The so-called "Japanese Initiative" Japanese airlines' abolition of liability limits for personal injury or death in international carriage by air*

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On November 20, 1992, the ten airlines of Japan simultaneously abolished the carrier's liability limit for damages for passenger bodily injury or death in international carriage by air, waiving the existing contractual limitation with the approval of the Minister of Transport of Japan.

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This abolition of the passenger liability limit is based on the provision for a "special contract" under Article 22(1) of the Warsaw Convention, to be incorporated in "the conditions of carriage". Since this was an unprecedented move among the international air carriers of the world, the new approach has become known as "The Japanese Initiative" to the aviation industry people concerned.

As a party to the planning of this initiative, I would like to describe the background, development and reasoning relating to this decision to abolish any passenger liability limit.

I. Legal Environment in Japan

First of all, I want to explain briefly the legal aspects of compensation in Japan for damages in the case of bodily injury or death, in order to assist in a better understanding of this subject.

(1) Japan is a High Contracting Party to the Warsaw Convention and the Hague Protocol but has not yet ratified Montreal Additional Protocol No. 3.

(2) In January, 1981, all Japanese airlines raised the liability limit for international passenger transportation to SDR 100,000 from the then limit of US $ 75,000. The Article 20 defence also is waived. In respect of Japanese domestic passenger transportaion, the liability limit under the "conditions of carriage"(in 1981 - 23 million yen) was abolished in April, 1982, because that amount was seen as too low when compared with the prevalent level of damage compensation at that time in Japan in other types of cases.

(3) With respect to international carriage by sea, in November, 1990, the Japan Oceangoing Passenger Ship Association decided to waive limits of liability for passengers which would otherwise be applicable under international convention and a law which enacted the convention domestically.

(4) In Japan, no other means of public transportation, such as buses or trains, have any limitation of liability concerning damages for bodily injury or death.

(5) In Japan, the present level of compensation in case of bodily injury or death caused by accident is far beyond the amount of the abolished limit of SDR 100,000, currently equivalent to 15 million yen. For example, none of the approximately 500 cases for the recovery of damages relating to our B747's domestic carriage accident in 1985 was settled below 15 million yen in amount, including awards for victims who were children and aged men.

(6) In Japan, the method of computing damages has been well established by common practice for automobile accidents for a long time. This method of computation applies widely to settlements of damages for all kinds of tort death or injury cases whether in or out of court. According to this method, an estimated amount of damages for death can be calculated mathematically, taking into consideration such factor as age, annual income, and number of dependents. Of course, this estimated amount will be subject to adjustment to some extent reflecting the individual circumstances of each case.

(7) Punitive damages are not known and cannot be awarded in Japan and the jury system of awards is not known in Japan either. Furthermore, the contingent fee is not allowed in Japan.

(8) The Japanese public are not well informed of passenger liability limits existing in international air transportation.

(9) In Japan, in the case of an air accident, most claims for compensation for passenger injury or death are resolved by negotiated settlements, and law suits against airlines are few. Furthermore, such settlements are usually negotiated between the employees of the airline and the families of the victim directly, without the direct intervention of lawyers. Besides, insurance companies are not allowed directly to settle claims for damages on behalf of their insureds in Japan except in the case of automobile accidents.

II. Developments Leading to Abolition of Liability Limit

(1) In June 1991, the Japanese Council for Transport Policy made a

recommendation to the Minister of Transport to study the current liability limit for the international transportation by air of passengers, indicating that "because the current liability limits cannot always be said to be sufficient, it is necessary to revaluate these limits".

The Japanese Council for Transport Policy is a committee, composed mainly of scholars and journalists, which gives advice to the Minister of Transport concerning overall policies of transportation administration from an objective standpoint.

(2) Upon this recommendation, the Civil Air Law Research Institute resumed research on the current status of, and issues pertaining to, the liability scheme of interrnational air carriers. After an extensive study, the Institute made a report recommending abolition of any liability limitation for international transportaion of passengers in May, 1992.

The Institute is an organization in Japan which has been in existence for twenty-five years and which has a high reputation in Japan for its past activities, which include studies on Montreal Additional Protocol 3 (MAP 3) and a domestic supplemental compensation plan(SCP) of the kind that is referred to in MAP 3. The Institute is composed of prominent scholars, officials of the Ministry of Transport and the Ministry of Foreign Affairs, representatives from several airlines, including JAL, and from an insurance company.

A summary of the Institute's report is as follows:

i) The current international transportation liability limit is undoubtedly too low, in light of the recent levels of damages for accidents involving human life in Japan, Europe or in the United States.

ii) Montreal Additional Protocol No. 3/ Domestic Supplemental Plan is not likely to be feasible in Japan. Further, the possibility of its coming into force in the near future is small.

iii) It is difficult to find sufficient grounds for justifying the continued existence of any limitation of liability.

iv) Since the cost of insurance premium accounts for a very small percen-

tage of the total costs of airlines, it is estimated that a substantial increase or abolition of the liability limit would not present an insurmountable economic obstacle. In other words, increases in insurance premiums would not directly lead to increases in airfares.

v) The aboltion of the liability limit would be a more appropriate choice, rather than a large increase of the liability limit, considering that a large increase of limit would not serve as an effective and realistic step to resolve the issue, provided however that there would not be a major cost difference from increased insurance premium costs resulting from the waiver.

The conclusion, as contained in the report of the Institute, is as follows.

"With regard to the liability limit in question, the only proper and realistic solution is to amend the "conditions of carriage" in such a way as to comply with the current system under the Warsaw Convention. However, the amendment of the "conditions of carriage" is no more than a response by individual carriers and we should take it into consideration that this method definitely falls behind a treaty as a proper way to settle the issue of international air carrier liability. It is important to make further efforts toward establishing a new liability scheme for international air carriers, including those matters as jurisdiction and so forth. Japan, too, is expected to make significant contributions in this regard."

(3) After the report was made, the three airline groups, Japan Airlines, All Nippon Airways and Japan Air Systems, conducted a further study and respectively made an application in early November, 1992 to the Minister of Transport for approval of the abolition of any liability limit for international transportation of passengers under the conditions of carriage. The approval of the Minister was granted to all ten airlines in the group of three simultaneously on November 16, 1992 and the revised "conditions of carriage" setting forth the waiver of liability limit entered into effect on November 20, 1992.

The reason we selected November 1992 to apply the revision was that it was considered to be most appropriate to make the effective date correspond to the November renewal date of the annual insurance contracts of

the involved airlines so as to reflect the abolition of the liability limit in the renewed contracts.

(4) The following is the text of paragraph 16(C) (4) (a) and (b) of the revised conditions of carriage of JAL, whereby the waiver is effected :

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

(i) JAL shall not apply the applicable limit of liability based on Article 22(1) of the Convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention. Except as provided in paragraph (ii) below, JAL does not waive any defense to such claims as is available under Article 20(1) of the Convention or any other applicable law.

(ii) JAL shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, avail itself of any defense under Article 20(1) of the Convention up to the sum of 100,000 S.D.R. exclusive of the costs of the action including lawyers' fees which the court finds reasonable.

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

(5) Thus, effective from November 20, 1992, all the ten Japanese airlines included in the three groups of Japan Airlines, All Nippon Airways and Japan Air Systems waived any limitation of liability for damages for passenger injury or death in international transportation and accepted liability for unlimited damages. As for proof of fault, the waiver of the defense of absence of negligence under Article 20(1) of the Warsaw Convention up to SDR 100,000, as was then the case, was maintained.

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

(6) Upon application by the Japanese airlines for the approval of the amended "Conditions of Carriage", the Department of Transportation of the United States approved the waiver of the Warsaw limits as "… consistent with the public interest."

(7) Through the steps outlined above, we tried to keep people outside of Japan concerned with this topic informed of the progress of our study as much as possible.

III. Reasons for Abolition of the Liability Limit

With respect to the reasons for the abolition of the liability limit, I would like to express some personal views, in addition to the reasons described above as contained in the report of the Civil Air Law Research Institute.

(1) No justifiable ground is found for the liability limit.

i) It was 1929 when the Warsaw Convention was signed. In those days, the airline industry was still in its infancy and, in addition, aviation insurance was not so developed as to cover liabilities to be borne by the airlines without limitation. Under these circumstances, it seems to have been necessary to foster and protect the airline industry. However, since 1929 and over the past more than 60 years, the airline industry has grown remarkably, to become one of the most powerful of all industries.

ii) Aviation insurance has also made such great progress that it is now available to airlines as a means to protect themselves from risk at a reasonable cost.

iii) In view of these circumstances, it would appear to be obvious which party needs more protection, airlines or passengers, in the case of an accident.

(2) To recover realistic compensatory damages is deemed one of the

fundamental human rights. Therefore, this right should not be limited, without due and justifiable grounds.

(3) All industries or companies can only ensure development by treating their customers considerately and with the utmost care.

If a company provides an excellent service to customers, but does not help them when they are in great difficulties, the company would be rightly seen as far from "service-oriented" towards its customers.

(4) Some people say that, with the absence of any limitation of liability in compensation levels, substantial differences may arise, resulting in unfairness and inequality of treatment.

We have to admit that there are differences in the damages payable to victims taking one jurisdiction when compared with another. However, there may be differences attributable to factors existing in different societies that are beyond the control of airlines. It could be said that any attempt to make damages as equal as possible, by placing a limit on liabilities artificially, would be even more unfair.

(5) In respect of the selection of unlimited liability or limited liability, abolition of liability limits is the appropriate choice from following reasons.

i) There are no definite grounds to justify a limitation of liability as set out above.

ii) It would be difficult to determine the proper amount of limitation.

iii) The limit of liability sometimes is apt to work negatively. The limit itself would be often taken as a minimum level of compensation, or a starting figure for negotiation. Further, the limit may work to raise such damages, that would otherwise be much below the limit, up to the amount of the limit.

iv) The limit will be hard to maintain properly, because it will always be subject to change on account of such variable factors as inflation and exchange rate.

v) There would not be a substantial difference in impact on insurance premium between the complete abolition of the liability limit and a large increase of the limit.

If we had selected to increase the limit of liability, the revised limit would have to have been sufficiently high in amount so as to provide cover for most claims for damages in order to make the new limit workable as an effective step to deal with such claims. Otherwise, it would invite many disputes and much litigation to break the limit and, as a result, the new limit would not serve the purpose and would turn out to be meaningless. When the increase of limit is large enough to cover most of the claims, the risk exposure of the higher limit to the insurers would not be largely different from that of unlimited liability or the waiver of the limit. Accordingly, as far as the impact on insurance premium rate is concerned, there would not be so much difference, whether we take the waiver of the limit or a large increase of the limit.

Ⅳ. The Montreal Additional Protocol No. 3

MAP 3, with a Supplemental Compensation Plan (SCP), is not an effective measure to solve the issue we face in Japan, on the following grounds.

(1) 18 years have passed since MAP 3 was signed and 22 years have elapsed since the Guatemala City Protocol, the predecessor of MAP 3, was signed. These Protocols were said to have been agreed by the participants, not as an ideal or ultimate step in solving the issue of passenger liabilities, but rather as a practical step, which is nothing but a product of compromise. Furthermore, the SDR 100,000 limit of 1975 has lost its value greatly during such a long period and would now be unacceptable to many countries as a practical, unbreakable limit.

(2) Therefore, any possibility that MAP 3 will soon enter into force is presumed now to be very small. Should MAP 3 become effective eventually, it would probably take a long time. In the United States ratification of MAP 3 would be subject to bringing the SCP into effect through legislation, and 30 countries must ratify MAP 3 for it to enter into force.

We in Japan have been waiting for a long time for a convention based solution but after so long a delay we could hardly wait any longer. Thus,

we reached the conclusion that we have to resort to a contractual solution under the Warsaw Convention, because we could not keep our customers waiting any longer.

(3) Even if MAP 3 ever comes into force, the situation would be very complicated by the existence of both MAP 3 passengers and non-MAP 3 passengers on individual flights and by the plurality of SCP's. Some countries will not, or are unable to, ratify MAP 3-some will, and many will not, implement SCPs.

For instance, it would be difficult for Japan to ratify MAP 3 due to the restrictions of the Japanese Constitution, something which was pointed out by one of Japanese representatives at the diplomatic conference on the Guatemala City Protocol in 1971. The unbreakable limit of liability would be in conflict with the "inviolable property rights" guaranteed under the Japanese Constitution.

Even if Japan could overcome this restriction, it would be almost impossible for us to put a SCP in place, theoretically as well as practically, although a SCP would be indispensable for the implementation of MAP 3 in Japan.

Further, I understand that one or more of the European Community (EC) countries have indicated that they could not ratify MAP 3 because the notion of "unbreakability" of limits would be contrary to constitutional theory. According to the consultation paper issued recently by the EC, they appear to have taken a negative view regarding the ratification of MAP 3.

In addition, there may be many countries that would not ratify MAP 3 because SDR 100,000 is too low as an unbreakable limit of liability nowadays.

(4) I am afraid that the probable existence of both MAP 3 nations and non - MAP 3 nations, and multiple SCP's, would lead the world passenger compensation scheme into a far more complicated and uncertain situation, verging on chaos, and imposing tremendous difficulties upon both airlines and passengers.

(5) A SCP seems to be uneconomic comparatively large amounts of

expenses and costs would be involved in the operation of a SCP, because a SCP requires the creation of a new organization and a system of collection of fees from all international passengers. Economically speaking, it will probably be less expensive for the airlines to abolish any liability limit and to cover necessary risks by their passenger liability insurance instead.

(6) There are many countries where the interantional passengers are not sufficiently numerous to set up and implement their own SCP. In those countries, if MAP 3 is ratified, their citizens would not have the right to recover damages in excess of SDR 100,000 because a SCP would not be available to them. Therefore, this could lead to cases where the recovery of damages becomes less favorable to the passengers under MAP 3, due to the unbreakable nature of the MAP 3 limit.

(7) It is said that one of the reasons for expediting the ratification of MAP 3 in the United States is aimed at the exclusion of punitive damages under the MAP 3 scheme.

There have been some strong judicial precedents in which punitive damages are held not recoverable in a case where the Warsaw Convention applies. Likewise, it is assumed that punitive damages would not be recoverable under MAP 3 with it's unbreakable limitation of liability.

It has been said that the United States intends to denounce the Warsaw Convention when MAP 3 is ratified and their own SCP is in place. Also, should the United States fail to ratify MAP 3, it is said that the United States would be sure to denounce the Warsaw Convention with its unacceptably low liability limit.

Under such circumstances, many U. S. citizens will or could become so-called "non-Convention passengers" in international transportation by air. As a result, airlines would probably be exposed to more claims of punitive damages.

However, the ratification of MAP 3 would not be the only means to preclude punitive damages against the carrier. If many airlines follow suit after the lead taken by the Japanese airlines, and waive the limit of liability by invoking a special contract under Article 22(1) of the Warsaw Conven-

tion, the United States might not find any reason to denounce the Warsaw Convention in the case of their failure to ratify MAP 3. In this sense, we believe that the waiver of the limit of liability for passenger injury or death would be the best way to make the Warsaw regime survive existing serious confusion.

Further, even if the denunciation of the Warsaw Convention by the United States is unavoidable, eventually, it would not be equitable to impose upon the world air passengers the questionable sum of SDR 100,000 as an unbreakable limit of liability in order to exclude punitive damages.

V. Successive Carriage

As stated above, the abolition of the passenger liability limit by the Japanese airlines was accomplished through an amendment to the "conditions of carriage" by means of a "special contract". Therefore, this abolition of the limit has an effect only on the carriage to which such "conditions of carriage" applies.

Take Japan Airlines for instance. Even if JAL makes a reservation and issues a ticket to a passenger, the condition of carriage containing the waiver of the limit is effective only for the portion of the carriage actually performed by JAL and has no effect on the liability of successive carriers.

This rule of the Warsaw Convention is quite clear and leaves no room for doubt. In addition, in JAL's "conditions of carriage", it is stated that "JAL shall not apply the limit of liability based on Article 22(1) of the Convention…", specifying JAL instead of using the nonspecific word "carrier".

We in Japan Airlines kept our press release regarding the waiver of the limit of liability to the minimum, and decided to withhold inclusion of reference to the waiver of the limit in our tickets for the time being, so as to avoid unnecessary friction and criticism that, by our action, we are attempting to take advantage of these favorable conditions of carriage for marketing purposes.

However, we are now preparing for our own protection to describe expressly on our tickets that "JAL shall not apply the limit of liability", since there seems to be a view that the waiver of the limit by the Japanese airlines may also be applicable to carriage by successive carriers. It has been argued that successive carriers may be entitled to claim indemnity from a Japanese carrier for any liability in excess of the successive carriers' own contractual limit due to the Japanese waiver. We believe that is wholly wrong but the argument must be addressed.

Ⅵ. Conclusion

The main factors that the Japanese airlines took into account in taking their initiative to abolish the passenger limit of liability within the Warsaw Convention regime are considered to be as follows :

(1) We have been under the strong pressure of circumstances where a fundamental reform in the scheme of liability for Japanese international air carriers was urgently needed to deal adequately with the situation in case of catastrophe. The existing limit of liability was so low that it would be sure to invite considerable confusion and disputes, should a major air accident occur.

(2) We were fully convinced that we were proceeding with the subject matter in the correct, effective and most realistic direction, and have received strong support from external advisors, including scholars, lawyers and others.

(3) It was estimated that the costs to abolish the liability limit would not be very big.

(4) After comparing costs to be incurred and benefits to be gained, the new scheme appeared to prove favorable. The benefit includes not only the reduction of litigation for proof of wilful misconduct or gross negligence to overcome limitations of liability, but also the improvement of the company's reputation and a more efficient use of legal manpower. Less time would be spent on long and costly liability disputes and more on other

important aspects of legal work.

(5) With respect to airline activities outside of Japan, IATA has passed resolutions to expedite the ratification of MAP 3 several times at General Meetings until 1984. The IATA Legal Advisory Group, however, has now formed a Working Group to study new approaches to the liability issue and has held several meetings since last year. They will seek to establish the position of IATA on this issue shortly.

If IATA members should finally adhere to the unbreakable limit of liability of SDR 100,000 of MAP 3, thereby adhering to the old IATA resolutions, I am afraid that IATA and its members might well be criticized by the public, seeing IATA as a kind of cartel which gives priority to the interests of the member carriers over the interests of the customers or the public.

Lastly, I would like to express my hearty gratitude to the lawyers and scholars concerned, in and out of Japan, for their kind assistance and support to us in our efforts. Without such assistance and support, we could not have accomplished the project which has led to the new scheme of international passenger liability we are proud to have called "The Japanese Initiative."

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I would like to refer to a consultation paper issued by Commission of the European Communities and to make a few comments on the paper. It was in early January of 1993, when I learned of the consultation paper through IATA. Since it was on November 20, 1992, as aforementioned, that the Japanese airlines waived the limitation of passenger liability, our decision was not affected by the EC Commission's move. I dare say that even if we had known of the paper beforehand, our decision would have been unchanged for the following reasons :

Firstly, reference is made to the paper which states that the Commission invites interested parties to present their views on this issue, in particular in relation to the basic elements for a proposed EC system of passenger liability. As shown in the Study attached to the consultation paper, compensation limits among the 12 member nations of EC and their airlines differ

considerably. Thus, I assume that it could take quite a long time for the Commission to take community action to harmonize limits or standards of liability throughout EC. As previously mentioned, we were under heavy pressure to resolve the liability issue urgently to cope with the contingency of an air accident and were compelled to take action without any further delay when we implemented the new scheme last year. Therefore, we could hardly have waited until the consultation was concluded, particularly as there have been long delays and little activity since.

Secondly, I could not believe the plans as contained in the Study Recommendations (Note) in the consultation paper to be a practical or feasible solution to this liability issue, for the following reasons though I personally pay profound respect to the extensive and in-depth study undertaken :

1. To place a revised limit on liability is nothing but an interim solution and will be subject to further revision sooner or later.

2. Reference is also made to an item of the Study Recommendations : "The notice to passengers should be reviewed to advise the passenger of the specific applicable limits and confirm the scope of the optional supplemental insurance."

It would present many difficulties for an airline to give notice. When a ticket is purchased by a passenger, in many cases, various parties, such as a travel agency, his secretary or friends, may be involved in this transaction between a selling airline and a buying passenger, and actual contact with the passenger is not always ensured. I am afraid that, under those circumstances, many difficult problems would arise, such as how to confirm the notification to passengers, whether or not a failure to confirm the notification to the passenger affects validity of liability limit, whether or not the staff of airlines and travel agencies can correctly and precisely answer various questions related to the liability limit such as breakability, conversion of the value of gold francs, etc.

However, should this new scheme under the Study Recommendations be implemented in future, it would bring about unintended side effects. It is not too much to say that the Japanese airlines would be put in a

favorable competitive position, because all the airlines and travel agencies in Europe have to bring attention of passengers to the liability limit of European airlines and to the unlimited liability of the Japanese airlines if carriage by the Japanese airlines is included in their itinerary. I am afraid that European airlines would be certainly unwilling to accept the unfavorable side effects on their marketing caused by advising better conditions of other airlines.

I sincerely hope that the European airlines will examine this issue of the limit of liability urgently from the most practical and feasible viewpoint, and follow suit after the initiative taken by us.

Note : "Study Recommendations" included in the "Study" attached to EC consultation paper.