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The Guatemala Protocol

Ian E. McPherson

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THE GUATEMALA PROTOCOL

IAN E. MCPHERSON*

AT THIS STATE we have heard the presentation by Mr. Boyle who represented, generally, I think the position of the United States Government, and Mr. Kreindler representing the claimants' attorneys; and he is one of the most distinguished claimants' attorneys in the United States. It would be presumptuous for me to comment on the pros and cons of this situation as far as the United States is concerned, and I would like to limit my comments to observations as a lawyer who is interested in international law. Of course I may be prejudiced, being a representative of an airline and the air carrier industry. Having heard Mr. Kreindler, one can appreciate what a formidable adversary he can be, particularly in front of a jury. I have heard him speak before and on other occasions he has indicated how much he is in favor of the jury system. It is very apparent why. He also reiterated two or three times "Why are we here? Why are we here?" Quite frankly, I have a pretty good idea why Mr. Lee Kreindler is here. We all have particular interests to represent and it is natural that we would express somewhat subjective views from time to time and may not be entirely altruistic.

Mr. Boyle spoke of the three objectives or criteria of the United States Government in advocating the Guatemala Protocol and also the Supplemental Compensation provisions thereof. He referred to certainty, speed and sufficiency of recovery. Certainty and speed I think are perhaps pretty obvious. They are inherent in the Guatemala Convention. The sufficiency of recovery, of course, is a very controversial point and one on which Mr. Kreindler certainly would not agree with Mr. Boyle, and I don't think agrees with me. There is another very significant objective that has been overlooked and that is the great desirability of *uniformity of law*. As the world gets smaller and smaller this desire to develop a form of international law in some areas where there is no uniformity is highly desirable. The World Peace Through The Rule of Law Organization itself has pointed out that the Warsaw Convention,¹ which has over 100 countries adhering to it, is a fine example of how this international law can be developed. It enables your passenger, no matter where he is flying to be confident that he has certain protection available to him. This is true whether he is under civil law jurisdiction, common law jurisdiction or the

*B.A., L.L.B., University of British Columbia; L.L.M., McGill University. Mr. McPherson is the Past Treasurer of the Canadian Branch of the International Law Association; former Chairman of the Legal Committee of IATA; and has been a member of the Canadian delegation to a number of international air law conferences. He is presently the chief legal officer and General Counsel of Air Canada.

¹ 49 Stat. 3000, T.S. No. 876.

various laws in the Orient, and also in those jurisdictions where the rights of recovery are very seriously restricted, which they are in many countries.

I recall some years ago where they had a limitation of liability in Brazil which through inflation resulted in an airline passenger, an American, making I think a recovery that amounted to about \$75. It was a death action and the law when it had been passed had been relatively generous. I say relatively because, of course, all of these countries have very different concepts as to what damages should be recoverable.

Obviously, when you are developing a Convention of this nature in international law, when you are trying to get uniformity, you must make compromises. It is a two-way street. Transportation may be from the United States but it also is to England, or France, or Germany, or other parts of the world.

There is a great variance in the law of these countries and to secure the interests of the passenger you must make compromises. For example, there is a fundamental difference in your practice in the United States from that of most other countries, and that is your practice of charging fees on a contingency basis. The law of many countries provides that the courts will award costs generally against the unsuccessful party and this distinction in fact has been recognized in the Hague Protocol to the Warsaw Convention² and also in the Guatemala Protocol³ thereto. Again in the Montreal Agreement,⁴ for example, a distinction was made for the recovery of \$75,000 in jurisdictions where legal fees were not recoverable and \$58,000 where legal fees were recoverable⁵ thus recognizing the practice in the United States of a claimant's lawyer recovering a substantial part of his legal fees from the judgment obtained. Although I am certainly not an authority on this subject I think that the fees run in the vicinity of 30% and this is recognized in these compromises.

There are many other areas where the national laws vary considerably and where, in order to obtain uniformity, concessions must be made in international law. For example, you have the fundamental question of whether liability should be based on fault, which is a traditional common law concept. A great many countries do not follow this practice. Some have presumptions of fault that are rebuttable. Others have absolute liability.

Again there can be great variances in the amount of damages which may be awarded based not only on the extreme economic differences but also on certain concepts of morality and sociology. In those countries

² 478 U.N.T.S. 371.

³ ICAO Doc. 8878-L.C. 162 (1970) [hereinafter references to specific provisions of the convention will be: The Guatemala Protocol, Art.].

⁴ Agreement CAB 18990, approved by order E-23680, May 13, 1966 (Doc. 17325).

⁵ *Id.* para. 1.

where you have smaller damages awarded, one of the great arguments is why under international agreements should the poor pay for the rich. In this respect Mr. Kreindler spoke of having to pay a \$2.00 assessment for the privilege of having his liability limited. On the other side of the coin, however, it must be recognized that the privilege of being able to claim unlimited damages must also be paid for by someone and eventually it is the passenger who will pay whether or not he may be one of the few to which unlimited damages may be significant. Putting it another way, it is the average consumer who will pay and he should not be required to pay increased fares to cover the payment to others of damages which bear little relationship to his own circumstances. It is for these reasons that in order to obtain the most good for the most people compromises must be made which may be to the detriment of a very small minority.

Finally, this extra compensation system that Mr. Boyle has outlined has been described very well as a three-tier system.

Basically, your airline has the fundamental liability of up to roughly \$100,000 under Guatemala,⁶ and it is based upon the theory of absolute liability.⁷ The airlines do not like absolute liability because notwithstanding the skill of claims attorneys and the application of the doctrine of *res ipsa loquitur* and like principles, there are situations where one can deny liability totally, and if we are interested in limiting liability or eliminating liability defenses are available to us.

The second tier is provided for by the Government. The Government in the United States has recognized that to obtain uniformity, that is a treaty, it cannot negotiate more than a \$100,000 maximum liability. This was made very apparent to the United States at Guatemala. At the same time it has concluded that United States' citizens should have available some compensation in excess of that, and this is what will be provided for under the extra compensation plan. Whether it is an extra \$100,000 or \$200,000, of course, would be up to the United States Government to decide. But there would be this second tier. And then on top of this second tier there will be some passengers, a proportion of the less than 200 affected annually by the Warsaw Convention referred to by Mr. Kreindler, who will be able to cover their additional potential damages by taking out flight insurance.

I submit that when all the facts are considered the Guatemala Protocol to the Warsaw/Hague Convention, when supplemented by the extra compensation system where a Contracting State deems it necessary, adequately meets the requirements of most passengers and carriers and its ratification will greatly enhance the rule of law throughout the world.

⁶ The Guatemala Protocol, Art. 22, para. 1(a).

⁷ *Id.* Art. 17, para. 1.

