The Major Recent Development in International Airline Liability*

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The IATA Agreement, in which airlines in international Warsaw Convention transportation agree to waive the limit of damages, was long and hard in coming, but it was a remarkable achievement given the political and economic realities of the world. IATA deserves enormous credit for bringing it about.

I think it would be a great mistake, however, to revel in the glory of accomplishment, and ignore problems and threats which could very well brings this brave new dream crashing down. My concern is that the new

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system, because of its inherent weaknesses, may fail.

I think this is a very special time, a magic moment when there is a real possibility of creating a good, a fair, and an attainable solution, which can last for years to come. Up until about three years ago my position was that we had to denounce the Warsaw Convention. Now, thanks to IATA's initiative and the IATA Intercarrier Agreement (now known as I.I.A. and its follow-up agreements, MIA and IPA) we are pulling together constructively, to create a new or amended Convention that will provide a fair and workable solution to the liability problem.

But if we are going to accomplish our goal we must act now. Delay is an enemy. After all these years, and after all these unsuccesful tries at a new convention, success is within our reach. The airines, the United States Government, passenger groups, and plaintiffs' lawyers, are all of a mind to work together, and succeed.

The IATA-ATA agreements and the resulting system they create. The basic law in international airline liability is still provided by the Warsaw Convention, which was effectively modified in 1966, with respect to transportation involving the United States, to increase the passenger injury and death limitation to $75,000. Onto this convention there have now been engrafted three agreements, the IATA Intercarrier Agreement (IIA), the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), and the ATA Intercarrier Agreement, also known as Provisions Implementing the IATA Intercarrier Agreement (IPA), applicable, at least, to those carriers which have signed the agreements.

Each of the three agreements, IIA, MIA. and IPA is a private contractual agreement sponsored by either IATA or ATA and signed by individual airlines. Some of these agreements, by some of the signatory airlines, have been incorporated in tariffs, which have been filed with the U.S.

Department of Transportation. This does not, however, turn them into "law." They are still private contracts which, by virtue of the tariffs, are incorporated in the airline's conditions of contract.

In the first of these agreements, IIA, the signatory airlines agreed to "take action" to waive the limitation of liability on recoverable compensatory damages, which, since the Montreal Agreement of 1966 has effectively been $75,000 per passenger on a substantial part of international airline travel, including all transportation involving the United States.

In the MIA the signatory carriers agree to implement the IIA by incorporating various provisions in their contracts of carriage and tariffs where necessary. Under the most important provision the carrier agrees that it will not invoke the limitation of liability in Article 22 (1) of the Convention as to any claim for recoverable compensatory damages under Article 17. In other words, each carrier waives the Warsaw limit.

The second provision each carrier agrees to in MIA is to not avail itself of any defense under Article 20 (1) of the Convention with respect to claims up to 100,000 SDRs. Article 20 (1), sometimes called the exculpatory clause, provides that the carrier can exculpate itself from liability completely if it can show it took all necessary measures to avoid the damage. Thus, in agreeing to waive this defense up to 100,000 SDRs each carrier has subjected itself to absolute or strict liability up to that amount. In not making this waiver above 100,000 SDRs the carrier has accepted the burden of proving the taking of all necessary measures. Proving that is a virtual impossibility in all cases except terrorist cases, other situations entirely caused by a third party, and possibly clear air turbulence cases.

Thus while this provision may not have substantial practical significance the principle of the carrier having the burden of proof regarding its

absence of fault has become a precedent which may affect the formulation of a new convention or protocol.

Rights of recourse, including indemnity and Contribution

The MIA goes on to provide that the signatory airline "reserves all defenses available under the Convention to any such claim." And it adds that "With respect to third parties, the carrier also reserves all rights of recourse ... including rights of contribution and indemnity."

A Foundation based on Contract

It may be well and good for the signatory airlines to reserve all rights of recourse against a manufacturer, for example, in a contract between itself and other airlines, But there is real doubt that this can have any legal and binding effect without the consent of such third party and possibly without the consent of the passenger himself. The fact that this reservation of rights is a creature of private contract, rather than law or legal judgments, is, in my opinion, a fatal flaw in the system in terms of legal enforceability.

An impleaded third party, such as a manufacturer, or its insurer, will be free to claim that the airline, or its insurer, which made a payment pursuant to IIA, was a "volunteer", and was a collateral source whose payment may not be credited to damages owed the passenger or his estate by the manufacturer.

It is my understanding that the manufacturers have been requested to provide a statement of policy that they will not assert a "volunteer" defense in the event that an airline settles a claim in excess of the applicable limit of liability in any suit for contribution or indemnity, and it

is my further understanding that the request is being favorably considered.

However, in my opinion, the problem can't definitively be cured by consent of the third party defendant. Under this system the airline can offer to pay unlimited damages, and it may try to insist that a passenger or passenger's family execute a general release, releasing third parties, but the passenger does not have to accept that.

The passenger can sue the airline under the IIA and the MIA, as a third party beneficiary, and can maintain a wholly independent action against a negligent manufacturer or air traffic control facility. In other words there is the theoretical possibility here of double recoveries. The passenger can recover on his case against the airline, which is based on the IIA and MIA contracts and then take the position, on his case against the manufacturer, or other third party, that the airline was a collateral source for which the manufacturer may not get a credit. For the recourse provisions of IIA, MIA, and IPA to be meaningful the payment of damages by the airline would have to be the result of law and not private contract.

This problem of recourse runs through all three of these agreements, and, in my opinion, can be solved only by a new convention or protocol, establishing a legal basis for the payment of unlimited damages by an airline.

That is not the only problem presented by IIA agreements.

Domicile, "subject to applicable law"

IIA states as an objective "that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger."

When one examines the MIA, however, it provides that at the option of the carrier it may include a provision in its conditions of carriage and tariffs that, "subject to applicable law", recoverable compensatory damages ... may be determined by reference to the law of the domicile or permanent residence of the passenger.

In the IPA there is no option provision. It simply states that "subject to applicable law, recoverable compensatory damages ... may be determined by reference to the law of the domicile or permanent residence of the passenger." The IPA is the agreement that was sponsored by the American Air Transport Association, and it has been signed by all major U.S. carriers, which have also filed tarriffs incorporationg the IPA's provisions.

The language of the three agreements, would appear to suggest have been to apply the law of the passenger's domicile or permanent residence. In actual fact, however, there was no such uniform agreement to apply the law of domicile, and the language can best be explained by the political, or negotiating constraints that existed if any agreement at all was to be achieved.

Briefly stated, the United States carriers, with the prodding of the U.S. Department of Transportation, insisted on language applying the law of domicile. To European carriers, however, their law did not apply law of domicile. Generally their courts would apply the law of the place of the accident or the law of the forum. Thus in the face of the language in IIA, pointing to law of domicile, they insisted on language making it clear that would only be at the option of the airline.

The U.S. carriers, on the other hand, all signed the IPA, and thereby accepted law of the passenger's domicile on cases against them.

The agreements may not do that, however, because the language, "subject to applicable law" may dictate some other law!

Let's assume, for example, a case brought under the IPA in which the deceased passenger was domiciled in Pennsylvania, which has relatively liberal death damages law. Let's say the airplane crashed into the high seas. When the case is brought in the United States will the Death on the High Seas Act be applied, or the law of Pennsylvania?

In the first instance the decision will be up to the airline, or, more likely, the airline's insurer. Let's suppose the airline, faithful to the text of the IIA agreements, makes an offer under Pennsylvania law standards. But let's assume the passenger, or the lawyer for the estate of the passenger, rejects the offer as being insufficient. The matter would then go to court. In court the passenger (or the estate's) lawyer, asserts that the law of Pennsylvania will govern damages, pointing to the IIA Agreements.

What position does the airline take in court? And what position will the court take? After all the Death on the High Seas Act is a United States statute.

As for the carrier, one might hope it would feel morally bound to accept the law of the domicile of the passenger, but history suggests that economics will determine its position, or, more precisely, its insurer's position.

Let's take a similar case under the IPA, where the airplane has crashed over land, as in the Pan Am 103 Lockerbie bombing. Let's assume the action is started in Florida, as, indeed, a significant number of Lockerbie cases were. In those Lockerbie cases the court, stating that it was applying Florida choice of law rules, applied the law of the place of the accident, Scotland.

What will the situation be under the Intercarrier Agreements including the IPA? Will the carrier, and the court, enforce the law of the passenger's domicile, or will they apply the law of the place of accident?

Again, history suggests that the parties are likely to be motivated by economics.

In short, the words, "subject to applicable law" are likely to introduce conflict and uncertainty in many cases brought under the IPA. I would respectfully suggest that those words be removed from the IPA Agreement, and that it simply provide that the law of the passenger's domicile will be applied.

Successive Carriage

Another problem arises by virtue of Article 30 (1) and (2) of the Warsaw Convention which deal with the liability of successive carriers. Article 30 (2) states:

(2).... the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or delay occurred....

It may turn out, of course, that all carriers sign and adhere to the Intercarrier Agreement, and they will, therefore, all be subject to it. But, given the nature of the world, it is probable that some, or even many, will not sign on. If the second, or third, successive, carrier is the one on which the accident happens, it may chose not to waive the limit, despite the claim by the plaintiff that the successive carrier is bound by the original contract of carriage. Then where are we?

I understand that carriers now signing the IIA Agreements are limiting their waivers of the limit to accidents occurring on their own part of the carriage, so passengers may still be subject to the limit in other cases.

But the injured passenger, or his family if he has been killed, will, nevertheless, argue that the carrier which issued the ticket must be liable for damages without limitation, and that he or his estate is an authorized third party beneficiary. An action will be brought against that carrier for unlimited damages. The Warsaw Convention, which was supposed to have simplified liability rules, and the IATA Intercarrier Agreement, will be the very cause of the dispute in these cases.

If, indeed, waivers of the limit do not apply to successive carriers, then the IATA agreements will be something of a cruel hoax in successive carriage situations and may well inspire intense adverse passenger group reactions.

The 5th Jurisdiction

Article 28 of the Warsaw Convention permits suit to be brought in any one of four places; the place of incorporation of the carrier, its principal place of business, the place where the contract of carriage was made (ie. where the ticket was sold), and, finally, the place of ultimate destination of the passenger. Notably absent is the place of the passenger's domicile. In most cases the place of the passenger's domicile will coincide with one of the places suit can be brought anyway, so there is no problem. But there are occasional cases where an American, for example, will buy a ticket while on a trip, away from home. American damages standards are considerably higher than those of other countries, generally, and in that rare case the American passenger, or his family, will be denied the higher American standards.

It is generally recognized in the United States that the place of domicile is the place which has the greatest interest in the question of damages, and the denial of domicile law is very troubling to parties and the government alike.

The United States Government, and particularly the Department of Transportation and Department of State, have taken the position that any new regime of law, in international airline transportation, must provide for suits in "the 5th Jurisdiction", ie.
the place of the passenger's domicile. Non American carriers have resisted the proposal, for reasons that baffle me. It seems to me that from the airline's standpoint the point is not worth fighting about, if the carriers can get an otherwise favorable system. There are simply not enough such cases to provide a real stumbling block.

The IATA intercarrier agreements do not and cannot solve the problem, and they cannot because of the Warsaw Convention's proscription against changing jurisdictional rules (See Article 32).
The United States has gone along with the intercarrier agreements because of the predominant interest in getting the airlines to abandon the limits, notwithstanding their failure to adopt the Fifth jurisdiction, but the point remains one of contention for any new convention or protocol. In fact the United States Government has made it clear that it won't sign or ratify any new convention or protocol that doesn't provide for the "fifth jurisdiction."

Fault or No Fault?

Finally, important lawyers in the United States DOT seem to be favored an anti-fault mode of thinking on any new system, whether it be based on the intercarrier agreements or a new convention or protocol.

This probably goes back to attitudes developed in 1966 at the time of the Montreal Agreement, when State Department lawyers obtained from the airlines and IATA an agreement to accept absolute liability up to a limit of $75,000 as a tradeoff for perpetuation of the Warsaw Convention and its limited liability regime.

The DOT has viewed absolute, no-fault, liability as being in the passenger interest. Most passenger groups, however, as well as lawyer groups which customarily represent passengers, view the fault system as a fundamental necessity which is critically important from the safety perspective for the protection of passengers as well as society in general. They point to numerous contributions to airline safety made by tort cases and their examination into both negligence and accident causation.

The contribution of the tort system to aviation safety is well recognized, also, by aviation insurers and their lawyers. Sean Gates, a London solicitor and senior partner of Beaumont and Son, one of the leading firms representing aviation underwriters, has expressed himself as strongly opposed to absolute liability for international airlines, both because he is opposed to abandonment of the fault system, and because he doesn't see why airlines alone in our society should be held to be guarantors of safety. Anthony Mednuik, one of the world's leading underwriters, and presently Managing Director of the British Aviation Insurance Group, has similarly expressed himself as strongly opposed to abandoning the fault system. He did so most recently at a large meeting in Amelia Island, Florida, in October, of the Aircraft Builders Council, which consists of both aviation manufacturers and underwriters, and again at an aviation insurance and law symposium in London in November, sponsored by Lloyds of London Press. And George N. Tompkins, Jr. one of the top airline defense lawyers in the United States has recommended the following language to the ICAO Secretariat Study Group, of which he is a member:

"No limit of liability on the recoverable damages mentioned in A above if the passenger/claimant proves negligence or fault on the part of the carrier. This would not impose an undue burden on the passenger/claimant and would serve to preserve the "Warsaw Convention" as a fault based system."

This difference of opinion on the fault system is not a factor affecting the intercarrier agreements since they are already in place. They have been based on strict liability up to 100,000 SDRs and presumptive liability above that amount if the carrier fails to show its complete absence of fault. It will be a significant factor, however, in the effort to achieve a new convention or protocol.

Thus we have a situation where the IATA agreements, however noble their purpose and laudable their execution, provide an insufficient basis for a satisfactory, lasting, future regime in international air law. What is needed is an effective new convention or protocol.

There is considerable doubt, however, that from a poilitical standpoint, differences of fault/no fault, limitations of venue, rights of recourse, and successive carriage, can be overcome, so as to create a reasonable new convention or protocol. Thus the prospect exists that there may be no satisfactory new convention or protocol, and that the intercarrier agreements will fail to provide a workable system.

It is uncertain where such an outcome would lead, but it probably would mean a complete abandonment of the Warsaw Convention, and the airlines would not be happy about that.

So, where do we go from here?

The need to Work Together

Everyone involved, from IATA and airlines, to the United States Government and other governments, to passengers' groups and plaintiffs' lawyers, has something to lose from a failure to come up with a satisfactory new liability regime. The obvious answer to the problem is the formulation of a new and widely acceptable convention or protocol which will have the force of law to handle not only airline liability, but rights of recourse, successive carriage, choice of law and adequate venue.

The need for ratifiability

At the excellent Lloyds of London Press Aviation

Insurance and Law Symposium in November, in London, Don Horn, Associate General Counsel for International Affairs of the United States Department of Transportation, pointed out the truism that the first requirement for any new convention (or protocol) is that it must be ratifiable.

I respectfully suggest that that is a good place to start in our consideration of the new convention or protocol. Whatever we come up with must be ratifiable. It must be ratifiable by the United States, and it must be approvable by the international airlines.

Excellent preparatory work has been done by the ICAO Study Group and the ICAO Legal Committee. The pattern of a splendid convention or protocol is now clear, and available. In general it has been set forth by the Study Group. It will provide for a two tier liability system, with absolute liability on the airline up to the threshold number of 100,000 Special Drawing Rights, and negligence liability above that. It must

provide for the addition of the "fifth jurisdiction." In other words, passenger's domicile must be added to the other available venues, place of incorporation of the carrier, place of its principal place of business, and place where the ticket was bought.

For those international airlines and insurers who are eluctant to accept the fifth jurisdiction I would point out three things. First, there is an element of compromise inherent in the United States Government acceptance of the two tier concept on fault. The position of the U.S. has been to favor absolute liability across the board. This is not in the airline interest, and in my humble opinion, not in the public interest, either, but that, as I understand it, has been its position. Agreement by non-American carriers to the Fifth Jurisdiction will go far toward insuring acceptance of a new Convention or protocol by the U.S. Government.

Acceptance of the two tier system by the United States will have another laudable effect. It will insure support of the new convention or protocol in the United States on the part of passengers', consumers, and lawyers' groups who believe that the fault system is one of society's basic protections. Were the United States to hold out for absolute liability across the board, and were that part of the new Convention or protocol I would expect intense opposition to the new convention or protocol in the United States.

The second point is that in terms of cost to airlines or insurers the fifth jurisdiction is deminimus. There are, simply, very few cases where an American domiciliary buys a ticket in another country and cannot sue in the United States under one of the four presently permissible jurisdictions. I have been practicing aviation law for forty five years, and I have probably handled as many airline cases as any other lawyer in the world, and I can only remember one case involving an American passenger where I was unable to sue in the United States because of Article 28.

Finally, the overall benefit to airlines, and all others, of having a viable new convention or protocol would be enormous. It would be foolish to jeopardize its chances because of opposition to the fifth jurisdiction.

At its recent meeting in Montreal, on January 26 and 27, of this year the ICAO Study Group took an important step to reduce the opposition of European carriers to adding a "fifth jurisdiction." It presented a narrowed and more conditional version of a "fifth Jurisdiction" clause, which it felt would be more accedptable to non-American airlines, and yet would be sufficient to satisfy the United States Department of Transportation. It would add a jurisdiction in which a passenger had his domicile or permanent residence, from which the actual or contracting carrier operates services for carriage by air, in which the contracting of actual carrer has premises owned or leased and from which carriage by air is conducted.

At the 1998 Legal Symposium sponsored by IATA, in Bangkok, on February 2, Donald Horn, Assistant General Counsel for the United States Department of Transportation for International Affairs, said from the podium that the United States would support this clause.

The moderator of the panel on which both Mr. Horne and I spoke, was Judge H.E. Gilbert Guillaume of the International Court of Justice. He is an eminent French scholar on these subjects and was the presiding offficer over the Montreal Conference of 1972, which adopted Montreal Protocols 3 and 4.

Before either Mr Horne or I spoke, Judge Guillaume, in his introductory remarks, expressed his strong opposition to adopting the "Fifth Jurisdiction." He said it was against all principles of international law, and it would promote "forum shopping".

In my speech I pointed out how basic domicile and permanent residence

were to our law in the United States. United States Courts now, tradionally, in the exercise of choice of law determinations will generally look to the law of the place with the greatest interest in the particular issue. As to the isssues of death or personal injury damages, the place with the greatest interest is the place of domicile. Thus with respect to both the law that will be applied, and the question of proper venue, we in the United States look to domicile. It is much different in Europe, where the courts traditionally apply either the law of the place where the accident happened or the law of the forum.

As to Judge Guillaume's statement that the fifth Jurisdiction would promote forum shopping, that is simply not so.

For an American to want to sue in the United States is not forum shopping. It is the reasonably anticipated exercise of a fundamantal right.

Burden of Proof on the Second tier.

As indicated above, the new convention proposed by the Legal Committee of ICAO, with the active support of a very imaginative and creative Study Group, prescribes a two tier system of liability.

There is absolute liability for damage up to 100,000 SDRs (approximately $135,000), and presumed negligence liability above that.

In an exercise of indecision, however, the Legal Committee drafters left for determination by the diplomatic conference a choice among three alternative provisions on who shoulders the burden of proving negligence, or the absence of negligence. The concept of placing the burden on the defendant airline of showing its freedom from fault grows from Article 20 of the Warsaw Convention which provides that to exculpate itself the airline must show that it took all necessary measures to avoid the damage. Generally speaking, however, it is the plaintiff who has the

burden of proving negligence.

The concept of providing three alternative suggestions for resolution by the Diplomatic conference was not sound and would have lead to confusion and uncertainty. Obviously, it is to the plaintiff's advantage to place the burden on the defendant, but I have not considered it a make or break matter. Again, it is more important to get the broad outlines of the convention established than to fight about each of its terms.

In a meeting of the ICAO Study Group in Montreal In January, 1998, however, that group recommended that the carrier maintain the burden of proving lack of fault on its part to exculpate itself from payment above 100,000 SDRs. The Study Group also broadened what the carrier could show to thus exculpate itself to include proof by the carrier that the damage was solely due to the negligence or other wrongful act or omission of a third party.

The Study Group will meet again in April of this year, together with the Drafting Committee. Hopefully, out of this meeting will come a draft for a new convention or protocol for presentation to a diplomatic conference.

Convention or Protocol?

The question of whether this should be a brand new convention or a protocol to the Warsaw Convention is less important than the substance of the new instrument. Experts tell me that it will be much easier to enact a protocol, so, for that reason alone I favor it.

I would urge a note of caution, however. The Warsaw Convention has a very bad history and reputation with many people, including me and my clients. For many of them it has ruined their lives.

I would eliminate all extolatory language praising the Warsaw Convention, such as the introductory language in the ICAO Legal Committee draft, regardless whether it is new convention or protocol.

Simpler and Shorter is better

I would suggest that all references to cargo be removed. It is not necessary to include it in the new instrument. In fact, it may be completely resolved by the ratification of Montreal Protocol 4. The simpler and shorter the new instrument is, the better.