August 2015

The Guatemala Protocol

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THE GUATEMALA PROTOCOL

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WHEN I AM ASKED to talk about the Warsaw Convention and the Guatemala Protocol, I look forward to it with some anticipation. However, when I discovered that I had Ian McPherson on one side of me, and Lee Kreindler on the other, I felt like a quarterback faced with third and three. He doesn't know whether to run or pass, and that's exactly how I feel.

The Warsaw Convention[1] is an international treaty which acts to limit the liability of the airlines to passengers. In return, it is intended to make it easier for the passenger to recover from the airlines should he be injured or killed in an accident, by requiring the airlines to prove that it took all necessary measures to avoid the damage. This treaty was drawn up in the infancy of aviation, 1929 to be precise. It was primarily the creation of the European nations. They envisioned it as a means to stabilize the law applicable to international flights, which might otherwise be subject to diverse treatment in the different countries which an airplane in Europe could easily over-fly. It contains many rules other than those on liability, which directly affects the relationship of the airline to its passengers and its shippers. The United States adhered to this treaty in 1934, at which time the limit of liability of the airline to the passenger was $8,300. The limit of liability of the airline to its shipper was $7.50 per pound for its cargo.

The convention worked reasonably well when aviation was an infant; however, after World War II when aviation grew up, particularly with the significant increase in the number of persons flying, and generally the increase in the world standard of living, $8,300 became simply too low. Consequently, in the late 1940's and early 1950's the United States undertook a program to try and achieve an increase in this limit.

The story of the 1971 revision of the Warsaw Convention which is contained in the Guatemala Protocol, begins with denunciation by the United States of the Warsaw Convention in November of 1965. The United States was motivated in taking that action at that time by a number of circumstances.

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. 876 (1934) [hereinafter references to specific provisions of the convention will be: The Warsaw Convention, Art. .....].

First, as I have already said, the limit of liability contained in the Warsaw Convention of $8,300 was completely inadequate and even with the proposed amendment of the Hague Protocol (a protocol drawn up in 1955) to a limit of $16,600, the amount still fell far short of the needs of the American public.[2] The government had tried to supplement this totally inadequate figure by suggesting legislation which would have provided an additional $50,000 in insurance to all United States citizens traveling to and from the United States on United States airlines, and international air transportation. If this legislative proposal had been accepted it would have permitted recovery, assuming United States ratification of the Hague Protocol, in the amount of approximately $66,600; however, the proposal drew so much opposition from the airlines, the insurance companies and others, that it did not even get a hearing in the Congress.[3]

Faced with this failure, the government then tried to get a voluntary agreement, permissible under Article 22 of the Warsaw Convention, from the United States' airlines, under which the carriers would increase their liability limit to $100,000 per passenger. This effort also failed.[4] The United States was thus left in a dilemma. It had concluded that the limited liability in the Warsaw Convention of $8,300 was not in the public interest, and its efforts to correct this deficiency by purely domestic actions were unsuccessful.

In looking at the prospect of early international action to secure a substantial upward revision of the limit, the prognosis was equally unfavorable. Consequently, even though the government was extremely reluctant to withdraw from a multilateral international agreement of widespread application, which with the exception of the limits of liability had worked well in providing a regime of a law under which international air transportation had flourished, there seemed to be no viable alternative, and so, the United States filed a denunciation of the Warsaw Convention.

This action precipitated international action, particularly within the International Civil Aviation Organization.[5] ICAO convened in early 1966 a special meeting for the purpose of considering ways and means of coping with the problem of increasing the limit of liability for passengers under the Warsaw Convention. The United States participated in this meeting and, in fact, the meeting developed into a dialogue between the United States, on one side, and practically all the other countries of the world on the other.

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[2] Senate Exec. H. 86th Cong., 1st Sess; Doc. 7632, Int'l Civil Aviation Org. 1955.

[3] *See* Stephen, *The Adequate Award in International Aviation Accidents,* INS. L.J. 720 (1966).

[4] *Id.* at 722.

[5] Hereinafter cited as ICAO.

As Vice Chairman of the U.S. Delegation I can assure you that it was not a pleasant meeting. The action of the United States in denouncing Warsaw was regarded by some as far too precipite and, in fact, taken in an effort to force upward revision of the Warsaw Convention limits by the international community. At this meeting, the United States proposed the limit be increased to $100,000 per passenger, but we found almost universal opposition to this proposal. There were a number of other suggestions advanced by other delegations, but none of those receiving majority approval were acceptable to us. One which would have combined a per-passenger limit of $75,000 with a concept of absolute liability on the part of the airlines might have been acceptable to the United States if a substantial majority could have been persuaded to favor it. However, for procedural and other reasons, this majority never materialized. Thus, the meeting ended unsuccessfully and the denunciation of the Warsaw Convention, which would take effect in six months, stood. At the last moment, the International Air Transport Association[6] presented to the United States a proposal under which all of the major air carriers serving the United States voluntarily agreed to increase their limit of liability on flights to, from, and through, the United States to $75,000, and to accept the principle of absolute liability.[7] The story of this effort is set forth in length by its principal architect, Sir William Hildred, who was then Director General of the International Air Transport Association.[8]

This proposal met the principal concerns of the United States. It increased the limit of liability, and it offered a prospect of quicker settlements with a minimum of litigation, due to the acceptance of the concept of absolute liability. It was accompanied by a general indication by the major countries of the world that they would be willing to work through ICAO for a permanent revision of the Warsaw Convention, rather than the interim solution which was offered by the private agreement sponsored by IATA.

The United States government was thus faced with the problem of determining what kind of a permanent arrangement for the Warsaw Convention it could accept as being in the public interest. With the Department of Transportation assuming chairmanship, a special committee began a study of this problem.[9] After a lengthy deliberation within the government, including extensive consultation with the aviation industry,

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[6] Hereinafter cited as IATA.

[7] CAB Order No. E-23680 (May 18, 1966), 31 Fed. Reg. 7302 (1966).

[8] Hildred, *Air Carriers' Liability: Significance of The Warsaw Convention and Events Leading Up To The Montreal Agreement*, 33 JOURNAL OF AIR LAW AND COMMERCE 521 (1967).

[9] This was an ad hoc group of the Interagency Group on International Aviation which was created by Presidential memorandum to resolve policy issues in the field of international aviation affecting more than one agency of Government.

and the legal profession (including both the academic and the active bar) a United States position was agreed upon. The essence of this position, as was stated by the Chief of the United States delegation at a meeting of the Legal Committee of the ICAO, was that to meet the test of public interest a revised convention should achieve three basic objectives: *certainty of recovery, speed of recovery,* and *sufficiency of recovery.*

To obtain certainty of recovery, we proposed absolute liability, with no defense except that of contributory negligence. To assure speed of recovery, we proposed a settlement inducement provision that would empower courts to award over and above any limit ultimately established, all legal expenses incurred by claimants, including legal fees, unless a timely and adequate offer of settlement was made with the carrier. In addition, the United States proposed that the fora available to claimants for suit be enlarged to include the forum of the state of domicile of permanent residence of the claimant, if the defendant had a place of business in, and was otherwise subject to the jurisdiction of that state. To assure sufficiency of recovery, we recommended a limit of $125,000, with a provision for periodic and automatic upward revision of that limit to take account of changing world economic conditions.

During the course of the debate of this proposal in the Legal Committee of ICAO it became evident that the level of $125,000 was unacceptable to a majority of the other governments, and the United States delegation reluctantly agreed to a level of $100,000.

In agreeing to accept this lower level, coupled of course with periodic and automatic upward adjustment, we relied upon a survey undertaken by the Civil Aeronautics Board. The subject matter of this survey was death settlements and judgments in non-Warsaw Convention cases in the United States for the period of 1958 through 1967.[10]

The subcommittee took no definite action on this particular proposal, but they did refer it to the full Legal Committee of ICAO for further work, and a meeting on that was held in 1970.[11] The ultimate outcome was to recommend a revision of the Warsaw Convention which met in all substantial respects the requirements of the United States. It called for absolute liability of the airline to the passenger with no defenses available to the airline, except that of contributory negligence. In addition, it included a limit of liability of $100,000. Furthermore, it added a provision which had not been supported by the United States. This provided that the limit would be unbreakable in all cases, even in the case of gross negligence, or wilful misconduct.[12] It included the settlement

[10] ICAO Legal Committee Meeting, Sept. 1969, LC/SC Warsaw WD 30.
[11] Legal Committee of ICAO, 17 Sess. Feb.-Mar., Doc. 8878-LC 161-162 (1970).
[12] ICAO Doc. 8878-LC 162 at 24.

inducement clause to which I referred. It called for automatic and periodic revision of the limit. It included the additional forum, and finally provided for a revision of ticketing requirements to make it clear that ticketing failures would not automatically break the limit.[13]

With approval from the legal committee, ICAO convened a diplomatic conference. In preparation for this conference, the United States undertook a new survey of recoveries in non-Warsaw Convention aviation accident cases, of both judgments and settlements. The new data included cases through the first part of 1970. On the basis of that data, we came quickly to the conclusion that the $100,000 that we had previously accepted was now *inadequate*. In fact, the new statistics indicated that in order to provide full recovery for the great majority of the passengers, a limit on the order of $300,000 was required. The United States notified ICAO of this as soon as we ascertained this fact. Furthermore, we indicated in our notification that we would try to find some way of providing additional compensation, and would hope to submit a proposal dealing with this matter at the Diplomatic Conference. It was this proposal at the Diplomatic Conference which ultimately became Article 35(A) of the Guatemala Protocol,[14] under which any country may provide a system to supplement the compensation awarded under the Guatemala Protocol as long as that system meets certain tests that are set forth in said article.

The United States proposal caused a great deal of controversy, not to say consternation, at the Diplomatic Conference. The countries of the world had every reason to believe that as a result of the Legal Committee deliberations a revised Warsaw Convention with a $100,000 limit would be acceptable to the United States. Our proposal for more almost broke up the conference; however, after many days of negotiation, we signed the convention, and thereafter set out almost immediately to work out the development of a supplemental system.

After some deliberation we decided to explore, at least initially, the feasibility of doing this by interline agreement among the airlines subject to approval by the Civil Aeronautics Board, under section 412 of the Federal Aviation Act.[15] This is very much like the existing Montreal Agreement,[16] which does provide on a voluntary basis the $75,000 limit with an absolute liability regime.

The basic concept of the supplemental compensation plan, which is envisioned in the draft agreement that is currently in circulation,

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[13] *Id.* at 25.

[14] International Conference on Air Law, W/H Doc. 3, 25, Guatemala City, Feb.-Mar. (1971).

[15] 49 U.S.C. § 1382.

[16] Agreement CAB 18990, *approved by* order E-23680, May 18, 1966 (Doc. 17325).

is relatively simple. It proposes that a charge be levied by the seller on any airline tickets sold within the United States calling for international air transportation. The funds derived from these charges will be turned over to a contractor who will be responsible for the administration, operation, and integrity of the fund. The fund would be used to pay all those provable compensatory damages established by any claimant which exceeded the limit prescribed by the convention. It is recognized that the fund in its initial years will probably not be sufficient to meet claims made against it. For this reason, the draft agreement calls for the contractor to agree to accept the obligation to pay the maximum amount that is agreed upon in the plan. Obviously, since this can mean that the contractor may have to provide additional funds from his own resources, or by obtaining insurance, it provides that he may recoup such advances, including the cost of insurance, from the fund as it acquires additional revenue. The agreement calls for the establishment of this fund as one for the benefit of the passengers, in which neither the contractor nor the carriers have any property right, and for which both are required to render full accounting. At the moment, the unresolved central issues are the extent of the additional coverage which can be provided for passengers by this fund and at what price. We are hopeful that the additional charge per ticket would be modest, perhaps less than $2.

One of the major provisions of the plan is that it contemplates that of the total sum collected, 90% to 95% will be available for the payment of claims. This means of course that the expense of administration and of additional insurance must be kept at a very low level. The Government believes this is possible. Furthermore, the plan contemplates that at least annually the Civil Aeronautics Board will review results under the plan. If it appears that the plan is accumulating more funds than it needs to pay off current claims, and still maintain an appropriate reserve, the Board will either increase the benefits or decrease the charge. Correspondingly, if the fund appears inadequate to pay claims, the Board in turn will decrease the benefit or increase the charge. One of the obvious advantages of the private plan versus other arrangements, such as the establishment of a scheme of legislation, is the flexibility that this kind of annual review provides.

The plan has been made available to interested organizations for their consideration in determining whether or not they wish to submit a proposal for its operation. The initial meetings with the United States airlines were held in September, and at that time we indicated that we would like to have an indication by the 15th of November, 1972, of their interest. To date, we have had indications from at least two organizations of their intention to submit formal proposals for the operation of this plan. Both of these are from responsible organizations. We anticipate further discussion with them to review and explore their formal proposals.

What I have set forth is a very brief review of the events which led

up to the proposal for a supplemental compensation plan under the Guatemala Protocol. What the ultimate fate of that plan will be, I do not know; however, it is my understanding of the current position of the Government, that it is not intending to submit the Guatemala Protocol to the Senate for its advice and consent to ratification unless some form of supplemental compensation system can be established to increase the amount available to United States citizens traveling on international air transportation above the $100,000 limit provided in the Guatemala Protocol. If this so-called private plan approach fails, obviously, the Government will have to consider either dropping its intention to ratify the Guatemala Protocol which, in my opinion, necessarily requires denunciation of the Warsaw Convention, or the development of a supplemental system through other means, such as legislation. Thus as to the future, I can only say with the Apostle Paul, "For now we see through a glass darkly."