Liability Limits. Please note that the references to the Australian legislation at the Table of Contents of Documentation, Part I, and at Item 7, WP 10, page 2 of Documentation, Part I, should be to Australian draft legislation.

A revised version of Item 7, WP 9, is also attached to reflect the changes regarding Australian draft legislation on Passenger Liability Limits.

Lorne S. Clark
General Counsel and Corporate Secretary

EXTRACT FROM SECOND READING SPEECH**INTRODUCTION OF MANDATORY INSURANCE AGAINST PASSENGER CARRIERS' LIABILITY**ALC- Item 7
WP 4
page 1

The Bill amends the Civil Aviation (Carriers' Liability) Act 1959 to make it mandatory for air operators to be insured against liabilities for death or injury caused to passengers carried under the Act.

These amendments represent an important component of the Government's response to the Monarch Airlines crash. That response, announced by the Minister for Transport in October 1994, included increases in passenger carriers' liability limits, as well as the introduction of mandatory insurance.

The new domestic passenger carriers' liability limit of \$500,000 per passenger took effect in October 1994, and the Government has subsequently introduced legislation to increase the limit for Australia's international carriers to an equivalent amount. Foreign airlines serving Australia have been asked to adopt this higher limit on a voluntary basis.

The introduction of mandatory insurance is an important complement to the increase in carriers' liability limits. This legislation will ensure that no operator will be allowed to carry passengers for hire or reward without appropriate insurance cover. It will be an offence for an operator to carry passengers without such cover. In the case of domestic carriage, the minimum insurance level is \$500,000 per passenger. International carriers, including foreign carriers serving Australia, will be required to provide evidence that they are insured to a level of 260,000 Special Drawing Rights per passenger. This is approximately the equivalent of \$500,000 per passenger.

An important feature of the mandatory insurance provisions is that they greatly reduce the scope for insurers to avoid paying compensation in respect of passengers who are killed or injured. For example, insurers will now not be able to avoid payment if there has been a breach of an aviation safety law which has caused an accident. These "non-voidability" provisions have been closely modelled on arrangements already applying in the United States.

The Bill provides authority for the Minister for Transport to require operators to provide evidence of compliance with the insurance requirements. This authority will be delegated to the Civil Aviation Safety Authority, which will be responsible for administration of the new arrangements. The Bill provides authority for regulations to be made covering a range of important administrative matters such as what constitutes acceptable insurance, and the manner and form in which evidence of insurance must be provided. These regulations will be developed *in* full consultation with industry before coming into effect.

The Government is conscious that the mandatory insurance arrangements will impose substantial new responsibilities on operators and the Civil Aviation

Safety Authority, and will ensure that the arrangements are workable and well understood before being implemented.

These amendments do not apply to intrastate travel because of constitutional limits to the Commonwealth's powers to regulate in this area. The Government sees it as imperative that all States adopt complementary legislation to ensure nationwide application of the mandatory insurance requirements. Discussions are being held with the States with a view to achieving this outcome on a unified timetable.

1995

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

TRANSPORT **LEGISLATION AMENDMENT BILL (No.2) 1995**

EXPLANATORY **MEMORANDUM**

(Circulated by authority of the Minister for Transport,
the Honourable Laurie Brereton MP)

72454 Cat. No. 95 4429 4 ISBN 0644 444659



9 780644 442659

PART 2 - AMENDMENTS OF THE CIVIL AVIATION (CARRIERS' LIABILITY)
ACT 1959

Item 28

Before section 41 A

167. This clause inserts a new Part heading into the Act.

Section 41A - Object of Part

168. Section 41A explains the object of the new Part IVA, which is to ensure that all carriers of passengers subject to the Principal Act are insured to the prescribed liability limits for death or personal injury to passengers and that, as far as practicable, injured passengers do receive compensation to which they are entitled.

Section 41B - Definitions

169. This item provides definitions of terms used in the new Part IVA.

Section 41 C - Carriers may be required to produce evidence that an acceptable act of insurance is in force between the carrier and the insurer

170. Subsection 41C(1) provides an authority for the Minister to be satisfied that a contract of insurance exists between a carrier and an insurer which meets prescribed requirements. It enables the Minister, by written notice, to require a carrier to produce appropriate evidence within a period specified by the Minister.

171. Subsection 41C(2) provides that the prescribed requirements under subsection (1) are those set out in subsections (3) and (4) and any other requirements set out in regulations.

172. Subsection 41 C(3) sets out the minimum amount of indemnity for which the insurer must accept liability for each passenger carried, or to be carried, by air. For carriage by a domestic carrier, the minimum level of cover is \$500,000 per passenger. In respect of all other carriage, the minimum permissible cover is 200,000 SDRs (Special Drawing Rights), which is approximately the equivalent of \$500,000. The subsection does not prevent the adoption of higher levels of indemnity than those specified.

173. Subsection 41C(4) provides that a contract of insurance is to require an insurer's liability to indemnify a carrier against personal injury liability to continue, notwithstanding any breach of a safety-related requirement set out in

ILITY)

an Act or imposed by the CASA. Similarly, liability to indemnify continues notwithstanding the financial condition of a carrier, including bankruptcy or winding up.

174. Subsection 41C(5) provides that a contract of insurance indemnifying a carrier for personal injury liabilities to passengers can also indemnify a carrier against other liabilities. For example, indemnity for damage caused to persons or property on the ground.

175. Subsection 41C(6) provides that a contract of insurance which indemnifies a carrier for personal injury liabilities as required by Part 205 of Title 14 of the United States Code Of Federal Regulations and which extends that indemnity to carriage in, to or from Australia and breaches of Australian safety related requirements shall be deemed to meet the requirements of subsection (4).

176. Part 205 of Title 14 of the United States Code of Federal Regulations deals with Aircraft Accident Liability Insurance and imposes requirements on carriers similar to the requirements of Part IVA.

177. Subsection 41C(7) provides the Minister with the authority to give a written certificate to a carrier, stating that the Minister is satisfied that a contract of insurance is in force which meets the requirements of section 41 (C).

Section 410 - Insurer's liability not effected by exclusions or breaches

178. This new provision operates to ensure that an insurer will still be liable to indemnify a carrier for personal injury liabilities to passengers, despite any warranties or exclusions in the contract which would otherwise remove the insurer's liability. However, regulations may provide exceptions to this requirement.

Section 41E - Carriers to be covered by acceptable insurance

179. Subsection 41E(1) requires that a carrier must not carry passengers by air without an acceptable current insurance contract.

180. Subsection 41E(2) makes it an offence for a carrier to intentionally carry passengers without an acceptable current insurance contract. The maximum penalty is two years imprisonment. By application of the Crimes Act 1914 a Court can impose a financial penalty as well as imprisonment, or as an alternative to imprisonment. Also by application of the Crimes Act 1914 a corporation can be fined up to five times the maximum amount for an individual.

ensure
to the
that, as
ch they

ceptable

satisfied
or which
rtice, to
ified by

s under
y other

or which
ried, by
500,000
le cover
tely the
ption of

quire an
bility to
set out in

Section 41F - Conduct by directors, servants and agents

181. Subsection 41F(1) provides that in proceedings for an offence under Part IVA the state of mind of a corporation in relation to particular conduct, may be established from the state of mind of a director, servant or agent of the corporation who was engaged in the conduct and where the conduct was within the scope of the actual or apparent authority of the director, servant or agent

182. Subsection 41F(2) provides that any conduct engaged in by a director, servant or agent on behalf of a corporation, is taken to have been engaged in by that corporation for the purposes of a prosecution for an offence under the Act. However, such conduct is not taken to have been engaged in by the corporation if it is established that the corporation took reasonable precautions and exercised due diligence to avoid the conduct.

183. Subsection 41F(3) has essentially the same effect as subsection 41F(1), except that it applies in relation to individuals.

184. Subsection 41F(4) is similar in effect to subsection 41F(2), except that it applies to conduct engaged in on behalf of an individual

185. Subsection 41F(5) specifies that an individual convicted of an offence is not liable to imprisonment if that individual would not have been convicted but for subsections 41F(3) and (4).

186. Subsection 41F(6) specifies that reference to a person's state of mind includes matters such as the intention and opinion of the person, and the person's reasons for that intention or opinion.

187. Subsection 41F(7) defines the meaning of a director of a body corporate.

188. Subsection 41F(8) explains that a reference to 'engaging in conduct' includes failing or refusing to engage in conduct.

189. Subsection 41F(9) specifies that an offence under Part IVA includes reference to an offence created by certain sections of the Crimes Act 1914 which deal with accessories, attempts to commit an offence, inciting or urging the commission of an offence and conspiracy.

Section 41G - Grounds of cancellation of contract of insurance not affected

190. This provision specifies that new Part IVA does not alter the grounds on which an insurer may cancel an insurance contract, or any rights an insurer may have to recover from a carrier amounts paid under an insurance contract.

Section 41H - Conflict of laws

191. This provision is intended to prevent parties excluding the application of Part IVA to an insurance contract by purporting to make the law of a foreign country the law of the contract. It provides that Part IVA applies to an insurance contract notwithstanding that the contract contains a term that it is subject to the law of a foreign country if, apart from that term, the proper law would be Australian law. Further, it provides that Part IVA applies to an insurance contract notwithstanding that the contract contains a term which substitutes the law of a foreign country for all or any of the provisions of Part IVA.

Section 41J - Injunctions

192. Subsection 41J(1) defines uninsured carriage as 'prohibited carriage'.

193. Subsection 41J(2) provides authority for the Minister to apply to a court for an injunction preventing a carrier from engaging in carriage, when the Minister has reason to believe the carrier is not insured as required by Part IVA.

194. Subsection 41 J(3) requires a court to grant an injunction, if the carrier is unable to satisfy the court that it is (or intends) engaging in prohibited carriage.

195. Subsection 41 J(4) gives a court discretion to grant an interim injunction pending its full consideration of an injunction application.

196. Subsection 41J(5) provides authority for the court to discharge or vary any injunctions granted.

197. Subsection 41 J(6) clarifies the scope of the injunction power. A court may grant an injunction whether or not it appears a carrier intends to engage in gain, or continue to engage, in prohibited carriage: or whether or not a carrier has previously engaged in prohibited carriage.

198. Subsection 41 J(7) provides that a court cannot require the Minister to give an undertaking about the award of damages, when an interim injunction is granted.

199. Subsection 41 J(9) gives the Federal Court of Australia federal jurisdiction in relation to injunction applications.

Section 41 K - Regulations

200. This provision makes it clear the scope of the existing regulation making power (section 43) extends to a range of matters under Part IVA, including the manner and form of notices to be given concerning evidence of insurance,

er Cart
ay be
of the
within
ent.

rector,
ged in
er the
y the
utions

1F(1),

that it

nce is
ad but

mind
d the

rate.

nduct'

cludes
. 1914
urging

d

nds on
nsurer
ract.

notification to the Minister about events such as cancellation, renewal or modification of an insurance policy and the consequences of a failure to notify such events.

Section 41 L - Delegation

201. This provision provides, authority for the Minister to delegate to the Director of Aviation Safety of the Civil Aviation Safety Authority (CASA), or to an officer of CASA, all or any of the Ministerial powers under new Part IVA.

SCHEDULE—continued

24. Subsection 29(2):

- (a) After "him" insert "or her".
- (b) After "he" insert "or she".

25. Subsection 31(1):

- (a) Omit "writing under his hand", substitute "signed writing".
- (b) Omit "his powers", substitute "his or her powers".

SCHEDULE—continued

PART 2—AMENDMENT OF THE CIVIL AVIATION
(CARRIERS' LIABILITY) ACT 1959

26. After Part IV:

Insert:

"PART IVA—CARRIERS TO BE INSURED AGAINST
LIABILITY TO PASSENGERS FOR DEATH OR PERSONAL
INJURY

Object of Part

"41A. The object of this Part is to require carriers to hold, in respect of carriage to which Part II, III or IV applies, insurance that will ensure, as far as practicable, that compensation within the limits of liability prescribed by this Act will be paid in respect of death or personal injury suffered by passengers on aircraft.

Definitions

"41B. In this Part:

'acceptable contract of insurance' means a contract of insurance in respect of which a certificate is in force under subsection 41C(7);

'business day' means a day other than a Saturday, a Sunday or a public holiday in the Australian Capital Territory;

'carrier' means a person engaged, or offering to engage, in an air transport operation for the carriage of passengers to which Part II, III or IV applies;

'contract of insurance' means a contract between a carrier and an insurer under which the insurer indemnifies the carrier against personal injury liability in respect of each passenger carried, or to be carried, by air by the carrier;

'personal injury liability', in relation to a carrier, means liability under this Act in respect of the death of, or personal injury suffered by, passengers carried, or to be carried, by air by the carrier.

Carriers may be required to produce evidence that an acceptable contract of insurance is in force between the carrier and an insurer

"41C.(1) The Minister may, at any time and from time to time, by written notice given to a carrier, require the carrier, within a period set out in the notice, to produce evidence, satisfactory to the Minister, that there is in force between the carrier and an insurer a contract of insurance that meets the prescribed requirements.

SCHEDULE—continued

“(2) The prescribed requirements are:

- (a) the requirements of subsections (3) and (4); and
- (b) any other requirements made by the regulations for the purposes of this section.

“(3) It is a requirement in relation to a contract of insurance that, under the contract, the insurer’s liability to indemnify the carrier against personal injury liability, in respect of each passenger carried, or to be carried, by air by the carrier, is for an amount that is not less than:

- (a) in respect of carriage by a domestic carrier to which Part IV applies—\$500,000; or
- (b) in respect of any other carriage—260,000 SDRs.

“(4) It is a requirement of a contract of insurance that, under the contract, the insurer’s liability to indemnify the carrier against personal injury liability:

- (a) is not affected by any breach of a safety-related requirement imposed by or under any Act or by the Civil Aviation Safety Authority; and
- (b) is not contingent upon the financial condition or solvency of the carrier or upon the carrier not being or not becoming bankrupt or not beginning to be or not being wound up.

“(5) The prescribed requirements do not prevent a contract of insurance from including provisions indemnifying the carrier against a liability other than personal injury liability.

“(6) A contract of insurance under which:

- (a) the insurer indemnifies the carrier against liability as required by Part 205 of the Federal Aviation Regulations of the United States of America made under the law known as Title 49 United States Code—Transportation; and
- (b) the insurer’s liability to indemnify the carrier:
 - (i) extends to carriage in, to or from Australia; and
 - (ii) is not affected by any breach of a requirement referred to in paragraph (4)(a);

is taken to meet the requirements referred to in subsection (4).

“(7) If the Minister is satisfied that there is in force between a carrier and an insurer a contract of insurance that meets the prescribed requirements, the Minister may give the carrier a written certificate stating that the Minister is so satisfied.

SCHEDULE—continued

Insurer’s liability not affected by exclusions or breaches

“41D. Except as prescribed by the regulations, an insurer’s liability under a contract of insurance to indemnify the carrier against personal injury liability to the extent mentioned in subsection 41C(3) is not affected by any warranty or exclusion in the contract of insurance or by any breach of the contract of insurance by the carrier.

Carriers to be covered by acceptable insurance

“41E(1) A carrier must not carry passengers by air unless an acceptable contract of insurance is in force in relation to the carrier.

“(2) A carrier who intentionally contravenes subsection (1) is guilty of an offence punishable on conviction by imprisonment for a period of not more than 2 years.

Note: Subsection 4B(2) of the *Cyber Act 1914* allows a court to impose in respect of an offence an appropriate fine instead of, or in addition to, a term of imprisonment. If a body corporate is convicted of an offence, subsection 4B(3) of that Act allows a court to impose a fine of an amount that is not greater than 5 times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

Conduct by directors, servants and agents

“41F(1) If, in proceedings for an offence against this Part, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and
- (b) that the director, servant or agent had the state of mind.

“(2) Any conduct engaged in on behalf of a body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Part, to have been engaged in also by the body corporate unless the body corporate establishes that it took reasonable precautions and exercised due diligence to avoid the conduct.

“(3) If, in proceedings for an offence against this Part, it is necessary to establish the state of mind of an individual in relation to particular conduct, it is sufficient to show:

- (a) that the conduct was engaged in by a servant or agent of the individual within the scope of his or her actual or apparent authority; and
- (b) that the servant or agent had the state of mind.

SCHEDULE—continued

“(4) Any conduct engaged in on behalf of an individual by a servant or agent of the individual within the scope of his or her actual or apparent authority is taken, for the purposes of a prosecution for an offence against this Part, to have been engaged in also by the individual unless the individual establishes that he or she took reasonable precautions and exercised due diligence to avoid the conduct.

“(5) If:

- (a) a person who is an individual is convicted of an offence; and
- (b) the person would not have been convicted of the offence if subsections (3) and (4) had not been enacted;

the person is not liable to be punished by imprisonment for the offence.

“(6) A reference in subsection (1) or (3) to the state of mind of a person includes a reference to:

- (a) the knowledge, intention, opinion, belief or purpose of the person; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

“(7) A reference in this section to a director of a body corporate includes a reference to a constituent member of, or to a member of a board or other group of persons administering or managing the affairs of, a body corporate incorporated for a public purpose by a law of the Commonwealth, of a State or of a Territory.

“(8) A reference in this section to engaging in conduct includes a reference to failing or refusing to engage in conduct.

“(9) A reference in this section to an offence against this Part includes a reference to an offence created by section 6, 7 or 7A or subsection 86(t) of the *Crimes Act 1914* that relates to this Part.

Grounds of cancellation of contract of insurance not affected

“41G. Nothing in this Part affects:

- (a) the grounds on which an insurer may cancel a contract of insurance between the insurer and a carrier; or
- (b) any right that an insurer may have to recover from a carrier an amount paid by the insurer under a contract of insurance between the insurer and the carrier.

Conflict of laws

“411. If:

- (a) the proper law of a contract of insurance would, except for a term that it should be the law of a foreign country or a term to a similar effect, be the law of any part of Australia; or

SCHEDULE—continued

(b) a contract of insurance contains a term that purports to substitute, or has the effect of substituting, the law of a foreign country for all or any of the provisions of this Part; this Part applies to the contract despite that term.

Injunctions

“411.(1) In this section:

‘prohibited carriage’ means carriage by a carrier at a time when an acceptable contract of insurance is not in force between the carrier and an insurer.

“(2) If the Minister has reason to believe that a carrier has engaged, or is proposing to engage, in prohibited carriage, the Minister may apply to a court of competent jurisdiction for an injunction restraining the carrier from engaging in the carriage.

“(3) If the carrier does not satisfy the court that it is not engaging, or proposing to engage, in prohibited carriage, the court must grant the injunction.

“(4) If in the opinion of the court it is desirable to do so, the court may grant an interim injunction pending determination of an application under subsection (2)

● (S) The court may discharge or vary an injunction or an interim injunction granted under this section.

“(6) The power of the court to grant an injunction or an interim injunction restraining a carrier from engaging in prohibited carriage may be exercised:

- (a) whether or not it appears to the court that the carrier intends to engage again, or to continue to engage, in prohibited carriage of that kind; and
- (b) whether or not the carrier has previously engaged in prohibited carriage of that kind.

● *121. A court must not require the Minister, as a condition of granting an interim injunction, to give any undertakings as to damages.

“(8) The Federal Court of Australia is invested with federal jurisdiction in matters where the Minister applies for an injunction or an interim injunction under this section.

SCHEDULE—continued

Regulations

“41K. The regulations may make provision for or in relation to:

- (a) the manner and form in which notices may be given under subsection 41C(1); and
- (b) the period that may be set out in such notices; and
- (c) the manner and form in which evidence is to be produced under that subsection; and
- (d) the giving by persons referred to in the regulations (who may be individuals not resident in Australia or corporations not incorporated or carrying on business in Australia) of notice (whether in advance, or after the occurrence of the event concerned) to the Minister of any modification, cancellation, non-renewal or expiry, or of any proposed modification, cancellation or non-renewal, or of any impending expiry, of an acceptable contract of insurance; and
- (e) the consequences (including any effect on the contract of insurance) of failure to give a notice referred to in paragraph (d).

Delegation

“41L(1) The Minister may, in writing, delegate to the Director, or to an officer, of the Civil Aviation Safety Authority all or any of the Minister's powers under this Part.

“(2) In this section:

“Director” has the same meaning as in the *Civil Aviation Act 1988*.

“(3) If:

- (a) the Minister has, under this section, delegated a power of the Minister contained in a provision of this Part; and
- (b) a delegate exercises the power;

a reference in that provision to the Minister is taken, in relation to the exercise of the power by the delegate, to be a reference to the delegate.

Note: See sections 34AA, 34AB and 34A of the *Acts Interpretation Act 1901* on delegations.”.

SCHEDULE—continued

PART 3—AMENDMENTS OF THE CRIMES (AVIATION)
ACT 1991

27. Paragraphs 5(1)(a) and (b):

Omit, substitute

- “(a) when the last external door is closed in preparation for the first movement of the aircraft for the purpose of taking off on the flight; or
- (b) if the aircraft moves, before all the external doors are closed, for the purpose of taking off on the flight—when it first so moves.”.

28. Subsection 6(1):

Omit, substitute:

“(1) Subject to this section, a flight of an aircraft is, for the purposes of this Act, taken to end when the first external door is opened after the aircraft comes to rest on the next landing it makes after starting the flight.”.

29. Paragraph 23(2)(b):

Omit “Air Navigation Regulations”, substitute “*Air Navigation Act 1920* or regulations made under that Act”.

SCHEDULE 1—continued

'ministerial nominee' means a person whose responsibilities or duties include advising the Minister about the performance and strategies of the Commission.

"(2) The Minister may direct the Commission to give to a specified ministerial nominee any documents or information relating to the operations of the Commission that the nominee requests.

"(3) The Commission must comply with a direction by the Minister under subsection (2).

"(4) The Commission must include in the annual report for a financial year particulars of any directions given to the Commission by the Minister under subsection (2) in that financial year."

2. After subsection 32(3):

Insert:

"(3A) If:

- (a) the Minister is of the opinion that the Commission has failed to comply with section 20B of this Act; and
- (b) the Minister proposes that the appointment of all or specified Commissioners be terminated;

the Governor-General is to terminate the appointment of all Commissioners, or the specified Commissioners, as the case may be."

3. Subsection 36A(1):

Omit the subsection, substitute:

"(1) The Managing Director is to be appointed by the Commission."

4. Subsection 36A(2):

Omit "The Minister shall", substitute "The Commission must".

5. Subsection 36F(1):

Omit "The Minister", substitute "The Commission".

6. Before subparagraph 55(1)(a)(i):

Insert:

"(ii) a specified rate of return on the Commission's assets; or"

7. Subparagraph 55(1)(a)(i):

Add at the end:

"or".

8. After section 57:

Insert:

SCHEDULE 1—continued

Interim dividends

"57A.(1) In this section:

'interim dividend', in relation to a financial year, means an amount paid on account of the dividend that may become payable under section 57 for the financial year.

"(2) The Commission must, before 1 March in each financial year, by notice in writing given to the Minister, recommend that the Commission pay a specified interim dividend, or not pay any interim dividend, to the Commonwealth for the financial year.

"(3) In making a recommendation, the Commission must have regard to:

- (a) the need to ensure that the Commonwealth receives a reasonable return on the capital of the Commission used in the Commission's operations in the financial year; and
- (b) such other commercial matters as the Commission considers relevant.

"(4) The Minister must, within 45 days after receiving a recommendation, by written notice to the Commission, either:

- (a) approve the recommendation; or
- (b) give directions to the Commission in relation to the payment of an interim dividend.

"(5) If the Minister gives the Commission a direction under paragraph (4)(b), he or she must inform the Commission, by notice in writing, of the reasons for the direction.

"(6) If an interim dividend is approved or directed under subsection (4), the Authority must pay the interim dividend to the Commonwealth by 15 June in the financial year."

PART D

AMENDMENTS OF THE CIVIL AVIATION (CARRIERS' LIABILITY) ACT 1959

1. After section 11:

Insert:

Limitation of liability for Australian international carriers

"11A.(1) Despite the terms of paragraph 1 of Article 22 of the Convention, but subject to the regulations relating to passenger tickets, the liability of an Australian international carrier under this Part in respect of each passenger, by reason of the passenger's injury or death resulting from an accident, is limited to:

SCHEDULE 1—continued

- (a) if neither paragraph (b) nor (c) applies—260,000 SDRs; or
- (b) if, at the date of the accident, a regulation was in force prescribing a number of SDRs that exceeds 260,000 for the purpose of this section and paragraph (c) does not apply—the number of SDRs so prescribed; or
- (c) if, at the date of the accident, no regulation was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier's liability as a number of SDRs that exceeds 260,000—the number of SDRs so specified; or
- (d) if, at the date of the accident, a regulation prescribing a number of SDRs exceeding 260,000 was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier's liability as a number of SDRs that exceeds the number so prescribed—the number of SDRs so specified.

“(2) In this section:

‘Australian international carrier’ means:

- (a) a carrier designated, nominated or otherwise authorised by Australia under a bilateral arrangement to operate scheduled international air services; or
- (b) a carrier operating a non-scheduled international flight permitted under section 13A of the *Air Navigation Act 1920*;

‘bilateral arrangement’ has the same meaning as in section 11A of the *Air Navigation Act 1920*.”

2. After section 21:

Insert:

Limitation of liability for Australian international carriers

“21A.(1) Despite the terms of paragraph 1 of Article 22 of the Convention, but subject to the regulations relating to passenger tickets, the liability of an Australian international carrier under this Part in respect of each passenger, by reason of the passenger's injury or death resulting from an accident, is limited to:

- (a) if neither paragraph (b) nor (c) applies—260,000 SDRs; or
- (b) if, at the date of the accident, a regulation was in force prescribing a number of SDRs that exceeds 260,000 for the purpose of this section and paragraph (c) does not apply—the number of SDRs so prescribed; or

SCHEDULE 1—continued

- (c) if, at the date of the accident, no regulation was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier's liability as a number of SDRs that exceeds 260,000—the number of SDRs so specified; or
- (d) if, at the date of the accident, a regulation prescribing a number of SDRs exceeding 260,000 was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier's liability as a number of SDRs that exceeds the number so prescribed—the number of SDRs so specified.

“(2) In this section:

‘Australian international carrier’ means:

- (a) a carrier designated, nominated or otherwise authorised by Australia under a bilateral arrangement to operate scheduled international air services; or
- (b) a carrier operating a non-scheduled international flight permitted under section 13A of the *Air Navigation Act 1920*;

‘bilateral arrangement’ has the same meaning as in section 11A of the *Air Navigation Act 1920*.”

3. Subsection 26(1):

Insert:

“‘domestic carrier’ means a carrier operating a flight for the carriage of passengers:

- (a) between a place in a State and a place in another State; or
- (b) between a place in a Territory and a place in Australia outside that Territory; or
- (c) between a place in a Territory and another place in that Territory; other than carriage to which Part 2 or 3 applies;”

4. Subsection 31(1):

Omit “carrier”, substitute “domestic carrier”.

5. Paragraph 31(1)(a):

Omit “\$100,000”, substitute “\$500,000”.

6. Paragraph 31(1)(b):

Omit “\$100,000”, substitute “\$500,000”.

7. Paragraph 31(1)(c):

Omit the paragraph, substitute:

SCHEDULE 1—continued

- “(c) if, at the date of the accident, no regulation was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier’s liability as an amount that exceeds \$500,000—the amount so specified; or
- (d) if, at the date of the accident, a regulation prescribing an amount was in force as mentioned in paragraph (b) but the contract of carriage under which the passenger was carried specified an amount that exceeds that amount as the limit of the carrier’s liability—the amount so specified.”.

8. After subsection 31(1):

Insert:

“(1A) Subject to the regulations relating to passenger tickets, the liability under this Part of a carrier to which this Part applies, other than a domestic carrier, in respect of each passenger, by reason of the passenger’s injury or death resulting from an accident, is limited to:

- (a) if neither paragraph (b) nor (c) applies—260,000 SDRs; or
- (b) if, at the date of the accident, a regulation was in force prescribing a number of SDRs that exceeds 260,000 for the purpose of this section and paragraph (c) does not apply—the number of SDRs so prescribed; or
- (c) if, at the date of the accident, no regulation was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier’s liability as a number of SDRs that exceeds 260,000—the number of SDRs so specified; or
- (d) if, at the date of the accident, a regulation prescribing a number of SDRs exceeding 260,000 was in force under paragraph (b) but the contract of carriage under which the passenger was carried specified the limit of the carrier’s liability as a number of SDRs that exceeds the number so prescribed—the number of SDRs so specified.”.

PART E

AMENDMENTS OF THE FEDERAL AIRPORTS-
CORPORATION ACT 1986

1. After subsection 19(2B):

Insert:

“(2C) If the Minister is of the opinion that the Board has failed to comply with section 42B, the Minister may terminate the appointment of all members (other than the Chief Executive Officer) or specified members (other than the Chief Executive Officer).”.

SCHEDULE 1—continued

2. After section 42:

Insert in Part V:

Minister may give Corporation notices about its strategic direction etc.

“42A.(1) The Minister may, from time to time, by notice in writing to the Corporation, advise the Corporation of his or her views in relation to the following matters:

- (a) the appropriate strategic direction of the Corporation;
- (b) the manner in which the Corporation should perform its functions.

“(2) The Corporation must, in performing its functions, take account of notices given to it under subsection (1).

“(3) The Board must, in preparing each Corporate plan, take account of notices given to the Corporation under subsection (1).

“(4) The Corporation must include in the annual report for a financial year:

- (a) a summary of notices given to the Corporation, in that financial year, under subsection (1); and
- (b) a summary of action taken in that financial year by the Board or the Corporation because of notices given to the Corporation under subsection (1) in that or any other financial year.

Minister may direct Corporation to give documents and information to nominee

“42B.(1) In this section:

‘ministerial nominee’ means a person whose responsibilities or duties include advising the Minister about the performance and strategies of the Corporation.

“(2) The Minister may direct the Board to give to a specified ministerial nominee any documents or information relating to the operations of the Corporation that the nominee requests.

“(3) The Board must comply with a direction by the Minister under subsection (2).

“(4) The Corporation must include in the annual report for a financial year particulars of any directions given to the Board by the Minister under subsection (2) in that financial year.”.

3. After section 46:

Insert:

Mandatory insurance against passenger carriers' liability

Proposed drafting instructions

The Commonwealth *Civil Aviation (Carriers' Liability) Act 1959* (the Act) specifies limits of liability in respect of carriage by air which comes within the ambit of the Act (primarily international and *interstate* carriage). Currently, passenger liability Insurance policies typically contain exclusion clauses which specify the circumstances in which the insurer may declare the policy void. This raises the possibility that consumers may receive no compensation if a carrier does not have sufficient funds or assets to meet its liabilities arising from injury or death to passengers. Accordingly, the Government has decided that all operators subject to the provisions of the Act will be required to hold mandatory insurance which meets the increased passenger liability limits. This insurance is to be non-voidable in respect of aviation safety law violations by operators. Accordingly, there are two parts to the proposed provisions:

amendments to existing legislation: and

regulations made pursuant to the Act and to be administered by the Civil Aviation Authority (CAA).

Amendments to the *Civil Aviation (Carriers' Liability) Act 1959*

The Act is to be amended to make it mandatory for all carriers subject to the Act to carry insurance in accordance with the liability limits specified by the Act, including such higher limit as might apply by virtue of a special contract for carriage between the carrier and a passenger. (The intention of the last part of the sentence is to "capture" Convention carriage where foreign carriers have adopted a voluntary limit higher than the Convention limit, such as the 260,000 SDR's to be sought by the Australian government). The Minister for Transport is to be responsible for approving applications for approval of insurance arrangements. This function is to be delegated to the CAA.

To ensure compliance with these provisions, it is proposed that the Act be amended to provide that failure to comply with these requirements would be an offence, with appropriate pecuniary penalties [to be discussed with the Attorney-General's Department and industry]. It is also proposed that the Minister for Transport would be provided with the power to seek a court injunction preventing an operator continuing to carry fare paying passengers under the Act, in the event of such a failure by an operator.

The Act is also proposed to be amended to provide a legislative basis for the Commonwealth to make regulations specifying the requirements carriers must meet to demonstrate their compliance with the obligations imposed by the Act.

It is proposed that the powers to ensure compliance will be delegated to the CAA. The CAA has a close working relationship with the airline industry.

To enable the CAA to administer (ie ensure compliance with) the proposed Act amendments, it may be necessary to amend the Civil Aviation Act to give the CAA this specific function, [At present this is the position, but this may after after establishment of the Aviation Safety Authority, Under s9(1)(j) of the Civil Aviation Act the Authority's functions include those conferred under the Air Navigation Act].

The principal purpose of the proposed legislation. Is to prevent insurers from adopting insurance policies which make violations of the Civil Aviation Act or regulations (or superseding legislation establishing the Aviation Safety Authority) a possible basis for refusing claims in respect of compensation to passengers killed or injured during the course Of carriage under the Act.

Aside from preventing breaches of air safety law being made an exclusion provision (in respect of fare paying passengers only), the amendments to the Act are not otherwise intended to proscribe forms of allowable or non-allowable exclusions (eg advent of war) which are currently negotiated commercially between insurers and insureds.

There is also no intention for the proposed legislation to remove the existing anus upon insureds to advise the insurer of all information material to the assessment by the insurer of the terms and conditions upon which a policy will be offered or maintained.

The actual amount of compensation to be paid to plaintiffs in settlement of claims will continue to be determined on the same basis as currently applies, namely by negotiation between the parties, or as determined by a Court in accordance with the provisions of the Act.

It is considered these proposed amendments will 'stand alone' and that no consequential amendments to the other operative provisions of the Act are necessary. It is not considered that the mandatory insurance requirement will require any consequential amendments to the Commonwealth Insurance Contracts Act 1984 since subsection 9(3) of that Act provides 'This Act does not apply in relation to...contracts of insurance entered into....In respect of aircraft engaged in commercial operations.'

Regulations

[It is not strictly necessary from a legal perspective to have regulations stipulating the mechanics of applying for insurance approval etc. There could simply be broad powers in the Act delegatable to the CAA which are exercised in accordance with administrative guidelines or procedures. However, putting the detailed requirements in regulations has the advantage of transparency.]

com
1-3
catio
-3, ad
100

The proposed regulations will set out the detailed requirements carriers must meet to satisfy the proposed legislative requirement that all carriers subject to the Act have mandatory, non-voidable insurance (of the type specified above) that meets the liability limits of the Act.

Outline of proposed regulatory requirements

1. The carrier is to provide documentary evidence to the CM that the carrier is insured in accordance with the Act.
2. The documentary evidence will take the form of a current insurance certificate showing insurance cover to 8 level of at least:
 - a. ~500,000 per incidence of carriage in the case of carriage under Part IV of the Act;
 - b. 260,000 SDR's per passenger in the case of international carriage by Australian operators or non-Convention carriage;
 - c. sufficient to cover the maximum liability per passenger specified in Parts II and III of the Act (ie respectively Warsaw and Hague Convention carriage) of such level of liability agreed by special contract between carrier and its passengers where the level is higher than a carrier's obligations under the Act.
3. In the case of a policy providing combined single limit cover, the policy must clearly state that cover is sufficient to meet at least the minimum requirements set out in 2.
4. Carriers operating at the time the amendments to the Act come into effect are to provide the evidence required in 1-3 to the CAA within (say) 60 working days of the amendments coming into effect, [Insurance requirement will be in Act Regs. dealing with mechanics can be drafted in parallel to come into effect shortly after Act proclaimed.. Regs confer flexibility].
5. Thereafter, for intending new operators, the evidence required in 1-3 is to be provided at the time of application to the CAA for an air operators certificate (AOC).
6. The CAA will, within (say) 10 working days of receipt of an application pursuant to 4 or 5:
 - a. if the proposed arrangements satisfy the provisions of 1-3, advise the carrier that the insurance arrangements submitted are approved;

- b. if the proposed arrangements do not meet the requirements of 1-3, advise the carrier that the insurance arrangements are not approved and will identify in that advice the steps necessary to remedy the deficiency;
- c. if 6b applies, the carrier will resubmit within (say) 5 working days a revised policy to the CAA. The CAA will, within (say) 5 working days of receipt of the revised policy, if the revised policy is in accordance with 1-3, advise the operator or its insurer that the revised arrangements are approved.

7. While it is envisaged that a carrier would provide evidence of its insurance cover at the same time as it applies for issue of/renewal of its AOC, insurance cover will not be a requirement for an AOC as such.

In the event of a material change to a carrier's operating circumstances which affects the level or nature of cover required by the carrier in accordance with these regulations, the carrier must provide evidence to the CAA that appropriate revised cover has been effected, within (say) 15 working days of those changed circumstances taking effect.

8. The provisions of 6 will apply in relation to action taken under 7 or 8.

Draft of 29 November 1994

EXPLANATORY BACKGROUND NOTE
(based on ICAO State Letter **EC2/73**, Att. A)

THE WARSAW SYSTEM

The Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw in 1929 (the Warsaw Convention), unifies the documents of carriage, the regime of liability and the jurisdiction of courts: it also limits the liability of a carrier to a maximum of 125 000 French gold francs (about U.S. \$10 000) per passenger, 260 French gold francs (about U.S. \$20) per kilogramme of luggage and of goods and 5 000 French gold francs (about U.S. \$400) for objects of **which** the passenger takes charge himself. In case of **"wilful misconduct"** of the carrier these limits of liability do not apply. **The Convention** entered into force in **1933** and has been widely accepted (126 parties). In 1955, The Hague Protocol to amend this Convention was adopted and it currently has 172 parties. It simplifies the provisions on the documents of carriage, clarified the concept of **"wilful misconduct"** and doubled the **limits of liability** in the **carriage** of passengers to 250 000 French gold francs. The Guadalajara Convention (**1961**), in force since 1964, extends the application of the provisions of the 'Warsaw Convention' (or that Convention as amended) **also** to the **'actual carrier'**.

The Guatemala Cii Protocol (1971) to amend the Warsaw Convention as amended by The Hague Protocol increased the **limit** in respect of passengers to 1500 000 French gold francs, or about U.S. \$100 000. This limit is unbreakable. The Protocol simplifies the documents of **carriage** and permits the substitution of documents by electronic data recording; the regime of liability is **"strict"** (not dependent on fault); and contains a provision **permitting** a **'domestic supplement'** to cater to the interests of States **with** a high cost of **living**. The Protocol also provides a mechanism to increase the **limits** of liability by no more than 187 500 French gold francs (about U.S. \$12 500) in the fifth and tenth year after its date of entry into force. The Guatemala Cii Protocol has been ratified by 11 States only, and it is unlikely that it will enter into force in view of the conditions imposed by Article XX of that Protocol which contains a **qualifier** with the practical impact that the Protocol will not enter into force without ratification by the United States of America.

The 'Warsaw System' has been modernized by Additional Montreal Protocols Nos. **1, 2** and 3 and Montreal Protocol No. 4 of 1975. The sole **purpose** of Additional Protocols Nos. 1 and 2 is to replace the **limits of liability** expressed in the original Warsaw Convention, and the Warsaw Convention as amended by **The** Hague Protocol of 1955, by the Special Drawing Rights (SDR) of the International Monetary Fund, without changing the actual limits. Additional Protocol No. 3 concerns passengers and baggage and **its** sole purpose is to replace the 'gold clause' in the Warsaw Convention as amended by The Hague (1955) and the Guatemala City (1971) Protocols by the SDR; Montreal Protocol No. 4 amending the 1929 Convention as amended in 1955 simplifies the documentation in the carriage of cargo, and establishes a strict **liability** regime (independent of fault) for any damage sustained in the event of destruction or loss of, or damage, to cargo. The limits of **liability** in respect thereof have not changed, but are expressed in SDR. In accordance with Article V of Additional Protocol No. 3, the Warsaw Convention as amended at

The Hague (1955) and at Guatemala Cii (1971) and the Additional Protocol No. 3 are to be read and interpreted together as one single instrument; consequently, the entry into force of this Protocol would also bring into force the provisions of the Guatemala City Protocol.

The Warsaw Convention of 1929 has served the international community well. However, with the passage of time and in view of the evolution of technological and socio-economic elements of international carriage by air the Convention required subsequent updating and adjustment. The successive amendments of the 'Warsaw System' adopted under the auspices of ICAO over the years were intended to be responsive to the economic, social and legal problems faced as a result of developments in the field of international transport by air. Yet, five out of the eight components of the 'Warsaw System' have not so far entered into force some nineteen to twenty-four years since their adoption. These instruments all require 30 ratifications before entering into force; the Guatemala Cii Protocol requires additional conditions.

THE MONTREAL AGREEMENT OF 1966

Separately from the 'Warsaw System' stands the so-called 'Montreal Agreement of 1966' adopted by the Civil Aeronautics Board of the United States of America on 13 May 1966. This document is not an international agreement but only an arrangement among the carriers operating passenger transport to, from, or with an agreed stopping place in the United States of America. By this arrangement, the parties thereto have *de facto* amended the application of the Warsaw Convention as amended at The Hague (1955) by agreeing to include in their tariffs, effective 16 May 1966, a special contract (permitted under Article 22(1) of the Convention) providing for a limit of liability (breakable) for each passenger in case of death or bodily injury of U.S. \$75 000 inclusive of legal fees and costs and U.S. \$58 000 exclusive of legal fees and costs. The 'Montreal Agreement of 1966' is not an international agreement or a formal revision of the 'Warsaw System' but it governs a significant segment of international carriage of passengers by air in one of the regions with heaviest traffic.

THE PRESENT SITUATION

Since 1965 ICAO has been actively involved in the process of modernization and updating of the 'Warsaw System'. Unification of law relating to the international carriage by air, in particular unification of law relating to liability, is of vital importance for the harmonious management of international air transport. Without such unification of law complex conflicts of laws would arise and the settlement of claims would be unpredictable, costly, time consuming and possibly uninsurable. Furthermore, conflicts of jurisdiction would arise which would further aggravate the settlement of liability claims.

The Montreal Protocols await their required number of ratifications (39) for entry into force. A substantial number of States still attach great significance to the ratification by the United States of the Montreal Protocols Nos. 3 and 4 and seem to be awaiting any developments in that context before undertaking similar steps. It is not clear at this moment whether a ratification by the U.S. is forthcoming, although several initiatives have been undertaken by the U.S. Administration. The most recent proposals include the ratification of the Montreal Protocols 3 and 4, updating the liability limit contained in the Montreal Agreement of 1966, and a supplementary compensation plan available under an insurance scheme, separate and distinct from the liability of the air carrier (contemplated under Article 35A of the Guatemala Cii Protocol).

Unilateral actions have been taken by a number of States to seek national or regional solutions in order to remedy the current problems of the "Warsaw System". Some States have **taken** national legislative steps in order to bridge the gap between the liability limits provided for in the Warsaw/Hague Convention and the need for adequate limits of compensation for the travelling public, while others are presently contemplating such action. A number of airlines in, among other countries, Western Europe, have unilaterally increased their limits of liability to the equivalent of 100 000 SDR.

Italy introduced legislation in July 1988 imposing a limit of not less than 100 000 SDR for **death** of, or injury to, a passenger. This limit applies **for** Italian air carriers anywhere in the world and for foreign carriers if their point of **departure**, destination or a stopover is situated in Italy.

As of December 1992, all Japanese international carriers have waived, insofar as passenger injury or death is concerned, for claims up to **100 000 SDR**, their right under the Convention to plead limitation of liability, whereas **for** claims in **excess** of **100 000 SDR** this **defence** will be retained in respect of the **portion** of **the claim** in excess of that amount. In other words, for **claims** up to **100 000 SDR** there is absolute liability and for claims above that sum the carrier may prove freedom from negligence in order to invoke limited liability.

In June 1994 **the** European Civil Aviation Conference (ECAC) adopted Recommendation **16-1** which urges its Member States to update certain elements of the **international** air carrier liability system by encouraging its air **carriers** and those from third States operating to, from or via **the territory** of **ECAC Member** States, to participate in a European **inter-carrier** agreement along the lines of the **1966** Montreal Agreement. **The** Recommendation advises the air carriers that the Agreement should maintain **liability limits** of at **least 250 000 SDR** and a number of provisions that relate to a speedy settlement of claims, up-front payments to victims and their next of kin and to **mechanisms** that would safeguard **limits** against inflationary **erosion**.

The aforementioned **ad hoc** solutions do not necessarily contribute to the improvement of **the** "Warsaw System". **The provision** of higher **limits** in **those cases** do not seek to change the other provisions in the old 1929 and **1955** instruments; they should be **seen** as temporary **measures** to remedy the perceived limitations of **the** Warsaw/Hague instruments and the conditions that exist as a result of **the** lack of support by **ICAO** contracting States regarding the ratification of **the Montreal** Protocols. While these initiatives are understandable in the light of the slow and unsatisfactory attempts at **world-wide** reform, **they** do not present a realistic alternative and **could** lead to a proliferation of individually tailored solutions which would add to confusion and defeat hopes of maintaining a global **uniform** system. The necessity to retain a high degree of global uniformity therefore remains a primary objective.

(ITALY)

LAW NO. 274 OF 7TH JULY 1988

LIMIT OF LIABILITY
IN INTERNATIONAL AIR CARRIAGE OF PERSONS

ARTICLE 1

For the purpose of this Law:

- a) "Convention" means the "Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, on 12 October 1929", enacted in Italy by Law no. 841 of May 19, 1932;
- b) "Protocol" means the "Protocol to amend the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules Relating to International Carriage by Air signed at The Hague on 28 September 1955", enacted in Italy by Law no. 1832 of December 3, 1962;
- c) "International Carriage by Air" has the meaning defined by Article 1 of the Convention as amended by Article 1 of the Protocol.

ARTICLE 2

1. In the case of international air carriage of persons performed by either Italian or foreign carriers, and also in the case where the contract envisages only a stopover in Italian territory, the carrier may avail itself of the limit of liability provided in the Convention, as amended by the Protocol, on condition that:

- a) pursuant to Article 22, paragraph 1 of the Convention, the carrier has established in its General Conditions of Carriage or, in case of non-scheduled services in the relevant operating authorizations or licenses, whichever the case may be, a limit of compensation for each passenger for death or personal injury of not less than one hundred thousand Special Drawing Rights as defined by the International Monetary Fund, to be converted into the national currency in accordance with the method of valuation applied by the International Monetary Fund;
 - b) the carrier has insured its liability for damage in case of death or personal injury of passengers in accordance with Article 3 below.
2. The provisions of this Article 2 shall also apply to Italian carriers performing transportation which does not include a place of departure, a place of destination or an agreed stopover within Italian territory.
 3. The provision set forth in letter a) of paragraph 1 is enforceable until the Additional Protocol no. 3 adopted in Montreal on September 25, 1975 and ratified by Law no. 43 of February 6, 1981 comes into effect.

ARTICLE 3

1. For international air carriage of persons, as stated in Article 2, the carrier shall have in effect a passenger liability insurance, provided by a qualified insurer, for damage in case of death or personal injury of a passenger for an amount not less than one hundred thousand Special Drawing Rights as defined in the preceding Article 2.

.../...

2. The insurer shall be considered as qualified if its solvency is certified by a public authority of the state of registry of the aircraft or of the state where the insurer has its principal place of business; for the Italian insurers the certification is granted by ISVAP (Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo). In the absence of such certification of solvency, the insurer is considered as qualified if the same is re-insured for the risks and limit indicated in paragraph 1.
3. No aircraft can fly without the insurance coverage referred to in paragraphs 1 and 2 or if such coverage is inadequate.
4. The Ministry of Transport may at any moment request the air carrier to produce evidence of the insurance covering its liability for damage sustained by passengers in accordance with the above provisions. In case of non-compliance with the above provisions, the Ministry of Transport shall take the measures provided in Law no. 862 of December 11, 1980 and the related Ministerial Decrees for the enforcement of said Law, for non-performance of obligations imposed upon Italian or foreign carriers operating scheduled or non-scheduled air services.

ARTICLE 4

The carrier shall comply with all the requirements set forth in the preceding Articles within 120 days of the date of entry into force of the present law.

1992 No. 2992

CIVIL AVIATION

The Licensing of Air Carriers Regulations 1992

<i>Made</i>	- - - -	<i>1st December 1992</i>
<i>Laid before Parliament</i>		<i>4th December 1992</i>
<i>Coming into force</i>		<i>1st January 1993</i>

The Secretary of State for Transport, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972(b) in relation to measures relating to the licensing of air carriers established in the Community in exercise of the powers conferred by that section, hereby makes the following Regulations:—

1. These Regulations may be cited as the Licensing of Air Carriers Regulations 1992 and shall come into force on 1st January 1993.

2.—(1) In these Regulations—

“air transport licensing functions” has the same meaning as in section 68(5) of the Civil Aviation Act 1982(c);

“the CAA” means the Civil Aviation Authority; and

“the Council Regulation” means Council Regulation 2407/92 on licensing of air carriers(d).

(2) Other expressions used in these Regulations have, in so far as the context admits, the same meanings as in the Council Regulation.

Operating licences

3.—(1) Subject to the provisions of regulations 4 and 16 to 19 below the CAA shall perform the functions relating to the grant and maintenance of operating licences that are required to be performed by the United Kingdom or by the competent authorities or licensing authorities of the United Kingdom by the Council Regulation save for those functions for which the Secretary of State is the competent authority.

(2) The Secretary of State shall be the competent authority for the purposes of the second sentence of paragraph 5 of article 4, paragraph 7(b) and (c) of article 5, paragraphs 2 and 3 of article 8 and articles 14, 17 and 18 of the Council Regulation.

4. In any case where the CAA has reason to believe that—

(a) an applicant for, or the holder of, a licence granted in accordance with the Council Regulation, or

(b) a carrier to whom article 16 of the Council Regulation for the time being applies,

does not meet the requirements of paragraphs 2 to 4 of article 4 of the Council Regulation it shall be the duty of the CAA to inform the Secretary of State accordingly. In any such case the CAA shall make no determination as to whether the said requirements are met but

shall await the determination of the Secretary of State. The Secretary of State's determination shall be binding on the CAA and, in particular, in a case where the Secretary of State determines that paragraphs 2 to 4 of article 4 of the Council Regulation are not met, the CAA shall forthwith either refuse to grant or revoke the relevant operating licence (as the case may be) or, in a case where the undertaking operates by virtue of an exemption, shall forthwith except that undertaking from that exemption.

5. Where the CAA has reason to believe that an aircraft is intended to be used by an undertaking without an operating licence that is required by and granted in accordance with the Council Regulation, the CAA may-

- (a) give to the person appearing to it to be in command of the aircraft a direction that he shall not permit the aircraft to take off until it has informed him that the direction is cancelled,
- (b) whether or not it has given such a direction, detain the aircraft until it is satisfied that the aircraft will not be so used,

and a person who, without reasonable excuse, fails to comply with a direction given to him in pursuance of this regulation shall be guilty of an **offence**.

6.—(1) An undertaking which knowingly or recklessly undertakes the carriage by air of passengers, mail or cargo for remuneration or hire without an appropriate operating licence required by and granted in accordance with the Council Regulation shall be guilty of an **offence**.

(2) Nothing in paragraph (1) above shall apply to an undertaking which holds, or which is deemed to hold, an operating licence which remains valid by virtue of article 16 of the Council Regulation.

7. For the purposes of determining in pursuance of regulation 6 above whether an **offence** relating to carriage has been committed by an undertaking it is immaterial that the contravention mentioned in that regulation occurred outside the United Kingdom if when it occurred the undertaking-

- (a) was a United Kingdom national,
- (b) was a body incorporated under the law of any part of the United Kingdom, or
- (c) was a person (other than a United Kingdom national or such a body) maintaining a place of business in the United Kingdom.

8. An undertaking which, for the purpose of-

- (a) obtaining for itself or another undertaking an operating licence under the Council Regulation or
- (b) seeking to demonstrate that the requirements of paragraphs 2 to 4 of article 4 of the Council Regulation are met in connection with securing the continuation of a right to operate under article 16 of that Regulation,

knowingly or recklessly furnishes the CAA or the Secretary of State with any information which is false in a material particular shall be guilty of an **offence**.

9.—(1) An air carrier which fails without reasonable excuse to obtain approval for the use or provision of an aircraft from or to an undertaking as required by paragraph 1 of article 10 of the Council Regulation or fails without reasonable excuse to comply with the conditions of any such approval shall be guilty of an **offence**.

(2) Regulation 5 above shall apply in a case where the CAA has reason to believe that an aircraft is intended to be used by an air carrier in breach of the requirement for prior approval required by paragraph 1 of article 10 of the Council Regulation or in breach of any condition of any such approval as it applies in the case there provided for.

(3) Regulation 7 above shall apply for the purpose of determining in pursuance of paragraph (1) above whether an **offence** relating to the use or provision of an aircraft has been committed as it applies in the case there provided for.

10.—(1) The Secretary of State may, by notice in writing served in a manner set out in regulation 4 of the Civil Aviation Authority Regulations 1991(a) on a Community air carrier with a valid operating licence granted by the CAA require that carrier to furnish to him, in such form and at such times as may be specified in the notice, information of such descriptions as may be so specified, being descriptions of information required by the Commission for it to carry out its duties under article 4 of the Council Regulation.

(2) An air carrier which fails without reasonable excuse to comply with the requirements of a notice served on it under paragraph (1) above shall be guilty of an offence.

(3) An air carrier which, in purported compliance with the requirements of any such notice, knowingly or recklessly furnishes information which is false in a material particular shall be guilty of an offence.

11.—(1) An air carrier with a valid operating licence granted by the CAA in accordance with the Council Regulation-

(a) shall not carry by air any passenger for remuneration or hire to whom accommodation for carriage on the flight has been made available by any person required by regulations made under section 71 of the Civil Aviation Act 1982 to hold a licence issued in pursuance of those regulations unless that person does hold such a licence;

(b) shall enter into a special contract with every passenger to be carried for remuneration or hire, or with a person acting on behalf of such a passenger, for the increase to not less than the Sterling equivalent of 100,000 Special Drawing Rights, exclusive of costs, of the limit of the carrier's liability under article 17 of the Warsaw Convention 1929 and under article 17 of that Convention as amended at The Hague in 1955(b); and

(c) when undertaking the carriage of passengers having the common purpose of attending an association football match shall not cause or permit a passenger to go or be taken on board the aircraft unless that passenger is in possession of a valid ticket of admission to the match. For the purpose of this sub-paragraph a person shall be deemed to be in possession of a valid ticket of admission to the match where such a ticket is held on his behalf by another passenger.

(2) Regulation 5 above shall apply in a case where the CAA has reason to believe that an aircraft is intended to be used by an air carrier in breach of any of the requirements set out in paragraph (1) above as it applies in the case there provided for.

(3) Regulation 6 above shall apply in a case where an air carrier knowingly or recklessly undertakes the carriage by air of passengers for remuneration or hire in breach of any of the requirements set out in paragraph (1) above as it applies in the case there provided for.

(4) Regulation 7 above shall apply for the purpose of determining in pursuance of paragraph (3) above whether an offence relating to carriage has been committed as it applies in the case there provided for.

12. A person guilty of an offence under these Regulations shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum, and

(b) on conviction on indictment, to a fine or to imprisonment for a term not exceeding two years or to both.

13.—(1) Where an offence under these Regulations has been committed by a body corporate and is proved to have been committed with the consent or connivance of or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and be liable to be proceeded against and punished accordingly.

(a) S.I. 1991/1672.

(b) For The Warsaw Convention see Cmd. 4284 of 1933 and for The Hague Protocol see Cmnd. 3356 of 1967. The Warsaw Convention as amended at The Hague may also be seen in Schedule I to the Carriage by Air Act 1961 (1961 c.27.).

(2) Where the affairs of a body corporate are managed by its members, paragraph (1) above shall apply in relation to the acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.

(3) Where a Scottish partnership is guilty of an offence under these Regulations and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, he as well as the partnership shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

14.—(1) Subject to paragraph (2) below, summary proceedings for an offence under these Regulations may be commenced in Scotland within a period of 6 months from the date on which evidence sufficient in the opinion of the procurator fiscal to warrant proceedings came to his knowledge.

(2) No such proceedings shall be commenced by virtue of this regulation more than 3 years after the commission of the offence.

(3) For the purposes of this regulation, a certificate signed by or on behalf of the procurator fiscal and stating the date on which evidence sufficient in his opinion to warrant the proceedings came to his knowledge shall be conclusive evidence of that fact.

(4) A certificate stating that matter and purporting to be so signed shall be deemed to be so signed unless the contrary is proved.

(5) Subsection (3) of section 331 of the Criminal Procedure (Scotland) Act 1975 (date of commencement of proceedings)(a) shall apply for the purposes of this regulation as it applies for the purposes of that section.

15.—(1) The CAA may require, for the purpose of granting an operating licence in accordance with the Council Regulation, proof that the persons who will continuously and effectively manage the operation of the undertaking are of good repute and that none of them is an undischarged bankrupt.

(2) The CAA may suspend or revoke an operating licence in the event it is satisfied the holder is not a fit person to operate aircraft under the authority of that licence by reason of serious professional misconduct or a criminal offence.

16. The CAA shall, for the purposes of paragraph 7(a) of article 5 of the Council Regulation, always afford air carriers exclusively engaged in operations with aircraft of less than 10 tonnes maximum take off weight or less than 20 seats the option of providing the information relevant for the purposes of paragraph 5 of that article instead of being required to demonstrate that their net capital worth is at least 80,000 ECUs or such other sum as may be published pursuant to paragraph 7(b) of that article.

17. Paragraphs 1, 2, 3, 4 and 6 of article 5 of the Council Regulation shall not apply to any air carrier described in regulation 16 above and to which the CAA grants an operating licence under the Council Regulation being a carrier that operates scheduled services or whose turnover exceeds 3 million ECUs per annum.

18.—(1) Save for waivers granted by the Secretary of State by virtue of paragraph 3 of article 8 of the Council Regulation an operating licence granted to an air carrier by the CAA in accordance with the Council Regulation shall not be valid for the purpose of enabling an air carrier to use an aircraft for the carriage by air of passengers, mail or cargo for remuneration or hire in so far as that carriage is performed by an aircraft which is not registered according to the option selected by the Secretary of State by virtue of paragraph 2(a) of article 8 of the Council Regulation and published as described in paragraph (2) below.

(2) The CAA shall, on request made by the Secretary of State, publish in its Official Record the option selected by the Secretary of State referred to in paragraph (1) above.

(a) 1975 c.21.

19.-(1) Where the CAA takes a decision to refuse an application for an operating licence, or to revoke or suspend an operating licence granted under the Council Regulation, the applicant for, or the holder of, the licence, as the case may be, shall have a right of appeal to the Secretary, of State.

(2) The provisions of Schedule I to these Regulations shall apply.

(3) Paragraph (1) above shall not apply to the extent that the reason for the CAA's decision relies upon a determination of the Secretary of State made under regulation 4 above.

(4) If an operating licence is revoked or suspended by the CAA otherwise than on the application of the holder of the licence and otherwise than in consequence of a determination made in pursuance of regulation 4 above the revocation or suspension shall not take effect before the expiration of the period within which an appeal may be made against that decision (which period is described in Schedule I to these Regulations) nor, if such an appeal is brought within that period, before the determination or abandonment of the appeal.

Restriction of air transport licensing functions of the CAA

20. Section 64 of the Civil Aviation Act 1982 (regulation of carriage by air by air transport licences) shall be amended by the insertion in subsection (2) (flights for which such licences are required), by way of a further exception, of the following-

" (d) a flight for the undertaking of carriage by air for which a valid operating licence issued in accordance with Council Regulation 2407/92 on licensing of air carriers is required."

Regulation of carriage by air by route licences

21. After section 69 of the Civil Aviation Act 1982 there shall be inserted the following section-

" Regulation of carriage by air by route licences.

69A.—(1) No aircraft shall be used for the carriage for reward of passengers or cargo on a flight to which this subsection applies unless—

- (a) the operator of the aircraft holds a licence granted to him by the CAA in pursuance of section 65 as applied by subsection (6) below (in this Act referred to as a " route licence ") authorising him to operate aircraft on such flights as the flight in question: and
- (b) the terms of the licence are complied with so far as they relate to that flight and fall to be complied with before or during the flight.

(2) Subsection (1) above applies to any flights to which section 64(1) above applies (apart from the exceptions) where the aircraft is used by a Community air carrier, except that it does not apply to-

- (a) a flight of a description specified for the purposes of paragraph (a) of section 64(2) as applied by subsection (6) below:
- (b) a particular flight or series of flights specified for the purposes of paragraph (b) of section 64(2) as so applied;
- (c) a flight by an aircraft of which the CAA is the operator: and
- (d) flights by aircraft in exercise of traffic rights permitted by virtue of the Community access Regulation.

(3) No route licence shall be granted by the CAA so as to permit the exercise of those traffic rights access to which is denied to the aircraft operator concerned by virtue of exceptions contained in articles 3 to 6 of the Community access Regulation.

(4) The CAA shall refuse to grant a route licence in pursuance of an application under section 65 as applied by subsection (6) below if it is not satisfied that the applicant possesses a valid operating licence.

(5) Where a person holds—

- (a) an operating licence granted by an authority in any member State.
and
- (b) a route licence.

and his operating licence is revoked or suspended by that authority (and that revocation or suspension takes effect), the route licence shall, as from the date when the revocation or suspension takes effect, cease to be in force or, in the case of suspension, not be effective during the period of suspension of the operating licence.

(6) Subject to subsections (3) to (5) above, sections 64(2)(a), (b) and (c), (3) to (8) and 65 to 69 above shall apply in relation to route licences (and route licensing functions) as they apply in relation to air transport licences (and air transport licensing functions) subject to the modifications specified in subsection (7) below.

(7) Those modifications are—

- (a) the omission of section 65(2) and the substitution, for the reference to that subsection in subsection (4), of a reference to subsection (4) above;
- (b) the omission of section 66(3) to the end of paragraph (b);
- (c) the omission in sections 64(6) and 65(3) of the references to the law of a relevant overseas territory or of an associated state;
- (d) the substitution, in section 68(5), for the reference to sections 64 to 67, of a reference to this section and those sections as applied by subsection (6) above; and
- (e) the substitution, in section 69(1), for the reference to sections 64 to 68, of a reference to this section and those sections as so applied.

(8) In this section—

“ the Community access Regulation ” means Council Regulation 2408/92 on access for Community air carriers to intra-Community air routes;

“Community air carrier ” has the same meaning as in the Community access Regulation;

“ operating licence ” means an operating licence granted in any member State in accordance with Council Regulation 2407/92 on licensing of air carriers.“.

22. An air transport licence which remains valid by virtue of article 16 of the Council Regulation shall take effect on the day the holder thereof is granted an operating licence by the CAA as a route licence granted under section 65 of the Civil Aviation Act 1982 as applied by section 69A in relation to those flights which were authorised by that air transport licence and for which a route licence is required under section 69A of that Act and subject to the same terms as that air transport licence in so far as those terms are compatible with Community law.

Consequential amendments

23. The provisions specified in Schedule 2 to these Regulations shall have effect subject to the amendments there specified.

Signed by authority of the
Secretary of State for Transport

1st December 1992

Caithness
Minister of State,
Department of Transport

APPEALS TO THE SECRETARY OF STATE

1. When the CAA provides to a person having a right of appeal notification in writing of its decision to refuse, revoke or suspend an operating licence, the notification shall specify a date, being not less than 3 working days after the date on which a copy of the notification was available for collection by or despatch to that person (which date is hereinafter referred to as "the decision date").
2. An appeal to the Secretary of State shall be made by a notice signed by or on behalf of the appellant and clearly identifying the case to which it relates and stating the grounds on which the appeal is based and the arguments on which the appellant relies.
3. The appellant shall serve the notice of appeal on:
 - (a) the Secretary of State; and
 - (b) the CAA.
4. The notice of appeal shall be served within 14 days after the decision date.
5. Within 14 days after receiving notice of an appeal, the CAA shall serve on the Secretary of State any submission it may wish to make in connection with the appeal including, if it thinks fit, an amplification and explanation of the reasons for its decision, and shall, within such period, serve a copy of any such submission on the appellant.
6. Within 14 days after the expiry of the period of 14 days referred to in the preceding paragraph the appellant may serve on the Secretary of State a reply to any submission made pursuant to the preceding paragraph and shall within such period serve a copy of any such reply on the CAA.
7. Before deciding an appeal the Secretary of State may ask the appellant or the CAA to amplify or explain any point made by them or to answer any other question, the answer to which appears to the Secretary of State necessary to enable him to determine the appeal, and the Secretary of State shall as the case may be give the appellant and the CAA an opportunity of replying to such amplification, explanation or answer.
8. In the appeal proceedings no person may submit to the Secretary of State evidence which was not before the CAA when it decided the case.
9. The Secretary of State may, if he thinks fit, uphold the decision of the CAA or direct it to reverse or vary its decision.
10. The Secretary of State shall notify the CAA and the appellant of his decision and of the reasons for it. Where the decision is to grant or revoke an operating licence the CAA shall take the steps necessary to cause the Secretary of State's decision to be published in the Official Journal of the European Communities.
11. An appeal to the Secretary of State shall not preclude him from consulting the competent authorities of any country or territory outside the United Kingdom for the purposes of section 6(2)(a) to (d) of the Civil Aviation Act 1982 (which relates to national security, relations with other countries and territories and similar matters) notwithstanding that the consultation may relate to matters affecting the appeal.
12. The failure of any person (other than the appellant in serving notice of appeal on the Secretary of State within the time prescribed in paragraph 4 above) to serve any notice, submission or reply, or copies thereof or to furnish any particulars in the time provided for in this Schedule or any other procedural irregularity shall not invalidate the decision of the Secretary of State; and the Secretary of State may, and shall if he considers that any person may have been prejudiced, take such steps as he thinks fit before deciding the appeal to cure the irregularity.

The Airports Act 1986(a)

1. In section 29(1) after the definition of the expression “ movement ” there shall be added the following definition-

” “ route licensing functions ” means the functions conferred on the CAA in relation to the grant of such licences as are referred to in section 69A(1)(a) of the 1982 Act and in relation to the revocation, suspension or variation of such licences (whether on the application of any person or otherwise).“.

2. In section 31(2) after the word “ functions ” there shall be inserted the words “ and its route licensing functions ”.

3. In section 32(3) after the word “ functions ” there shall be inserted the words “ and its route licensing functions ”.

The Civil Aviation Act 1982

4. In section 17(1)(c) after the words “ air transport licence ” there shall be inserted the words “ or operating licence granted in accordance with Council Regulation 2407/92 on licensing of air carriers ”.

5. In section 70 after the words “ sections 64 to 68 ” there shall be inserted the words “ (but **not** as applied by section 69A(6)) ”.

6. In section 84(1)(a) after the word “ Order ” there shall be inserted the words “ or an operating licence granted by the CAA in accordance with Council Regulation 2407/92 on licensing of air carriers ”.

7. In section 84(2) after the words “ air transport licence ” there shall be inserted the words “ or operating licence ”.

The Air Navigation Order 1989(b)

8. For paragraph (3) of article 4 there shall be substituted the following paragraph:

“ (3) The following persons and no others shall be qualified to hold a legal or beneficial interest by way of ownership in an aircraft registered in the United Kingdom or a share therein:

- (a) The Crown in right of Her Majesty’s Government in the United Kingdom;
- (b) Commonwealth citizens;
- (c) nationals of any member State;
- (d) British protected persons;
- (e) bodies incorporated in some part of the Commonwealth and having their principal place of business in any part of the Commonwealth;
- (f) undertakings formed **in** accordance with the law of a member State and having their registered office, central administration or principal place of business within the European Economic Community; or
- (g) firms carrying on business in Scotland.

In this sub-paragraph “ **firm** ” has the same meaning as in the Partnership Act 1890(c).”.

The Civil Aviation Authority Regulations 1991

9. In regulation 3(1) after the definition of the expression “ hearing ” there shall be added the following definition-

” “ operating licence ” means an operating licence granted by the CAA in accordance with Council Regulation 2407/92 on licensing of air carriers;“.

10. In regulation 3(5) after the words “ air transport licences ” there shall be inserted the words “ or route licences ”.

11. In regulation 10(2)(a)(iv) after the words “ under the Act ” there shall be inserted the words “ or of any operating licence ”.

(a) 1986 c.31.

(b) S.I. 1989/2004 amended by S.I. 1990/2154 and S.I. 1991/1726.

(c) 1890 c.39.

12. In regulation 13(I)(b) after the words "air transport licence" there shall be inserted the words " or operating licence ".

13. In regulation 15(I)(a) after the word " licence " there shall be inserted the words " or a route licence ".

14. In regulation 15(1)(d) the word "or" where it last appears shall be omitted.

15. After regulation 15(1)(e) there shall be added the following sub-paragraphs-

- "(f) revoke or suspend an operating licence otherwise than at the request of the holder: or
- (g) refuse to grant an operating licence."

16. In regulation 15(2) after the words " paragraph (1)(a) to(c) " there shall be inserted the words "(f) and (g) ".

17. In regulation 15(4) after the word " licence " there shall be inserted the words " or a route licence and any other decision to grant, revoke or suspend an operating licence".

18. In regulations 16, 17(4), 18, 20, 21, 24, 25, 27, 30(1) and 31 after the words " air transport licence " there shall be inserted the words " or a route licence ".

19. In regulation 17(2) after the words " in that regard " there shall be inserted the words "or proposes to revoke, suspend or vary a route licence otherwise than in pursuance of an application made to it in that regard,".

20. In regulation 17(3) for the words " suspend a " there shall be substituted the words " suspend an air transport ".

21. In regulation 21(ii) the word " or " where it last appears shall be omitted.

22. In regulation 21(iii) after the word " licence " there shall be inserted the word " or"

23. After regulation 21(iii) there shall be added the following paragraph—

- "(iv) the Authority is acting in pursuance of its duty under section 69A(4) of the Act."

24. In regulation 25(1)(b) after the words " the holder of" there shall be inserted the words "an operating licence,".

25. In regulation 25(1)(ii) after the words " Airports Act 1986 " there shall be inserted the words " or under section 69A(4) of the Act ".

26. In paragraph (5) of regulation 30 for the words after " if" where it first appears there shall be substituted the words-

- "(a) in the case of an air transport licence it would be bound under section 65(2) of the Act, and
- (b) in the case of an air transport licence or a route licence it would be bound under section 65(3) or 69A(4) of the Act,

to refuse that application if it were an application for the grant of a licence to that person."

27. In regulation 31 after the words " has taken effect " there shall be inserted the words " or if a route licence ceases to be in force by virtue of section 69A(5) of the Act " and at the end there shall be inserted the words " Nothing in this regulation shall apply to a route licence which is rendered ineffective during a period of suspension of an operating licence by virtue of section 69A(5) of the Act."

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make provision for implementing the Community obligations of the United Kingdom provided for in Council Regulation 2407/92 on licensing of air carriers and matters arising out of or related thereto.

Subject to the terms of these Regulations and save for those instances where the Secretary of State is specified as the competent authority for the purposes of the Council Regulation the Civil Aviation Authority (the CAA) is given the task of performing the various functions relating to the grant and maintenance of air carrier operating licences that are required to be performed by the Council Regulation (regulation 3). Those terms require the CAA, in the case of small air carriers, to afford those carriers the option of providing the financial information relevant to article 5.5 of the Council Regulation rather than information as to net capital worth; disapply paragraphs 1 to 4 and 6 of article 5 of the Council Regulation in the case of small air carriers and require UK licensed air carriers to use aircraft registered according to an option determined by the Secretary of State save for the exceptions provided for in the Council Regulation (regulations 16 to 18). Provision is made for appeals to the Secretary of State consequent upon a refusal, suspension or withdrawal of an operating licence (regulation 19 and Schedule 1).

The CA.4 is required to give the Secretary of State notice of cases where the CAA believes an air carrier seeking or holding an operating licence is not majority owned or effectively controlled by EC member States or their nationals and the CAA is obliged to act according to the determination of the Secretary of State (regulation 4).

The CAA is empowered to prevent aircraft flying where it believes the operator does not possess the necessary operating licence (regulation 5).

A number of **offences** are created namely, failing to comply with a CAA direction not to fly (regulation 5), operating without the required operating licence (regulation 6) failure to obtain prior approval for making use of or providing aircraft to another undertaking or to comply with the terms of any such approval (regulation 9) and failing to give, or giving false, information (regulations 8 and 10).

Carriers holding a valid operating licence from the CAA are required to ensure when taking passengers who have arranged their travel through a person who is required to possess an Air Travel Organiser's Licence (ATOL) that such a licence is held, to extend their potential liability under article 17 of the Warsaw Convention 1929 as amended at The Hague in 1955 to 100,000 Special Drawing Rights and to ensure that passengers on flights arranged for their attendance at association football matches all carry tickets for the match. Failure to so ensure is created a criminal **offence** (regulation 11).

The CAA is enabled to apply moral fitness criteria to the grant and maintenance of operating licences.

Provision is made applying sections 64 to 69 of the Civil Aviation Act 1982 with modifications so as to create, in place of the present air transport licence regime created for flights by those sections, a new regime for route licences. An air carrier requiring an operating licence under Council Regulation 2407/92 will require a route licence in order to undertake carriage for reward on a route for which traffic rights are not available under Council Regulation 2408/92 on access for Community air carriers to intra-Community air routes (regulations 20 and 21).

Air transport licences which remain valid by virtue of article 16 of Council Regulation 2407/92 are converted, in relation to certain routes, into route licences for those routes on the day the carrier concerned is granted its operating licence (regulation 22).

Finally a number of consequential amendments are made to the Airports Act 1986, the Civil Aviation Act 1982, the Air Navigation Order 1989 and the Civil Aviation Authority Regulations 1991 (regulation 23 and Schedule 2).

STATUTORY INSTRUMENTS

1993 No. 101

CIVIL AVIATION

**The Licensing of Air Carriers (Amendment) Regulations
1993**

Made	- - - -	20th January 1993
Laid before Parliament		28th January 1993
Coming into force		19th February 1993

The Secretary of State for Transport, being a Minister designated(a) for the purposes of section 2(2) of the European Communities Act 1972 (b) in relation to measures relating to the licensing of air carriers established in the Community, in exercise of the powers conferred by that section hereby makes the following Regulations:

1. These Regulations may be cited as the 'Licensing of Air Carriers (Amendment) Regulations 1993 and shall come into force on 19th February 1993.

2. In regulation 2(1) of the Licensing of Air Carriers Regulations 1992(c) for the words from "and" to the end there shall be substituted the following-

“ “the Council Regulation” means Council Regulation (EEC) No 2407/92 on licensing of air carriers(d) ; and

“United Kingdom national” has the same meaning as in section 105(1) of the Civil Aviation Act 1982(e) .”.

Signed by authority of the
Secretary of State for Transport

20th January 1993

Caithness
Minister of State,
Department of Transport

(a) S.I. 1992/1711.
(b) 1972 c.68.
(c) S.I. 1992/2992.
(d) OJ No. L 240. 24.8.92. p.1.
(e) 1982 c. 16.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations amend the Licensing of Air Carriers Regulations 1992 principally by adding a definition for the expression "United Kingdom national".

£2.30 net

Printed in the United Kingdom for HMSO
850/WO 0257 C13 1/93 452/1 9385/7932/5252 179229

ISBN 0-11-025810-X



9 780110 258102

PART 203—WAIVER OF WARSAW CONVENTION LIABILITY LIMITS AND DEFENSES

[¶ 10,060]

sec.

203.1 Scope.

203.2 Applicability.

203.3 Filing requirements for adherence to Montreal Agreement.

203.4 Montreal Agreement as part of airline-passenger contract and conditions of carriage.

203.5 Compliance as condition on operations in air transportation.

AUTHORITY: 49 U.S.C. 1301, 1324, 1371, 1372, 1373, 1374, 1377, 1378, 1381, 1386, 1387, 1388, 1389.

SOURCE: ER-1324, 48 FR 8044, Feb. 25, 1983, unless otherwise noted.

[¶ 10,061]

§ 203.1 Scope.

This part requires that certain U.S. and foreign direct air carriers waive the passenger liability limits and certain carrier defenses in the Warsaw Convention in accordance with the provisions of Agreement 18900, dated May 13, 1966, and provides that acceptance of authority for, or operations by the carrier in, air transportation shall be considered to act as such a waiver by that carrier.

[Docket No. 47939, 57 FR 40100, Sept. 2, 1992]

[¶ 10,062]

§ 203.2 Applicability.

This part applies to all direct U.S. and foreign direct air carriers, except for air taxi operators as defined in Part 298 of this chapter that (a) are not commuter air carriers, (b) do not participate in interline agreements, and (c) do not engage in foreign air transportation.

[¶ 10,063]

§ 203.3 Filing requirements for adherence to Montreal Agreement.

All direct U.S. and foreign air carriers shall have and maintain in effect and on file in the Department's Documentary Services Division (Docket 17325) on OST Form 4523 a signed counterpart to Agreement 18900, an agreement relating to liability limitations of the Warsaw Convention and Hague Protocol approved by CAB Order E-23680, dated May 13, 1966 (the Montreal Agreement), and a signed counterpart of any amendment or amendments to such Agreement that may be approved by the Department and to which the air carrier or foreign air carrier becomes a

party. U.S. air taxi operators registering under part 298 of this chapter and Canadian charter air taxi operators registering under part 294 of this chapter may comply with this requirement by filing completed OST Forms 4507 and 4523, respectively, with the Department's Office of Aviation Analysis. Copies of these forms can be obtained from the Office of Aviation Analysis, Regulatory Analysis Division.

[ER-1324, 48 FR 8044, Feb. 25, 1983, as amended by ER-1338, 48 FR 31013, July 6, 1983; Docket No. 47939, 57 FR 40100, Sept. 2, 1992]

[¶ 10,064]

§203.4 Montreal Agreement as part of airline-passenger contract and conditions of carriage.

(a) As required by the Montreal Agreement, carriers that are otherwise generally required to file tariffs shall file with the Department's Tariffs Division a tariff that includes the provisions of the counterpart to Agreement 18900.

(b) As further required by that Agreement, each participating carrier shall include the Agreement's terms as part of its conditions of carriage. The participating carrier shall give each of its passengers the notice required by the Montreal Agreement as provided in § 221.175 of this chapter.

(c) Participation in the Montreal Agreement, whether by signing the Agreement, filing a signed counterpart to it under § 203.3, or by operation of law under § 203.5, shall constitute a special agreement between the carrier and its passengers as a condition of carriage that a liability limit of not less than \$75,000 (U.S.) shall apply under Article 22(1) of the Warsaw Convention for passenger injury and death. Such participation also constitutes a waiver of the defense under Article 20(1) of the Convention that the carrier was not negligent.

(The reporting provisions contained in paragraph (a) were approved by the Office of Management and Budget under control number 3024-0064)

[ER-1324, 48 FR 8044, Feb. 25, 1983, as amended by ER-1338, 48 FR 31013, July 6, 1983; Docket No. 47939, 57 FR 40100, Sept. 2, 1992]

[¶ 10,065]

§ 203.5 Compliance as condition on operations in air transportation.

It shall be a condition on the authority of all direct U.S. and foreign carriers to operate in air transportation that they have and maintain in effect and on file with the Department a signed counterpart of Agreement 18900, and a tariff (for those carriers otherwise generally required to file tariffs) that includes its provisions, as required by this subpart. Notwith-

standing any failure to file that counterpart and such tariff, any such air carrier or foreign air carrier issued license authority (including exemptions) by the Department or operating in air transportation shall be deemed to have agreed to the provisions of Agreement 18900 as fully as if that air carrier or foreign air carrier had in fact filed a properly executed counterpart to that Agreement and tariff.

[Docket No. 47939, 57 FR 40100, Sept. 2, 1992]

[The next page is 5121.1

TABLE OF LIABILITY LIMITS*

Presumed Fault (with defences available)

Warsaw Convention (1929)	125 000 French gold francs per passenger	about U.S. \$12 500**
Hague Protocol (1955) in force	250 000 French gold francs per passenger	about U.S. \$25 000
Additional Montreal Protocol 1 (1975) not yet in force	Warsaw limits expressed in Special Drawing Rights (SDRs)	
Additional Montreal Protocol 2 (1975) not yet in force	Hague limits expressed in SDRs	
Italian Law No. 274 (1988) in force	100 000 SDRs per passenger	about U.S. \$153 000
United Kingdom Civil Aviation Authority licensing requirement	100 000 SDRs (on UK registered carriers) per passenger	about U.S. \$153 000
Japanese Initiative (1992) in force	Two tiered system. Only the portion over 100 000 SDRs is subject to presumed fault defences	over U.S. \$153 000
ECAC (1994) recommendation with deadline of June 1995	250 000 SDRs per passenger	about U.S. \$383 000
Australia (1994) draft legislation mandatory insurance limits	260 000 SDRs per passenger	about U.S. \$398 000

Strict Liability

Montreal Agreement (1966) in force	strict liability up to \$75 000 USD per passenger	up to U.S. \$75 000
Guatemala City Protocol (1971) not yet in force	1 500 000 French gold francs per passenger	up to U.S. \$153 000
Additional Montreal Protocol 3 (1975) not yet in force	Guatemala City limits expressed in SDRs	
Japanese Initiative (1992) in force	Two tiered system. Only the portion below 100 000 SDRs is subject to strict liability	up to U.S. \$153 000
EU (1995) draft legislation	strict liability (?) up to 600 000 ECUs per passenger	up to U.S. 786 000

* This is not an exhaustive list.

** The exchange rates are from the Royal Bank of Canada, 25 May 1995.

BACKGROUND AND OBJECTIVES OF THE AIRLINE LIABILITY CONFERENCE

The Convention for the Unification of Certain Rules Relating to International Transportation by Air (the Warsaw Convention or the Convention) was signed in 1929. The United States became a party in 1934. Currently, about 130 countries are parties to the Convention.

The Warsaw Convention sets uniform rules **governing** the relationship between air carriers and users (both passengers and shippers) of international air transportation, including their respective rights and obligations. It makes transportation documents, such as passenger tickets, baggage checks, and air waybills, **uniform**.

Included in the uniform rules are those that establish air carrier liability for death or injury from an accident during carriage by air. Article 22 of the Convention limits the liability of the air carrier for such accidents to about US \$10,000, absent a finding of willful misconduct. Article 20 **allows** carriers to avoid liability by showing that they took all necessary measures to avoid damage or that it was impossible to take such measures (hereafter the "defense of **non-negligence**").

The Hague Protocol of 1955 doubled the Convention's passenger liability limit, but the United States never ratified this Protocol. Indeed, the United States was so dissatisfied with the modest increase in the limit contained in The Hague Protocol that it deposited a formal notice of denunciation of the underlying Warsaw Convention. In 1966, in conjunction with the U.S. Government's withdrawal of its notice of denunciation, the carriers then serving the United States agreed to adopt a special contract with their passengers, as authorized by Article 22 of the Warsaw Convention, for transportation to, through, or from the United States. The agreement, known as the Montreal inter-carrier agreement, increased the carriers' liability limits to US \$75,000. Further, for claims within that limit, the carriers **agreed** that they would not assert a defense of non-negligence under Article 20 of the Convention. This agreement was originally intended as a temporary measure pending revisions to the Warsaw Convention, but it remains in force today.

The Guatemala City Protocol of 1971 proposed major changes to the Convention's passenger liability regime. These changes were then incorporated into Montreal Protocol No. 3 with a new limit of liability expressed 'in Special Drawing Rights (SDR). The changes eliminated the carrier's defense of non-negligence under Article 20. In return, the Protocol made the new liability limit of SDR 100,000 (about US \$150,000) unbreakable. This new limit could be increased periodically. Further, Article 22 of the Convention was amended by deleting the sentence specifically authorizing a special contract with the passenger to establish a higher limit. A new Article 35A was added to allow each party to the Convention to set up within its territory a system to supplement the compensation payable to claimants. Among other changes, the Protocol also amended the jurisdictional provisions of Article 28 to permit claimants to bring

suit against a carrier in the country of the passenger's domicile or permanent residence, provided the carrier has "an establishment" there (such as a general sales agent).

The United States Government has tried to ratify Montreal Protocol Nos. 3 and 4 (No. 4 establishes new cargo liability rules) and to set up a supplemental compensation system consistent with Article 35A of the new Guatemala City/Montreal Protocol regime. However, Montreal Protocol Nos. 3 and 4 have failed to get necessary approval by the United States Senate. The delay in U.S. ratification and the entry into force of the Montreal Protocols has put significant pressure upon the Warsaw system itself. Many countries today consider the current liability limits, even as increased by the Montreal intercarrier agreement, to be grossly inadequate under their standards of compensation.

The effectiveness of the liability limit has eroded significantly in recent years. The low limits force claimants to resort to expensive and lengthy litigation to establish willful misconduct on the part of the carrier to break the limit. Courts in the United States have been increasingly willing to **find** willful misconduct. This litigation has become a heavy burden upon both claimants and carriers, and in many cases insurers have paid unlimited damages after incurring considerable costs in a futile attempt to defend the limit. This in turn benefits neither airlines nor their passengers, and in many cases carriers have settled claims for amounts in excess of the limit.

Unilateral plans to address the inadequacy of the Warsaw limits have emerged. The following summary of these plans, however, underscores the need for an international consensus on how the Convention should be modernized.

In 1992, Japanese-flag **airlines** established a new special contract under Article 22 of the Convention. In effect, Japanese carriers have accepted unlimited liability, but recovery above SDR 100,000 (about US \$150,000) is subject to the defense of non-negligence under Article 20 of the Convention. Australia has enacted legislation that will increase the limits of liability of Australian air carriers to approximately SDR 260,000 (about US \$390,000) per passenger.

Initiatives are also under way in Europe to address airline liability under the Warsaw system. In July 1988, Italy imposed a limit of SDR 100,000 (about US **\$150,000**) for death of, or injury to, a passenger. This limit applies for Italian air carriers anywhere in the world and for foreign carriers if their point of departure or destination or a stopover is in Italy. In 1992, the United Kingdom required carriers licensed by its Civil Aviation Authority to establish special contracts increasing the carrier's limitation of liability to SDR 100,000.

In June 1994, the European Civil Aviation Conference (**ECAC**) adopted Recommendation **16-1**, which urges its Member States to update certain elements of the international air carrier liability system. ECAC recommends that Member States encourage air carriers operating to, from or via the territory of ECAC Member States to participate in a European intercarrier agreement setting up a new special contract. Recommendation 16-1 advises air carriers that any such agreement should contain liability limits of at least SDR 250,000 (about US \$380,000).

Such an agreement should also provide for the speedy settlement of claims, up-front payments to claimants, and mechanisms to safeguard the limits against inflationary erosion. Finally, the Commission of the European Union has published a Preliminary Proposal for a Council Regulation on air carrier liability that would require carriers serving a point in the Union to adopt liability limits of at least ECU 600,000 (about US \$750,000).

In 1993, IATA requested appropriate authorizations and approvals from both the European Commission and the U.S. Department of Transportation to hold intercarrier discussions on the passenger-liability limits of the Warsaw Convention. The discussions were approved by the Commission in September 1993 and by the U.S. Department of Transportation in February 1995.

Carriers must act now to improve the compensation available under the Convention if the Warsaw system is to continue to be viable. The current Warsaw regime is widely regarded as unsatisfactory in the United States and elsewhere, and passenger groups have called for its prompt reform to increase dramatically compensation available in air disasters. The U.S. Department of Transportation Order granting **IATA's** application for approval of intercarrier discussions of liability limits includes guidelines regarding the compensation that should be available for international trips ticketed in the United States, and to U.S. citizens and permanent residents. These guidelines are intended to secure benefits like those available to domestic passengers under the national laws of the United States. The supplemental compensation plan proposed to accompany U.S. ratification of Montreal Protocol No. 3 had sought the same objective.

Continued U.S. adherence to the Warsaw Convention may be jeopardized if the Airline Liability Conference fails to reform compensation available under the Convention. As noted, the United States deposited a **formal** notice of denunciation of the Convention in 1965, but withdrew its notice when the airlines adopted the Montreal intercarrier agreement. Now, thirty years later, the industry may face a comparable challenge.

U.S. withdrawal from the Warsaw system would have severe consequences for international air carriers and threaten the viability of the treaty system itself. Lawsuits could be brought in the United States for accidents occurring anywhere in the world, particularly those involving U.S.-manufactured aircraft. This would subject airlines to the uncertainties of the U.S. legal system, including exposure to uninsurable punitive damages. The imposition of *ad hoc* penalties on international airlines for conduct deemed unsafe in U.S. courts could erode the authority of aeronautical authorities and ultimately undermine the integrity and independence of the international airworthiness system that now ensures the safety of international air transportation.

Ultimately, the objective of the Airline Liability Conference is to preserve the Warsaw system itself. This objective can be accomplished only by increasing the compensation available to international passengers in a manner consistent with the policies of various concerned governments and the expectations of their citizens. The Conference will consider in principle

proposals for new intercarrier agreements, including agreements establishing new special contracts under Article 22 of the Convention, to increase the compensation available to passengers up to a level consistent with the policies of concerned governments. The Conference will also discuss an agreement to set up a Supplemental Compensation Plan for the United States. Finally, the Conference will discuss any changes to interline agreements, passenger notices or other procedures that proposed agreements discussed at the Conference may require.

ISSUE I: DISCUSSION OF NEW SPECIAL CONTRACTS

New special contracts to increase air carriers' liability under the Warsaw Convention are required to preserve the Convention. The simplest and most elegant solution would be for all international airlines to agree to adopt for all international services a single new special contract acceptable to all concerned aeronautical authorities. This contract would establish a liability limit that would serve as a minimum limit of liability applicable to all carriers party to a Warsaw contract of carriage, in the same fashion as the current limits of liability set forth in the Convention. Individual carriers would nonetheless be able, through special contracts with passengers, to set unilaterally higher limits of liability, or waive those limits altogether, for their own on-line services.

If that approach is not practical, carriers must consider a more modest -- but necessarily more complicated -- system of different special contracts. Since the Warsaw Convention contemplates a single contract of transportation for the entire journey, the question of the effect of intercarrier agreements establishing new special contracts on successive carriers not party to those agreements must be addressed. Further, any intercarrier agreement to establish a new special contract must also allow carriers to implement a system of different special contracts without conflict or ambiguity in their application.

If governments require different special contracts, carriers must agree on a framework for special contracts that preserves that diversity within the Convention's uniform rules. The approach reflected in the Guatemala City Protocol contemplates a framework whereby a supplemental compensation system is established within the territory of a party to the Convention that is satisfactory to that party. In practice, such a compensation system would apply to international journeys (including round trip carriage) ticketed in and/or originating in the territory of that party. This "country-of-origin" approach would ensure that compensation made available under the Convention is consistent with the policies of that party.

The "country-of-origin" approach, if applied to Article 22, would prevent overlapping application of different special contracts as would occur with the "to, through, or from" approach of both the Montreal intercarrier agreement and the ECAC Recommendation. The U.S. Department of Transportation guidelines for the Airline Liability Conference adopt a country-of-origin approach, in that they apply principally to international journeys ticketed in the United States. The guidelines express no view on the appropriate level of compensation that should be available to foreign citizens purchasing tickets outside the United States, even if their trip is to or through the United States.

If, on the other hand, the Conference agrees to consider special contracts based on the "to, through or from" approach reflected in the Montreal intercarrier agreement and the ECAC Recommendation, it should reconcile the application of special contracts to international journeys that may be subject to multiple special contracts (such as between the United States and ECAC Member States).

The Conference should consider, and take note of, the desirability of developing recommendations for special contracts that nonetheless would allow individual airlines to maintain higher limits of liability, or a waiver of limits altogether, for their own services.

ISSUE II: DISCUSSION OF INCREASED LIMITS OF LIABILITY UNDER THE CONVENTION

The success of the Airline Liability Conference hinges on its ability to reach agreement on a new, higher limit of liability for passenger death or injury. Various governments have offered different proposals for new limits of liability. The SDR 100,000 (about US \$150,000) limit (proposed in Montreal Protocol No. 3) is reflected in both the Italian and U.K. legislation. The ECAC Recommendation and the new Australian legislation would raise the limit to SDR 250,000 (about US \$380,000) and SDR 260,000 (about US \$390,000) respectively. The draft regulation of the European Commission would require compensation up to ECU 600,000 per passenger (about US \$750,000). The Japanese initiative waives the limit altogether.

The United States continues to require adherence to the Montreal intercarrier agreement limit of US \$75,000 and has supported ratification of Montreal Protocol No. 3 with its limit of SDR 100,000 (about US \$150,000). It has recently become clear, however, that this relatively low limit made attempts to **secure** U.S. ratification of Montreal Protocol No. 3 considerably more difficult. Accordingly, the Clinton administration has indicated that, at a minimum, the value of that limit lost to **inflation** should be restored. Therefore the U.S. Government now favors a limit in the SDR **300,000-to-400,000** range (about US **\$450,000-\$600,000**), with an appropriate mechanism to adjust the limit to reflect the effects of future inflation. In addition, the United States expects that there will be a supplemental mechanism to pay provable damages above the carrier's limit of liability.

The Conference should address what new limit on carrier liability is likely to be acceptable to passengers and governments of the parties to the Warsaw Convention. The Conference should also consider how uniformity of this limit should be maintained for successive carriage under the Convention, without prejudice to the right of any airline to maintain a higher limit, or waive the limit altogether, with respect to carriage on its own services.

ISSUE III: DISCUSSION OF
CONDITIONS OF, AND DEFENSES TO,
LIABILITY

The Warsaw Convention establishes a limited liability regime on the basis of presumed, but rebuttable, fault. Specifically, Article 20 provides: "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." Many of the proposals under consideration at the Airline Liability Conference include a limited or total waiver of this defense of non-negligence.

Specifically, the Montreal intercarrier agreement waives the Article 20 defense up to the carrier's liability limit of US \$75,000. The Japanese special contract waives the Article 20 defense up to the sum of SDR 100,000 (about US **\$150,000**), exclusive of costs. While Article 22 of the Convention, which authorizes a special contract, is silent on the question of waiving the Article 20 defense, the right of carriers to waive the defense has been clearly established by the practice of carriers under the Convention. Further, the Guatemala City Protocol would have abolished the Article 20 defense for passenger death or injury.

The ECAC Recommendation to increase the limit to SDR 250,000 (about US \$380,000) does not waive the Article 20 defense. It does, however, contemplate an advance lump-sum payment of up to SDR 12,500 (about US \$19,000) in the case of injury and SDR **25,000** (about US \$38,000) in the case of death, which is not returnable under any circumstances. Similarly, the European Commission's proposed regulation contemplates a non-returnable lump-sum payment of ECU 60,000 (about US \$75,000). These advance lump-sum payments **are**, in effect, a waiver of the Article 20 defense to the extent of the payment. In this regard, officials of the European Commission have expressed support for a waiver of the Article 20 defense, up to SDR 100,000 or higher.

The United States has long been a proponent of strict liability for international air transportation, consistent with the operation of the Montreal intercarrier agreement and the intent of the Guatemala City Protocol. Its recent experience with acts of violence against civil aircraft by persons effectively immune from judicial process has **confirmed** its support of this principle. The Clinton administration is prepared to continue to support continued limitation of liability under the Convention (supplemented by a compensation plan), but only in exchange for the benefits of a strict liability system. Thus, the U.S. Department of Transportation favors, and may even require, a waiver of the Article 20 defense up to the carrier's liability limit in any new special contract.

On the other hand, there are compelling reasons why an air carrier should not be liable (beyond a reasonable limit) for incidents leading to injury or death over which it has absolutely no control or ability to avoid or prevent. Accordingly, the Conference may consider a three-tier system -- *i.e.*, strict air carrier liability up to a certain level, complemented by air carrier liability subject to the Article 20 defense of non-negligence up to a higher limit, with the

carrier's limits supplemented by a compensation plan. The reaction of U.S. authorities to such a system, however, is uncertain.

It should be recognized that the carrier's defense under Article 21 based upon the negligence of the injured person, and its right of recourse against any other person, would be preserved.

ISSUE IV: DISCUSSION OF AGREEMENT
TO ESTABLISH A SUPPLEMENTAL
COMPENSATION PLAN

The United States Government has consistently stated that, as a matter of national policy, full recovery of all provable damages must be available for passengers in international air transportation. Passengers in U.S. domestic air transportation can obtain such recoveries under national laws. The guidelines in the U.S. Department of Transportation order approving the Airline Liability Conference require that any intercarrier agreement offer compensatory damages consistent with those available under domestic law.

The U.S. Government carefully considered this objective in its proposal to ratify Montreal Protocol No. 3. That proposal included a supplemental compensation plan, as contemplated by proposed Article 35A of the Convention, that would have provided unlimited recovery of provable, compensatory damages above the carrier's limit of liability. The Bush administration transmitted that supplemental compensation **plan** to the U.S. Senate in 1990 in the form of a draft intercarrier agreement establishing a supplemental compensation plan. In 1992, it was resubmitted to the Congress without major change in the form of proposed legislation, but which nonetheless required intercarrier agreements to effect both its implementation and administration.

The U.S. goals in setting up a supplemental compensation plan are to assure claimants of an immediate payment based on strict liability to enable them to meet their immediate obligations and to guarantee that the plan will meet the remainder of their provable economic and noneconomic injury.

Under the guidelines set forth in the U.S. DOT order, carriers will be required to set up a compensation system to supplement the damages recoverable from the airline beyond the revised limitation of liability that may be agreed to at the Airline Liability Conference. All passengers purchasing tickets and/or beginning their trip in the United States must be eligible to recover under the plan. U.S. citizens and permanent residents **travelling** in international air transportation would also be eligible to recover under the plan, regardless of their place of ticketing or departure. These features were included in the Supplemental Compensation Plan that was included with Senate consideration of Montreal Protocol No. 3.

In essence, the new plan, like its predecessors, would be an intercarrier agreement to retain a contractor with the capacity to compensate claimants over and above the carrier's limit of liability under any new special contract. The new plan's coverage differs from that of its predecessor in that the carrier's limit remains breakable. Thus, claimants would recover against the plan if they voluntarily elect alternative recovery of their provable damages instead of pursuing further action against the carrier. Under that election, the claimant would forego any other potential claims against any other party, including the carrier, in respect of any potential liability above its limitation arising from a claim of willful misconduct.

The new plan would be funded by passenger contributions collected by the airlines on all tickets for international trips sold in the United States and/or beginning in the United States. The amount of contribution will be negotiated with the contractor selected to provide the required coverage and shown as a surcharge in the carrier's tariffs. The surcharge would be included in the price of the ticket for air transportation advertised and sold in the United States.

It is expected that the intercarrier agreement establishing a supplemental compensation plan would be incorporated ultimately in regulations of the U.S. DOT, similar to DOT's regulation on the current Montreal intercarrier agreement. Under those new regulations, all airlines holding or receiving authority from the U.S. DOT would be required to participate in the plan. The plan is an essential feature of the compensation system that will be required to meet the policy goals of the United States Government.

REPORT OF THE AIRLINE
LIABILITY CONFERENCE

At the conclusion of the Airline Liability Conference, the Chair, with the assistance of the IATA Secretariat and the IATA Legal Advisory Group, will prepare a report of the Conference, taking note of the views of the Conference on the issues that were discussed, and the presentations of the participants. The report, which must be filed with the U.S. Department of Transportation, will include summaries of the discussions and any proposed agreements contemplated by the discussions. Thereafter, the Secretariat, with the guidance and approval of the Legal Advisory Group, will prepare the documentation necessary to reflect the recommendations of the Conference on the issues under consideration, in consultation with regional associations and airlines. Such documentation will be submitted to the airlines and, as necessary, to the U.S. DOT and the aeronautical authorities of other concerned governments.



International Air Transport Association

IATA Building, 2000 Peel Street, Montreal, Quebec, Canada H3A 2R4
Telephone: (514) 844-6311 Fax: (514) 844-5286 Telex: 05-267627 Cables: IATA MONTREAL

Memorandum

TO: Registered Participants, Airline Liability Conference
FROM: General Counsel and Corporate Secretary
DATE: 19 June 1995
SUBJECT: **IATA Airline Liability Conference - Documentation, Part II**

With reference to my memorandum dated 26 May 1995, please find attached Part II of the Documentation for the above Conference. An information sheet is to be found as Doc. 1 of the Part II.

Please note that the working papers attached hereto have been identified as relating to Documentation Part II.

Lorne S. Clark
General Counsel & Corporate Secretary



INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

DOCUMENTATION, PART II

**19-27 June 1995
Washington, D.C.**

INFO SHEET

AIRLINE LIABILITY CONFERENCE

Washington, D.C.

19-27 June 1995

Opening of Conference

1000 hours
June 19, 1995

Working Hours

Proposed working hours for the Airline Liability Conference ("ALC"):

0900-1 200 hours
1400-1 730 hours

Plenary Session is expected to meet:

1000 - 1200 hours
1400 - 1630 hours

Conference Room

The ALC will take place in the Dolley Madison Ballroom located on the second floor of The Madison Hotel (the "Hotel").

IATA ALC Administration/Documentation Desk

An Administration/Documentation Desk will be located outside the **IATA** Office, Drawing Room V, on the second floor near the Dolley Madison Ballroom.

Registration

Registration will take place from Sunday, June **18th**, 1730 - 2000 hours at the ALC Administration Desk. Late registration will take place at the same location from 0830 - 1100 hours daily. Identification badges will be issued only upon registration.

Working Groups - Meeting Rooms

There will be meeting rooms located on the second floor of the Hotel provided for Working Groups to convene throughout the duration of the ALC. These are:

19 June	The Boardroom
20-21 June	Mount Vernon Room, Salon A
22-26 June	The Boardroom
19-26 June	The Arlington Room

Attendance List

An Attendance List will be distributed after the opening of the ALC. Delegates arriving later should register with the ALC Administration Desk to ensure that their participation is noted and that they receive an identification badge. **For security purposes, only duly registered delegates wearing the identification badge will be admitted into the meeting areas.**

Hotel Telephones and Telefaxes

A number of telephone cabins for outgoing calls are located on the second floor. The Hotel telephone number is (202) 862-1600 and its telefax number is (202) 785-1255. Delegates expecting phone calls or telefaxes should inform the Hotel operator.

Business Centre

There is a Business Centre (the "Centre") located on the second floor in front of the guest elevators. It is open from 0800-1800 Monday to Friday. The Centre provides secretarial services including typing, photocopying, telefax, and courier service. The telefax of the Centre is the same as for the Hotel - (202) 785-1255. All outgoing telefaxes should be processed with the Centre or with the Hotel Reception Desk directly.

Telex Arrangements

SITA telex facilities are available from the ALC Administration Desk. Forms for drafting telex messages can be obtained from the ALC Administration Desk to whom they should be returned after completion. The telex address code of the ALC is "IATLGXB", for the attention of the Delegate concerned.

Bank and Foreign Exchange

NationsBank is located on Fifteenth Street, directly across from the Hotel.

Smoking Area

All conference rooms and offices are **non-smoking areas**.

Restaurants & Lounges

The Hotel has three restaurants:

The Montpelier, The Retreat, and The Lobby Lounge.

For further information as to other restaurants in the area, please refer to your hotel copy of Where Magazine.

Coffee and Beverages

Coffee and beverages are commercially available at The Retreat or through room service.

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

Washington, 19-23 June 1995

DOCUMENTATION, PART II

TABLE OF CONTENTS

	<u>Working Paper No.</u>
Chairman's Opening Remarks	Item 2, WP 1 - Doc. II
AITAL General Remarks - 25 May 1995 and AITAL General Remarks - Revised - 19 June 1995	Item 7, WP 1 - Doc. II
OAA Position Statement - 19 June 1995	Item 7, WP 2 - Doc. II
ECAC - Working Group Statement on Intra-European Air Transport Policy - 1 June 1995	Item 7, WP 3 - Doc. II
ICC Position Statement - 26 May 1995	Item 7, WP 4 - Doc. II
The American Association for Families of KAL 007 Victims - Position Paper - 30 March 1995	Item 7, WP 5 - Doc. II
Question and Answer Paper and index - with corrections	Item 7, WP 6 - Doc. II
Draft Supplemental Compensation Plan & Commentary	Item 7, WP 7 - Doc. II
Glossary of Terms for the Airline Liability Conference	Item 7, WP 8 - Doc. II
ERA - Preliminary Statement	Item 7, WP 9 - Doc. II
Possible Elements of an Inter-Carrier Agreement - Submitted by Air Mauritius	Item 7, WP 10 - Doc. II
Faturec Position Statement	Item 7, WP 11 - Doc. II
Recommendations of the IATA Legal Advisory Group - 20 June 1995	Item 7, WP 12 - Doc. II

	<u>Working Paper No.</u>
EC Position Statement	Item 7, WP 13 - Doc. II
AFRAA Submission	Item 7, WP 14 - Doc. II
LOT Position Statement	Item 7, WP 15 - Doc. II
IACA Opening Statement	Item 7, WP 16 - Doc. II
ATA Position Statement	Item 7, WP 17 - Doc. II
Objectives for the Airline Liability Conference & the role of a Supplemental Compensation Plan	Item 7, WP 18 - Doc. II
Comparison between the Japanese Initiative and the Proposed Supplemental Compensation Plan	Item 7, WP 19 - Doc. II
Note on the Effects on Insurance Costs of Increased Liability Limits	Item 7, WP 20 - Doc. II
Opening Statement of Japan Airlines	Item 7, WP 21 - Doc. II
Report on the Current Status of the Liability System - Civil Air Law Research Institute, Aviation Development Foundation, Japan, May 1992	Item 7, WP 22 - Doc. II
ICAO Position Statement	Item 7, WP 23 - Doc. II
Proposal for an Enhanced Liability Package - Air Mauritius and Air New Zealand	Item 7, WP 24 - Doc. II
AFRAA Submission - No. 2	Item 7, WP 25 - Doc. II
China Airlines - Comments	Item 7, WP 26 - Doc. II
AEA Opening Statement	Item 7, WP 27, Doc. II
Principles on the Proposed Supplemental Compensation Plan - LACSA	Item 7, WP 28, Doc. II
EC Commission Remarks	Item 7, WP 29, Doc. II
Issues that Warrant Further Discussion by the Conference and Consideration by the Airlines - AVIANCA	Item 7, WP 30, Doc. II

AFRAA Submission No. 3

TAP - Air Portugal - Comments

Suggestions on Improving the Air Mauritius Proposal
- Air Malta

Working Paper No.

Item 7, WP 31, Doc. II

Item 7, WP 32 - Doc. II

Item 7, WP 33 - Doc. II



Airline Liability Conference Washington, 19-27 June 1995

Chairman's Opening Remarks

In welcoming you to Washington, let me echo the views just stated by the Chairman of the Legal Advisory Group, Cameron DesBois. We have in the days before us a "window of opportunity" for representatives of our industry to take control and shape a significant factor impacting on the business of providing international air transportation - the liability issue.

Let's quickly take stock of where we are, and how we got here today. I am going to assume that all Delegates have read the US Immunity Order and other background material prepared for this Conference. Nevertheless, it will probably be helpful to have a formal explanation of the relevance and impact of the US authorities' decision on our deliberations. Thus I will be asking IATA's Washington Counsel to provide this important information to you.

So, where are we?

Many Governments throughout the world have made it abundantly clear that they are seriously dissatisfied with the rights accorded international passengers under the existing airline liability regime, varied as it currently is in different parts of the globe.

Despite this ever growing dissatisfaction, Governments themselves (and ICAO) have been unable to bring into effect acceptable reforms to the existing global treaty-based system.

Thus, they are now offering the air carriers what could be a last chance to preserve the benefits of the universal system, while modernising the liability limits and related rules, before Governments act, either individually or regionally, to try to ensure adequate protection for their citizens as they see fit.

There is a significant challenge before us here - and let me say I firmly believe all of us have a responsibility to represent not only the entity that sent us to Washington, but the interests of the industry at large. Much as members of a "constituent assembly" or a constitution-writing group, we have to look beyond narrow parochial interests and seize the moment to serve our carriers, the industry at large, and the travelling public.

The challenge is to find and agree on a **balanced** solution to the liability issues which -

- harmonizes airline tariff conditions, contracting practices, passenger notifications and liability administration throughout the world, while ensuring the avoidance of **punitive damages**;
- makes clear that airlines, as responsible corporate citizens and business enterprises, accept a reasonable level of individual carrier responsibility for compensating passengers killed or injured in international air operations;
- establishes the conditions under which compensatory responsibility may be shifted from individual airlines to the passenger, or to compensation mechanisms funded outside the ticket pricing structure;
- addresses the question of the immediate needs of victims of an accident and their families, for funeral and medical expenses and short-term financial support; and
- provides for recovery of compensation in amounts consistent with prevailing practice in the states where they are resident.

Ladies and Gentlemen, if we are not able to accomplish this in an air carrier forum, Governments **are** going to **impose** a solution, and they are likely to do it sooner rather than later! If we take a careful look around the world, we can see what is happening: individual and regional proposals directed to national and regional agendas. One major effect of these activities is **the disintegration of the Warsaw System**.

The collapse of Warsaw, and let us be frank, that is what we are witnessing today, would mean exposing airlines to:

- ◆ varying and often conflicting regimes in different parts of the world
- ◆ heavy increases in insurance coverage
- ◆ unlimited liability, without specific defences
- ◆ punitive damages in certain jurisdictions

Simply put, **this is an unacceptable option**.

If there is one over-riding **unifying** factor at this conference, it is the need for preservation of the Warsaw system. Despite its deficiencies and inadequacies, it remains an extremely useful instrumentality!

Now I recognize that many carriers have serious concerns about the question of insurance, and we will of course have to address these. I have asked some of IATA's insurance experts to be available during the Conference to talk about this, and I see that several delegations in fact include people very knowledgeable in this area.

Let me now quickly share with you a very few slides setting out what the world we now live in looks like:

- Slide # 1* CURRENT LIABILITY LIMITS PER PASSENGER
- Slide # 2* CURRENT LIABILITY LIMITS IN U.S. DOLLARS
- Slide # 3* INFLATIONARY EFFECT ON 1966 MONTREAL
AGREEMENT AND 1975 MAP 3
- Slide # 4* SIGNIFICANT US AWARDS SINCE 1975
- Slide # 5* PROPOSED LIMITS
- Slide # 6* AIR CARRIERS' LIABILITY IN ABSENCE OF WARSAW
SYSTEM

I look forward to working with all of you closely.



Current Liability Limits per Passenger

◆ 1929 Warsaw Convention	125,000 French gold francs
◆ 1955 Hague Protocol	250,000 French gold francs
◆ 1966 Montreal Agreement	U.S. \$75,000
◆ 1988 Italian Law No. 274	SDRs 100,000
◆ 1992 UK requirement	SDRs 100,000 (on UK registered carriers)
◆ 1992 Japanese Initiative	Unlimited ¹



Current Liability Limits in U.S. Dollars per Passenger

◆ 1929 Warsaw Convention	\$12,500 approximately
◆ 1955 Hague Protocol	\$25,000 approximately
◆ 1966 Montreal Agreement	\$75,000
◆ 1988 Italian Law No. 274	\$153,000 approximately
◆ 1992 UK requirement	\$153,000 approximately
◆ 1992 Japanese Initiative	Unlimited



1994 Value of Limits: 1966 Montreal Agreement 1975 Montreal Aviation Protocol 3

◆ 1966 Montreal Agreement	1966: U.S. \$75,000 1994: U.S. \$352,905*
◆ 1975 Montreal Protocol No. 3	1975: SDRs 100,000 1994: U.S. \$364,260*

Figures provided by the IMF



Significant U.S. Awards Since 1975

◆ 1983 Korean Airlines 007 Disaster 1993 Award	\$3,500,000
◆ 1985 Delta Airlines Dallas/Ft. Worth Disaster 1990 Award	\$6,431,615
◆ 1988 Pan-Am Lockerbie Disaster 1995 Award	\$19,059,040
◆ 1989 United Airlines Sioux City Disaster 1994 Award	\$9,400,000



Proposed Limits

◆ 1975 - Montreal Protocol

SDRs 100,000
U.S. \$153,000 approximately

◆ 1994 - Australia

SDRs 260,000
U.S. \$398,000 approximately

◆ 1994 - ECAC

SDRs 250,000
U.S. \$383,000 approximately

◆ 1995 - EU Commission

ECUs 600,000
U.S. \$786,000 approximately



Air Carriers' Liability in Absence of a Warsaw Convention System

**Unlimited Individual Carrier Liability
INCLUDING
Punitive Damages**

AITAL GENERAL REMARKS

25 May 1995

1. There is no dispute that the current Warsaw/The Hague limits are *extremely* low and we all accept that they must be increased to reasonable limits.
2. When discussing new limits we must also bear in mind that they will have a direct impact on civil liability insurance premiums and that such increase will undoubtedly have greater effect on the small carriers, from Latin America and other regions, than on U.S. airlines and megacartiers in general.
3. The U.S. position to establish unlimited liability will dominate the Washington Conference. In fact, the granting of antitrust immunity gives the U.S. extraordinary decision-making power and therefore carriers from other parts of the world will be under inferior conditions. It is worth mentioning that the European Union deemed unnecessary to grant similar antitrust immunity when requested in Europe.
4. If it is true that the current Montreal Protocol Number 3 limits should be higher today as a consequence of currency devaluations, it should be determined whether the airlines' fares and revenues have increased likewise. Probably they have not. This factor has also a negative incidence on less developed carriers. Perhaps **IATA** could submit information on the matter during the Washington meeting.
5. Even though the airlines are fully responsible by law for damages inflicted on passengers, it is also true that the latter are not naive and they should be aware of the risk they run when using air transportation. Therefore there should be a kind of auto insurance or flight insurance to be individually contracted in such a way that the economic burden of the liability should not be placed entirely on the airlines.
6. A way to accomplish it would be by passenger contribution to a supplementary compensation fund through a surcharge in airline tickets. This surcharge should be expressly entered in the ticket with a particular code to avoid the risk that the companies may fall in the temptation to absorb it within their own costs for commercial competitive purposes.

IATA CONFERENCE ON LIABILITY LIMITS

AITAL General Remarks

Above all, I wish to thank IATA for this opportunity for AITAL, in its capacity as regional organization, to deliver some general remarks on behalf of its 27 member airlines, regarding the delicate problem of liability in international air transportation.

Basically, we all share the need to update the Warsaw-The Hague limits. We also share the need to preserve the Warsaw system and its universality.

We believe that the present limits must be reasonably increased. In order to concretely define what is reasonable, we think the following circumstances must be carefully borne in mind.

1. Documents show a series of figures on how the various limits of Warsaw-The Hague, the Guatemala Protocol, the Montreal Protocols, and the Montreal Agreement should be today in terms of currency constant values. But these same calculations had not been made with regard to airline

Aerolíneas Argentinas
Aeroméxico
Aeroperú
Avensa
Avianca
Aviateca
Copa
Cubana de Aviación
Ecuatoriana de Aviación
Lacsa
Ladeco
Lan Chile
Líneas Aéreas Paraguayas
Línea Aeropostal Venezolana
Lloyd Aéreo Boliviano
Mexicana de Aviación
Nica
Pluna
Saeta
Sahsa
Sam
Tsa
Vasp
Viasa



revenues. However, the IATA General Director, in his speech during the celebration of the 50th Anniversary of the Organization this past April in Havana, clearly said that in real terms, rates are 68% lower today than 20 years ago. We thus believe that there should be some relationship between the increment in liability limits and airlines' unit revenues in real terms.

2. The Guatemala and Montreal Protocols, along with many national legislations, have accepted that contractual liability be governed by the principle of strict liability, versus the classical principle of subjective liability, that is, where liability depends on the airline's fault. But strict liability has a basic set-off which is an economic limit. The concept of an unlimited strict liability would then be a gross contradiction. That is why we do not agree with the basic proposal submitted by the United States under the February 22/95 DOT ORDER.

On the other hand, liability limits are common in many public services rendered by the state. I don't know if this is an exorbitant privilege of the state, but air



@

transportation should have a liability limit when, according to many legislations, it is an essential public service, although operated by private companies.

3. Evidently, the 1929 original Warsaw limit was inspired by a wish to protect a weak and risky industry. I would say this industry is no longer as risky, but I doubt that it has become a strong industry, given its lack of stability, its highly significant losses, its very marginal profits, if any, and its direct dependence on an enormous series of exogenous factors such as war and peace, economic development or recession, etc., etc. Of course every industry is subject to these factors, but, ours is especially vulnerable.

4. Although it is a basic principle that everybody must be accountable for their acts or omissions, today's passenger is a responsible person who knows -or must know- the risks of the air, regardless of how remote they may be. Furthermore, passengers are treated on an equal-footing, according to the general conditions of carriage. If we had the case, for example, of a mean millionaire who travels at a super-apex rate, and seated beside him is a poor immigrant, it wouldn't quite make sense to indemnify the former with an astronomic amount and the latter with



a low one. That is why we believe that passengers must share part of the aviation risk. A supplemental compensation plan might encompass this philosophy: The need for the aviation risk to be somehow shared between the airline and the passengers.

5. The catastrophic nature of most aviation accidents implies a potential for outrageous indemnifications, and therefore a few catastrophic accidents occurring within a short period, can jeopardize the aviation insurance industry, already undergoing a serious crisis and thus the stability itself of air transportation.

6. Liability insurance costs represent a significant slice of our operation costs, at a time when the general survival trend of the industry is to operate at the lowest possible costs. This leads to the very delicate subject of the potential impact that the liability limits you might approve in this meeting may bear on the corresponding insurance costs. Obviously, this aspect varies from company to company, depending mainly on the volume of passengers carried and on their specific security records. But it does seem inevitable that very high liability limits will have a direct impact on insurance costs.



7. Regarding the very particular position of the United States, we believe that the ideal would be to revive the old Supplemental Compensation Plan devised by IATA many years ago, when the U.S. Senate was expected to approve Montreal Protocol No. 3. This plan was accepted by the industry and many companies signed it, but it was not enforced because the United States never ratified Protocol No. 3. The April 21/95 draft that IATA distributed, seems to be acceptable, subject, of course, to a careful review thereof.

At that time, the idea was to have passengers pay an additional rate at the time of purchasing their tickets to/from the U.S. We believe that it is imperative to preserve this principle, because, as I already said, it implies some kind of passengers' participation in the aviation risk.

And to avoid the temptation of including such additional rate in the airfares for competition reasons, we may think of a system whereby such special rate is expressly detailed on the tickets.

8. We fully agree that we must try our best to reduce lawsuits but this can be extremely difficult, because we



are not talking about fixed indemnification amounts but about indemnification for proved damage, which means that, in the end, only judges have the last word. And I wonder if litigation attorneys, especially in the United States, who usually take a significant part of the indemnification do not contribute to promote lawsuits.

From this standpoint, we do not **quite** agree with ECAC (European Civil Aviation Commission), whose idea is to have a part of the indemnification paid immediately, since, instead of fostering out-of-court settlements, it may lead to the opposite situation, that is to an increase of lawsuits, once the heirs or successors receive the money they need to start the claim. We might rather consider the possibility of making compulsory those special insurances which are so common, to cover medical and hospital expenses, corpse repatriation, trips for relatives, etc.

9. Many airlines believe that a limit such as the one proposed by ECAC, that is, 250.000 Special Drawing Rights, together with the Supplemental Compensation Plan for U.S. passengers, would fall within the reasonable levels we are trying to defend.



e

I do understand that all these issues are very complicated, not only from the economic but also from the legal standpoint. But IATA represents the entire industry, including the Latin American one. An agreement among the largest airlines, which the small ones would have no choice but to accept, would be unfortunate. I would thus like to urge you to reach a general understanding, in order for this debate to reach practical solutions that are beneficial for both our users and ourselves.

Washington, D.C. June 19/95

E. Waspener

Opening Statement on behalf of the Orient Airlines Association to IATA AIRLINE
LIABILITY CONFERENCE, 19th June 1995
Richard T Stirland, Director General

ALC- Item 7
WP 2 - Doc. II
page 1

Ladies & **Gentlemen,**

The meeting which opens here today is, perhaps one of the most **important** gatherings under the auspices of **IATA** since the foundation of the **organisation** some **50** years ago. The subject of the conference, passenger liability, is **one which is of** vital significance to every airline and every passenger which it carries, and the **financial** implications **for all** concerned, including not **only** the airlines and their customers, **but also** their suppliers, the aircraft manufacturers, cannot be underestimated.

I **say** this by way of preamble to **emphasise the** very great **need to reach a** successful conclusion to the deliberations which take place; we have before **us what** **may** be a unique opportunity to **resolve** one of the least satisfactory aspects of **the** legal framework **within** which scheduled air transport is conducted, and we simply cannot afford to fail.

I speak **to you today on behalf of all the** members of the Orient Airlines Association, a grouping of those carriers situated in the Asia-Pacific region, an area of dynamic growth and huge potentiality in terms of passenger traffic, but also **an** area of great socio-economic diversity, which brings its **own** special problems to the subject of passenger liability.

The members of **the OAA naturally welcome the** convening of this conference, and in common with airlines in other **parts** of the world, fervently hope

that: our endeavours will be crowned by success. The **OAA** would like to thank **IATA** and its secretariat for **their** work in securing the necessary regulatory environment for this conference to be held, and in organising the meeting itself.

The airlines of the Asia-Pacific **region**, have so far adopted a variety of measures to address **the question** of **passenger** liability, 'and currently there exists no consensus on the **extent** of **any increase** in limits, or **indeed** whether there should be a regime of limited liability at **all**; there is **however** a consensus that **the present** situation is unsatisfactory, and that it **cannot be allowed to continue**. **The very fact** that certain governments including one in our area, Australia, have stepped in to impose higher **limits in order to** protect their citizens shows that we are on **the verge** of a **total** breakdown of uniformity of **limits** under the Warsaw system, unless we reform them **ourselves** in a way acceptable to all **authorities**. And, let us remind ourselves, should we fail to reach a satisfactory solution and as a result are denied the protection **of the Warsaw system**, we are all exposed to unlimited liability on proof of simple negligence, the loss of a **standard** rule of jurisdiction and the possibility of punitive damages **in certain jurisdictions**.

The airlines of **the OAA** are also in agreement that whatever the outcome **of this** conference, **it** must inevitably **be** only **an interim** measure, while we seek a truly universal **solution** to the problem of passenger liability which simultaneously **recognises** both the global **nature of the**, airline industry **and** socio-economic diversity **between** different parts of **the world**. However, from **experience we can** safely say that measures which **are** regarded as temporary will in practice remain **in force** for

longer than originally anticipated, and therefore such measures should be structured to endure the test of time.

What are the essential issues? Here again the airlines of the OAA are in concurrence on the subject matters to be addressed, and resolved. First and foremost, is the urgent need to **review** and increase **the monetary figure** for the limit of liability, and to devise a **mechanism** whereby any such limit can respond to the impact of inflation, and rising living standards, to prevent its devaluation over a **period** of time.

Secondly, there is the linked issue of the **United States Supplemental Compensation Plan**. It is obvious to us that **there are** several practical as well as legal problems with any such plan, not least the perceived nationality bias in the total amount of individual settlements; the introduction of yet another party, the Plan Administrator, to any claims settlement; the application of the Plan to non U.S. originating **travel** by U.S. citizens and the **potential** for "double dipping", by claimants seeking compensation both under the Plan **and** by **breaking** the carrier's liability **limit**. Frankly, many may feel that the **relationship** of the Supplemental Compensation Plan to **normal** insurance arrangements has not been adequately addressed by its proponents, and **the uneven application** of the Plan **depending** on the nationality of the passenger could possibly be challenged under consumer protection law in certain jurisdictions.

Thirdly, we believe that whatever solutions are arrived at, they cannot be

tailored to satisfy the exclusive **concerns** and priorities of a **single** government or legal regime. This **is** particularly important in the **Asia-Pacific** region, as any agreed system must be compatible with, and be able to run **parallel** to, the Japanese initiative of unlimited liability. The **OAA** airlines are not **adopting** any particular position as to whether all should follow this initiative; what **we** do say, however, is that any solution proposed by this **conference** should **allow** for, and accommodate individual initiatives by carriers to **waive** limits **if** they, so choose, under a special contract, while remaining within the basic **Warsaw** liability **framework**. In practice, if limits are **to** be retained, economic data and recent **settlements** would **appear to suggest** that for passengers of countries within the Asia Pacific **region**, with the exception of Japan, a limit around the level envisaged by ECAC **and** Australian **proposals** would be adequate to settle most claims, at least at present.

This brings us to **the** fourth issue which should be addressed, that is, the question of **waiver** of the **Warsaw Article 20 defences**; these are, that the carrier has taken all **necessary** measures to avoid the accident **or, that** it was impossible to take such **measures**. As you are aware, under the **Japanese initiative** Article 20 defences **are waived for claims** up to **100,000 SDRs**, but, Japanese **carriers** have retained 'the right to invoke this **defence for** claims above that' amount. By contrast, we understand the U.S. **position to be** that **the right to invoke** these defences should be waived entirely up to the level of an increased. limit.

Obviously, it is extremely difficult to **rely successfully** on Article 20, yet what would be the reaction of the airline insurance market if it were waived entirely? What would **be the** attitude of third parties, such as the aircraft manufacturers? Would they perceive that airlines

no longer wished to pursue rights of recourse against them? Is it equitable that airlines should assume entire responsibility for **the** loss of an aircraft and its passengers in situations, such as a surface to air missile launch by terrorists, where **they** are entirely **blameless**? In such circumstances the airline would, in essence, become the insurer. Before proposals to waive the **defences** under this Article are adopted, the consequences must be carefully considered.

Finally, we come back to the fundamental point. that the Warsaw Convention was designed for universal application to international air transport of passengers, as were the subsequent Hague and Guatemala Protocols. With changes in the global economic balance and the rapid development of **new** international airlines, particularly in China and the **Asia-Pacific** region, it is doubly important that the system of airline liability be acceptable to all, while providing adequate compensation. The viewpoint of all carriers should be given equal consideration, **and** the OAA urges the **conference** to reach consensus, rather than adopt partisan solutions out of pure expediency. Imposed or stopgap **solutions** can only lead to further fragmentation among airlines and legal regimes, which is precisely what this conference, which has been so painstakingly convened, is intended to remedy.

Members of the Orient Airlines Association are committed to playing a full part in this **meeting**, to discussing matters in a spirit of compromise, **and** to making their best efforts to arrive at a **successful** conclusion; we trust and hope that others **will meet them** halfway, in seeking common ground for agreement.

**WORKING GROUP "II" ON INTRA-EUROPEAN AIR TRANSPORT POLICY I
GROUPE DE TRAVAIL "II" SUR LA POLITIQUE DES TRANSPORTS AERIENS
INTRA-EUROPÉENS**

At their meeting, in June, Directors General will be invited :

- a) to note that, taking account "inter alia" of the ECAC Recommendation ECAC/16-1 on air carriers' liability with respect to passengers, adopted by the sixteenth Plenary Session (22-24 June 1994) and further to the grant of immunity by the competition authorities of the European Community and the USA, a number of air carriers and air carrier associations are meeting in a conference, organized by IATA, from 19 to 27 June 1995;
 - b) to endorse the convening of a meeting of the EURPOL-II group, early in the Autumn, to evaluate the results of current air carriers initiatives and to recommend action by Member States :
 - i) either to reinforce any positive outcome of such initiatives;
 - ii) or to take measures, in line with Part 6 of the ECAC Recommendation, in case such initiatives would prove to be inadequate to meet the objectives and criteria of the said Recommendation;
 - c) to mandate the President of ECAC to contact the relevant authorities supporting an appropriate extension of immunity for inter-carrier discussions, in case the Conference of June would have not achieved a formal agreement, but would however have shown significant progress with short term prospects of such an agreement being achieved.
-

Attention is drawn to recent ICC Position Papers on air transport liability; Doc. 310/409 Rev. (on passenger matters, 1993), Doc. 310/415 Rev. 2 (on cargo and baggage matters, 1994) and Doc 310/121-1/5 Rev.4 (on claims handling matters, adopted by the ICC Commission on Air Transport in May, 1995, but still awaiting formal approval by the Commission on Insurance and the Executive Board).

These Position Papers address the problem of Warsaw reform in general as well as specific terms. They have in common certain fundamental observations. The texts reflect my belief that

(1) the global and essentially uniform order offered by the Warsaw liability system is useful and worth preserving,

(2) the balance of the Warsaw system, whose liability limits have now been severely eroded, must be restored, as a matter of urgency,

(3) the protracted delays in the attempts by governments to update the system have now reached a point where an interim solution is required to solve the most urgent problems,

(4) to reconcile the different needs of nations with different compensation standards, efforts should be directed towards developing a flexible system, in particular with respect to liability limits,

(5) in the selection between alternative interim solutions, emphasis should be given to cost effectiveness, practicality and the speed whereby the solution can be implemented.

The specific issues that IATA is now considering and which the Conference will review, are focused on the possibility to develop a standardized and viable method to compensate passengers in excess of the limits defined by law or contractual commitments. The ICC Position Paper on passenger matters suggests that a solution might be found for airlines "to offer supplemental cover on an optional rather than mandatory basis, as a "third tier of protection". The Position Paper goes on to state the ICC's belief "that careful consideration should be given to the practical, legal and cost consequences" of such a concept. To facilitate that task, I am pleased to offer the attached Notes which explain what I had in mind when I drafted the Position Paper which refers to the "three tier" concept.

Villeneuve, 26 May 1995

Sven Brise

EXPLANATORY COMMENTS ON THE "THREE TIER" CONCEPT

1. THE FIRST TIER (FT)

.1 FT cover is already applied worldwide with limits and terms set by the Warsaw/Hague treaties. *FT protection is paid by the carrier.* The cost is included in the ticket price. Passengers are made aware of limits through a Notice, routinely attached to the ticket document, in compliance with W/H Art. 5 (and CAB 18900).

2. THE SECOND TIER (ST)

.1 Like the FT, *ST protection is carrier paid*, with the cost included in the ticket price.

.2 ST protection is applied in many but not all countries, with passengers-limits now at a variety of levels but mostly around SDR 100,000. ST protection is in most cases restricted to carriers of a given flag, who offer ST cover in compliance with national regulations. In one case (CAB 18900), the passenger limit has been introduced by carriers *collectively*, through a "voluntary" Intercarrier Agreement, *as a contractual commitment* under the "special contract" clause of W/H Art. 22.1. Precise ST terms are found in carriers' Conditions of Carriage.

.3 ST protection is now available in an increasingly complex pattern. Passenger awareness is low, not only for reasons of subject complexity but also for lack of timely and meaningful information. Carriers generally make no attempts to notify passengers beyond routine reference to Conditions of Carriage. The attitude is explained (1) by fear of administrative complications likely to cause cost increases, (2) by a wish to avoid inherently negative risk messages, and (3) by the general absence of specific notice requirements for contractually agreed protection in excess of treaty limits. The Montreal Agreement, backed by CAB Order 18900, is an exception, as the Order specifies a notice format which must be attached to each passenger ticket.

.4 Ongoing developments seem to offer an opportunity to move available ST protection towards greater uniformity, as the contemplated new Intercarrier Agreement has the potential of attracting global adherence.

3. THE THIRD TIER (TT)

.1 *Passenger paid TT protection* in excess of the otherwise applicable FT and ST limits is currently not offered by any carrier, anywhere. However, several attempts have been made in the U.S. to develop "a system to supplement the compensation payable to claimants", in accordance with Art. 35A of the now dormant Montreal Protocol 3.

.2 *It is submitted that a/ready W/H Art. 22 would permit carriers to collect surcharges in return for raising or waiving liability limits.* As regards the passenger limit a valid passenger/carrier contract could be concluded, either through a *routine/y offered yes/no option* for each individual passenger to "buy off" the limit, or through a *mandatory extension of the carriers' liability*. The choice between optional or mandatory TT cover would be up to governments. Mandatory TT cover would offer contributing passengers the same protection as does the S-plan concept under MP3, Art.35A, *except that the expected surcharge could well be lower for TT protection.*

.3 The TT surcharge could be *collected at the point of ticket sale and follow existing ticket accounting routines.* Surcharges would thus *accrue to airlines, thereby offsetting the higher passenger liability premiums that insurers might charge for increased limits.*

.4 Looking at cost effectiveness, TT protection differs fundamentally from S-plan cover in that it stems from an *extension of the carriers' liability*. **TT** cover is thus absorbed *within the framework of existing airline liability insurance policies*. By contrast, the U.S. S-plan concept foresees development of national supplemental compensation plans. *Such S-plans would by definition require new and relatively expensive insurance capacity*, since their risk exposures would cumulate with that under airlines' existing liability policies. Logically, *the TT concept should be more cost effective than the S-plan concept and probably allow the surcharge to be fixed at a relatively modest level*.

.5 If combined with a reasonably high ST limit, it should be possible to set the TT surcharge at a *globally uniform* level. In its optional form, the TT concept might prove acceptable also to countries with relatively low compensatory standards, where a vast majority of citizens would be adequately compensated within the ST limit.

.6 It is submitted that the TT concept, if universally adopted, might give an acceptable answer also to the DOT's demand that the system must offer U.S. citizens, anywhere, protection with no per passenger limit. If the U.S. authorities were prepared to accept *routine/y offered options* for U.S. citizens buying their tickets abroad as a substitute for automatic inclusion under any mandatory plan for the U.S. market, then the TT concept *would have the added advantage of eliminating the cost increasing effect of the "extended coverage" feature* and thus lower the surcharge collected in the U.S. market.

.7 As regards notice requirements it is felt that the "Three Tier Concept" would simplify the task of notifying passengers. Existing CRS technology makes it possible to give each individual passenger precise and meaningful information, at insignificant incremental cost.

.8 The TT concept would lend itself to application also in respect of declared value for registered passenger baggage, as stipulated in W/H Art.22.2

* * *

MEMORANDUM

ALC- Item 7
WP 5 - Doc. II
page 1

DATE: March 30, 1995

SUBJECT: DEPARTMENT OF TRANSPORTATION ORDER #95-2-44,
DOCKET #49152 - 2/22/1995 - PUBLISHED 3/8/1995
INTERNATIONAL AIR TRANSPORT ASSOCIATION AGREEMENT
RELATING TO LIABILITY LIMITS OF THE WARSAW CONVENTION

1. PREAMBLE:

1.1. In their request for antitrust Immunity for intercarrier discussions concerning the limits and conditions of passenger liability established by the "Warsaw Convention" of 1929" dated September 24 1993, IATA stated that there is need for interim passenger rules that are adequate to current dry standards of compensation.

2. DEPARTMENT OF TRANSPORTATION ORDER 95-2-44

2.1. On February 22, 1995 the "United States Department of Transportation" issued an order, Docket #49152, granting the International Air Carriers, organized in the "International Air Transport Association (IATA)", the antitrust immunity for intercarrier discussions, to agree on a proposal for Current day standard of compensation.

2.2. The order states that the international air carriers submit to the Department of Transportation within a specified period a proposed agreement as follows:

2.2.1. An update of the compensation limits from the inter-carrier agreement (CAB 18900) of 1966,

2.2.2. A "Supplemental Compensation Plan" in addition to the carriers' liability limits, this plan to include extended liability coverage for United States citizens travelling internationally,

2.2.3. This proposed agreement to be negotiated and submitted to the Department of Transportation within 120 days of the orders' publication (March 8, 1995), that is on or before: July 6, 1995.

3. DISCUSSION:

3.1. On September 24, 1993 IATA applied for discussion authority to update the liability limits of CAB Order 18900 of May 13, 1966 (Order #E-23680 - Docket #17325). This order covered the carriers liability for all international flights from, to and through the United States.

- 3.2. In 1975 the liability in international air travel was updated by "The Montreal Aviation Protocols Nos. 3 & 4" to the "Warsaw Convention" of 1929.
- 3.3. "The Montreal Protocols Nos. 3 and 4" (MAP 3) have as yet not been ratified by the required thirty countries. They are presently not in force.
- 3.4. The purpose of "The Montreal Aviation Protocols No. 3" is:
- o - to update the carriers liability limits to SDR 100,000,
 - o - to allow the development of "Supplemental Compensation Plans" where the carriers liability limit is insufficient to compensate air accident victims adequately within the established level of recognized damages, in certain countries
 - o - to eliminate the need to prove carriers' "Wilful Misconduct" stated in the Warsaw Convention.
- 3.5. The reason for MAP 3 was to update the liability limits to 1975 standards, to create flexibility to account for economic, legal, and cultural differences among countries, and to simplify as well as accelerate the process of damager claims and payments.
- 3.6. Twenty years have passed since MAP 3 was agreed on. For various reasons the ratification process has not been completed. Although the principles of MAP 3 remain valid, a further update to 1995 standards is necessary.
- 3.7. The international air liability system has functioned under the "Warsaw Convention" since 1929. Its underlying principles remain valid to this day. Some countries have updated the liability limits under "The Hague Protocols of 1955", others by the means of special interairline agreements under Article 35-b of the Convention, such as the United States in 1966 and Japan in 1992.
- 3.8. Although air travel continues to be safe - a number of major air tragedies have occurred since 1975.
- 3.8. Those incidents, involving hundreds of passengers and their surviving families, have shown the need for an urgent interim update of the liability limits in international travel because)
- 3.9.1. the air carriers are subjected to persistent intense media attention and highly publicized investigations resulting in an ongoing loss of revenue. (PAA lost \$250 Mio in ticket sales because of the PM 103 (Lockerbie) tragedy, contributing to its earlier demise.

3.9.2. Under the present system the injured passengers or the families of fatal air crash victims are denied timely damages or compensation.

- o - Only 109 decedents families in the KAL 007 shootdown of September 1, 1983 had access to the American court system. 12 years later their wrongful death issues are still largely unresolved.
- o - The courts in Japan and in the Philippines have not even completed the "Wilful Misconduct" phase of the litigation.
- o - 147 decedents families had to settle for the Warsaw/US limits.
- o - The families of the PAA 103 (Lockerbie) have not seen their damages ● □□□□□□□ - seven years after their tragedy occurred.
- o - Because PAA is in bankruptcy some of those families may become general unsecured creditors.

3.9.3. Because HAP 3 and 4 have been languishing in the ratification process worldwide, some countries have found it necessary to address the liability problem by either putting the MAP 3 limits into force, unilaterally, or by means of special contracts under article 35 A of the "Warsaw Convention".

4. UNITED STATES LIABILITY UPDATES:

4.1. IATA applied for authority to discuss updates of the Special Contract liability limits on September 24, 1993.

4.2. This step was consistent with the recommendations of two Presidential Commissions in the Administrations of President Bush and of President Clinton.

4.3. In July 1994 a working group was formed at the initiative of the then Chairman of the National Economic Council and of the Secretary of Transportation, to discuss the issues of MAP 3 with an American Supplemental Compensation Plan.

4.4. The result of those discussions was to support the IATA application of September 24, 1993 to update the already existing Special Contract of 1966 (CAB 18900) and to add a "Supplemental Compensation Plan" with extended damages protection for American Citizens, travelling outside of the United States.

MEMORANDUM

DOT order 95-2-44

March 30, 1995

page 4 of 5

4.3. The air carriers, engaged in international travel from and to the United States now have the unique opportunity to formulate within the required 120 days - that is before July 6, 1995 - an intercarrier special contract agreement covering an update of the liability limits, and a supplemental compensation plan within the guidelines of the DOT order.

5. COMMENTS:

5.1. The issues of modernizing the international air liability system have been extensively discussed in many countries since 1975 when MAP 3 was negotiated.

5.2. As far as the United States is concerned, IATA has been actively and constructively represented at all phases of the administrative and legislative process.

5.3. The parameters of the required update of the carriers liability limits have been discussed, and are already part of the IATA/DOT application of September 24, 1994.

5.4. The US Compensation Plan has been discussed and formulated in various, (in many respects identical) versions in 1990, 1991, and lastly in the 1994 P3/SCP discussions. The basis, the details, and much of the language of the SCP are therefore already available.

5.5. The United States efforts run almost parallel with similar deliberations in the European Union (ECAC reports) and in Australia. The Japanese airlines have put into force their farsighted special contract that addresses their specific needs.

6. RECOMMENDATIONS:

6.1. It is suggested that the IATA Steering Committee formulate recommendations in preparation for a plenary session, addressing the issues raised in the IATA application, as allowed by DOT order #95-2-94:

6.1.1. An update of the liability limit,

6.1.2. A supplemental compensation plan based on the plans already suggested and agreed on in 1990 and in 1992, adjusted by the NEC MAP3/SCP working group of 1994.

6.1.3. That this IATA Steering Committee proposal be concluded during April 1995 and a plenary session be held in May 1995 in order to be able to agree on a final proposal, no later than June 15, 1995.

MEMORANDUM
DOT ORDER 95-2-44
March 30, 1995
page 4 of 5

6.j.4. It is further suggested that preliminary discussions be held - unrelated and independent of the Special Contract procedure - towards updating those provisions of the Montreal Protocols No. 3 that need changes to 1995 standards and that ultimately the Special Contract be incorporated into *t h e* Montreal Protocols, once they come into force, in order to restore the unity in international air liability, within the framework of a rejuvenated and revitalized "Warsaw Convention" system.

End

INDEX TO QUESTIONS AN-D ANSWERS

<u>SUBJECT</u>	<u>PAGE NO.</u>
Antitrust Immunity, U.S.	20
Bereaved Family Associations	21-22
Damages	8
determination in U.S. courts	8
nonpecuniary	8
pecuniary	8
EC negative clearance	20
Jurisdictional approaches	9-11
country-of-origin	10
flag-based	10
generally	9, 10
to-from-through	10
used by States	10
U.S. approach to	11
Liability	8
absolute	8
defenses, retention of	8
for terrorist acts	8
presumed	8
successive carriers	11
strict	8
unlimited	8
Warsaw regime	8
Liability Limits	6
insurability	6
level	6
periodic adjustments to	6
Special Contract	6
necessity for	6

Supplemental Compensation Plan	11-19
Airline Alternative Compensation Plan compared	11
advantages of	19
appropriateness for United States	12
benefits to passengers	12
claims under minor injuries	18
previously unidentified claimants	17
collateral source rule	14
defined	11
double recovery	14
DOT guidelines	12, 15
election to recover under the Plan vs. litigate Warsaw claim	13, 14
EU, enforceability in	18
escrow, use of	17
relation to Montreal Intercarrier Agreement	15
surcharges, lawfulness of	15, 16
U.S.-developed	11
Unilateral State Actions	2-4
Australia	2
Canada	2
Europe	3
ECAC..	3
European Union	3
Italy	4
Japan	4
United Kingdom	4
United States	4
Warsaw Convention	1-2
benefits of	1
MAP3 changes to	2
multilateral efforts to change	1
regimeintheabsenceof	1

I. STATUS OF WARSAW SYSTEM

A. CURRENT ISSUES

Q: What are the benefits of preserving the Warsaw Convention? What is the effect if there is no Warsaw Convention?

A: The **Warsaw** Convention has successfully eliminated or significantly reduced problems of conflicts of laws and jurisdiction by creating a uniform set of rules applicable to all parties to the Convention (i.e., most States). Overriding domestic law and contractual provisions, the Convention standardized documents of carriage. It also made a single set of rules governing the place where and the period within which claims can be brought. Moreover, it established a rebuttable presumption of carrier fault for a very limited amount of damages and allowed full compensation for claims upon proof of a carrier's wilful misconduct.

Without the **Warsaw** Convention, the legal position of both airlines and passengers would be considerably more complicated. Rules relating to liability, jurisdiction, limitation periods and recoverable damages could vary from State to State, giving rise to troublesome conflicts that would be very difficult to resolve in practice. One of the potentially troublesome conflicts would be the liability of airlines for exemplary or punitive damages that may not be insured, particularly in the United States. Without the Convention, claimants could seek punitive damages in cases where the Convention now precludes them from doing so.

Finally, the Convention sets a liability limit. Although many have argued that the limit is too low, the Convention has effectively established the idea that there should be a balance in the rights of passengers to compensation when national standards of compensation vary greatly.

B. GOVERNMENTAL INITIATIVES

Q: What efforts have States made to change the new passenger liability regime?

A: The Hague Protocol of 1955 doubled the **Warsaw** Convention's passenger liability limit. In 1966, the United States induced carriers then serving the United States to adopt a special contract with their passengers, as authorized by Article 22 of the **Warsaw** Convention, for transportation to, through, or from the United States. The agreement, known as the Montreal Inter-carrier Agreement, increased the carriers' liability limits to US \$75,000. Further, for claims within that limit, the carriers agreed that they would not assert a defense of non-negligence under Article 20 of the Convention.

The Guatemala City Protocol of 1971 proposed major changes to the Convention's passenger liability regime including, *inter alia*, elimination of the carrier's defense of non-negligence under Article 20 and a new unbreakable liability limit of SDR 100,000 (about US \$150,000) that could be increased periodically. The protocol also would have deleted the sentence specifically authorizing a special contract with the passenger to establish a higher limit and permitted each party to set up within its territory a system to supplement the compensation payable to claimants. However, that Protocol, which incorporates the Montreal Additional Protocol No. 3 has never entered into force, due to the failure of a sufficient number of states to ratify it.

Q: What liability does Montreal Additional Protocol No. 3 (MAP3) provide?

A: MAR3 would make airlines strictly liable by eliminating the carrier's defense of non-negligence under Article 20 and make the new liability limit of SDR 100,000 (about US \$150,000) unbreakable. This new limit is intended to be increased periodically.

C. UNILATERAL STATE ACTIONS

Australia. Australia has proposed legislation that would increase the limits of liability of Australian air carriers to approximately SDR 260,000 (about US \$390,000) per passenger.

Canada. Where the airlines negotiate and agree to an inter-carrier agreement among themselves (e.g., under the auspices of IATA) there would be no legislative or legal implications under Canadian laws (federal or provincial) as long as the agreement would not be inconsistent with the Carriage by Air Act (which implements the Warsaw Convention into Canadian domestic law). However, to ensure that it would be given effect, participating air carriers that operate to and from Canada would need to include the terms of the agreement in their General Rules filed with the National Transportation Agency pursuant to the Air Transportation Rules made under the National Transportation Act, 1987.

Should the Canadian government wish to give the agreement legal and binding effect, it could do so based on existing legislation and regulations.

Q: Is liability governed by state/province/etc. law in Canada?

A: In Canada, the answer to this question is not clear-cut. However, based on the federal Parliament's power over aeronautics and certain court decisions, the better view is that Canadian courts would find that the federal Parliament can legislate in relation to the liability of air carriers.

Q: Would notice be governed by state/province/etc. law in Canada?

A: Again, the answer is not clear-cut due to the overlapping competence of the federal Parliament and provinces. Assuming that a term dealing with notice is a "contractual aspect," the better view is that Canadian courts would find that the federal Parliament can legislate with respect to notice of a limitation of liability of air carriers.

Europe. In 1994, the European Civil Aviation Conference (ECAC) adopted Recommendation 16-1, which urges its Member States to update certain elements of the international air carrier liability system. ECAC recommends that Member States encourage air carriers operating to, from or via the territory of ECAC Member States to participate in a European intercarrier agreement setting up a new special contract. Recommendation 16-1 advises air carriers that any such agreement should contain liability limits of at least SDR 250,000 (about US \$380,000). Such an agreement should also provide for payment of the 'uncontested part' of the claim as soon as possible or at the latest within three months, up-front payments to claimants, and mechanisms to safeguard the limits against inflationary erosion. Finally, the Commission of the European Union has published a Preliminary Proposal for a Council Regulation on air carrier liability that would require carriers serving a point in the Union to adopt liability limits of at least ECU 600,000 (about US \$750,000).

Q: What is meant by the "uncontested part" of the claim" pursuant to Article 5.2.4 of the ECAC recommendations?

A: Calculation of the quantum of damages payable in a Convention case (up to the applicable limit) is governed by local rules in the relevant jurisdiction. That exercise and subsequent settlement negotiations typically can take weeks or months to complete. Almost invariably, however, certain uncontested elements of every claim can be quantified, verified and agreed very quickly (e.g., cost of past medical treatment in a personal injury case or funeral expenses in a death case). Further, the carrier can often assess and agree quickly upon a sizeable portion of every claim (e.g., in a death case the minimum amount of the claimant's entitlement) without much supporting information. It is against this

background that the words “uncontested part of the claim” and the definition in Article 2.5 (““uncontested part’ means the part of a claim not disputed by either party”) should be read. However, Article 5.2.4. may be limited in practice because it relies on consensus to work and fails to take account of exaggerated or unreasonable claims that the airline may have to contest.

Italy. In July 1988, Italy imposed a limit of SDR 100,000 (about US \$150,000) for death of, or injury to, a passenger. This limit applies for Italian air carriers anywhere in the world and for foreign carriers if their point of departure or destination or a stopover is in Italy.

Japan. In 1992, Japanese-flag airlines established a new special contract under Article 22 of the Convention. In effect, Japanese carriers have accepted unlimited liability, but recovery above SDR 100,000 (about US \$150,000) is subject to the defense of non-negligence under Article 20 of the Convention.

United Kingdom. In 1992, the United Kingdom required carriers licensed by its Civil Aviation Authority to establish special contracts increasing the carrier’s liability limit to SDR 100,000.

Q: What are the legislative implications in the U.K. for a new inter-carrier agreement?

A: There may be no additional requirements that would have to be met before such an agreement could be implemented by participating carriers operating services to, from or with an agreed stopping place in the UK, provided such agreement meets, so far as UK carriers are concerned, the current minimum standard set out in regulation 11 (1)(b) of the UK Licensing of Air Carriers Regulations 1992, S.I. 1992/2992; namely, a minimum special contract of SDR 100,000 exclusive of costs (no mention being made of waiver of the Article 20 defense).

United States. What relationship should be envisaged between a new inter-carrier agreement and the 1966 Montreal Intercarrier Agreement of 1966? Should the Montreal Intercarrier Agreement be expressly superseded and abrogated?

A: The purpose of a new interim intercarrier agreement would be to provide passengers with substantially higher levels of compensation than are currently available. Therefore, the introduction of a new agreement would probably make continuation of the Montreal Inter-carrier Agreement unnecessary. If the Montreal

Intercarrier Agreement did remain in existence in its current form, continued compliance by carriers with its conditions and documentary requirements could conflict with the terms of any new intercarrier agreement and could also be highly confusing to passengers. In these circumstances, there would appear to be no justification for keeping it in force. U.S. DOT approval to rescind the Montreal Intercarrier Agreement should be forthcoming without difficulty if it approves any new inter-carrier agreement.

The DOT Order establishes informal guidelines for special contracts applicable to passengers ticketed in the United States. The United States Government has properly focused its concerns over the levels of compensation made available to its own residents. This approach is narrower than the jurisdictional scope of the Montreal Intercarrier Agreement, which applies to all transportation to, through or from the United States.

II. CARRIER INITIATIVES TO MODERNIZE THE WARSAW SYSTEM

A. SPECIAL CONTRACTS

Q: Why is a new special contract necessary?

A: A new special contract is necessary because many governments and air carriers believe that the current liability limits, even as increased by the Montreal Intercarrier Agreement, are grossly inadequate. Despite years of effort, governments have not been able to agree to increase those limits, so it is now up to airlines to do so.

Airlines should take the initiative now because the low limits have forced claimants seeking adequate compensation to resort to expensive and lengthy litigation to show that the carrier engaged in wilful misconduct, which enables those claimants to “break” the liability limits. Claimants have repeatedly been able to prove wilful misconduct in U.S. courts. This litigation has become a heavy burden upon both claimants and carriers. Often insurers have paid unlimited damages after incurring considerable costs in a futile attempt to defend the limit. In addition to its cost and complexity, lengthy litigation can result in substantial prejudgment interest and other costs. Litigation in which an airline is charged with wilful misconduct is of no benefit to either airlines or their passengers.

Against this background, some countries are beginning to change aspects of the international air transportation liability regime unilaterally. For example, Italy and the U.K. have required carriers to increase their liability limits. Carriers serving the U.S. have long been required to adhere to the Montreal Intercarrier Agreement, which both increases the limit and waives the defense of non-negligence. These developments call into question the future of the uniformity that the Convention established and may threaten the Convention itself.

Q: Up to what amount will a liability limit be insurable?

A: Every policy of airline passenger, baggage, cargo and third party legal liability insurance contains an upper limit of the insurers’ liability to meet claims arising out of a single occurrence. This is known as the combined single limit or CSL. The size of CSL available depends on insurers’ willingness to underwrite the risk, the recent claims history of the airline industry, and the insurance market’s underwriting capacity. At present, the maximum CSL generally available is \$1.5 billion. Coverage of up to \$2 billion is possible.

As long as one speaks of a "limit" it will always be insurable to the extent that there is sufficient insurance capacity available on the world aviation insurance market. However, the higher the limit, the higher will be the premium. It would be useless, and perhaps even misleading, for an insurer to quote price "X" for coverage "Y" since much will depend on the evaluation of the particular risks of each air carrier and the track record of each air carrier from an aviation safety and insurance perspective. Moreover, national and local laws vary regarding recoverable damages. The exposure in the case of unlimited liability will depend on the laws of the country where the action is brought.

The rate and premium are based on a maximum limit of insurance that would provide sufficient coverage for that carrier's worst case scenario. Hence, an amount will always have to be based not on the limited liability of Warsaw Convention but on the carriers' unlimited liability under Article 25 of the Warsaw Convention (**wilful** misconduct).

Q. What mechanism can be established to allow periodic adjustments to agreed liability limits to account for inflation?

A: There are many mechanisms that can be used for this purpose, once the Conference has set a base liability limit. Among them are the following:

- periodic review and increases, if necessary, to reflect changes
- build in periodic increases, perhaps by a fixed amount of **SDRs** or a percentage increase or based on external inflation index, such as the index of inflation in G7 countries or OECD countries.

In Article 42, MAR3 proposes to increase the SDR 100,000 (about \$150,000) liability limit by SDR 12,500 (about \$18,750) on the 5th and 10th years after MAR3 enters into force, unless a specially convened diplomatic Conference sets a different limit. (If MAR3 had entered into force soon after it was introduced **in** 1975, and if the Conference had conducted **5-year** reviews, the limit would have escalated to over SDR 150,000 (about \$225,000) by today).

Q: How should 1995 liability limits be determined?

A: Carrier liability limits should be based on several factors: the range and size of compensatory awards for losses in air transportation of the State involved; the ability of the carrier to insure against potential losses; the degree to which the carrier accepts liability without regard to fault; and the availability of a fund to supplement the compensation available from the carrier.

Q: How are damages determined in U.S. courts?

A: Pecuniary losses are proved by examining factors such as the passenger's future earning potential and other economic characteristics. Non-pecuniary or non-economic losses are intended to replace positive non-pecuniary benefits that the passenger would have provided to the family if he or she had lived (loss of society).

Q: Distinguish "strict" or "absolute" versus "unlimited" liability.

A: "Strict" or "absolute" liability modify the requirement of an injured party in a tort action to show that the injuring party was at fault or negligent in order to obtain recovery. In the context of this Airline Liability Conference, the term "strict liability" means that the party that caused the damages bears responsibility without actual proof of its fault or negligence. (In some common-law jurisdictions, this is known as "absolute" liability. In those jurisdictions, "strict liability" may permit a defendant to prove that it was not at fault.)

"Unlimited liability," on the other hand, goes to the quantum of damages an injuring party may be expected to bear, once liability for the injury is established. If liability is "unlimited," it means that the carrier has assumed responsibility for payment of all provable damages. Under Warsaw, this does not include punitive damages.

Q: What is the liability regime under the Warsaw Convention?

A: The Warsaw Convention sets up a regime of "presumed liability," *i.e.*, the carrier is presumed to be liable unless it shows that it has not been negligent. In Article 17, it states simply that "[t]he carrier shall be liable for damage sustained in the event of the death or [bodily injury] of a passenger". However, Article 20 permits the carrier to show that it took "all necessary measures to avoid the damage or that it was impossible . . . to take such measures." MAP 3 would remove this defense of non negligence for damages involving death or bodily injury.

Q: Would retention of defenses under Article 20(1), but limited only to unforeseen and unpreventable terrorist attacks, be a recommendable course of action as an element of an inter-carrier agreement?

A: Arguments *in favor of* retaining the defenses are:

Retaining the defense for accidents caused by attacks, hijacking and sabotage would represent only a partial waiver. No barrier appears to exist to such a partial waiver of the carriers defense under Article 20. The waivers included in the Montreal Intercarrier Agreement (\$75,000) and the Japanese Initiative (SDR 100,000) are complete.

Carriers (and their insurers) prefer to retain the Article 20 defense for several reasons. It avoids the airline liability for events beyond their control, and hence the costs of ensuring those risks. Further, it provides a framework for seeking contribution from other potentially responsible parties.

Arguments *against* retaining the defenses are:

It may be difficult for governments to accept retaining the Article 20(1) defense in respect of any claim brought by or on behalf of an innocent passenger for any amount below a figure that would reflect at least the MAR 3 limit, even in the case of an unpreventable terrorist attack.

Moreover, the U.S. DOT stated in its order granting antitrust immunity that it would expect any new agreement to provide that passengers ticketed in the US and U.S. citizens and permanent residents will recover compensation on a strict liability basis. A consensus recommendation to retain the defense, not only for the carrier but also for any supplemental plan administrator, would make DOT approval much more difficult.

Finally, some would argue that airlines can prevent some attacks and that, where attacks are preventable, airlines should bear some responsibility. Putting aside the merits of that argument, the realities are that many governments and other groups agree with it and have imposed liability for failure to prevent attacks.

Q. What are the possible jurisdictional approaches for an interim agreement? Is a country-of-origin approach recommended?

A: There are many possible jurisdictional approaches for special contracts if it appears likely that different countries or regions may require different special contracts: *(i)* place of issue, *(ii)* all citizens and permanent residents, *(iii)* place of accident, *(iv)* place where action is brought, *(v)* to/through/from, *(vi)* place of domicile or principal place of business of air carrier, *(vii)* State of corporate headquarters of air carrier, *(viii)* Article 28 of the **Warsaw** Convention, *(ix)* air carrier flag, *(x)* domicile or permanent residence of passenger and *(xi)* country of origin. All of these have advantages and disadvantages and some are highly impractical.

If the objective is to ensure that all passengers are fully compensated, jurisdictional approaches *(ii)* and *(x)* might be worthwhile to consider but they present serious documentation problems for airlines who might have to have different contracts of transportation for passengers of different nationalities. Jurisdictional approaches *(i)* (place-of-issue) and *(xi)* (country-of-origin) would, in most cases, address this objective since the place of issue, country of origin, and the domicile or permanent residence of a passenger, are often the same place. These approaches would also avoid conflicts among multiple jurisdictions applying the to/through/from approach.

Q: What jurisdictional approaches have countries used?

A: Countries have used three main jurisdictional approaches:

- a. Flag-Based. Under this approach, all carriers of a certain national registry agree to the same liability limit and grounds for liability. The Japanese carriers have used this approach.
- b. "To-from-through." Under this approach, all services to, from or through a country must accept liability on the same terms, whatever the passenger's or the airline's nationality. The United States used this approach in the 1966 Montreal Intercarrier Agreement among carriers, as did Italy in 1988. ECAC adopted this approach in its Recommendation to carriers.
- c. Country-of-origin. The grounds for and limits of liability are determined by the country from which the international transportation originated or where the ticket was issued. This approach is reflected in Article 35A of the convention, as amended by the Guatemala City/Montreal Protocol No. 3 amendments.

Q: May there be a framework agreement setting liability *etc.*, but leaving the limits to each country? On a place-of-issue or departure basis? On an all-citizens basis? On a to/through/from basis?

A: Yes, however, any inter-carrier framework agreement could not reduce the rights accorded to passengers, nor could it derogate from the obligations imposed on the air carriers, under the Warsaw Convention itself.

If the framework agreement is applied on a to/through/from basis, there could arise overlaps in **fora**, asserted jurisdiction and rules. The reason is that all international flights **are** to/from at least two different States. Furthermore, if a

particular journey includes agreed stopping places in several States, the limits of each of those States would also apply. The result could be a plethora of jurisdictions and limits applicable to each passenger on a single flight. The to/through/from formula worked well for the Montreal Intercarrier Agreement while there were no other special contracts. This formula could be problematic in the case of a global inter-carrier agreement to devise special contracts acceptable to more than one country.

Q: What jurisdictional approach is suggested by the U.S.?

A: The DOT Order and the U.S.-developed Supplemental Compensation Plan propose a country-of-origin approach.

Q: Would a successive carrier be bound by the liability limits of a new inter-carrier agreement (i.e., where there is code sharing, interlining)?

A : Article 30(1) of the Warsaw Convention deems a successive carrier "to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under its supervision." Insofar as the Convention contemplates a single contract of transportation, it suggests that successive carriers will be bound by that contract according to its terms. If it describes only a single limit of liability by special contract, successive carriers may be subject to that limit.

Code sharing. Generally, in the code-sharing situation, the contract of carriage is between the passenger and the carrier in whose code the transportation was sold. The liability of the carrier under whose actual supervision the transportation is provided may be liable consistent with the terms of that contract.

B. SUPPLEMENTAL COMPENSATION PLAN

Q: What is a Supplemental Compensation Plan?

A: A Supplemental Compensation Plan (SCP) provides a source of funds to compensate a passenger or claimant for losses that exceed the individual airline's liability limit or in the absence of such a limit, in excess of a certain level of air carrier liability. Under the U.S. -developed SCP, passenger contributions collected by the airline would purchase coverage administered by a Contractor, to be used to compensate economic and non-economic losses. A modified version of the SCP, called an Airline Alternative Compensation Plan (AACP) differs from

the SCP primarily in that it operates to provide a comprehensive settlement of the carrier's liability under the Warsaw Convention. Thus, the carrier's responsibility for claims compensated by the AACCP would be determined by intercarrier agreement, independent from its existing or proposed limitation of liability under Warsaw, the Montreal Intercarrier Agreement or any new special contract.

Q: How does an SCP benefit passengers absent MAP3?

A: An SCP would benefit passengers in that it would provide passengers with prompt compensation and measures of damages greater than those that might otherwise be unavailable unless they established wilful misconduct or the carrier waived its limit of liability. Moreover, a plan provides a legitimate framework for establishing a strict and unlimited compensation system without creating the problems that might result if airlines were asked to bear such liability. Further, passengers are guaranteed a payment from the plan even if the airline's insurance should fail (perhaps as a result of policy breaches or insolvency of insurers), if the combined single limit of available insurance is **insufficient** to compensate passengers fully or if the airline is insolvent. In these circumstances, the passenger contribution would be fully justified. Even if none of these situations arise, claimants are better off since the SCP could save them the delay, uncertainty, expenses and stress of obtaining a judgment against an airline.

Q: Why is a Supplemental Compensation Plan considered especially appropriate for the United States?

A: If claimants can get their cases before U.S. courts, they may be able to recover compensation far in excess of that available in most other jurisdictions. In addition, the U.S. government is committed to ensuring that passengers on international trips can get recoveries similar to those available on domestic trips, which exceed **dramatically** the limits of liability applied to international trips. An SCP may be necessary to ensure international and domestic compensation parity, especially given the size of claims in U.S. courts.

Q: Why does the U.S.-developed SCP cover U.S. citizens and permanent residents regardless of where the ticket was issued?

A: Because the U.S. Department of Transportation has indicated that this is an important requirement of any intercarrier agreement to establish a supplemental compensation plan.

Q: Can the passenger and airline agree in advance to exclude the application of Warsaw's Article 25, given the wording of Articles 23, 32 and 33?

A: Article 25 eliminates the Warsaw liability limit if the damage is caused by wilful misconduct. Article 23 nullifies any provision seeking to relieve an airline from liability that it otherwise assumes under the Convention. Article 32 has similar effect, except that there is doubt whether it applies just to the applicable law and jurisdiction provisions or to any provision purporting to infringe Convention rules. The issue is somewhat academic in view of Article 23. Article 33 permits an airline to make regulations governing its passengers, but only if not in conflict with the Convention.

Although it is not entirely certain, a passenger and a carrier probably cannot agree by way of the contract of carriage to exclude the applicability of Article 25. Thus, a claimant probably must be permitted to assert a claim based on an airline's **wilful** misconduct or intentional tort under Article 25.

However, Article 23 does not prevent an airline from taking a written release from further liability in exchange for paying compensation to a passenger.

The original U.S.-developed SCP contemplates that a claimant may be given the choice of either asserting an Article 25 claim or getting access to the SCP. To receive payment, the SCP would require claimants to (a) agree that the sums being paid under the Plan constitute full and fair recovery for all damages sought; and (b) release and discharge all potential parties known and unknown from liability. An airline may use that release as a complete defense to any further claims whether under the Convention or otherwise.

Q. Once a claimant has collected compensation up to the no-fault liability limit from the airline's insurance company, when, if ever, would the claimant have to choose between suing under the Warsaw Convention or seeking compensation from the Contractor? What if the family launches a Warsaw suit prior to electing to go with the SCP? If it subsequently chooses the SCP, what happens to the dollars spent on the suit thus far? Does the launching of the suit immediately disqualify the family from opting for the SCP?

A: The U.S.-developed SCP will make remedies under Warsaw and under the SCP mutually exclusive. To receive payments, the SCP would require claimants to (a) agree that the sums being paid under the Plan constitute full and fair recovery for all damages; and (b) release and discharge all potential parties known and unknown from liability.

If the SCP Contractor compensates a claimant and receives in return a receipt releasing the airline and others from liability without reservation, the claimant should not be able to pursue further claims against the airline or any party named in the release. At some point the claimant will have to choose whether to accept the airline/Contractor offer of settlement or to continue its Warsaw litigation. An SCP should be able to make further pursuit of litigation unattractive by making an offer comparable to that available at the end of the day in litigation, without all the delay and cost of litigation.

The Conference may consider any additional protections it considers necessary or desirable.

Q: Since the passenger will have paid for the SCP, can a claimant subsequently be denied access to it because he or she decided to assert an Article 25 claim?

A: Yes. Under these circumstances, the SCP may be characterized as a conditional offer made to those passengers that purchased a ticket from whence the contribution is made. The payment of the contribution would not mean acceptance of the offer, but only the right to participate in the SCP in accordance with applicable conditions, if and when a claim is made. One condition would be the claimant's waiver of any right to assert an Article 25 claim.

Q: Is there any possibility that a claimant might be able to make a double recovery under the SCP and on a wilful misconduct claim?

A: If the risk of double recovery were to arise, in some jurisdictions the courts would reduce the damages to which the claimant is entitled under the Convention by an amount equal to the compensation he or she has received under the SCP, thus preventing a double recovery.

The U.S.-developed SCP would require a complainant to sign a waiver of any further legal action against the individual airline or any other potential parties to obtain payment under the SCP. If, however, for any reason this waiver is adjudged ineffective, the plaintiff would most **likely** not be able to make a recovery both under the SCP and on a **wilful** misconduct claim because any damages paid under the SCP should be credited toward any further potential damage award.

In U.S. practice, the collateral source rule prohibits a court from considering benefits a plaintiff receives from third parties; however, the rule does not apply when the source is the defendant or someone acting for the defendant. Barkanic

v. CAAC, 923 F.2d 957 n.8, (2d Cir. 1990); Yost v. American Overseas Marine Corp., 798 F.Supp. 313 (E.D.Va. 1992).

Q: Is a surcharge allowable? Is it a tax?

A: The U.S. Department of Justice has ruled that a passenger contribution under the SCP would not be considered a tax since it is imposed by the carrier, albeit to **fulfill** a government mandate.

Q: What guidelines did the U.S. DOT give?

A: DOT's order sets two guidelines:

1. For international trips ticketed in the United States, passengers should be **entitled** to prompt and complete compensation on a strict liability basis with **no** per passenger limits and with measures of damages consistent with those available in cases arising in U.S. domestic air transportation.
2. The same parameters should apply to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States.

Q: Does the DOT Order mandate that the intercarrier agreement include an SCP?

A: The guidelines of DOT's order set forth the U.S. Government's expectation that there be compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in U.S. domestic air transportation. The SCP, or a modified version thereof, is the best, if not the only, practical way to accomplish that objective.

Q. Would the U.S.-developed SCP agreement replace the 1966 Montreal Intercarrier Agreement?

A: We would expect the SCP, coupled with a new inter-carrier agreement with higher liability limits, to replace that Agreement.

Q. Will it be necessary for each airline to amend its contract of carriage to incorporate its acceptance of the new SCP?

A: Yes.

Q: Would the SCP be open to alterations every 2 years subject to DOT approval?

A: The U.S.-developed SCP does not envision reopening every two years. However, the coverage will be renegotiated periodically since it is subject to renewal according to its terms. It is expected that changes can and will be made to the SCP pursuant to this process.

Q: Discuss the rationale for collecting equal contributions from passengers who may, in the event of an accident, be entitled to unequal recovery based on factors such as life expectancy and income.

A: Clearly, the costs of providing the funds for the SCP will vary according to the number of passengers transported. Other factors will, of course, go into computing the amount of capital necessary to fund the plan, and thus the amount of contribution necessary. The assessment of an equal contribution is also simple and easy to administer.

Q. With respect to the requirement that the U.S.-developed SCP pay a lump-sum distribution of the claim within a fixed period of time after fiig:

(i) What if the claim is unsubstantiated and the SCP or carrier is not able to determine the validity of the claim within the period?

A: The U.S.-developed SCP states that the **90-day** period for making an offer to settle does not run until the claimant has provided all reasonable information requested by the Contractor or until payment by the carrier to the claimant of an amount equal to its liability **limit** under the Convention, or pursuant to a special contract under the Convention in cases arising in international air transportation, whichever occurs later.

(ii) Can a proper assessment be made within the allowed period?

A: Ninety days should be a reasonable time to evaluate a claim where the only question is the quantum of damages. However, the Conference may consider a different time period.

(iii) Is the period long enough to permit identification of claimants entitled to payment?

A: Under the draft Plan, airlines are to identify the potential claimants to the Contractor. The **90-day** period does not begin to run until the claimant has provided all reasonable information requested by the Contractor or until payment by the carrier to the claimant of an amount equal to its liability limit under the Convention, or pursuant to a special contract under the Convention in cases arising in international air transportation, whichever occurs later.

(iv) What if the SCP or carrier is not able to identify the persons entitled to payment within the period (for example, in case of a dispute among potential heirs)?

A: The **90-day** period does not begin to run until the claimant has provided all reasonable information requested by the Contractor.

Q. Would an escrow arrangement be established to hold funds pending resolution of disputes among claimants?

A: The SCP does not address this issue, since it may be advisable to leave, to the greatest extent possible, claims resolutions procedures to the carrier and the contractor in individual cases. The Conference may propose any necessary changes.

Q. What if a previously unidentified claimant emerges to make a claim after a lump sum payment has been made?

A: Under Article 29 of the Warsaw Convention, the right to damages is extinguished if an action is not brought within two years. Moreover, under the Plan, each claim is evaluated on its merits. If a claimant seeks damages in respect of a passenger for which compensation has not already been paid, the Contractor will pay the claim. This could occur in the case of a spouse who did not originally file a claim, but later seeks compensation for loss of society after a payment for lost support was already made to a different claimant such as a child. If,

however, a later claimant, *e.g.*, an unknown heir, seeks compensation for lost support, the Contractor may be forced to request the earlier claimant to refund a portion of the settlement or to seek third-party resolution of the proper apportionment between the claimants.

Q. How should payments for minor injuries be treated?

A: Since the SCP deals only with claims that exceed a carrier's limit of liability (or in the case of a carrier with unlimited liability, above a determined level), it would probably not be called on to pay a claim for minor injuries.

Q: Is the new SCP enforceable before E.U. courts given the EC directive on unfair terms in consumer contracts? Under the EC directive, it is unfair for a service-provider to restrict its liability for death or injury of a consumer.

The EC Directive on Unfair Terms in Consumer Contract (**93/13/EEC**) sets out rules imposing specific concepts of fairness and good faith on certain terms in consumer contracts for implementation into the laws of member states by 31 December 1994. The SCP will be a contract between airlines and the Contractor. As such, it cannot be regarded as a consumer contract, although it is conceivable that the combined effect of its terms, passengers' premium payments and a likely connection with a regulatory mechanism could alter that position. If the SCP is treated as a consumer contract, the Directive will apply to those of its terms that have not been individually negotiated. The enforceability of such terms against a passenger (as a consumer) will be governed by an assessment of fairness unless they (a) **define** the main subject matter of the contract, or (b) concern the adequacy of price against the goods or services soled. In practice, this means (provided they are written in plain intelligible language) that terms in the SCP defining the Contractor's obligations and determining the premium or amount payable on a loss would be exempted from the application of the Directive.

Q: What is an Airline Alternative Compensation Plan (AACP) Agreement?

A: An Airline Alternative Compensation Plan (AACP) Agreement would establish an elective benefit to be offered to Warsaw claimants in settlement of Warsaw claims. Acceptance of an AACP benefit would require the claimant to settle and release all claims against the airline arising from the injury giving rise to the Warsaw claims and to assign to the airline all claims against other persons (*e.g.*, manufacturers) arising from such injury. A Warsaw claimant would be required at a **fixed** point in time -- *e.g.*, 90 days after being offered an AACP benefit -- to decide whether to accept that benefit or to continue to assert Warsaw rights.

A claimant asserting Warsaw rights would not benefit from the AACP. Like the SCP, the AACP benefit to be offered would be structured by the airlines both as to substance and procedure. It would need to be sufficiently attractive to gain the voluntary acceptance of claimants.

Q: How does AACP differ from the Supplemental Compensation Plan (SCP) Agreement?

A: An AACP differs from the SCP because the AACP does not involve a special contract under Article 22. It is more precisely an alternative to air carrier liability under any special contract or under the Convention itself, as opposed to a supplement to that liability. The AACP would require a claimant to choose between litigating under Warsaw or seeking compensation under the AACP, whereas the SCP does not force a claimant to choose until the carrier's liability is established and a settlement offer is made.

Q: What are the advantages of the proposed AACP?

A: The advantages of the AACP are several. First, a claimant choosing to participate in the AACP would release all Warsaw claims at the threshold, including willful misconduct claims. Thus, unless the claimant were **willing** to risk facing Warsaw defenses **and** a recovery at Article 22 levels (a rare case), the claimant would accept the AACP benefit.

Second, for the same reason, it would allow the airlines to avoid the cost and adverse publicity of court litigation over the conduct giving rise to injury and the appropriate measure of compensation.

Third, it would permit the airlines properly to claim credit for moving creatively to meet passenger needs rather than casting airlines as reluctantly accepting special contracts to preserve Warsaw.

Fourth, the carrier's contribution to the total compensation available to claimants electing the AACP would not be determined by its special contract under Article 22. Carriers could agree to a uniform special contract without regard to the level of their responsibility for damages in the case of claims presented to the AACP.

HI. RELATED ISSUES

Q: What topics are permitted for discussion under the EC negative clearance?

A: **IATA** requested negative clearance to hold inter-carrier discussions to consider the possibility of reaching intercarrier agreements on higher liability limits established voluntarily by way of special contracts under Article 22 of the Convention. The EC's negative clearance of September 1, 1993, permits the airlines to discuss liability limits for death of, or injury to, passengers. The Commission also stated its understanding that: (1) participation in the discussions is voluntary; and (2) the outcome of the discussions will not be binding on participants.

Q: What topics are permitted for discussion under the DOT Order?

A: As a general rule, the Order may be construed as extending antitrust immunity to discussions that are reasonably related to the preparation, negotiation and implementation of a proposed agreement on passenger liability limits. The Order provides that attendees of the Airline Liability Conference "must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan." Accordingly, attendees should be particularly careful to avoid discussion of issues unrelated, or only tangentially **related**, to such a proposed agreement. To insure compliance with the conditions in the Department's order, the following general guidelines should be observed.

- During the meeting, the parties should adhere strictly to the stated agenda. Subjects not included on the agenda should not be discussed at the meeting absent the advice of counsel.
- The parties should avoid discussions concerning rates, fares, costs, capacities, market shares, marketing strategies, and customer classifications.

Q: How long does the DOT immunity exist?

A: Until July 6, 1995.

Q: What are “Bereaved Family Associations?”

A: Bereaved Family Associations are associations of families of victims of air incidents. They provide support to the families, share technical advice on pursuing claims and engage in political activity necessary or desirable to address the many problems faced by such families.

The first Bereaved Family Association was formed because of the 1983 KAL 007 shootdown, and represents groups in 3 countries and families in 16 countries.

The second family group resulted from the 1985 Arrow Airlines crash in Gander, Newfoundland, Canada.

The third family association resulted from the 1988 Pan Am 103 (Lockerbie) incident, and has affiliates in various countries.

Other family associations were formed in response to national or international air incidents.

Q: Why are Bereaved Family Associations formed?

A. Initially, **the low** liability limits and the slow process of addressing damages claims led to the formation of Bereaved **Family** Associations in many countries. Other reasons for their formation include:

- the families’ perception that international air carriers provide inadequate regard for the practical, human, and political consequences of air incidents (lack of support);
- the need for a support group for bereaved family members;
- promoting and advancing the air crash investigative process; and
- the desire to participate in supporting and creating rules, regulations, and legislation to improve and update air liability, air safety, and the air **security** system.

Q: What influence do the Bereaved Family Associations exercise?

A. The family support groups and their leadership exercise considerable influence nationally and internationally because many victims were businesspeople, **high-**

ranking Government **officials**, politicians and other people of influence, who attract media attention.

Q: Are there areas of common interest between air carriers and Bereaved Family Associations?

A: Some bereaved family associations have worked cooperatively with air carriers in the United States on the issues of international air carrier liability.

Substitute for the second question on page 11:

Q: Would a successive carrier be bound by the liability limits of a new inter-carrier agreement (*i.e.*, where there is code sharing or interlining)?

A: Article 30(1) of the Warsaw Convention deems a successive carrier "to be one of the contracting parties to the contract of transportation **insofar** as the contract deals with that part of the transportation which is performed under his supervision." Under some circumstances, Article I(3) of the Convention deems the contract of carriage to be a single contract of transportation. If the contract is deemed to be a single one, the Convention provides that each successive carrier will be bound by terms of that single contract. If the first contract also includes a special contract under Article 22(1) of the Convention, there is a risk that **the** special contract will be carried over and apply to the transportation performed by each successive carrier. Of course, if the parties to the successive transportation specifically provide in the special contract that a special limitation applies only to the carriage performed by the first carrier, it will not apply to a successive carrier.

Code sharing. Generally, in the code-sharing situation, the contract of carriage is between the passenger and the carrier in whose code the transportation was sold. The carrier actually performing the transportation may be liable consistent with the terms of that contract.

EXPLANATION OF **AGREEMENT** TO
ESTABLISH UNITED STATES SUPPLEMENTAL
COMPENSATION PLAN

The draft SCP will supplement the carriers' liability under the Warsaw Convention, determined under its special contract in the case of trips with a place of departure in the United States. This draft SCP is designed to meet the guidelines established by the Department of Transportation in its Order 95-2-44 granting airlines discussion authority.

Article 1, titled "Carrier Obligations," establishes the method of collection to fund the compensation plan. Section 1.1 says that the issuing carrier must collect and pay the contribution to the SCP. Article 1 also requires that moneys collected either shall be segregated by the carrier from its own funds or shall be paid over to the Contractor within 30 days from the end of each calendar month.

Article 1 further **requires** each carrier to include in its tariff the Compensation Plan Contribution and to revise those tariffs to reflect any change in the SCP. **Each** carrier must maintain, for not less than 2 years, passenger records, or a copy of such records. **Each** carrier must notify the Contractor of any claim for personal injury or death against the carrier and must provide information to the Contractor concerning such claims. A carrier must also use its best efforts to assist the Contractor in evaluating and addressing claims made under the Plan.

Section 1.5 permits the Contractor to bring an action for breach of the carrier's obligations in any court of competent jurisdiction. Section 1.6 appoints the **ATA** and IATA as attorneys in fact for the purposes of administering the SCP.

Article 2, titled "Contractor Obligations to Claimants," sets forth the method by which claims are to be handled. Section 2.2 requires the Contractor to pay any provable damages to the extent they exceed a carrier's liability arising from death or bodily injury of a passenger caused by an accident on board aircraft or during embarking or disembarking. This obligation to pay would run to passengers departing from the United States in international air transportation and to U.S. citizens and permanent residents, and is subject, *in infer alia*, to the conditions that:

- aggregate recovery **cannot** exceed a set per incident/per aircraft limit; and
- the Contractor's liability is coextensive with, but in lieu of, the airlines' liability.

Section 2.4 authorizes the Contractor to exercise its rights to recover damages attributable to the culpability of third parties. The Contractor must offer to settle with claimant within 90 days. Section 2.8 requires the Contractor to reimburse a claimant for medical services, emergency family support, or funeral expenses. Any such claims are included in the total damages to the claimant.

Article 3, titled "Claimant Rights and Obligations," sets out how a claimant can obtain compensation under the plan in lieu of its right to bring an action for compensation against the carrier. Section 3.2 requires claimant to file a proof of claim that includes all reasonable information required by the Contractor. The claimant must also provide any reasonable additional information the Contractor requests. Claimants must permit the Contractor to conduct a reasonable inspection or examination of any covered person and injured person seeking moneys. Sections 3.4 allows the claimant to bring an action if the Contractor fails to settle. A claimant dissatisfied with the offer may, however, seek a neutral determination of the amount of compensation payable under the Plan either through arbitration or in a U.S. court.

Section 3.5 requires the claimant, in order to obtain payment, to:

- release the Contractor from any further liability;
- agree that the sums being paid are fair and constitute full recovery;
- assign irrevocably to the Contractor **all** recoveries and rights to recover damages from third parties; and
- release and discharge all potential parties known and unknown from liability.

Section 3.7 provides that no claimant shall have the right to contest the Contractor's evaluation of a claim made by any other claimant.

Article 4, titled "General Provisions," provides that this agreement would not become effective until it receives DOT approval. This article also states that nothing contained under the SCP is intended to create any liability on the part of an air carrier, a carrier's agent or its employees, or an agent of a passenger, covered person, claimant or representative thereof.

The Supplemental Compensation Plan could be modified to apply only where passengers elect to seek recovery of all provable damages from the Plan instead of seeking recovery from the carrier, including for amounts within **the** carrier's limitation of liability. (An Airline Alternative Compensation Plan). The SCP differs from an AACP primarily in that the former provides compensation in excess of the carrier's limitation of liability and the latter establishes a true alternative to such liability. One of the principal benefits of the AACP approach is that the amount of damages that the carrier itself would be responsible for in any settlement by the Plan could be determined by intercarrier agreement without regard to its limit of liability under the Convention or any special contract made pursuant to the Convention. Of course, to the extent a carrier could be held liable under Article 25 of the Convention for damages in excess of its limitation, both the SCP and the AACP operate in the same fashion in that they provide an alternative to pursuing a claim against the carrier. In this regard, it is important that the Plan, in its dealings with claimants, offer its alternative compensation on behalf of the airline itself.

A draft of a SCP is attached.

**AGREEMENT TO ESTABLISH A UNITED STATES
SUPPLEMENTAL COMPENSATION PLAN
PURSUANT TO ARTICLE 35A OF THE WARSAW CONVENTION AS AMENDED**

WHEREAS, the Convention for the Unification of Certain Rules Relating to International Transportation by Air done at Warsaw on October 12, 1929 ("the Convention") establishes the liability of carriers for damages sustained in case of death or bodily injury of a passenger in international transportation or carriage by air; and

WHEREAS, the Government of the United States of America has requested that the carriers establish a supplemental compensation plan as contemplated by Article 35A of the Convention, as it would be amended by the Protocol done at Guatemala City (1971) to augment the amounts recoverable from the carrier;

NOW, THEREFORE, the undersigned carriers have agreed to establish a Supplemental Compensation Plan to supplement the compensation available under the Convention, which shall be funded by passenger contributions and administered by a Contractor, as hereinafter provided:

Article 1

Carrier Obligations

1.1 Compensation Plan Contributions.

(a) Each carrier or its agent shall collect when it issues a ticket, or a written authorization for free or reduced-rate transportation, for:

- (1) international transportation as defined in Article I(2) of the Convention; or
- (2) foreign air transportation as defined in 49 U.S.C. section 40102(23);

where the place of departure for such transportation is in the United States, the amount specified in Appendix B to this Agreement.

(b) **Each** carrier shall act exclusively as agent of the contractor, and as a fiduciary of the Plan, in collecting Compensation Plan Contributions, the proceeds of which shall be held in trust by the carrier for payment to the Contractor. Each carrier shall promptly either:

- (1) segregate all such Compensation Plan Contributions from its own funds in a manner satisfactory to the Contractor, or
- (2) pay all such Compensation Plan Contributions over to the Contractor immediately.

(c) Within thirty (30) days from the end of each calendar month each issuing carrier shall pay to the Contractor the total of all Compensation Plan Contributions that were, or should have been, collected in that month, as determined by the completed revenue accounting transactions for each month recorded in the appropriate account on the books of such carrier, minus any Compensation Plan Contributions included in refunds made by the issuing carrier in those cases where the transportation was not performed. Interest at the rate of interest established under section 6621(a)(2) of the Internal Revenue Code as of the due date and compounded daily shall be added to all delinquent payments of these monies to the Contractor for the period of delinquency; provided, however, that the payment of any such interest shall not excuse any such delinquency.

1.2 Tariffs. Each carrier shall include in its tariffs filed with the U.S. Department of Transportation the provisions of Appendix A to this Agreement, and the Compensation Plan Contribution specified in Appendix B to this Agreement, and shall revise those tariffs as necessary.

1.3 Retention of Passenger Records. **Each** carrier shall retain the document evidencing any transportation referred to in Article 1(2) for at least two years after the date of the commencement of such transportation.

1.4 Notice and Information to Contractor. Each carrier shall:

(a) promptly notify the Contractor of any claim for bodily injury or death filed against the carrier that exceeds the amount of the carrier's liability under the Convention or a special contract made under the Convention;

(b) supply such information requested by the contractor relating to such claim as would be available to any party in litigation against the carrier; and

(c) use its best efforts to make its facilities, employees, insurers and agents available to the Contractor to assist it in the evaluation and disposition of any claim under the Plan. At the request of the carrier, the Contractor shall reimburse the carrier, its insurers or agents for the reasonable costs of such assistance.

1.5 Jurisdiction. Each carrier agrees to submit to the jurisdiction of any court of competent subject matter jurisdiction within the United States in any action brought by the Contractor for breach of the carrier's obligations under this Agreement. In any action brought by the contractor based upon any delinquency of a carrier, an agent of the carrier responsible for collecting

Compensation Plan Contributions that the Contractor has identified as delinquent shall be named as the necessary party defendant.

1.6 Attomevs in Fact. Each carrier hereby constitutes and designates the Air Transport Association of America ("**ATA**") and the International Air Transport Association ("**IATA**"), their employees and agents as its attorneys in fact under this Agreement, for the following purposes:

- (a) **filing** this Agreement and any amendments or additions thereto with the U.S. Secretary of Transportation for approval;
- (b) negotiating the level of the Compensation Plan Contribution;
- (c) negotiating with and selecting the Contractor according to the criteria and procedures set forth in Appendix C; and
- (d) monitoring the contractor's performance of its obligations under this Agreement.

Article 2

Contractor Obligations to Claimants

2.1 Plan Administration. The Plan shall be administered by a Contractor, who shall be selected and appointed according to the criteria and procedures agreed in Appendix C to this Agreement.

2.2 Contractor Liability. The Contractor shall be liable to a claimant for any provable damages, to the extent those damages exceed a carrier's limitation of liability under the Convention or a special contract made under the Convention, arising from death or bodily injury of a passenger, including economic and noneconomic losses, of

(1) any person carried in international transportation as defined in Article I(2) of the Convention or foreign air transportation as defined in 49 U.S.C. section **40102(23)** for which a contribution was, or should have been, collected under paragraph 1.1 (a) of this Agreement; or

(2) any citizen or permanent resident of the United States in foreign air transportation as defined in 49 U.S.C. section **40102(23)**, international transportation as defined in Article I(2) of the Convention, or other transportation by air between two or more foreign countries

caused by an accident that took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Contractor's liability is in lieu of the liability of the carrier, and the contractor is not liable for damages recovered from the carrier.

The Contractor's obligation to pay is subject to the conditions, limitations, exclusions and other provisions set forth in this Agreement; *provided however*, that the Contractor's liability shall not in any event exceed in the aggregate the per incident, per aircraft limitation specified in Appendix B.

2.2 Liability Co-extensive with Air Carrier's.

(a) The Contractor shall not be liable for any payment under this Plan unless the claimant can maintain a claim for damages against the carrier under Article 17, Paragraph 1 of the Convention or, in the case of foreign air transportation or other transportation by air between two or more foreign countries, could have maintained an action if the transportation had been subject to the Convention.

(b) It shall be an express condition of the liability of the Contractor to the claimant that the carrier has paid, been held liable to pay, or has agreed to pay damages to the claimant equal to the applicable limit of its liability under the Convention, or any special contract pursuant to the Convention in the case of international air transportation, except in the case of the insolvency of the carrier.

2.3 Insolvency. The liability of the Contractor under this section shall not be affected by the insolvency of the carrier, or by the carrier's failure to perform any of its obligations under this Agreement.

2.4 Assignment. It shall be an express condition of the liability of the Contractor to the claimant that the claimant shall assign to the Contractor any recovery or right of recovery for damages from any other potentially liable party, known or unknown, including the carrier to the extent of its liability for claims in excess of the liability described in paragraph 2.2(b) above. The Contractor, insofar as permitted by law, shall have the right to recover back such damages from any such other party to the extent of such other party's culpability.

2.5 Legal Fees and Costs. The Contractor shall not be liable for lawyers' fees and other costs of a legal action incurred by a claimant hereunder, in excess of those normally recoverable under the law governing the action, nor shall the Contractor be liable for punitive damages or their equivalent.

2.6 Notice to Claimant. Upon receipt of a notice from a carrier of a claim for bodily injury or death, the Contractor shall notify the claimant of his or her possible rights of recovery under this Plan and shall request the information necessary to make a proof of claim. The notice shall explain the provisions of this Plan and the procedures for **filing** a claim.

2.7 Offer of Settlement. If, after reviewing the information submitted by the carrier and the claimant, the Contractor concludes that the claimant has established a valid claim for compensation under this Plan, the Contractor shall make an offer of settlement to the claimant within 90 days after receipt of the claimant's proof of claim, or payment by the carrier to the claimant of an amount equal to its liability limit under the Convention or pursuant to a special contract under the Convention in cases arising in international air transportation, whichever occurs later.

2.8 Emergency Benefits. Whenever and to the extent the contractor is liable for damages under this Agreement, the contractor shall reimburse promptly a claimant for reasonable and documented charges for funeral expenses, emergency family support or medical services or supplies incurred by or on behalf of a person described in paragraph 1.1 (a) of this Agreement arising from the accident giving rise to the claim for damages, pending the disposition of the claim. Any such reimbursement shall be included in the total damages for which the contractor is liable under the Plan.

2.9 Choice of Law. Any action brought in the United States by a claimant against the contractor under this Plan, and the assessment of covered damages sustained in the case of death or bodily injury of a covered person, shall be governed by the same rules of law in actions in respect of death or bodily injury in any State of the United States that would be applicable in any action that could be brought by the claimant in respect to the same subject matter. In no event, however, shall the laws of any foreign jurisdiction be applied in any such action brought by a U.S. citizen or permanent resident.

Article 3

Claimant Rights and Obligations

3.1 Claimant's Right. The claimant shall have the right to receive from the Contractor the compensation described in paragraphs 2.1 and 2.8, in lieu of its right to bring an action for such compensation against the carrier.

3.2 Proof of Claim. To obtain compensation, the claimant must submit to the Contractor a proof of claim that includes all reasonable information required by the Contractor, including any additional reasonable information as the Contractor may request to verify the proof of claim.

3.3 Inspections. The claimant shall permit the Contractor to conduct such inspections and examinations as the Contractor may reasonably require.

3.4 Failure to Offer to Settle. If the Contractor fails to settle a claim as provided in paragraph 2.7, the claimant may bring an action based on the Contractor's liability under this Agreement in any court of competent subject matter jurisdiction within the United States.

3.5 Dispute as to Quantum. If the claimant is dissatisfied with the amount the Contractor offers under paragraph 2.7, the claimant may seek a neutral determination of the amount of compensation that should be paid either through arbitration or in any court of competent subject matter jurisdiction within the United States.

3.5 Assignment of Claim. **To** obtain any payment from the Contractor in satisfaction of the Contractor's liability under this Plan (except with respect to interim payments of funeral expenses, emergency family support or medical benefits under section 2.8), whether pursuant to settlement or in satisfaction of a judgment of a court of competent jurisdiction, the claimant shall execute a document satisfactory to the Contractor whereunder the claimant:

(a) shall release and discharge the Contractor from any further liability in full satisfaction of **all** claims against the Contractor by such claimant;

(b) shall agree that the sums being paid under the Plan constitute full and fair recovery for all covered damages;

(c) shall agree that, insofar as permitted by law, the Contractor shall be subrogated to the extent of such payment, to all the claimant's rights of recovery against any other party to the degree of such other party's culpability;

(d) shall irrevocably assign or otherwise preserve to the Contractor all recoveries and rights to recover such covered damages from any third party, including the carrier for claims in excess of liability described in **paragraph 2.2(b)** of this Agreement; and

(e) shall otherwise release and discharge all potential parties known and unknown from liability.

3.6 Relationship to Other Supplemental Compensation Systems. In the case of a claim made by or on behalf of a person in international transportation as **defined** in the Convention who did not purchase, or receive an authorization for, such transportation in the United States, the claimant, in addition to the requirements of section 3.6, shall irrevocably assign and preserve to the Contractor **all** recoveries or rights to recover damages or other compensation.

3.7 No claimant shall have the right to contest the Contractor's evaluation of any other claimant's claim.

Article 4

Effective Date

4.1 Filing with DOT. This Agreement and each amendment or addition thereto shall be **filed** with the Secretary for approval.

4.2 DOT Approval Necessary. This Agreement and each addition or amendment thereto shall have no force and effect until and unless 1) it has been **finally** approved and granted immunity from the operation of the antitrust laws under 49 U.S.C. sections 41308 and 41309 by the U.S. Secretary of Transportation or his designee and then only according to the terms of the Agreement and any conditions of any order granting such approval, and 2) the Secretary requires carriers holding authority under Subtitle VII of Title 49 of the United States Code to be deemed to have agreed to the provisions of this Agreement.

4.3 Parties and Counterpart Documents. This Agreement shall be open to signature by any carrier holding authority **granted** by the Secretary to engage in foreign air transportation. It may be signed in any number of counterparts which collectively shall constitute one agreement. **Each** such counterpart shall be deemed an original, and shall be deposited with either the **ATA** or the IATA and with the Secretary. It shall not be necessary in making proof of this Agreement to produce or account for more than one such counterpart.

4.4 Application. The obligation to collect contributions and to pay supplemental contributions in accordance with this plan shall apply to transportation to be performed on or after the effective date of this Agreement.

4.5 Withdrawal. Any carrier that ceases to be engaged in foreign air transportation as **defined** in 49 U.S.C. section 40102, and whose authority to engage in such transportation has expired or is otherwise terminated, may withdraw from this Agreement by written notice to the Contractor, the Secretary, the **ATA** and the IATA. Withdrawal shall not affect the obligations of any carrier under this Agreement for any accident that took place prior to, nor for any obligations, duties or liabilities that arose prior to, its withdrawal from this Agreement, nor shall withdrawal affect its obligations as agent for any other carrier party to this Agreement, or its obligations under any regulations issued by the Secretary.

4.6 Governing Law and Interpretation. The validity of this Agreement and its provisions shall be determined under the laws of Delaware, excluding Delaware's law of conflict of laws. Any ambiguities arising under this Agreement shall be construed in favor of providing adequate and timely compensation for death or bodily injury of passengers covered by this Agreement.

4.7 Governing Time. Subject to the provisions of the Convention, all dates specified in this Agreement shall be based on Greenwich Mean Time.

4.8 Notices. All notices, demands of other communications required or permitted to be given or sent hereunder shall be in writing and shall be deemed to be duly given or received if and when hand delivered or sent by registered mail, return receipt requested, postage prepaid, or in the event of an emergency, by telegraph, facsimile transmission, or cable.

4.9 No Change in Carrier's Liability. Nothing contained in this Agreement shall be construed to create any liability on the part of a carrier, **ATA**, IATA or their employees and agents to any passenger, covered person, claimant or any representative thereof.

4.10 Headings. The headings of the Sections contained in this Agreement are inserted for convenience only and shall not be interpreted to have any meaning inconsistent with the text of this Agreement.

4.9 Entire Agreement. This Agreement, including any appendices, contains the entire understanding among the parties hereto in respect of the subject matter contained herein and may be amended only by a duly executed written instrument or instruments.

INWITNESS **WHEREOF**, the parties hereto have caused this Agreement to be duly **executed** by their corporate officers.

Carrier: _____

By: _____ Date: _____

Title: _____

GLOSSARY

Antitrust Immunity: Immunity from private or government suit brought under the U.S. laws designed to protect competition.

Article 20 Defense: Also called the "defense of non-negligence." In a lawsuit brought under the Warsaw Convention, an airline can avoid liability if it shows that it has "taken all necessary measures to avoid the damage or that it was impossible for [it] to take such measures." MAP3 would remove this defense for death or personal injury of a passenger. Similarly, the Montreal Intercarrier Agreement waives this defense.

Contract of Carriage: The legal relationship between a passenger or shipper and an airline, normally evidenced by a ticket. Under the Warsaw Convention, a ticket for international transportation must have a place and date of issue, the place of departure and destination, the agreed stopping places, the name and address of the carrier and a statement that the transportation is subject to the liability rules of the Convention.

Discussion Authority: Permission from the U.S. government to discuss matters of mutual concern in the public interest, even though the discussions might have otherwise led to the inference of agreements in violation of the U.S. antitrust laws.

DOT Approval: Approval of an intercarrier agreement and a grant of antitrust immunity by the U.S. Department of Transportation.

Economic Authority: Authority to engage in air transportation from an economic regulatory agency usually involving an examination of economic qualifications. This does not refer to a technical or operating safety license.

Economic Injury: See Pecuniary Loss.

European Proposals:

(1) AGAE/CAC proposal under which Member States should encourage air carriers operating to, from or via the territory of ECAC Member States to participate in a European intercarrier agreement setting up a new special contract. The special contract should contain liability limits of at least SDR 250,000 (about US \$380,000), the speedy settlement of claims, up-front payments to claimants, and ways to safeguard the limits against inflationary erosion.

(2) European Union. A proposal of the Commission of the European Union to require carriers serving a point in the Union to adopt liability limits of at least ECU 600,000 (about US \$750,000).

Fault-based Liability: Liability for damage based on proof of negligence, a deliberate act, or an intentional disregard for the consequences.

Guatemala City Protocol: A 1971 proposed amendment to the Warsaw Convention. It proposed major changes to the Convention's passenger liability regime, which have been incorporated into Montreal Protocol No. 3. Not in force.

Japanese Initiative: In 1992, Japanese-flag airlines established a new special contract under Article 22 of the Convention. In effect, Japanese carriers have accepted unlimited liability, but recovery above SDR 100,000 (about US \$150,000) is subject to the defense of non-negligence under Article 20 of the Convention.

Montreal Additional Protocol No. 3: Often called MAP3. Montreal Protocol No. 3 would amend the Warsaw Convention to eliminate the carrier's defense of non-negligence under Article 20(1) and set the new passenger liability limit of SDR 100,000 (about US \$150,000). The new limit would be "unbreakable," *i.e.*, a claimant cannot get any more money from the airline, regardless of the claimant's provable damages or the degree of airlines' fault. This new limit could be increased periodically. Further MAR3 would amend Article 22 of the Convention by deleting the sentence that specifically permits a special contract with the passenger to establish a higher limit. A new Article 35A would be added to allow each party to the Convention to set up within its territory a system to supplement the compensation payable to claimants. Among other changes, the Protocol would also allow a claimant to sue in the country of the passenger's domicile or permanent residence, provided the carrier has "an establishment" there (such as a general sales agent). MAR3 is not in force.

Montreal Intercarrier Agreement: A 1966 agreement among all airlines operating to, from or through an agreed stopping place in the United States under which the airlines agree to a passenger liability limit of US \$75,000 and to waive the defense of non-negligence permitted by Article 20(1). In essence, airlines serving the U.S. agreed to establish special contracts with passengers, as authorized by Article 22 of the Warsaw Convention.

Non-economic Injury: See Non-pecuniary Loss.

Non-pecuniary Loss: In U.S. practice, non-pecuniary losses in wrongful death or survival actions can include mainly loss of society, mental injury, grief or anguish and pre-death conscious pain and suffering.

Pecuniary Loss: In U.S. practice, pecuniary loss can include several elements:

- (1) loss of support;
- (2) loss of services;
- (3) loss of inheritance;
- (4) loss of parental care, nurture, guidance training or advice; and
- (5) medical, funeral and burial expenses.

A U.S. court may also award prejudgment interest as a **pecuniary** loss.

Punitive Damages: An award of damages set so as to deter and punish undesirable conduct, rather than to compensate for actual loss. U.S. courts have ruled that plaintiffs may not recover punitive damages from an air carrier in a U.S. wrongful death action governed by the Warsaw Convention, even if the carrier's conduct amounts to wilful misconduct.

Right of Recourse: The right of a party liable for damages to recover part or all of that loss from a third party. Airlines obliged to pay damages following an event occurring on board aircraft sometimes have a right of recourse against a third party such as the air traffic control service or the aircraft manufacturer.

SDR: Abbreviation for Special Drawing Rights, which are rates of currency exchange set by the International Monetary Fund and are based on exchange rates for the U.S., German, British, French and Japanese currencies. On June 1, 1995, one SDR was equal to US \$1.5477.

Special Contract: An agreement between the carrier and the passenger permitted by Article 22(1) of the Warsaw Convention as part of the contract of carriage establishing a limit of liability higher than that set by the Warsaw Convention.

Strict Liability: In U.S. practice, liability, without regard to fault. In some common-law countries, there may be an opportunity for the defendant to show that it was not at fault.

Supplemental Compensation Plan (SCP): A plan that would supplement the compensation available from the airline. An SCP **originally** developed in the United States to accompany ratification of MAP3, under Article 35A thereof, would compensate a passenger for all provable economic and noneconomic damages above the airline's limit of liability. A modified version of the SCP, called an **Airline Alternative Compensation Plan (AACP)** differs from the SCP primarily in that it operates to provide a comprehensive settlement of the carrier's liability under the Warsaw Convention. Thus, the carrier's responsibility for claims compensated by the AACP would be determined by intercarrier agreement, independent from its existing or proposed limitation of liability under Warsaw, **the** Montreal Intercarrier Agreement or any new special contract.

Surcharge: A charge on passengers in addition to the base fare that addresses a specific increase in cost of the services provided by a carrier.

The Hague Protocol: Amendments to the Warsaw Convention proposed in 1955 that entered into force in 1963 that, *inter alia*, doubled the passenger liability limit. A majority of States, not including the United States, are party to this Protocol.

Ticket: Document evidencing the contract for air transportation.

Unlimited Liability: Liability for all provable damages. In the context of this Conference, unlimited liability shall refer only to compensatory damages, both economic and non-economic, and shall not include punitive damages.

Up-front Payment: A partial payment made before claims are finally decided.

Warsaw Convention: A treaty signed at Warsaw in 1929 that sets uniform rules governing the relationship between air carriers and users (both passengers and shippers) of international air transportation, including rules governing liability for personal injury or death to passengers. The treaty makes transportation documents, such as passenger tickets, baggage checks, and air waybills, uniform. It also sets a passenger liability limit of about \$10,000, and permits a carrier to avoid liability if it shows that it has "taken all necessary measures to avoid the damage or that it was impossible for [it] to take such measures. "

Wilful Misconduct: In general, an unreasonable action taken intentionally and in disregard of a known or obvious risk that is highly likely to result in harm. Under Article 25 of the Warsaw Convention, a carrier may not avail itself of the liability limits if the damage is caused by wilful misconduct.

Written Authorization: Usually refers to the document that permits free or reduced-rate transportation.

AIRLINE LIABILITY CONFERENCE

Preliminary statement by *European Regional Airlines Association*

Background

The European Regional Airlines Association represents the interests of more than 50 regional air carriers operating in an area approximately 50% larger than the USA.

In 1994, their 650+ aircraft fleet carried more than 44m passengers, the majority of which were business travellers. Around 30 % of these passengers travelled for interline transfer purposes.

ERA airline membership comprises fully independent airlines as well as the daughter companies of major carriers.

ERA Views

The following notes summarise ERA's initial views. ERA

accepts

- the fundamental need to adjust the current Warsaw passenger liability limits

- that these limits are inadequate in many areas throughout the world

- that a number of ERA airlines are already required under their national legislation to provide a higher level of protection

agrees

- the need for generally expedited compensation payments

supports

- a speedy initial 'hardship' payment without prejudice to any full and **final** payment

- the need for information regarding liability limits to be provided to passengers in a far clearer and more digestible way than hitherto

recognises

- the major differences which exist worldwide with respect to social and economic conditions

- the seemingly impossible objective of establishing a single universally applicable compensation limit which would satisfy all interested parties

contends

- that no new limit could ever remove the risk of individual parties seeking even higher compensation through individual litigation

higher limits could, in practice, act as a higher minimum threshold target for litigants

recent awards from such litigation have exceeded, by many dimensions, the largest limits proposed by even the most vigorous governments and/or international bodies

is concerned

that smaller carriers are likely to be more seriously economically affected than larger carriers

such carriers have generally poorer access to insurance markets and favourable rates

a recent study has indicated that **insurance** rates for these carriers in Europe has forecast that insurance rates could rise by more than 30%

advocates

a voluntary system to be implemented by **airlines**

within such a system, the liability limit should be increased, but to a moderate level eg the ECAC proposed limit

that individual carriers should be free to exceed such limits if they so wish.

19JUN95

POSSIBLE ELEMENTS OF AN INTERCARRIER AGREEMENT

(Submitted by Air Mauritius)

Based on the discussions of the Conference so far, and taking into account views of carriers expressed at the Legal Advisory Group Working Group and the LAG recommendations, there seems to be an emerging consensus that

- the concept of an intercarrier agreement through voluntarily raising liability limits is generally considered acceptable;
- adjustment of the limits internationally agreed in the 1975 Montreal Additional Protocol No. 3 by the applicable inflation factor since 1975 (updated MAP 3) would constitute a reasonable updated figure; and
- governments should assume their responsibility to diligently modernise the Warsaw System through ICAO.

However, any intercarrier agreement to be developed on this basis should also address the following factors:

- in order to be acceptable to governments, the provision of an up-front payment facility;
- as a *quidpro quo* for voluntary increase of limits, the question of defenses under Article 20;
- the need for any “third-tier” beyond a new limit which must be entirely optional;
- the need to retain Article 21 throughout;
- the need to provide for financial assistance to developing countries’ airlines in meeting any additional insurance premiums resulting from the additional risks/limits.

An intercarrier agreement by the Conference developed on this basis could have the following elements:

- ◆ *first tier:* Current Warsaw/Hague limits but on the basis of **strict liability**. This amount could therefore become the minimum “up-front payment” for claims in excess of the first tier.
- ◆ *second tier:* The updated MAP 3 limit, periodically inflation-adjusted on the basis of **presumed-fault liability** (defenses under Article 20 Warsaw/Hague being retained). Uncontested part of claim could also be paid up-front, and that payment would necessarily include the pay-under of the first tier.
- ◆ *third tier:* Full (but not double) compensation of proven compensatory damages on the basis of **presumed-fault liability** could be secured through an optional, non discriminatory comprehensive industry-wide insurance mechanism, incorporating passenger surcharges. This mechanism should ensure that a passenger who would only be claiming under the first or second tiers would not be subsidising the passenger claiming under the third tier.

Federation of Air Transport User Representatives in the European Community



Faturec Position Statement on Airline Liability

Introduction

For several years various ICAO Member States have made considerable effort to expedite the entry into force of Montreal Protocols 3 and 4 to the Warsaw Convention. Adherence to these Protocols would mean a.o. updating of the liability limits. Although the number of ratifications grew, the final goal has so far not been achieved.

It is generally felt that ratification by the Government of the United States, being a major aviation country, would set an important incentive for other countries to follow suit. Since this is not likely to happen in the near future consumer organisations note with appreciation the fact that anti trust immunity was granted by the US Department of Transport to IATA in order to accomplish an inter carrier agreement with regard to liability limitation.

Although consumer organisations were not formally invited to attend the Conference, FATUREC considered it appropriate to present its views informally, passenger interest supposedly being one of the airlines' major concerns.

Position

The consumer organisations believe that the global nature of air transport requires a liability system that is universally applied. Different regional or national systems would lead to less transparency and more lengthy legal procedures.

This Conference offers the best, and perhaps even the last opportunity to accomplish what apparently could not be accomplished by States: to keep intact a universally applied liability system and update the liability limits.

The aviation industry has never been in a better position to set the tone for possible future intergovernmental arrangements.

Under these circumstances consumer organisations consider it most important that agreement is reached before the end of the Conference.

support

The liability limit mentioned in ECAC Recommendation 16/1 is 250,000 SDR. This is still relatively low, given the fact that in some major aviation countries unlimited liability is considered or even introduced.

However, taking into account the importance of a universal system, and given the unique opportunity this Conference offers, the consumer organisations will support IATA in any agreement reached regarding the liability limit, at a minimum of 250,000 SDR, provided that the liability limit will be applied by all member airlines on all of their flights.

If necessary it can be left to individual airlines to add up to this minimum, eg. in order to comply with national or regional regulations.

Airline Liability Conference

Washington, 19-27 June 1995

Recommendations of the IATA Legal Advisory Group

After careful deliberation, taking into account the statements made at yesterday's opening session and the dialogue carried on yesterday afternoon, the IATA Legal Advisory Group recommends that the Conference agree to focus its continuing efforts on a liability approach including a level of individual airline responsibility of not less than 250,000 SDR, to be appropriately adjusted over time to maintain value.

The reasons for this recommendation are several.

First, the Legal Advisory Group is persuaded of the critical importance of avoiding a breakdown of the Warsaw System. A breakdown, arising **from** government perceptions that airlines are unwilling to take the actions necessary to adjust that system to provide fair compensation to passengers, would result in severely increased liability risks, including the possibility of punitive damage awards; severely increased litigation costs; a consequent escalation of insurance rates; and, a potentially significant limitation on the ability of smaller carriers to serve developed markets where government-imposed liability and insurance regimes may prove prohibitively expensive.

Second, the Legal Advisory Group is persuaded that any airline responsibility limit less than 250,000 SDRs would be viewed by governments as a basic retreat from the responsibilities airlines were prepared to assume under MAP-3, the Montreal Agreement and even the Warsaw and Hague Conventions. The inflation-adjusted figures reviewed yesterday are dramatic evidence that the passage of time and the effects of inflation have made the current limits offered by our relatively mature industry lower in real terms than the historic limits offered by a then infant industry. Governments will be hard pressed to avoid the political pressure for drastic change in this situation.

Third, the Legal Advisory Group believes that an adjustment mechanism is required to keep faith with customers and governments and to avoid the unhappy consequences and insurance disruptions of the type of step increase we must now consider.

Fourth, the Legal Advisory Group recognizes a distinction between the limits of responsibility airlines may offer and the level of damages to be awarded to or on behalf of an individual passenger. The measurement of compensation is an issue to be determined according to the law and social policy of individual states, and the adjustment of responsibility limits should not be taken as a reflection on the adequacy or inadequacy of current compensation measurements. Indeed, as was pointed out in certain insurance underwriter comments brought forward yesterday, in states where the recommended

responsibility limit would be **sufficiently** above the current award level to be effectively unlimited, it is possible that the increase will remove the limit as a perceived target and help stabilize the compensation system.

Fifth, the Legal Advisory Group is aware that the recommended responsibility level, while perhaps imposing a significant cost increase on some carriers, still may not be enough to **satisfy** all concerned governments. The Group believes that, using the U.S. as a first working model, the Conference should develop an industry-wide, **industry-**operated mechanism which permits such requirements to be satisfied through uniform tariff surcharges and without competitive disadvantage to smaller carriers.

The Legal Advisory Group thus urges the Conference to accept its recommendation as a working premise and to proceed to consideration of the appropriate defenses to liability and the establishment of the industry-wide supplemental mechanisms necessary to meet particular government requirements on a basis that is workable and equitable for all members of the Conference.

20 June 1995

Airline Liability Conference

Washington, 19-27 June 1995

Recommendations of the IATA Legal Advisory Group



**Legal Advisory Group
Recommendations**

◆ Tier 1 – Warsaw/Hague Limits	US \$ 10,000/20,000
◆ Tier 2 – Inter-carrier Agreement Limit	SDRs 250,000
◆ Tier 3 – OPTIONAL Mechanism for additional cover through model SCP or other form of arrangement on behalf of the Carrier. In some jurisdictions, additional cover may become legal requirement.	Full Compensation PROVEN DAMAGES

19-27 June 1995

ALC - Item 7
WP 13 - Doc II

Washington, D.C.

**EUROPEAN
COMMISSION**

I should first like to thank IATA for organising this Conference. I need not remind you that this represents the first initiative at global level to increase the limits for compensation paid to victims of air accidents, since the ICAO convened the Montreal Conference in 1975. I find it very encouraging that this initiative is taken at airline level on a voluntary basis.

The key objective of this Conference - as with the various unilateral plans presented by individual countries during the intervening 20 years - is to achieve a satisfactory increase in current liability limits, while preserving the legal system constituted by the Warsaw Convention. Limits on liability of carriers represent only one element of the international system of rules substantively governing international air transport of passengers. However, this one element has called the entire Warsaw system into question because of the anachronistic and intolerably low levels of compensation which it provides.

The Warsaw system is certainly of enormous significance for tk carriers but also, we should not forget, of equal importance for passengers. Therefore, it should be preserved.

Upholding the interest of consumers is one of the central preoccupations of the Commission of the EU and that is why we have responded enthusiastically to IATA's invitation to attend this Conference. It goes without saying that the Commission will carefully follow the discussions that will take place this week. At the same time, it must be stressed that the Community will not be party to a solution which does not give sufficient weight to the concerns of consumers.

The Commission has for some time sought to ensure that changes should be introduced to the current liability limits. In 1992, a consultation paper was issued entitled *Passenger Liability in Aircraft Accidents: Warsaw Convention and Internal Market Requirements*. In line with the position outlined in this document, the Commission granted IATA an exemption for discussions on liability. Since then, the Commission has actively participated in ECAC's activities in this field. In June 1994 ECAC adopted a Recommendation urging airlines to enter into an inter-carrier agreement which would increase the compensation limits to at least 250,000 Special Drawing Rights. The Commission is of the opinion that limits should be applied which, on the one hand, reflect the normal settlements in other modes of transport and, on the other hand, take account of the most recent aviation settlements in Europe where air carriers have waived the present limits. We would consider that a liability limit which provided for SDR 500,000, and which incorporated an appropriate revision mechanism to update the limit

in line with the rate of inflation, would correspond reasonably well to contemporary requirements and circumstances. Obviously, the Community could welcome other solutions that would increase the limits, preserve the Warsaw System and simplify the current situation. Therefore, it would also be possible to accept a solution involving a two tier system such as:

- The first tier would consist of strict liability up to at least SDR 250,000.
- The second tier would concern compensation beyond the first tier up to SDR 500,000 with possibility of defense.

Both solutions, I believe would generate consumer benefits compared to the present situation and approval under our competition rules could be granted. It has to be added that the Japanese scheme also has a lot going for it.

I should like to stress again that the Commission is prepared to be flexible and is keen to contribute to a successful conclusion of this conference which serves the interest of the travelling public. Indeed, I wish every success to the Conference and its organisers and I hope that the discussions this week will be fruitful and positive.

AFRICAN AIRLINES ASSOCIATION



AFRAA Association des Compagnies Aériennes Africaines
ETA : NBOXAXB P. O. Box 20116
TELE : 502513, 502448, 502449, 502418 NAIROBI
FAX : 502504 Kenya

SUBMISSION OF THE AFRICAN AIRLINES ASSOCIATION on

The Warsaw System of Airline Liability

1. The African Airlines Association (AFRAA) welcomes and supports the initiatives of IATA in convening this conference which we believe is timely. We are hopeful that the conference will be successful in achieving an acceptable compromise as a basis for regulating airline liability, without destroying the global uniformity that the Warsaw framework offers.

2. The African Airlines Association is increasingly concerned over not only the inadequacies of the liability limit which should be adapted to reflect changing conditions but also with its fragmentation.

3. As regards the latter, AFRAA's concern has been emphasized by recent tendencies of unilateral actions to increase the passenger limit. Such tendencies, in the opinion of AFRAA, will further destabilize the Warsaw System, thereby diminishing its usefulness.

4. AFRAA is equally concerned over the lack of progress in efforts that seek to update the current system of a worldwide airline liability regime and in the entry into force of the Montreal Protocol 3. Our Association has been advocating the ratification of Montreal Protocol 3.

5. AFRAA also appreciates the difficulties of arriving at a level of compensation that would be satisfactory to all countries. It believes that it is still doubtful whether it would be possible to reach, in the short term, agreement on an internationally acceptable level of compensation that would be considered adequate on a worldwide basis. Accordingly any international agreement must necessarily be a trade-off between the interests of the various parties:

- * the interest of consumers for reasonable and fair compensation to be paid promptly to claimants;
- * the interest of state in ensuring equitable protection of their citizens;
- * the interest of the airlines to contain their liability exposure and insurance premium at reasonable levels with consequential benefits to the consumer;
- * the interest of minimizing costly and protracted litigation;
- * the collective interest of all to ensure uniform procedures that reduce legal conflicts and simplify claim settlements.

6. Despite these difficulties and divergences in the compensatory standards of countries, sustained efforts should, in the opinion of AFRAA, be made to find solution which would increase the passenger limit, without destroying the global uniformity that the Warsaw System offers. In this context, AFRAA supports the concept of an inter-carrier agreement as a means of increasing the amount of compensation and that would have a wider geographical coverage.

- 6.1. As regards the limit under the new **inter-carrier** agreement, it would be established at a level that would provide fair and equitable compensation to the majority of the travelling public, with the stipulation that the limit would be upgraded regularly.
- 6.2. This base level would be accompanied by a second tier of protection which would be offered in the form of supplemental compensation on an optional basis which will be accepted and rejected by the passenger.
- 6.3. As regards other elements of the new inter-carrier agreement, AFRAA would favour certain collateral improvements that would result in speedy settlement and periodic upgrading of the limits within a specified period of time or as soon as SDR-based consumer index increase beyond a given percentage.
- 6.4. All the other main components of the international liability system based on the Warsaw Convention would be retained.

Airline Liability Conference

Washington, 19-27 June 1995

Statement by LOT - Polish Airlines on Proposed In tercarrier Agreement

Having in mind

That there is a need to update the existing air carrier liability regime based, wherever possible, on worldwide uniform rules;

That the most urgent solution is needed for updating air carrier compensation limits for damages in cases of passenger death or injury;

That the key problem is to ensure full compensation for such damage while taking account of the position of the majority of governments which consider maintaining monetary limitation of air carrier liability essential and are unlikely to accept either abolition or increase of existing limits up to the level sought by the richest countries and groups of passengers;

That reconciliation of these objectives seems to be a prerequisite to a worldwide acceptance of any relevant system;

That worldwide acceptance of existing intergovernmental agreements or of any new ones dealing with these problems may need considerable time;

That, in the meantime, any improvements in the existing regime must respect that provisions of the Warsaw System in force, as well as those supposed to enter into force after obtaining a sufficient number of ratifications;

That any provisional arrangements must be flexible enough to offer optional solutions wherever a uniform solution cannot immediately be adopted;

That any such arrangements must also be simple enough so as to be easily understandable by the public;

That, in order to improve the present situation to the benefit of the public, air carriers may wish to offer a temporary solution by means of an intercarrier agreement;

It is proposed

That the Conference consider the idea of working out a voluntary intercarrier agreement which, after obtaining necessary governmental approvals, would be incorporated in the air carrier conditions of carriage, and which might include the following provisions:

1. The carrier shall pay compensation to the passenger, or those entitled to compensation, for death or injury occurred during the carriage by air -- in accordance with the applicable law.
2. The carrier shall pay compensation up to the limit of XXX per passenger, irrespective of any lower limits that may be fixed under the applicable law. When the limit fixed under the applicable law increases so as to exceed the **above-**mentioned amount, the latter will be increased accordingly.
3. If there is a supplemental compensation system applicable, the provisions of this intercarrier agreement shall remain binding upon carriers as far as their liability is concerned without affecting their obligations under such a system. (That provision may need revision after the discussion on the SCP issue).
4. In the absence of an applicable supplemental compensation system, the carrier shall assist passengers, at their request and at their own cost, and without incurring any liability therefore, to obtain individual insurance as may be available to ensure coverage of amounts exceeding the carrier liability limit. Otherwise carriers may offer "special contracts" for increased (yet insurable) liability limits against payment of an appropriate fee.
5. Persons entitled to compensation from the carrier shall receive the uncontested part of the claim without delay and at any rate not later than XXX months of the claim being made.
6. Persons entitled to compensation from the carrier shall receive a lump sum without delay and not later than XXX days after their identification. The lump sum shall be XXX % of the liability limit referred to under paragraph 2. The lump sum may be offset against any subsequent sum to be paid in respect of carrier liability, but not remunerable.

IATA AIRLINE LIABILITY CONFERENCE
19-27 June 1995

Opening Statement on behalf of the
International Air Carrier Association
Peter Kaukars, Member **IACA** Board of Directors

Mr. Chairman, Ladies and Gentlemen,

The International Air Carrier Association, **IACA**, welcomes the opportunity to briefly outline its position concerning the review of the Warsaw System.

IACA is the association representing carriers specializing in leisure-oriented traffic, primarily in charter mode. **IACA** has been actively involved in the discussions on **ECAC**-level and regards the compromise position expressed in the **ECAC** proposal as an economically and legally practical proposal for an interim solution which takes due regard of the widely accepted necessity of short-term adjustment of certain Warsaw elements while preserving the general principles of the Warsaw system as a whole.

IACA believes that the **ECAC** proposal properly balances the closely interrelated targets to raise liability limits to a widely acceptable level, to retain the Warsaw liability regime, to permit quick settlement of certain uncontested parts of claims in case of death or bodily injury of passengers and -- of definite interest for **IACA** members -- to avoid the difficulties of any supplemental scheme.

IACA would like to call the attention of the conference to the fact that for air transportation in the charter mode, the air fare is part of a tour package price paid by the passenger to a tour operator, not to the carrier. Tour operators, however, have no obligation to abide by carrier agreements because their liability is not regulated by Warsaw conditions. Therefore, **IACA** members are concerned that -- apart from and beyond historic reasons for the failure of previous supplemental schemes -- practical control of collecting additional premiums cannot be achieved in the case of tour packages. The carrier would have to absorb additional costs without compensation in the charter price.

Charter traffic -- particularly in Europe -- is typically conducted between countries of origin and countries of destination. The flow of traffic goes from the colder Northern regions to Mediterranean points. Tour operators are mostly situated in the countries of origin, they conclude charter contracts for aircraft or seat allotments with air carriers from both countries, origin and destination. It is therefore highly important for **IACA** members that air traffic to and from any geographical area must be subject to the same liability regulations in order to avoid competitive disadvantages.

Finally, **IACA** would like to underscore the necessity to also take into consideration the economic effects on air carriers resulting from premium increases to be expected. There will certainly be widely different effects on small carriers, on the one hand, and large carriers, on the other. Any solution adopted by this conference should keep in mind that the global acceptability of any agreement also rests on possible competitive distortions being kept at an acceptable level.

In any case, **IACA** believes that the target of this conference can only be an interim solution. Neither the aviation industry nor the governments will be relieved of continued efforts to come to a final revision of the international liability regime in aviation.

- oOo -

Statement of Air Transport Association of America
Airline Liability Conference
Washington, D.C.
June 19, 1995

Ladies and Gentlemen:

On behalf of the Air Transport Association, which is headquartered here in Washington, we welcome you to our fair city.

To summarize our perception of the challenging opportunity which lies before this assemblage, we sincerely believe that we have arrived at a watershed point in the checquered history of the Warsaw Convention. If the world's airline industry can now achieve something which has thus far proved unachievable for the world's governments -- the long overdue modernization of an instrument that has often been cited as the most widely adopted private law treaty in the history of mankind, we will, I believe, preserve its many benefits for generations of travellers, shippers and airlines yet to come. If we fail, as governments have collectively failed over the past 40 years, we will see the unravelling of those benefits, which has already begun, accelerate until, in all too short a time, the treaty itself is no longer viable.

That is, unfortunately, no longer a theoretical possibility. Pressures have mounted in all three branches of the U.S. government -- the legislative, the executive, and even the judicial, for the U.S. to denounce this treaty as an anachronism, if we cannot update its liability provisions to modern standards.

What would denunciation mean, should it come to pass? For every future accident subject to the jurisdiction of U.S. courts -- and the claimants' attorneys would pull out all stops to get their cases into U.S. courts -- the claimant would have not only the potential of unlimited, U.S.-style compensatory damages but also of punitive damages which as our courts have confirmed, are not now allowed by the Warsaw Convention. In other words, the recent well-publicized jury award of \$19 million for the family of a Pan Am 103 victim could be readily eclipsed by the additional award of punitive damages in a treaty-less era.

Moreover, to the predictably protracted period of time required to demonstrate the degree of carrier fault underlying the accident, one would have to add a substantial amount of time for argument and analysis of the conflicts of laws issues raised by a multinational fact situation in a treaty-less environment. In sum, plaintiffs and defendants alike would grow to expect interminable waits for the resolution of damage claims -- potentially far longer than the delays now experienced in proving willful misconduct in Warsaw cases to the satisfaction of U.S. courts.

The U.S. carrier members of the Air Transport Association strongly support preservation of the Warsaw Convention's passenger regime -- for the certainty it brings to questions of jurisdiction and documentation, for the guidance it currently offers us regarding our liability exposure, and as a foundation upon which to build greater certainty as to levels of liability in the future. We also urge its preservation for the overall certainty offered by its cargo **regime**, together with its promised enhancement by Montreal Protocol No. 4.

As the Chairman indicated, we believe that we are joined in that support by every carrier participating in this Conference, and by the governments of all nations which are currently parties to Warsaw or Warsaw/Hague. Accordingly, we trust that this Conference can and will succeed in leading us out of the developing morass.

We also believe that there is an almost universal recognition that the Achilles heel -- the weakest and most vulnerable part of the Warsaw Convention over the past 30 to 40 years -- has been the limit of liability imposed absent proof of willful misconduct by the carrier or its agents. In IATA's application for authority to hold these discussions, we were all reminded that the \$75,000 (U.S.) limit established by all carriers serving the United States in the Montreal **Intercarrier** Agreement of 1966 would, if adjusted for inflation, amount to over \$300,000 (U.S.) today. As the slides presented by the Chairman have shown, a more recent analysis reveals that the inflated equivalent is now over \$350,000 (U.S.) and that today's equivalent of the \$100,000 (SDR) limit envisioned by the Montreal Protocol No. 3 of 1975 is over \$364,000. I should also mention that both increases, in the 1966 Agreement and in the 1975 Protocol, also entailed a waiver of the carrier defenses under Article 20, **Para** 1. In other words, carriers were to be strictly or absolutely liable up to the new limit. Clearly, as is evidenced by initiatives already taken or contemplated by many parties to this treaty, and by the U.S. DOT's order granting IATA's application for this discussion authority, we must strive at this Conference to agree to a new limit for what I shall call the second tier of liability.

And we should strive to agree on an automatic formula for periodic adjustment to reflect inflation in the future. We at ATA recognize that there will be different views expressed at this Conference as to the proper level of the new limit, and as to whether strict liability, waiving Article 20 (1) defenses, or presumed fault liability, not waiving those defenses, should apply, or even, as suggested by some, that the second tier should be divided into two tiers. For our part, we will keep an open mind on the issue -- mindful at all times, however, of the long-standing position of our own government, as reflected most recently in DOT's guidelines, that any passenger liability agreement which we can produce, if it is to be implemented in this country, must be approved by our DOT, and that means it must provide claimants the opportunity to prove and secure unlimited compensatory damages. In short, we will at a minimum maintain an open mind as to the component elements of any agreed approach offering full compensatory damages for the death or injury of international passengers, as defined by Warsaw, whose place of departure is in the United States. I should also note that provision for full compensatory damage for the death or injury of U.S. citizens and permanent residents on international air trips between any two or more countries, including such trips totally outside the United States is another feature of major importance to our government.

Increases in the carriers' limit of liability can be achieved by implementing the provision for special contracts in Article 22 of the Warsaw Convention. Ideally, of course, there would be universal agreement by all international air carriers on a single limit by special contract. We may learn from these discussions, however, that such agreement may

not be attainable at this time. As I have indicated, we will remain flexible as to the components of any liability package which will warrant approval by our government. Implicit in that stand is our recognition that U.S. socio-economic standards need only apply to the death or injury of passengers whom our government properly seeks to protect. Other socio-economic standards can appropriately apply elsewhere. It remains for our discussions to consider how the U.S. standards of full compensatory damages will best be met.

The preparation for this vital conference has already inspired some innovative suggestions, either in lieu of or as adaptations of the original concept of a compensation plan supplementing Montreal Protocol No. 3. We look forward to a full discussion of those approaches, as well as a supplemental plan and any other concept compatible with the Warsaw Convention itself and with other approaches reflecting socio-economic standards elsewhere in the world.

As I suggested at the outset of my remarks, let us all, individually and collectively, seize this opportunity to bring order out of looming chaos. The opportunity may never arise again.

OBJECTIVES FOR **THE**
AIRLINE LIABILITY CONFERENCE
AND THE ROLE OF A
SUPPLEMENTAL COMPENSATION PLAN

According to the immunity order issued on 22 February 1995, the U.S. Government believes that the Conference "should seek to reflect the basic objectives" of U.S. support for MAP3 and the Supplemental Compensation Plan. Those include both international uniformity and prompt and fair compensation for U.S. citizens. Specifically, compensation should be consistent with the three following objectives, as set out by the U.S. Department of Transportation:

- full recovery of all provable damages (without regard to per passenger limitation) for journeys ticketed in the United States, with measures of damages as provided in U.S. law;
- strict liability without regard to the fault of the carrier for journeys ticketed in the United States (as in the case of the Montreal Intercarrier Agreement, which waives the Article 20 defense of non-negligence); and
- U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States should also be able to obtain compensation as described above.

The objective of uniformity can be met by agreement among the airlines on the extent to which airlines assume individual liability for the compensation objectives reflected above.

The objective of prompt and fair compensation can be met by agreement among the airlines to administer collectively, in conjunction with or approval of the aeronautical authorities of the nation in which it operates, a plan to provide additional compensation.

The cost of a plan developed by the Conference should be borne in the nation in which it operates, without additional burdens on airlines. It could be:

- funded through a small passenger surcharge on each ticket sold in the nation in which it operates;
- collected by the airlines selling those tickets; and
- administered through a contractor selected by the airlines, in cooperation with the aeronautical authorities of the nation in which the plan operates.

A plan should provide compensation in a manner that would avoid burdens on the airlines in excess of internationally agreed norms. The plan could:

- offer passengers up-front payments to assist them with immediate needs: e.g., medical services, emergency family support, funeral expenses;
- remove the requirement that passengers must litigate negligence and wilful misconduct questions to obtain full compensation;
- have claims determined where necessary by the Contractor with appeal to an arbitral or judicial procedure in the nation in which the plan operates;
- set strict timetables and guidelines for recovery to ensure that passengers are treated fairly and their claims handled promptly; and
- assist airlines in the burdens of responding to an unforeseen tragedy.

To obtain payment from a plan, a claimant would:

- settle and release all parties, including the airlines, from liability;
- agree that the sums being paid are fair and constitute full recovery; and
- assign to the Contractor rights to recover damages from third parties to the extent of their culpability.

SUMMARY

- **The concept of the plan recognizes that airlines currently bear the entire burden of compensation with respect to the claims brought on behalf of passengers of any nation in which the plan would operate.**
- **The plan's purpose is to provide prompt and adequate compensation without the costly and burdensome litigation contemplated by the current liability regime.**
- **Including all passengers of that nation in its plan (regardless of where they purchased their tickets) will help avoid wilful misconduct litigation in the tribunals of other nations.**
- **A plan that meets these objectives would accommodate national expectations of adequate compensation without disturbing the benefits airlines derive from uniform international liability rules.**

COMPARISON BETWEEN JAPANESE INITIATIVE AND PROPOSED SCP

	J.I.	S.C.P.
Lead Time to Implement	short	need time to accumulate funds
Insurance system	within framework of conventional aviation insurance coverage	need to create new insurance system
Financial Viability	proven viable	question of shortage of funds from a series of accidents early in plan operation
cost	substantially smaller than SCP contribution (cost for unlimited liability: estimated less than 1 cent per pax)	3-5 dollars (per pax)
Passenger Contribution	no need to collect contribution from passengers	need to collect contribution from passengers
Applicability	applicable to all passengers (non-discriminatory)	dependent upon nationality of passengers
Workability	proven workable:	some questions on workability
Settlement Procedures	under the control of carrier	under the control of SCP contractor beyond the limit
Legal Problems	none	question on nature of payment out of SCP -liability or accident compensation?

presented by **JAL/T.Abe**
 June 20, 1995

Airline Liability Conference Washington, 19-27 June 1995

Note on the effects on insurance costs of increased liability limits (Submitted by IA TA)

The note is based on informal discussions with market experts, on the insurance aspects of raising the liability limits.

The London Insurance Market maintains that it presently insures airline passenger liability for the current Warsaw limits or the voluntary limits stated in an airline's conditions of carriage.

Therefore, they would expect an additional premium if this limit is raised. It is believed that the limit to which it would be raised is not a significant variable. (So the difference between a new limit of \$300,000 and \$500,000 would probably not significantly affect the amount of the additional premium.)

A large number of settlements are still effectively limited at the current Warsaw or voluntary limits. These settlements would naturally tend to rise to the maximum allowed under the new limits. Therefore, whatever effect an unbreakable cap would have on larger settlements or many of them, the majority of settlements would tend to increase, pushing up the total cost of claims.

It should be noted that aviation insurance rates are currently driven by the supply and demand of the capacity of the insurers. This capacity is currently estimated at about 200% of demand, significantly above the "natural" level of about 150%, thereby holding insurance rates lower than insurers believe they need to meet claims. Therefore, they will take any opportunity to raise rates.

In the longer term the capping of the cost of settlements by an unbreakable limit should lead to the capping of the cost of insurance. It should also be noted that since the intention is to introduce an indexed limit, there will be a continuing increase in the cost of claims and hence the cost of insurance.

The introduction of new unbreakable limits would have two positive effects on the cost of claims. The first would be the elimination of certain legal expenses; the second would be the reduction of the very large settlements over the last few years being experienced especially in Japan and the United States. A review of settlements over the past few years could identify the amount of money at stake here. However, the insurance market is aware that even in the case of fixed limits, they may still be exposed to "social" payments in certain cultures.

From our Members point of view, certain larger airlines have argued that they would not expect to pay extra insurance for unlimited exposure (within Warsaw). This is contested by the Market. However, it is probably true that the major airlines would be less affected by a rate increase due to their greater bargaining power. The US Insurance Market already insures US Domestic airlines for unlimited liability, so there will not be a reason for an increase in rates in that area. This market does not insure non-US airlines to any significant extent.

Of particular **importance** in this context is the nationality of the passengers carried by a particular airline. If some states have significantly higher legal liability limits for their residents/citizens, the **proportion** of such passengers in any airline's passenger mix should be a variable for insurance rating. This is not always the case today.

June 
NOT FOR PUBLICATION

INTERNATIONAL AIR TRANSPORT ASSOCIATION

AIRLINE LIABILITY CONFERENCE

19-27 JUNE 1995

WASHINGTON, D.C.

OPENING STATEMENT OF JAPAN AIRLINES

DELIVERED BY

KOICHI ABB

VICE PRESIDENT

LEGAL AFFAIRS

Mr. Chairman, ladies and gentlemen, I welcome this Conference because it gives us the first opportunity to discuss and explain our approach to passenger compensation in the company of so many of our colleagues from around the world.

At the outset, I would like to thank IATA and the staff and outside counsel for all of their hard work in putting this Conference together in such a short time, and I welcome the distinguished panel of experts.

As a member of the Legal Advisory Group, I have been privileged to explain this subject in principle within the Group. But, without the availability of the United States anti-trust immunity, we have not been able to have the free-ranging discussion which we look forward to having this week.

As a formal matter, I speak only for Japan Airlines. But I have discussed my opening remarks and our position with colleagues from Japan and I am authorized to say that you may regard my remarks as representing the collective views of all Japanese international carriers.

By way of historical background, Japan has participated fully in the international discussions of air carrier liability and compensation since the earliest days in 1925. In Japan, the Civil Air Law Research Institute has studied the Guatemala City Protocol since 1971 and, on a collaborative basis, we have studied the Montreal Protocols and US proposals for a Supplemental Compensation Plan in great depth, over the past 15 to 20 years.

In 1992, these collaborative studies led to a clear consensus in Japan that the best and simplest solution for our passengers is to waive reliance on the treaty limits, while at the same time preserving the Warsaw system intact. We are strong supporters of

the existing Warsaw system and shall remain so unless and until there is a new treaty reflecting a new international consensus. We cannot and do not regard the 1971 Guatemala City Protocol or the 1975 Montreal Protocol 3 as reflecting a current or an acceptable consensus, because, after a quarter of a century, they are still not in force.

Full details of what is **commonly** referred to as the 1992 "Japanese Initiative" have been well publicized in specialist journals and we have made extra copies of the leading articles available for the benefit of delegates to this Conference. I shall be pleased to answer any questions that anyone may have concerning the Japanese Initiative.

We are totally dedicated to the preservation of the Warsaw system because it eliminates so many "choice of law" problems and provides unifying rules on liability. It is by no means perfect. For example, we would like to see the documentary provisions modernized or eliminated, and we will continue to support further efforts in this direction. The only real problem in the 65 plus year history of the treaty has been the passenger limitation of liability, which each carrier has been free to adjust upwards since 1929. The solution to this problem which we have adopted for our passengers has been to waive the treaty-limits entirely and for all of our passengers.

I would like to stress that our waiver applies to our passengers without distinction as to origin, destination or nationality. We cannot and will not support any form of discrimination among our passengers whatsoever. It also is our firm intention to retain the Japanese Initiative regardless of the outcome of this Conference. Because we regard the benefits of the Japanese Initiative to all of our passengers as something that must be preserved, and only improved upon, but never **compromised** in the

interests of international agreement or uniformity, we hope that our colleagues here will cooperate and allow us to continue unimpeded. At the same time we wish to assure you that we will cooperate with you to assist in the achievement of your objectives if you do not wish to follow our example. We do not seek to impose our solution on others. We ask only that our airline colleagues do not seek to impose upon us a system of compensation which is less beneficial to our passengers than the system we have already adopted.

We applaud the efforts of the United States consistently over such a long period to improve the compensation available to passengers. That is exactly our aim and we have solved it in our own way in strict accordance with the Warsaw system. Our passengers do not need any plan to supplement the compensation to which they are entitled under the Warsaw Convention and the Japanese Initiative. Our passengers have automatic access to compensation, without any supplementary or ticket surcharge, limited only by whatever are the applicable damage laws. Our waiver eliminates all costly liability litigation concerning wilful misconduct. Naturally, we commend this solution to others but we recognize that for good and valid reasons, other airlines may prefer a different pathway. We support the efforts of other airlines to evolve their own solutions even if they differ from ours and in return we ask their understanding and cooperation in allowing us to continue on our chosen pathway. All of our passengers, regardless of origin, destination, nationality or wherever they join our service, now have access to full and fair compensation. Nothing is needed to supplement the compensation available to our passengers.

Happily, I can report that there have been no accidents to test the Japanese Initiative. From our point of view, the cost to JAL of the Japanese Initiative has been insignificant when compared to the benefits to our passengers. The small increase in cost has

had no impact on our fare structure and we are comfortable with the results. Thus, our passengers have benefitted at no cost to **them**.

We welcome certain key points in the Department of Transportation Discussion **Immunity** Order of **February 22, 1995**:

- Granting anti-trust **immunity** for discussions on an interim **solution** to serve until a new convention **comes** into force.

- Rejecting the unilateral imposition of a new regime by the US. This measure of self-restraint is entirely consistent with treaty obligations and I am sure will be **welcomed** by all airlines.

We believe that without any **amendment** or adaptation, the Japanese Initiative comes very, very close to satisfying the DOT guidelines. However, I freely admit and accept that we do not meet the DOT guidelines in two respects:

- We do not offer strict liability in excess of 100,000 SDR per passenger, because in appropriate cases we wish to be able to share costs with other parties who may be legally liable.

- We do not and cannot discriminate in favor of passengers of a particular nationality and against passengers of other nationalities.

I wish to state for the record that, whatever the results of this or any subsequent airline conference, we do not intend to reduce the benefits available to our passengers. We cannot be a party to any proposal which would have the direct or indirect effect of reducing the rights of our passengers to full and fair compensation in accordance with the Japanese Initiative. Nevertheless, I repeat our **commitment** to our fellow carriers. We

do not seek to **impose** our solution on others, and we will work conscientiously **with** colleagues who strive for alternative solutions. The only condition we ask is a reciprocal commitment **from** colleagues that they will not seek to reduce benefits for our passengers or impede our ability to continue with the Japanese Initiative.

We therefore look forward to working with our colleagues during the week. **We are** confident that with good will and hard work this Conference will demonstrate a good faith response to the aims of the US administration. But we suspect, at the outset, that **more** time will be needed to reach solutions to satisfy all here assembled.

Thank you for your attention.

LLOYD'S AVIATION. LAW

Vol. 12, No. 12

June 15, 1993



CONTENTS

THE WARSAW CONVENTION AND THE WAIVER OF THE LIMITATIONS OF LIABILITY BY THE AIRLINES OF JAPAN

The so-called 'Japanese Initiative'
--Japanese airlines' abolition of liability
limits for personal injury or death in
international carriage by air.....p.

THE WARSAW CONVENTION AND THE WAIVER OF THE LIMITATIONS OF LIABILITY BY THE AIRLINES OF JAPAN

Editor's Note: We have been privileged to publish a number of articles over the past several months by learned international aviation law scholars and practitioners commenting on the waiver by the airlines of Japan of the Warsaw Convention/Hague Protocol/Montreal Agreement limitations of liability for passenger injury and death. See 11 LAL No. 22, p. 1 (Nov. 15, 1992); 12 LAL No. 3, p. 1 (Feb. 1, 1993); 12 LAL No. 5, p. 1 (Mar. 1, 1993); 12 LAL No. 8, p. 1 (Apr. 15, 1993). These articles have addressed this dramatic and historically significant development from "the outside." In this issue of LAL, we are privileged and honored to publish an extremely informative article from "the inside," written by Koichi Abe, Vice President, Legal Affairs, Japan Airlines, one of the parties to the planning of what now has come to be known as The Japanese Initiative."

The so-called 'Japanese Initiative' --Japanese airlines' abolition of liability limits for personal injury or death in international carriage by air

By Koichi Abe
Vice President, Legal Affairs
Japan Airlines

ON NOVEMBER 20, 1992, the ten airlines of Japan simultaneously abolished the carrier's liability limit for damages for passenger bodily injury or death in international carriage by air, waiving the existing contractual limitation with the approval of the Minister of Transport of Japan.

This abolition of the passenger liability limit is based on the provision for a "special contract" under Article 22(1) of the Warsaw Convention, to be incorporated in "the conditions of carriage". Since this was an unprecedented move among the international air carriers of the world, the new approach has become known as "The Japan Initiative" to the aviation industry people concerned.

As a party to the planning of this initiative, I would like to describe the background, development and reasoning relating to this decision to abolish one passenger liability limit.

I. Legal Environment in Japan

First of all, I want to explain briefly the legal aspects of compensation in Japan for damages in the case of bodily injury or death, in order to assist in a better understanding of this subject.

(1) Japan is a High Contracting Party to the Warsaw Convention and the Hague Protocol but has not yet ratified **Montreal** Additional Protocol No. 3.

(2) In January, 1981, all Japanese airlines raised the liability limit for international passenger transportation to **SDR100,000** from the then limit of **US\$75,000**. The **Article 20 defence** also is waived. In respect of Japanese domestic passenger transportation, the liability limit under the "conditions of carriage" (in 1981 — **23 million yen**) was abolished in April, 1982, because that amount was seen as too low when compared with the prevalent level of damage compensation at that time in Japan in other types of cases.

(3) With respect to international carriage by sea, in November, 1990, the Japan Oceangoing Passenger Ship Association decided to waive limits of liability for passengers which would otherwise be applicable under international convention and a law which enacted the convention domestically.

(4) In Japan, no other means of public transportation, such as buses or trains, have any limitation of liability concerning damages for bodily injury or death.

(5) In Japan, the present level of compensation in case of bodily injury or death caused by accident is far beyond the amount of the abolished limit of **SDR100,000**, currently equivalent to 15 million yen. For example, none of the approximately **500** cases for the recovery of damages relating to our **B747's** domestic carriage accident in 1985 was settled below **15 million yen** in amount, including awards for victims who were children and aged men.

(6) In Japan the method of computing damages has been well established by common practice for automobile accidents for a long time. This method of computation applies widely to settlements of damages for all kinds of tort death or injury cases whether in or out of court. According to this method, an estimated amount of damages for death can be calculated mathematically, taking into consideration such factors as age, annual income, and number of dependents. Of course, this estimated amount will be subject to adjustment to some extent reflecting the individual circumstances of each case.

(7) punitive damages are not known and cannot be awarded in Japan and the jury system of awards is not known in Japan either. Furthermore, the contingent fee is not allowed in Japan.

(8) The Japanese public are not well informed

of passenger liability limits existing in international air transportation.

(9) In Japan, in the case of an air accident, most claims for compensation for passenger injury or death are resolved by negotiated settlements, and law suits against airlines are few. Furthermore, such settlements are usually negotiated between the employees of the airline and the families of the victim directly, without the intervention (or direct intervention) of lawyers. Additionally, insurance companies are not allowed directly to settle claims for damages on behalf of their insureds in Japan except in the case of automobile accidents.

II. Developments Leading to Abolition of Liability Limit

(1) In June 1991, the Japanese Council for Transport Policy made a recommendation to the Minister of Transport to study the current liability limit for the international transportation by air of passengers, indicating that "because the current liability limits cannot always be said to be sufficient, it is necessary to reevaluate these limits".

The Japanese Council for Transport Policy is a committee, composed mainly of scholars and journalists, which gives advice to the Minister of Transport concerning overall policies of transportation administration from an objective standpoint.

(2) Upon this recommendation, the Civil Air Law Research Institute resumed research on the current status of, and issues pertaining to, the liability scheme of international air carriers. After an extensive study, the Institute made a report recommending abolition of any liability limitation for international transportation of passengers in May, 1992.

The Institute is an organization in Japan which has been in existence for twenty-five years and which has a high reputation in Japan for its past activities, which include studies on Montreal Additional Protocol 3 (MAP3) and a domestic supplemental compensation plan (SCP) of the kind that is referenced in MAP3. The Institute is composed of prominent scholars, officials of the Ministry of Transport and the Ministry of Foreign Affairs, representatives from several airlines, including JAL, and from an insurance company.

A summary of the Institute's report follows:-

i) The current international transportation liability limit is undoubtedly too low, in light of the recent levels of damages for accidents involving human life in Japan, Europe or in the United States.

iii Montreal Additional Protocol No. 3/ Domestic Supplemental Plan is not likely to be feasible in Japan. Further, the possibility of its coming into force in the near future is small.

iii) It is **difficult** to find sufficient grounds for justifying the continued existence of any limitation of liability.

iv) Since the cost of insurance premium accounts for a very small percentage of the total costs of airlines, it is estimated that a substantial increase or abolition of the liability limit would not present an insurmountable economic obstacle. In other words, increases in insurance premiums would not directly lead to increases in airfares.

v) **The abolition of the liability limit would be a more appropriate choice, rather than a large increase of the liability limit, considering that a large increase of the limit would not serve as an effective and realistic step to resolve the issue, provided however that there would not be a major cost difference from increased insurance premium costs resulting from the waiver.**

The conclusion, as contained in the report of the Institute, is as follows.

With regard to the liability limit in question, the only proper and realistic solution is to amend the 'conditions of carriage' in such a way as to comply with the **current** system under the Warsaw Convention. However, the amendment of the 'conditions of carriage' is no more than a response by individual **carriers** and we should take it into consideration that this method **definitely** falls behind a treaty as a proper way to settle the issue of international air carrier liability. It is important to make further efforts toward establishing a new liability scheme for international air carriers, including such matters as jurisdiction and so forth. Japan too, is expected to make **significant** contributions in this regard."

(3) After the report was made, three airline groups, Japan Airlines, All Nippon Airways and Japan Air Systems, conducted a further study and respectively made an application in **early** November, 1992 to the Minister of Transport for approval of the abolition of any liability limit for **international transportation** of passengers under the conditions of carriage. The **approval** of the Minister was granted to all ten airlines in the group of three simultaneously on November 16, 1992 and the revised "conditions of carriage" setting forth the waiver of the liability limit entered into **effect** on November 20, 1992.

The reason we selected November 1592 to apply the revision was that it was considered to be most appropriate to make the effective date correspond to the November renewal date of the annual insurance contracts of the involved **airlines** so as to reflect the abolition of the liability limit in the renewed contracts.

(4) The following is the **text** of paragraph 16 (C) (4) (a) and (b) of the revised **conditions** of carriage of JAL, whereby the waiver is **effected**:

4)(a) **JAL** agrees in accordance with Ar-

ticle **22(1)** of the Convention that as to all international **carriage** hereunder as **defined** in the Convention:

(i) **JAL** shall not apply the applicable limit of liability based on Article 22(1) of the Convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention. Except as provided in paragraph (ii) **Now, JAL** does not waive any defense to such claims as is available under Article 20(1) of the Convention or any other applicable law.

(iii) **JAL** shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, avail itself of any defense under Article 20(1) of the Convention up to the sum of 100,000 **S.D.R.** exclusive of the costs of the action including **lawyers' fees** which the court finds reasonable.

(b) **Nothing** herein shall be deemed to affect the rights of **JAL** with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding or other bodily injury of a passenger.

(5) Thus, effective from November 20, 1992, all the ten Japanese airlines included in the three groups of Japan Airlines, All Nippon Airways and Japan **Asia** Systems waived any limitation of liability for damages for passenger injury or death in international transportation and accepted liability for unlimited damages. As for proof of fault, the waiver of the defense of absence of negligence under Article 20(1) of the Warsaw Convention up to **SDR100,000**, as was then the case, was maintained. **Note:** Article 20(1) of the Warsaw Convention provides: "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".

(6) Upon application by the Japanese airlines for the approval of the amended "Conditions of Carriage", the **Department** of Transportation of the United States approved the waiver of the Warsaw limits as "... consistent with the public interest".

(7) **Through the steps outlined above, we tried to keep people outside of Japan concerned with this topic informed of the progress of our study as much as possible.**

III. Reason for Abolition of the Liability Limit

With respect to the reasons for the abolition of

the liability limit, I would like to express some personal views, in addition to the reasons described above as contained in the report of the **Civil Air Law Research Institute**.

(1) No justifiable ground is found for the liability limit

i) It was 1929 when the Warsaw Convention was signed. In those days, the airline industry was still in its infancy and, in addition, aviation insurance was not so developed as to cover liabilities to be borne by the airlines without limitation. Under these **circumstances**, it seems to have been necessary to foster and protect the airline industry. However, since 1929 and over the past more than 60 years, the airline industry has grown remarkably, to become one of the most **powerful** of all industries.

iii Aviation insurance has **also** made such great progress that it is now available to airlines as a means to protect themselves **from** risk at a reasonable cost

iii) In view of these circumstances, it would appear to be obvious which party needs more protection, airlines or passengers, in the case of an accident

(2) To recover realistic compensatory damages is deemed one of the fundamental human rights. Therefore, this right should not be limited, without due and justifiable grounds.

(3) All industries or companies can only ensure development by treating their customers considerately and with the utmost care.

If a company provides an excellent service to customers, but does not help them when they are in great difficulties, the company would be rightly seen as far from "service-oriented" towards its customers.

(4) Some people say that with the absence of any limitation of liability in compensation levels, substantial differences may arise, resulting in unfairness and inequality of treatment

We have to admit that there are differences in the damages payable to victims, taking one jurisdiction when compared with another. However, there may be differences attributable to factors existing in **different** societies that are beyond the control of airlines. It could be said that any attempt to make damages as equal as possible, by placing a limit on liabilities artificially, would be even more unfair.

(5) In respect of the selection of unlimited liability or limited liability, the Civil Air Law Research Institute, after a thorough study, reached the conclusion that abolition of liability limits is the appropriate choice under the current circumstances in Japan, so long as there would not be much difference resulting from the impact of any increase in

the cost of insurance. Their reasons were:

i) There are no definite grounds to **justify** a limitation of liability as set out above.

iii It would be difficult to determine the proper amount of **limitation**.

iii) The limit of liability sometimes is apt to work negatively. The limit itself would be often **taken as a minimum level of compensation, or a starting figure for negotiation**. Further, the limit may work to raise such damages, that would otherwise be much **below the limit, up to the amount of the limit**.

iv) The limit **will** be hard to maintain properly, because it **will** always be subject to change on account of such variable factors as inflation and exchange rates.

IV. Montreal Additional Protocol No. 3

MAP3, with a **Supplemental Compensation Plan (SCP)**, is not an effective measure to solve the issue we **face** in Japan, on the **following** grounds.

(1) 18 years have passed since MAP3 was signed and 22 years have elapsed since the Guatemala City **Protocol**, the predecessor of **MAP3**, was signed. These Protocols were said to have been agreed by the **participants**, not as an ideal or ultimate step in solving the issue of passenger liabilities, but rather as a practical step, which is nothing but a product of compromise. Further, the **SDR100,000** limit of **1975** has lost its value greatly during such a long period and would now be unacceptable to many **countries** as a practical, unbreakable limit.

(2) Therefore, any possibility that MAP3 will soon enter into force is presumed now to be very **small**. Should MAP3 become effective eventually, it would probably take a long time. In the United States ratification of MAP3 would be subject to bringing the SCP into **effect** through legislation, and 30 countries must ratify MAP3 for it to enter into force.

We in Japan have been waiting **for** a long time for a convention based solution but after so long a delay we could hardly wait any longer. Thus, we reached the **conclusion** that we have to resort to a contractual solution under the Warsaw Convention, because we could not keep our customers **waiting** any longer.

(3) Even if MAP3 ever comes into **force**, the situation would be very complicated by the **existence** of both MAP3 passengers and non-MAP3 passengers on individual flights and by the plurality of **SCPs**. Some countries will not, or are unable to, **ratify** MAP3 - some will, and many will not, implement **SCPs**.

For instance, it would be difficult for Japan to ratify MAP3 due to the **restrictions** of the Japanese Constitution, something which was pointed out at the diplomatic conference on the Guatemala City

protocol in 1971. The unbreakable limit of liability would be in conflict with the "inviolable property rights" guaranteed under the Japanese Constitution.

Even if Japan could overcome this restriction, it would be almost **impossible** for us to put a SCP in place, theoretically as well as practically, although a **SCP** would be indispensable for the implementation of **MAP3** in Japan.

Further, I understand that one or more of the **European Community (EC)** countries have indicated that they could not **ratify MAP3** because the notion of "**unbreakability**" of limits would be **contrary** to **constitutional theory**. According to the consultation paper **issued recently by the EC, they appear to have taken a negative view regarding the ratification of MAP3.**

In addition, there may be many countries that would not ratify MAP3 because **SDR100,000** is too low as an unbreakable limit of liability nowadays.

(4) I am afraid that the probable existence of both **MAP3** nations and **non-MAP3** nations, and multiple **SCPs**, would lead the world passenger compensation scheme into a far more complicated and uncertain situation, verging on chaos, and imposing **tremendous difficulties** upon both airlines and passengers.

(5) A SCP seems to be uneconomic. Comparatively large amounts of **expenses** and costs would be involved in the operation of a SCP, because a SCP requires the creation of a new organization and a system of collection of **fees** from all international passengers. Economically speaking, it will probably be less expensive for the airlines to abolish any **liability** limit and to cover necessary risks by their passenger liability insurance instead.

(6) *There are many countries where the international passengers are not sufficiently numerous to set up and implement their own SCP.* In those countries, if MAP3 is **ratified**, their citizens would not have the right to recover damages in excess of **SDR100,000** because a SCP would not be available to them. Therefore, this could lead to cases where the **recovery** of damages becomes less favorable to the passengers under MAP3, due to the unbreakable nature of the **MAP3** limit

(7) It is said that one of the reasons for expediting the ratification of **MAP3** in the United States is aimed at the exclusion of punitive damages under the **MAP3** scheme.

There have been some strong judicial precedents in which punitive damages are held not recoverable in a case where the Warsaw Convention applies. Likewise, it is assumed that punitive damages would not be recoverable under **MAP3** with its unbreakable limitation of liability.

It has been said that the United States intends to denounce the Warsaw Convention when MAP3 is

ratified and their own SCP is in place. Also, should the United States fail to ratify **MAP3**, it is said that the United States would be sure to denounce the Warsaw Convention with its unacceptably low liability limit

Under such circumstances, many U.S. citizens will or could become **so-called "non-Convention passengers"** in international transportation by air. **As** a result, airlines would probably be exposed to more **claims** of punitive damages.

However, the ratification of MAP3 would not be the only means to preclude punitive damages against the **carrier**. If many airlines follow suit after the lead taken by the Japanese **airlines**, and waive the limit of liability by invoking a special contract under Article 22 (1) of the Warsaw Convention, the United States might not find any reason to denounce the Warsaw Convention in the **case of their failure to ratify MAP3.** In this sense, we believe that the waiver of the limit of liability for passenger **injury** or death would be the best way to make the Warsaw regime survive existing serious confusion.

Further, **even** if the denunciation of the Warsaw Convention by the United States is unavoidable, **eventually**, it would not be equitable to impose upon the world air **passengers** the questionable sum of **SDR100,000** as an unbreakable limit of liability in order to exclude punitive damages.

V. Successive Carriage

As stated above, the abolition of the passenger liability limit by the Japanese **airlines** was accomplished through an amendment to the "**conditions of carriage**," by means of a "**special contract**." **Therefore, this abolition of the limit has an effect only on the carriage to which such "conditions of carriage" applies.**

Take Japan Airlines for instance. Even if **JAL** makes a reservation and issues a ticket to a passenger, the condition of carriage containing the waiver of the limit is effective only for the portion of the carriage actually performed by **JAL** and has no **effect** on the liability of successive carriers.

This **rule** of the Warsaw Convention is quite clear and leaves no room for doubt. In addition, in **JAL's "conditions of carriage,"** it is stated that "**JAL shall not apply the limit of liability based on Article 22(1) of the Convention . . .**", specifying **JAL** instead of using the nonspecific word "**carrier**".

We in Japan **Airlines** kept our press release regarding the waiver of the limit of liability to the **minimum**, and decided to withhold inclusion of **reference** to the waiver of the limit in our tickets for the time being, so as to avoid unnecessary friction and criticism that, by our action, we are attempting to take advantage of these favorable conditions of carriage for marketing purposes.

AVIATION LAW

However, we are now inclined to deem it appropriate for our own protection to describe expressly on our tickets that "JAL shall not apply the limit of liability" and further that this condition of carriage containing the waiver of the limit is applicable only to carriage by JAL, since there seems to be a view that the waiver of the limit by the Japanese airlines may also be applicable to carriage by successive carriers. It has been argued that successive carriers may be entitled to claim indemnity from a Japanese carrier for any liability in excess of the successive carriers' own contractual limit due to the Japanese waiver. We believe that is wholly wrong but the argument must be addressed.

Conclusion

The main factors that the Japanese airlines took into account in taking their initiative to abolish the passenger limit of liability within the Warsaw Convention regime are considered to be as follows:

(1) We have been under the strong pressure of circumstances where a fundamental reform in the scheme of liability for Japanese international air carriers was urgently needed to deal adequately with the situation in case of catastrophe. The existing limit of liability was so low that it would be sure to invite considerable confusion and disputes, should a major air accident occur.

(2) We were fully convinced that we were proceeding with the subject matter in the correct, effective and most realistic direction, and have received strong support from external advisors, including scholars, lawyers and others.

(3) It was estimated that the costs of supporting the new scheme of liability would be comparatively low. And we presumed that there would not be a substantial difference in impact on insurance premium between the complete abolition of the liability limit and a large increase of the limit

If we had selected to increase the limit of liability, the revised limit would have to have been sufficiently high in amount so as to provide cover for most claims for damages in order to make the new limit workable as an effective step to deal with such claims. Otherwise, it would invite many dis-

putes and much litigation to break the limit and, as a result, the new limit would not serve the purpose and would turn out to be meaningless. When the increase of limit is large enough to cover most of the claims, the risk exposure of the higher limit to the insurers would not be largely different from that of unlimited liability or the waiver of the limit. Accordingly, as far as the impact on insurance premium rates is concerned, there would not be so much difference, whether we take the waiver of the limit or a large increase of the limit

(4) After comparing costs to be incurred and benefits to be gained, the new scheme appeared to prove favorable. The benefit includes not only the reduction of litigation for proof of wilful misconduct or gross negligence to overcome limitations of liability, but also the improvement of the company's reputation and a more efficient use of legal manpower. Less time would be spent on long and costly liability disputes and more on other important aspects of legal work.

(5) With respect to airline activities outside Japan, IATA has passed resolutions to expedite the ratification of MAP3 several times at General Meetings until 1984. The IATA Legal Advisory Group, however, has now formed a Working Group to study new approaches to the liability issue and has held several meetings since last year. They will seek to establish the position of IATA on this issue shortly.

If IATA members should finally adhere to the unbreakable limit of liability of SDR100,000 of MAP3, thereby adhering to the old IATA resolutions, I am afraid that IATA and its members might well be criticized by the public, seeing IATA as a kind of cartel which gives priority to the interests of the member carriers over the interests of the customers or the public.

Lastly, I would like to express my hearty gratitude to the lawyers and scholars concerned, in and out of Japan, for their kind assistance and support to us in our efforts. Without such assistance and support, we could not have accomplished the project which has led to the new scheme of international passenger liability we are proud to have called "The Japanese Initiative."

If you would like your own copy of LLOYD'S AVIATION LAW, or separate copies for your staff, please clip or copy this form and return to Helen Simpson, Lloyd's of London Press, Inc., 611 Broadway, Suite 308, New York, NY 10012.

Published twice monthly. One-year subscription: \$435 (outside USA \$455). Discounts available for multiple subscriptions to the same address.

Please enter my subscription for ___ copies of LLOYD'S AVIATION LAW.

___ PLEASE BILL ME ___ CHECK ENCLOSED

NAME: _____

COMPANY: _____

ADDRESS: _____

CITY: _____

STATE: _____ ZIP: _____

New York Law Journal

Friday, December 30, 1994

The Warsaw Convention and The Case for the Japanese Initiative Approach

In the October 3, 1994 issue of the Law Journal, Lee S. Kreindler reported on recent efforts of the Clinton Administration to bring into force amendments to the 1929 Warsaw Convention which were formulated in 1971 at Guatemala City. These amendments, known as Montreal Protocol's 3 and 4 (MAP 3 and 4), were rejected by the Senate in 1983, when the request of the Reagan Administration to give advice and consent to ratification of MAP 3 and 4 did not generate the requisite two-thirds majority of the votes cast. Since then, MAP 3 and 4 have languished in the Senate awaiting further consideration.

In his Article of October 3, 1994, Lee S. Kreindler advocated that the United States should scrap the whole Warsaw Convention system of liability when he concluded 'It is time the Warsaw Convention was denounced.' As one who has defended airlines for over 35 years in Warsaw Convention cases, I write this response to suggest and advocate that there is a better way than denunciation of the treaty. In fact the better way is found in the very language of the treaty. The airlines of Japan adopted this approach in 1992 and it is time for the airlines of the United States and the rest of the world to focus their attention on the benefits of the Japanese Initiative Approach. The approach of MAP 3 and the Supplemental Compensation Plan should be scrapped, but not the 1929 Warsaw Convention.

I. Introduction

For over 40 years, the government of the United States has been struggling to find an internationally acceptable solution to the disparity of how United States citizens/residents are treated under the Warsaw Convention regime of liability when compared with those same citizens/residents who are dealt with under the domestic laws of the United States applicable to aviation accidents. For most of the time, the government has directed its efforts towards increasing the limitation on recoverable damages in Article 22 of the Warsaw Convention.

During this same 40 years, we have seen all limitations on recoverable damages (with minor irrelevant exceptions) in state wrongful death statutes removed by legislative action, for the reason that the limitations on recoverable damages no longer were in the interests of the citizens of the various states. During this same period of time, however, the federal government has been endeavoring to continue and perpetuate a limitation on recoverable damages in personal injury and death actions which arise as a result of an accident occurring in "international transportation by air" as defined by the Warsaw Convention. During this same time, we have seen the average wrongful death damage award in the United States in aviation accident cases approach U.S. \$1,500,000.

Again, during this same 40 year period of time, the spectre of punitive damages surfaced and received considerable attention, even though punitive damages has been a part of the common law of the

United States for 200 years. The incidence of an award of punitive damages against commercial transport (as opposed to general aviation) aircraft manufacturers, is virtually nonexistent. Recent court decisions have resulted in punitive damages being declared **nonrecoverable** in Warsaw Convention cases. Again, the incidence of a successful punitive damage award against an airline in the United States in a domestic air transportation case virtually is nonexistent. The reason **should** be fairly obvious - neither commercial aircraft manufacturers nor United States domestic air **carriers** or foreign air **carriers** conduct their businesses in such a way as to warrant the imposition of punitive damages as a result of an accident.

With these introductory and background remarks, **I submit** these comments in support of the adoption of the Japanese initiative approach for consideration by interested parties.

II. The Perceived Ills with the Present Warsaw Convention Liability System

It is interesting to note that in the same 40 year period mentioned above, **there** has been no action at the governmental level to bring about any modification of the **domestic** laws of the United States that apply to personal injury and wrongful death cases involving passengers who are injured or killed in domestic or **non-**international transportation by air, except to **eradicate** all **limitations** on recoverable damages in the various state wrongful death statutes. The perceived ills with the present Warsaw Convention system of liability, at least in the United States, may be summarized as follows:

1. Expensive and protracted litigation in an effort to prove **Article 25 willful** misconduct in order to recover full compensatory damages.

2. The delay in any compensation being paid to passengers as a result of the Article 25 litigation when that course of action is adopted.

3. The increased risk of litigation in the United States involving commercial aircraft manufacturers as a result of the limitation on recoverable damages as to air carriers under the Warsaw Convention. Manufacturers in the United States take the **position** that they are joined unnecessarily and without reasonable cause in most Warsaw Convention cases because of the limitation on recoverable damages applicable only to the air carrier.

4. The exposure of manufacturers alone to punitive damage claims in Warsaw Convention litigation in view of the fact that controlling precedent in the United States precludes the award of punitive damages against an air carrier.

5. By reason of the provisions of Article 28 of the Warsaw Convention, some United States citizens/residents are unable to sue the air **carrier** in the United States because one of the requisite places **specified** in Article 28 where a Warsaw Convention action for damages must be brought against the air carrier is not in the United States.

III. The Problem

The efforts of the federal government over the past 40 years have been devoted to increasing the Warsaw Convention limitation of liability on recoverable damages,

The objective of these **efforts** has been **to** eliminate the **perceived ills** caused by the Warsaw Convention liability system, as enumerated in II above.

The failure to achieve this objective perhaps stems from a failure **properly** to identify the **problem**.

What, therefore, is the **real** problem? A problem, by proper **definition**, is that which stands in the way of achieving the objective and which, if removed, will allow the **objective** to be achieved. **If** the focus of attention is on improving something that will not allow the **objective** to be achieved, then the **real** problem is not being addressed.

The real problem in respect of **Warsaw** Convention **litigation** simply is the limitation of **liability** on recoverable damages. It has been the problem **which** has given rise to the perceived **ills** listed in II above since its inception, but it has become a greater problem over the **course** of the past 40 years as the economic well being of the citizens/residents of the United States has increased and the level of compensatory damage awards to passengers injured or **killed** in domestic air transportation in the United States has **escalated** to the point where the average award is now US. **\$1,500,000**, whereas the Convention limitation of liability remains at \$10,000 (augmented to \$75,000 by the Montreal Agreement) absent proof of Article 25 **wilful** misconduct. Additionally, this increasing level of compensatory damage awards has been reached in all other forms of tort litigation in the United States not involving air transportation.

If it is accepted that the real problem is the limitation of **liability** on recoverable compensatory **damages** and the limitation of liability simply is removed entirely, then it can readily be seen that all of the perceived ills in II above will disappear. The real problem then identified as the limitation of liability, the **course** of government action should be directed towards how best to eliminate the problem.

IV. The Solution

None of the "solutions" under current consideration will eliminate the problem entirely.

In seeking to reach a compromise solution, 'acceptable to **all**' interested parties, the government seems to be willing to **sacrifice** the paramount interests of United States citizens/residents who are passengers in "international transportation by air." For example:

1. Why is it that there is such intense interest on protecting manufacturers **from** the **very** claims which they face every day in domestic air transportation in the United States?

2. Why should United States citizens/residents be **called** upon to pay for protective compensatory damage insurance only in respect of international air transportation when they have the same protection without the additional **cost** in domestic air transportation?

3. Why is it that the rights of United States citizens/residents involved in international air transportation are so readily **sacrificed** when compared with the rights of United States **citizens/residents** involved in domestic air transportation?

4. Why is it that the United States government does not work within the current framework of the Warsaw Convention and simply eliminate the teal problem, the per passenger **limitation** of liability, pursuant to the provisions of **Article 22(1)**, the "special **contract**" provision of the Convention?

Surely the simple and most effective means of eliminating the problem is to adopt the Japanese Initiative and by wndiin of contract simply waive the applicable Warsaw Convention limitation of liability on recoverable damages for personal injury and death of passengers. In addition to the simplii of this approach and the lack of any necessity for international agreement on the approach, (since the mechanism for the approach already is in the existing treaty) the a&activeness of **this** approach may be summarized as follows:

1 . The approach eliminates any limitation on the amount of recoverable compensatory damages.

2. The approach maximizes the ease of recovery, since there no longer is any need to engage in expensive and protracted litigation in seeking to overcome the Convention limitation of liability by proof of Article 25 **wilful** misconduct

3. The cost of providing insurance to **cover** compensatory damages remains, where it is now, with the airlines, as it should.

4. There is no increase in the risk of litigation involving manufacturers or in the exposure to punitive damages over and above that which already exists with respect to domestic air transportation in the United States and the "Convention" related risk, as espoused by the manufacturers, virtually is eliminated.

5. The approach also virtually eliminates the necessity of manufacturers being joined in passenger liability litigation at all, except insofar as the manufacturers may be joined as a **third-party** by the airline in an effort to apportion liability in accordance with the relative percentages of fault.

6. There is no need to proceed with the **ratification** of MAP3 or the adoption of any SCP since the "problem" to which both **are** directed, the limitation of liability, no longer would exist.

7. There would be no need for any international agreement on the acceptability or not of the Japanese Initiative approach since this would be a matter for individual canter selection based upon the

wncems of that carrier for the well being of the citizens of the nation in which it is headquartered or of the countries to which it operates.

8. MAP4 can still be ratified separately from MAP3, notwithstanding the directive of the United States to the contrary. The concerns of the cargo caniers, therefore, can be fully addressed and **resolved** by the separate ratification of **MAP4**.

9. **There no longer would be any need for liability litigation as between an airline and its** passengers in order to **establish** fault or liability for an **accident** as a precondition to the **recovery of full** compensatory damages. The **airline** could deal with the subject of full compensatory damages **immediately** and without any delay, other than that normally encountered in assembling sufficient data to assess the extent of the pecuniary damage loss. The only litigation that would take place as between an airlin and **its** passengers or the families of its passengers would be with respect to the quantum of compensatory damages where agreement cannot **be** reached. Experience has **proven** that the incidence of this type of litigation is **de minimis** where no limitation of liabilii applies.

V. The Perceived Weakness of the Jaoanese Initiative Approach

A number of perceived weaknesses of the Japanese **Initiative** approach have been **advanced** as reasons why the United States should not adopt or advocate the adoption of this approach. They may be summarized and responded to as follows:

1. **The** United States **could** not impose the Japanese Initiative approach upon foreign **air carriers** operating to the United States. Why not? Is this not precisely what was done by the United States in 1966 by the Montreal Agreement, whereby all air **carriers** operating to, from or through the United States were required, as a condition to the continued exercise of their operating authority, to sign a counterpart to the Montreal Agreement, whereby the Warsaw Convention limitation of liabilii was increased to \$75,000 and the Article 20 defenses were waived up to that amount? There is nothing to prevent this same approach from being taken today with respect to the Japanese Initiative. In fact, the Japanese Initiative **could** be incorporated quite easily into the broad form of the Montreal Agreement, CAB Agreement 18,900. As in the case of the 1966 Montreal Agreement, the DOT has the authority in 49 U.S.C. § 1372(e) to include a condition in every issued foreign air carrier permit that the permit holder adopt the Japanese Initiative, i.e., waive the Warsaw Convention limitation of liability, as a prerequisite to operating to, from or through the United States. Since the DOT already has found that the Japanese Initiative, i.e., the waiver of the Convention limitation of liability by the airlines of Japan, is **in the** public interest of the United States, there would not appear to be any obstacle to making a similar finding as to all foreign air carrier **permit** holders.

2. The non-US. **airlines** may not be able to purchase adequate liability insurance if the limitation is waived or the cost of insurance may be increased substantially. The **air** carriers of the United States and indeed of the **world** did not find it at all **difficult** to obtain adequate liability insurance to cover the increased exposure to damages as a result of signing the counterpart to the **Montreal Agreement** in **1966**. The same would be true today if air caniers of the world were **to** adopt the Japanese Initiative approach.

There may be some increase in premium as a result of the waiver of the applicable limits of liability **worldwide**, but the **cost** to the carriers would be significantly lower than the **cost** to the passengers that would be imposed if the SCP plan of the United States were adopted.

3. The Japanese Initiative approach is limited to **carriage** on Japanese flag **carriers**. While this is true, there is no need for this to remain the case, should the other carriers who operate to, **from** or through the United States adopt the Japanese Initiative approach in a manner similar to that which has been adopted by the carriers of Japan. There would be few instances where a passenger would be flying on a non-participant in the Japanese Initiative approach, if the approach were adopted universally, just as there are few instances today where passengers **are flying** on non-Montreal Agreement transportation cards.

4. A very limited number of United States citizens/residents are unable to sue in the United States by virtue of the provisions of the current Warsaw Convention Article 28 and the SCP would provide them with the protection of additional compensation under the SCP regardless of the **restrictive** nature of Article 28. Also, MAP3 would add an additional **Article 28** jurisdiction, the domicile of the passenger. This is a feature to be preferred, provided the law of the domicile of the passenger always controls on the issue of the quantum of compensatory damages. It has been suggested, however, that this is possible of accomplishment under the regime of the Warsaw Convention and through the Japanese Initiative approach. The same condition of carriage which adopts the Japanese Initiative approach **could** provide the acceptance of a fact by the contracting **carrier** that the place of business of the carrier through which the contract has been made shall be deemed to be the place of domicile of the passenger. This would amount to a concession in advance of a factual issue by the air carrier and would not amount to an alteration of the **rules** as to jurisdiction within the meaning of Article 32, which is prohibited. Perhaps this suggestion should be given thorough consideration. Even today, where Article 28 jurisdiction may be found to be proper in the United States, the particular air carrier performing the transportation when the accident causing the injury took place may not be susceptible to **in personam** jurisdiction in the United States and the passenger, therefore, would have no recourse in the United States in any event. While it is recognized that the SCP would provide compensation for that passenger, the incidence of such passengers is even less than **de minimis** and it is questionable whether the entire international regime of the Warsaw Convention and the rights of thousands and thousands of United States citizens/residents should be compromised to alleviate a perceived problem with respect to a minuscule number of passengers.

VI. Some **Legal** Difficulties with the Other **Proposals** under Consideration

It has been proposed and suggested that a special contract also could be reached under MAP3. This would appear not to be possible. The Guatemala City Protocol deleted the last sentence of Article **22(1)** of the Warsaw Convention and the Hague Protocol. This sentence expressly permitted "the carrier and the passenger . . . (to) agree to a higher limit of liability" than that laid down in the respective Conventions. With the deletion of that sentence in the Guatemala City Protocol (now MAP3) and the adoption of an unbreakable limit of liability of the air carrier, it is highly questionable whether a special contract waiving the unbreakable MAP3 limit of liability would have any validity. By contrast, Article 22(2)(a) of the Warsaw **Convention/Hague** Protocol, as amended by MAP4, conspicuously has retained the possibility for the consignor to increase the

limit of liability for cargo by making a special **declaration** of value and, if required, paying a **supplementary** sum which, if done, would amount to a special contract with the air carrier raising the MAP4 cargo **limit** of liability. The presence of such an acceptable mechanism in MAP4 and the express deletion in MAP3 of existing provisions in the Warsaw Convention which **allow** the same thing to be accomplished with respect to passengers, would indicate that a waiver of the unbreakable MAP3 limit of liability, or a raising of the unbreakable MAP3 limit of liability, is not possible under MAP3.

VII. Conclusion

The Japanese Initiative approach presents the simple solution to the problem which has caused all of the perceived ills of the present **Warsaw** Convention liability system. The simplicity of the approach is emphasized by the fact that no international convention or agreement would be required to adopt and put into place the Japanese Initiative approach in the United States. It is significant that the Japanese Initiative approach has received the unqualified endorsement of the Bush and Clinton Administrations on three separate occasions as being in the public interest of the citizens of the United States.

The adoption of the Japanese Initiative approach as a matter of policy by the government of the United States would require little more than a 1990's approach to the 1966 approach which resulted in the Montreal Agreement. In fact, the basic structure of the Montreal Agreement probably **could** be used as the foundation for the formulation of the United States version of the Japanese Initiative.

The focus of current and future attention, therefore, should be upon the Japanese Initiative approach and how to make it adaptable and acceptable in the United States and presumably thereafter throughout the aviation world. Air carriers in other countries of the **world**, which do not have the disparate problems that exist in the United States and in Japan, as between domestic and international transportation damage award levels, simply can adopt the Japanese Initiative approach in some form or another, or not at **all**, consistent with the considerations of their citizens and their existing domestic laws.

The adoption of the Japanese Initiative approach will serve fully the interests of United States citizens/residents who are passengers in international air transportation, will meet fully the present concerns of manufacturers with respect to the adoption of **MAP3/SCP**, will eliminate all of the perceived ills of the current Warsaw Convention system of liability as enumerated above in II, will allow for the ratification and adoption of MAP4 to alleviate all of the concerns of the cargo carriers and will leave open only that very small class of United States citizen/resident passengers who formulate a trip which does not involve an Article 28 place in the United States. This single remaining concern should not serve to deter the immediate adoption of such a simple solution to a 40 year old problem. If it is a concern that must be addressed by the United States, then perhaps consideration should be given to remedial domestic legislation or to the acceptance by

the air carrier in the Japanese Initiative **condition** of carriage of the fact that the domicile of the passenger shall be deemed to **be** a place where the wnback of transportation has been made within the meaning of Article 28 of the Convention.

I disagree with my colleague Lee S. **Kreindler**. It is NOT time the Warsaw Convention was denounced. It IS time that the United States give serious consideration to the formulation and adoption of an **American** Initiative, following the example of the Japanese Initiative Approach.

George N. Tompkins, Jr.

(PRIVATE TRANSLATION)

CURRENT STATUS OF LIABILITY SYSTEM
AND
LIABILITY LIMIT OF INTERNATIONAL AIR CARRIER
AND
IMPROVEMENTS THERETO

MAY, 1992

CIVIL AIR LAW RESEARCH INSTITUTE
/AIR TRANSPORTATION LAW SUBCOMMITTEE

AVIATION DEVELOPMENT FOUNDATION
(J A P A N)

TABLE OF CONTENTS

I.	Preface.....*	1
II.	Research Schedule	3
III.	Details of Research	
1.	Current Status of Liability System of International Air Carriers and Problems concerning thereto	
(1)	Current Status of Liability System of International Air Carriers.....	5
(2)	Problems in the Current Liability System.....	7
(3)	Difficulty in Reformation of Current Status through Montreal Additional Protocol No. 3 /Domestic Supplemental Plan.....	9
2.	Direction of Solutions to the Issue of Passenger Liability Limits	
(1)	Consideration of Practical and Effective Measures.....	12
(2)	The Meaning of Limitation of Liability in International Air Carriage.....	13
(3)	Study on Economic Impact.....	13
(4)	Selection of either Large Increase or Abolition of the Liabilty Limit.....	14
3.	Modification of the Liability Limit by Conditions of Carriage	
(1)	Basic Policy of Modification.....	15
(2)	Specific Contents	15
(3)	Collateral Issues	17
4.	Efforts toward International Agreement	18
5.	Conclusion	18
IV.	Reference Materials (attachment omitted)	
	*Report of the Japanese Council for Transport Policy	
	*Excerpt of the relevant Convention/Protocol	
	*Provision of the Montreal Agreement	
	*List of the Contracting Parties to the Montreal Additional Protocol No. 3	
	*Excerpt of Consumers Protection Code of Japan Oceangoing Passenger Ship Association	
V.	Appendices (attachment omitted)	
	*List of the Members of the Civil Air Law Research Institute and its Subcommittee	

I. Preface

The Civil Air Law Research Institute, established within Aviation Development Foundation, a foundational juridical person, has been conducting a wide range of research activities concerning Civil Air Law since its establishment in 1967. In particular, since 1971, it has conducted several research activities on the Guatemala City Protocol and on the Domestic Supplemental Plan as a compensation system under the Guatemala City Protocol in light of movements in various countries relating to modernization of the Warsaw system through the Guatemala City Protocol. In 1978, in the Intermediate Report (entitled "Domestic Supplemental Plan"), the Civil Air Law Research Institute/AirTransportation **Law Special** Subcommittee reported the results of its study on the Domestic Supplemental Plan under the Guatemala City Protocol and the results of its research on the movement in the United States toward ratification of the Montreal Additional Protocol No. 3 as well as the results of its study of various issues related to the Domestic Supplemental Plan in Japan. Thereafter, in the report of the Civil Air Law Research Institute/Domestic Supplemental Plan Subcommittee (1980) and in the report of the Civil Air Law Research Institute/Montreal Protocol Subcommittee (1982), specific problems under a model insurance system were examined and reported. When it later appeared that the United States, whose participation is essential, had suspended its movement toward ratification of the Protocol, the focus of research activities shifted to the study of air carriers' "conditions of carriage". However, in 1990, when the U.S. Senate Foreign Relations Committee held public hearings on the Montreal Additional Protocol No. 3/ Domestic Supplemental Plan, we resumed our study of the Montreal Additional Protocol No. 3/ Domestic Supplemental Plan. The United States draft of the Domestic Supplemental Plan was introduced and **problems** related to that draft were reported. At about the same time last June

the Japanese Council for Transport Policy indicated that "because the current liability limits cannot always be said to be sufficient, it is necessary to re-evaluate these limits taking worldwide movements into consideration". Therefore, the Civil Air Law Research Institute has established the Air Transportation Law Subcommittee in order to study the current status of and issues pertaining to the liability scheme of international air carriers and methods for its improvement. The following is the report of the results of that study.

II. Research Projects (June, 1991 through May, 1992)

Civil Air Law Research Institute

June 13, 1991 : Adopted Research Report of 1990
: Reviewed and determined 1991 study
plan

May 22, 1992 : Adopted this Research Report

Air Carriers Conditions of Carriage Subcommittee

June 13, 1991 : Adopted Research Report of 1990
: Reviewed and determined 1991 study
plan

Air Transportation Law Subcommittee

July 9, 1991 : Studied responses (User Protection
Code) to the liability limit of the
Japan Oceangoing Passenger Ship
Association
: Studied issues concerning the Domes-
tic Supplemental Plan

November 14, 1991 : Studied the basis for the liability
limit of air carriers
: Researched issues which may arise if
the liability limits were abolished
by the "conditions of carriage"

February 18, 1992 : Examined outline of this Research,
Report

April 21, 1992 : Drafted this Research Report

May 22, 1992 : Adopted this Research Report and brought it up before the Civil Air Law Research Institute for adoption

Working Group

July 29, 1991 : Studied issues concerning the Montreal Additional Protocol No.3 and the Domestic Supplemental Plan in comparison with increasing passenger liability limits through "conditions of carriage"

September 12, 1991 : Studied liability limits of air carriers
: Studied insurance problems

October 30, 1991 : Reviewed movement on the Montreal Additional Protocol No. 3
: Studied issues which may arise if Japan does not ratify the Montreal Additional Protocol No. 3

January 28, 1992 : Studied the possibility of the Montreal Additional Protocol No. 3 entering into force
: Studied "conditions of carriage" that abolish the liability limit

March 25, 1992 : Examined Research Report Draft

III. Details of Research

1. Current Status of Liability System of International Air Carriers and Problems concerning thereto

(1) Current Status of Liability System of International Air Carriers

There are three agreements currently in force which provide for carrier liability in international carriage by air: the Warsaw Convention (Note 1), the Hague Protocol (Note 2) and the Guadalajara Supplementary Convention (Note 3). As is widely known, Japan is a high contraction party to the first two, both of which provide carrier's liability limits concerning damages in case of passenger death or bodily injury in international air carriage to which those agreements apply. The liability limits under those agreements are 125,000 gold francs (equivalent to **US\$10,000**) and 250,000 gold francs (equivalent to **US\$20,000**) respectively. However, those agreements stipulate that liability limits higher than the above amounts may be established by a special contract between the passenger and the carrier (Article 22 (1) of the Warsaw Convention, Article 22 (1) of the Warsaw Convention as amended by the Hague Protocol). Based on these provisions, all Japanese airlines are currently using 100,000 SDR (approx. 18 million yen) as the liability limit under their "conditions of carriage". (Note 4).

There are several other agreements concerning liability limits for international air carriers : the Guatemala City Protocol adopted in 1971, in which the liability limit was increased to 1.5 million gold francs (equivalent to **US\$120,000**), the Montreal Additional Protocol No. 3, an amendment of the Guatemala City Protocol adopted in 1975, in which the unit for denominating the liability limit was changed to Special Drawing Rights ("**SDR**"), which is applied by the International Monetary Fund. Neither of the above two protocols has entered into force yet.

Note 1: "Convention for the Unification of Certain Rules relating to International Transportation by Air" signed at Warsaw in October, 1929.

Note 2: "Protocol to amend the Convention for the Unification of Certain Rules relating to International Carriage by Air signed at Warsaw on 12 October

1929" signed in September 1955. In this Protocol, the carrier's liability limit for damages in case of death or bodily injury in international air carriage to which the conventions are applicable was increased up to twice the limit under the Warsaw Convention, which was, in the United States' opinion, not high enough. Then the United States refused to ratify this Protocol and even seemed to denounce the Warsaw Convention. As a result of this movement, the International Air Transport Association ("**IATA**") took the initiative to establish an air carriers agreement (the Montreal Agreement) in 1966. In the Montreal Agreement, the liability limit in case of the death or bodily injury of a passenger whose itinerary includes a point in the United States of America as a point of origin, point of destination, or agreed stopping place was increased to **US\$75,000** (inclusive of legal fees and costs. If such legal fees and costs are awarded separately, **US\$58,000** exclusive of **such fees** and costs). This is higher than the limit provided in the Hague Protocol. The Montreal Agreement also provides that when carrier increases its liability limit to the above-mentioned amount under its "conditions of carriage", it should waive the Article 20 defense under the Warsaw Convention. In the United States, it is required that all who engage in international air transportation should participate in the Montreal Agreement and therefore, all U.S. international airlines **and** foreign airlines which serve the United States participate in this agreement.

Note 3: "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" signed at Guadalajara in July, 1961.

Note 4: Provided, however, that the carrier shall not be entitled to avail itself of this liability limit if the damage is caused by its "**wilful** misconduct or such default as is considered to be equivalent to wilful misconduct" (Article 25 of the Warsaw Convention) or if it acts with "intent to cause damage or recklessly and with knowledge that damage would

probably result" (Article 25 of the Warsaw Convention as amended by the Hague Protocol) is proved.

(2) Problems in the Current Liability System

As described above, the Warsaw Convention and the Hague Protocol are the two primary sources concerning air carrier liability in accidents involving passenger death or bodily injury in international carriage by air. These are supplemented by the Montreal Agreement (an inter-carrier agreement in which all air carriers serving the United States participate) and each **airline's** "conditions of carriage". In light of the recent standards of damages for accidents involving human life in Japan, Europe or the United States, it must be acknowledged that the aforementioned liability limits are definitely too low.

For example, when we view the level of compensation in Japan for damages in the case of bodily injury or death, it is said that the amount may reach approximately 100 million yen in the case of the death of an adult male who is the main support of a household. In addition, the insured amount for compulsory insurance under the Automobile Accident Damages Compensation Law is currently 30 million yen (in the case of death). This amount is meant to be a minimum guarantee in respect of an automobile accident. Compared to the foregoing amount of compensation in the case of an automobile accident, the liability limits provided in international air carriage are of a much lower order.

In respect of international carriage by ships, which is another method of international passenger transportation that has traditionally retained limitations on liability, rules equivalent to other means of transportation which do not have limitations on liability have been adopted in Japan. That is, oceangoing passenger ship owners in Japan established "User Protection Code" (Note 5) in November, 1990 which is a voluntary set of rules for the protection of passengers, and they have waived liability limits for passengers which would otherwise be applicable under the conventions and the law (Note 6). This fact raises substantial questions about the existence of limitations on liability which only the air transportation business retains.

Additionally, in the Japanese domestic air transportation business, liability limit under "conditions of carriage" (then

23 million yen) was abolished in 1982 because that amount was too low even at that time.

Explained above are some examples just in Japan, but even on the international level, there have been many requests since the Hague Protocol entered into force that the current liability limit be reviewed. Several attempts have been made to modify the liability limit for passengers such as the Guatemala City Protocol and the Montreal Additional Protocol No. 3 as mentioned above. Those protocols, however, have not yet entered into force after 21 years from adoption of the Guatemala City Protocol and 17 years from adoption of the Montreal Additional Protocol No. 3. One reason for this is the characteristics of the liability limit (it is prescribed to be unbreakable even when there are causes under the Conventions (cf. Note 4) that would otherwise prevent the carrier from availing itself of liability limit), but now it appears that the biggest reason is that the above liability limit has become **unacceptably** low for major countries which are holding keys for these conventions to enter into force.

Note 5: The Japan Oceangoing Passenger Ship Association adopted "Rules for the Protection of Passengers aboard Passenger Ships" (User Protection Code) in November 1990 as recommended by Oceangoing Passenger Ships Subcommittee of General Department of Council for Transport Policy. The rules provide the following:-

- (i) Ship operators should ensure the smooth compensation for damages suffered by passengers in the case of death or bodily injury by carrying adequate insurance, taking social and economic circumstances into consideration. In such cases, the ship owners should carry liability insurance of at least 50 million yen per passenger.
- (ii) Ship Operators should waive their right to avail themselves of any liability limit including the limit provided in the "Law concerning limits of liability for ship owners, etc." in case they are to compensate passengers for death or bodily injury.

The Ministry of Transport has directed the Japan Oceangoing Passenger Ship Association to notify all members of this "User Protection Code".

Note 6: Japan is a high contracting party to the "Convention on Limitation of Liability for Maritime Claims, 1976". This convention is domestically enacted as the "Law concerning Liability Limit of Ship Owners, etc."

(3) Difficulty in Reformation of Current Status through the Montreal Additional Protocol No. 3/ Domestic Supplemental Plan

The issues of liability limits for international air carriers stipulated under the current conventions or "conditions of carriage" have been examined above. When we consider solutions for these issues, we must not overlook the point of international cooperation. That is, since international carriage relates to various countries where standards of damages are different, it is necessary to take those into consideration.

Under these circumstances, with the recognition of the importance of international cooperation, a study has been made in Japan on the Domestic Supplemental Plan (Note 7) as a system to supplement damages which exceed the liability limit provided under the Montreal Additional Protocol No. 3. Our Civil Air Law Research Institute/Air Carriers Conditions of Carriage Subcommittee resumed its study of the Domestic Supplemental Plan in 1990, and has continued to research the compensation system under the Montreal Additional Protocol No. 3. and the Domestic Supplemental Plan in the course of our basic study into what the liability of international air carriers should be. As a result of our study, we must state that this system has certain difficult problems both theoretical and practical (Note 8).

From an international viewpoint on the other hand, it is not too much to say that it is quite doubtful that the current status can be reformed by the Montreal Additional Protocol No. 3 since the possibility of its coming into force is very small. (Note 9)

Therefore, we have reached the conclusion that some method other than the Montreal Additional Protocol No. 3 and the Domestic Supplemental Plan based on that Protocol **must** be studied urgently to improve the current status.

Note 7: Under the Montreal Additional Protocol No. 3, liability limit is fixed at 100,000 SDR which is absolutely unbreakable. However, a high **contracting** party, which thinks the above amount is insufficient, is permitted to adopt a domestic system to supplement the damages which exceed the amount payable under the Protocol.

Note 8: Theoretical Problem

A point of great **controversy** during the conference **where** the Guatemala City Protocol was discussed and adopted was whether the liability limit should be prescribed to be unbreakable even when there are causes under the Conventions (cf. Note 4) that would prevent the carrier from availing itself of the liability limit. If Japan attempts to ratify this Protocol, this issue is sure to invite much dispute in Japan over the conflict with the "public order and good morals" prescribed in the Japanese Civil Code and the "inviolable property rights" guaranteed under the Japanese Constitution.

Secondly, payment under the Domestic Supplemental Plan can hardly be regarded as "compensation of damages" (which is, in principle, to be paid by the liable person in the way of "compensation"), since it is borne not by carriers' but by passengers' contributions (Article 35 A of the Warsaw Convention as amended by the Guatemala City Protocol provides that no burden other than to collect contributions from passengers shall be imposed upon the carrier). In view of the foregoing, there arise such problems as what is the theoretical characteristic of the payment under the Domestic Supplemental Plan and what is the theoretical fairness, in adopting a system where compensation is borne by "passenger's contributions" rather than the traditional system of compensation.- In respect of these problems, many discussions have been had not only during the conference on the said Protocol but also thereafter, but we must say that there has not yet been any adequately persuasive explanation.

Practical Problem

As for a concrete Domestic Supplemental Plan, **there** is a draft prepared in the United States, and our

Air Carriers Conditions of Carriage Subcommittee has researched this draft in 1990. As a result of that research, it has become clear that it is quite doubtful whether the Plan, the scheme of which appears in the draft, is actually workable in view of the following significant problems (and others):-

- (a) Payability of the said Plan, the method for calculating passengers' contributions, which become the funds of the Plan, and the measures to be taken when such contributions are not sufficiently accumulated are not clear.
- (b) The limit is established for one aircraft per accident. It will be difficult to decide whether the total amount to be paid from the funds will exceed the established limit before materials necessary to calculate damages are almost complete and before the total amount of damages is estimated. Before such estimation is made, payment cannot be started from the funds, and it thus appears that prompt payment will be hard to expect.
- (c) It is not clear how to make adjustments with other countries' Domestic Supplemental Plans.

Note 9: In order to make the Montreal Additional Protocol No 3. enter into force, 30 countries must ratify it. Only 19 countries have ratified this Protocol so far, and according to the survey by the International Civil Aviation Organization ("ICAO"), there are only 4 countries (Lesotho, Australia, Germany, the United States of America) which are showing some movement toward its ratification. The United States, in view of its position in the field of civil aviation, has the greatest power to make this Protocol enter into force. (The other countries have watched the movement of the United States for the past 20 years.) The United States is conditioning its ratification on a satisfactory Domestic Supplemental Plan, which, it is said, will require legislative action. However, looking just at the American draft, which has the problems discussed above, the success of the legislation seems highly uncertain. A similar situation occurred in the past in connection with draft legislation to create compulsory insurance system in order to sup-

plement the liability limit in connection with the Hague Protocol ratification which was expected to be enacted, but became deadlocked.

In Australia, a law to implement this Protocol domestically was completed at the end of last year in preparation for the future ratification of the Protocol. In the Parliament, however, the liability limit became a serious problem and it was suggested that a Domestic Supplemental Plan is indispensable (as expected, legislation was considered necessary) if the Protocol were to be ratified. The Government agreed to investigate the possibility of a Domestic Supplemental Plan for the first time at that point. It is reported that this investigation has not yet been started.

In Germany, it is reported that due to the preparation of legislation after unification of East and West Germany, there is no progress on the issue of ratification of this Protocol.

Since, as explained above, the reform of the current situation by the Montreal Additional Protocol No. 3 is progressing too slow, the major airlines in the world (especially European carriers) are reported to be intending to proceed with reformation outside that Protocol.

2. Direction of Solutions to the Issue of Passenger Liability Limits

(1) Consideration of Practical and Effective Measures

As a measure to solve the liability limit issue other than through the Montreal Additional Protocol No. 3 /Domestic Supplemental Plan which seems unlikely to enter into force at least in the reasonably near future, it would be conceivable from a theoretical viewpoint to take measures such as enacting a compulsory domestic law, introducing a completely new convention, or proposing another inter-carrier agreement similar to the Montreal Agreement. However, in consideration of the urgent need for improvement, none of these ideas can be said to be practical. Therefore, there seems to be only one realistic method to improve the current situation and that is through necessary amendments to the "conditions of carriage" (which can be regarded as a "special contract" as set forth in the Article 22 (1) of the Warsaw Convention) of the airlines under the current 'Warsaw Convention framework.

Set out below is the result of our study on measures to resolve the liability limit issue through necessary amendments to "conditions of carriage".

(2) The Meaning of Limitation of Liability in International Air Carriage

Currently, the limitation of liability of international air carriers is set forth under their "conditions of carriage" based on the relevant conventions. In order to research the issue of an increase/abolition of the liability limit, the meaning of limitation of liability in international air carriage must first be considered.

There is no doubt that the establishment of liability limits for air carriers with respect to compensation for damages had a strategic purpose at the beginning to protect and foster the primitive air transport industry (and simultaneously to establish aviation insurance markets) as well as to establish unified rules (which would make it possible to estimate the amount of damages to be paid by the carrier in case of an accident) in international carriage which would involve various countries with different legal, economic and social systems. However, considering the current status of largely developed air transport industry, these reasons cannot be sufficient to maintain the liability limit except in case of developing nations.

There have been many attempts to identify a basis for the continued existence of the limitation of liability other than those strategic considerations, but no sufficient explanation has been found. However, the economic impact should probably be the starting point when we consider this issue. That is, it is meaningless to argue about the propriety of the existence of a limitation of liability in the abstract without being attentive to the following issues:-

- Would an insurance company be able to provide the necessary insurance coverage even if the liability limit is increased by a large margin or abolished?
- How much of an increased burden (such as increased insurance premiums) would it place on air carriers and how would it be reflected in airfares?

(3) Study on Economic Impact

Here, let us consider what kind of impact it would have on

relevant parties if the Japanese airlines greatly increase or abolish the liability limit. The major points in considering this issue would be: whether it would be possible for carriers to carry necessary insurance after a large increase or the abolition of the liability limit; and how and whether there would be a dramatic increase in airfares as a result of an increase in insurance premiums.

As for the ability to carry necessary insurance, there seems to be no problem. When the liability limit was abolished for domestic flights in 1982, there was no problem. As in the United States, insurance is underwritten without any problem even though there is no liability limit for domestic flights. (It is, however, necessary to recognize that the amount of any increase in the premiums will largely depend upon the then current market situations and other complex factors.)

Secondly, although the mechanism to determine airfares is very complex, the fraction comprising insurance premiums, one of the elements in determining airfares, is not very large and can be expected to be less than 1%.

As a result, there is the foregoing reservation relating to **the** increase in insurance premiums, but it is estimated that this would not present an insurmountable economic obstacle (i.e. increases in insurance premiums do not directly lead to increases in airfares) if Japanese airlines substantially increase or abolish the liability limit. As for major foreign airline companies, the situation would be more or less similar to the Japanese situation if the liability limit is increased by a large margin or abolished.

(4) Selection of either Large Increase or Abolition of the Liability Limit

There is a concern that it might be too drastic to abolish the liability limit and that from the standpoint of preserving the international balance, it would be better to establish a certain increased limit instead of abolishing the limit altogether. However, if the international balance is considered in determining the amount of the limit, the result would be insufficient as a limit in light of the Japanese standard of damages for accidents involving human life. It is also expected that when compensation by out-of-court settlement (which is applied as a method of resolving compensation for

most accidents in Japan) is made, the carrier's "good faith" is, in a sense, measured by the amount paid in excess of the limit and thus the limit is apt to work as only a starting figure for negotiation in most cases. In addition, the "existence" or "retention" of the liability limit, which other modes of transportation do not have, would make matters even worse and might create social problems in Japan in view of the way in which the liability of airlines in case of accidents is pursued by the public including not only by victims and their families but also by the mass media. Furthermore, the existence of a liability limit which is breakable when there are causes under the Conventions (cf. Note 4) that prevent the carrier from availing itself of that liability limit leaves the following problem. That is, because of the breakable nature of the liability limit, those who wish compensation in excess of the liability limit will pursue the aforementioned causes, and it might lead to the delay of compensation. As for economic impact, although there are some uncertain elements concerning insurance premiums as examined above, there does not seem to be a substantial problem. As a result, under the current circumstances in Japan, abolition of the liability limit appears to be the appropriate choice.

3. Modification of the Liability Limit by Conditions of Carriage

(1) Basic Policy of Modification

While one cannot rule out the possibility that it will become necessary to amend the "conditions of carriage" by incorporating terms and conditions from the Montreal Additional Protocol No. 3, under the current circumstances, there is little possibility that this Protocol will enter into force in the near future. Therefore, it is practical to examine the minimum measures needed to abolish the limit under the current Warsaw Convention system.

(2) Specific Contents

(i) To establish provisions under which no liability limit would be applied for passenger accidents. (The carrier would not apply the liability limit based on the Warsaw Conventions/Hague Protocol.)

(ii) As for the basis for **liability**, the principle of the War-

saw/Hague Protocol, namely presumed fault of the carrier should be adopted along with the abolition of the liability limit. In this situation there are the following two choices in respect of the waiver of the defense of lack of negligence under the Article 20 (1) of the Warsaw Convention:-

- (a) Where the Montreal Agreement applies, the carrier waives the defense based on lack of negligence to the sum prescribed in the Montreal Agreement, namely **US\$75,000** inclusive of legal fees and costs or **US\$58,000** exclusive of legal fees and costs if those are awarded separately.
- (b) The carrier waives the defense of lack of negligence under the Article 20(1) of the Warsaw Convention up to 100,000 SDR, as is now the case.

The Japanese airlines' waiver of the aforementioned defense up to 100,000 SDR under its "conditions of carriage" is closely related to and balanced with the existence of the liability limit. The concept of (a) returns to the principle of the Warsaw Convention for liability where the liability limit is abolished and, where the Montreal Agreement applies, provides for waiver of the right to invoke the Article 20(1) defense under the Warsaw Convention to raise lack of negligence as a defense as required under the Montreal Agreement. In order to be compensated in excess of the liability limit under the current Warsaw Convention system, whichever of the two choices, (a) or (b) is selected, passengers have the burden of proving the causes under the Conventions (cf. Note 4) that prevent the carrier from availing itself of the liability limit. When the liability limit **is** abolished, passengers are relieved of this burden, and this will be of benefit to them. One view of (a) is that this choice may be disadvantageous to passengers since the scope of the waiver of the said defense is narrower than choice (b). On this point, the concept of (b) is to maintain the same extent of the waiver of the defense as is currently applied by Japanese airlines, which is 100,000 SDR. One view of (b) is that, where carriers abolish the liability limit while maintaining the same extent of the waiver of the defense, it may put too heavy a burden on carriers taking into consideration the balance between the abolition of the liability limit and the scope and extent of the waiver of the defense in question, especially where there is another wrongdoer.

(iii) Provision Excluding Punitive Damages

If the liability limit is abolished, there is concern about punitive damages which are permitted in some foreign countries in view of their large amounts and their difficulty in estimation. (However, it is considered that, even under the current circumstances, in such cases where punitive damages become an issue, the carrier's wilful misconduct or gross negligence might be found and the liability limit would not be applied (Article 25 of the Warsaw Convention). If this is so, the position of the carrier would not be made much worse than it is now.) On the other hand, there is another opinion that there is little cause for concern regarding punitive damages, since there have been some judicial precedents in which punitive damages are not recoverable in a case where the Warsaw Convention applies. However, this is premised on the Warsaw Convention being applied, and especially when one considers non-Convention carriage, a clause in the "conditions of carriage" under which punitive damages are excluded would not be without meaning. (However, the enforceability of such provision in the "conditions of carriage" is by no means free from doubt.)

(3) Collateral Issues

(i) Relation with the Montreal Additional Protocol No. 3

Abolition of the liability limit through the "conditions of carriage" conflicts with the Montreal Additional Protocol No. 3 which does not admit a limit in excess of the amount stipulated in the Protocol. If the Montreal Additional Protocol No. 3 should enter into force and any high contracting party should denounce the Warsaw Convention or the Hague Protocol in the future, any carriage between Japan and such denouncing country would become non-Convention carriage unless Japan ratifies the Montreal Additional Protocol No. 3 (ratification of the Montreal Additional Protocol No. 3, however, will be difficult since, as mentioned above, the Protocol in question does not admit a limit in excess of the one stipulated therein), and there would arise a problem in respect of the predictability of legal matters. In order to prepare for such a situation, it might be necessary to incorporate in the "conditions of carriage" all the provisions of the Montreal Additional Protocol No. 3 other than the liability limit and the liability **princi-**

ple.

(ii) Limits of Amendments of Conditions of Carriage as a Response

To the extent that amendment of "conditions of carriage" is selected to improve the current situation, the problem will not be solved for those airlines which do not amend their "conditions of carriage" voluntarily. In that sense, responses such as amendment of the "conditions of carriage" have their limits. This becomes clear in the case of accidents in a joint operation flight in particular when a low liability limit is left in the "conditions of carriage" of a partner airline.

4. Efforts toward International Agreement

Abolition of the liability limit by Japanese airlines under their "conditions of carriage" is recognized under the Warsaw Convention/Hague Protocol and creates no problems under relevant international conventions. On the other hand, careful consideration must be given to international aspects since the issue of the liability limit in international air carriage is a matter which relates to the special nature of international air carriage, as the carriage which involves various countries with different legal, economic, and social systems. Furthermore it cannot be denied that the abolition of the liability limit by amendment to the "conditions of carriage" recommended by us is intended to improve the current situation by a different approach from those which have been taken internationally in the past. Therefore, we would like to assert that every effort should be made before both the International Civil Aviation Organization ("ICAO") and the International Air Transport Association ("IATA") and wherever an opportunity is presented, to obtain an understanding of how present circumstances in Japan have required the adoption of these provisions as a temporary response to the problems related to appropriate liability for international air carriers, and at the same time to present a scheme of appropriate liability for international air carriers and form an international consensus around it.

5. Conclusion

As a result of our study on what should be the scheme of

liability for Japanese international air carriers, we are convinced that with regard to the liability limit in question, the only proper and realistic solution is to amend the "conditions of carriage" that complies with the current system under the Warsaw Convention. With regard to whether the liability limit should be abolished or its amount should be increased by a large margin, the former is recommended although it is subject to reservations with respect to insurance premiums. However, the amendment of the "conditions of carriage" is no more than a response by individual carriers and we should take it into consideration that this method definitely falls behind a treaty as a proper way to settle the issue of international air carrier liability. It is important to make further efforts toward establishing a new liability scheme of international air carriers, including such matters as modernization of transport documents, additional bases of jurisdiction and so forth. Japan, too, is expected to make significant contributions in this regard.

STATEMENT SUBMITTED TO THE IATA AIRLINE LIABILITY CONFERENCE BY
THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Good morning.

Mr. Chairman, delegates and observers, ICAO wishes to express its thanks to IATA at being able to participate as an observer to this very important Conference on Airline Liability.

Since 1965 ICAO has been actively involved in the process of modernization and updating of *The Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw in 1929 (the Warsaw Convention).

The last effort to update the Warsaw System was in 1975 with the adoption of Additional Montreal Protocols Nos. 1, 2 and 3, and Montreal Protocol No. 4. However almost twenty years later these instruments are still short of the necessary 30 ratifications to enter into force. A substantial number of States still attach great significance to the ratification by the United States of the Montreal Protocols Nos. 3 and 4 and seem to be awaiting any developments in that context before undertaking similar steps. One of the basic issues which has contributed to this is the level of the air carrier liability limits defined in the Protocols. Since 1975 inflation has reduced the worth of the passenger liability limit under Additional Montreal Protocol No. 3 to about a third of its original value; therefore some States would wish to see the liability limits established under that Protocol updated to reflect more adequately their change in value. Other States argue that the limits under that Protocol remain adequate to cover the needs of their citizens or are even too high; such States are also concerned with the impact which the increases in insurance premiums associated with the higher liability limits might have on the already generally precarious financial position of their national carriers and whether these increases could easily be absorbed through higher air fares. The impasse created by this situation has led a number of States to take unilateral action to seek national or regional solutions in order to remedy perceived deficiencies of the "Warsaw System". These initiatives are difficult to reconcile with the purpose of maintaining a global uniform system.

It is ICAO's view that the unification of law relating to the international carriage by air, in particular unification of law relating to liability, is of vital importance for the harmonious management of international air transport. Without such unification of law complex conflicts of laws would arise and the settlement of claims would be unpredictable, costly, time consuming and possibly uninsurable. Furthermore, conflicts of jurisdiction would arise which would further aggravate the settlement of liability claims.

In view of the above, in 1994 the ICAO Council established the parameters of a socio-economic analysis of the limits of air carrier liability to be carried out by the Secretariat in co-ordination with IATA. The study is one step in a dynamic process initiated by the Council to try to overcome the problems associated with the current liability system and, if necessary, rethinking the whole system in an innovative way in order to harmonize the needs of the air transport community world-wide.

The study is focusing on determining the adequacy of the limits of liability currently prevailing or proposed in different States and regional groups of States, the costs (in terms of insurance and payouts) to air carriers of providing higher limits, and indicative additional costs of applying such limits. The study is largely based on an analysis of questionnaires, one for States regarding the adequacy of the limits and one for air carriers (which was distributed by IATA) focusing on the costs, as well as data provided by other sources such as the insurance industry, consumer groups and other relevant world-wide and regional organizations.

The deadline for replies by States to the ICAO questionnaire was May 28. To date we have received some 30 replies as well as contributions from the insurance industry and from two consumer groups. We are very encouraged by this rate of response to a particularly difficult questionnaire involving several government departments, which suggests a high degree of interest among the ICAO contracting States on this issue. Our intention is to present to the ICAO Assembly in September a **preliminary** report based on the current situation, the results of this Conference and the analysis of the questionnaires received. Then it will be up to the Assembly to decide how ICAO should proceed on this issue. Clearly, much will depend on the outcome of your Conference and we wish you well in your deliberations.

Thank you.

PROPOSAL FOR AN ENHANCED LIABILITY PACKAGE

(Submitted by Air Mauritius and Air *New Zealand*)

Based on the discussions of the Conference, there seems to be a consensus **that**:

- the concept of voluntarily raising current liability limits through an **intercarrier** agreement is **generally** considered desirable;
- adjustment of those limits by the applicable inflation factor since 1966. with the new limit to be established as 250,000 **SDRs** would constitute a reasonable updated figure;
- prompt and full compensatory damages to passenger claimants should be secured through an appropriate mechanism or mechanisms; and
- governments should assume their responsibility to act urgently to **modernise** the Warsaw System through ICAO.

A new intercarrier agreement should now be concluded to incorporate the following:

- the provision of an up-front payment facility in order to respond to claimants' needs and be acceptable to governments;
- the retention of defenses under Article 21 of Warsaw/Hague;
- a waiver of Article 20 defenses up to the updated **limit**;
- a "**third-tier**" beyond the updated limit, where circumstances so require;
- assistance to developing countries' airlines to meet any additional cost resulting **from** the increased limits.

The enhanced liability package providing for proven compensatory damages would comprise:

- ◆ *First tier:* Current Warsaw/Hague limits on the basis of strict liability, *i.e.* waiver of Article 20 defenses up to such limits.
- ◆ *Second tier:* The updated limit of not less than 250,000 **SDRs**, on the basis of [strict liability (defenses under Article 20 Warsaw/Hague being waived)], periodically **inflation**-adjusted. (The second tier amount would include the **first** tier).
- ◆ *Third tier:* The amount of proven compensatory damages beyond the second tier on the basis of [presumed-fault liability (?)] to be secured where circumstances so require through a non discriminatory mechanism, which may be funded by passenger surcharges. Provision to be made to ensure that claimants may not recover damages twice.

Airline Liability Conference

Washington, 19-27 June 1995

Submission of the African Airlines Association (AFRAA)

No. 2

I am speaking on behalf of African Airlines Association members attending this conference, namely: *Royal Air Maroc, Ethiopian Airlines, Air Gabon, Air Madagascar, Uganda Airlines, Ghana Airways, South African Airways, Egyptair.*

I associate myself to compliment Air Mauritius and Air New Zealand for their job, but I have few comments and observations.

1. I think we have to add to our consensus:
 - the preservation and maintenance of the Warsaw system;
 - the third consensus point, I agree with the distinguished delegate of **Swissair** comment that it is a desirable objective airlines should be working on;
 - an additional consensus point that has emerged during the discussions, that there is no consensus about the insurance implications of any of the proposals considered by the conference, which in our view should be carefully assessed before any final position;
 - the amount of 250,000 SDR's based on inflation has been floated, but no consensus has been reached to accept this level, especially that such level will have drastic implications on small & medium size carriers premiums.
2. The third tier, from our point of view, should not be part of the intercarrier agreement. Also, there should be time to legally, financially and technically study the third tier.
3. The mechanism of assistance to developing countries should be clear before we commit ourselves.
4. What guarantees that the third tier will not have negative competitive implications on small and medium size carriers?

Hussein Sherif
Egyptair

Airline Liability Conference

Washington, 19-27 June 1995

*China Airlines' Comment in Furtherance of Proposal **for** an Enhanced Liability Package*

In the proposal submitted by Air Mauritius and Air New Zealand, a "?" has been left in the 3rd tier liability, which is said to leave some room for thinking. I wonder whether it is acceptable to all parties here to not only leave a room to think now, but also allow some flexibility for the carriers/countries to structure their own 3rd tier mechanism within the Warsaw Convention liability regime. The goal here today is to get the consensus of putting the 3rd tier liability in place as supplemental compensation for the passengers. This goal may not be extended to impose upon each carrier/country exactly the same scheme of the SCP. If this is the correct understanding, then one of the important issues will be how to ensure that the SCP of each carrier/country will exist in harmony, without precluding, conflicting or competing each other. To be specific, if the JI is found an acceptable 3rd tier liability scheme so that in the U.S., Japanese carriers will not be required to collect the surcharge under the U.S. SCP, I assume Japanese airlines will be more than happy to support the U.S. SCP. We certainly understand the U.S.'s concern on the insufficient coverage under the JI in cases where the Art 20 (1) defense is not waived. In order to eliminate the concern, I'm afraid that there is no answer but to put the MAP No. 3 or other new convention in force. And that certainly is a common goal of ours.

Given the optional nature of the 3rd tier liability, the potential conflict in the SCPs to be adopted by each carrier/country seems unavoidable. As such, a rule similar to the conflict of law rules may be required, either by referring direct to the applicable conflict of law rules, or by incorporating such a scheme in the SCP to be adopted, so that the carriers will not be forced to satisfy the requirements prescribed in each jurisdiction.

Airline Liability Conference

Washington, 19-27 June 1995

Opening Statement of the Association of European Airlines (AEA)

(Presented by Marc Frisque)

Thank you, Mr. Chairman, for giving the Association of European Airlines (AEA) the opportunity to address this important conference aimed at improving air carriers' liability.

The AEA which represents 25 major European carriers was **first** approached in October 1992 by the transport services of the European Union Commission. In its consultation paper on liability in air transport, the Commission asked for views of interested parties on how to improve the current passenger liability system which did not meet the basic requirement for fair compensation limits and harmonized standards throughout the European Union. In the AEA's own position paper, our member airlines have agreed with the Commission's view that current liability levels for death and personal injury of passengers under the Warsaw Instruments were too low and needed to be reviewed. As AEA members were and still are committed to the Warsaw System, they proposed, as an interim solution, to develop in Europe, an intercarrier agreement for a higher liability limit under Article 22(1) of the Warsaw Convention. Regarding a more permanent solution, the AEA recommended that the European governments continue to seek a global solution to the issue of passenger liability in air transport by improving the existing Warsaw Convention Instruments through an agreement between the contracting parties to the Convention. AEA carriers also indicated their willingness to start the necessary discussions on the specific terms of such an intercarrier agreement as soon as anti-trust immunity would be received from relevant authorities. In this context, authority under European competition law for discussions between AEA airlines on what might become an intercarrier agreement was granted in July 1993 by the European Commission.

These developments closely coincided with the European Civil Aviation Conference's (ECAC) own involvement in assessing ways and means for improving in Europe the passenger liability system under the Warsaw Convention Instruments in force. Considerable efforts were devoted by ECAC towards preparing the elements of what eventually became Recommendation 16-1 on air carriers' liability with respect to passengers as adopted by the DGCAs of ECAC in June 1994. European airlines associations were from the start closely associated with this ECAC work, in particular the AEA which was instrumental in preparing at ECAC's request the possible elements to be retained for an intercarrier agreement with increased liability limits in Europe as well as the framework for such an agreement.

However, the absence of anti-trust authority from the US, prevented AEA members from starting discussions on the specific terms and the implementation process of an European intercarrier agreement. Work on improving liability limits in air transport has nevertheless been progressed at ECAC's specific request by a group of AEA carriers which has developed a draft model agreement relating to liability limitations of the Warsaw Convention and the Hague Protocol. This draft is based on the Montreal 1966 intercarrier agreement and meets the ECAC's terms of Recommendation 16-1 for updating certain elements of the international air carrier liability system. It has been developed for discussion purposes with public authorities and has not been considered for adoption by any AEA carriers. It is, however, available as one possible option for an improved liability system certainly in Europe, but also for consideration in the development of a much wider international agreement on improved liability limits which hopefully will be the successful outcome of this Conference (see attachment).

Mr. Chairman, let me offer some conclusive views and expectations from the AEA members on this important issue of passenger compensation. It has been the clear expressed views of the AEA carriers that:

- Liability levels for death and personal injury of passengers under the Warsaw Convention Instruments currently in force are too low and need to be reviewed in order to increase these levels adequately;
- The uniformity provided by the Warsaw system of liability is of utmost importance in the interests of both the consumer and the world aviation industry;
- A permanent and global solution to the issue of passenger liability in air transport is desirable and should continue to be sought in the context of international law;
- As the successful conclusion of such initiative is likely to require time, an interim solution to the problem of the low level of the liability limit, which is of urgent concern to European authorities can be achieved within the existing Warsaw Convention Instruments which allow for liability levels to be increased under Article 22(1);
- At this point in time an interim solution should concentrate mainly on the liability limit issue in order not to endanger the Warsaw System or prejudice progress towards a permanent solution within its framework;
- An intercarrier agreement with the widest geographical scope possible and striking a fair balance between the interests of airlines from different regions and the traveling public should be encouraged. The different economic standards in the regions to be covered by a possible agreement should be carefully taken into account. It is believed in this respect that the ECAC recommendation offers all the elements of a reasonable interim scheme which also meets these objectives.

Mr. Chairman, there is a great deal of expectation by AEA carriers from this Conference's work. Let's hope that solutions can be found here to the benefit and the urgent need of the air traveler in the different regions of the world.



**PROPOSED DRAFT
AGREEMENT RELATING TO LIABILITY LIMITATIONS OF THE
WARSAW CONVENTION AND THE HAGUE PROTOCOL
(SUBMITTED BY A GROUP OF AEA CARRIERS)**

NOTE : THIS DRAFT AGREEMENT HAS BEEN PRODUCED IN RESPONSE TO A REQUEST FROM EC AND ECAC AUTHORITIES AND IS SOLELY FOR DISCUSSION PURPOSES WITH THESE AUTHORITIES.

The undersigned Carriers (hereinafter referred to as "the Carriers") hereby agree as follows:

1. Each of the Carriers shall include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any government: The Carrier shall avail itself of the limitation of liability provided in the Convention for the Unification of Certain Rules 'Relating to International Carriage by Air signed at Warsaw October 12th, 1929, or provided in the said Convention as amended by the Protocol signed at The Hague September 28th, 1955. However, in accordance with Article 22 (1) of said Convention, or said Convention as amended by said Protocol, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said Convention or said Convention as amended by said Protocol, which, according to the Contract of Carriage, includes a Point in an ECAC Member State as a point of origin, point of destination, or agreed stopping place:
 - (1) The limit of liability of each passenger for death, wounding, or other bodily injury shall be the sum of [SDR 250.000 ¹] inclusive of legal fees and costs.
 - (2) The Carrier reserves the right, with respect to any claim arising out of the death, wounding, or other bodily injury of a passenger, to avail itself of any defence under article 20 (1) of said Convention or said Convention as amended by said Protocol.
2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Convention, or the Convention as amended by the Hague Protocol, and by the special contract described in article 1 (1), the following notice, which shall be printed on (i) each ticket; (ii) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (iii) on the ticket envelope:

¹ This figure roughly represents the Montreal Protocol 3 limit if corrected for inflation and is merely inserted for discussion purposes.

"Advice to International Passengers on Limitation of Liability

Passengers on a journey involving an ultimate destination or a stop in a country other than the country of origin are advised that the provisions of a treaty known as the Warsaw Convention may be applicable to the entire journey, including any portion entirely within the country of origin or destination. For such passengers on a journey, to, from, or with an agreed stopping place in an ECAC Member State, the Convention and special contracts of carriage embodied in applicable tariffs provide that the liability of certain (name of Carrier) and certain other ² Carriers parties to such special contracts for death of or personal injury to passengers is limited in most cases to proven damages not to exceed [SDR 250.000] per passenger. Additional protection can usually be obtained by purchasing insurance from a private company. Such insurance is not affected by any limitation of the Carrier's liability under the Warsaw Convention or such special contracts of carriage. For further information please consult your airline or insurance company representative."

- 3a. In the event of the death of a passenger as a result of an accident, the Carrier shall immediately make available a lump sum amounting to five [5] percent of the figure mentioned in article 1 (1).
- 3b. In the event of disability of a passenger as a result of an accident, the Carrier shall immediately pay the costs of hospitalisation, up to five [5] percent of the figure mentioned in article 1 (1) provided however such hospitalisation occurs immediately after the accident and continues for at least seven [7] days.
- 3c. The amounts mentioned in paragraph a. and b. will be at the disposal of those w&o would be entitled to compensation if the liability rules were applied, however without prejudice to their actual application. Such amounts shall be deducted from the ultimate amount of compensation. However no reimbursement of such amounts will be required in the absence of further compensation.
- 3d. In addition, each Carrier undertakes to facilitate settlement - without prejudice - of the uncontested part of compensation in the events described in article 3a. and 3b. within a period of ten (10) weeks.
4. This Agreement may be signed in any number of counterparts, all of which shall constitute one (1) Agreement. Any Carrier may become a party to this Agreement by signing a counterpart hereof and notifying its Civil Aviation Authorities and ECAC.
5. This Agreement will enter into force when signed and notified by at least two (2) Carriers.
6. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to its Civil Aviation Authorities and ECAC.

* * *

² Either alternative. may be used.

Airline Liability Conference

Washington, 19-27 June 1995

Principles on the Proposed Supplemental Compensation Plan as Proposed by the Panel on June 21, 1995

(Submission by LACSA)

This statement of **the operative terms** of the proposed **Supplemental Compensation Plan** (SCP) assumes that the U.S. **Department** of Transportation has the legal authority to **approve** and render legally effective **an intercarrier** agreement establishing this Plan, an assumption which remains open to question in the view of some delegates. This statement is drawn from general *remarks* made by the SCP Panel and by other U.S. carriers.

1. Except for the defense of contributory negligence, all carriers operating to or within the United States agree to be strictly liable for provable damages up to **250,000 SDRs** in the case of personal injury or death to a passenger in the course of boarding or disembarking, or on board the aircraft where the contract of transportation provides for transportation between or among two or more countries as long as the transportation involves a point in the United States, whether or not the transportation is governed by the Warsaw Convention. This remedy shall be referred to as the "special contract" remedy.

2. The U.S. Supplemental Compensation Plan is applicable and accessible only to passengers whose tickets are issued in the United States and whose transportation involved a point in the United States who paid or should have paid a SCP **contribution** or surcharge; and to United States citizens or U.S. permanent residents traveling between the United States and

another country, or between two foreign countries, whether or not the transportation is governed by the Warsaw Convention, and whether or not such U.S. citizens **or** U.S. permanent residents paid- **the SCP** contribution or surcharge.

3. The SCP contribution **or** surcharge shall be **collected** from the passenger by the carrier or his agent at the time of the **issuance** of the ticket and payable by the carrier to the Contractor of the Fund who shall manage such fund and to the extent necessary purchase insurance to cover **the** obligations of the Contractor under the U.S. Supplemental Compensation Plan.

4. Subject to the applicability of the defense of contributory negligence, the Contractor shall be liable for compensatory damages to a passenger or his personal representative, who made or should have made ^{con}tribution under the Plan, for all amounts in excess of 250,000 **SDRs** upon execution by an eligible passenger of an agreement to be bound **by** the terms of the U.S. Supplemental Compensation Plan. With respect to a U.S. citizen or permanent resident of the United States, who did not pay a contribution but to whom the Plan is applicable, the Contractor shall be liable, subject to the applicability of the defense contributory negligence, for all compensatory damages, unless the passenger was traveling pursuant to a ticket providing for transportation involving a point in the United States in which case the carrier shall be liable to the extent of its special contract.'

5. In the event of an accident causing injuries and **death** to a passenger in transportation involving a point in the United States, the **passenger** or his representative shall have the right to pursue his damage remedies **under the** Warsaw Convention (**seeking** unlimited compensatory **damages** upon proof of willful **misconduct** or the carrier's failure to deliver a ticket) or other **damage remedies** under applicable law (including punitive **damages**, **where** applicable) **where** the transportation is not governed by the Warsaw Convention. For **purposes** of this paragraph, the remedies **under** the Convention or under applicable **law** shall **be** deemed to include **the special** contract remedy.

6. (a) In the event of an accident to a passenger in the **course** of transportation to which the **U.S.** Supplemental Compensation Plan is applicable, the passenger or his personal representative may obtain compensation under the Plan by entering an agreement to be bound by the terms **of** the SCP ("the agreement") namely:

- (1) Waiving in writing his Warsaw and other remedies against the carrier, and against any **third** parties and **agree** to assign all rights of subrogation to the Contractor.
- (2) Agreeing **with the carrier to** be bound by the decision of an arbitrator selected

at random from previously published list of arbitrators in which the arbitrator shall be bound to apply the defense of contributory negligence, where applicable, and the measure and level of compensatory damages applicable in the place where the **passenger** resided at the time of the accident.

(b) Upon executing the agreement set forth in paragraph (a), the arbitrator shall, within seven (7) days, be selected at random by **(to be determined)** and his name and address shall be wired to the passenger or his personal representative, the carrier and the **contractor.**

(c) Upon the selection of the arbitrator, the passenger or his representative shall have the option to present to **the arbitrator** a preliminary request for compensation with such financial and family information as is then available in the form of a sworn affidavit, as the passenger or his representative shall deem appropriate.

Within **10** business days of receipt of such data, a **copy** of which shall be **sent** by the arbitrator to the carrier's representative

set forth in the agreement, the carrier **may** submit **any data it** wishes on the issue of preliminary compensation and within 30 days of receipt of passenger's data the arbitrator shall make an irreducible **minimum damage award** to the passenger, to **be** paid to the passenger or his personal representative within 10 **days** by the carrier and the contractor, as the case may be, to the extent of their obligation under the special contract and the SCP.

(d) Within six months of the Agreement, after full opportunity of the carrier and the contractor to make an investigation and conduct such discovery as the arbitrator may **allow**, the arbitrator shall make a final and complete award to the passenger or his representative constituting full compensation of damages sustained, which shall be binding and conclusive in the passenger, the carrier and contractor, and which shall be paid within **10** days by the carrier and the contractor to the extent of their obligations under the special contract and the Plan.

7. The Contractor and the carrier shall have the right to seek reimbursement from any party (other than the

carrier in the case of the contractor) whose fault **or** defective product caused or contributed to the passenger's damage who would be liable to the passenger. In no event, however, shall the carrier be liable to the Contractor, the passenger or any other party in any manner for damages **or** payments to any passenger **covered** by the Plan except for the 250,000 **SDRs** payable by the **carrier** under its special contract, and **the Contractor agrees to defend** and hold **harmless** the **carrier** in the event a claim is **made** by anyone for **payment in excess** of 250,000 **SDRs with** respect to any passenger. .



Airline Liability Conference

Points made by the EC Commission
(Submitted by *Mr F. Soerensen*
Head of Air Transport Policy Division - DGVII)

1.
 - (a) An intercarrier agreement will have to be granted approval under the EC competition rules.
 - (b) Such approval requires that passengers benefits will result from the agreement.
 - (c) An agreement can, therefore, not represent less than what the passenger can expect today.
 - (d) In recent accidents the limit has been waived (in view of its absurdly low level) and compensations have been paid up to 500,000 SDR with some scrutiny. Claims up to 250,000 SDR have basically been accepted.
 - (e) On this basis an agreement that does not accept 250,000 SDR strict liability plus something more could likely not be approved. (An approval could likely be challenged before the Court of Justice).
2. Unbreakability as a principle is next to impossible to accept.
3. Discriminatory elements are normally not acceptable.



**ISSUES THAT WARRANT FURTHER DISCUSSION BY THE CONFERENCE
AND CONSIDERATION BY AIRLINES**

(Submitted by AVIANCA)

A. AS REGARDS THE SUPPLEMENTAL COMPENSATION PLAN.

1. Authority under which the plan is implemented. While it is truth that Article 22 of **Warsaw allows** for a special contract to increase the carrier limitation in the **case** of death or bodily injury, it is somewhat doubtful that such **an** increased amount could be achieved by way of a Supplemental Compensation Plan in which the Passenger pays a contribution. It could at least be argued that had the drafters envisioned such a supplementary sum they would have explicitly mentioned it as is the case of goods and passenger baggage under paragraph 2 of the same Article 22.

In this respect it is **as** well necessary to investigate whether the Supplemental Compensation Plan could be regarded **as a** form of mandatory personal accident insurance and, if so, whether the claimant could initiate an action on this basis. i.e. seeking recovery for what he now considers to be his own compensatory damages.

It could be argued that a release will be signed by the claimant stating that the sums being paid under the plan constitute full and fair recovery of all damages and that, **as** such, this would avoid the aforementioned risk. If this is the answer such a release must be crafted in such way that, within the boundaries of what is reasonable and foreseeable, it will be accepted by the jurisdictions of the carriers concerned.

2. Discussion of certain scenarios is required. Consider the following case: an action initiated by the Passenger **as a** result of the refusal of the carrier to pay the agreed limit on the belief that the claim is not worth it. Should the carrier be joined by the Contractor although it has not paid or agreed to pay the limitation?. If not, an adverse finding in excess of said limit could be binding or paid for by the Contractor ?.

3. Leaving aside U.S. citizens and permanent residents where the issue is clear, we must consider whether the scheme **will** discriminate among passengers of other nationalities. In its current version it does not afford the same treatment to say a Colombian passenger who has bought his ticket in the U.S. and another who bought it elsewhere. While the former has a recourse against the plan, the latter does not and to obtain full compensation must initiate an action under Article 25 of Warsaw. If the solution lies in the adoption of the scheme in all other countries, carriers should be certain that all possible regulatory problems will be solved and that as such it could be implemented in their respective nations.

4. Discussion on whether the proposed mechanism will be applicable in the case of **successive** carriage is necessary. This is a relevant issue as there will certainly be other carriers not party to the envisaged intercarrier agreement. Relevant information as regards the applicability of Article 2.2. of the Multilateral Interline Traffic Agreement (Actual scope of the documents of carriage issued by other airlines) should be provided. Conference should as well consider a clause restricting its application to carriage undertaken directly by the parties thereto.

5. Will the Supplemental Compensation Plan pay from the ground up or from the adopted limit in cases of transportation not subject to the Warsaw Convention?. **The** best option, from a risk point of view, appears to be the first one.

6. Under no circumstances is the carrier to be exposed to further legal actions, whether from the Contractor, the claimant (ii he chooses to pursue an action against the plan) or from any other party whatsoever, once it has paid the corresponding liability limit. Not only would the envisaged full and final release from the claimant be required but also a sufficiently comprehensive hold harmless agreement on the part of the Contractor. If the plan operates through an insurance policy/company another avenue could be the inclusion of participant carriers as additional assureds. This is as well valid in non Warsaw carriage.

7. The liability of various applicable Supplemental Compensation Plans to any one Passenger needs to be studied, specially in cases where the are different jurisdictional approaches. A pro rata share of the possible payments may be one avenue.

8. In the latest plan draft the Contractor is not liable for lawyer's fees and legal costs incurred by a claimant in excess of those normally recoverable under the law governing the action. Who will assess whether that limit is exceeded?. Apparently it will be the contractor, but the carrier will eventually end up paying for them.

As there could also be some jurisdictions where there are not clear guidelines as regards these litigation expenses, it may be advisable to consider deleting this clause in a future draft.

9. It is not clear how, in some cases, will the Contractor be able to **make an** offer to settle within 90 days after the receipt of the claimant's proof of claim or the payment by carrier of the limit of liability, whichever occurs later. Although it is an attractive proposition for the claimants to pursue their remedies under the plan, it may be advisable to consider specifying a bigger time frame or none at all.

10. There may be some financial and administrative burdens to the airlines participating in the Supplemental Compensation Plan . It in this respect it is to be noted that:

a. Carriers could face some problems with the payment of the plan contributions in 30 days. In the case of tickets purchased with credit cards or whose costs are funneled through the Bank Settlement Plan this time frame may not be enough. The new plan drafts could consider granting an extension of at least 90 days. The above is aggravated by the imposition of interest penalties for delay.

b. Verification of the amounts to be paid to the Contractor may be difficult in certain cases, e.g. PTA's issued in the U.S. for tickets to be handed over elsewhere.

c. Carriers are called to keep records of the transportation performed for 2 years.

11. A clear and comprehensive financial study regarding the amount of the per Passenger fee is to be provided. It is possible that the added burdens of the plan may prove to be more expensive than the perceived insurance costs.

IATA's efforts in providing clear guidelines in these matters are appreciated.

INSURANCE CONSIDERATIONS

1. Given that 1.994 loss (**US\$1.6** vs. **US\$2.2**) is considered by some as a normal experience, and projecting this on to future years growth in liability awards, hull values, increased number of freight and cargo flown, insurers will need to increase capital, income and reserves to meet the new challenges.

2. Taking the above into consideration there would appear to be an annual premium deficit of **US\$1** billion for the underwriters to break even. The foregoing means a need to increase premium regardless of any limitation on liability and an increased awareness that the losses of the few must be paid for by a bigger share of carriers if underwriters wish to break even and build up reserves.

3. This could lead an airline to consider obtaining an unlimited liability protection as a **sort** of add on to almost certain rate increases.

It has been argued that if this were the chosen mechanism, small and medium sized airlines will certainly face onerous insurance costs **as a** result of their weak bargaining position. This opinion fails to take into account not only the fact of insurers awareness that the limitations truly do not provide a real protection to high awards in passenger death and injury cases, but also that those carriers are already penalised with bigger rates in comparison to those

enjoyed by major international airlines. In some cases, their absolute premium volume is even greater than that paid by those majors.

4. Furthermore, certain insurers, specially the **french**, are already fully aware that at the end of the day the limitations do not provide a true protection to exposure. On the contrary it is perceived that if they were to be abolished in certain instances this would entail diminished costs **as a** result of decreased litigation.

5. The fear of rate increases should be weighed against the costs that each carrier will bear if the envisaged SCP were adopted, as a result of its administration by each carrier concerned in items such as collection of funds, payment to contractor, record keeping, etc.

7. It may also be possible that to purchase unlimited liability now will be to the benefit of airlines, as it will only give insurers one opportunity to increase their rates on the basis of increased liability limits.



Airline Liability Conference

*Submission of the African Airlines Association (AFRAA)
No. 3*

Mr Chairman,

Again, on behalf of AFRAA members, we still recommend to:

1. Keep the 250,000 **SDRs** in brackets and add to the proposed working group the mandate to decide what is the appropriate limit in light of the various socio-economic standards in various regions of the world besides the issue of defenses.
2. Initiate a working group to assess the implication of the increase of liability limits on small and medium size carriers in addition to clearly determine a specific assistance mechanism to developing countries' carriers, as we cannot commit ourselves without knowing the financial effect.

Both working groups should be membered on a regional basis and include a representative **from** the Japanese and the Americans.



Airline Liability Conference

*Comments of TAP - Air Portugal
on Paragraph (b) of II of the
"REPORT OF THE CONFERENCE SESSION"*

TAP-Air Portugal asks the Drafting Committee to remind the Working Group or any other body having in charge the follow-up of approved actions subsequent to the Conference to take into consideration:

- (i) that the "periodic adjustment" referred to in paragraph (b) of Nr. II should be more specific, suggesting that the adjustments should not take place before periods of five years;
- (ii) that, in the same paragraph, the reference to inflation should be clearer and fixed in respect of inflation rate of one specific country or group of countries.



Airline Liability Conference

Suggestions on Improving the Air Mauritius Proposal *(Submitted by Air Malta)*

1. In respect of the second tier:

Article 20 defenses should be retained except in respect of flights to-from-through jurisdictions where this would not be possible.

2. In respect of the third tier:

- (a) The contributions should not be presented as passenger surcharges, but should rather be built into the ticket cost. The airlines would agree to allocate a pre-determined portion of the ticket price to the compensation fund to be created.
- (b) The contributions should reflect the size of the carrier, as well as other equitable risk allocation factors, as determined by the "contractor".
- (c) To the extent that claim settlements can be finally determined by arbitration, one of the conditions of the agreement should be that quantum of damages would be made in accordance with criteria applicable in the place of residence of the claimant.

**RULES OF PROCEDURE
IATA AIRLINE LIABILITY CONFERENCE**

19-27 June 1995 - Washington D.C.

SECTION I - COMPOSITION

RULE 1. Any Air Carrier having registered and paid the requisite Conference fee shall have a right to be represented at the Airline Liability Conference (hereinafter "ALC"). References hereinafter to Registered Air Carriers shall mean Representatives of Air Carriers duly registered to attend the ALC.

RULE 2. Any Air Carrier may be represented at the ALC by one or more representatives who shall be duly authorised in writing by such Air Carrier.

RULE 3. Each Air Carrier shall submit in writing to the IATA Secretariat the name of the person(s) who will represent it at the ALC, and until such authorisation is specifically withdrawn, such person(s) alone shall act as the exclusive representative(s) of the Air Carrier. The IATA Secretariat shall advise the ALC of the names of IATA staff attending the Conference who, together with registered Air Carriers, shall be participants in the ALC.

RULE 4. Observers representing specific Air Carrier Organisations, Governments, and International Organisations, which have been invited to attend the ALC may take part fully in the ALC, except that they may not propose motions or vote.

RULE 5. The Chairman may appoint one or more scrutineers from registered Air Carriers, or the IATA Secretariat, to examine the credentials of any person(s) desiring to attend the ALC and the decision of such scrutineer(s) as to the validity of such credentials shall be conclusive and binding.

SECTION II - CONFERENCE OFFICERS

RULE 6. The ALC shall elect a Chairman, a Vice-Chairman, a Rapporteur and a Drafting Committee Chairman, upon motion duly proposed and seconded by the registered Air Carriers.

SECTION III - AGENDA

RULE 7. A draft agenda prepared by the Secretariat shall be submitted to the ALC by the IATA Secretariat at the opening of the ALC.

RULE 8. With the approval of the ALC the Chairman may establish and provide functional guidelines to such ad hoc Working Groups as deemed desirable for the conduct of the business of the ALC. Working Groups shall appoint their own Chairmen. Working Group(s) on the ALC Report and/or on its implementation may extend its deliberations beyond the close of the ALC.

SECTION IV - SECRETARIAT

RULE 9. The IATA Secretariat shall assist the ALC officers and shall act as Secretary of the ALC and its Working Group(s), as necessary.

SECTION V - CONDUCT OF BUSINESS

RULE 10. The ALC, including its Working Group(s), shall not be open to the public.

RULE 11. With the approval of the ALC distinguished guests may be invited by the Chairman to attend or address the Conference.

RULE 12. A majority of registered Air Carriers shall constitute a quorum. However, the absence of a quorum shall not impede the proceedings of the ALC with the exception that no binding vote shall be taken in the absence of a quorum.

RULE 13. The ALC shall be opened by a Representative of the Director General of IATA.

RULE 14. The Chairman shall direct the discussion, ensure observance of these Rules, accord the right to speak, put questions and announce decisions. He shall rule on points of order and, subject to these Rules, shall have control over the proceedings and over the maintenance of order at any session of the ALC. The Chairman shall also determine when a proposed agreement or any element thereof is ready for consideration, and shall declare the ALC closed.

RULE 15. The Chairman, registered Air Carriers and the IATA Secretariat may make either oral or written statements to the ALC or to any Working Group(s) concerning any question under consideration.

RULE 16. Except as otherwise specifically provided, the remaining Rules under this Section shall not apply to Working Group(s) which shall conduct their deliberations informally.

RULE 17. The Chairman shall call upon speakers in the order in which they have expressed their desire to speak; he may call a speaker to order if his statements are not relevant to the subject under discussion. A participant shall not be permitted to speak a second time on any question, unless called upon for clarification by the Chairman, until all other persons desiring to speak have had an opportunity to do so.

RULE 18. During the discussion of any matter, and notwithstanding the provisions of RULE 17, a participant may at any time raise a point of order, and the point of order shall be immediately decided by the Chairman. His ruling may be appealed, in which case the appeal shall be immediately put to vote, and the ruling of the Chairman shall stand unless overturned by a majority of votes cast. A participant raising a point of order may speak only on this point, and may not speak on the substance of the matter under discussion before the point was raised.

RULE 19. The Chairman may limit the time allowed to each speaker

RULE 20. The order of debate and voting on motions and amendments shall be as follows:

- (a) When a motion is made and seconded, the Chairman shall call for debate on the motion;
- (b) When an amendment to the motion is proposed and seconded, the Chairman shall open debate on the amendment unless it is accepted by the mover and seconder of the motion;
- (c) When an amendment to an amendment is proposed and seconded, the Chairman shall open debate on such amendment to the amendment and when debate is concluded shall call for a vote thereon which, if affirmative, shall be decisive of the amendment to the motion;

(d) If the vote on the amendment to the amendment is not affirmative, the Chairman shall re-open debate on the amendment and when debate is concluded call for a vote thereon. If this vote is not affirmative, debate on the main motion shall be re-opened and when concluded, the main motion shall be put to a vote;

(e) If the vote on an amendment has been affirmative, the Chairman shall open debate on the motion as amended and when concluded shall call for a vote thereon.

RULE 21. If amendments to different aspects or portions of a motion are proposed, each substantially different amendment shall be treated separately in accordance with the procedure in RULE 20.

RULE 22. No motion may be withdrawn if an amendment to it is under discussion or has been adopted, unless such amendment is also withdrawn.

RULE 23. Any registered Air Carrier may move at any time the suspension or adjournment of the ALC, the adjournment of the debate on any question, the deferment of discussion of an item, or the closure of the debate on an item. After such a motion has been made and explained by its proposer, only one speaker shall normally be allowed to speak in opposition to it, and no further speeches shall be made in its support before a vote is taken. Additional speeches on such a motion may be allowed at the discretion of the Chairman, who shall decide the priority of recognition.

RULE 24. Subject to the provisions of RULE 18, the following motions shall have priority over all other motions, and shall be taken in the following order:

- (a) To suspend the ALC;
- (b) To adjourn the ALC;
- (c) To adjourn debate on an item;
- (d) To defer debate on an item;
- (e) To close debate on an item.

These motions shall be adopted by a majority of votes cast by those duly represented at the ALC.

RULE 25. Re-opening of any matter already voted upon at the ALC shall require a specific proposal, duly seconded, and majority of votes. Permission to speak on a motion to re-open shall be accorded only to the proposer and to one speaker in opposition, after which it shall be immediately put to the vote. Speeches on a motion to re-open shall be limited in content to matters bearing directly on the justification of re-opening. Discussion of the substance of the question at issue will be in order only if, and after, the motion to re-open prevails.

SECTION VI - VOTING

RULE 26. Each registered Air Carrier shall have one vote, to be cast by one representative only.

RULE 27. All procedural matters shall be decided by a majority, and all amendments to the Rules and adoption of any agreement or portion thereof shall be decided by a majority of registered Air Carriers.

RULE 28. If there is no objection, the Chairman may declare that a proposal has been accepted or that a motion has been carried. If there is an objection, the question shall be decided by a show of hands except when a roll call is required as hereinafter provided. The Chairman or any registered Air Carrier may request a roll call provided, however, that no roll call shall be taken without the approval of a majority of registered Air Carriers. Unless a roll call is required, a declaration by the Chairman that a proposal has been accepted or rejected or that a motion has been carried, or carried by a particular majority, or not carried, and an entry to that effect in the record of the proceedings of the ALC shall be conclusive evidence of the fact without proof of the number of the votes recorded in favour of or against such decision.

RULE 29. A demand for a roll call vote may be withdrawn at any time before taking the vote.

RULE 30. If a registered Air Carrier abstains from voting on a question, its abstention shall be duly recorded.

RULE 31. A vote on any motion or amendment may be postponed upon request of any registered Air Carrier until copies of the motion have been

made available to all participants, unless postponement is objected to and such objection is supported by a majority.

RULE 32. In the event of a tie vote, a second vote on the motion concerned shall be taken. The motion shall be considered lost unless there is a majority in favour of the motion on this second vote.

SECTION VII - AMENDMENT OF THE RULES OF PROCEDURE

RULE 33. These Rules may be amended, or any portion of the Rules may be suspended, at any time by a majority of registered Air Carriers.



Airline Liability Conference

FINAL REPORT OF THE CONFERENCE SESSION *19-23 JUNE 1995, WASHINGTON, D.C.*

The Conference session was attended by 67 airlines, 6 regional airline associations, 3 other industry associations and observers from ICAO, ECAC, EU and the Government of the U.S. (Attendance List attached as Annex 1).

The Conference elected the following Conference officers:

Chairman:	Lorne S. Clark (IATA General Counsel & Corporate Secretary)
Vice-Chairman:	Vijay Poonoosamy (Director Legal & International Affairs, Air Mauritius)
Rapporteur:	Ana de Montenegro (Corporate Director Insurance & Contracts, TACA International)
Chairing the Drafting Committee:	Leslie Mooyaart (Senior Vice-President & General Counsel, KLM)

The Conference Agenda and Rules of Procedure, as adopted, are attached as Annexes 2 and 3, respectively.

To supplement discussion in Plenary, the Conference established two Working Groups, one on the Supplemental Compensation Plan, under the chairmanship of Mr Gerald Mayo (Counsel to Delta Air Lines), the other on the Japanese Initiative, under the chairmanship of Mr Koichi Abe (Vice-President, Legal Affairs Department, Japan Air Lines).

I. Following extensive debate in Plenary and taking into consideration proposals by a number of delegates and the results of the discussion in the Working Groups, the Conference concluded that:

1. The Warsaw Convention System must be preserved. However, the existing passenger liability limits for international carriage by air are

grossly inadequate in many jurisdictions and should be revised as a matter of urgency.

2. Governments, through ICAO, and in consultation with airlines, should act urgently to update the Warsaw Convention System and to address liability issues.
3. Governments should act expeditiously to bring into force Montreal Protocol No. 4 (Cargo) independently of their consideration of Montreal Additional Protocol No. 3.
4. The conditions and expectations for the Conference set out in U.S. DOT Order 95-2-44 of 22 February 1995 (Annex 4) restricted the ability of participating airlines to reach agreement at this session on the enhancement of compensation for passengers under the Warsaw Convention System.
5. In particular, the Conference objected to the U.S. expectation that the results of the Conference would ensure full compensatory damages for claims by all U.S. citizens and permanent residents traveling between countries outside the U.S., as it would discriminate among passenger nationalities and would impose on airlines an unreasonable responsibility that should be borne by the U.S. Government.

II. In light of the foregoing and subject to the conclusions of the working groups mentioned below, and in order to receive government approvals as required, the Conference agreed to recommend that a new enhanced liability package should be adopted by airlines, as quickly as possible, to include:

- (a) an updated liability limit of 250,000 SDRs, taking into account the effects of inflation on the limits in the 1966 Montreal Agreement, the 1971 Guatemala City Protocol and the 1975 Montreal Additional Protocol No. 3, as well as limits proposed by governments;

- (b) periodic updating of liability limits to reflect the effects of inflation;
- (c) standards and procedures for up-front payments to meet claimants' immediate needs, in accordance with established local customs, practices and applicable local law;
- (d) the retention of the defenses under Article 21 of the instruments of the Warsaw Convention System;
- (e) where circumstances so require, a waiver up to 250,000 SDRs of the defenses under Article 20, paragraph (1) of the instruments of the Warsaw Convention System;
- (f) where circumstances so require, recovery of proven compensatory damages beyond 250,000 SDRs through appropriate and effective means; and
- (g) complete compensation as allowed by and in accordance with applicable law.

III. Taking into account, and in an effort to meet, the needs and desires of various government authorities, the Conference agreed that:

1. The Conference Chairman should appoint a working group to urgently assess and report on the cost impact on airlines of the recommended enhanced liability package and, as a matter of urgency, make specific proposals as to how small and medium-size airlines can be assisted to meet additional costs resulting from possible increased liability.
2. The Conference Chairman should appoint a second working group to further consider and report on appropriate and effective means to secure complete compensation for passengers, including the Japanese Initiative and the U.S. Supplemental Compensation Plan, in light of discussions at the Conference, and taking particular account of the

circumstances of small and medium-size airlines and any submissions made to that working group by 31 July 1995.

3. The IATA Secretariat should prepare as a matter of urgency and circulate to airlines by 31 August 1995 an information paper on expeditious settlement of airline passenger liability claims.
4. The IATA Secretariat, in consultation with the Legal Advisory Group, should prepare draft texts of an intercarrier agreement, a plan for an appropriate and effective means to secure complete compensation, and circulate them and related documents by 31 August 1995, including the reports mentioned in paragraphs III.1. and 2.
5. The IATA Secretariat should immediately seek an extension of antitrust immunity from the U.S. authorities to permit and facilitate all further discussions by airlines necessary to complete the work of the Conference.
6. The IATA Secretariat, upon approval by and acting in accordance with any decision of the 1995 IATA Annual General Meeting, scheduled for 30-31 October 1995, should submit the texts of the intercarrier agreement, the plan for an appropriate and effective means to secure complete compensation and related documents for requisite governmental approval.

The Conference expressed its appreciation to IATA for the efficient organization of the Conference and congratulated the Conference officers and the Working Group Chairmen for their valuable contributions to its deliberations and its results to date.

The Conference Plenary session adopted this Report and adjourned on 23 June 1995, subject to the call of the Chairman.



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 22nd day of February, 1995

International Air Transport Association:
Agreement Relating to Liability
Limitations of the Warsaw Convention

Docket 49152

ORDER

On September 24, 1993, the International Air Transport Association (IATA) filed an application requesting approval of, and antitrust immunity for, intercarrier discussions concerning the limits and conditions of passenger liability established by the Warsaw Convention (Convention).

IATA states that pending ratification and entry into force of Montreal Protocols Numbers 3 and 4 to the Convention, there is a need for interim passenger liability rules that are adequate to current day standards of compensation... The current regime, as embodied in the Montreal intercarrier agreement of 1966 (Agreement) and which covers all carriers serving the United States, establishes a liability limit of \$75,000 for personal injury and death.¹ Adjusted for inflation, IATA notes that this amount would be over \$300,000 in today's dollars. Despite this, adherence to the Agreement's \$75,000 limit continues to be a condition for all carriers to operate to the United States. Against this background, IATA states that air carrier parties to the Agreement need the authority to discuss bringing the Agreement up to date. It states that such discussions may include possible amendments to, or replacements for, this Agreement. IATA states that its request for discussion authority and antitrust immunity is consistent with Department precedent.

¹ The Warsaw Convention, to which the United States became a party in 1934, established a number of uniform rules regarding international air transportation, including in Article 22 an air carrier liability limit of approximately \$10,000 for each passenger injury or death, absent a finding of willful misconduct. The Hague Protocol of 1955, which doubled the liability limit, was not ratified by the United States. Rather, in 1966, the carriers serving the United States agreed to adopt a special contract under Article 22, establishing what remains the current regime (Agreement CAB 18900, approved by Order E-23680, May 13, 1966 (Docket 17325)). Under the Agreement's terms, these carriers also agreed not to avail themselves of the defense of non-negligence under Article 20(1) of the Convention for claims under that amount.

No answers were filed in response to the LATA application.

Decision

The Department has decided to grant the requested discussion immunity subject to the conditions described below. The United States has a firmly-established policy that liability limits should be adequate to contemporary standards of compensation and that the current regime needs to be updated to provide sufficient protection to the traveling public. We are granting the application because the discussions proposed by LATA may bring about an interim solution that will serve either until Montreal Protocols 3 and 4 are ratified and enter into force, or until negotiation and entry into force of a new Convention meeting all US. requirements.

We may authorize intercarrier discussions and grant them antitrust immunity where we find that the discussions are necessary to meet a serious transportation need or to achieve important public benefits and that such benefits or need cannot be secured by reasonably available alternatives that are materially less anticompetitive.² 49 U.S.C. 41308, 41309.

The purpose of the discussions in this case is to secure the important public benefit of a liability regime that reflects contemporary standards of compensation. The discussions are consistent with a strong and long-standing Department policy of seeking a uniform set of passenger liability rules that meet today's needs.

We find that there are no reasonably available alternatives to the requested discussions having a materially less anticompetitive effect. The best alternative, of course, is an international agreement such as the Montreal Protocols and Supplemental Compensation Plan, but it is because that approach has proven to be such a complex and lengthy one, and given the pressing need to have an updated liability regime, that we are entertaining this discussion authority request. Another alternative would be to allow individual carriers to apply to the Department for modifications to their tariffs and conditions of carriage to implement individual new special contracts under Article 23 of the Convention. We do not believe that approach is workable. Some carriers would probably attempt this, while others would not. Those that did would likely offer contracts with different terms from one another. One clear and unacceptable result of such an approach would be that portions of the traveling public would not be adequately protected. A final alternative would be for the United States to unilaterally establish a regime that all carriers operating to the United States would have to abide by. This approach, however, could engender such significant opposition from our trading partners that our ability to implement the plan unilaterally could very well be jeopardized.

² We assume for the purposes of our decision here that the proposed discussions could reduce competition among carriers.

We also find that the requested approval and grant of antitrust immunity to discuss an interim liability regime is appropriately limited in nature and well-calculated to achieve a result consistent with our objective of having in place a liability regime that reflects contemporary standards of compensation. IATA seeks discussions geared toward producing a temporary arrangement, recognizing the immediate need to increase the liability limits through a uniform system of rules. This is fully consistent with our objectives. IATA would announce a place and date for such discussions and has said that it would invite all its member carriers.

IATA requests that we not impose conditions on such discussions that would restrict the ability of the participant carriers to consider all options in structuring a liability regime. We will not impose conditions other than those that we consider standard and which we have set out below. However, we believe that in constructing any intercarrier agreement, the participants should seek to reflect the basic objectives which we have pursued in our efforts to secure ratification of the Montreal Protocols and creation of a supplemental compensation plan. We have strived for a uniform international system that allows U.S. victims to receive fair recoveries within a reasonable period of time. Specifically, we would expect that any agreement reached by the carriers would be consistent with the following guidelines: first, with regard to passenger claims arising from international journeys ticketed in the United States, passengers would be entitled to prompt and complete compensation on a strict liability basis with no per passenger limits and with measures of damages consistent with those available in cases arising in U.S. domestic air transportation; second, this coverage should be extended to U.S. citizens and permanent residents traveling internationally on tickets not issued in the United States.

We have decided to grant the request for discussion authority and antitrust immunity in **this order**, rather than through a show-cause proceeding. The discussions sought by the applicants seek to carry out our established public policy goal, the modernization of passenger liability limits. Implementing that goal as soon as possible will redound to the immediate benefit of the traveling public and therefore provide important public benefits. We are willing to grant antitrust immunity in this instance because, unlike most situations where it has been sought, the purpose of the discussions at issue here is fully consistent with the public interest. Furthermore, any agreement reached by the carriers may not be implemented without our approval, and interested persons will have an opportunity to comment on any application for such approval.

In addition, to minimize any adverse impact on the public interest, we will condition our approval and grant of antitrust immunity upon the following express conditions: (1) the discussion authority is limited to 120 days from the date of publication of this order; (2) advance notice of any meeting shall be given to all U.S. and foreign air carriers as well as to the Department of Transportation and the Department of Justice; (3) representatives of the Department of Transportation and the Department of Justice shall be permitted to attend the meetings authorized by this order; (4) IATA shall file within 14 days with the Department a report of each meeting held including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary

of the discussions and any proposed agreements; (5) any agreement reached must be submitted to the Department for approval and must be approved before its implementation; (6) the attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan; and (7) the discussions will be held in the metropolitan Washington, D.C. area.

ACCORDINGLY,

1. The Department approves the request for discussion authority filed by **LATA** in this docket, subject to the restrictions listed below, under section 41308 of title 49 of the United States Code, for 120 days from the date of publication of this order, for discussions directed toward producing a uniform set of passenger liability limits;

2. The Department exempts persons participating in the **discussions** approved by this order from the operation of the antitrust laws under section 41309 of Title 49 of the United States Code;

3. The Department's approval is subject to the following conditions:

(a) Advance notice of any meeting shall be given to **all** identifiably interested U.S. air **carriers** and foreign air carriers, as well as to the Department of Transportation and the Department of Justice;

(b) Representatives of the entities listed in subparagraph (a) above shall be permitted to attend all meetings authorized by this order;

(c) **LATA** shall file within 14 days with the Department a report of each meeting held including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting by any participant, and a summary of the discussions and any proposed agreements;

(d) Any **agreement** reached must be submitted to the Department for approval and must be approved before its implementation;

(e) Attendees at such meetings must not discuss rates, fares or capacity, except to the extent necessary to discuss ticket price additions reflecting the cost of any passenger compensation plan;

(f) The Department **shall** retain jurisdiction over the discussions to take such further action at any time, without a hearing, as it may deem appropriate; and

(g) **Any** meetings authorized by this order shall be held in the metropolitan Washington, D.C. area.

4. Petitions for reconsideration may be filed pursuant to our rules in response to this order;
5. We will serve a copy of this order on all parties served by IATA in this docket, as indicated by the service list attached to its application; and
6. We will publish a copy of this order in the Federal Register.

By:

Patrick V. Murphy
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

ATTENDANCE LIST
AIRLINE LIABILITY CONFERENCE - SESSION 19-23 June 1995

<i>Airlines</i>	<i>First Name</i>	<i>Last Name</i>	<i>Title</i>
AER LINGUS	Bernadette	Kilduff	Head of Legal Affairs
AEROFLOT	Vasily	Afanafiev	Int'l & Government Affairs
AEROLINEAS ARGENTINAS	Martin	Barrantes	General Counsel
AIR AFRIQUE	Maimouna	Alzouma Toure	Legal & Insurance Manager
AIR CANADA	L. Cameron.	DesBois	Vice President & General Counsel
AIR FRANCE	Michel	Folliot	Deputy Vice President Legal
AIR GABON	O.L.	Joseph	
AIR INDIA	Gulaba	Shivdasani	Area Sales Manager
AIR INDIA	S.	Venkat	Regional Finance & Accounts Mgr.
AIR MADAGASCAR	Arthur	Randrianambintsoa	Director Legal Affairs
AIR MALTA	Tonio	Fenech	Legal Consultant
AIR MAURITIUS	Vijay	Poonoosamy	Director Legal & Intl Affairs
AIR NEW ZEALAND	Anthony	Mercer	Company Solicitor
ALITALIA	Pierpaolo	Cotone	Sr. V.P. Legal & General Affairs
ALITALIA	Cinzia	Bonfanti	Legal Department
ALL NIPPON	Nothilo	Mori	Mar. Legal Affairs
ALM ANTILLEAN	Jose	Ercol	Mgr. Customer Relations
AMERICAN AIRLINES	Anne	McNamara	Sr V.P. Admin & General Counsel
AMERICAN AIRLINES	James	Brashear	Senior Attorney
ASIANA AIRLINES	Samuel S.	Nam	Asst. Gen. Counsel of Kumho Grp.
ASIANA AIRLINES	Young Nam	Jun	Asst. Mgr. of Legal Affairs Dept
AUSTRIAN AIRLINES	Hans	Lob	Secretary General
AUSTRIAN AIRLINES	Veronika	Kozak	
AVENSA -MEXICANA- VASP Rep.	Robert	Papkin	U.S. Counsel
AVIANCA	Eduardo	Dueri	Insurance and Fuel Director
BALKAN BULGARIAN	Angelina	Hristova	Chief Legal Advisor
BALKAN BULGARIAN	Aneta	Valcheva	
BRITISH AIRWAYS	Ken	Walder	Legal Director
BRITISH AIRWAYS	Caroline	Boone	Legal Advisor
BRITISH AIRWAYS	Paul	Jasinski	General Counsel, USA
BRITISH MIDLAND	Kevin	Bodley	Company Solicitor
CANADIAN AIRLINES INT'L	Kenneth	Fredeen	Solicitor
CATHAY PACIFIC - REP.	Philip	Bass	Legal Counsel
CHINA AIRLINES	Janice	Lee	Consultant
CONTINENTAL AIRLINES	Leonard	Ceruzzi	Assoc. General Counsel
CUBANA	Francisco	Marques	Legal Advisor
CZECH AIRLINES	Jaroslav	Jechumtal	Secretary General
CZECH AIRLINES	Eva	Stoklaskova	General Counsel
DELTA AIR LINES	Gerald	Mayo	Counsel
EGYPTAIR	Nahed	Elkoussy	G.M. Industry Affairs
EGYPTAIR	Ahmed	Hafez	G.M. Contracts & Legal Opinion
EGYPTAIR	Moustafa S.	Soudy	Insurance Specialist
EGYPTAIR	Hussein	Sherif	Head Int'l Orgs. & Govt Affairs
EL AL	Ephraim	Zussman	Director Legal Affairs
ETHIOPIAN AIRLINES	Woldetensay	Woldemelak	Counsel
FINNAIR	Kai	Soveri	Legal Counsel
GARUDA INDONESIA	Salman	Rifaat	Mgr. Comml. & Genl. Transaction
GARUDA INDONESIA	Sucipto	Gatot	Customer Claims
GHANA AIRWAYS	M e r e n e	Botsio-Phillips	Director of Legal Services
GULF AIR	Abbas	Imam	Senior Legal Advisor
IBERIA	Jose	Morales	Legal Counsel
JAPAN AIRLINES	Koichi	Abe	V.P. Legal Affairs Department
JAPAN AIRLINES	Tomoo	Abe	Manager, Legal Affairs Dept.
JAPAN AIRLINES - REP.	George	Tompkins, Jr.	
K L M	Leslie	Mooyart	Sr V.P. & General Counsel
KOREAN AIR	Hae-Bok	Choi	Deputy Mgr. Legal Dept.
KUWAIT AIRWAYS	Rasha	Al Roumi	Specialist Aviation Insurance
LACSA REP.	Thomas J.	Whalen	Legal Advisor
LAN CHILE	Sergio	Mesias V.	General Counsel
LOT - POLISH AIRLINES	Janusz	Niedziela	Director Legal & Organization
LUFTHANSA	Arthur	Mollins	General Counsel North America
LUFTHANSA	Anthony	Santangelo	House Counsel North America
NORTHWEST AIRLINES	John	Williams	Associate General Counsel
PHILIPPINE AIRLINES	Caesar	Dulay	Assistant VP - Litigation
PHILIPPINE AIRLINES	Levi	Rebanal	VP Risk & Insurance
QANTAS	Michael	Nearhos	(Senior Solicitor

ATTENDANCE LIST
AIRLINE LIABILITY CONFERENCE - SESSION 19-23 June 1995

ROYAL AIR MAROC	Aadil	Hassouni	Attaché de Direction
SAUDI ARABIAN AIRLINES	Mazhar	Ul-Jamil	Senior Lawyer
SOUTH AFRICAN AIRWAYS	Tienie	Willemse	Senior General Manager
SOUTH AFRICAN AIRWAYS	Gasant	Orrie	Div. Secretary & Legal Adviser
SOUTHERN AIR TRANSP. - REP.	Carroll	Dubuc	Counsel
SWISSAIR	Andres	Hodel	General Manager, Legal Dept.
T A A G	Francisca	Sousa e Santos	Legal Adviser
T A A G	Luis Ferreira	Maria	Head of Legal Dept.
T W A	Mary	voog	Assoc.Gen. Counsel
TACA INT'L	Ana	de Montenegro	Corp.Director Insrnce & Ctrcts.
TAP - AIR PORTUGAL	Alberto	Branquinho	Director Legal Dept.
TAP - AIR PORTUGAL	So Anibal		Counsel
TOWER AIR	Stephen	Gelband	General Counsel
TURKISH AIRLINES	Umit	Albayrak	Chief Legal Counsel
UGANDA AIRLINES	Acali	Manzi	Corporation Secretary
UNITED AIRLINES	J. Craig	Busey	Senior Counsel
U.S. AIR Rep.	Matthew	Riven	Associate Attorney
VARIG	Thadeu	de Jesus e Silva	General Counsel
VIRGIN ATLANTIC	David	Kinloch	General Manager
Airline Associations	First Name	Last Name	Title
AEA	Marc	Frisque	Mgr. Legal & Social Affairs
AFRAA	Aberra	Makonnen	Director Corp. & Industry Affairs
AITAL	Ernesto	Vasquez Rocha	Executive Director
A T A	James	Landry	
E R A	Mike	Ambrose	Director General
I A C A-EURACA	Peter	Kaukars	Member of the Board of Directors
N A C A	Edward D r i s	c o l l	President & Chief Executive
ORIENT AIRLINES ASSOC.	Richard	Stirland	Director General-
Governments and Governmental Bodies	First Name	Last Name	Title
EC COMMISSION	Frederik	Soerensen	Head of Air Transport Policy Division
EC COMMISSION	Anna	Colucci	Administrator - Air Trans.Polic.
EC COMMISSION	Yves	Devellennes	Transport, Energy Environment
EC COMMISSION	Christopher	Ross	
ECAC	Vollrath	Brüsen	General Counsel, Swedish C A A
ICAO	A.	Costaguta	Chief, Econ Analysis Sect.
U.S. DEPT. OF TRANSPORTATION	Peter	Schwarzkopf	Senior Attorney
U.S. DEPT. OF TRANSPORTATION	Samuel	Podberesky	Asst. Gen'l Counsel for Aviation
U.S. DEPT. OF JUSTICE	Gary	Allen	Director, Torts Branch
U.S. DEPT. OF STATE	Chris	Jones	Intl Transportation Officer
U.S. DEPT. OF STATE	Robert	Reis	Director, Av. Programs & Policy
IATA Secretariat	First Name	Last Name	Title
I A T A	Lorne	Clark	General Counsel & Corporate Secretary
I A T A	Tony	Kelly	Director Industry Monetary Aff.
I A T A	William	Murnighan	Director, Legal Services
I A T A	Dennis	Viggers	Insurance Advisor
I A T A	L u d w i g	Weber	Legal Counsel
I A T A	Maria	Weinstein	Legal Counsel
I A T A	David	O'Connor	Regional Director, United States
I A T A	Anita	McCleod	Insurance Coordinator
IATA Outside Counsel	First Name	Last Name	Title
DYER, ELLIS, JOSEPH & MILLS	Warren	Dean	
FIORITA & ASSOCIATES	Dan	Fiorita	
FRERE CHOLMELEY BISCHOFF	Mark	Franklin	Counsel
WILEY, REIN & FIELDING	Bert	Rein	