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International Air Transport Association

Washington Office

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VIA MESSENGER

Mr. Donald H. Horn
Assistant General Counsel
for International Law, C-20
Department of Transportation
400 Seventh Street, SW.
Washington, D.C. 20590

Dear Mr. Horn:

Air Carriers met in Miami on the 31 of January and the 1st of February 1996 in a meeting conducted in accordance with the Department's Order 96-1-25 extending the carrier's discussion immunity.

This is a report on that meeting and on the airlines' continuing efforts to secure and implement an intercarrier agreement to supplement the passenger liability provisions of the Warsaw Convention.

Sincerely,

-David M. O'Connor
Regional Director, US

cc: Ms. Jennifer Richter, Dept. of State
Mr. Gary Allen, Dept. of Justice
Mr. Lorne Clark, General Counsel, IATA



Report of Meeting of the IATA Legal Advisory Subcommittee on Passenger Liability, Miami 31 January - 1 February 1996

Following receipt of DOT Immunity Extension Order No 96-1-25 of 23 January 1996, a Subcommittee meeting was convened in Miami 31 January - 1 February 1996 to discuss implementation of the IATA Inter-carrier Agreement (IIA), opened for signature in Kuala Lumpur 31 October 1995.

As required by the Immunity Order, representatives of the US government were invited, but were unable to participate. In addition to the appointed Subcommittee members, US carriers and representatives of all airlines signatory to the IIA were invited to the Miami meeting.

The Subcommittee session was chaired by Mr Cameron **DesBois** (Air Canada) and attended by representatives of 24 airlines, 5 Regional Airline Associations and the European Commission (DG VII). The list of participants is set out in **Annex 1, the Agenda** in **Annex 2** and the list of documents provided for the meeting in **Annex 3**.

To put the discussions in appropriate perspective and to brief participants who had not been fully involved in the Airline Liability Conference exercise, the Chairman gave a brief introductory slide presentation. This is attached as **Annex 4**.

The discussion on the remaining Agenda items **focussed** mainly on the following issues:

- ◆ the principle of waiver by the airlines of the Warsaw Convention limitation of liability
- ◆ implementation of the IIA
- ◆ whether implementation should include any element of “strict liability”, and if so up to what amount
- ◆ the “law of the domicile” provision as referred to in the IIA
- ◆ a “fifth jurisdiction” (in addition to the four jurisdictions specified in Warsaw Convention Article 28)
- ◆ additional IIA implementation options to be available to carriers
- ◆ Alternative dispute resolution (arbitration)
- ◆ reports to Governments

Waiver of Warsaw Convention limitation of liability

The Subcommittee reaffirmed the basic provision in the IIA that signatory carriers are obliged to “take action” to waive the Warsaw Convention Article 22 (1)

limitation on liability, irrespective of how the recoverable compensatory damages were to be determined.

Implementation of the IIA

The Subcommittee reaffirmed that the **IIA** could be implemented by means of individual tariff filings acceptable to governments (as in the existing situation respecting Japanese airlines), or by means of an implementing Inter-carrier Agreement acceptable to governments. After some discussion, the members of the Subcommittee agreed that **an Inter-carrier Implementation Agreement (IIA2)** should be developed in Miami.

Strict liability, and if so up to what amount

The Subcommittee agreed that carriers should, in principle, waive their Warsaw Convention Article 20(1) defence vis-a-vis passengers up to an amount no higher than SDRs 100.000. Nevertheless, as indicated below and set out in **IIA2**, carriers would still have the **option** of retaining this defence, either in whole or in part, on specifically identified routes, subject to authorisation of the governments concerned.

Law of the domicile in the IIA

The **IIA** provision regarding determination of damages by reference to domiciliary law is spelled out more precisely in **IIA2**. Use of this provision is at **the option** of the carrier, as indicated in the **IIA**.

Fifth jurisdiction

Noting that US carriers continued to believe that **IIA2** should deal with this issue, all other Subcommittee members made it clear that they cannot accept the “**fifth jurisdiction**” and insisted that this could only be addressed by governments in the context of eventual amendment of the Warsaw Convention. Working Paper 5 of the meeting documentation sets out an authoritative legal opinion containing the following unequivocal assertion: *“States parties to the Convention are bound by these provisions and cannot, without ignoring their obligations, allow passenger actions in jurisdictions other than those which are fixed by the list in Article 28”*.

Additional IIA implementation options

Reviewing the results of the Drafting Committee deliberations, most of the Subcommittee members agreed to include in the text of **IIA2** two specific carrier options in addition to applicability of the law of the domicile for determination of damages. These options allow for incorporating in the conditions of carriage of provisions for the retention of Warsaw Convention **defences** on particular routes, if

authorised by government, and retention of Convention limitation of liability as well as **defences** vis-a-vis “public social insurance or similar bodies”.

Alternative dispute resolution (arbitration)

Working Paper 8 of the meeting documentation sets out a proposal on development of an alternative dispute resolution mechanism. Taking into account this approach could, possibly, go some way towards meeting US government concerns that its citizens or permanent residents impeded from litigating in the US should nevertheless have access to a US forum, the Subcommittee agreed that at least two carriers should be members of the **IATA/ICC Working Party (WP)**. Subsequently, the representatives of Air France and **Swissair** accepted to participate in the WP, a meeting of which is scheduled in Paris 1 March 1996.

A Drafting Committee composed of Subcommittee Chairman **DesBois** and representatives of British Airways, KLM, **Swissair** and Japan Airlines, assisted by the **IATA** Secretariat, met on 31 January and submitted a proposed **IIA2** to the full Subcommittee on 1 February. After detailed discussion and incorporation of suggested revisions, the Chairman called for an indicative vote on the text of the Intercarrier Implementation Agreement. All Subcommittee members, with the exception of the two US carrier representatives who abstained, expressed agreement with the document, subject to editorial corrections which were **left** to the Secretariat

Report to governments

The Subcommittee agreed with the US carriers’ suggestion that, in advance of formally filing the Report of the Miami meeting (as required by the Immunity Order), the IATA Secretariat should arrange for an information exchange meeting with DOT as soon as mutually convenient. In particular this would allow non-US carriers to present their views on **IIA** implementation, and the background to the drafting of **IIA2**, directly to US officials. (A meeting was subsequently organised in Washington on 14 February 1996.) The European carrier representatives also agreed that, following the 14 February meeting of the AEA on liability issues, those airlines would make known their views on **IIA** implementation to ECAC and to the European Commission.

The text of **IIA2**, as finalised by the Secretariat, is attached as **Annex 5** to this Report.

Annex 1

**IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996**

List of Participants

<i>Member Airline</i>	<i>Lust Name/First Name</i>
Air Afrique	Alzouma Maimouna Toure
Air Canada	DesBois Cameron *
Air France	Folliot Michel G.
Air Malta	Spiteri Christopher
Air Mauritius	Poonoosamy Vijay *
Air New Zealand	Mercer Anthony *
American Airlines	McNamara Anne *
American Airlines	Brashear Jim
British Airways	Walder Ken *
British Airways	Jasinski Paul
Canadian Airlines Intl	Fredeen Kenneth *
Delta Airlines	Parkerson John
Delta Airlines (Rep)	Mayo Gerry
Egyptair (also representing AACO)	Sherif Hussein
Egyptair	Hafez Ahmed
Finnair	Jussila Pekka
Japan Airlines	Abe Koichi *
Japan Airlines	Miyoshi Susumu
Japan Airlines	Tompkins, Jr George
KLM	Mooyaart Leslie *
Lufthansa	Santangelo Anthony A.
Lufthansa	Müller-Rostin Wolf
Mexicana	Papkin D. Robert (also Rep for VASP & AVENSA)
Sabena	Moulaert A.
SAS	Lönkvist Mats *
SAS	Westerstad Hans
South African Airways	Le Roux Danie
South African Airways	Orrie, Gasant
Swissair	Hodel Andres *
TACA	De Montenegro Ana
V A R I G	De Jesus e Silva Thadeu

* LAG Member

Governments

EU Commission	Colucci Anna
---------------	--------------

Regional Associations

A A C O	Represented by Egyptair Rep
AITAL	Vasquez Rocha Ernesto
AEA	Frisque Marc
ATA	Warren Robert
ATA	Dean Warren (ATA outside counsel)
O A A	Chua Carlos

Secretariat

IATA	Clark Lorne
IATA	Donald Robert
IATA	O'Connor David
IATA	MacLeod Anita
IATA Counsel	Rein Bert

Annex 2

**IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996**

AGENDA

- Item 1* Chairman's Welcome and Opening Remarks
- Item 2* Secretariat Review of Meeting Documentation
(List attached)
- Item 3* Slide Presentation by Chairman
(hard copies to be distributed)
- Item 4* Implementation of Intercarrier Agreement
- a) Methods of Implementation
- Tariff Filings Already Accepted by Government
 - Japanese carriers
 - ◆ Special Contract/New Tariff Filings to be Submitted to Government
 - under consideration by other carriers
 - ◆ a "Subsidiary intercarrier Agreement", Binding on Participating Carriers
 - to be filed with Government
 - ◆ Government-Imposed Implementation
 - ECAC Recommendations/
European Commission Proposal
- b) Draft Special Contract
- ⇒ Waiver of limits
 - ⇒ Article 20 Defences
 - 3 Law of the domicile
- c) Draft Subsidiary Intercarrier Agreement
- d) IIA Encouragement
- Item 5* Insurance Related Issues
- item 6* "Fifth Jurisdiction" (taking into account Warsaw Article 28)
- Item 7* Electronic Ticketing and the Warsaw Convention System
- Item 8* IATA/ICC Working Party on Aviation Liability Disputes Resolution
(Arbitration) - Proposed Airline Membership
- Item 9* Follow up Action, including filing IIA with Government authorities
- Item 10* Next Meeting

Annex 3

**IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996**

***Index of Documentation
(Revised)***

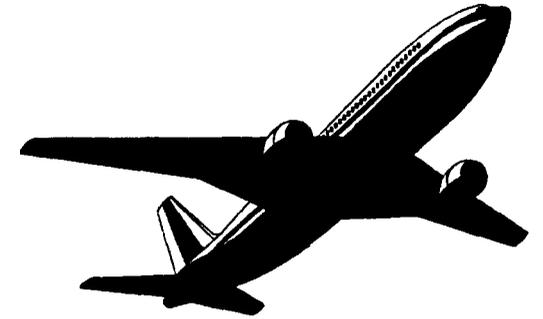
IATA Inter-carrier Agreement and List of Signatories as at 25 January 1996	WP 1.
US DoT Order 96-I-25 Granting Continued Discussion Authority - 23 January 1996	WP 2.
Legal Opinion Concerning DoT Order 96-I-25	WP 2-A
European Commission Proposal for a Council Regulation on Air Carrier Liability in case of Air Accidents - 20 December 1995	WP 3.
Papers Submitted to Legal Advisory Subcommittee by	
• Scandinavian Airlines System - 78 January 1996	WP 4-A
• Swissair - 22 January 1996	WP 4-B
• Japan Airlines - 22 January 1996	WP 4-c
• Transaero Airlines (<i>pending</i>)	WP 4-D
• AITAL - 79 January 1996	WP 4-E
Outside Legal Opinion on "Fifth Jurisdiction" - 70 December 1995	WP 5.
Paper on Indemnification of Damages in France - 27 October 1995	WP 6.
Paper on Electronic Ticketing and the Warsaw System	WP 7.
IATA/ICC Aviation Liability Disputes Resolution (Arbitration)	WP 8.
 <i>Information Papers</i>	
Lloyd's Aviation Law Article Vol. 14, No. 23 - "IATA Inter-carrier Agreement - The Trojan Horse for a fifth jurisdiction?" - 7 December 1995	Info Paper 1.
Wall Street Journal Article: "EU Takes Tough Stance on Airline Liability" - 27 December 1995	Info Paper 2.
Summary of US Supreme Court Ruling in <i>Zicherman v. Korean Air Lines Case</i> - 76 January 1996	Info Paper 3.
Air Malta Group: Re Risk Management (Article in <i>Aviation Europe</i> , Vol. 5 Issue 48 of 14 December 1995); to be followed up by explanation from Air Malta Representative	Info Paper 4. (Withdrawn)
Extract from Minutes taken at the 51st IATA AGM, Kuala Lumpur, 30-31 October 1995 - IATA Inter-carrier Agreement	Info Paper 5.

Annex 4



Slide Presentation

to



**Legal Advisory
Subcommittee Meeting**

Miami, 31 January - 1 February 1996

IATA Intercarrier Agreement (IIA)

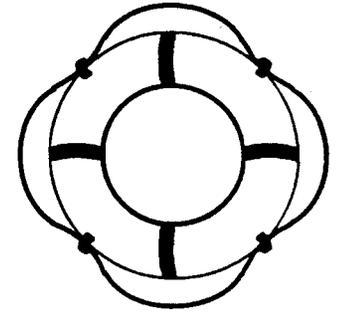


Current/Pre-IIA Implementation Liability Limits

1929 Warsaw Convention		USD 10,000
1955 Hague Protocol		USD 20,000
1966 Montreal Agreement		USD 75,000
Government-imposed liability limits		SDR 100,000
Australian Carriers		SDR 260,000
Japanese Carriers		Unlimited Liability (SDR 100,000 strict)



Insurance Costs



Gross premiums paid for ALL insurance by the world's scheduled airlines in 1994:

USD 1.5 billion *

** Source: Skandia Insurance*

Total operating costs for the world's scheduled airlines:

USD 239.5 billion **

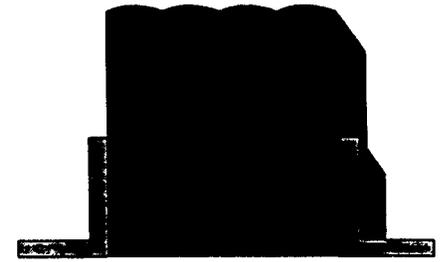
*** Source: ICAO Financial Results for 1994 (excluding domestic FSU)*



1995 IATA Inter-carrier Agreement (IIA)

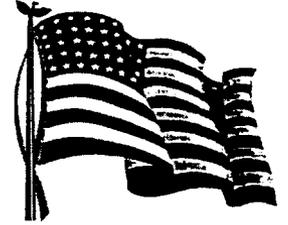
“Umbrella Agreement” specifically designed to:

- ▶ permit maximum flexibility to carriers
- ▶ facilitate development of individual conditions of carriage and tariff filings
- ▶ take into account applicable governmental regulations
- revise/terminate the 1966 Montreal Agreement
- encourage widespread implementation by carriers
- come into effect 1 November 1996 (or on receipt of government approvals)



Lloyd's Aviation Law (1 November 1995) Reaction to IIA:

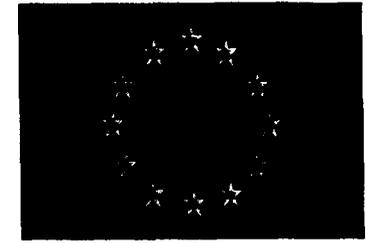
“In what must be regarded as the most dramatic development in the 66 year history of the Warsaw Convention, the Members of IATA at their AGM in Kuala Lumpur on October 30, 1995 unanimously approved and adopted an intercarrier agreement which, when put into effect, will result in the waiver by signatory IATA carriers of the limitation on recoverable damages for passenger injury or death provided by the 1929 Warsaw Convention, the 1955 Hague Protocol and the 1966 Montreal Agreement. The long awaited ratification and coming into force of the 1975 Montreal Additional Protocol No. 3 (MAP 3) will now become a moot issue”



A. Governmental Reaction to IIA:

US Department of Transportation (Immunity Order 95-12-14, Washington DC, 11 December 1995) -

“We believe that IATA has made remarkable progress towards achieving a liability system that will benefit passengers and carriers alike by removing artificial liability limitations which have been a constant source of litigation and have deprived international airline passengers of full recoveries for their proven damages.”



B. Governmental Reaction to IIA:

European Commission (Brussels, Proposal for a Council Regulation, 20 December 1995):

“An intercarrier agreement was agreed in Kuala Lumpur at the IATA AGM (30 October 1995) and signed by 12 major world carriers The solution agreed by IATA waives the limitation of liability in Article 22 of the Warsaw Convention with respect to the liability of-the participating air carriers. Recoverable compensatory damages might be determined and awarded by reference to the law of the domicile of the passenger. The Intercarrier Agreement is a minimum common denominator. If carriers on a voluntary basis, or obliged by their governments would like to offer more, they would be able to do so.”



Number of IIA Signatories as of 24 January 1996: [25]

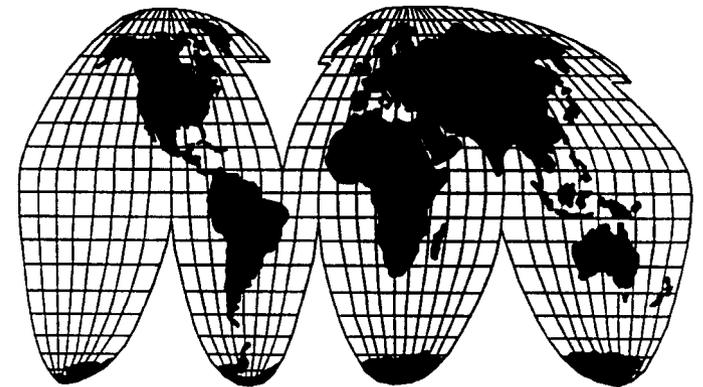
Europe – 10

Africa – 6

Latin America – 4

North America/Caribbean – 3

Asia-Pacific – 2





1995 IATA Intercarrier Agreement Implementation

- ✓ **Afford** Passengers Full Recoverable Compensatory Damages
(unspecified liability coverage i.e. no artificial limits)

or

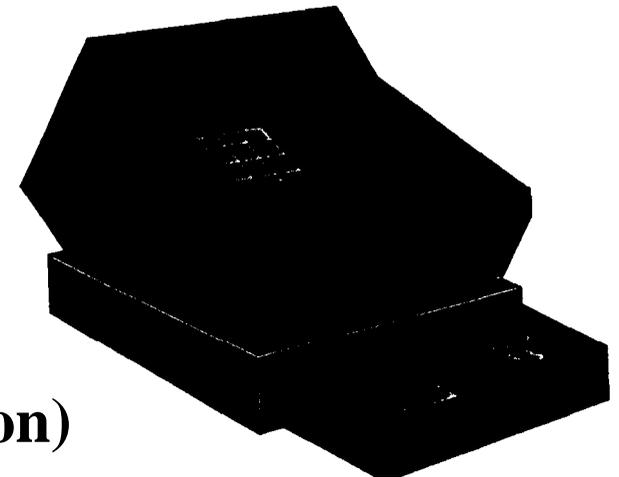
- ✓ **Afford** Passengers Full Recoverable Compensatory Damages
calculated according to the law of the passenger's domicile

and

- ✓ **Encourage** other airlines to apply the terms of the **IIA**

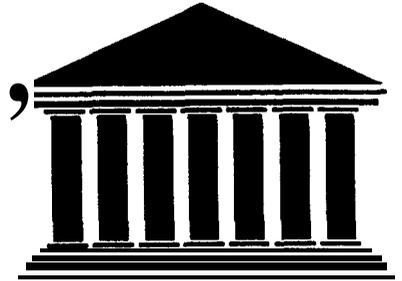
Options:

- Retain/Waive (up to fixed amount?)
Warsaw Hague **Defences** (Article 20)
- ▶ **“Up front”** payments to claimants
- ▶ **Alternative disputes resolution** (e.g. arbitration)
- ▶ **“Fifth Jurisdiction”**





1995 IATA Intercarrier Agreement Implementation'

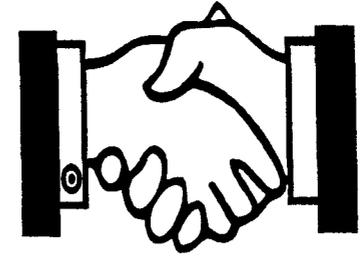


Methods of Compliance:

- **Tariff Filings as Already Accepted by Government**
 - *Japanese carriers*
- **Special Contract/New Tariff Filings to be Submitted to Government**
 - *under consideration by other carriers*
- ▶ **a “Subsidiary Intercarrier Agreement” Binding on Participating Carriers**
 - *to be filed with Government*
- ▶ **Government-Imposed Implementation**
 - *e.g. 1995 European Commission Proposal*



IIA Implementation Objectives



- ▶ **Maintain Universal Warsaw System Framework**
- ▶ **Promote Global Harmonisation of IIA Implementation**
- ▶ **Bring IIA into Effect by 1 November 1996**
- ▶ **Limit Divergences in Ticket Notice Provisions**
- ▶ **Simplify Interlining Between Carriers**
- ▶ **Provide Significant Benefits to Travelling Public**
- ▶ **Reduce Litigation and Attendant Expenses**



Let's get the IIA
off the ground!



Annex 5



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: Participants, IATA Legal Advisory Subcommittee on Passenger Liability

From: Lorne S. Clark

Date: 25 January 1996

Ref: Y/3401-D

Subject : **IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996
Agenda and Documentation**

Attached please find the Agenda and Documentation for the above meeting which will convene at 0900 hours on Wednesday 31 January 1996 at the Miami Airport Hilton and Towers, Salon 4.

With best regards.

Lorne S. Clark
General Counsel and Corporate Secretary

Att.



AGREEMENT IMPLEMENTING THE IATA **INTERCARRIER** AGREEMENT

- I Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:
1. (CARRIER) shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for compensatory damages arising under Article 17 of the Convention for death or bodily injury.
 2. (CARRIER) shall not avail itself of any defences under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs* [unless option II(2) is used].
 3. Except as otherwise provided in paragraphs 1 and 2 hereof, (CARRIER) reserves all defences available under the Convention to such claims and, with respect to third parties, also reserves all rights of recourse, contribution or indemnity in accordance with applicable law.
- II At the option of the carrier, the conditions of carriage and tariffs also may include provisions incorporating the following :
1. (CARRIER) agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.
 2. (CARRIER) shall not avail itself of any defences under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver of defences is limited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.
 3. Neither the waiver of limits nor the waiver of defence shall be applicable in respect of claims made by public social insurance or similar bodies whether for indemnity or contribution or acquired by way of subrogation or assignment.
- Such claims of third parties shall be subject to the limit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for proven compensatory damages in excess of payments received from any public social insurance or similar body.
- III
1. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
 2. Any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.
 3. The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October 1995.

Signed this ____ day of _____ 1996

* Defined if necessary

IATA Legal Advisory Subcommittee on Passenger Liability Miami, 31 January - 1 February 1996

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 - ◆ Government-Imposed Implementation
 - ECAC Recommendations/
European Commission Proposal
- b) Draft Special Contract
- ⇒ Waiver of limits
 - ⇒ Article 20 **Defences**
 - ⇒ Law of the domicile
- c) Draft Subsidiary Intercarrier Agreement
- d) IIA Encouragement
- Item 5* Insurance Related Issues
- Item 6* "Fifth Jurisdiction" (taking into account Warsaw Article 28)
- Item 7* Electronic Ticketing and the Warsaw Convention System
- Item 8* **IATA/ICC** Working Party on Aviation Liability Disputes Resolution
(Arbitration) - Proposed Airline Membership
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- Item 10* Next Meeting

**IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996**

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• AITAL - 79 January 1996	WP 4-E
• ATA - (<i>pending</i>)	WP 4-F
Outside Legal Opinion on "Fifth Jurisdiction" - 10 December 1995	WP 5.
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Paper on Electronic Ticketing and the Warsaw System (<i>pending</i>)	WP 7.
Proposal re IATA/ICC Working Party on Aviation Liability Disputes Resolution (Arbitration) - (<i>pending</i>)	WP 8.

Information Papers

Lloyd's Aviation Law Article Vol. 14, No. 23 - "IATA Inter-carrier Agreement - The Trojan Horse for a fifth jurisdiction?" - 7 December 1995	Info Paper 1.
Wall Street Journal Article: "EU Takes Tough Stance on Airline Liability" - 27 December 1995	Info Paper 2.
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Air Malta Group: Re Risk Management (Article in <i>Aviation Europe</i> , Vol. 5 Issue 48 of 14 December 1995); to be followed up by explanation from Air Malta Representative	Info Paper 4.

**IATA Legal Advisory Subcommittee on Passenger Liability
Miami, 31 January - 1 February 1996**

List of Participants

<i>Member Airline</i>	<i>Lust Name/First Name</i>
Air Afrique	Toure Maimouna Alzouma
Air Canada	DesBois Cameron *
Air France	Folliot Michel G.
Air Malta	Spiteri Christopher
Air Mauritius	Poonoosamy Vijay *
Air New Zealand	Mercer Anthony *
American Airlines	Brashear Jim
American Airlines	McNamara Anne *
Avianca	Dueri Eduardo
British Airways	Jasinski Paul
British Airways	Walder Ken *
Canadian Airlines Intl	Fredeen Kenneth *
Delta Airlines	Parkinson John
Delta Airlines (Rep)	Mayo Gerry
Egyptair	Hafez Ahmed
Egyptair	S herif Hussein
Finnair	Jussila Pekka
Japan Airlines	Abe Koichi *
Japan Airlines	Miyoshi Susumu
Japan Airlines	Tompkins, Jr George
KLM	Mooyaart Leslie *
Lufthansa	A-Frowein Bettina
Malaysia Airlines	Nik Adeeb Nadimah
Mexicana	Papkin D. Robert (also Rep for VASP & AVENSA)
SAS	Lönnkvist Mats *
SAS	Westerstad Hans
South African Airways	Le Roux Danie
South African Airways	Orrie, Gasant
S wissair	Hodel Andres *
TACA	De Montenegro Ana
VARIG	De Jesus e Silva Thadeu

* LAG Member

Governments

EU Commission	Colucci Anna
---------------	--------------

Regional Associations

AITAL	Vasquez Rocha Ernesto
AEA	Frisque Marc
ATA	Warren Robert
OAA	Chua Carlos

Secretariat

IATA	Clark Lorne
IATA	Donald Robert
IATA	O'Connor David
IATA	MacLeod Anita
IATA Counsel	Rein Bert

WP 1.



WP 1.

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great benefit to international air transportation; and

NOTING **THAT:** The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

The undersigned carriers agree

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available **defences** pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this _____ day of _____ 199__

* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

INTERCARRIER AGREEMENT ON PASSENGER LIABILITY

EXPLANATORY NOTE

The Inter-carrier Agreement is an “umbrella accord”; the precise legal rights and responsibilities of the signatory carriers with respect to passengers will be spelled out in the applicable Conditions of Carriage and tariff filings.

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

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

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

**List of Carriers Signatories to the IATA Inter-carrier Agreement
As at 24 January 1996**

Carrier	Date of Signature
1. Air Canada	31 Oct95
2. Air Mauritius	31 Oct 95
3. Austrian Airlines	31 Oct 95
4. Canadian Airlines Intl	31 Oct 95
5. Egyptair	31 Oct95
6. Japan Airlines	31 Oct 95
7. KLM Royal Dutch Airlines	31 Oct 95
8. Saudi Arabian Airlines	31 Oct 95
9. Scandinavian Airlines System	31 Oct 95
10. South African Airways	31 Oct95
11. Swissair	31 Oct 95
12. TACA	31 Oct 95
13. Aer Lingus	09 Dec 95
14. Finnair	11 Dec95
15. Icelandair	11 Dec 95
16. Aeromexpress	11 Dec 95
17. LAPSA Air Paraguay	12 Dec 95
18. Kenya Airways	13 Dec 95
19. Air Afriaue	14 Dec 95
20. Croatia Airlines	15 Dec 95
21. Trinidad & Tobago BWIA International	15 Dec 95
22. Jet Airways (India)	18 Dec 95
23. Varig S.A.	19 Dec 95
24. TAP Air Portugal	20 Dec 95
25. Air UK Group Limited	1 I Jan 96

WP 2.

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Order 96-L-25

SERVED JAN 23 1996



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

Issued by the Department of Transportation
on the **23rd** day of January, 1996

International Air Transport Association

AGREEMENT RELATING TO LIABILITY

LIMITATIONS OF THE WARSAW CONVENTION

Docket **OST-95-232**
(49152)

ORDER GRANTING CONTINUED DISCUSSION AUTHORITY

By Orders 95-2-44, and 95-7-15, the **Department granted** and extended discussion authority and **antitrust** immunity to **IATA** for the purpose of reaching an Agreement among **carriers** to waive the liability limits of the Warsaw Convention. In **Order 95-2-44** we **agreed** with **IATA** that the Montreal intercarrier Agreement of 1966 (Montreal **Agreement**) must **be** brought up to date, and we set forth guidelines for such an **agreement** which **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.¹ **Order 95-7-15** incorporated the **same guidelines**. The **discussion** authority expired on December 31, 1995.

As a result of the **IATA** discussions, an **IATA Intercarrier Agreement (IIA)** was unanimously endorsed at the **IATA Annual General Meeting in Kuala Lumpur** on October 31, 1995, which requires signatory **carriers** to take action, by **November 1, 1996, to waive the** Convention's limitation of passenger liability, "so that **recoverable compensatory damages may be determined** and awarded by reference to the law of the **domicile of the passenger,**" and to encourage other carriers to do the **same.**² The

¹ Order 95-24, at pp. 2 and 3.

² IATA has provided the Department with copies of the final resolution and the Intercarrier Agreement in a letter dated November 27, 1995.

Agreement leaves the technical details of implementation to the carriers, subject to requirements of Governments in connection with approval of the Agreement and other implementing Agreements,

On December 22, 1995, IATA filed a request for extension of the discussion authority and antitrust immunity for a **period** of ninety days, until April 1, 1996.³ IATA urges that continued discussion authority and **immunity** is needed to consider whether **there** is a **need** for a specific **intercarrier agreement** on implementation of the **IIA**, which is not specific in its terms; the **terms** of any such agreement; whether there is sufficient consensus to reach such an agreement; and the **relationship** of any such agreement to efforts to seek approval of the **IIA**. IATA also **requests** a technical revision to the conditions **attached** to its **previous** immunity in **Order 95-7-15**, to the extent that IATA, as distinct from **U.S. carriers** required to **attend** all sessions, would be responsible for reporting to the Department on a 24 hour **basis**.⁴

Answers ⁵ in support of IATA's Petition were filed by Air Canada, British Airways, Japan Airlines and the Asociacion Intemacional de Transporte Aereo Latinamericano.

We have decided to grant IATA's petition for continued discussion authority and antitrust immunity to the extent set forth in this Order. We will authorize discussions "directed toward producing an acceptable passenger liability regime under the Warsaw convention." We will also make the requested technical revisions to the U.S. carrier reporting requirement.

Given the apparent confusion regarding the scope of the immunity granted by our recent orders, we believe it advisable to elaborate on the scope of the immunity granted here. IATA suggests that immunity should be sufficient to consider the views of many carriers that a further implementing Agreement is not necessary. We would consider the immunity granted as sufficient to permit carriers, on an individual basis, to express their

³ IATA states that its requested extension of the discussion authority and antitrust immunity should be issued in lieu of the discussion authority and immunity issued to the Air Transport Association of America (ATA) and IATA in Order 95-12-14 "to develop an intercarrier agreement for implementation of the IATA Intercarrier Agreement in a manner which adequately meets the Department's guideline⁶ as specified in Order 95-2-44", which it suggests should be suspended during the period its requested authority is issued. IATA states that, in the current Petition, it seeks somewhat broader discussion authority and immunity than granted in Order 95-12-14.

⁴ IATA otherwise supports the conditions in Order 95-7-15. Specifically it does not object to the requirement of U.S. carrier attendance at all meetings, working groups, etc., or that the U.S. carriers be directed to report. (The condition regarding U.S. carrier reporting was added in Order 95-7-15 when the original conditions were modified at IATA's request to permit discussions outside of Washington, D.C.)

⁵ IATA requested a shortened answer period, and by Notice served January 3, 1996, the Department set January 9, 1996, as the date answers would be due.

views in this regard.⁶ However, the approved objective of these discussions is to arrive at an Agreement designed to ensure that a single liability regime which adequately meets the Department's Guidelines will be in effect for all passengers on Rights to and from the United States, and hopefully for most flights throughout the world. It is our understanding that IATA shares this objective, since its original application expressed IATA's desire to revise and update the Montreal Agreement and the IIA which IATA endorsed in Kuala Lumpur recognizes that the Warsaw Convention system is of great benefit to international air transportation,

We recognize, although regretfully, that it may not be possible to reach unanimity on an Agreement for worldwide application.⁷ The absence of unanimity, or even a large worldwide consensus for areas other than to and from the U.S., should not, however, deter the efforts to achieve the maximum U.S. and foreign carrier participation in the development of a single liability regime that conforms to the Department's guidelines to be applicable to and from the United States.⁸

We therefore find that the discussion authority granted here is necessary to meet a serious transportation need and will provide important public benefits which cannot be met by reasonably available and materially less anticompetitive alternatives. Since implementation of the discussion authority and Agreements will be dependent on the grant of antitrust immunity, we also find that grant of such immunity meets the standards of the Act, and will be in the public interest. Our discussion authority, and the antitrust immunity granted by this Order, will extend to all carriers participating in the discussions or approved agreements, regardless of whether they are members of IATA.

We will reserve the right to modify this order, and its conditions, at any time as may be required in the public interest.

⁶ We would not consider, however, that the immunity would extend to any collective understanding that there should be no such Agreement.

⁷ We note, in this regard, that the EU is proceeding to develop and consider regulations that would implement the IIA for EU carriers in accordance with EU requirements. We would prefer to base our proposed regulations OR an agreement developed by the carriers and approved by us, if such an agreement is possible.

⁸ Thus, we will not suspend Order 95-12-14. As we stated in that Order, it would be our preference for discussions to proceed under the auspices of IATA, in order to create as wide an application as possible. Nevertheless, we believe that IATA should also have immunity to continue discussions, with full participation of foreign carriers, in the event that IATA is unable or unwilling to proceed on this basis.

ACCORDINGLY:

1. **The Department approves**, under section 4 1308 of Title 49 of the United States Code, **until** April 1, 1996, to the extent provided herein, the request **filed** by **LATA** in Docket **OST-95-232** for continued discussion **authority** directed toward producing an acceptable passenger' liability regime under the Warsaw Convention, **subject** to the **restrictions** listed below;
2. The **Department** exempts **LATA** and any other persons participating in the discussions **approved** by this order from **the** operation of the antitrust laws under section **4 1309** 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** for discussions covered by this **order** shall be given to all U.S. **carriers** participating in **the** meeting, and the U.S. Departments of Transportation, State and Justice;
 - (b) Representatives of the entities **listed** in **subparagraph (a)** above shall **be** permitted to attend ail meetings authorized by this Order,
 - (c) **A U.S. air carrier representative** designated by **the** Air Transport Association of America **shall** be in attendance at **all** meetings, **discussions**, working **groups**, drafting **groups**, or **other discussions covered** by this order, to the **extent** that the discussions may have any bearing on **matters** within the scope **of the** Guidelines set **forth** in Order **95-2-44**;
 - (d) The designated **U.S. carrier** representative(s) attending **all** such discussions shall be authorized to report fully and continually to the **Department** on the substance, nature and **progress** of such discussions, by telephone or otherwise, within 24 hours after **any** such discussion, and **shall be** authorized to **submit all drafts**, working papers or other documentation to **the** Department by facsimile, or otherwise;
 - (e) **LATA or ATA** shall **file** within 14 **days with** the Department a report of each **meeting, discussion**, working group or drafting session **held**, including *inter alia* the date, place, attendance, a copy of any information submitted to the meeting or **other** discussion by any **participant**, and a **summary** of the **discussions**, any **drafts** or preliminary **drafts** prepared, and any proposed agreements;
 - (f) Any agreement reached must be **submitted to** the Department for approval and must be approved before **its** implementation;
 - (g) 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**;

(h) **This order** may be amended, revoked or further 'conditioned, at any time, without **a hearing, as the** Department may find **to be consistent** with the **public** interest; and

(i) The Department **retains** jurisdiction **over** the discussions **to take such further** action at any time, without **a** hearing, as it may deem appropriate: and

5. An ATA designated **U.S. carrier** representative attending all discussions, working groups, drafting sessions, **etc.**, shall report fully and continually to the Department on the substance, nature and progress of **such discussions**, by telephone **or** otherwise, within 24 hours after any such discussion, and shall submit **all** drafts, working papers or other documentation **to** the Department by facsimile, or otherwise;

6. We will **serve a** copy of this order on **all** parties in the above-titled docket, and on the Departments of State and Justice.

By:

MARK L. GERCHICK
Acting Assistant Secretary for
Aviation and International Affairs

(SEAL)

WP 3.

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

EXPLANATORY MEMORANDUM

A. BACKGROUND

1. Air carrier liability in case of 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- to which **all** member States but not **the** Community' **are** Contracting Parties - , and a number of other instruments which, together with the Convention, is **generally** referred to as the Warsaw System' (**WS**). The WC was established by the worldwide air transport Community in order to provide a worldwide system of standards and rules for the carriage of passengers by air and in **particular** common rules in respect of liability for passengers and cargo in the event of **an** accident, **loss** of baggage and delay for international **air** transport while at the same **time** limiting **costs** for air carriers. **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, Nevertheless, **the** passenger and the carrier may, by special contract, agree **to** a **higher** limit of liability (**art.22§1**). **The** carrier has the possibility to defend itself against any claims under the **Convention** if it proves it took all necessary measures **to** avoid the damage, in this case it will not be held **liable** (**art.20§1**). Moreover, the carrier is permitted **to** reduce its liability if it **proves** the contributory negligence of the injured **person** (**art.21**). **Finally**, art.25 prohibits the carrier to avail itself of any clauses limiting or excluding liability if it or its agents are guilty of **wilful** misconduct.
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 **now** generally agreed that the WS no longer **realises** its economic objectives. In short **the** Limits of liability established by the **WS** are too low in **today's** monetary standards and for today's aviation market.

¹ In addition to the initial **Warsaw** Convention (WC) **the other instruments** include the 1955 **Hague** Protocol, **the 1961** Guadalajara **Convention**. **Other** instruments related to the System but not **yet** into **force**, due to an insufficient **number** of **countries having ratified these instruments are: the 1971** **Guatemala City** Protocol and **the four** Protocols signed at **Montreal** in **1975**. **The 1966** Montreal **Inter-carrier Agreement (MIA)** must also be **mentioned** in that it is a "voluntary" agreement **between** airlines to include **certain conditions in their contract** of carriage. .

3. Attempts have been made within the Warsaw framework over the years to increase these limits. But such attempts have not **met with** any success due to lack of **sufficient** number of ratification for such modifications to the **Convention**. **The** Warsaw system indeed suffers from a lack of an automatic adaptation **mechanism**, which would take account of the impact of inflation and the development of **real income**.
4. The **only** possibility currently available for a victim or next-of-kin to **recover** compensation beyond the Warsaw limits is to prove the **wilful** misconduct of **the** air **carrier**. **This** obligation to prove **wilful** misconduct in order to break the current limits **leads** to lengthy and costly litigation for both passenger and carrier and it is the **carrier** who generally **will** have to bear **the** costs of this complex system. This is detrimental to the interests of **the** air transport policy in general.
5. Attempts have also been made **outside** the Warsaw framework to update the **limits**. **In** 1966 the WC was supplemented by a "**voluntary**" inter-carrier agreement **imposed** on **all** carriers flying to, from or with an agreed stop in the US. This agreement, called the Montreal **agreement**, **raised the applicable** limit for **passengers** in case of **death** or injury to US \$ 75,000. It also introduced another important element, carriers renounced to their right of **defence** under article 20§1 of the WC, bringing, therefore, strict **liability**. By 20 November 1992, Japanese airlines agreed, by special contract incorporated in conditions of carriage and tariffs, that they would waive all limits of liability in international transport and would do so under strict liability for claims **up** to SDR 100,000 (approximately ECU 119,600). **UK** by adopting the Licensing of Air Carriers Regulation 1992 SI 1992/2992 required that a carrier with a valid operating license granted by the UK Civil Aviation Authority must make an SDR 100,000 **special** contract with **passengers** carried for remuneration or hire. It is **worthwhile** noting that Italy by adopting the Law 274 of 7th July 1988, **compelled all** airlines serving a point **in** Italy to adopt a special contract for SDR 100,000. In recent years **most** European countries have introduced domestically and, for their own national carriers also **internationally** a higher passenger limit than **that** prescribed by the **Hague** Protocol (see annex I).

B. COMMUNITY ACTION

6. The third aviation package has created an internal aviation market where the rules for the operation of air services, **whether domestic** of international, have been largely **harmonised**. Rules on the nature and limitation of liability for damages of an air carrier in the **event** of death or injury of air passengers form an essential element of the terms and conditions of carriage in an **air** transport contract between carrier and passenger. **Article 7** of Council Regulation (EC) **N°2407/92** introduced with the third package requires air carriers to be insured to cover liability in case of accidents. However, the Regulation does not provide the modalities to comply with **this** provision. Given as stated above that Member states have variously taken steps to increase the Warsaw limit and even in some cases to modify the nature of liability leading therefore, to different terms and conditions of carriage and given also that differences subsist between the liability rules for domestic and international transport, it is obvious that the situation risks fragmenting the internal aviation **market** so far achieved.
7. In addition, one of the most important factors in all modes of transport and thus in aviation is the question of safety and quality of service. The **inevitable link between** safety and **the** issue of liability cannot be denied. The original low limit set by the Warsaw Convention was in part a protection for **an enfant** industry whose risk factors were largely unknown and therefore considered to be high. In such a climate the interest was to **reduce as** much as possible the financial liability of the carrier even to the detriment of the passenger. Today, the situation of the aviation sector is totally different; it **is** perceived to be one of the safest modes of transport. This image of a safe and quality service is at odds with a system whereby the passenger is still treated as taking a risk, which justifies a low level of compensation in the event of death or injury. In addition, the fact that in order to achieve an acceptable **level** of compensation the **wilful** misconduct of the carrier has to be proved leads **very** often to serious damage to the image of aviation as the safest **mode** of transport. The aim of the EC air transport policy is to ensure **that not only** will air transport continue **to** be the safest way to travel but also that it is perceived as such. Therefore, **the** issues of liability and compensation should now be legislated for in **terms which** are consistent with today's aviation industry.
8. **The** objective of the internal aviation market is also to take **account** of the needs of **the** air transport user. The low limits currently in place are, as stated above, largely inadequate and unsatisfactory for the **passenger** victim of an air accident or for his survivors. Moreover, the fact that the passenger has to prove **wilful** misconduct of **the** carrier in order to recover compensations above the limits of the WC, makes settlements less predictable, more expensive and time consuming. **Furthermore**, due to the complexity of the system - i.e. different limits in force and carriers' differing obligations under national law - the passengers is misinformed or not informed at **all** of the applicable regime. It is worth noting that the "Notice" formats of standard tickets make no attempt to inform the passenger of the precise limit that applies to his particular journey. Although **the possibility** always exist, of course, for passengers to ensure themselves on an individual basis, given the confusing situation, it is impossible 'for the passenger to make an informed decision as to which personal

insurance he should take. **In** a nutshell, not only are **the** passengers or next-of-kin insufficiently covered by the current low limits, but **they have** also to face the uncertainty and lack of transparency of **remedies when having to seek** higher damages than the mandatory limit. **Generally speaking** it has been **recognised** as witnessed by article **129a of the** Treaty that **the** Community should contribute to a higher level of **consumer** protection. This proposal is very **much** in line with that commitment.

9. In conclusion it can be seen that the role of liability in the aviation sector is far from negligible.
10. It is against this background of low limits and a **risk** not only for the unity of the internal aviation market, but also for the protection of **the** air transport users that the Commission felt that a basic **reappraisal** of the present situation is required. **To this** end it commissioned in 1989 a **study**² 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 mounts of compensation for international accidents victims in **air** transport"? 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"³. The **Consultation** Paper, while acknowledging **the** need to increase 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 Community 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 (ECU 358,800 - 598,000) 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**.⁵
11. 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

² 'La responsabilité du transporteur aérien à l'égard des passagers et des expéditeurs de marchandises', 1. Naveau, **June** 1989, updated in September 1989.

³ Study delivered the 15 **September** 1991, by **Sven Brise**, Consultant.

⁴ Ref: **VII.C.1 - 174/92-8**

⁵ **Article** 22 (1) of **the** WC allows, by special **contract**, **the** **carrier** and **the** **passenger** to **agree** to a higher limit of liability,

be **commissioned**. The Commission launched such a **study**⁶, 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**. On the whole, however, it was perceived **that the market** will react in a moderate way. If the limits are sufficient to **accommodate** claims or if there **are no** limits, some reduction in plaintiffs costs would be likely to result, since a number of plaintiffs would not need to go to litigation. Insurers **and** other interested parties seem, in general, to be **confident** that financial capacity would be available irrespective of **the** level of the **limit** chosen.

12. Parallel to the Commission's efforts, there have been efforts in other **fora** to arrive at a solution. Thus ECAC in its **Triennial Meeting (22-24 June 1994)** adopted a Recommendation aiming to increase limits and to ensure **the** payment of a **Tump** sum. This **Recommendation** also urged **carriers to conclude** an inter-carrier agreement in this respect. **In** response to this the **AEA** set up a task force to consider such a voluntary agreement between air **carriers**. **In** order to discuss such a **system**, the air carriers obtained US **antitrust** immunity, and a **comfort** letter from the Commission services. An inter-carrier agreement was **agreed** in **Kuala Lumpur** at **the IATA Annual General Meeting (30 October 1995)** and signed by twelve major world carriers, including the following European carriers: Austrian Airlines, **KLM**, **SAS** and **Swissair**.
13. The solution agreed by IATA waives the limitation of liability in article **22 of the Warsaw Convention** with **respect** to the liability of the participating air carriers (see annex II). Recoverable **compensatory** damages might be determined and awarded by reference to the law of **the domicile of the passenger**. **The inter-carrier** agreement is a minimum common denominator. If carriers on a voluntary basis, **or** obliged by **their** governments would **like** to offer **more**, they would **be** able to do so. The signing, carriers **will** have to implement the provisions of **the** agreement no later than 1 November **1996**.
14. The draft **inter-carrier** agreement was discussed with interested **parties**⁷ at a meeting **held** on 23.10.95. All participants agreed that the agreement would constitute a significant improvement of the situation. However, such an agreement does not solve all issues as to liability. **In particular**, the effectiveness of the agreement will depend on the degree of participation by airlines. At the moment as **indicated** earlier **only** certain Community carriers **have** signed. **Without** the agreement of all Community

⁶ "The cost implications of higher mandatory compensation limits for passengers involved in air accidents" Frere Cholmeley Bischoff, delivered on February 1994.

⁷ Association of **European Airlines**, European Regional **Airlines**, International **Chamber of Commerce**, **International Union of Aviation Insurers**. The Federation of Air Transport User **Representatives of Europe**, the European Association of Charter Airlines and the **Comité Européen des Assurances** provided written **statements**.

air carriers, the risks of differing standards and **thus** fragmentation of the internal aviation market **will** not only subsist, but potentially **increase**. **Thus**, the **situation** for **the air user** would become more confusing.

15. Against this background, and considering the **conclusions** of both studies mentioned above, the Commission is of the opinion that Community action should be undertaken in order to establish an acceptable situation for the air transport sector by ensuring common rules for liability in **the** terms and conditions of **carriage** irrespective of **the nature** of the operation and by **guaranteeing** a fair situation for air transport users. In doing so the Commission has taken into account **the** following elements:

- The fact that there is a universal acceptance that the current mandatory Limits are **too low coupled** with a recognition that **the** WS, despite its economic **deficiencies**, provides a **uniform** Legal foundation enjoying 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**.

- The fact that Member states **have** taken various steps to increase **the** Warsaw limit and even in **some** cases have modified **the** nature of the liability and also that differences subsist between the liability **rules** for domestic and international transport risk fragmenting **the** internal aviation market so far **achieved**. Consequently, **any** change should guarantee the equal treatment of the carriers, irrespective of **departure** point, type of service (domestic **or** international j etc.

- 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!

- Simple and speedy procedures for both the **air** users and the carriers should be guaranteed. It is intolerable that victims or their relatives **should** have **to** wait for the results of lengthy litigation. Air accidents **normally** are of a serious "nature with dramatic consequences and involve **in most** instances a significant number of passengers far away from home. **Therefore**, it is reasonable to follow the ECAC **Recommendation** and ensure the payment of a lump sum to **take** care of immediate financial implications.

⁸ For instance, a 40 year old executive **earning** [ECU 97,082] a year, **survived** 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) (see annex III)

- The **proposal** of the Commission has **therefore** the **following** main **elements**:
 - a waiving of all **limits**;
 - the introduction of strict liability up to ECU 100,000 This will protect air users **even** in the case of a **terrorist** attack that would **otherwise** leave the innocent **passenger** uncovered. Moreover, by **doing** so the Community would **legalise** a practice which has been accepted by airlines for many years and officially **formalised** in some **cases**⁹.

- It **would** be preferable that **all** carriers serving a point in the **Community** adopt the same system. Third country carriers not subject to **Community rules** should be **requested** to properly and clearly inform passengers accordingly.

- Passengers should have the choice of the jurisdiction before which they **want** to bring action. It should include the possibility' to bring **action** **before** the court of **the** Member State where the **passenger** has its **domicile**. This might **circumvent** the possibilities of confusion that might arise when referring to **the** law of the domicile.

- Priority **should** later be given to improve the situation in respect of passengers' luggage and cargo, if efforts at international level by carriers and/or governments would fail to **provide** a satisfactory **solution**.

- Such a **Community** action, according to the studies referred to **above**, **would** have minimal cost implications, **because** current liability insurance costs for European airlines generally comprise from about 0.1% to **0.2%** of total operating costs. **An increase** or a **removal** of the **limit will, therefore, only** represent a minimal increase in **costs**¹⁰ of insurance premium - it would comprise about 0.1% to 0.35 % of total operating costs.

- **The** Community action must be seen as a measure which will help to trigger existing international Conventions (**WS**). By adopting the Regulation, **the** Community will act as a catalyst together **with** similar moves in **Japan** and the USA. In any event, the Community and **the** Member States should in cooperation with **ECAC** use all **its** efforts in order to urge the appropriate international forum - ICAO - to update **the** current international instruments into force.

⁹ **The MIA** introduced in 1966 increased **limits to**, from or with an **agreed** stop in the US to US **\$75,000** on a strict liability basis. Japanese airlines have, since November 1992, waived liability limits on their flights with a **level** of **strict** liability up to **SDR 100,000**.

¹⁰ 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 to **the** current **low** premium levels.

16. These elements and concerns have led **the** Commission to propose a Regulation which, by establishing certain common rules for **liability irrespective** of the nature of the air **services**, will contribute to the internal aviation already established by the third aviation package and will in addition ensure a high level of protection for the air transport user.

C. JUSTIFICATION OF THE ACTION

17. The Community action envisaged can be **analyzed** 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)?

The third aviation package has created an **internal aviation** market where the **rules** for the operation of air services, whether domestic or international, have been largely **harmonised**. Rules on the nature and limitation of liability for damages of an air carrier in the event of death or injury of air passengers **form** an essential element of the **terms** and conditions of carriage in an air transport contract between carrier and passenger. Given that Member States have variously taken steps to **increase** the Warsaw limit and even in some **cases** to modify the nature of the liability and given also that differences subsist **between** the liability rules for domestic **and international** transport, it is obvious that the situation risks fragmenting **the** internal aviation market so far achieved. Moreover, in the event of death or injury, air transport users or next-of-kin are not **only insufficiently** covered in respect of the WC limits, but they have **also** to face the **uncertainty** and lack of transparency of remedies **when** having to seek higher damages than the **mandatory** limit.

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

The envisaged action does not relate to an exclusive competence of the Community.

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

Since with the creation of the aviation single market the distinction between domestic and international carriage for the operation of air services is no longer valid such a solution can best be addressed at **the Community** level.

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

The value of the Community action lies in the improvement of the position of air carriers and protection of the air users when the current **liability limits** have been removed **by ensuring fair** compensation and juridical security. It will also provide the **passengers** with speedy **procedures**. It should be **emphasised** that the current system is extremely complex, the rights of the passengers and the obligations of air carriers currently vary as a function of departure point, type of service (**domestic** or international) etc **and** the average passenger is most of the time misinformed or not

informed at **all** of the precise hit that **applies** to her/his journey. Passengers involved in accidents abroad **have** to face different legal situations from what they are used in their home country. The inter-carrier agreement adopted by **IATA** will not **eliminate** all **difficulties**. Moreover, the risk exists that some European carriers **will** not adhere to this voluntary **agreement** thereby adding to the **current** confusion. The costs of no action would be insufficient protection **of the** air passengers in case of air accidents and persistence of an overly complex **system** for Community air carriers within **the Community**.

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

In order to provide for **homogenous** and effective protection of the air users in **this** area, it is necessary to introduce legal measures, either in the form of a **Directive** or a Regulation. By embodying a broad Community **system** in a legislative **framework** divergent national measures **will** be avoided.

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?

Because of **the international** mode of operation a **uniform** action is desirable **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, guaranteeing a proper level of protection. 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 represent the best legal **instrument**.

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**²,

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

Whereas rules on liability are governed by the Convention for the unification of **Certain Rules** Relating to International Carriage by Air signed at Warsaw, 12.10.29, hereafter **called** the Convention, or that Convention as amended at The Hague, **28.09.1955**, whichever might be applicable; whereas this Convention is applied worldwide for the benefit of both passengers and **air** carriers and must be preserved;

Whereas **the rules** on the **nature** and limitation of liability in the event of death, wounding or any other bodily injury suffered by a passenger **form** part of the terms and conditions of carriage in **the** air transport contract **between** carrier and passenger; whereas Council Regulations (EEC) N° 2407/92, 2408/92 and 2409/92⁴ have created **an** internal aviation market wherein it is appropriate that the **rules on the nature and** limitation of **liability** should **be harmonized**;

Whereas the limit of liability set by the Convention is too low by today's economic and social standards; whereas in consequence Member States have variously increased the liability limit 'thereby leading to different terms and conditions **of carriage in** the Community;

Whereas in addition the Warsaw Convention **only** applies to **international** transport; whereas in the **internal** aviation **market the distinction between** national and international transport has been eliminated; whereas it is therefore appropriate to ' have the same level and nature of **liability** in both **national and** international transport;

²

³

⁴ OJ N° L 240, 28.8.1992, p1

Whereas the present low **limit** of liability often leads to lengthy **legal** actions which damage the image of air transport;

Whereas Community action in the field of air transport should also aim at a high level of protection for the interests **of** the **users**;

Whereas in order to provide **harmonised** conditions of carriage in respect of liability of air carrier and further in order to ensure a high level of effective protection of air users, action, **having** regard to the principle of **subsidiarity**, can best be addressed at Community level;

Whereas it is appropriate to **remove all** limits of liability in the event **of** death, wounding **or** any other **bodily** injury **suffered** by a passenger;

Whereas in order to avoid that victims of unpreventable accidents remain uncovered carriers should 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 Convention⁵ avail **themselves** of any defense **under** article **(20)§1** of **the Convention**⁶ up to the sum of ECU 100,000;

Whereas passengers or next-of-kin should receive a lump sum as soon as possible in **order** to face immediate needs;

Whereas passengers and those **entitled** for compensation should benefit from legal clarity in the **event** of an accident, **whereas** they must be **fully** inform&i beforehand of the applicable rules; Whereas it is necessary to avoid lengthy litigation. or claims process; **whereas** it is appropriate in addition to give **t&e** passenger **the** possibility of taking **action in the courts** of the member State in which such passenger has his domicile or **permanent residence**;

Whereas it is desirable in order to avoid distortion of competition that third country's carriers adequately inform passengers of their conditions of **carriage**;

Whereas the **improvement** of the situation for luggage and cargo is currently taken care of **at** ICAO level and does not require to be dealt **with** the same urgency than the passengers situation;

Whereas it is appropriate and **necessary that the values** expressed in this Regulation are increased in accordance with economic developments; whereas it is appropriate to empower the Commission, after consultation of an advisory Committee, to decide upon such **increases**;

⁵ Article 17 of **the** Convention: "The carrier shall **be** liable for damage **sustained in** the event of **the death** or wounding of the **passenger** or any other bodily injury **suffered** by a passenger, if the accident which caused the **damage** so sustained took **place ON board the** aircraft **or** in the course of any **operations** of embarking or disembarking.

⁶ Article **20§1** of **the** Convention: "**The carrier** shall **not** be **liable** if **he** proves that **he** and his agents have taken **all necessary measures** to avoid the **damage** or that it **was** impossible for him or **them** to **take** such **measures**."

HAS ADOPTED THIS REGULATION:

Article

This Regulation **defines** the obligations of **Community air** carriers to cover liability in case of accidents with respect to passengers.

Article 2

For the purpose of this Regulation:

- (a) **unless** otherwise **stated** terms contained 'in the Regulation are as referred to in the Warsaw Convention;
- (b) "air carrier" means an air transport undertaking with a valid operating **licence**;
- (c) "Community air carrier" **means** an air transport **undertaking** in the sense of Council Regulation (EEC) N° 240792;
- (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) "**lump** sum" means. an advance payment to the person entitled to compensation to enable him to **meet his** most urgent needs, without prejudice to the speediest settlement of **full** compensation;
- (f) "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**.
- (g) "Warsaw Convention" 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;

Article 3

1. The liability of a Community air **carrier** for damages sustained in the **event** of the death, wounding or any **other** bodily injury suffered by a passenger **shall not** be subject to any statutory or contractual limits.
2. **For any** damages up to the sum of **ECU 100.000** the Community air **carrier** shall not exclude or limit his liability by proving 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.

Article 4

1. The carrier shall without delay and in any event not later than ten days after the event during which **the** damage occurred pay to or **make available** for the **person** entitled to compensation a lump sum of up to ECU **50,000** in proportion **to the** injury sustained and in any event a sum of ECU **50,000** in case of death.
2. The lump sum may be offset against any subsequent sum to be paid in respect of the liability of the Community air carrier, but is not returnable under any circumstances.

Article 5

1. **The** requirements referred in article 3 and 4 **shall** be included in the **Community** air 'carrier's conditions of carriage
2. **Adequate information** on the requirements referred to in articles 3 and 4 shall on request be given to passengers at the Community carrier's agencies, travel agencies, check-in counters and a summary of these requirements shall be made on the ticket document.
3. Air carriers established outside **the** Community and not subject to the obligations referred to in articles 3 and 4 shall expressly and clearly inform **the** passengers thereof, at the time of purchase of the ticket at the carrier's agencies, travel agencies, or check-in counters **located** in the territory of a Member State. Air carriers shall on request provide the passengers with a form setting out their conditions. The fact that **the** limit is indicated on the ticket document does not constitute sufficient **information**.

Article 6

Once a year Member States authorities shall notify the list of third country air carriers not **subject** to 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 7

Persons entitled to compensation in the case of air accidents involving Community air carriers, may in addition to the possibilities given by article 2% of the Warsaw Convention bring action for liability before the courts of the Member State where the passenger **has** its domicile or permanent residence.

Article 8

The Commission may, after consulting the advisory Committee established according to **article 9**, decide to increase as appropriate **the** values referred to in **articles 3** and **4** if economic developments indicate **the** necessity of such a decision. Such decision **shall be** published in the *Official Journal of the European Communities*.

Article 9

1. **The** Commission **shall** be assisted by an Advisory Committee composed of the **representatives** of the Member States and chaired by the representative **of the** Commission.
2. **The** committee **shall** be consulted by the Commission On a draft of the measures to be taken on the application of Article **3**. The committee shall deliver **its** opinion within one **month**. **The** Commission shall **take** the utmost account of the opinion delivered by **the committee**. It shall **inform** the committee **of the manner in** which its opinion has been taken into **account**.
3. Furthermore, **the** Committee may be consulted by **the** Commission **on** any **other** question concerning the application of the Regulation.
- 4. **The** Committee shall **draw up** its rules of procedure.

Article 10

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**.

IMPACTASSESSMENT

IMPACT OF THE PROPOSAL ON BUSINESSES with special reference to small and medium-sized enterprises

Title of the proposal:

Council, Regulation on air carrier liability in case of **air** accidents

Document reference number:

The proposal:

The impact on business

1. Who will **be** affected by the proposal?

Which sectors of business?

Air carriers.

Which sizes of business (what is **the** concentration of **small** and medium-sized firms)?
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**¹

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

No

2. What will business have to **do** 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

¹ **"The competitiveness of the European Community's air transport industry "** Study by AVMARK Inc., prepared for the Commission, 28 February 1992.

of Member **States**. To **comply** with this Regulation, air carriers will have to renegotiate their liability insurance to allow **passenger** liability limit to be waived.

3. What **economic effects** is the proposal likely to have?

- On employment:
None
- On investment and the creation of **new** business:
None
- On the competitive position of **businesses**:
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, in particular **their** safety records 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. **Charter** air carriers will be **affected** by a lesser degree.

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

No. In fact, **current** liability insurance costs for European air carriers generally represent a small proportion-of the operating costs. They comprise about **0.1%** to 0.2% of. total operating costs, with the proportion generally becoming higher **the smaller** the airline. With a waiving of the limits increased insurance **costs** would **comprise** about 0.1% to **0.35%**² of total operating costs. Which means that **the** increment **will** be insignificant, even for the smaller carriers which **might be** more affected by such an **increase**.

Consultation:

5. List of the **organisations** which have been consulted about the proposal and outline their main views

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**.

² 'The cost implications of higher mandatory compensation limits for passengers involved in air accidents' Frere Cholmcey Bischoff, delivered on **February 1994**

All concerned organisations³ have been consulted. All of them agreed on the need to upgrade the system while keeping the essential elements of the international system currently into force. They were concerned that any improvement of the system within the EC applied to all carriers serving the Community.

³ Organisations consulted were: Bureau Européen Union des Consommateurs, International Organisation of Consumer Unions, European Community Travel Agents and Tour Operators Association, International Council of Aircraft Owner and Pilot Association, International Air Transport Association, Association of European Airlines, International Chamber of Commerce, Federation of Air Transport User Representatives in the EC, International Union of Aviation Insurers, Association Européenne des Constructeurs de Matériel Aérospatial, European Regional Airlines.

ANNEX I
LIABILITY LIMITS IN EC COUNTRIES

W/H: **limits** of Warsaw/The Hague, as converted **following** national rules (or **raised** as **indicated**)⁵

- AUSTRIA:** Liability under the contract of carriage up to AS 430,000 per person
Obligatory passenger accident **insurance** AS 550,000 per passenger
SDR 100,000 on the national carrier
- BELGIUM:** W/H applied to all services
No domestic services
SDR 100,000 on Sabena and affiliates - US \$58,000 for **charters** and air taxis
- DENMARK:** SDR 100,000 applied to **all** air services
Limits for damages other than death and injury are different **for** domestic and international air services
- FRANCE:** SDR 100,000 applied to all services
Limits other **than** death and injury are W/H on all 'air services
- FINLAND:** **W/H** applied to international services. If the **country** of destination is not party to **the W/H** the limits of **MP3** apply (SDR 100,000)
SDR 100,000 for domestic services
SDR 100,000 on **Finnair** on international services
- GERMANY:** **W/H** applied to international air services, based on law on conversion rates (e.g. Francs **Poincaré** 250,000 = **DM 53,600**) .
DM 150,000 for **Lufthansa**
DM 320,000 on domestic air services
- GREECE:** **W/H** applied to ail services
In absence of law on conversion rates, some court decisions are contradictory
National legislation specifies a limit of drs **4,000,000** applied to domestic air services (may not **be** exceeded if damages are awarded in the form of periodic payments) in the case of death or injury

⁴ Sven **Brise's** study, see footnote 5. **The** study did not examine **the situations existing in** Austria, Finland and Sweden.

⁵ For all **limits (except** Portugal on domestic **carriage), carriers can avail themselves** of the **defense** of **article 20§1** of **W C**

IRELAND: W/H applied to all services
SDR 100,000 on Aer Lingus (international air services)
Same amount for other Ireland registered operators

ITALY: W/H as converted by law into SDR (international) and Lit(domestic) applied to all services. Limits specified are:
SDR 100,000 international air services
Lit 195,000,000 domestic air services

N.B. It should be noted that foreign airlines operating to Italy are subject to the law imposing the international limit of SDR 100,000

LUXEMBOURG: W/H applied to all air services
No domestic services
SDR 100,000 on all Luxembourg registered passenger carriers

NETHERLANDS: W/H applied to all air services
SDR 100,000 (all Netherlands registered major carriers)

PORTUGAL: liability without fault (domestic services)
on all services: escudos 12,000,000 per passenger; baggage as per The Hague

SPAIN: on all services: pts 3,500,000 per passenger; baggage as per The Hague

SWEDEN SDR 100,000 on international and domestic services

UK: W/H applied to all air services, raised to 100,000 SDR.

ANNEX II
IATA INTER-CARRIER AGREEMENT ON
PASSENGER LIABILITY

WHEREAS: The Warsaw Convention system is of great **benefit to international air transportation**; and

NOTING THAT: The **Convention's** limits of liability, **which** have not been amended since **1955, are now** grossly inadequate in most **countries** and **that** international airlines have **previously acted** together to increase them to the benefit of passengers.

The undersigned carriers agree

1. To take action to **waive** the limitation of liability on recoverable compensatory **damages** in Article 22 paragraph 1 of **the** Warsaw Convention as **to claims** for **death**, wounding or other bodily injury of a **passenger within the** meaning of Article **17** of the Convention, so **that** recoverable compensatory **damages** may be **determined** and awarded by reference of **the law** of the domicile of the passenger.
2. To reserve all **available defences** pursuant to the provisions of the Convention; nevertheless, **any** carrier **may** waive any defence, **including** the waiver of any defence up to a **specified** monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of **recourse** against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of **passengers** to apply the terms of this Agreement to such **carriage**.
5. To implement the provisions of this Agreement no later than **1 November 1996** or upon receipt of requisite government approvals, whichever is later.
6. That nothing in **this** Agreement shall affect **the** rights of the passenger or the claimant otherwise available under **the** Convention.
7. That this Agreement may be signed in any number of counterparts, **all** of which shall constitute one Agreement. Any carrier may **become** a party to this Agreement **by signing** a counterpart hereof and depositing it with the Director **General** of the **International** Air Transport Association (**IATA**).
8. **That** any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of **IATA** and to the **other carriers** parties to the Agreement.

INTER-CARRIER AGREEMENT ON PASSENGER LIABILITY

IATA EXPLANATORY NOTE

The Inter-carrier Agreement is an “umbrella accord”; the precise legal rights and responsibilities of the signatory carriers **with respect** to passengers will be spelled out in the applicable Conditions of Carriage and tariff filings.

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

Such waiver by a **carrier** may be **made** to the **extent** required to **permit** the law of the domicile of the passenger to govern the **determination** and award of the **recoverable** compensatory damages under the Inter-carrier Agreement. But this is an option. Should a **carrier** wish to waive the limits of liability but not insist on **the** law of **the** domicile of **the** passenger governing the calculation of the recoverable compensatory damages, **or not be so** required by a governmental authority, it may rely on the law of the court to **which the case is** submitted.

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

ANNEX III
EUROPEAN DAMAGES LEVEL IN CASE OF MOTOR ACCIDENTS

Table 1: Victim: Man 40, married, 2 dependent children, doctor

Injury	UK	Belgium Bf 59,6	Greece Dr 25	NL Hfl 3.26	Italy Lire 2,124	France Ff 9.73	Germany Dm 2.90	Denmark Kr 11.02	Ireland Ir £ 1.08	LUX Lux f 59.55	Spain Pta 178.45	Portugal Esc 254
Instant death	311,000	325,719	195,007	224,540	464,900	307,098	331,034	81,347	461,806	351,098	168,114	229,724
Burns (A) (B) (C)	89,000 99,000 79,000	81,978	71,088 to 86,316	18,098 to 21,166	55,085 to 120,835	109,198 to 127,790	132,759 to 148,276	37,659	93,981 126,389 93,981	83,985	16,811 28,019 16,811	24,016
Paraplegia	526,500	449,457	3 10,947	498,466 to 567,485	474,710	705,576	637,931 to 672,414	110,254 to 237,296	607,407	453,830	280,191	288,937
Loss of eyesight-total blindness	572,500	531,871	363,333	466,258 (486,258)	674,795	744,853	586,207 to 603,488 (623,448)	225,499	613,889	537,871	56,038	290,465

Source: Davies Arnold Cooper: Personal injury Awards in EC Countries on an unlimited basis in respect of death or serious injury.

⁶ The figures do not include interest, whether pre- or post-judgment. NL and Germany have two sets of figures in the same schedule. The figures in brackets include estimated medical expenses not covered by the State. All the figures have been converted into f's sterling and rounded up to the nearest £. Exchange rate of 21 June 1990.

Table 2: Victim: Woman, 20, single, student doctor

Injury	UK	Belgium Bf 59,6	Greece Dr 25	NL HF1 3.26	Italy Lire 2,124	France Ff 9.73	Germany Dm 2.90	Denmark Kr. 11.02	Ireland Ir £ 1.08	LUX Lux f 59.55	Spain Pta 178.45	Portugal Esc 254
Instant death	1,250	6,292	14,912	2,147	210,122	15,416	2,069	1,089	8,102	6,795	67,246	4,528
Burns (A) (B) (C)	44,000	47,723	7,579	21,779	61,205	62,025	63,793	26,770	63,426	46,434	16,811	5,937
	54,000		to	to	to	to	to		95,833		33,623	
	34,000		8,870	24,847	83,729	81,398	79,310		63,426		16,811	
Paraple- sia				498,466			431,034	90,290			168,114	360,840
	452,250	370,569	234,723	to (1,074,985)	318,710	563,759	465,517	to 166,515	529,630	376,246	to 224,152	
Loss of eyesight- (total blind- ness)	478,250	415,323	251,404	466,258 (486,258)	517,514	537,196	472,414 to 489,655 (509,655)	157,441	421,296	423,013	67,246	325,465

Source: Davies Arnold Cooper: Personal injury Awards in EC Countries on an unlimited basis in respect of death or serious injury.

COMISSION EUROPEA
Servicio de Portavoz

EUROPA-KOMMISSIONEN
Talsmandstjenesten

EUROPAISCHE KOMMISSION
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Commission proposes improved compensation system for air passengers in case of accident

The Commission today proposed legislation to ensure improved compensation for passengers involved in aircraft accidents. The proposal is a major step in guaranteeing the consumer's right to proper protection. It also reinforces the single market in aviation by encouraging Member States not to introduce piecemeal legislation, but to provide a single, harmonised system of protection. The proposal should also trigger progress within the International Civil Aviation Organisation and facilitate the search for a multilateral solution to the wider questions of compensation in a global air market.

Proposed terms of the regulation

The Commission proposal would improve upon existing systems of compensation in various different aspects:

1. It provides for the abolition of current ceilings on awards for damages so that a passenger or his/her dependents are fully covered in case of injury or death. At present passenger liability is limited to about US\$10,000 maximum unless a passenger can show that the airline has been wilfully negligent which, obviously, is extremely difficult to prove.

2. It establishes the principle of strict liability which means that for damages up to the sum of Ecu 100,000 the carrier is obliged to accept responsibility for any accident. This would establish in EU law for the first time a practice that has been adopted by many airlines informally or, in the case of the US and Japan, formally.

3. The carrier will be obliged to make a payment within 10 days of an accident of Ecu 50,000 in case of death or a sum up to a 50,000 Ecu wiling in case of injury. This emergency payment may be offset against the sum of a final settlement but does not need to be returned. This clause is particularly important in the case of death, where the families of victims may find themselves in extreme financial difficulties.

4. The victims of an airline accident, wherever they may live in the Union, or their dependents may take the carrier to court either where they live or where they are considered to be permanent residents. This extends the provisions of the Warsaw convention which enable a passenger to bring court action either where the carrier is based, or its principal centre of operation, or in the place where the ticket was bought, or in the place listed as the final destination of the flight.

These rules will apply to all international and domestic flights operated by Community carriers. Existing rules apply only to international flights.

648.4017

PORTE-PAROLE

Background

The extent to which an air carrier may be held financially responsible for compensating passengers in case of accident has up to now been broadly governed by the 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air and other instruments, which together are generally referred to as the Warsaw System.

In essence this provides a worldwide system of standards and rules for the carriage of passengers by air and common rules in respect of liability for passengers and cargo in the event of an accident, loss of baggage and delay for international air transport while at the same time limiting costs for air carriers.

Although the Warsaw System has been helpful in establishing an international uniform law, it dates from a time when air travel was considered very high risk and it is generally agreed that the limits of liability are now too low for today's aviation market. There have been attempts to update the Warsaw framework, which has 123 signatories, but it has proved difficult to collect the requisite number of signatories necessary to ratify any changes to the Convention. Attempts to introduce higher limits outside the Warsaw System have been a little more successful but piecemeal. In recent years most European countries have introduced domestically and, in the case of their own national carriers also internationally, a higher passenger limit.

Since 1968, the US has imposed the Montreal Agreement on all carriers operating on its territory which sets passenger liability at \$75,000. Since 1992 an agreement between Japanese airlines has abolished ceilings and applied a system of strict liability. Many EU Member States have already unilaterally adopted rules that go beyond the provisions of the Warsaw Convention.

As a result of this ongoing debate an inter-carrier agreement was signed in Kuala Lumpur in October, within the context of the International Air Transport Association. This agreement, which abolishes the ceiling for damages, has already been signed by 12 airlines - four of them European carriers (AA, KLM, SAS, SWI).

Thus the Commission's proposal is the synthesis of developments at both the Union level and internationally and draws on Commission studies done in 1989 and 1992 that were at the time widely discussed and received broad support across all sectors involved in this issue. A similar debate is currently being conducted by the European Civil Aviation Conference and the International Air Transport Association. The Commission will do all it can to encourage this work in a global context.

Why must the Union act?

The Union has established a single market in airline aviation with a set of harmonised rules governing the operation of air services both domestically and internationally.

The third package of airline liberalisation requires air carriers to be insured to cover liability in case of accidents yet does not stipulate how. The Kuala Lumpur agreement and other steps taken unilaterally to increase or modify the Warsaw limit risk fragmenting the single market. There is also an obvious link between safety - an overriding goal of all EU Transport policy - and the issue of liability. The Warsaw limit was set when civil aviation was in its infancy and the financial liability of a carrier had

to be limited. Today's image of quality air service is at odds with a system whereby the passenger is still treated as taking a risk and thus only entitled to a very low level of compensation.

The Commission therefore proposes a regulation that guarantees simple and speedy procedures for both the travelling public and the air carriers by:

- a waiving of all limits
- the introduction of strict liability up to Ecu 100,000. This will protect air users even in the case of a terrorist attack where at present, the innocent passenger is uncovered. By doing so, the Community would legalise a practice which has been accepted by airlines for many years and officially formalised in some cases.
- Third country carriers will not be covered by these rules and will be requested to inform their passengers clearly and properly of this fact.
- it will be made easier logistically to bring a case to court.

Enhanced consumer protection at a reduced cost to business

Commission studies suggest that this regulation has minimal cost implications because current liability insurance costs for European airlines are generally anything from 0.1 to 0.2 per cent of total operating costs. An increase or removal of the limit will, therefore, only represent a minimal increase in insurance premiums.

Sarah Lambert 296 5659
 Christel Sanglier 295 6188

WP 4-A.

SCANDINAVIAN AIRLINES SYSTEM
 S-195 87 Stockholm, Sweden
 ☎ 46-8 797 00 00

TELEFAX

FROM:
 RISK MANAGEMENT CONTROL
 & CORPORATE INSURANCE
 Hans E Westerstad (☎ 46 8 797 12 95)

DATE: 18 January 1996
 NUMBER OF PAGES
 (including this page):

FAX NUMBER: 46 8 797 12 50

MESSAGE TO: **Lorne S Clark Esq**
General Counsel & Corporate Secretary IATA
 FAX NUMBER: I-5 1-844-6934

COPY TO:	Andres Hodel	Swissair	41-1-612 90 19
	Hans Lob	Austrian	43-1-1766 12 25
	Leslie W Mooyaart	KLM	+ 31-20-648 86 96
	Kaj Soveri	Finnair	+ 358-0-818 40 92

SUBJECT: Implementation of IATA Intercarrier Agreement on Passenger Liability - your telex 111750 on meeting planned for Miami 31JAN-01FEB96

MESSAGE:

Dear *Lorne,*

Reference is made to your above-referenced telex. With regard to your request that attendees "consider providing to the secretariat informal discussion papers relating to the IIA or its implementation" no later than Januar 23, we would wish to make the following statement:

We have supported IATA's work on the Intercarrier Agreement and we have signed it at the AGM in KUL 31OCT95. We intend to implement it with effect as from 1/11/96.

We believe the best way of gaining widest possible acceptance in the industry is to amend our Conditions of Carriage in principle as the Japanese carriers did it in 1992. A possible language could be as attached

Notwithstanding widespread recognition that current passenger liability limits are intolerably low, governments have not succeeded over decades to find common ground for a uniform amendment of the Warsaw Convention with respect to such limits. The airlines have, however, through its industry association, IATA, provided an instrument by which to radically solve the impasse: a simple straightforward waiver of the limitation of liability of the Convention. We are not prepared to jeopardise this achievement by continuing further extensive discussions relating to jurisdiction and choice of law and unconditional waiver of deience.

We look forward to seeing you in Miami.

Kind regards,

Hans E Westerstad
 Hans E Westerstad
 and on behalf of Mats Lönnkvist

ATTACHMENT

- "1. Carrier shall not invoke the limitation of liability in Art. 22 (1) of the Convention as to any claim for compensatory damages arising under Art. 17 of the Convention. Carrier shall not avail itself of any defences under Art. 20 (1) of the Convention with respect to that portion of such claim, which does not exceed 100,000 SDR.**
- 2. Except as otherwise provided in paragraph 1, Carrier reserves all defences as are available under the Convention and, with respect to third parties, also reserves all rights of recourse, contribution or indemnity in accordance with applicable law."**

WP 4-B.



TELETYPE UNIT
SWISSAIR LEGAL

Telefax

WP 4-B.

Attention: Mr. Lorne S. Cbrk Esq Swiss **Air Transport** Company Ltd.
Company: General Counsel & Corporate **Secretary** IATA Legal **Affairs**
Telefax no: **1-514/844-5934** CH-8058 Zurich-Airport
From: **Andres Hodel** **Telephone: +41-1-812.12.12.**
Date: January 22, 1996 **Direct dial: +41-1-812.40.29**
Telefax: +41-1-812.90.19
Telex:
Telegram:

Number of pages
incl. this cover sheet: 3

Subject **Intercarrier** Agreement I
Legal Meeting Miami

Dear Lorne

With reference to your telex 1 11760 I would like to submit the following:

1. **Swissair** has signed the **Intercarrier** Agreement and intends to **implement it not later than Nov. 1, 1996.**
2. We still favour an industry-wide solution.
In order to gain widest possible acceptance, implementing clause(s) in the conditions of carriage should be as simple as possible.
3. Also it would be highly desirable that they satisfy not only the DOT but also the requirements of ECAC, the **EU** and other government **initiatives so** that they can be applied worldwide.
4. The best way to achieve these objects **would** in our view **be** that carriers **follow the principles** of the **Japanese solution.**
6. In order to **accomodate** a special requirement of **many carders in Europe, the implementing clause** should **(optionally) provide that public social security institutions or perhaps even private insurances should not benefit from any waiver of liability limits and defences.**



6. I take the **liberty** of attaching a draft clause **which I think** would **satisfy** the above mentioned requirements.

7. In the past we have spent a lot of energy and time on discussions about the **differences between** the various DOT-orders and about **choice** of law and **jurisdiction**. I think these subjects have now **been** sufficiently elaborated **and** suggest that the Miami meeting **concentrates** on the development of an **implementing** clause.

Looking forward to the meeting in Miami I remain with best **regards**.

A handwritten signature in black ink, appearing to read "Andre Hodel".

Andre6 **Hodel**

ATTACHMENT

- „1. Carrier **shall not invoke the limitation of liability in Art. 22 (1)** of the Convention as to any claim for compensatory **damages arising** under Art. 17 of the Convention.
[Carrier shall not avail **itself** of any **defences** under Art. 20 (1) of the Convention **with respect to that portion** of such claim, which does not exceed 100,000 SDR.]

2. Except **as otherwise provided** In **paragraph I**, Carrier reserves all defences as are **available** under **the** Convention and, with **respect** to third **parties**, also **reserves** all rights of recourse , contribution **or indemnity in** accordance **with applicable law**.

3. [Neither the waiver of limits nor the waiver of **defence** shall be applicable in **respect** of subrogation claims **made** by public social insurance **organisations**. Such subrogated **claims shall** be subject to the limit in **Art. 22 (1)** and to the defences under Art. 20 (1) of the Convention. The carrier will **compensate the passenger** or his dependents for proven compensatory **damage** which is in **excess** of payments **received from any public social security organisation.]**“

[= optional parts of clause]

WP 4-c.

TOMPKINS, HARAKAS, ELSASSER & TOMPKINS

COURTHOUSE SQUARE
140 GRAND STREET
WHITE PLAINS, NEW YORK 10601

WP 4-c.

TELEPHONE: (914) 428-2525
FACSIMILE: (914) 428-5196

January 22, 1996

VIA FACSIMILE

Mr. Lorne S. Clark
General Counsel and Corporate Secretary
international Air Transport Association
IATA Building
2000 Peel Street
Montreal, Quebec,
Canada H3A 2R4

Re: JAL/IATA/Passenger Liability Limit
Our Ref: GNT/00544

Dear Lorne:

I enclose a summary of the rulings of the Supreme Court in the Zicherman case which relate to the scope of Articles 17 and 24 of the Convention. You may wish to include this summary in the working papers for the meeting in Miami.

These rulings, in my view, go a long way to render the US carrier/DOT position on "law of domicile" in the IATA Intercarrier Agreement totally unnecessary to their objectives. The extraterritorial application of their objectives, in my view, would not survive a legal challenge in US courts.

The bottom line is that, in my view, there is nothing standing in the way of immediate implementation of the IATA Intercarrier Agreement by the simple waiver of the limit of liability, either by (1) each carrier saying so, (2) a statement stamped on the ticket or, if required, (3) ultimate amendment of existing conditions of carriage.

I am puzzled as to why IATA has not filed the Agreement to date with the DOT.

T O M P K I N S , H A R A K A S , E L S A S S E R & T O M P K I N S

Mr. Lorne S. Clark
January 22, 1996
Page 2

Best personal regards.

Sincerely yours,



George N. Tompkins, Jr.

GNT/jam

cc: Koichi Abe, Esq.
Vice President
Legal Affairs Department
Japan Airlines Co., Ltd.

Susumi Miyoshi, Esq.
Vice President and Regional Manager
Mid-Atlantic Region
Japan Airlines Co., Ltd.

ZICHERMAN v. KOREAN AIR LINES

— U.S. —

Nos. 94-1361, 94-1477

January 16, 1996

1. The English word "damage" and the official French word "dommage" as ~~used in Article 17 of the Convention~~ are to be understood in their distinctively legal sense to mean *only legally cognizable harm*.
2. The official French word "dommage" in Article 17 means legally cognizable harm but Article 17 leaves it to adjudicating courts to specify what harm is cognizable.
3. Article 24 means that, in an action brought under Article 17, ~~the~~ law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states. Article 24 makes clear that the Convention left to domestic law the questions of who may recover and what compensatory damages are available to them.
4. The question of who is entitled to a damages award is a substantive and not a procedural matter and Article 24 deals with substantive and not procedural matters. To read Article 24 to relate to procedural matters would render Article 28(2) superfluous.
5. The questions of who may recover and what compensatory damages they may receive are unresolved by the Convention and are left to private international law — to the area of jurisprudence known as conflict of laws, dealing with the application of varying domestic laws to disputes that have an interstate or international component.
6. Choice of law is determined by the forum jurisdiction. Article 24 leaves to the forum the choice of which sovereign's domestic law to apply.
7. The Convention contains no rule of law on types of recoverable compensatory damages—
8. The Convention does not empower US courts to develop some common law rule of the types of recoverable compensatory damages in Convention cases.

WP 4-D.

From: MOWTO4J
To: CLARKL
Date: 19 January, 1996 04:04

ZCZC 033 190904JAN96

•QD YULDLXB

.MOWTO4J 190903 19 JAN 96

*All-N: MR.LORNE CLARK

GENERAL COUNSEL AND CORPORATE SECRETARY
RE: LEGAL MEETING RE IMPLIMENTATION
OF IATA INTERCARRIER AGREEMENT
MAIMI, JANUARY 31 - FEBRUARY 1, 1996

DEAR MR.CLARK

THANK YOU FOR YOUR KIND INVITATION TO THE MIAMI MEETING OF THE
LAG. REGRET TO ADVISE THAT DUE TO A NUMBER OF APPOINTMENTS OF AN
EXTREME URGENCY DURING THE PROPOSED DATES. I'LL BE UNABLE TO
PARTICIPATE IN THE MEETING. HOWEVER I'LL DO MY BEST TO PROVIDE THE
SECRETARIAT WITH OUR VIEW ON IIA'S IMPLEMENTATION IN RUSSIA BEFORE
JANUARY 23,1996.

KINDEST PERSONAL REGARDS.

VALENTINE E. LEPIKHOV, DIRECTOR LEGAL AND INSURANCE AFFAIRS.

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•



WP 4-E.

FACSIMIL TRANSMITTAL SHEET

[FAX No, (571)413-9178]

TO: **Mr. Lorne Clark - General Counsel and Corporate Secretary, IATA**

FROM: **Ernesto Vásquez Rocha - Executive Director**

DATE : January 19, 1996 PAGES : 3 (including this)

REP: **Legal Advisory Subcommittee on Liability Miami, January 31-February 1, 1996**

=====

Dear Lorne,

As requested please find enclosed the general statement of AITAL to be considered during the next legal meeting in Miami.

I would highly appreciate your confirmation that this statement will be included in the meeting documentation.

Looking forward to seeing you personally, I remain cordially yours,

E. Vásquez Rocha
Ernesto Vásquez Rocha
Executive Director

- Aces
- Aero Costa Rica
- Aerolíneas Argentinas
- Aeroméxico
- Aeroperú
- Avensa
- Avianca
- Aviateca
- Copa
- Cubana de Aviación
- Faucett
- LACSA
- Ladeco
- Lmn Chile
- LAPSA
- Línea Aérea Boliviana
- Mexicana de Aviación
- Nico
- Pluna
- Seeta
- Sem
- Taca
- Transbrasil

WP 4-E.

WP 4-F.

Information Paper 1.

LLOYD'S AVIATION LAW

Vol. 14, No. 23

December 1, 1991



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Warsaw Convention

Editor's Note: We are grateful to Sean Gates, a Partner with Beaumont and Son, London, England, for preparing the following article.

IATA Intercarrier Agreement - The Trojan Horse for a fifth jurisdiction?

AT THE RECENT Lloyds of London Press Seminar those concerned with the practical implications of the IATA Intercarrier Agreement were given further food for thought when the topic was debated by a panel including Lorne Clark, General Counsel and Corporate Secretary of IATA and Frederik Sorensen, Head of Air Transport Policy Division, DG VII European Commission.

Mr. Clark introduced the discussion by summarising the efforts directed by IATA to resolve the difficulties caused by the low limit of liability to be found in the Warsaw Convention (in both the amended and unamended forms) for passenger injury and death claims arising out of accidents during the course of international carriage by air. He recited the unsuccessful attempts of States represented at successive Convention drafting meetings over many years to devise 'universally acceptable' amendments to improve the position of passengers and their heirs, although diplomatically forbearing from pointing out that the United States was the rock upon which those efforts foundered. Mr. Clark was proud, in the light of those failures, that within a period of six months carriers had been able to formulate an agreement which, if implemented, would achieve that which had eluded Governments for so many years.

Mr. Clark accepted that the drafting of the Intercarrier Agreement had necessarily been accelerated, perhaps more than was desirable, by the need for a speedy resolution to the problem but that nevertheless the document which gave carriers a number of options to pursue could form the framework of a solution to the problem of the limits

AVIATION LAW

without losing the benefits of the Convention. He did not recite them, but the remaining benefits of the Convention for carriers after the removal of limits and with the addition of the domicile provision (of which more below) can only be the prevention of forum shopping and particularly of plaintiffs taking non U.S. cases to that country's courts.

Attentive readers of the Agreement would agree with Mr. Clark as to the quality of its draftsmanship and wonder at what, in my view, is the somewhat misleading nature of the explanatory note attached by IATA. This states that carriers have an option of offering plaintiffs the right to have principles governing their claim and the amount of any compensation pursuant to such principles decided in accordance with the laws of the country of their domicile, as determined by the court having jurisdiction under the Convention.

It needs hardly be remarked that the cost of educating a court in Country A (the Convention country) about the laws governing compensation in Country B (the domicile country) will be substantial. Each party will need lawyers from both countries, and the Court will probably appoint its own expert legal adviser from Country B. Given the strict liability imposed in the Convention as amended by the Inter-carrier Agreement, the carrier (or more particularly its insurers) will find itself sustaining an army of legal expertise.

To return to the question of whether the Agreement gives an option to carriers in the matter of domicile, it must be observed that the Agreement is "to take action" to waive the limit of liability on damages for death, wounding or bodily injury of passengers "so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger?

The explanatory note states "such waiver by a carrier may be made to the extent required to permit the law of the domicile of the passenger to govern the determination and award of the recoverable compensatory damages under the Inter-carrier Agreement. **But this is an option** (emphasis added). **Should a carrier wish to waive the limits of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a Governmental Authority, it may rely on the law of the court to which the case is submitted**".

The terms of the Agreement are clear. They are that the carriers will "take action to" waive the limits so that damages may be determined by refer-

ence to the law of domicile. The terms of the explanatory note are equally clear. It states this waiver is optional. It was suggested that the word "may" (italicised above) achieves this purpose. However the words "so that" (also italicised) suggest an imperative rather than an alternative, the whole phrase thus meaning "in order that damages can be determined..." rather than "so that damages can at the carrier's express option be determined. . . ."

Leaving aside other less significant drafting quiddities, one might usefully speculate how a document of this importance could include the word domicile in any event. Domicile is a concept that has probably given rise to as much litigation as any other in the English language. In English law, one has a domicile of birth which may be changed to a domicile of choice. Establishing a domicile of choice involves principally proof of the intention of the person concerned. In the case of a deceased passenger, this proof will be found, *inter alia*, in the testimony of his closest relatives. Their evidence in the context of a dispute arising out of the Inter-carrier Agreement can be expected not to be impartial in view of the benefits flowing to them from establishment of a domicile of choice in a country with high levels of damages.

In the letter enclosing the explanatory note attached to the Agreement from IATA, Lorne Clark explains "with respect to the law of the domicile, domicile has, of course, the same meaning in the Agreement as it does in Article 28 of the Warsaw Convention". However in the English (as opposed to U.S.) version of the Convention (adopted by the majority of Commonwealth countries including IATA's Canadian domicile!) Article 28 does not refer to domicile. Instead, and probably because of the difficulties that could be expected to arise from domicile reference-is-made to the principal place of residence which is less amenable to abuse. Further, personal domicile is not a factor in Article 28 and corporate domicile (as used in Article 28) and personal domicile, as used in the Inter-carrier Agreement option, are determined by the application of different standards.

On its own, domicile can be seen to give rise to uncertainty but other developments adumbrated at the Seminar make the expression appear also as the precursor of a more expensive possibility. Concern was expressed at the signing of the inter-carrier Agreement in Malaysia by some carriers that certain U.S. carriers were working with the U.S. Department of Transportation on an amendment of their tariff conditions incorporating the spirit of the Inter-

AVIATION LAW

carrier Agreement with the additional provision that U.S. passengers ticketed on a U.S. carrier injured or killed anywhere in the world will be entitled to sue that U.S. carrier in the United States. In itself, that is not a bold departure from the provisions of the Convention which would in any event entitle passengers to sue U.S. carriers in the U.S. Courts with jurisdiction over the carrier's head office (domicile) under Article 28. For U.S. carriers, necessarily that would include a U.S. jurisdiction.

The concern expressed in Kuala Lumpur was that the Department of Transportation would impose on foreign carriers a similar provision entitling U.S. domiciled passengers to sue in the U.S. if those carriers wish to continue to operate into the United States. This concern appeared to be confirmed at the Seminar. This would add a **fifth jurisdiction** to the Convention's four existing choices. Seen in the light of the imposition of a fifth jurisdiction, the IATA Intercarrier Agreement's incorporation of a domicile provision can be seen not as a destination but as a stepping stone. Perhaps instead of assault, one might describe it as assault with a deadly weapon! The last provision of any benefit to the carrier in the Convention would, with the imposition of this provision, be lost.

There is, of course a history of unilateral **treaty-breaking** action by the United States in the **form** of the Montreal Agreement **CAB148900**. That provision was forced on **carriers** with a threat that failure to accede would preclude those carriers from operating into the United States. This is, of course, reminiscent of the threats alleged to have been made by the DOT in relation to the formation of the Intercarrier Agreement that the U.S. would denounce the Convention system if carriers did not fall into line originally with the Supplementary Compensation. **Plan** and now with the even more generous Intercarrier Agreement.

Of course this threat is only reported by third parties. It is a **rumour**. It nevertheless seems to have been sufficient to persuade carriers into unilaterally imposing upon themselves strict liability without limit. An industry willing to mutilate itself in this way must seem to the bureaucrats regulating their affairs unlikely to resist further impositions for the ostensible benefit of consumers and the greater **glory** of the bureaucrats!

At the seminar Mr. Sorensen indicated that he **was** proposing similar steps on behalf of the EC, at least to the extent of obliging European carriers to offer European passengers a fifth jurisdiction. With these **two** examples, it seems unlikely that other countries will resist the further flaying of the Airline

industry by similar or even more onerous provisions. Perhaps all carriers should simply **agree that any accident** any where should be regulated by the courts of Harris County, Texas!

Little surprise should be expressed at the apparent willingness of the EC to align itself with the treaty-busting tendency of the United States. The abolition of the limit will **have** budgetary implications, particularly in civil **law** members of the community, for social and health insurers. The obligation on these insurers is to provide cradle to grave support for members; and to subrogate against tortfeasors whose actions have led to such dependency. In the past, **subrogation** claims have been resisted by reliance on the limits. Informal **advice** from lawyers in various of these countries suggest subrogation claims will not be easily defended by the inclusion of the "no subrogation"* clause in the Agreement. One observer at least has commented that the **capitalised** value of these subrogated claims could dwarf the average U.S. or Japanese award.

The references to strict liability in this text are, in my opinion, advised. The explanatory note to the Intercarrier Agreement refers to defences available after it's adoption. This is a perpetuation of the myth that Article 20 defences in the Convention have real force and effect. Article 20 provides that the carrier can avoid liability if it can prove that it took all necessary measures to avoid the damage or that it was impossible for it to take such measures. If the defence so called provided by this Article had any value, one would have expected it to have been the subject of frequent litigation in the 65 year life of the Convention. Apart from a couple of probably unreliable decisions, that is not the **case** and there should be no illusion amongst those executing the Agreement that there is a defence. to **be** found in this Article other than in the most extreme and unlikely of circumstances.

Fortunately although a number of carriers have already executed the document, it has yet to come into force. There is still time for carriers to ponder the implications of the Agreement and the likely grafting on it of **fifth** jurisdiction provisions around the world. No persuasive reason has been advanced and there can be no justifiable. reason for **carriers** to impose upon themselves strict liability in jurisdictions where strict liability is not the inevitable consequence of operating **Airlines**. **There is no moral or other justification** for retaining a limit of liability in respect of death or personal injury of passengers **but every** reason to go as far as but no further than U.S. domestic carriers by accepting liability for negligence and retaining

AVIATION LAW

the right to defend conduct which is not negligent. To take such a stance would send a clear message to Governments seeking to impose a fifth jurisdiction that carriers can and will oppose any such attempt. Easy recourse may be had to the Convention for that purpose and Governments would bilk their treaty obligations at their peril. Failure to take some stand must inevitably increase carriers exposure far beyond that discussed in the context of the Agreement alone and if liability exposure increases, eventually, at some time, so must premiums. If, on the other hand, the Intercarrier Agreement replete with a fifth jurisdiction clause is adopted, then let it be clearly understood that it is my intention permanently to reside in Harris County, Texas! //

Information Paper 2.

Info. Paper 2.

EU TAKES TOUGH STANCE ON AIRLINE LIABILITY

(Wall Street Journal, 21 December, 1995)

BRUSSELS - In a proposal that changes the face of the world-wide debate over airline liability, the European Commission called for European carriers to be held strictly liable for damages up to 100,000 European currency units (\$128,000) per passenger for accidents on both international and domestic flights.

In addition, existing national limits on liability would be scrapped, so even higher damage awards could be assessed if negligence is proved. Also, carriers would have to make an initial payment within 10 days of 50,000 ECUs to the relatives of people killed in air crashes, on grounds that they often face acute financial difficulties.

The proposal, which must be approved by EU governments, was enthusiastically welcomed by consumer advocates, but it was bitterly criticized by the **24-member** Association of European Airlines. The AEA said that the proposed rule on strict liability - or liability without any showing of fault on the carrier's part - could open the door to floods of unwarranted damage claims.

'A Bit Sfrange'

"If an aircraft enters turbulence, and a passenger gets hurt because he didn't fasten his **seatbelt** - even though the 'fasten seatbelt' sign is on - the airline would have to pay" under strict liability, said Karl-Heinz Neumeister, secretary general of the AEA. "That's a bit strange compared to the way other things work in life, like liability with a car."

But the commission insisted that strict liability would help EU consumers: "If you're dealing with something like a terrorist attack," says an EU official, "the average family can't afford the cost of a 10-year trial to prove whether the airline took the necessary precautions."

The new EU plan stems from ongoing global efforts to reform the antiquated 1929 Warsaw Convention on air liability. It goes well beyond, however, voluntary rules adopted in October by the International Air Transport Association. Those rules would abolish liability limits if negligence is shown, but allow for strict liability only if a carrier voluntarily chooses to submit itself to such a standard.

Tepid Approach

The EU initiative largely mirrors Japanese rules, and it reflects, say aviation experts, the commission's dissatisfaction with what it sees as a tepid approach by the carriers themselves under the **IATA** framework.

"The EU is seeking to impose a much higher level of consumer protection than what the airlines will accept themselves," said Peter Martin, an aviation lawyer with the firm Frere Cholmely Bischoff in London. **While** the **IATA reforms** would help bring the international law up to date, he said, it's clear that EU Transport Commissioner Neil Kinnock "has stolen **IATA's** thunder" with his bolder plan.

Adoption of strict liability by the EU, said Mr. Martin, would put pressure on other carriers serving Europe, including those from the U.S., to also adopt such a rule on their international flights. 'While it would be a pretty unattractive proposition for EU airlines to campaign on the fact that they offered higher payouts' for accidents, he said, 'the word is sure to get around.'

A spokesman for the Geneva-based **IATA** said it was too early to say whether Mr. Kinnock's proposal would be a "help or a hindrance" to the group's proposed **inter-carrier** agreement, which has so far been signed by 12 airlines - including four carriers based in the EU.

Mr. Kinnock said that it was necessary to have uniform rules under the **EU's** single market, rather than a "fragmented" system that a voluntary approach might invite. But the European airline trade group, complaining that it wasn't consulted by the commission, said it was concerned that the EU approach might delay **IATA's** reform efforts by creating "competition among the regulators.,,,"

There was also a dispute between Mr. Kinnock and the airline trade group over the measure's impact on airline liability insurance. The commission said the new rules would cause only a 'minimal increase' in premium rates, a claim dismissed as a "bit of rubbish" by the **AEA's** Mr. Neumeister, who predicted huge jumps in insurance costs, especially for small carriers.

In addition to new rules on liability, the EU plan would allow EU citizens to bring a lawsuit wherever they live, rather than, as under the Warsaw Convention, only where the carrier is based, the place where the ticket was bought or the flight's final destination.

Outdated limits on liability also apply to other transport sectors, such as shipping and rail transport. For his part, Mr. Martin, the aviation lawyer, urged the commission to also bring its air liability crusade down to the ground in future proposals.

Information Paper 3.

--- S.Ct. ---

(Cite as: 1996 WL 12619 (U.S.))

MARJORIE ZICHERMAN, etc., et al.,
PETITIONERS 94-1361
 v.
KOREAN AIR LINES CO., LTD.
KOREAN AIR LINES CO., PETITIONER
94-1477
 v.
MARJORIE ZICHERMAN, etc., et al.

Nos. 94-1361 and 94-1477

SUPREME COURT OF THE UNITED STATES

Argued November 7, 1995

Decided January 16, 1996 [FN*]

*FN**. Together with No. 94-1477, Korean Air Lines Co., Ltd. v. Zicherman, Individually and as Executrix of the Estate of Kole, et al., also on certiorari to the same court.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Syllabus

● In a suit brought under Article 17 of the Warsaw Convention governing international air transportation, petitioners Zicherman and Mahalek were awarded loss-of-society damages for the death of their mutual relative who was a passenger on respondent Korean Air Lines' Flight KE007 when it was shot down over the Sea of Japan. The Second Circuit set aside the award, holding that general maritime law supplied the substantive compensatory damages law to be applied in an action under the Warsaw Convention and that, under such law, a plaintiff can recover for loss of society only if he was the decedent's dependent at the time of death. The court concluded that Mahalek had not established dependent status and remanded for the District Court to determine whether Zicherman was a dependent of the decedent.

Held: In a suit brought under Article 17, a plaintiff may not recover loss-of-society damages for the death of a relative in a plane

crash on the high seas, within the meaning of the Death on the High Seas Act (DOHSA). Pp. 4-15.

(a) Article 17 permits compensation only for legally cognizable harm, but leaves the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules. That the Convention does not itself resolve the issue of what harm is compensable is shown by the text of Articles 17 and 24, the Convention's negotiating and drafting history, the contracting states' post-ratification understanding of the Convention, and the virtually unanimous view of expert commentators. Pp. 4-12.

(b) Having concluded that compensable harm is to be determined by domestic law, the next logical question would be that of which sovereign's domestic law. In this case, the Court need not engage in this inquiry, because the parties have agreed that if the issue of compensable harm is unresolved by the Warsaw Convention, it is governed in the present case by the law of the United States. The final unresolved question is then which particular United States law applies. The death that occurred here falls within the literal terms of DOHSA § 761, and it is well established that those terms apply to airplane crashes. Since recovery in a § 761 suit is limited to pecuniary damages, § 762, petitioners cannot recover for loss of society under DOHSA. Moreover, where DOHSA applies, neither state law nor general maritime law can provide a basis for recovery of loss-of-society damages. Because petitioners are not entitled to recover loss-of-society damages under DOHSA, this court need not reach the question whether, under general maritime law, dependency is a prerequisite for loss-of-society damages. Pp. 12-15.

43 F. 3d 18, affirmed in part and reversed in part.

SCALIA, J., delivered the opinion for a unanimous Court.



JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether, in a suit brought under Article 17 of the Warsaw Convention governing international air transportation, Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T-S. No- 876 (1934) (reprinted in note following 49 US-C. App. § 1502 (1988 cd-)), a plaintiff may recover damages for loss of society resulting from the death of 8 relative in a plane crash on the high seas.

I

● Z On September 1, 1983, Korean Air Lines Flight KE007, en route from Anchorage, Alaska, to Seoul, South Korea, strayed into air space of the soviet Union and was shot down over the Sea of Japan. All 269 persons oa board were killed, including Muriel Kale. Petitioners Marjorie Zicherman and Muriel Mahalek, K a l e ' s sister and mother, respectively, sued respondent Korean Air Lines Co., Ltd. (KAL) in the United States District Court for the Southern District of New York. Petitioners' final amended complaint contained three counts, entitled, respectively, "Warsaw Convention," "Death on the High Seas Act," and "Conscious Pain and Suffering." At issue here is only the Warsaw Convention count, in which petitioners sought "judgment against KAL for their pecuniary damages, for their grief and mental anguish, for the loss of the decedent's society and companionship, and for the decedent's conscious pain and suffering." App. 29.

Along with other federal-court actions arising out of the KAL crash, petitioners' cam was transferred to the United States District Court fur the District of Columbia for consolidated proceedings on common issues of liability. There, a jury found that the destruction of Flight KE007 was proximately caused by "willful misconduct" of the flight crew, thus lifting the Warsaw Convention's \$75,000 cap en damages. See Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases

in Liability Limitations of Warsaw Convention and Hague Protocol, reprinted in note following 49 U.S.C. App. § 1502 (1988 ed.). The jury awarded \$50 million in punitive damages against KAL. The Court of Appeals for the District of Columbia Circuit upheld the finding of "willful misconduct," but vacated the punitive damages award, holding that the Warsaw Convention does not permit the recovery of punitive damages. In re Korean Air Lines Disaster of Sept. 1, 1983, 932 F. 2d 1475, 1479-1481, 1484-1490 (CA DC), cert. denied, 502 U.S. 994 (1991). The individual cases were then remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts for trial of compensatory damage issues.

At petitioners' damages trial in the Southern District of New York, KAL moved for determination that the Death on the High Seas Act (DOHSA), 41 Stat. 537 (1988 ed.), 46 U.S.C. App. § 761 et seq., prescribed the proper claimants and the recoverable damages, and that it did not permit damages for loss of society. The District Court denied the motion and held, inter alia, that petitioners could recover for loss of "love, affec- tion, and companionship." In re Korean Air Lines Disaster of Sept. 1, 1983, 807 F. Supp. 1073, 1086-1088 (SDNY 1992). The jury awarded loss-of-society damages in the amount of \$70,000 to Zicherman and \$28,000 to Mahalek. [FN1]

FN1. The jury also awarded petitioners \$161,000 in survivors' grief, \$16,000 to Zicherman for loss of support and inheritance and \$100,000 to Zicherman for the decedent's pain and suffering. The Second Circuit has set aside the award of grief damages and has remanded for further proceedings on the award for loss of support and inheritance. None of these awards is at issue here.

*3 The Court of Appeals for the Second Circuit set aside this award. Applying its prior decisions in In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988, 928 F. 2d 1267, 1278-1279(CA2) (Lockerbie I), cert. denied sub nom. Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991), and In re Air Disaster at Lockerbie, Scotland, on Dec.



(Cite as: 1996 WL 12619, ● 3 (U.S.))

21, 1988, 37 F. 3d 804 (CA2 1994) (*Lockerbie II*), cert. denied sub nom. *Pan American World Airways, Inc. v. Pagnucco*, 513 U.S. ___ (1995), it held that general maritime law supplied the substantive law of compensatory damages to be applied in an action under the Warsaw Convention. 43 F. 3d 18, 21-22 (1994). Then, following its decision in *Lockerbie II*, it held that, under general maritime law, a plaintiff is entitled to recover loss-of-society damages, but only if he was a dependent of the decedent at the time of death. 43 F. 3d, at 22. The court concluded that as a matter of law Mahalek had not established that status, and therefore vacated her award; it remanded to the District Court for determination of whether Zicherman was a dependent of Kole. *Ibid.*

In their petition for certiorari, petitioners contended that under general maritime law dependency is not a requirement for recovering loss-of-society damages. In a cross-petition, KAL contended that the Warsaw Convention does not allow loss-of-society damages in this case, regardless of dependency. We granted certiorari.

II

Article 17 of the Warsaw Convention, as set forth in the official American translation of the governing French text, provides as follows: "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of ● embarking or disembarking." 49 Stat. 3018 (emphasis added). The first and principal question before us is whether loss of society of a relative is made recoverable by this provision.

It is obvious that the English word "damage" or "harm"-or in the official text of the Convention, the French word "dommage" [FN2]-can be applied to an extremely wide range of phenomena, from the medical expenses incurred as a result of Kole's injuries (for which every legal system would provide

tort compensation), to the mental distress of some stranger who reads about Kole's death in the paper (for which no legal system would provide tort compensation). It cannot seriously be maintained that Article 17 uses the term in this broadest sense, thus exploding tort liability beyond what any legal system in the world allows, to the farthest reaches of what could be denominated "harm." We therefore reject petitioners' initial proposal that we simply look to English dictionary definitions of "damage" and apply that term's "plain meaning." Brief for Petitioners 7-9.

FN2. The French text of Article 17 reads: "Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." 49 Stat. 3005.

*4 There are only two thinkable alternatives to that. First, what petitioners ultimately suggest: that "dommage" means what French law, in 1929, recognized as legally cognizable harm, which petitioners assert included not only "dommage matériel" (pecuniary harm of various sorts) but also "dommage moral" (non-pecuniary harm of various sorts, including loss of society). In support of that approach, petitioners point out that in a prior case involving Article 17 we were guided by French legal usage: *Air France v. Saks*, 470 U.S. 392 (1985) (interpreting the term "accident"). See also *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) (interpreting the Article 17 term "lésion corporelle"). What is at issue here, however, is not simply whether we will be guided by French legal usage *vel non*. Because, as earlier discussed, the dictionary meaning of the term "dommage" embraces harms that no legal system would compensate, it must be acknowledged that the term is to be understood in its distinctively legal sense-that is, to mean only legally cognizable harm. The near question, and the critical one here, is whether the word "dommage" establishes as the content of the concept "legally cognizable harm" what French law accepted as such in 1929. No case



of ours provides precedent for the adoption of French law in such detail. In *Floyd*, we looked to French law to determine whether "lesion corporelle " indeed meant (as it had been translated) "bodily injury"-not to determine the subsequent question (equivocal to the question at issue here) whether "bodily injury" encompassed psychic injury. See 499 U. S., at 536-540. And in *Saks*, once we had determined that in French legal terminology the word "accident" referred to an unforeseen event, we did not further inquire whether French courts would consider the event at issue in the case unforeseen; we made that judgment for ourselves. See 470 U. S., at 405-407.

It is particularly implausible that "the shared expectations of the contracting parties," *id.*, at 399, were that their mere use of the French language would effect adoption of the precise rule applied in France as to what constitutes legally cognizable harm. Those involved in the negotiation and adoption of the Convention could not have been ignorant of the fact that the law on this point varies widely from jurisdiction to jurisdiction, and even from statute to statute within a single jurisdiction. Just as we found it "unlikely" in *Floyd* that Convention signatories would have understood the general term "lesion corporelle " to confer a cause of action available under French law but unrecognized in many other nations, see 499 U. S., at 540, so also in the present case we find it unlikely that they would have understood Article 17's use of the general term "dommage " to require compensation for elements of harm recognized in France but unrecognized elsewhere, or to forbid compensation for elements of harm unrecognized in France but recognized elsewhere. Many signatory nations, including Czechoslovakia, Denmark, Germany, the Netherlands, the Soviet Union, and Sweden did not, even many years after the Warsaw Convention, recognize a cause of action for non-pecuniary harm resulting from wrongful death, see 11 *International Encyclopedia of Comparative Law: Torts*, ch. 9, pp. 15-18 (A. Tunc ed. 1972); *Floyd*, *supra*, at 544-545, a 10.

*5 The other alternative, and the only one we think realistic, is to believe that "dommage " means (as it does in French legal usage) "legally cognizable harm," but that Article 17 leaves it to adjudicating courts to specify what harm is cognizable. That is not an unusual disposition. Even within our domestic law, many statutes that provide generally for "damages," or for reimbursement of "injury," leave it to the courts to decide what sorts of harms are compensable. See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Jones Act, 46 U.S.C. App. § 688 (1988 ed.), which provides "action for damages" to "[a]ny seaman who shall suffer personal injury," permits compensation only for pecuniary loss); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913) (former Employers' Liability Act of Apr. 22, 1908, which makes employer "liable in damages ... for ... injury or death," permits compensation only for pecuniary loss); *Brown Mfg. v. Associated Distributors, Inc.*, 923 F. 2d 1232, 1235-1236 (CA6 1991) (Lanham Trade-Mark Act, 15 U.S.C. § 1117(a), which provides for recovery of "any damages sustained," permits compensation for future lost profits); *Phelps v. White*, 645 So. 2d 698, 703 (La.Ct.App. 8d Cir.1994) (specifying elements of compensation allowable under La. Civ. Code Ann., 2315.2 (West Supp. 1995), providing for recovery of "damages ... sustained as a result" of wrongful death); *Department of Ed. v. Blevins*, 707 S.W. 2d 782, 783 (Ky.1986) (Kentucky Rev. Stat. Ann. § 411.130 (Michie 1992), which provides that "damages may be recovered" for wrongful death, does not permit compensation for emotional distress).

That this is the proper interpretation is confirmed by another provision of the Convention. Article 17 is expressly limited by Article 24, which as translated provides:

"(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

"(2) In the cases covered by article 17 the provisions of the preceding paragraph shall

(Cite as: 1996 WL 13819, *5 (U.S.))

also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020 (emphasis added). (FN3) The most natural reading of this Article is that, in an action brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit and what they may be compensated for. Those questions are to be answered by the domestic law selected by the courts of the contracting states. Petitioners contend that, because Article 24 refers to the parties' "respective rights," this provision defers to domestic law only on the "procedural" issues of who has standing to sue and how the proceeds of a damages award under Article 17 should be divided among eligible claimants. It does not seem to us that the question of who is entitled to a damages award is procedural; and in any event limiting Article 24 to procedural issues would render it superfluous, since Article 28(2) provides that "[q]uestions of procedure shall be governed by the law of the court to which the case is submitted." 49 Stat. 3021. More importantly, petitioners' reading of Article 24(2) would produce a strange regime in which 1929 French law (embodied in the Convention) determines what harms arising out of international air accidents must be indemnified, while current domestic law determines who is entitled to the indemnity and how it is to be divided among claimants. When presented with an equally plausible reading of Article 24 that leads to a more comprehensible result—that the Convention left to domestic law the questions of who may recover and what compensatory damages are available to them—we decline to embrace a reading that would produce the melange of French and domestic law proposed by petitioners.

FN3. The governing French text of Article 24 provides: "(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, a quelque titre que ce soit, ne peut être exercée que dans la conditions et limites prévues par la présente Convention. (2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs."

49 Stat. 3006.

*6 Because a treaty ratified by the United States is not only the law of this land, see Const., Art. II, § 2, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux préparatoires) and the post-ratification understanding of the contracting parties. Both of these sources confirm that the compensable injury is to be determined by domestic law. In the drafting history, the only statements we know of that directly discuss the point were made by the Comité International Technique d'Experts Juridiques Aériens (CITEJA), which did the preparatory work for the two Conferences (1925 in Paris, 1929 in Warsaw) that produced the Warsaw Convention. In its report of May 15, 1928, the Committee stated:

"It was asked whether it would not be possible, in this respect, to determine the category of damages subject to reparations.

"Although this question seemed very interesting, it was not possible to find a satisfactory solution before knowing exactly the legislation of the various countries. It was understood that the question would be studied later on, when the issue of knowing which are the persons, who according to the various national laws, have the right to take action against the carrier, will have been elucidated." Report of the Third Session by Henry de Vos, CITEJA Reporter (May 15, 1928), reprinted in

International Technical Committee of Legal Experts on Air Questions 106 (May 1928). To the same effect is the following passage from the CITEJA Report accompanying the 1929 draft:

"The question was asked of knowing if one could determine who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation. It was not possible to find a satisfactory solution to this double problem, and the CITEJA esteemed that this question

o f private international law should be regulated independantly [sic] from the present Convention." Report of the Third Session of CITEJA by Henry do Vos (Sept. 25, 1928), reprinted in second International Conference on Private Aeronautical Law Minutes, Warsaw 1929, 255 (R. Horner & D. Legrez transl. 1975).

Both these statements make clear that the questions of who may recover, and what compensatory damages they may receive, were regarded as intertwined; and that both were unresolved by the Convention and left to "private international law"-i.e., to the area of jurisprudence we call "conflict of laws," dealing with the application of varying domestic laws to disputes that have an interstate or international component.

We are unpersuaded by petitioners' reliance on the comment of French delegate Georges Ripert, asserting, as one basis for rejecting application of domestic law to the issue of carriers' vicarious liability, that it would be "the first time that application of national law is required." *Id.*, at 66. Reply Brief for Petitioners 2-3. Not only does this remark not have the authority of submissions by the drafting committee, but it is a generalization rather than a statement focused specifically upon the issue here: what law governs the "category of damages subject to reparations." And the generalization is demonstrably wrong to boot, since it is incontrovertible that Article 24 of the Convention requires the application of national law to some issues.

*7 The post-ratification conduct of the contracting parties displays the same understanding that the damages recoverable-so long as they consist of compensation for harm incurred ("dommage survenu")-are to be determined by domestic law. Some countries, including England, Germany and the Netherlands, have adopted domestic legislation to govern the types of damages recoverable in a Convention case. See P. Haanappel, *The Right to Sue in Death Cases under the Warsaw Convention*, 6 *Air Law* 66, 72, 74 (1981); E. Gjemulla, R. Schmid & P. Ehlers, *Warsaw Convention* 39, n. 5 (1992);

German Law Concerning Air Navigation (Luft VG) of January 10, 1959, Arts. 35-36, 38, reprinted in 1 *Senate Committee on Commerce, Air Laws and Treaties of the World*, 89th Cong., 1st Sess., 766-768 (Comm. Print 1965); R. Mankiewicz, *The Liability Regime of the International Air Carrier* ¶ 187, pp. 160-161 (1981). Canada has adopted legislation setting forth who may bring suit under Article 24(2), but has left the question of what types of damages are recoverable to provincial law. Haanappel, *supra*, at 70-71. The Court of Appeals of Quebec has rejected the argument that Article 17 permits damages unrecoverable under domestic Quebec law. *Dame Surprenant v. Air Canada*, [1973] C.A. 107, 117-118, 126-127 (Ct.App.Quebec) (opinion of Deschênes, J.). But see *Preston v. Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454, 461-462 (granting damages under Convention, but without considering Article 24). Finally, the expert commentators are virtually unanimous that the type of harm compensable is to be determined by domestic law. See, e.g., H. Drion, *Limitation of Liabilities in International Air Law* ¶ 111, pp. 125-126 (1954); Gjemulla, Schmid & Ehlers, *supra*, at 33; D. Goedhuis, *National Air Legislations and the Warsaw Convention* 269 (1937); Mankiewicz, *supra*, at ¶ 187, 160-161; G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* 125 (1977); see also Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 *Air L. Rev.* 25, 56-57 (1936).

III

Having concluded that compensable harm is to be determined by domestic law, the next question to which we would logically turn is that of which sovereign's domestic law. That is the "private international law" issue alluded to in the last-quoted excerpt from the CITEJA Report. Choice of law is, of course, determined by the forum jurisdiction, see E. Scoles & P. Hay, *Conflict of Laws* § 3.56 (1982), and would normally be a question confronting us here. We have been spared that inquiry, however, because both parties agree that if the issue of compensable harm is

(as we have determined) unresolved by the Convention itself, it is governed in the present case by the law of the United States.

That leaves a final question unresolved: which particular law of the United States provides the governing rule? The Second Circuit, moped by the need to "maintain a uniform law under the Warsaw Convention," held that general maritime law governs causes of action under the Convention, whether the accident out of which they arise occurs on land or on the high seas. 43 F. 3d, at 2142. We think not. As we have discussed, the Convention itself contains no rule of law governing the present question; nor does it empower us to develop some common-law rule under cover of general admiralty law or otherwise that will supersede the normal federal disposition. Congress may choose to enact special provisions applicable to Warsaw-Convention cases, as some countries have done. See *supra*, at 11. Absent such legislation, however, Articles 17 and 24(2) provide nothing more than a pass-through, authorizing us to apply the law that would govern in absence of the Warsaw Convention. There is little doubt what that law is in this case.

• 8 Section 761 of the DOHSA provides: "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued." 46 U.S.C. App. § 761 (1988 ed.). The death that occurred here falls within the literal terms of this provision, and it is well established that those literal terms apply to airplane crashes. See *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 263-264 (1972). Section 762 of DOHSA provides that the recovery in a suit under § 761 "shall be a

fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought." 46 U.S.C. App. § 762. Thus, petitioners cannot recover loss-of-society damages under DOHSA. Moreover, where DOHSA applies, neither state law, see *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232-233 (1986) nor general maritime law, see *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978), can provide a basis for recovery of loss-of-society damages. [FN4]

FN4. We need not consider whether § 761 of DOHSA calls into question the District Court's determination that the decedent's mother is a proper party to this suit, or its grant of a jury trial, see *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 371, n. 28 (1959), and whether § 762 contradicts the District Court's allowance of pain and suffering damages, see *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 215, n. 1 (1986). KAL challenged none of these rulings in its petition for certiorari.

Petitioners argue that DOHSA should not apply to this cause of action because of the concern expressed by the Second Circuit: that "a uniform law should govern Warsaw Convention cases." 43 F. 3d, at 21. They urge that, if we must look to domestic law, we should craft a federal rule of damages that will be applicable in all suits brought under the Convention. Undoubtedly it was a primary function of the Warsaw Convention to foster uniformity in the law of international air travel, see *Floyd*, 499 U.S., at 552, but as our discussion above has made clear, this is not an area in which the imposition of uniformity was found feasible. See *supra*, at 9-10. The Convention neither adopted any uniform rule of its own nor authorized national courts to pursue uniformity in derogation of otherwise applicable law. Petitioners argue, in effect, that the Convention contains an implicit authorization for national courts to create uniformity between over-land and over-sea accidents governed by their respective domestic laws, even though it leaves the vast discrepancies among the various domestic laws untouched. That is most unlikely.

*9 Finally, petitioners contend that DOHSA cannot supply the substantive law of damages, because this would result in an unintended "double cap." They argue that the Warsaw Convention's \$75,000 per passenger limit on liability (except in cases of willful misconduct), when combined with a DOHSA rule prohibiting compensation for non-pecuniary harm, will not sufficiently deter willful misconduct. We are unpersuaded. The Convention unquestionably envisions the application of domestic law; it is the function of Congress, and not of this Court, to decide that domestic law, alone or in combination with the Convention, provides inadequate deterrence.

* * *

We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules. Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society. We therefore need not reach the question whether, under general maritime law, dependency is a prerequisite for loss-of-society damages.

Accordingly, that portion of the Second Circuit judgment permitting Zicherman to recover loss-of-society damages if she can establish her dependency on the decedent is reversed, and that portion of the judgment vacating the award of loss-of-society damages to Mahalek is affirmed.

It is so ordered.

END OF DOCUMENT

Information Paper 4.

CLARK Lorne

From: 7-I-Y CONFIRM
Subject: MLADLKM DL34 Briefing re Air Malta Group
Date: 17 January, 1996 18:09

- MIADLKM GVADLXB
- .YULDLXB 172209
- DL34

**GC-027 ATTN: DR CHRISTOPHER SPITERI
AVIATION EUROPE, DEC 14 VOL 5 ISSUE 48, PAGE 3 REPORTS THAT
AIR MALTA GROUP ADDS INSURANCE UNIT. IN CASE YOU DO NOT
HAVE IT, IT READS**

**“THE AIR MALTA GROUP HAS LAUNCHED OSPREY
INSURANCE BROKERS CO. LTD., OFFERING OF BROKERAGE
SERVICES INCLUDING RISK MANAGEMENT, CLAIMS HANDLING
AND CREATION OF INSURANCE PROGRAMMES. A FULLY OWNED
SUBSIDIARY OF AIR MALTA CO. LTD., OSPREY WAS SET UP TO
COMPLEMENT THE ACTIVITIES OF ITS SISTER COMPANY,
SHIELD INSURANCE CO. LTD., WHICH AIR MALTA REGISTERED
THIS YEAR IN GUERNSEY. AIR MALTA SAID OSPREY WILL HAVE
ACCESS TOWORLDWIDE INSURANCE MARKETS THROUGH
OTHER BROKERS”.**

WOULD IT BE POSSIBLE TO BRIEF MIAMI MTG ON THIS?

LOOK FORWARD TO SEEING YOU AT THE MTG.

**KIND REGARDS
LORNE CLARK**

•

WP 5.

December 10, 1995

“For the purposes of Article 28 of the [Warsaw] Convention and in addition to any other place specified in the Article, the contract of International transportation shall be considered to have been made through the carrier’s place of business in the territory of the passengers domicile. ”

You asked me:

1. If this clause would be contrary to Article 28 of the Warsaw Convention?
2. If yes, would it not be possible for carriers to apply such a clause voluntarily?
3. If yes, would it be possible for a government (or for the European Union) to impose this type of clause on its carriers (excluding foreign airlines)?

Hereafter are the comments in response to these questions.

I - Interpretation of Article 28 of the Warsaw Convention

1. In the official French version, the Warsaw Convention states in Article 28, paragraph 1, that an action for damages against the carrier *“devra être portée, au choix du demandeur, dans le territoire du trartransporteur, du siège principal de son exploitation ou du lieu où il posskde un établissement par le soin duquel le corrtrat a été conclu, soit devant le tribunal de destination”*.

2. In its British translation (schedule I to the carriage by Air and Road Act -1979), Article 28 reads:

“An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination.”

3. As a result of Article 28, an action for damages against a carrier **MUST** be brought before one of the four jurisdictions mentioned in Article 28.

What are these jurisdictions?

A. The “domicile” of the carrier

Judicial decisions rarely use this criterion for establishing jurisdiction for the court seized of the case. Indeed, if the concept of “domicile” is particularly relevant when the defendant is a natural person, it is much less for a juridical person (company). For that reason, there was a reference added in extremis in 1929, to Article 28 covering cases concerning physical persons (see the Report of the conference, p. 113).

Most courts have interpreted the terms thus used in the Convention as referring, for natural persons, to their ordinary place of residence, and, for juridical persons, to their principal place of business or registration. This is particularly the case in the United States where jurisprudence is clearly established:

- Sabena - 7 Avi - 18.295 (Eastern District of Pennsylvania, 1962)
- Smith v. Canadian Pacific Airways - 12 Avi - 17.143 (2nd Circuit - 1971)
- Karfunkel v. Air France - 14 Avi - 17.674 (S.D.N.Y. 1977)
- People of the State of Illinois v. Giliberto - 15 Avi - 17.429 (Ill. Sup. Ct - 1978)
- Wygler v. Korean Airlines - 23 Avi - 17.409 (District Columbia Court- 1985)
- Recumar v. **KLM** - 19 Avi - 17.293 (S.D.N.Y. - 1985)
- Duff v. Varig - 22 Avi - 17.367 (Illinois Court of Appeals - 1989).

Similar solutions have been used in Great Britain (see Shawcross and Beaumont, *No. 438*) or in France (see *Revue française de droit aérien et spatial*, 1985, p. 161).

B. The “principal place of business”

This concerns the “nerve center” of the company in question, the place where basic decisions are made and implemented. It may coincide with the domicile of the carrier, but it may be different (for example, for the United States, *Scott Typewriter Co. v. Underwood Corp.* 170F, Supp. 862 (S.D.N.Y. 1959); *Wood v. United Airlines* 216F. Supp. (E.D.N.Y. 1963)). A company may only have a single principal place of business (Court of the Eastern District of Pennsylvania - 2 July 1962, *Il Diritto aereo*, 1965, p. 335).

C. “The establishment by which the contract has been made”

This criterion has been interpreted literally by European **courts** (see, for example, Shawcross and Beaumont no. 441; see also the decision of the Tribunal de première instance de Genève, *Gondrant Frères v. Lai*, *Revue française de droit aérien*, 1958, p. 190 - Cour d’appel de Paris, 2 March 1962, *Herfroy v. Cie portugaise Artop* - *Revue française de droit aérien*, 1962, p. 177); Tribunal de Grande instance de Paris, 22 March 1971 - *Revue générale de l’Air et de l’Espace* - 1972 - 202 - footnote, by Pontavice).

On the other hand, it has been interpreted broadly by the courts in the United States. This interpretation has its origins in the translation into American English of the French language clause of the Warsaw Convention. Although the British translation reads “the establishment by which the contract has been made”, the American text mentions “the place of business through which the contract has been made.”*

Moreover, some US courts have had the tendency not only to interpret the concept of establishment broadly, but also to assert their jurisdiction over carriers not established on United States territory, but having sold a ticket there through the intermediary of a representative having such an establishment (*Bemer v. United Airlines*, 3 Avi - 17.169 (N.Y. Sup. Ct. App. Div. - 1956, *Revue française de droit aérien*, 1958, p. 195).

Also US courts have established their jurisdiction in a case where a carrier had an establishment in New York, but the ticket was not sold by that establishment, but by another carrier located in California (*Eck v. United Arab Airlines* - 8 Avi - 18.180 (N.Y. Sup. Ct. App. Div - 1964), quashed by 9 Avi (N.Y. Ct. App. - 1964); 9 Avi - 17.322 (S.D. N.Y. - 1964) and 17.469 (S.D. N.Y. 1965), quashed by 9 Avi 18.145 (2nd Circuit, 1966).

However, these solutions have been **criticised** (for example, Pourcelet, *Revue générale de l’Air et de l’Espace*, 1965, p. 177; Shawcross and Beaumont n° 441) and some US courts have been sensitive to such criticisms (for example *Mascher v. Boeing* - 13 Avi 18.047 (New York Superior Court, 1975). Yet, US jurisprudence still remains open in this regard.

D. The place of destination

This criterion of jurisdiction has resulted in considerable jurisprudence. Basically, it concerns the place of final destination, which is marked on the ticket. Consequently, in cases of round-trip or circular tickets, the place of destination is the same as that of origin (for example *Galli v. Al Brazilian International Airlines*, 7 Avi 17.6 14 - 196 1; and, more recently, *Wyler v. Korean Airlines* and *Recumar v. KLM* mentioned above; *Gayda v. Lot*, 17 Avi 18.142 (2nd Cir. 1983); *Adesina v. Swissair*, 21 Avi 17.469 (Sup. Ct. N.Y., App. Div. 1988); (see also Bundesgerichtshof, 23 March 1976 - Z.L.W. 1976, p. 258; *Revue française de droit aérien*, 1977, p. 99).

However, there are difficulties with successive carriers, “open” tickets, or in certain cases the passengers intent.

For successive carriers, see:

- *Al Zamil v. British Airways*, 19 Avi 17.646 (2nd Cir. 1985)
- *Karfunkel v. Air France* mentioned above
- *PT Airfast Services, Indonesia v. Sup. Ct of Siskiyou County*, 17 Avi 18.087 (C. App. California, 3rd Dist. 1983).

For “open” tickets, see:

- Acnestad v. Air Canada, 13 Avi 17.515 (24 January 1975)
- Steber v. British Caledonian, 22 Avi 17.211 (C. app. Alabama 1989)
- Lee v. China Airlines, 2 1 Avi 17.129 (S.D. **Calif.** 1987)

With respect to passenger intent research, see:

- Wyler v. Korean Airlines mentioned above
- In the crash disaster near Warsaw on May 9, 1987 - 22 Avi 17.472 (E.D.N.Y. 1991) (which, different from prevailing jurisprudence, proceeded to such research).

4. Whatever jurisprudential variations in the interpretation of criteria of jurisdiction are fixed by the Warsaw Convention, one rule is clearly established. If the action is not in one of the **fora** foreseen in the text, the court seized must declare itself incompetent. The Article 28 list has thus a limiting character. The court will only be able to declare itself competent by basing itself on the place of the accident or the domicile of the passenger (see, for example, Rome Court, 20 June 1967, *Rivista di diritto della navigazione*, 1969, II, p. 440, Montessori footnote).

5. During the Guatemala Conference, the United States, concerned to have the jurisdiction of American courts with respect to their citizens **recognised** on a wider basis, however requested and obtained that a fifth jurisdictional competence be added to those foreseen in the Warsaw Convention (See Mankiewicz, “Le **Protocole de Guatemala**”, *Revue française de droit aérien*, 1972, p. 25).

The Guatemala Protocol added to Article 28 of the Convention a new paragraph according to which: “in respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, before **“le tribunal dans le ressort duquel le transporteur possède un établissement, si le passager a son domicile ou sa résidence permanente sur le territoire de la même Haute Partie Contractante”**. This last sentence reads in English: “The Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party.”

These two conditions are cumulative

- The carrier’s possession of an establishment;
- and domicile or permanent residence of the passenger in the country concerned.

In applying the Warsaw Convention thus amended, when a carrier has an establishment in a country, he can be legally pursued either when a ticket has been issued by such establishment (paragraph 1 of Article 28), or when the passenger has his domicile or **his** permanent residence in the same country (new paragraph of Article 28).

On that occasion, the Guatemala Conference had, moreover, discussed at length what should be understood by “establishment” of the carrier and decided on a rather extensive concept of the term, while excluding the case of a travel agency (ICAO- Doc 9040 - LC/167 - 1 - 1972, pp. 110 and 130, footnote 8). The Guatemala Protocol, however, not having entered in force, this new jurisdictional basis has not been incorporated in the Warsaw system.

6. The draft under consideration today has the same goal as the Guatemala Protocol through the expedient of an interpretation of Warsaw Convention’s Article 28. It stipulates, in fact, that the carrier contract, for application of Article 28, will be “considered as having been concluded through the carrier’s establishment located on the territory of the passenger’s domicile”. **In** other words, when a passenger is domiciled on a state’s territory, and the carrier has an establishment on such territory, the carrier contract will be considered as having been concluded by such establishment.

By a kind of juridical fiction, the contract will be considered as having been concluded both where the ticket was issued and where the plaintiff has his domicile. On that basis, a person domiciled, for example, in the United States who buys a ticket Nairobi - Cairo with an African company may, in case of accident, legally pursue the company in the United States on the single condition that the company in question has an establishment in that country (a concept which, as we have seen, is interpreted broadly by the US courts).

7. Such a fiction does not strike me as being compatible with Article 28 of the Warsaw Convention:

A. It should be noted, in the first place, among the criteria for jurisdiction retained by the Convention, are included not the place the contract was concluded, but the place of business of the carrier by which the contract has been concluded. Now, if one can imagine the use of fictions with respect to the juridical operation such as the conclusion of a contract, it is much more difficult to accept such fictions with respect to a fact (the circumstance that the contract has been concluded by a particular establishment).

B. This difficulty is still more apparent in the French version (which alone is valid) of the Warsaw Convention than in the U.S. version, even in the English version. The terms “**par le soin duquel**” have, in fact, a material connotation much more concrete than the “through” used in the American and the “by” in the English.

C. In reality, the fiction envisaged consists in interpreting the terms “the place where the carrier has an establishment by (/through) which the contract has been made” as meaning “the place where the carrier has an establishment, that the contract has or has not been made by (/through) this establishment, since the passenger has his domicile in such place”.

Such an interpretation appears to clash with the very text of Article 28 by creating a new jurisdiction : that of the passenger’s domicile (matched with a condition relating to the presence of the carrier in such place).

D. Juridical fiction has its limits, namely, those of the agreed conventional text and good faith in the interpretation and application of this text. The proposed clause appears to me to be contrary to Article 28.

II - Possible exceptions to Article 28

8. Having thus extracted the meaning of Article 28, it remains to ask under which conditions it would be possible to make an exception.

9. In this perspective, it should first be recalled that, according to Article 32 of the Warsaw Convention,

"sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport de marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28, alinea 1er."

In its British translation, this text reads:

“Any clause contained in the contract and all special agreements, entered into before the damage occurred, by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for the carriage of cargo, arbitration clauses are allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.”

Thus, the clauses of the Warsaw Convention about jurisdictional competence concern law and order (see, for example, **Litvine, Droit aérien**, 1970, p. 219).

10. Of course, States parties to the Convention are bound by these provisions and cannot, without ignoring their international obligations, allow passenger actions in jurisdictions other than those which are fixed by the list in Article 28. Furthermore, they cannot ignore the normal rules by encouraging, or by obliging, the carriers to act contrary to the combined provisions in Articles 28 and 32 (in this respect, see, for example, for international agreements undertaken with respect to air transport, the decision of the Court of Justice of the European Communities of April 11, 1989 in the case of Ahmed Saied Fltigreisen, no. 48 and 49).

11. Also, any clause of a contract of carriage or private agreement entered into previous to the occurrence of the damages, under which the parties depart from the Warsaw Convention are legally null and void, especially if they modify the rules of jurisdictional competence fixed in Article 28. Article 32 prohibits, in other words, any contractual clause conferring jurisdiction with respect to carriage of passengers. Therefore, such a clause is null and void, not only when it stipulates a court other than those foreseen by the Convention, but also when it stipulates in advance one of the competent courts, depriving the plaintiff of the possibility of the choice that he has under Article 28 (Du Pontavice, Manuel du droit **aérien**, vol. 2, p. 155).

12. On the other hand, Article 32 does not prohibit subsequent to the accident, an agreement between the Parties by which they agree to submit any disagreement to a particular jurisdiction, for example, that of the plaintiffs domicile. In this perspective, however, it is useful to recall that, in several countries, the jurisdiction of courts is a matter of public order and, afterwards, an agreement between the parties may not be sufficient to permit the judge to rule on the disagreement. Legislative or statutory action by public authorities may be found necessary, at least in certain cases.

13. To sum up, it seems to me that :

- A. the clause proposed is contrary to Article 28 of the Warsaw Convention;
- B. the carriers would not be able to include a clause of this type in a carrier contract;
- C. the governments would not be able to impose it on them.

14. The only possible solution would be, it seems to me, an offer by which the carriers declare in advance that, in case of accident, they would be ready, in countries where they have an establishment, to accept the jurisdiction of the courts of the passenger's domicile in cases where the victim of those representing him so desire. This solution would, however, raise problems in the national law of some countries.

WP 6.

Situation en droit français dans la question de l'action des Caisses de Sécurité Sociale

1. **les Caisses** sont **dans l'obligation de verser directement aux victimes** ou à leurs **ayant-droits les prestations** en nature ou **en espèce prévues** par la loi;
2. **les transporteurs aériens (comme d'ailleurs tous les responsables d'accidents)** **règlent** par suite aux **victimes** ou à leurs **ayant-droits des indemnités correspondant aux dommages subis** (éventuellement dans la **limite des plafonds**). **Les sommes déjà versées par les Caisses de Sécurité sociale sont cependant déduites** lors du calcul de **ces indemnités**;
3. **les Caisses sont subrogées aux droits des victimes** ou **ayant-droits** et peuvent **récupérer sur** les auteurs du dommage les **sommes qu'elles ont versées** (là encore dans la **limite d'éventuels plafonds**).

Social Security Funds in France:

1. ***The fund is obliged to pay directly to the victims, or their legal representation, the benefits in kind or the monetary allowance provided by law.***
2. ***Air carriers (as indeed all those legally responsible for an accident) then pay to the victims or their assignees compensation corresponding to the damage sustained (within ceiling limits as applicable). Amounts which have already been paid by the Social Security Fund, are however deducted at the time these compensations are calculated.***
3. ***Social Security Funds are subrogated in the rights of the victims or assignees and may recover all amounts paid, from those responsible for the damage (here again within ceiling limits if applicable).***

WP 7.

WP 8.

Legal Advisory Subcommittee on Liability
Miami, January 31-February 1/96

AITAL POSITION ON THE IATA INTERCARRIER AGREEMENT

The IATA Intercarrier Agreement -**IIA**- adopted in Kuala Lumpur on October 30, 1995 in **essence** establishes an unlimited liability in the event of death, wounding **or** other **bodily** injury of a passenger, by waiving the limitations of liability set out in paragraph 1 of Article 22 of the **Warsaw** Convention/Hague Protocol. In general, **AITAL** concurs **with** this principle **but has** recommended its **members** to refrain for the time being from **signing** the **IIA** until a thorough analysis **of** the additional **costs** the scheme can produce on legal liability insurance premium⁶ is made.

Regarding the **IIA** implementation options through the amendment to the General Conditions of Carriage of each airline, our position is **as** follows:

1. Possibility that **recoverable** compensatory damages be determined and granted in accordance **with** the law **of** the domicile **of** the passenger. We concur, but recognize the serious legal difficulties that may arise, since, in accordance with some principles: **of** civil law, **this stipulation may** be regarded as contrary to certain basic public policy principles. We are also aware that its implementation **may** be very difficult **as** it could be extremely hard to prove in a given **case** the specific contents of the applicable foreign **law**. It is also certain that if such **provision is** not properly drafted, Article 32 **of** the Convention will be breached.
2. Possibility that carriers waive their defenses under Article 20 **of** the **Warsaw** Convention, **that** is to say that the carrier **is** not liable if he proves that he and his agents have taken **all** necessary **measures** to avoid the damage or that it **was** impossible for them to **take** such **measures**.

We do not agree **with this** option because its acceptance would imply the establishment of an absolute liability on the **part** of the carrier. **Absolute liability is admissible as long as** it is capped with a numerical limitation. Therefore the establishment of a regime that sets forth an unlimited and absolute **liability seems** to us completely **out of proportion**.

3. **Waiver** of any defense up to an amount previously established as maximum compensation. **This** is the Japanese initiative and it is also considered unacceptable. A **person** is liable for his negligent behavior or **because** the law establishes his absolute liability, The combination of both **factors** in the **same case** could be considered illegal under civil law.
4. **Establishment** of a fifth jurisdiction: the law of the domicile of the **passenger**. This new aspect **is not contemplated** in the IIA and we are certainly **against it**. In our belief, it would be an **exorbitant** privilege in **favor** of the passenger, it would **also imply serious** defense **difficulties** and certainly higher insurance costs, penalizing the basic interests of airlines.

Apparently in this case U.S. carriers are trying to lead the implementation of the **IIA** by making it more **acceptable** to their **own** government. However, if it **is** a worldwide problem to be dealt with by consensus, the U.S. should accept that to preserve the ideal unanimity pretended by the Warsaw Convention **it** is necessary to make concessions taking into account other foreign interests.

In an extreme case, it would **be** more appropriate for the U.S. to sign a **different agreement** from the **IIA**, to be approved by the U.S. for traffic originated, destined or with one stopover in its territory, In this case it **would** be an **unilateral** position, explainable perhaps by the particular Interests of the **U.S.** in this matter.

Finally, **AITAL** considers that the longed-for unity to preserve the Warsaw Convention universality is almost **unattainable**. The different options included in the **IIA**, as an "**umbrella**" agreement enabling each company to **choose** what it deems more appropriate, lead precisely to a non-existing unity.