

**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

International Air Transport Association:

**Agreement Relating to Liability
Limitations of the Warsaw Convention**

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) **Docket OST-95-232**
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Air Transport Association of America:

**Agreement Relating to Liability
Limitations of the Warsaw Convention**

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) **Docket OST-96-1607**
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**COMMENTS OF KOREAN AIR LINES CO., LTD. TO ORDER 96-10-7
ISSUED BY THE DEPARTMENT OF TRANSPORTATION OCTOBER 3, 1996**

Pursuant to Part 303 of the Department's Regulations and 49 U.S.C. §§ 41308 and 41309, Korean Air Lines Co., Ltd. ("Korean Air") submits these Comments to Order 96-10-7, an Order to Show Cause issued by the Department October 3, 1996. For the reasons stated in these Comments, Korean Air objects to the amendments that the Department proposes to attach to foreign air carrier permits and other operating authority. As explained more fully below, Korean Air respectfully requests that the Department revise and clarify Order 96-10-7 ("the Show Cause Order") to reflect the concerns of Korean Air.

A. BACKGROUND.

On July 31, 1996, both the International Air Transport Association ("IATA") and the Air Transport Association of America ("ATA") filed with the Department applications for approval of, and antitrust immunity for, private intercarrier agreements that, if implemented, would reform the current system of compensating passengers for injury or death on flights covered by the Warsaw Convention.^{1/} Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw October 12, 1929, 49 Stat. 3000. As an "umbrella accord," the IATA Intercarrier Agreement ("IIA") enunciates the general principles of reform on which signatory carriers agree.

In order to implement this agreement, IATA and the ATA have proposed more specific agreements that include language to be placed in the conditions of carriage and tariffs of signatory carriers. Thus, IATA's Agreement on Measures to Implement the IATA Intercarrier Agreement ("MIA") and the ATA's Provisions Implementing the IATA Intercarrier Agreement to Be Included in Conditions of Carriage and Tariffs ("IPA") each require signatory carriers to alter their conditions of carriage and tariffs in two principal ways: (i) to remove the liability limitation created

^{1/} Both IATA and ATA were acting under Department Orders granting antitrust immunity for, and approval of, intercarrier discussions concerning passenger liability issues. See Orders 95-2-44, 95-7-15, 96-1-25, and 96-3-46.

by Article 22(1) of the Warsaw Convention; and (ii) with respect to travel to and from the United States, to waive the ability to assert the non-negligence defense created by Article 20(1) of the Convention, up to and including damages of 100,000 Special Drawing Rights ("SDRs").^{2/} A claimant under these agreements would have the ability to recover all of his or her compensatory damages and would be able to assert the carrier's strict liability for proven damages up to the 100,000 SDR ceiling, subject to the law of the jurisdiction.

Korean Air has signed both the IIA and the MIA and supports IATA's continuing efforts at reform.

In its Show Cause Order issued October 3, 1996, the Department proposes to approve all three of these agreements, as modified by several substantive changes that the Department believes are in the public interest. As one of its conditions of approval, the Department proposes to apply the modified IIA and MIA to all non-U.S. carriers operating to, from, or through the U.S. by amending all foreign air carrier permits to reflect its Show Cause Order. Korean Air objects generally to this attempt to alter its foreign air carrier permit in this manner and

^{2/} Although the MIA provides carriers with the option of reducing the strict liability level of 100,000 SDRs, IATA's July 31, 1996 Application to the Department indicates that this option would not be available for any flight to or from the U.S. The Department's Show Cause Order acknowledges and approves this stipulation. See Order 96-10-7 at n.5.

objects specifically to several of the changes on which approval of these agreements is conditioned.

B. ARGUMENT.

The Department proposes to approve the IIA, the MIA, and the IPA and to grant signatory carriers the antitrust immunity necessary to effectuate the provisions of these agreements on international flights to and from the U.S. The Department also proposes to apply these agreements to all non-U.S. carriers by amending all foreign air carrier permits and all other outstanding authority to operate to, from, or through the U.S.

Korean Air objects first to the Department's intention to alter Korean Air's foreign air carrier permit to reflect the provisions of the Show Cause Order. The Show Cause Order states that, because participation in the 1966 Montreal Agreement^{3/} was mandatory, carriers had notice that the Department would expect continued participation by all carriers in IATA's and ATA's efforts. Yet, until the Show Cause Order was served on October 7, Korean Air had received no notice that its permit would be significantly altered in accordance with provisions that neither the IIA nor the MIA include. The Department appears

^{3/} The 1966 Montreal Agreement raised the liability limit to \$75,000 and provided for strict liability up to that same amount. See Agreement CAB 18900, approved by Order E-23680 (May 13, 1966).

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

1. Enumerated Conditions Attached to the Department's Approval of the Agreements.

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

- **Condition (a).** The application of the law of the domicile provision, which is optional in the MIA, would become mandatory for operations to, from, or with a connection or stopping place in the U.S. As private agreements among carriers, however, the IIA, the MIA, and the IPA cannot prevail against the laws of foreign sovereigns. The Department appears to acknowledge that it cannot compel a non-U.S. jurisdiction to apply the law of the passenger's domicile, if, despite a claimant's wishes, that jurisdiction's own procedural law requires otherwise. See Order 96-10-7 at n.10. In addition, many rights available under the laws of a passenger's domicile simply may not exist in that jurisdiction, e.g., the right to a jury trial, and thus cannot be indulged even if the governing law does not specifically prohibit them. Korean Air therefore does not

object to this condition but urges the Department to clarify that the law of the jurisdiction ultimately will prevail in the event of a conflict with the IATA agreements, and that carriers do not lose the protections of their home nations' laws merely because they have signed and implemented these agreements.

- **Condition (c).** This condition proposes to waive all limits that currently govern damage awards to claimants for death or injury in international aviation. The IIA and the MIA together do this already. Korean Air objects to the Department's reiteration of this provision for two reasons. First, the DOT has omitted the words, "recoverable compensatory damages," and this oversight could leave a carrier open to other kinds of damages, e.g., punitive damages, that the IATA agreements do not encompass. These words should be re-inserted. Second, it should be made clear that the word "systemwide" means only international flights covered by the Warsaw Convention itself and excludes non-covered international and domestic flights. Without these changes, condition (c) is unclear and objectionable.^{4/}

- **Condition (d).** This condition would extend the IIA and MIA to all non-signatory parties that engage in interlining arrangements with carriers that have signed the IATA proposals. Thus, each signatory carrier either would have to:

^{4/} If the Department in fact intends Condition (c) to go beyond the IIA and the MIA waivers, then Korean Air requests clarification about precisely what this condition means.

(i) ensure that all its interlining partners have signed the IIA and MIA; or (ii) itself assume liability under the IIA and MIA for damages that arise from its interline partners' flights.

Korean Air objects to this condition. An interlining carrier would have little incentive to sign the IIA and MIA itself, and so the signatory carrier would have to assume liability for that carrier's flights. In effect, then, the Department's condition would force signatory carriers to police the operations of their interlining partners, often on domestic travel completely unrelated to the Warsaw Convention. IATA's July 31, 1996 Application does not begin to contemplate such a sweeping extension of the Warsaw Convention scheme. Further, this condition would require a signatory carrier to pay to passengers settlements under an international scheme that the carrier at fault does not recognize, making recovery by the signatory carrier difficult and costly. This difficulty would only increase if, as is often the case, more than one signatory carrier has interlining arrangements with a partner or partners responsible for an incident. Instead of simplifying matters, this condition complicates them significantly.

2. Unenumerated Modifications to the Agreements.

The Department also proposes to take several other actions concerning the IIA, MIA, and IPA, through four, unenumerated changes in its Show Cause Order. The first of these is to amend

all foreign air carrier permits to reflect the final version of the three agreements. As discussed above, Korean Air objects to this proposal because it had no opportunity to comment on any change to its permit until after issuance of the Order to Show Cause and because this proposal may be inconsistent with the Department's regulations and applicable administrative law.

- **"Most favored passenger" modification.**

The Department proposes that, if a claimant flying to or from the U.S. would enjoy a more favorable recovery scheme in a non-U.S. court under the Warsaw Convention system than would be allowed under the IIA, MIA, or the IPA, then that claimant must be allowed to bring a claim under the more favorable law. Jurisdiction would be included in this assessment; i.e., if the more favorable law creates jurisdiction in a court of the passenger's domicile, then the claimant must be allowed to bring suit in the passenger's domicile. See Order 96-10-7 at n.12. A carrier that ignored this modification would be violating 49 U.S.C. § 41310, and the Department could suspend or revoke the carrier's permit in response.

Korean Air objects to this modification. Specifically, Korean Air objects to the Department's effort to establish the passenger's domicile as a basis for jurisdiction by reference to the domestic law of other nations and other aviation agreements. IATA members rejected the creation of the "fifth jurisdiction" of

the passenger's domicile,^{5/} but here the Department attempts to restore it to the Warsaw Convention scheme by using agreements unconnected with the IATA and ATA Applications. The Department offers no rationale for this proposal, which, when combined with Condition (d) above, would force a carrier into the courts of a passenger's domicile to defend a claim that arose out of an incident for which the carrier's domestic interlining partner is completely responsible. Such a result stretches the Warsaw Convention scheme beyond reasonable limits.

- **Four alternatives to the fifth jurisdiction.**

Finally, the Department proposes to impose several requirements on carriers that do not accept the fifth jurisdiction of the passenger's domicile. Specifically, the Department proposes to choose a, c, or d, and b, described below. Korean Air objects to all four of these alternatives.

- a) Mandatory arbitration.**

The Department would require carriers operating to or from the U.S. to submit to an arbitration process that would take place in the U.S. at a place of the claimant's choosing, in front of a panel of U.S. arbitrators chosen by the claimant, and using U.S. procedures. This proposal is perhaps the most onerous

^{5/} Article 28(1) of the Warsaw Convention provides for jurisdiction in any of four nations: the domicile of the carrier, the principal place of business of the carrier, the place where the contract of carriage was made, and the place of destination.

contained in the Show Cause Order. Korean Air believes that it is simply unfair to force a non-U.S. carrier into a U.S. arbitration proceeding in which the claimant has chosen the arbitrators. Moreover, the Department's suggestion that this change would apply to all passengers and not only to U.S. passengers goes beyond what even the fifth jurisdiction would achieve.

b) Notice of rejection of fifth jurisdiction.

A non-U.S. carrier that rejects the fifth jurisdiction would have to notify its passengers, in writing, that they might not be able to sue the carrier in their home nations. Korean Air objects to this proposal as an effort to punish non-U.S. carriers for rejecting the fifth jurisdiction. The proposed notice would damage the carrier's goodwill while providing information likely to do nothing more than scare travelers.

c) Accident insurance policy.

Each carrier that rejects the fifth jurisdiction option would have to obtain an accident insurance policy of some specified amount to cover all passengers departing from the U.S.; the Department suggests an amount of 500,000 SDRs. This amount would be payable to a passenger for any flight, anywhere in the world, provided that the passenger first departed from the U.S. This modification would appear to require each carrier to insure all passengers departing from the U.S., at all times on all

connecting flights, whether those flights are covered by the Warsaw Convention or not, for an entire year. Like others in the Show Cause Order, this provision seems to be an effort to secure non-U.S. carriers' consent to the fifth jurisdiction by offering even less palatable alternatives. It is unacceptable.

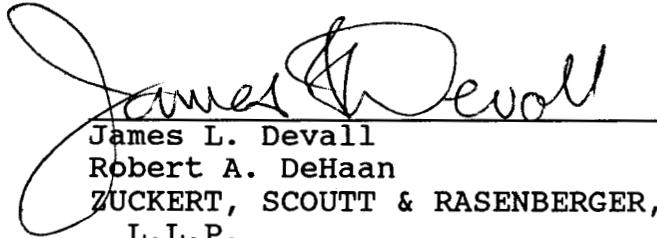
d) Liability for passenger's entire journey.

This modification would appear to require a carrier departing from the U.S. to assume liability for a passenger's entire journey, to the extent that the Warsaw Convention might limit the passenger's recovery. The carrier therefore would have to supplement the passenger's recovery for injury or death occurring outside of the Warsaw Convention system, regardless of which carrier actually bears responsibility for the underlying accident. Recovery would be enforced in the U.S. pursuant to U.S. law. With due respect to the Department, it is difficult to view this provision as anything but an effort to secure a U.S. tribunal for U.S. travelers in all situations and a method of imposing the fifth jurisdiction on non-U.S. carriers without obtaining their consent to it. Korean Air objects to the modification on these grounds.

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WHEREFORE, Korean Air respectfully requests that the Department of Transportation reconsider the proposals contained in its October 3, 1996 Order to Show Cause and that the Department revise and clarify that Order consistent with these Comments.

Respectfully submitted,

A handwritten signature in cursive script, reading "James L. Devall", is written over a horizontal line. The signature is fluid and extends above and below the line.

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I certify that on this day I served a copy of the foregoing
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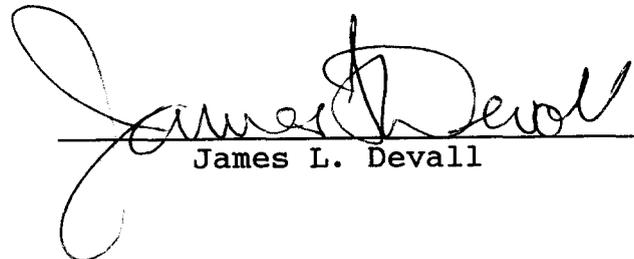
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