The Drifting Warsaw System of Liability - Toward New Practical Remedies -

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Introduction

The Warsaw System of Liability is now drifting. The basic instrument

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of the Warsaw System is the worldwidely recognized Warsaw Convention of 1929 coming into force on 13 February 1933, contracting states to which reached 134 states as of 15 December 1993. In the Warsaw Convention of 1929, carriers' liability for passenger injuries and deaths was to be limited to 125,000 gold francs consisting of 65 1/2 milligrams gold millesimal fineness 900. After World War II, it had become clear that in accordance with drastic change of the socio-economic climates in the world, disparity between de facto compensation level for passenger injuries and deaths and de jure artificial carriers' liability limit level had conspicuously widened and that needs to raise the limit were to be gradually asserted especially in industrialized states at the time. Consequently the first amendment to the original convention, The Hague Protocol came into existence in 1955. This Protocol raised carriers' liability limit for passenger injuries and deaths to double of the original convention limit, namely to 250,000 gold francs. This Protocol coming into force on 1 August 1963 was also worldwidely accepted by except the United States, contracting states to which amounted to 119 states as of 15 December 1993. Insofar as failure of ratification of The Hague Protocol by the United States is concerned, it is retrospectively pointed out that at the time the rest of the world should had more seriously and accurately understood and foreseen the socio-political climates in the United States. Adding to those two key instruments, there are five amendment protocols, one supplementary convention, and numerous quasi-official and unofficial arrangments, among which the most major is the so-called Montreal Intercarrier Agreement of 1966 between international carriers flying from, to and via the territory of the United States. However, the remaining five amendment protocols are not yet coming into force. Among them, the most substantial is undoubtedly the Guatemala City @rotocol of 1971 which was at the time regarded to update completely as a whole the Warsaw System of liability in the carriage of passengers and baggage.

It is well acknowledged that it made numerous reforms which included: the adoption of a strict liability in a line with one developed in the Montreal Intercarrier Agreement of 1966; a very substantial increase in the limits at the time; adding an additional forum to the previous four forums; adopting an automatic increase clause and also a settlement inducement clause; and setting up, if required, a domestic supplemental compensation plan. It, however, stipulated such new limits to be unbreakable in any circumstances, revoked the Article 25 arrangement to break the limit by proving intentional or reckless misconduct and removed the Article 22(1) remedy to increase the limit by special contract between carriers and their passengers. However, when major states were still under consideration whether or not they should ratify the Guatemal City Protocol of 1971, an external but decisive event that was to be directly related to the Warsaw System of liability, namely, a collapse of the Bretton Woods System suddenly broke up in 1974, consequently caused unforeseeable uncertainty of calculation of a gold franc to their natoinal currencies, and thereafter their very willingness of ratification of the Protocol became rapidly withered. Among four remainders which adopted at the Montreal Conferences in 1975, the first three were named Additonal Protocols, the very objective of which Warsaw System to convert the previous gold clauses into the new IMF Special Drawing Right(SDRs) clauses. The Monteal Additional Protocol No. 1 of 1975(MAP1), the Montreal Additoinal Protocol No. 2 of 1975(MAP2) and the Montreal Additional Protocol No. 3 of 1975 (MAP3) convert the gold clauses in the original Warsaw Convention, the Warsaw Convention as amended by The Hague Protocol, and the Warsaw Convention as amended by The Hague Protocol and the not yet in force Guatemala City Protocol into the Special Drawing Rights (SDRs) clauses respectively. On the other hand, the final was simply named the Montreal Protocol No. 4 of 1975 (MP4) without "Additional", the objectives of which were regarded to update the

cargo - related provisions of the Warsaw Convention to be as amended by The Hague Protocol as well as to convert its gold clauses into the Special Drawing Rights (SDRs) clauses.

Although in the practical point of view, the International Civil Aviation Organization (ICAO) and the Internatoinal Air Transport Association (IATA) have repeatedly urged states to ratify the 1975 Montreal Protocols Nos. 3 and 4 of the Warsaw System so far, these Protocols have not yet received adequate ratifications to come into force. It is quite acknowledged that one of main reasons for this driftage of the Warsaw System retrospectively is to be found in uncertainty over the noncommittal attitude of the United States toward especially the 1975 Montreal Protocols Nos. 3 and 4, whereas it is well-recognized that the United States keeps on seeking a well-organized full compensation scheme for all of it's nationals. In addition, as a result of the passage of long time, both Protocols are increasingly being undermined as outdated.

Recently, some regions, states and airlines in the rest of the world, getting tired of waiting for an unforeseenable response of the United States for the forementioned both Protocols, are to become evolved some practical and interim remedies in their own initiatives as an urgent refuse against the drifting Warsaw System of liability. One of them is the so-called Japanese Initiative which was compelled to opt unlimited liability regime in its own rather unique socio-economic and institutional climates in 1992. Since that time certain sections of the world seem again quite earnestly to set out challenging invention of new practical countermeasures toward the drifting Warsaw System of liability. This paper is in tracing major individual interim remedies so far, and trying to sound out on and predict a practical consequence in the near future within present limited conditions and times as of the mid-October 1995.

1. Practical Remedies before 1992

1.1. The Montreal Intercarrier Agreement of 1966

The first practical remedy to the drifting Warsaw System of liability was the 1960 Montreal Agreement among international carriers flying from, to and via the territory of the United States, the main objective of which was to dissuade the United States from its denouncing the Warsaw Convention of 1929. While this agreement is, in the sense of a private agreement among certain international carriers, classified as an unofficial agreement, it is noteworthy that this Agbeement is to have a quasi-official character in the senses of that majority of the party carriers except the US ones at the time are government owned or government controlled flag carriers, and that this Agreement is required to be filed with the CAB of the United States as the depository for approval. What the 1966 Montreal Agreement constitutes is: first, to set up strict liability under Article 17 of the Convention except contributory negligence recognized under Article 21 there of, instead of presumed fault liability, having waived carrier's defence to avoid liability by proving absence of fault that is granted to him by Article 20(1); second, to increase the limit of carrier's liability to the sum of US $ 75,000 or US $ 58,000 depending on whether or not legal fees and costs are inclusively awarded; third, to require for party carriers to use a new type of notice of liability limit to be given to passengers and to be printed in at least 10 point type; and lastl, to limit carrier's liability for passengers carried by any non-party carrier of this Agreement to approximately US $ 10,000 or US $ 20,000 under a US regulation, namely, the CAB Order 74-1-16 of on 3 January 1974 in which the US Dollar equivalent of 125,000 and 250,000 francs was fixed at US $ 10,000 and US $ 20,000 respectively. It is noteworthy that this Agreement has in itself a discriminative character in the sense of that passengers flying from, to and via the territory of the United States are solely granted such an increased award privilege.

As time goes on, many carriers in industrialized states became voluntarily expanded the application of their such amended Conditions of Carriage, whether or not flying from, to and via the territory of the United states, for all of their passengers being applicable to the Warsaw System of liability. As a result of the year by year expansion of the applicable passengers, the discriminative nature of the Agreement becomes gradually to be in fact deduced. In this context, it is pointed theoretically out that there is no reasonable ground mentioning, in the notice on limitation of liability on each ticket, to limit carrier's liability for passengers flying from, to and via the territory of third states other than the United States carried by not only any non-party carriers but also any party carriers of the 1966 Montreal Agreement, to approximately US $ 10,000 or US $ 20,000, instead of 125,000 francs respectively.

1.2. The Malta Group Initiative

The so-called Malta Group is an unofficial meeting of government aviation lawyers organized by the British ones shortly after establishment of the 1966 Montreal Agreement. In 1974, under the recommendation of the Malta Group, a number of Western European states agreed formally in London upon a provisional remedy to raise The Hague Protocol limit to US $ 58,000 per passenger. Each state has informally undertaken to give effect to this increase with regard to its flag carriers, and the increased limit was introduced either by a special contract on the part of its air carriers pursuant to Article 22(1) of the Convention as amended by the 1955 Hague Protocol or by national legislation.

In March 1980, an informal Agreement was also reached in Lisbon among the Malta Group to recommend to their government that the limit per passenger should be increased to 80,000 Special Drawing Rights (SDRs) being equivalent to approximatley US $ 100,000 at the

time.

1.3. The Italian Initiative

A prelude of the Italian Initiative was first performed in the Constitutional Court in 2 May 1985. In the case of Coccia Ugo et al. v. THV, (Decision No. 132/1985(2 May 1985)), the Italian Constitutional Court found that the Italian statutes which implemented the limit of the carrier's liability for passenger deaths and injuries found in Article 22(1) of the Warsaw Convention as well as in Warsaw Convention amended by The Hague Protocol were incompatible with the Italian onstitutional principles of fundamental liberties granted to all citizens under the Constitution of 1948. In this case, legality of the very existence of the limitation of liability as well as the effectiveness of the low limit of the Warsaw System was disputed. The Court found such low limits to be unacceptable, while the former issue of legality was upheld by the Court. Consequently, all of other basic principles of the Warsaw System remained unaffected by the decision. Following the court decision, the Italian Parliament approved in 1988, as a practical but legislative remedy, Law No. 274 of 7 July 1988 on the "Limit of Liability in International Air Carriage of Persons" which obliges not only Italian air carriers but also foreign air carriers flying from, to and via the territory of Italy to conclude a special contract which increases their limitation of liability for passenger injuries and deaths to not less than 100,000 SDRs, together with the fact that this law is to be unforceable on filling a requirement of the Montreal Additional Protocol No. 3 to come into force. Moreover, No aircraft is permitted to fly without evidence of a corresponding insurance coverage. In the Italian Initiative, the increased limit is imposed by a Italian Law as a condition for the operating permit of the carrier. An decisive shortcoming of the Italian Initiative is that such an increased limit of liability for passengers is also to apply to all foreign carriers who are

as a result compelled to draw up a new special contract including, whether or not they want, not less than 100,000 SDRs limit.

2. The EC Initiative

On 5 October 1992, the commission of the European Community (EC) issued a Consultation Paper entitled "Passenger Liability in Aircraft Accidents: Warsaw Convention and Internal Market Requirements", together with an its annexed report by Sven T. Brise on 15 September 1991 and entitled "Study on Possibilities of Community Action to Harmonize Limits of Passenger Liability and Increase the Amounts of Compensation for International Accident Victims in Air Transport", on 18 January 1993, a meeting between the Commission and some EC member states with Sweden and Norway concluded that compensation limits were too low and internal market requirements necessitated phasing-out of distortions, but also that care should be taken to avoid drifting Warsaw System. These developments influenced the European Civil Aviation Conference (ECAC) Economic Committee to give priority to the study of the Warsaw Convention, which will be treated more fully in the later section of this paper.

3. The Japanese Initiative

3.1. Generalities

Early in November 1992, ten Japanese international air carriers, one after another, filed applications with the Ministry of Transport (MOT) to modify their respective Conditions of Carriage in particular in order to waive passenger liability limits based on the original Warsaw Convention amended by The Hague Protocol of 1955. The new Conditions of Carriage came into force on 20 November 1992. As the Japanese economic growth progressed, the Japanese domestic air carriers modified already their respective Conditions of Carriage in 1982, by removing passenger liability limits with a view to converting

from the limited liability scheme to the unlimited liability scheme. Accordingly, since 1992, unification of the liability scheme being made up of unlimited liability came realized in respect of compensation schem for both the international and domestic air transport in Japan. Articles 16(C) (4) (a) and (b), and 16(C) (12) of the Conditions of Carriage modified by the All Nippon Air ways (ANA) read as follows:

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

(i) ANA shall not apply the applicable limit of liability based on Article 22(1) of the Convention in defence 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, ANA does not waive any defence to such claims as is available under article 20(1) of the Convention or any other applicable law.

(ii) ANA 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 defence 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 reasonability.

(b) Nothing herein shall be deemed to affect the rights of ANA 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."

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

The other Japanese international carriers have also made almost the

same modifications to their respective Conditions of Carriage. The new Conditions of Carriage modified by the All Nippon Airways(ANA) were immediately filed to the Department of Transportation(DOT) of the United States for receiving an exemption from compliance with the regulations and foreign air carrier permit conditions relating to the Montreal Agreement of 1966. On 30 December 1992, the exemption was granted to the All Nippon Airways (ANA). In granting the exemption, the Department of Transportation (DOT) of the United States concluded that " while Agreement 18900 binds the parties to a liability limit of not less than $ 75,000 (US) under Article 22(1) of the Warsaw Convention for passenger injury and death, it was not intended to preclude the waiver of the limitations of liability for higher amounts, or to unlimited liability as proposed here, in a manner which would benefit the travelling public in the form of additional protection. Therefore, we find that the relief sought by ANA is consistent with the public interest". Similar exemptions were granted by the DOT on 11 February 1993 to all participating air carriers of Japan.

What the new modified Conditions of Carriage constitutes is that: first, all Japanese air carriers set up unlimited liability for claims arising out of passenger injury and death in all international carriage by air coming under the Warsaw Convention of 1929 and the Warsaw Convention amended by The Hague Protocol of 1955, in other words, they promise full compensation; second insofar as carriers liabilily system is concerned, for claims up to the sum of 100,000 SDRs, all the Japanese air carriers waive the right that they have under Article 20(1) of the Convention to reverse the presumption of liability by proving the absence of fault, while for claims beyond the sum of 100,000 SDRs, they do not waive such a right. Therefore, they retain strict liability up to the sum of 100,000 SDRs and presumed fault liability beyond the sum of 100,000 SDRs; persons who have willfully caused damage will not be entitled to recover any damage; and all Japanese air carriers

turn down to take the liability for any punitive and similar damages.

3.2. Backgrounder on the Japanese Initiative

There exist various academic and practical reasons behind the Japanese Initiative which was somewhat compelled to opt unlimited liability by modifying the carrier's Conditions of Carriage. In this context, views were not advanced in support of promoting actively the ratification of the Montreal Additional Protocol No.3 of 1975 (MAP3), as this would give rise to negative reaction of the public opinion due to the protocol itself being tragically defective from the academic and practical view points. Firstly, it may be pointed out that the SDRs clause in MAP3 does not serve the purpose of stabilizing the liability limit. It is noteworthy that this clause functions practically as it was a hidden automatic decrease clause for states having relatively stronger economic power. In Japan the past two decades converted value of 100,000 SDRs was reduced by 60% in its nominal value. Secondly, 100,000 SDRs limit is much too low compared with actual damage amounts which might be suffered from passengers. It is very likely that enforcing this limit would be ruled by Japanese Court breach of the public order and the good-natured social manners and customs. Thirdly, as Professor Bin Cheng had pointed out, there is no avenue to automatic increase envisaged by automatic increase clause introduced in MAP3 as a result of drafting mistake. Fourthly, there is a question of unbreakability of the liability limit. This unbreakability on the one hand is in reality tantamount to being able to have limited liability recognized even when there is intentional or reckless misconduct on carriers' side. This thinking is incompatible with the scholarly opinions in Japan. What this unbreakability singnifies, on the other hand, is a total denial to the special contract between carriers and passengers acknowledged under the Warsaw System. This thinking causes great concern for Japanese who believes that the unbreakable liability limit is

unacceptably low, and thus works as one of the major factors that make Japan refrain from ratifying MAP3. Fifthly, there is an issue relating to domestic supplemental plan funded by passengers, which is devised to supplement the low unbreakable liability under MAP3 on the basis of the principle of beneficiary-borne. Nowadays, the safety standard of commercial air transportation is as high as, or even higher than those of other modes of transportation. It is submitted that the domestic supplemental plan under MAP3 with its extremely biassed nature to the interest of air carriers, is not supported.

Be that as it may, Japanese carriers bearing in mind that there was no possibility for Japan to ratify MAP3 were obliged to take their decision as to whether to refrain from further increase of the liability by taking action in concordance with the major carriers of the world as was the case, or to take their own decision toward further increase of the limit. The first point to be taken into account is that there has been very evident tendency of Japanese Yen equivalent of 100,000 SDRs decreasing year by year. With the current conversion rate 100,000 SDRs being equivalent of ¥15,000,000 is merely one-sixth of the average actual airplane damage and is extremely low. Once in litigation it is very likely that this amount is considered not just untenable but inacceptably low and to be breach of public order. In this sense, increase of the limit was justifiable. The second consideration may be given to comparison between domestic and international air carriage in respect of their compensation schemes for passenger injury or death. Compensation schemes for domestic air carriage marked a very notable change as from 1 April 1982 from the limited liability regime to the unlimited liability one following the appropriate modifications to the Conditions of Domestic Carriage. It is noteworthy that in the Japan Airlines' Mt. Osutaka crash of 1985, although 29 out of 520 deceased passengers were international, their cases were, however, dealt with in exactly the same manner as those of domestic

passengers and full compensation to meet the actual damage was made. In this context, 100,000 SDRs limit provided for the Conditions of International Carriage did not mandate the settlement of claims. What both the carrier and the victims and their families contemplated and bore in mind was the compensation level in automobile accidents. In this regard, it is appropriate to assess raising of the unlimited liability scheme. The third point to be taken into account, although unique in Japan due to its social customs as well as legal customs is very high possibility of persons concerned being held criminally responsible, whenever liability limit is much too low and no compromise negotiations have been concluded. Despite Japan is generally considered to be one of civilized countries, some of those persons concerned in aircraft accidents here involving personal injury or death are subject to criminal investigation as suspects for offense against injury or death caused by fault in service and offense against air risk caused by fault in service and some of those suspects could well be prosecuted with the possibility of receiving criminal disposal. With regard to effect of progress or outcome of civil cases on criminal cases, the view of many scholars are negative, whereas the majority view of practitioners consider there is actually strong effect. In particular, in criminal trial in traffic accidents, it is believed that success or non-success of compromise negotiations in civil trial is regarded a very significant element in determining the outcome of criminal disposal. Concluding of a private settlement would mean that at the stage of criminal investigation, the suspecsts may have been increasing possibility of extenuating of his charges or not to be indicted. At the stage of trial, he has increasing possibility of receiving suspended sentence in consideration of the extenuating circumstances. In this sense, it is appropriate to raise the liability limit.

As has been examined above, in Japan increasing the liability limit is appropriate and justifiable, nevertheless what is at issue here is what

the new liability limit would be. Although Article 22(1) of the Warsaw Convention from the wording itself would provide airlines with freedom to adopt higher liability limit, it is not entirely clear whether, instead of higher liability limit, airlines would be to adopt unlimited liability. Nonetherless, the Japanese airlines eventually opted a method in which unlimited liability was adopted instead of one subscribing to a higher limit. To my knowledge, there were some reasons which Japanese airlines compelled to take that course of action or made them feel it was desirable to do so. First of all, in Japan as mentioned above the liability limit is as a practical matter regarded as the minimum liability limit of which amount is taken as starting point in compromsie negotiation. Therefore, it is easily anticipated that even if the carriers decide to raise their liability limit to one as extremely high amount as e.g., ¥100,000,000(≒US $ 1,000,000), such a limit would be still in practice regarded as the minimum compensation. In this ground, the Japanese airlines appear to have intentionally adopted the principal of unlimited liability. Secondly, in Japan, this change to the umlimited liability regime does not mean opening away to emergence of unforeseenably high compensation amounts. What this change brings about is that the Japanese airlines in dealing with compensation claims as a result of aircraft accidents will base their compensation amount on the existing compensation standard in a force by following the compensation formulae applied widely in traffic accidents in general. The third reason is that which is derived from their endeavors toward unificaion of liability principle in respect of compensation scheme for both international and domestic air transportation. The fourth reason is based on the fact that the 1982 change to the unlimited liability scheme for domestic carriage by air and the 1990 change to the unlimited liability scheme for international carriage by sea resulted in no substantial increase in the cost of their insurance. Rather by virtue of this change to the unlimited liability scheme, which fosterd compromise

negotiations for a private settlement, this scheme helped to reduce the cost involved compromise negotiations. Lastly, in my view, the Japanese airlines could be announcing their confidence in high standard of their safety, although they were taciturn about it and so diffident in doing so.

3.3. Remarks

The Japanes Initiative is characterized as an urgent refuse against the drifting Warsaw System of liability for the present. It is technically attained in accordance with the Warsaw System completely, namely pursuant to special contract under Article 22(1) of the Warsaw Convention or the Warsaw Convention amended by The Hague Protocol of 1955. In this sense, it is legitimately established without contravention of the term of the Convention. In the Japanese initiative, all the Japanese carriers accept voluntarily unlimited liability scheme which is not intended to extend to any foreign carriers. Passengers carried by one of Japanese carriers ought to be, whether they are Japanese nationals or not, taken the same privilege enjoying unlimited liability, therefore, there is no discriminatory nature. As mentioned above, in the conclusion done by the Department of Transportation (DOT) of the United States to grant Japanese air carriers an exemption from compliance with the regulations and foreign air carrier permit conditions relating to the Montreal Intercarrier Agreement of 1966, it says that we find that the Japanese initiative is consistent with the public interest.

On the other hand, when observing in detail upon the Japanese Initiative, we will find some shortcomings there. First of all, insofar as the liability system adopted by the Japanese Initiative is concerned, what it does is to set up a two-tier liability system consisting of strict liability and presumed fault liability which is divided by a line of demarcation shown by a specified sum of liability limit, namely, 100,000

SDRs. Consequently, what this Japanese Initiative machinery means is, in short, that for claims up to 100,000 SDRs strict liability is to be imposed and for claims beyond 100,000 SDRs presumed fault liability and full compensation. If 80% of claims are settled in less than 100,000 SDRs, then the Japanese two-tier system machinery would be appreciated to be well-workable. However, the fact shows that nowadays there is no such a claim as may be settled in less than the sum of 100,000 SDRs in Japan. In a domestic airlines case killing 520 passengers in 1985, the average compensation award per passenger would be estimated to be more than 500,000 SDRs. No passenger was awarded less than 200,000 SDRs. Therefore, from the practical point of view, almost all passengers would apply in accordance with the Japanese Initiative machinery a presumed fault liability and full compensation except quite limited foreign passengers coming from developing states. Nowadays, bearing in mind the very existence of the considerable complexity in finding the probable causes of aircraft accidents, insofar as liability system on air transportation is concerned, substantial difference between absolute or strict liability and presumed fault liability seems hardly to be so absolute as what it is theoretically construed. However, in the present Japanese Initiative machinery, it is pointed out that almost all claims would be always exposed to risks that Japanese carriers may exercise any defences, and moreover that all persons concerned responsible for an accident would be also exposed to higher risks that they would become suspects of criminal disposition. From theoretical and practical points of view, it may be pointed out that the present Japanese Initiative was not able to attain a good-balanced innovation. In this sense, it is submitted that transportation from the present two tier system to the single tier system with absolute or strict liability system would be recommended.

Secondly, as compared with compulsory automobile liability insurance, there are two shortcomings found in the Japanese Initiative.

Presently the statutory limit of compulsory automobile liability insurance for passenger's death is ¥30,000,000 being equivalent to about 212,000 SDRs which seems nowadays to work as if this amount were a minimum compensation award for serious traffic accidents. Moreover the Japanese compulsory automobile liability insurance accompanies with a front-payment system which would be equivalent to 10% of the compulsory liability award, while, in the Japnese Initiative, there is no such an adequate consideration.

Finally, the Japanese Initiative seems, as a whole, to lack an idea relating to a speedy settlement machinery.

4. The UK Initiative

On 1 April 1981, the Civil Aviation Authority (CAA) of the United Kingdom(UK) belonging to the Malta Group has unilaterally imposed a 100,000 SDRs limit which was equivalent to the amount specified in the Montreal Additional Protocol No. 3 (MAP3) only upon all UK carriers. This UK Initiative has been followed spontaneously by the major European states and some non-European states as well as their flag carriers. It is noted that recently British Airways voluntarily applies a limit of 130,000 SDRs in carriage that would otherwise be subject to the 1966 Montreal Agreement.

5. The Australian Initiative

In November 1991, the Australian parliament enacted an amendment to the Civil Aviation (Carriers' Liability) Act of 1959 to give effect locally to Montreal Protocols No. 3 and No. 4 when they come into force.

In November 1993, after consideration of the insurance consultant's findings, the Minister of Transport and Communication proposed the following three-tier passenger liability limit scheme: a A$ 750,000 limit to apply to the major jet carriers; a A$ 500,000 limit to operators of

middle-sized commercial aircraft; and a A$ 250,000 to operators of small-sized commercial aircraft. The responses to this proposal recognizing that passenger's compensation award would be determined by the size of the aircraft were predictedly negative. Consequently, on 12 October 1994, the Australian Government has announced the introduction of a uniform limit scheme and related insurance issues applicable to domestic and international carriage by all Australian air carriers. The single limit of A$ 500,000 being equivalent of 260,000 SDRs applied to Australian domestic carriage from 18 October 1994. It is anticipated that the same new limit would be applied to international carriage by solely Australian carriers early in 1995. In accordance with the advises by the Attorney-General's Department stating any unilateral change to the applicable Warsaw System limits by the imposition of a higher limit on foreign carriers would constitute a breach of Australia's treaty obligations under the Warsaw System to which it is a party, therefore, insofar as foreign international carriers are concerned, the same higher limit would not apply.

6. The ECAC Initiative

The European Civil Aviation Conference (ECAC) is a permanent institution which was established in the Conference that was held by ICAO at Strasbourg, headquarters of the Council of Europe in 1995. The main objectives of European Civil Aviation Conference are: to review development of intra-European air transport in order to promote coordination, better utilization and orderly development of such air transport; and to consider any special problems in the field. The function of European Civil Aviation Conference is intended to be consultative and therefore any conclusions and recommendations are required to be subject to the approval of the individual governments. The original member states were 19 states and at present reached 32 states in the larger European area.

In June 1994, the European Civil Aviation Conference adopted in its sixteenth triennial session (Strasbourg, on 22-24 June 1994) the Recommendation 16-1 concerning air carriers' liability with respect to passengers, the purpose of which, in a spirit of consumer protection, " is to propose a means for updating certain elements of the international air carrier liability system with respect to passengers".

After assessing the current situation regarding air carriers' liability in its member states, based in particular on replies to two detailed questionnaires, European Civil Aviation Conference further considered ways of improvement it, in the light of defects noted.

The work has been undertaken by EACA's Working Group II on Intra-European Air Transport Policy (EUROPOL-2/8). The following major problems have been identified there: the inadequate level of the liability limits currently applicable in international transport which vary with the routes and/or carriers involved and range from the negligible amounts established in the original Warsaw/The Hague Conventions to the values set some twenty years ago, which have meanwhile become insufficient in most instances; the difficulty of revising these limits by means of the legal instruments which are in force or are open for ratification; and the length and cost of legal procedures.

In pursuance of these objectives, it has been decided to aim as a long term objective at improving the international legal situation, coming under the Warsaw System, whose most recent instruments are not yet into force. As this operation was seen as a complex and lengthy task, it has been agreed that the more urgent question of updating the limits is possibility making other improvements that are compatible with the Warsaw/The Hauge Conventions, should be covered by an interim system that could be adopted in the near future, at least in Europe and, if possible, by other status. In this context, and in the light of a preliminary evaluation of the implications of both a voluntary intercarrier agreement and a more binding approach, it has

been agreed that airlines which are at least operating from, to and via Europe should be urged to reach an agreement containing certain key elements. European Civil Aviation Conference member states have been invited to take the necessary steps to make such an interim system enforceable if, within a reasonable period, the intercarrier agreement was not in force or if it did not include a sufficient number of airlines. The basic elements for an interim system are included; liability limits increased, as a first step, at least 250,000 SDRs, to restore the value in real terms of 100,000 SDRs established at Montreal in 1975; revision of such limit after three years, and periodically thereafter; liability system as currently available in Warsaw/The Hauge, namely breakable and presumable fault liability system; provision for advance settlement of uncontested part of claims, as speedily as practicable; and payment of lump sum, irrespective of carrier liability, immediately after the damage has occurred, in cases of passenger death or disability with a view to overcoming initial hardship. Such a sum would not be refundable, but would be deducted from total value of compensation.

Recently the author of this paper received an information that the Commission of the European Union (EU) also published a preliminary proposal for a council Regulation on air carriers' liability which would require carriers serving a point in the European Union(EU) to adopt liability limits of at least ECU 600,000, being approximately US$ 750,000. Apart from success or unsuccess of this Commission's proposal, the proposed Council Regulation seems to require not only EU carriers but also non-EU carriers serving a point in the territories of the EU member states to adopt a higher limit. However, it is pointed out that as found by the Attorney-General in Australian, imposition of a higher limit on non-EU carriers would constitute a breach of each EU member state's treaty obligations under the Warsaw System to which it is a party.

In 1993, the International Air Transport Association(IATA) requested

that both the US Department of Transportation (DOT) and the Commission of the European Union (EU) grant the required antitrust immunity, and hold discussions with a view to adjusting the liability by intercarrier agreement. The EU Commission gave the necessary authorizations and approvals in September 1993, and on the other hand the Department of Transportation (DOT) of the United States finally did in February 1995, which were extended on 12 July 1995.

7. The IATA Initiative

On 19-23 June 1995, the International Air Transport Association (IATA) convened Airline Liability Conference in Washington, D.C. in the United States, to preserve the Warsaw System by increasing the compensation available to international passengers in a manner consistent with the policies of various governments concerned and the expectations of their citizens. The Conference was attended by 67 air carriers, 6 regional airline associations, 3 other industry associations, as well as by observers from ICAO, the EU and the US Government. It in particular focused on a new liability limit to be established by special contract, along the lines of the Montreal Agreement of 1966, as well as on the question of defences under Article 20 and 21. It also considered the elements of a possible supplemental compensation plan and the approach taken in the Japanese Initiative. The Conference fianally arrived at the following conclusions: the Warsaw System must be preserved, whereas the existing liability limits are grossly inadequate in many jurisdictions and should be urgently revised; Governments, through ICAO and in consultation with airlines, should act urgently to update the Warsaw System and to address liability issues; Governments should act expeditiously to bring into force the Montreal Protocol No. 4 of 1975 (MP4) independently of their consideration of the Montreal Addtional Protocol No. 3 of 1975 (MAP3); the Conference was restricted the ability of participating air carriers to

reach an agreement immediately on the enhancement of compensation for passengers under Warsaw System; the US Government expected that the result of the Conference would ensure full compensatory damages for claims by all US citizens and permanent residents travelling between countries outside the United States; and the Conference objected to the US Government expectation as it would discriminate among passenger nationalities and would impose on airlines an unreasonable responsibility that should be borne by the US Government.

The Conference also agreed to recommend that a new enhanced liability package should be adopted by airlines as quickly as possible, to include: an updated liability limit of 250,000 SDRs; periodic updating of liability limits to reflect the effects if inflation; standard and precedures for up-front payments to meet claimants immediate needs; retantion of defences under Article 21 of the Warsaw System; where circumstances so require, a waiver up to 250,000 SDRs of the defences under Article 20(1) of the Warsaw System; where circumstances so require, recovery of proven compensatory damages beyond 250,000 SDRs; and complete compensation as allowed by and in accordance with applicable law.

The IATA Secretariat was amongst other things asked to prepare expeditious settlement of airline pasengers liability claims and draft texts of an intercarrier agreement, a plan for an appropriate and effective means to secure complete compensation as well as related documents by the end of August 1995. What the IATA Secretariat was prepared will be presented for approval of the 1995 IATA Anunual General Meeting scheduled 30-31 October 1995 in Kuala Lumpur, and thereafter will be submitted for requisite governmental approval.

The forementioned information paper on the expeditious settlement of airline passenger liability claims includes, in particular, offering aid and assistance on a non-refundable basis to passsengers and their relatives

with emergency needs or suffering financial distress as soon as possible; an interim payment for the uncontested part of the claims as speedily as practicable; and payments in advance of final settlement of the claims in accordance with all relevant local laws, special contracts with passengers, local customs and religious formalities.

What the forementioned draft text of an intercarrier agreement that is temporarily named the "IATA Draft Washington Intercarrier Agreement" constitutes is as follows: the agreement is an arrangement between international air carriers, concluded on a voluntary basis; all the participating carriers waive the limitation of liability on recoverable damages in Article 22(1) of the Convention as to claims for passengers deaths or injuries within the meaning of Article 17 of the Convention, so that recoverable damages may be awared by reference to the law of domicile of the passengers, in other words, for all the claims, full compensation would be set up, reserving a possibility to establish a domestic supplemental plan for the United States, any other rights of the passengers available under the Convention remain unchanged; insofar as liability system is concerned, a single tier system of presumed fault liability, and a two tier system consisting of strict liability and presumed fault liability would be coexisted, and in the latter case, for claims up to a specified sum, strict liability would be set up and for claims beyond that sum presumed fault liability, and moreover, it is, in the author's construction, submitted that in this context, a single tier system of strict liability would be possible as a carrier may decide; all the participating carriers reserve defences against passengers' contributory negligence under Article 21 of the Convention; all the participating carriers will encourage other carriers to apply the terms of this agreement to their international carriage; and all the participating carriers agree to implement this agreement no later than 1 November 1996, or upon receipt of requisite government approvals, whichever is later.

Conclusion

In order to save the drifting Warsaw System of liability, recently some regions, states and air transport undertaking associations are simultaneously to become evolved certain practical remedies in their own initiatives. When observing the recent major initiatives in particular the Japanese, the ECAC, the proposed EC Commission and the IATA initiatives, and also reactions by the United States for their initiatives, it is acknowledged that there is the following common assertion in these initiatives and the United States' reactions for them: first, the present Warsaw System should be preserved; however, the existing passenger liability limits are to be in the inadequate level in many jurisdictions; moreover, a quick revision of these limits by means of legal instruments would unlikely be attained today; in this circumstances, in order to address urgent liability issees, the most practical remedy is to be found to establish a provisional intercarrier agreement as soon as possible; and simultaneously profound studies should be commenced to update the Warsaw System of Liability as soon as possible.

Insofar as the ECAC's new enhanced liability package which would be embodied in an intercarrier agreement is concerned, it introduces a new intercarrier regime in the larger European area, thereby raising the liability limits at minimum 250,000 SDRs with periodical reviewing clause. Not only any ECAC licensed air carriers but also any third country air carriers flying from, to and via in the territory of an ECAC member state may participate in that agreement. With regard to its liability system itself, unchanged presumed liability system as currently available in the Warsaw System; compensation corresponding to the damage actually incurred up to a specified limit more than 250,000 SDRs which is breakable in cases of intentional and reckless misconduct as defined in Article 25 of the Convention. Furthermore, the

ECAC agreement provides for a number of addtional measures, such as a clause for advance settlement or uncontested part of claims, and non-refundable front pay-out regime to cover medical or funeral costs. Finally, party carriers to an ECAC Intercarrier Agreement is required to notify their accession and withdrawal to their civil aviation authorities and ECAC.

While what the ECAC's new enhanced liability package constitutes seems generally speaking to be quite well done, however, it is pointed out that there are four issues that should be taken into more account. The first issue is that SDR adopted by the ECAC intercabrier Agreement does not necessarily have a specific objective of stabilizing fixing the liability limits under any appropriate international Agreements. It is true that when one state has relatevely stronger economic power than the other, the conversion rate for SDRs to the local currency of that state having stronger economic power is to fall in inverse ratio. On the oher hand, if its economic power is weaker, the conversion rate is to rise. Consequently, this very fact implies that for states with either relatively stronger or weaker economic power, application of SDRs would not function as driving force to stabilize the liability limit: one SDR at the end of 1975 when the MAP3 was made up was 3.0698 Deutsche marks, 3.0671 Swiss francs and 357.23 Japanese yen, while that of the end of 1994 is 2.2610 Deutsche marks, 1.9146 Swiss francs and 146.61 Japanese yen; reduction rate of each local currency is 24.35%, 37.58% and 59.24% respectively. It is quite noteworthy that the SDRs clause used to work as it were a hidden automatic compensation award decrease clause for states having relatively stronger economic power. Therefore, in order to recover stability of the converted sum of national currencies from the sum mentioned in terms of SDRs, e.g. the following provision would be added into SDRs clause and its periodical increase clause: "Conversion of the sum mentioned in terms of Special Drawing Right into national

currencies shall be made according to the value of such currencies in terms of the Special Drawing Right at the date this agreement was made out."

The second issue is that the increased liability limit seems to be yet inadequate : accurately speaking, ECAC does not increase the liability limit in the substantial value but only adjusts the value in real terms of 100,000 SDRs established at Montreal in 1975. Nowadays it is a little doubtful whether or not the United States may reissue authorizations and approvals for holding intercarrier meetings on the passenger liability limits of Warsaw System and for the results of such meeting in the light of a new drastic development of the IATA Initiative in the end of October 1995. In this context, it is quite noteworthy the commision of the European Union (EU) recently published a preliminary proposal for a Council Regulation to adopt liability limits of at least ECU 600,000 which is equivalent to approximately US$750,000, in other words, the double increase of the value in real terms of 10,000 SDRs established at Monteal in 1975.

The third issue is that ECAC package adopts, insofar as liability system is concerned, a single tier system consisting of presumed fault liability that seems to be against the speedy claim settlement. Finally, it is pointed out that there is no longer considerations relating to insurance. It is submitted that new mandatory insurance requirements for carriers to be insured against potential liabilities would be introduced there.

In so far as the IATA Initiative on concerned, in 30 October 1995, the forementioned draft texts of the intercarrier agreement that is temporarily named the "IATA Washington Intercarrier Agreement", the packaged plan for an appropriate and effective means to secure full compensation and related documents, would be presented for the approval of the 1995 IATA Annual General Meeting, scheduled 30-31 October 1995 in Kuala Lumpur.

One of the most important basic elements of the draft Washington Agreement is to introduce a worldwide new intercarrier regime, thereby adopting the unlimited liability on a voluntary basis, reserving a possibility to establish a domestic supplemental plan in the United States. In other words, full compensation would be set up for all the claims. Insofar as liability system is concerned, all the participating carriers reserve the rights to opt either a single tier system of presumed fault liability or two tier system consisting of strict liability and presumed fault liability divided by a specified monetary amount of recoverable damages, in accordance with any government requirement or as a carrier may decide, and moreover in the latter case, for claims up to a specified sum, strict liability would be set up and for claims beyond that sum presumed fault liability would be so. Thus, it is submitted that in this context, a single tier system of strict liability would be also construed to be possible as a carrier may opt. Furthermore, all the participating carriers reserve defences against passengers' contributory negligence under Article 21 of the Convention.

On the other hand, it is pointed out that there are a few issues that should be taken more account. The first issue is that this draft agreement has no clauses such as an immediate pay-out to cover emergency need or suffering financial distress on the passengers side, an interim payment of the incontested part of the claims and e.g. advance payment for funeral costs, all of which were studied in the forementioned information paper on the expeditious settlement of airline passenger liability claims. It is a little doubt for IATA to have an intention including such generally useful clauses to the agreement within a two days' meeting. Without inclusion of such clauses to the agreement, or the attached documents thereof, unreliability against IATA would be certainly extended among travelling public in the world. The second issue is that there is no considerations relating to insurance. It is submitted that new mandatory insurance requirements

for carriers to be insured against potential liability would be introduced there.

Thus, it is time to consider the Japanese response or adjustment to the draft IATA Washington Intercarrier Agreement. First of all, insofar as the limitation of liability is concerned, all the Japanese air carriers have adopted unlimited liability in order to avoid lengthy and contly claim settlements in or out of litigation, so that there is no special issue on the limitation of liability. Second, insofar as liability system is concerned, as mentioned before, the virtue to adopt a single tier system of strict liability is more appreciated than to keep on adopting the present two tier system consisting of strict liability and presumed fault liability divided by a lower sum, namely 100,000 SDRs borrowed directly from the old MAP3, and moreover in the light of development of various outstanding remedies in the rest of the world, the reason to adhere to 100,000 SDRs seems almost to be disappeared. In this sense, it is submitted that we should now abolish the two tier system and transfer to a single tier system of strict liability before the times. While we have never considered inclusion of the speedy claim settlement and front pay-out clauses into the Conditions of Carriage so far, however, in practice, we used to refer to similar customs as those of compulsory automobile liablity insurance system, thereby almost 10% front pay-put would be conducted in accordance with the applicable regulations, and also social custion, thereby e.g. some monetary offering with a wreath to a deceased person in the funeral ceremony would be provided on an non-refundable basis. Insofar as insurance issue is concerned, all of the Japanese air carriers used to take out the necessary insurance to cover their unlimited liability.