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Testimony before the United States Senate Committee on Commerce, Science, and Transportation: Accident Compenstation in International Transportation

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TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION: *ACCIDENT COMPENSATION IN INTERNATIONAL TRANSPORTATION*

ALLAN I. MENDELSOHN

Mr. Chairman and Members of the Committee:

I. INTRODUCTION

I AM PLEASED to be here this morning to discuss the very important subject of compensation for victims of international aviation disasters. The legislation before the Committee, S. 943,[1] is intended to correct the Supreme Court's decision in the *Zicherman* case,[2] and thus to enhance the rights of the survivors of the victims of the KAL Flight #007 and TWA Flight #800 disasters beyond those granted by the outdated Death on the High Seas Act.[3]

As Professor Lowenfeld mentioned in his testimony,[4] he and I worked together as State Department officials during the mid-1960s in the effort to bring the limits of liability under the Warsaw Convention into the twentieth century. In place of a limit of $8,300 and only a presumption of negligence, we helped to move the international airline community to adopt a limit of $75,000 and to accept a system of liability without fault, meaning that a claimant no longer would have to litigate the issue of negligence on the part of the carrier in order to recover damages.

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[1] S. 943, 105th Cong., (Introduced June 20, 1997).

[2] Zicherman v. Korean Airlines Co., 116 S. Ct. 629 (1996).

[3] 46 U.S.C. § 761 (1994). This statement is directed to the bill as adopted by the House of Representatives on July 28, 1997, as H.R. 2005. S. 943 as introduced in the Senate on June 23, 1997, is slightly different, in that it seeks to preserve remedies available under common law or under state law. It does not, however, provide for any such remedies, and thus does not remove the ambiguities discussed herein.

[4] *See* Andreas R. Lowenfeld, *Testimony Before the United States Senate Committee on Commerce, Science, and Transportation: Accident Compensation in International Transportation*, 63 J. AIR L. & COM. 425 (1997).

The task now—an overdue task—is to bring the Warsaw Convention and aviation disaster litigation in general into the twenty-first century.

A. Toward a Long Range Solution

There is no sound reason, as Professor Lowenfeld has said, why DOHSA should be the statutory provision governing litigation brought as a consequence of aviation disasters that occur over the high seas. Nor is there any sound reason why Americans who are victims of aviation disasters should be treated any differently than Americans who are victims of maritime disasters. Neither should be subject to a monetary limit on the damages they can recover in the event of personal injury or death. There should be a federal statute that creates a cause of action and provides for jurisdiction of the federal courts. At best, the statute should include a substantive set of rules governing compensation for injury or death; at least as a minimum, it should contain a choice of law rule looking to the law of the domicile of the victim. That is the kind of long-range solution we should be seeking.[5]

B. Toward an Interim Solution

First, however, it is necessary to focus on an interim solution, which ought to command quick support and cause no great controversy. Congress cannot reverse the effect of *Zicherman* merely with the simple fix proposed by the House, that is, making DOHSA inapplicable to aircraft. If the House's solution were to become law, it would create a void on the issue of which law is applicable when an aviation disaster occurs over the high seas. Federal courts might well struggle for years in protracted litigation to reach a uniform conclusion as to which law should be applicable to determine damages for the victims. Moreover, for disasters that occur on domestic trips over the high seas, for example on a trip from Phoenix to Miami or from Miami to Washington, D.C., making DOHSA inapplicable might well deprive

[5] While this Hearing and the pending legislation are focused on aviation disasters, the Committee should recall that under 46 U.S.C. app. § 183, a major disaster aboard a ship could result in shockingly low recoveries for victims or their survivors. Current limitations on damages are based on the value of the vessel *after* the disaster or $420 per ton.

disaster victims of the only cause of action available to bring a suit.[6]

I believe there is a good interim legislative substitute, which would accomplish most of what is desired by the proponents of the S. 943. Our suggestion would be to leave DOHSA as the basis for jurisdiction, but to make provision for pain and suffering and comparable damages, and (when the Warsaw limits are not applicable) to call for application of the law of the victim's domicile to determine the measure and scope of compensation. Thus, if a person domiciled in Illinois were on a round-trip voyage from Chicago to France and his plane crashed over the ocean or over France, he or his survivors would be entitled to bring an action in the federal district court in Chicago, and that court would apply the law of Illinois to determine the measure and scope of his damages. Similarly, if an Arizona citizen were injured or killed on a flight between Phoenix and Miami and the disaster occurred over the Gulf of Mexico, he or his survivors could bring suit in a federal court in Arizona (or elsewhere in the United States), and the court would apply Arizona law to determine the compensation payable. If, say, a resident of France were the victim of an air disaster and opted to bring suit in a U.S. court, that court would either apply the law of France to determine compensation, or, alternatively, dismiss the case under the doctrine of forum non conveniens, on the theory that the claim belonged in a different court at the victim's domicile.[7]

This approach, I submit, would make the outcome of litigation less like a lottery, would improve the chances of expeditious out-of-court settlements, and would provide a result most in keeping with the expectations of passengers. We have no doubt that when passengers board a commercial airplane, if they think about an accident at all, they think in terms of the law of their home state or nation—the place where they made their wills, planned their estates, and leave their surviving family members. I have attached the draft of a bill prepared by Professor

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[6] This is because the *Benjamins* case which holds that the Warsaw Convention does create a cause of action, would not apply in a non-Warsaw case, such as a voyage between two points in the United States. *See* Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979). *See also* Lowenfeld, *supra* note 4, at 428 n.8.

[7] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (dismissing an action brought in the United States on behalf of Scottish victims of an aircraft accident in Scotland, on the ground that Scotland would be a more suitable forum).

Lowenfeld and me that we believe would accomplish this interim goal.[8]

C. The Bigger Picture

I want to turn briefly to what is happening today in the law of compensation for international aviation disasters. It is important that the Committee appreciate that something must be done very soon if we are to make sure that the $75,000 Warsaw limit that was adopted in 1966 does not remain in effect.

In his testimony, Professor Lowenfeld mentioned that we were not altogether proud of our role in raising the Warsaw limits from $8,300 to $75,000, because we never dreamed that the $75,000 limit would remain in effect for over thirty years. There has finally been an effort to modernize the limits. But except for about a dozen U.S. carriers and a handful of foreign carriers, the extent to which that effort has been successful is not clear.

1. The Two-Tier System

Under the initiative of the International Air Transport Association (IATA), both foreign and U.S. airlines tentatively agreed about two years ago to adopt a two-tier system of liability to replace the $75,000 limit in the 1966 Montreal Agreement.[9] The lower-tier would be one with a limit of liability of approximately $150,000 per passenger under a system of absolute liability, i.e., where the negligence of the carrier could not be placed in issue. In an instance where an airline in international air transportation is downed by a terrorist missile, or where there is no explanation for the disaster (perhaps like TWA Flight #800), this approach would allow a passenger or his survivors to at least recover damages up to $150,000.[10] The second tier would allow unlimited damages, but would be subject to a defense that the airline had not been at fault. If properly implemented, this will constitute a major improvement over the prior situation.

The problem, however, is that until now, only about a dozen U.S. airlines and some seven foreign airlines have filed tariffs

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[8] *See* Attachment to Statements of Allan I. Mendelsohn and Andreas F. Lowenfeld, *infra.*

[9] IATA Intercarrier Agreement on Passenger Liability, Oct. 31, 1995 [hereinafter IIA]; Agreement on Measures to Implement the IATA Intercarrier Agreement, July 30, 1996 [hereinafter MIA].

[10] In contrast, a case involving pure domestic air transportation where the Agreement would not apply and proof of negligence would still be necessary, there might well be no recovery for victims of this type of disaster.

with the U.S. Department of Transportation confirming that they have in fact accepted this two-tier approach.[11] A number of foreign airlines have signed an agreement known as the MIA indicating they would adopt the two-tier approach, but for reasons not explained, they have not yet filed tariffs with the DOT demonstrating or confirming their acceptance. Until they do so, there is no certainty that, in the event of a disaster on board those airlines, the two-tier system would replace the $75,000 limit in the 1966 Accord. Moreover, a number of foreign and U.S. airlines have not committed themselves at all to the two-tier system. Should a disaster occur on a flight on one of these carriers in international transportation (a technical concept that may well include a U.S. domestic leg of an international journey),[12] U.S. passengers might well be limited to the $75,000 ceiling in the 1966 Accord.

The international picture on liability limits is so profoundly confused that passengers cannot know which airline is, and which is not, still applying low limits of liability. We would urge that the legislation presently under consideration include at least a sense of the provision urging the Department of Transportation to press the remaining domestic and foreign carriers to promptly adopt the IATA two-tier system, and to end the confusion and uncertainty prevailing today.

2. *The Forum and the Applicable Law*

Two other areas equally require change but have been largely ignored so far by the international airline community. One of these is the question of where victims can sue; the other is which law shall apply wherever suit is brought.

D. The Fifth Forum

Regarding the forum, Article 28 of the Warsaw Convention provides only four forums in which victims or their survivors can sue. Under Article 28, for example, an American who flies on Air France Paris-New York-Paris on a ticket purchased in Paris would not be able to sue in the United States, even if the crash

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[11] The foreign airlines are British Airways, Air Canada, Canadian Airlines International, Malaysian Airlines, Lufthansa, Air France, and Korean Air Lines. KAL filed the tariff only after its recent accident in Guam.

[12] *See, e.g.*, Grey v. American Airlines, Inc., 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) (applying the Warsaw Convention to an accident on a flight from Washington to Dulles with respect to passengers holding tickets to Mexico City).

occurred over New York and his survivors resided in New York. Twelve American citizens perished in the recent KAL disaster in Guam. Because of Article 28, their survivors can probably not bring suits in the United States to recover for their loss.[13] Several of such cases came up in the KAL Flight #007 disaster where U.S. residents or citizens had purchased round-trip tickets Seoul-U.S.-Seoul. There is no persuasive reason why these American citizens or residents or their survivors should not be able to bring their suits in the courts of this country.

There is an easy solution to this problem: the "fifth forum." It contemplates simply that international carriers will voluntarily agree that, in the event of a disaster, victims will be able to sue in the country where the victim is domiciled, provided the carrier does business there. This solution has been repeatedly recommended to the international aviation community. I understand that the U.S. carriers wanted to adopt the fifth forum in the tariffs they filed with the DOT, but were discouraged from doing so, and ultimately did not give the required consent. The DOT itself actively favors adoption of the fifth forum. There has been little recent progress, however, in making sure the fifth forum is adopted.

E. Law of the Domicile

The second area that needs attention concerns the issue of what law will apply to determine a victim's appropriate measure of damages. The legislation we have drafted as an interim solution would, as I have said, provide for adoption of the law of the victim's domicile to determine his damages. That is the correct approach, consistent with modern thinking on accident compensation and on conflict of laws. But the proposed interim legislation would apply only when the disaster occurs over the high seas. If the disaster occurred over land, there is no clearly applicable U.S. law. In the current effort to bring the Warsaw convention into the twenty-first century, we had hoped that the international aviation community would voluntarily agree to application of the law of the victim's domicile, but up to now only the American carriers have done so, in the tariffs filed with the DOT. The American carriers, together with the DOT, have actively encouraged IATA and its members to adopt this approach, but so far without success.

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[13] *See, e.g.*, Nudo v. Sabena Belgian World Airlines, 207 F. Supp. 191 (E.D. Pa. 1962).

If the legislative amendment we have recommended were enacted, and if the fifth forum together with the law of the domicile were ultimately adopted world-wide by all the major international carriers, the United States would have made great progress towards bringing air law into the twenty-first century. On both of these issues a push from Congress would be highly desirable.

F. Long Range Solution

Finally, it is appropriate to look for a long range solution that would treat victims of all maritime and aviation accidents similarly. We ought not only create a federal cause of action for both types of transportation disasters, but also consider creating a federal law of damages, so that there would be uniformity of law in this critically important field. That is the long-range solution I strongly recommend.

How should one go about trying to reach this goal? We would recommend that the Congress establish an ad hoc Joint Committee made up of members of the Commerce and Judiciary Committees, with the assignment of coming up within no more than one year with the draft of a comprehensive Interstate and International Transport Accident Act. This is not an easy project. It will take time, serious study, and much thought. But it is a project whose time has come.

ATTACHMENT TO STATEMENTS OF ALLAN I. MENDELSOHN AND ANDREAS F. LOWENFELD

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:
Section 2 (46 U.S.C. § 762) of the Death on the High Seas Act (46 U.S.C. § 761 et seq.) is hereby amended

(i) by labeling the present section as "paragraph (a)" and deleting the word "pecuniary" before the word "loss;" and

(ii) by adding a paragraph (b) as follows: "(b) recoverable elements of damages awardable to or on behalf of a person injured or killed while a passenger on a flight operated by a commercial air carrier [or a voyage on a commercial vessel] shall be determined by the law of the passenger's domicile."

Comments