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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

DEPARTMENT OF TRANSPORTATION
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DOCKET SECTION

AIR TRANSPORT ASSOCIATION OF AMERICA)
AGREEMENT RELATING TO LIABILITY)
LIMITATIONS OF THE WARSAW CONVENTION)

Docket OST-96-1607-24

With cross reference to:

INTERNATIONAL AIR TRANSPORT ASSOCIATION)
AGREEMENT RELATING TO LIABILITY)
LIMITATIONS OF THE WARSAW CONVENTION)

Docket OST-95-232-55

RESPONSE OF THE VICTIMS FAMILIES ASSOCIATIONS
TO THE ORDER TO SHOW CAUSE
96-10-7

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this document should be sent
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Dated: October 22, 1996

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| LIMITATIONS OF THE WARSAW CONVENTION) | | |
|) | | |

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| INTERNATIONAL AIR TRANSPORT ASSOCIATION) | | |
| AGREEMENT RELATING TO LIABILITY) | | Docket OST-95-232 |
| LIMITATIONS OF THE WARSAW CONVENTION) | | |
|) | | |

RESPONSE OF THE VICTIMS FAMILIES ASSOCIATIONS
TO THE ORDER TO SHOW CAUSE
96-10-7

On behalf of its individual members, the Victims Families Associations¹ respectfully respond to the Department's Order to Show Cause dated October 3, 1996, Order 96-10-7. The thorough, thoughtful, and well reasoned "Order to Show Cause" is appreciated by the Families Associations, as is the opportunity for comments and suggestions before the final order is issued. The Families Associations, however, note that the Department has responsibility, as part of this Administration, for American citizens and residents, and an acknowledgement of the American judicial

¹ This pleading is filed on behalf of the American Association for Families of KAL 007 Victims; the Families of Pan-Am 103 at Lockerbie, Scotland; and the Families of the TWA 800 Disaster. The undersigned acknowledges that not all families of the disaster may agree with the statements contained herein but assures the Department that one or more of the members of the Associations has retained the undersigned to express those views.

processes, which, it is suggested, can only be fulfilled by adopting the following suggestions.

I. SPECIFIC COMMENTS

A. Strict Liability for Damages up to 100,000 SDR.

The Department noted its serious concern that the arguments provide for strict liability only up to 100,000 SDRs. Show Cause Order at 12. The Victims Families Associations share these serious concerns.

Although the guiding spirit of the Treaty is to maintain international uniformity where possible, as long as a two-step liability process is retained, uniformity in the first step is not possible. This is because of the socio-economic differences in the various countries of this world which would result in full compensation for some passenger's deaths being available in the strict liability first step, but others requiring process through the second step to obtain proper compensation.

Initially, the Families Associations continue to suggest that the level of this first step should be at least the current value of the Montreal Protocols SDR100,000, or approximately SDR 250,000.

However, the Families Associations also recognize that there have evolved distinctions in American courts concerning levels of compensation based upon whether a death occurs on land or at sea.

Since the Supreme Court decision in Zicherman v. KAL, 116 S. Ct. 629 (1996), any uniformity in damages claims is no longer available since the substantive law of damages and, thus, the measures of damages applied to assess full compensation, will

differ depending on whether the injuries or deaths occur on land or at sea, at least for claims brought in American courts. Zicherman held that the Death on the High Seas Act² ("DOHSA") controls claims arising from Warsaw-governed accidents resulting in deaths on the high seas. DOHSA is a restrictive recovery statute permitting recovery of only pecuniary damages. By comparison, most state statutes provide recovery for the claimants' loss of decedents' care, comfort, society, love and affection. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 587 n.21 (1974). The DOHSA limitations on recoverable damages for deaths on the high seas, therefore, results in a windfall to the air carriers and their insurers. If the Department only requires strict liability recovery up to 100,000 SDRs it places yet another burden on the passengers' families who are already burdened with inequities in damages based solely on the locus of the deaths.

SUGGESTION:

The Families Associations would concur with the Department's cut-off between the first and second level at SDR100,000 if, in the case of air tragedies occurring over the High Seas and covered by the DOHSA, the strict liability portion of damages is a fixed sum of SDR500,000, payable regardless that economic loss may be less, to off-set the inequities of land vs. high seas accident happenstance.

² Death on the High Seas Act (DOHSA), 46 U.S.C. App. § 761 et. seq.

B. Automatic updates of strict liability

Past experience has shown that it is almost impossible to update first-step strict liability limits. For example, 26 years between Warsaw and The Hague Protocol; 11 years between The Hague Protocol and U.S. Special Contracts; and 30 years between U.S. Special Contracts³ and the present.

Therefore, an automatic update mechanism is needed. The Victims Families Associations previously suggested an annual increase of the tier cut-off by an appropriate economic indicator. See, Victims Families Response at 11. The Families Associations stand by this request.

C. Payout of strict liability claims portion

Experience has shown that the strict liability portion of the ultimate damages is only paid within an agreement for settlement or after litigation. This procedure is an undue lever used by the carrier/insurer to limit damages payments by forcing families in dire economic circumstances to accept lesser compensation or endure economic hardship. For example, after thirteen years, the families of KAL victims whose cases were tried and are on appeal still have not received the \$75,000 strict liability Montreal Agreement amount.

SUGGESTION:

The strict liability portion should be paid to rightful claimants within 120 days after a tragedy occurred.

³ Montreal Agreement, Agreement CAB 18990, approved by Order E-23680, May 13, 1966 (docket 17325).

D. Fifth jurisdiction:

There should be an even playing field in the liability of carriers over whom the Department has authority. United States airlines are subject to American court jurisdiction under Article 28 because their headquarters are located in America. Foreign Flag Carriers flying from, to, and through the United States are subject to American court jurisdiction only if the passengers tickets are purchased and paid for in America. This inequity gives an unfair competitive edge to the foreign carriers who take advantage of the lucrative American market. It is detrimental to the fair recovery of reasonable damages of air crash victims killed on foreign airlines.

The so called "law of the domicile" provision suggested as an alternative does not work because of cultural, socio-economic, ethical and judicial differences in the world. Forcing passengers from third-world countries to apply domiciliary laws would bar them from the option of suing the wrongdoing carrier at its place of business which may provide a more expansive recovery than that provided by decedents' domicile. The claimants should have the option of choice of fora.

E. Comments re: the Department's Alternative Suggestions

1. Arbitration

Arbitration, as suggested, is not a fair or desirable alternative for damages resolution because the bereaved victims and families have no experience with arbitration.

Moreover, the Families Associations would object to the

use of the "International Court of Arbitration" under the "International Chamber of Commerce" since it is not a government body but, rather, is an organization of companies and business associations which would be biased in favor of the airline defendants. Moreover, to the degree that airline defendants were members of the ICC, a serious conflict of interest exists. Use of the American Arbitration Associations procedures, as noted by the Department, would be preferable but the Families Associations principally do not like the arbitration suggestion.

IATA is a Trade Organization of international carriers that have conflicts of interest as possible defendants in international air crashes vis a vis passengers interests.

2. Other suggestions

All other suggestions in the DOT Show Cause Order should be considered as additions to the "fifth jurisdiction", but not as a replacement.

3. New suggestions

a. It is suggested that the Department require the carrier's insurance policies to specifically provide for the:

- (1) Fifth jurisdiction,
- (2) Early pay out of strict liability, and
- (3) Adjusted strict liability level in DOHSA

tragedies.

b. Air Carrier Alliances

The Department should incorporate in their Order specific provisions that, in international air carriers

alliances, the foreign carrier be subject to the same air crash crisis management and damages and damages rules; regulations and provisions as those of its American airline partner. (British Airways, KLM, Lufthansa, Swissair, etc.).

F. Implementation

The Families Associations anticipate that the Department will not receive the consensus of all parties to its Show Cause Order. In order that some progress can take place while issues are finalized, it is suggested that the Provisions Implementing the IATA Intercarrier Agreement (IPA) suggested by ATA, which is the only document before the Department which implements the IATA Agreement, be approved on an interim basis, especially considering that it is available for signature by both American and foreign carriers.

Dated: October 22, 1996

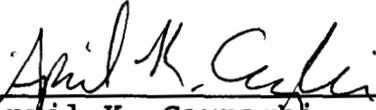
Respectfully submitted

SPEISER, KRAUSE, MADOLE & COOK

BY  JUANITA M. MADOLE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Response of the Victims Families Associations to the Order to Show Cause 96-10-7** was mailed on October 23, 1996, to the parties listed on the attached Service List.



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