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# UNLIMITED LIABILITY FOR AIR PASSENGERS: THE POSITION OF CARRIERS, PASSENGERS, TRAVEL AGENTS AND TOUR OPERATORS UNDER THE IATA PASSENGER LIABILITY AGREEMENT SCHEME

TREVOR ATHERTON\*

## I. INTRODUCTION

**I**ATA HAS BYPASSED the inertia of inter-governmental multi-lateral negotiations and has introduced a radical scheme to reform several key problems of the Warsaw System. In 1995, IATA obtained unanimous approval from its member carriers for the Intercarrier Agreement on Passenger Liability (IIA). The preamble to the agreement acknowledged that although the "Warsaw Convention system is of great benefit to international air transportation" the "Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries."<sup>1</sup>

### A. IIA

Under the IIA, the carriers agreed:

- (1) To undertake action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
- (2) To reserve all available defenses pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defense, including any defense up to a specified monetary amount

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<sup>1</sup> IATA Intercarrier Agreement on Passenger Liability, pmbl., Oct. 31, 1995 [hereinafter IIA].

of recoverable compensatory damages, as circumstances may warrant.<sup>2</sup>

## B. MIA

Following approval of the European Union (EU) and United States<sup>3</sup> regulatory authorities, the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA) was declared effective on February 14, 1997. Under the MIA, signatory carriers<sup>4</sup> agree to incorporate into their conditions of carriage and tariffs the following provisions:

### I. [Mandatory]

- (1) [The carrier] shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
- (2) [The carrier] shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDR . . . [II. (2) provides the option of setting different limits for different routes subject to government approval]
- (3) Except as otherwise provided in paragraphs 1 and 2 hereof, [the carrier] reserves all defenses available under the Convention to any such claim . . .

### II. [Optional]

- (1) [The carrier] agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.<sup>5</sup>

This Article examines the impact of the scheme on carriers, passengers, and intermediaries, such as travel agents and tour operators. It finds that although the scheme has adopted an innovative self-regulatory approach to introducing long overdue reforms, further work is required to ensure that it achieves its

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<sup>2</sup> *Id.* ¶¶ 1 & 2.

<sup>3</sup> For an analysis of the issues in the U.S. Department of Transportation approval see A.J. Harakas, *The Status of the Warsaw Convention Limits on Liability—The International Air Transport Association and Air Transport Association of America File Applications with the U.S. DOT for Approval of the Intercarrier Agreement and Implementing Agreement of Passenger Liability*, THE AVIATION QUARTERLY, OCT. 1996, at 115-123.

<sup>4</sup> Forty-seven carriers have signed. For an updated list see the IATA home page: <<http://www.iata.org/>>.

<sup>5</sup> Agreement on Measures to Implement the IATA Intercarrier Agreement, May 1996, pts. I and II [hereinafter MIA].

objectives for carriers and passengers and does not expose innocent travel agents and tour operators to unlimited liability for the safety of air transport.

## II. WARSAW SYSTEM

### A. WARSAW CONVENTION 1929

Air carriers' liability is generally determined by the principles of the *Convention for the Unification of Certain Rules Relating to International Transportation by Air* (Warsaw Convention 1929), which was signed at Warsaw in 1929 and came into force on February 13, 1933.<sup>6</sup> It has been ratified by 127 countries and, in this respect, is the world's most successful private law treaty.<sup>7</sup>

The original objectives of the Warsaw Convention were to achieve international uniformity in air carriers' liability and documentation for air transportation.<sup>8</sup> It introduced a uniform system of strict but limited liability for passengers, baggage,<sup>9</sup> and cargo. Uniformity was desirable to facilitate transactions across borders, languages and cultures, and to avoid interminable conflicts of law problems. Liability was made strict to avoid the problems of proving fault and to compensate for the imposition of limits on claims. It was argued that it was necessary to limit claims, otherwise, a single disaster could bankrupt a carrier and insurance would be too expensive for carriers or for passengers if added to the price of each ticket. Advances in technology, safety, and insurance have undermined the latter arguments, and the Warsaw System has evolved through a series of increased limits to various attempts to remove the limits altogether.<sup>10</sup>

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<sup>6</sup> Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

<sup>7</sup> See H. Caplan, *Modernizing the Warsaw System: A Protocol on New Convention*, THE AVIATION QUARTERLY, Oct. 1996, at 138.

<sup>8</sup> See Warsaw Convention, *supra* note 6, pmbl.

<sup>9</sup> The term "baggage" rather than "luggage" is used throughout the Warsaw Convention, CACLA, and IATA Resolutions and air travel documentation although the two terms appear to have identical meanings.

<sup>10</sup> See E. GIEMULLA ET AL., WARSAW CONVENTION, Introduction (Kluwer Law Int'l).

B. KEY AMENDMENTS: HAGUE PROTOCOL OF 1955,  
GUADALAJARA CONVENTION 1961

There was no mechanism in the Warsaw Convention to increase the limits in order to keep abreast of inflation and other factors. However, as inflation devalued the limits in real terms, the aviation industry spread to more and more diverse countries so that it became more difficult to achieve consensus among nations regarding revised limits. Sufficient consensus was reached under the Hague Protocol of 1955, which doubled the limits under for the wide acceptance of the Warsaw Convention and amended it to solve various other problems that had emerged.<sup>11</sup>

The Guadalajara Supplementary Convention of 1961 (Guadalajara Convention) further amended the Warsaw System to cover journeys performed by several carriers (interlining) and provided that passengers could sue either the contracting carrier or the actual carrier or both, but the total liability remained subject to the limits.<sup>12</sup>

There have been numerous other proposals and schemes to increase or avoid the limits on liability. Many of these are found in various other agreements, conventions, and protocols. Thus, the "uniform" Warsaw System now varies from country to country, depending upon which of these have been adopted. Liability also varies from carrier to carrier as the Warsaw System leaves carriers free to accept higher limits.

To restore uniformity and overcome objections to the limits, IATA brokered the agreement for the new scheme among its member carriers.

C. WARSAW SYSTEM: WORLD OVERVIEW

Despite its original objective of unification, the Warsaw System has become increasingly fragmented, and it has become impossible to reach a new consensus. The following world overview highlights the fragmentation in the present system.

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<sup>11</sup> The United States was the nation most dissatisfied with the low limits and it refused to endorse the Hague Protocol because it considered the doubled limits too low. Instead, by threat of denunciation of the Warsaw System altogether, it forced international carriers to enter the Montreal Agreement of 1966, which provided for special liability limits for carriers with a U.S. stopover. These are per passenger US \$75,000 inclusive or US \$58,000 exclusive of legal fees.

<sup>12</sup> See Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, art. IV, 500 U.N.T.S. 31 [hereinafter Guadalajara Convention].

Warsaw System World Overview<sup>13</sup>

Instrument	Number of Parties Countries/Carriers	Date in Force
Warsaw Convention 1929	127	2/13/33
Hague Protocol 1955	113	8/1/63
Guadalajara Convention 1963	71	5/1/64
Guatemala City Protocol 1971	11	(30 ratifications required)
Montreal Additional Protocols 1975		
No. 1	28	(30 ratifications required)
No. 2	29	(30 ratifications required)
No. 3	21	(30 ratifications required)
Montreal Protocol No. 4 1975	26	(30 ratifications required)
IATA Inter-carrier Agreement on Passenger Liability	66+	10/31/95
Agreement to Implement IATA Inter-carrier Agreement	47	2/14/97

Aviation is one of the world's most dynamic industries. When it takes over twenty years to achieve the required number of ratifications, circumstances change so much that the proposed reform is overtaken and outmoded long before it can be implemented.<sup>14</sup> It is not surprising that the industry has abandoned the traditional process and has developed its own reforms, albeit within the framework of the Warsaw System under the IATA scheme.

Nevertheless, as seen from the discussion below, the problems cannot all be solved contractually by the private sector, and the Montreal Protocols contain essential reforms that have received substantial, but as yet insufficient, support to come into force.<sup>15</sup>

<sup>13</sup> Compiled by author from data provided by the Australian Department of Transport Aviation Policy Division, Canberra (Apr. 1997) and IATA Web Site (visited Feb. 14, 1997) <<http://www.iata.org>>.

<sup>14</sup> For a discussion of the current position of the Warsaw System see Caplan, *supra* note 7, at 132-37.

<sup>15</sup> See Additional Protocols to Amend Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 25, 1975, 22 I.L.M. 13 [hereinafter Montreal Protocols].

### III. LIMITS ON LIABILITY

#### A. MULTILATERAL AND UNILATERAL ARRANGEMENTS

Under the Warsaw System, although liability is strict<sup>16</sup> or presumed, the amount recoverable has traditionally been limited. The 1929 convention contained no mechanism for automatic review of the limits, and subsequent multilateral efforts have failed to reach general agreement on the issue. The Hague Protocol doubled the original limits, but even this was not sufficient for the United States which, instead, made its own special arrangement with carriers.<sup>17</sup> Subsequently, many other countries have made their own special arrangements for higher limits.<sup>18</sup>

Multilateral efforts by government have failed to restore uniformity. The inter-governmental multilateral negotiation process is so slow that it becomes self-defeating. In the time required to reach consensus, the new limits become inadequate. This is the problem with the Montreal Protocols of 1975. They have not yet come into force despite providing for a general increase to 100,000 SDR, and the limit is already out of date.<sup>19</sup>

#### B. SPECIAL CONTRACTS

The Warsaw System made provision for another approach to this problem. Article 22(1) provides that the carrier may, by special contract, agree upon a higher limit of liability for the passenger.<sup>20</sup> Many carriers used this method to provide higher limits to their passengers and, until recently, this method led to further diversity in the system. IATA, with the unanimous support of its carrier members, has now used this method to introduce its scheme to reform the limits and restore uniformity. Under the IATA scheme, carriers that are party to the MIA accept strict liability to 100,000 SDR per passenger and unlimited presumed liability.

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<sup>16</sup> The "best endeavors" defense under Article 20 makes what is otherwise strict liability, presumed liability. In the United States, under the Montreal Agreement of 1966, carriers agreed to waive this defense.

<sup>17</sup> See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Sept. 28, 1955, 478 U.N.T.S. 371 [hereinafter Hague Protocol]. The Montreal Agreement raised the limit for carriers to US \$75,000 per passenger for the United States.

<sup>18</sup> US \$75,000 in the United States; US \$150,000 in most of Europe; 260,000 SDR in Australia.

<sup>19</sup> See Montreal Protocols, *supra* note 15.

<sup>20</sup> See Warsaw Convention, *supra* note 6, art. 22.

## C. TABLE OF LIMITS

The limits on liability can now be summarized as represented in the following table (excluding higher limits imposed in specific countries).

## Limits on Carrier Liability

	Passengers	Baggage	
		Registered	Carry on
Warsaw Convention <sup>21</sup>	125,000 francs <sup>22</sup>	250 francs/kg	5,000 francs
Warsaw/Hague <sup>23</sup>	250,000 francs	250 francs/kg	5,000 francs
IATA Intercarrier Agreement <sup>24</sup>			
Strict liability <sup>25</sup>	100,000 SDR		
Presumed liability <sup>26</sup>	unlimited		

## IV. REFORMS UNDER THE IATA SCHEME

## A. SUMMARY OF REFORMS

The IATA Passenger Agreements reform the Warsaw System in the following key ways:

- Uniform strict liability of 100,000 SDR per passenger. This involves waiver of the Article 22 per passenger limits<sup>27</sup> and the Article 20 best endeavors defense<sup>28</sup> up to this limit;

<sup>21</sup> *Id.*

<sup>22</sup> Article 22 of the Warsaw Convention provides that these francs are deemed to refer to a currency unit consisting of 65.5 milligrams of gold of millesimal fineness 900. Article 22 provides that this is converted into national currency at the exchange rate prevailing on the date of the judgment. The problem is that the gold standard has been abandoned and replaced by the International Monetary Fund's unit, the Special Drawing Right (SDR), which has been made the exclusive reserve currency for transaction among IMF States. The SDR is defined in terms of a basket of currencies, not in terms of gold. The Montreal Protocols 1-3 convert the limits under the Warsaw System to SDR. However, they are not yet in force. In the meantime, the method of converting the franc into national currency varies from country to country. *See S.S. Pharm. Co., Ltd. v. Qantas Airways, Ltd.* (1989) 1 Lloyd's Rep. 319 (in dicta that the appropriate method of conversion in Australia was the market price of gold at the date of judgment) (appeal dismissed on other grounds).

<sup>23</sup> *See* Hague Protocol, *supra* note 17, art. 22.

<sup>24</sup> *See* IIA, *supra* note 1; MIA, *supra* note 5.

<sup>25</sup> Under clause I.2. or optional clause II.2. carriers agree not to invoke the defense under Article 20 on 100,000 SDR of a claim.

<sup>26</sup> Under clause I.1. carriers agree to waive the limits in Article 22 on claims for compensatory damages arising from claims under Article 17.

<sup>27</sup> *See* MIA, *supra* note 5, clause I.1.

<sup>28</sup> *See id.* clause I.2.



- Unlimited presumed liability above 100,000 SDR. This involves waiver of the Article 22 per passenger limits;<sup>29</sup>
- Optional law of domicile or permanent residence of passenger. This involves adding a fifth jurisdiction to the plaintiff's choices under Article 28;<sup>30</sup>
- Optional variation of 100,000 SDR limit according to route, subject to government approval.<sup>31</sup>

The measures designed to achieve these reforms are discussed in the following paragraphs.<sup>32</sup>

#### B. ONLY ARTICLE 17 CLAIMS COVERED

The IATA Passenger Agreements apply only to claims for damages for injury to passengers under Article 17. They do not cover claims for loss or damage to baggage under Article 18 or for delay under Article 19, both of which remain subject to the usual convention provisions.<sup>33</sup> However, it will be a rare case where the amount at stake will justify litigation on the Article 20 best endeavors defense up to the limit, or to try and break the limit for carrier misconduct under Article 25.<sup>34</sup> However, these will continue to be important practical issues for cargo, which is also outside the IATA scheme.

#### C. WAIVER OF ARTICLE 20 BEST ENDEAVORS DEFENSE

Article 20 of the Warsaw System provides that the carrier is not liable if it proves that all necessary measures were taken by it and its agents to avoid the damage, or if it was impossible to take such measures.<sup>35</sup> Because of this defense, many authors characterize carrier liability under the Warsaw System as presumed liability rather than strict liability. However, the defense is waived in the United States under the Montreal Agreement and is limited or waived in several amendments of the Warsaw System, which have not yet come into force.

This defense is akin to the principles of force majeure in contract and inevitable accident in tort. To satisfy Article 20, the

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<sup>29</sup> See *id.* clause I.1; Warsaw Convention, *supra* note 6, art. 22.

<sup>30</sup> See MIA, *supra* note 5, clause II.1; Warsaw Convention, *supra* note 6, art. 28.

<sup>31</sup> See MIA, *supra* note 5, clause II.2.

<sup>32</sup> For an analysis of the issues in the U.S. Department of Transportation approval see Harakas, *supra* note 3, at 115-23. See also Caplan, *supra* note 7, at 132-37.

<sup>33</sup> See Warsaw Convention, *supra* note 6, arts. 18-19.

<sup>34</sup> See *id.* arts. 20, 25.

<sup>35</sup> See *id.* art. 20.

range of avoidance measures required is all that were *necessary*, not merely those which were *desirable*.<sup>36</sup> The precise scope of this defense remains uncertain, but it appears to arise in many hijack and terrorism cases.<sup>37</sup> There is also doubt over whether the term "agents" includes independent contractors.

The IATA scheme removal of this defense for damages up to 100,000 SDR introduces a truly strict liability regime with presumed liability now operating only above that limit.

#### D. WAIVER OF ARTICLE 22 LIMITS

Not only have the limits imposed under Article 22 become absurdly low, but the conversion of the gold franc measuring unit into local currency is uncertain and the method varies from country to country<sup>38</sup> since the gold standard has been abandoned and replaced by the SDR. The SDR is defined in terms of a basket of currencies, not in terms of gold. The Montreal Protocols 1-3 convert the limits under the Warsaw System to SDR.<sup>39</sup> However, they are not yet in force.

The most radical part of the IATA scheme is the removal of the Article 22 and Article 17 limits on liability. This marks the coming of age of the aviation industry in terms of technical and commercial responsibility. It will put pressure on long-standing limited liability regimes in place for international road, rail, and sea transport.

#### E. ARTICLE 25 NOW IRRELEVANT

Article 25 of the Warsaw System provides plaintiffs with a method of breaking the limits on liability by proving serious misconduct of the carrier or its servants or agents. Under Warsaw, "wilful misconduct" is required, whereas under Warsaw-Hague the conduct must be intentional or done recklessly with knowledge that damage would probably result.<sup>40</sup> The Warsaw concept applies in the United States where it has been used in extensive litigation to break the limits on liability. The Warsaw-Hague

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<sup>36</sup> *See id.*

<sup>37</sup> In *Bornier v. Air Inter*, Cass. civ. I. Fr., May 5, 1982, 1983 R.F.D.A. 49, the defense failed because the passengers had not been subject to a security check.

<sup>38</sup> *See, e.g., S.S. Pharm. Co., Ltd. v. Qantas Airways, Ltd.* (1989) 1 Lloyd's Rep. 319.

<sup>39</sup> *See* Montreal Protocols 1-4, *supra* note 15.

<sup>40</sup> *See* Warsaw Convention, *supra* note 6, art. 25.

concept is equally controversial with conflicting interpretations on whether objective<sup>41</sup> or subjective<sup>42</sup> knowledge is required.

One of the main aims of the IATA scheme is to avoid the increasing cost, delay, and frustration of litigation in trying to establish misconduct<sup>43</sup> of the carrier to break the Article 22 limits. With removal of the Article 22 limits on Article 17 damages, such litigation will, in the future, be confined to cargo cases.

#### F. FIFTH JURISDICTION ADDED TO ARTICLE 28

Article 28 of the Warsaw System permits a plaintiff to choose the courts of any of the following jurisdictions in which to bring an action:

- the carrier's domicile;
- the carrier's principal place of business;
- the carrier's place of business through which the contract is made; or
- the destination.

Proponents of the IATA scheme describe the addition of the fifth jurisdiction in these terms:

This provision is key to assuring that passengers and their families receive compensatory damages commensurate with their reasonable expectations. The law of the passenger's domicile is the law around which he or she made plans before the accident, the law where (in the event of death), the estate will be probated and where the passenger's survivors will most likely continue to live.<sup>44</sup>

Aviation is so widespread that it is impossible to reach a consensus on a universal limit or absolute measure of damages for death or personal injury. By adding the fifth jurisdiction, the IATA scheme taps a formula that, in most cases, will be fairer and more convenient. Unfortunately, there are some doubts about its legality.

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<sup>41</sup> See *S.S. Pharm. Co. Ltd. v Qantas Airways Ltd.* (1991) 1 Lloyd's Rep. 288.

<sup>42</sup> See *Goldman v. Thai Airways Int'l, Ltd.*, 1 W.L.R. 1186 (C.A. 1983).

<sup>43</sup> "Wilful misconduct" under Warsaw is defined as "recklessly with intention." See Hague Protocol, *supra* note 17, art. 20.

<sup>44</sup> American Transport Association application to U.S. Department of Transportation approval of the scheme.

## V. LEGAL BASIS OF THE SCHEME

## A. CONTRACT WITH PASSENGER

Authority for the scheme comes from the Warsaw System Article 22(1), which provides that, by special contract, the carrier and passenger may agree upon a higher limit of liability. This will usually be done through the passenger ticket, which, under Article 3(2), is *prima facie* (but not conclusive) evidence of the terms of the contract.<sup>45</sup> The ordinary principles of contract law will determine whether or not the MIA terms have been effectively included in the contract. It will take some time before knowledge of the terms is so widespread that notice is presumed and even longer before they become part of the custom of the trade. Many passengers are still not aware of the limits under the Warsaw System. However, as the MIA terms are generally more favorable to the passenger than the Warsaw System terms, a passenger is unlikely to challenge the terms on this basis.

Could a carrier or its insurers avoid the MIA terms because they have not been effectively incorporated into the contract on ticket case principles, e.g., because the passenger has inadequate notice, language skills, age, or capacity? Passengers are unlikely to make admissions against their own interest to assist the carrier. Estoppel appears to require the passenger to have knowledge of the terms that is similar to the knowledge required to incorporate the terms into the contract.

## B. PASSENGER THIRD PARTY

Do the IIA and MIA provide a sufficient legal basis for the special terms even if they are not incorporated into the contract between carrier and passenger? This issue is especially important between February 14, 1997, when the MIA was declared effective, and the date when each carrier:

- (a) introduces the documents and systems to incorporate the terms into their conditions of carriage and tariffs, and
- (b) organizes insurance coverage for the increased liability.

The IIA is broad and in more general terms than the MIA. It does not specify the 100,000 SDR threshold, which marks the transition between strict and presumed liability under the MIA.<sup>46</sup> Nevertheless, the IIA does clearly establish the general

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<sup>45</sup> Warsaw Convention, *supra* note 6, art. 3, § 2.

<sup>46</sup> See IIA, *supra* note 1.

agreement to waive the limit on liability.<sup>47</sup> The further details and agreed method are clearly established through the MIA.

However, these are agreements among carriers for the benefit of passengers who are not themselves parties to the agreements. Traditionally, privity of contract would prevent passengers from suing directly on the agreements to enforce the rights in England.<sup>48</sup> This is to be contrasted with the long-standing position in the United States,<sup>49</sup> and more recently in Australia,<sup>50</sup> where passengers may well be able to enforce the rights even though they are not parties to the agreement.<sup>51</sup>

### C. LEGALITY OF FIFTH JURISDICTION

Is the so-called fifth jurisdiction provision legal? IIA clause 1 and MIA optional clause II.1. purport to allow the law of the passenger's domicile to determine recoverable compensatory damages.<sup>52</sup> While this is likely to be fairer and more convenient for the plaintiff passenger, it is not one of the four jurisdictions from which the plaintiff must choose under Article 28. This appears to directly offend Article 32,<sup>53</sup> which provides:

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.<sup>54</sup>

Thus, it appears that a carrier or its insurers could avoid this clause in the MIA even if it was agreed and included in their conditions of carriage.

### D. ARBITRATION

Another element of the IATA scheme provides for settlement of claims by arbitration rather than by the normal courts.<sup>55</sup> Article 32 of the Warsaw System expressly permits arbitration clauses

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<sup>47</sup> *See id.*

<sup>48</sup> *See* *Beswick v. Beswick*, 1967 App. Cas. 58.

<sup>49</sup> *See* *Lawrence v. Fox*, 20 N.Y. 268 (1859).

<sup>50</sup> *See* *Trident Gen. Ins. Co., Ltd. v. McNeice Bros. Proprietary Ltd.* (1988) 165 C.L.R. 107.

<sup>51</sup> Consider also statutory provisions such as Property Law Act, 1974, § 55 (Austl.) which grant third party beneficiaries similar rights of enforcement.

<sup>52</sup> *See* IIA, *supra* note 1; MIA, *supra* note 5.

<sup>53</sup> Reinforced by Article 24.

<sup>54</sup> Warsaw Convention, *supra* note 6, art. 32.

<sup>55</sup> *See id.*

for goods, but is silent on the point for passengers and baggage.<sup>56</sup> The strong implication is that it is not permitted for them. Further analysis must await the release of details on the arbitration scheme.

## VI. IMPLICATIONS FOR TRAVEL AGENTS AND TOUR OPERATORS

### A. AGENTS OR PRINCIPALS

The law is unsettled on whether a tour operator or travel agent acts as an agent or principal of the actual carrier.<sup>57</sup> The conflicting cases have been reconciled in the landmark decision of the Privy Council,<sup>58</sup> which divided the cases into two categories.<sup>59</sup> Usually, the travel agent and tour operator are mere agents of the carrier and/or passenger in the first category described by the Privy Council. In the Privy Council's second category, the travel agent or tour operator is found to be the principal contractor who has undertaken to supply the services that will often be performed by others as sub-contractors. More and more package holidays are being construed in this way. The second category is the norm in Europe where the E.C. Directive on Package Holidays deems the travel agent or tour operator to be the principal in package holidays.<sup>60</sup>

### B. WARSAW SYSTEM

If the travel agent or tour operator is merely acting as an agent of the carrier (first category situation), then they are not a party to the carrier's contract with the passenger and they cannot be sued upon it.<sup>61</sup> If the travel agent or tour operator are sued, then they are entitled to limited liability under the Warsaw System, provided they prove that they were acting within the

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<sup>56</sup> See *id.*

<sup>57</sup> See T.C. Atherton, *Package Holidays: Legal Aspects*, 15 *TOURISM MANAGEMENT* 193-99 (1994).

<sup>58</sup> See *Wong Mee Wan v. Kwan Kin Travel Services Ltd.* (1995) 4 All E.R. 745, 746.

<sup>59</sup> See T.C. Atherton, *Tour Operator's Responsibility for Package Holidays: Common Law Takes the E.C. Directive Model Global*, 3 *TRAVEL L. J.* 90-96 (1996).

<sup>60</sup> See *Wong Mee Wan*, 4 All E.R. at 754-55.

<sup>61</sup> See generally GREAT BRITAIN LAW COMMISSION, *PRIVITY OF CONTRACT: CONTRACTS FOR THE BENEFIT OF THIRD PARTIES* (1996).

scope of their authority.<sup>62</sup> Otherwise, their liability to the passenger is determined by tort law.

If the travel agent or tour operator is acting as principal (second category situation) who undertakes responsibility for the entire journey, then they may become jointly and severally liable to the passenger with the actual carrier at fault under Article 30 of the Warsaw System or under the Guadalajara Convention of 1961.<sup>63</sup> Article 30 applies where there are "successive carriers" within the meaning of Article 1(3).<sup>64</sup> The Guadalajara Convention has wider application.

### C. GUADALAJARA CONVENTION

The Warsaw System rules and limits are further extended by the Guadalajara Convention, which applies when the person contracting as principal with the passenger (contracting carrier)<sup>65</sup> is different from the actual carrier providing the carriage in whole or in part (actual carrier).<sup>66</sup> This often arises in charter, interlining, and package holiday situations. The Guadalajara Convention makes the contracting carrier liable jointly and severally with the actual carrier and subject to the Warsaw System rules and limits.<sup>67</sup> A travel agent or tour operator who contracts with the passenger for air travel as principal (Privy Council's second category discussed above) will be a contracting carrier under the Guadalajara Convention.<sup>68</sup>

If the Warsaw limits apply, then the travel agent and tour operator are not at great risk. However, under Article 3, the acts and omissions of an actual carrier are deemed to be those of a travel agent or tour operator who is a contracting carrier. Thus, if the Warsaw System limits do not apply because of failure to provide the required documentation,<sup>69</sup> or are broken because of carrier misconduct,<sup>70</sup> travel agents and tour operators in the second category have unlimited liability for the acts and omissions

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<sup>62</sup> See Warsaw Convention, *supra* note 6, art. 25; *Reed v. Wiser*, 555 F.2d 1079, 1084-85 (2d. Cir. 1977).

<sup>63</sup> See Guadalajara Convention, *supra* note 12, art. 3.

<sup>64</sup> See Warsaw Convention, *supra* note 6, art. 30.

<sup>65</sup> See Guadalajara Convention, *supra* note 12, art. 1(b).

<sup>66</sup> See *id.* art. 1(c) (expressly excluding a successive carrier covered by Warsaw Convention arts. 1(3), 30).

<sup>67</sup> See *id.* art. 2.

<sup>68</sup> See *id.* art. 3.

<sup>69</sup> See Warsaw Convention, *supra* note 6, arts. 3 (tickets), 4 (baggage checks).

<sup>70</sup> See *id.* art. 25.

of the actual carrier.<sup>71</sup> This has been a concern for travel agents and tour operators for some time.

#### D. IMPACT OF THE IATA SCHEME

When these principles are applied to the IATA scheme, the travel agent and tour operator are placed at intolerable risk. It appears that they, too, become liable to the passenger for the actual carrier's waiver of limits and defenses under the Warsaw System. The terms of Article 3(1), which makes the contracting carrier liable for the acts or omissions of the actual carrier, is similar to the terms of Article 3(2), which provides for the converse.<sup>72</sup> However, Article 3(2) also provides: "[A]ny special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention . . . shall not affect the actual carrier unless agreed to by him."<sup>73</sup>

There is no such proviso to the contracting carrier's liability for the actual carrier's acts or omissions under Article 3(1).<sup>74</sup> On a plain meaning interpretation of the provision, it appears that the contracting carrier is liable on the terms set by the actual carrier.

This conclusion is reinforced if, as is usual, the travel agent's or tour operator's brochure or contract with the passenger states something to the effect of "the carriage of passengers and baggage by the carrier is performed subject to the conditions of carriage endorsed on the relevant travel tickets and documents issued by the carrier."

Such a provision, which is designed to ensure that the carrier's limitation conditions apply to protect the travel agent and tour operator, would have the effect of expressly binding them to the carrier's waiver of Warsaw System limits and defenses under the IATA scheme. Could the travel agent or tour operator alter this term to avoid responsibility for an actual carrier's waiver of defenses or limits? This would be difficult to enforce because Article 9 prohibits contracting out.<sup>75</sup>

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<sup>71</sup> See Guadalajara Convention, *supra* note 12, art. 3(1). (contracting carriers are not given protection similar to that provided to actual carriers for their acts or omissions under the proviso to Art 3(2)).

<sup>72</sup> See Guadalajara Convention, *supra* note 12, art. 3.

<sup>73</sup> *Id.* art. 3(2).

<sup>74</sup> See *id.* art. 3(1).

<sup>75</sup> See Warsaw Convention, *supra* note 6, art. 9.



Under Article 7 the passenger or the passenger's representatives may sue the travel agent or tour operator with or without suing the actual carrier. While any rights to indemnity against the party at fault are preserved by Article X, this may be of little comfort if the actual carrier or its insurer is unable or unwilling to pay. At the least, travel agents and tour operators should insist that the actual carrier is insured and that the policy is extended to cover the contracting carrier. However, the innocent travel agent and tour operator are still likely to be left with unreimbursed legal costs and some risk of bearing unlimited liability. Thus, the position of a travel agent or tour operator acting as a principal is unsatisfactory under the scheme as presently structured.

## VII. CONCLUSION

The IATA scheme is a radical private sector initiative designed to reform some of the key problems of the Warsaw System. It introduces a uniform strict liability of 100,000 SDR per passenger and unlimited presumed liability. It waives the best endeavors defense under Article 20 and it renders litigation to break the limit by proving carrier misconduct under Article 25 unnecessary. It offers passengers the fairest and most convenient choice of the law of their residence or domicile to determine recoverable compensatory damages. These are solutions to problems that have floundered in inter-governmental multi-lateral negotiations for decades.

As in all efforts at self-regulation, IATA is constrained by the legal framework in place for the industry. This limits the effectiveness of some of the reforms for carriers and passengers. On the one hand, the scheme is underway even before some carriers have their insurance and other arrangements in place. On the other hand, it will always be difficult to ensure that the MIA terms become part of every carriage contract. There are doubts about the legality of the fifth jurisdiction and arbitration under the Warsaw System. The scheme opens up unexpected and unwelcome risks for travel agents and tour operators that their representative bodies need to address urgently.

Some of these problems will be difficult to resolve within the constraints of the existing legal framework. The neatest solution is for the state parties to the Warsaw System to formulate and implement an urgent protocol to make adjustments to the legal framework necessary to facilitate the IATA scheme of re-

forms. Unfortunately, judging from past form, this takes a long time, it takes us back to the beginning of the problems.

Nevertheless, the IATA scheme is a great leap forward; it is a fair and widely accepted model for reform. It is being implemented right now, and the problems will be resolved as well as can be done along the way. This places enormous pressure on state parties to the Warsaw System to catch up.



# **Congressional Testimony**

