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Report of the Work of the Panel of Experts on Limits for Passengers Under the Warsaw Convention and The Hague Protocol

INTERNATIONAL REVIEW

INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPORT OF THE WORK OF THE PANEL OF EXPERTS ON LIMITS FOR PASSENGERS UNDER THE WARSAW CONVENTION AND THE HAGUE PROTOCOL (Second Session)

REPORT ON THE WORK OF THE SECOND SESSION

I. Introduction

The Panel held its second session in Montreal from 4 to 18 July 1967 and elected Mr. B. S. Gidwani (India) as Chairman and Mr. L. R. Edwards (Australia) as Vice-Chairman. All meetings were held in closed session.

At its first session, the Panel had prepared four suggested solutions for amendments to the Warsaw Convention and had also made suggestions for amendments to the May 1966 Interim Agreement of Montreal. The Council, having considered the Report of that session, agreed:

(1) that the Report should be sent to states and interested international organizations under cover of a letter requesting their views, by 15 May 1967, on the four solutions for the problem of liability limits for passengers that were outlined in Annex A to the Report and information on economic factors pertaining to the question of limits, including an indication of any increase in insurance costs arising out of the Interim Agreement of Montreal concluded among airlines in May 1966; and

(2) that, in addition, a letter should be sent to the parties directly interested in the Interim Agreement of Montreal (i.e., the Government of the United States of America, the Governments of the countries whose airlines were parties to the Agreement, the IATA and the IUAI), inviting them to consider Annex B to the Panel's Report for any action they might wish to take.

Accordingly, the Secretary General of ICAO sent a letter to States and international organizations requesting their views on the four solutions outlined in Annex A to PE-Warsaw Report-1. As regards the economic factors, the information sought was indicated in a Questionnaire attached to that letter. The replies received to the letter were made available to the Panel during its second session.

The Secretary General also sent a letter, in accordance with paragraph (2) above, to the parties directly interested in the Interim Agreement of Montreal. The Panel was informed that, although there had been consultations between the airlines and the United States' authorities concerning possible amendments to that Agreement, no decision has yet been reached. No progress could therefore be made by the Panel in this regard.

II. Economic Factors Pertaining To The Limits Of Liability For Passengers

The Panel gave careful consideration to the economic factors pertaining to the question of liability limits in the light of the information provided by states and international organizations in response to the request in the Panel's first report. Although this information was extremely difficult to interpret and although it did not lead to any exact assessment of the economic factors in question, it is clear that those who prepared it did so at considerable trouble and the Panel wishes to record its appreciation of these efforts. The information received showed that an immediate effect of the Interim Agreement of Montreal was that many airlines had found that their insurance costs had risen steeply. Cases were mentioned of increases in premiums by three or four times, even though the traffic of some of these airlines was not wholly subject to that Agreement. Some members stated that some of these effects would not necessarily be of a permanent character. The increase in insurance costs could result in higher passenger fares unless there was some countervailing factors. The data available concerning the general level of compensation awards for death or serious injury in various countries are not complete or conclusive, except that it is sufficiently clear that there is a wide difference in this respect between different countries which, the Panel feels, is so great as to justify a system of liability that will provide for different limits in order to achieve general acceptability.

III. Solutions I And II Further Examined

The comments received from states and international organizations on the four solutions which were mentioned in Annex A to the Report of the first session showed that most of them were in favour of either solution I or Solution II, subject, in some cases, to certain qualifications. On the other hand, Solutions III and IV found little support. The Panel therefore decided not to proceed further with Solutions III and IV. It attempted to revise Solutions I and II in the light of the comments received. The revisions so made are described in paragraphs 7 to 10 below. In preparing these revisions the Panel, as at its previous session, took as the basis of its work the Warsaw Convention as amended at The Hague.

The following features will be common to both Solutions I and II as revised at this session:

(1) *Notice:*
Article 3 of the Warsaw Convention as amended at The Hague should be so revised as to eliminate any possibility that the carrier would lose his limitation of liability because of non-delivery of ticket or notice or any other defect in the documents of carriage. Reasons for this view are stated in Annex 1 hereto.

(2) *Article 25:*
The limits of liability of the carrier should not apply in cases falling within the provisions of Article 25 of the Warsaw Convention as amended at The Hague. Even though some of the members of the Panel would have preferred, in the case of Solution II with its principle of strict liability, to eliminate or restrict Article 25 of the Warsaw Convention, nevertheless the Panel considered that Article 25 as amended

at The Hague should be retained because a more restrictive formula might prevent the new protocol or convention from receiving the largest measure of acceptance.

(3) *Choice of Limits:*

Each state on or after becoming a party to the new protocol or convention would have a choice between two levels of limits and also be free to change the limit chosen. While the Panel noted that a single-limit system would be desirable in the interest of uniformity, it reached the conclusion that only a system which provided for a choice by States between two limits would be more likely to achieve world-wide application. Some members suggested a three-level system of limits. The Panel, however, thought that this would be too complicated and would be further remote from the objective of uniformity.

The solution adopted by the Panel was that the new protocol or convention would provide for a basic limit, but any state would be free, at the time of ratification or later, to opt for a lower limit specified in the convention, and to retain the right to change its choice. The lower limit would apply only in those cases where both the place of departure and the place of destination, as specified in the contract of carriage, were in a state or states which had chosen the lower limit (any agreed stopping place being disregarded for this purpose). A return-trip would be regarded as two separate journeys. Other cases, for example, circular journeys or open-jaw journeys would also be brought within the system, though this aspect will require further study.

In this connection a suggestion was made to the effect that the level of limit should be determined by the nationality, domicile or residence of the passenger or the state of the forum. The Panel, however, considers that these criteria would be complicated, discriminatory and unjustified and, in the latter case, would encourage forum-shopping. On the other hand, the criterion adopted by the Panel, as described above, is consistent with the definition of international carriage specified in the Warsaw Convention and Article XVIII of the Hague Protocol.

(4) *Costs:*

The limits would be expressed as being exclusive of costs with an alternative figure which would include costs, as is the cast with the Interim Agreement of Montreal. The law of the court seized of a case will determine whether the applicable limit would be the one inclusive or that exclusive of costs.

The Panel agreed on the following figures for a two-level system of limits, these being round figures and intended to be related to multiples of The Hague Protocol limits, and to be expressed in the new convention or protocol in gold (Poincaré) francs:

	Exclusive of Costs	*Inclusive of Costs*
Solution I	US $ 75,000	US $100,000
	37,000	50,000
Solution II	58,000	75,000
	33,000	43,000

In specifying the limits applicable to Solution I, the Panel bore in mind that any amount exceeding $100,000 would be unlikely to be acceptable to a large number of States.

The Member from the United States of America pointed out that the comments from his country indicated that the benefits to passengers under international and United States domestic rules and limits of liability should

be approximately equivalent before elimination of the notice requirements of the Convention could be considered. In view of the Panel's recommendations concerning notice (see paragraph 7(1) above and Annex 1) he felt that the limits of liability recommended by the Panel might be too low for acceptance by the United States.

IV. Solutions I And II As Revised

A. *Solution I*:

As revised at the present session, Solution I retains the rules of the Warsaw Convention as amended at The Hague, with only the following modifications:

(1) the carrier will not be deprived of limitation of liability because of failure to deliver a ticket or notice; and

(2) the limits are specified in two levels, as follows—
basic limit $75,000 ($100,000 including costs)
lower limit $37,000 ($50,000 including costs).

B. *Solution II*:

(1) *Strict Liability:*
As revised at the present session Solution II is that the carrier shall be liable for death or injury to a passenger if resulting from an accident (Article 17 of the Warsaw Convention) irrespective of how the accident was caused, with the exception of war or comparable situations. The carrier will continue to retain the benefits of Article 21 of the Convention relating to contributory negligence (the Panel being of the opinion that the Article applies also to cases of deliberate acts by the passenger or claimant). Where the damage resulted from the act or omission of a third party, the carrier's right of recourse against that party shall not be prejudiced and the new protocol or convention should contain a specific provision to that effect.

(2) *Notice:*
The carrier will not be deprived of limitation of liability because of failure to deliver a ticket or notice.

(3) *Article 25:*
The provisions of Article 25 of the Warsaw Convention as amended at The Hague will apply.

(4) *Limits:*
The applicable limits in Solution II are:
basic limit $58,000 ($75,000 including costs)
lower limit $33,000 ($43,000 including costs).

V. Solution Recommended

The main advantage of Solution I is that it would require the minimum of amendment to the Warsaw system, the basic rule of liability being retained. It will provide a relatively high upper limit of $75,000 ($100,000 including costs). Such a high limit might be desirable to some States. Others may find this limit too high, considering that it would apply to all cases of air carriage to or from the territory of a State, even if it had chosen the lower limit, namely, $37,000 ($50,000 including costs) except in those particular cases where the other terminal of the journey was in a State which also had chosen the lower limit. Further, some States would find that the basic limit was much too high and the lower limit much too low to be acceptable.

The main advantage of Solution II would be that the carriers would tend to settle claims out of court since very few defenses would be available to them. Normally the only contestable point would be the quantum of compensation. Solution II with strict liability but with its limits of $58,000, or $75,000 including costs, which are lower than limits applicable in Solution I, may be expected to entail lower costs of insurance as compared with Solution I. The system of strict liability has already been accepted in the Interim Agreement of Montreal by a large number of airlines with the approval of their Governments. In this respect, Solution II would be an extension, geographically, of that Agreement. It is also noted that the rule already exists in regard to domestic carriage in certain countries.

The Panel agreed to recommend Solution II as the one most likely to gain wide acceptance, although Solution I also was retained for consideration by States.

VI. Other Solutions

The Panel before arriving at the conclusion mentioned above had also taken into account some other solutions including those put forward by the Observer from IUAI which are summarized in Annex 2 hereto. The Panel came to the conclusion that those solutions would not be suitable for general application.

VII. Future Revision Of Limits

The Panel considered the question whether some method could be found for revision of the limits in the future considering that the limits, even though stated in terms of gold, may become obsolete with the passage of time. It considered that a plan whereby limits would be raised or lowered automatically according to a fixed formula, or by delegation to an international body, might raise constitutional and political problems which would impede ratification of the new protocol or convention. Nevertheless, recognizing that studies for keeping the limits up to date would serve a useful purpose, the Panel recommends that ICAO should study and keep under review such statistics and other information as would have a bearing on the amounts of the limits specified in the new instrument and to transmit the results of such studies to the interested States from time to time.

VIII. Interim Solution

The Panel considered whether, at the present time, it would be feasible to develop an interim solution which, pending wide acceptance by States of an international instrument amending the Warsaw Convention, would provide some of the benefits which might be expected from the long-term solution embodied in that instrument. The Panel concluded that an interim solution could not be developed at this time. One could be attempted only after the views of the States on the proposals formulated by the Panel in the present Report had been ascertained and further studies had been made in the light of the States' comments on those and other related questions. At the appropriate time a diplomatic conference could consider and recommend measures for the interim period between the opening for signature and wide acceptance by States of the new protocol or convention.

ANNEX I

(see paragraph 7 (1) of the Report)

Question Of Notice

Article 3 of the Warsaw Convention provides that if the carrier accepts a passenger without a ticket having been delivered he shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability. In one country the courts have interpreted this as meaning that the carrier is not entitled to avail himself of the limits if the ticket delivered does not give adequate and timely notice of the fact that the Convention applies to the carriage. The Hague Protocol provides that if the passenger embarks without a ticket having been delivered, or if the ticket does not include the notice required by the Protocol, the carrier is subject to unlimited liability.

Having recommended a substantial increase in the limits, the Panel was of the opinion that there would be less justification, if there were any before, for breaking the limits on grounds of defect in the documents of carriage.

The members of the Panel, with one exception, saw no need to give special notice of the law. In any event, it appears to the Panel that few passengers pay attention to notices relating to conditions of carriage. It would be difficult, if not impossible, to devise a short, accurate and informative notice in the various languages and currencies of the world. Air travelers include people who are not literate. Insistence upon inclusion of a notice in a ticket to be delivered before embarkation would present obstacles to the development of modern forms of air transport, in particular, group travel and shuttle services. It was noted that some States had already dispensed with notice for non-international carriage.

If notice was to be required the Panel thought that unlimited liability was not the appropriate penalty because it would be excessive and could be a source of prolonged litigation the outcome of which could depend upon such circumstances as the omission of a single word or late arrival or ticketing of a passenger. It would be better if the penalty took the form, for example, of a fine or a refund of the fare. In the Panel's opinion the passenger's right to reclaim the fare would be the most effective sanction because it would apply even where there was no accident.

Contrary to the views stated above, the Member from the United States of America was of the opinion that notice is needed in countries where the Warsaw/Hague system is not applicable to domestic air transportation and where the liability of carriers is generally unlimited. In the United States of America, for example, a very substantial number of people travel frequently on domestic journeys, but quite infrequently on international journeys. Unless substantial parity is achieved between the levels and rules of liability applicable to both foreign and United States domestic air transportation, the need for legible, intelligible and timely notice will continue, so that such passengers will be aware of the exceptional liability limitations for international journeys and can take appropriate measures to offset their impact.

The Member from the United States of America considered that past experience demonstrated the need to continue the sanction of the loss

of limitation of liability in order to ensure compliance by the carriers with the notice requirements.

If it were decided to retain a requirement of notice, the Panel agreed that it would be desirable to have the new convention or protocol prescribe the actual form, time and method of giving notice in order to achieve uniformity and a high degree of certainty.

ANNEX II

(see paragraph 14 of the Report)

SOLUTIONS PRESENTED BY THE OBSERVER OF THE IUAI

The following solutions were put forward by the Observer from the IUAI:

(1) *Long-term Solution:* This would embody the Warsaw/Hague system of liability, but would omit most of the clauses dealing with documents of of carriage, thus eliminating claims for unlimited liability based solely on errors or omissions in such documents. There would be a limit of liability of $58,000 coupled with an automatic personal accident insurance of $8,300 which was to be taken into account in the final assessment of damages. The only defenses open to the carrier would be unavoidable accident (not due to any defect in the aircraft or to foreseeable weather or aerodynamic conditions) or that the damage was caused by a wilful act of the claimant.

(2) *Short-term Solution:* This would be the Interim Agreement of Montreal amended on the lines recommended by the Panel of Experts at its first session. There could be an extension of that Agreement to cover all Warsaw/Hague carriage, by voluntary agreement on the part of carriers under Article 22(1), provided the United States of America would ratify the Hague Protocol, pending a new convention.

RECENT CONFERENCES AND MEETINGS

INTER-AMERICAN AVIATION LAW — FOURTH CONFERENCE — BUENOS AIRES, ARGENTINA (14-16 June 1967), prepared by Matthew J. Corrigan.†

The first three conferences on Inter-American Aviation Law, sponsored by the University of Miami, were met with enthusiastic response. Delegates of the twenty-five countries represented included personnel from airlines and aviation departments of government, aviation lawyers, and aviation insurers.

The Fourth Conference in 1967, co-sponsored by the University of Miami, the Schools of Law and Social Sciences of the University of Buenos Aires, and the University of Moron, was again well attended although the attendance was not as large as at the Miami conferences. In Buenos Aires, discussion centered on a number of air law questions of current interest. The theme of this conference differed from many international conferences in that concentration was on the practical day-to-day problems of aviation lawyers and the airline industry rather than on broad political aspects of relations among countries.

There was discussion on the very current problems of the legal responsibilities for noise claims and sonic booms. Dr. Videla Escalada of Argentina outlined cases in various jurisdictions and highlighted the need for additional study by lawyers in this area.

Dr. Eduardo Le-Riverend presented a paper on the Warsaw Convention with the reminder that many problems remain for aviation lawyers in countries which are signatories or adherents to the Convention.

Dr. Burton Landy of Miami discussed the financing of aircraft purchases. Dr. Eduardo T. Cosentino of Argentina gave a paper on leases, charters, and interchanges of aircraft. Legal and economic problems of travel agents were discussed. A subject of great interest was the close cooperation among South American countries in the buildup of air cargo business and efficient handling methods. Naturally the impact in the near future of the "jumbo" jets was an important topic.

The objectives of the conference were to:

1. Assist in the achievement of unification of Aviation Law in the Western Hemisphere.
2. Provide those having special interest in air transportation with the necessary understanding of Aviation Law to afford proper administration of their responsibilities.
3. Establish a sound basis for progress and stimulate scientific investigation in air transportation problems.
4. Foster the spirit of international cooperation.

A fair assessment is that the conference made considerable progress to-

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ward achievement of these aims. International air transportation has grown by leaps and bounds in the past thirty years and today practically every country in the Americas has at least one international air carrier. The rise has been so rapid, and the need to meet the day-to-day operational problems so pressing, that a large number of airlines' personnel and lawyers have not had the opportunity to become acquainted—to the extent that they should—with certain facets of the industry outside their particular spheres. The discussions at the conference certainly broadened the outlook of the participants and made them more knowledgeable of aviation legal problems. In addition, an opportunity was afforded aviation lawyers to become personally acquainted with their colleagues in other countries and to make known their peculiar problems in the common effort toward solutions of problems in the aviation industry and air law.

In summary, this conference to a large extent disregarded the political arena and dealt with everyday air law and transportation problems. Refreshing? The writer firmly believes so. Hopefully more law schools will exert similar efforts. A hemispheric air law conference, jointly sponsored by the three leaders among law schools with air law programs—McGill, Miami, and Southern Methodist—and an equal number of law schools in Latin America, would make the air law community sit up and take notice. It would provide a forum for a much wider dissemination of views on how to solve current air law problems.