

fault on the part of the carrier. This would not impose an undue burden on the passenger/claimant and would serve to preserve the "Warsaw Convention" as a fault based system."

This difference of opinion on the fault system is not a factor affecting the intercarrier agreements since they are already in place and they have been based on strict liability up to 100,000 SDRs and presumptive liability above that amount if the carrier fails to show its complete absence of fault, but it will be a significant factor in the effort to achieve a new convention or protocol.

Thus we have a situation where the IATA agreements, however noble their purpose and laudable their execution, provide an insufficient basis for a satisfactory future regime in international air law, and where there is considerable doubt that, on a political level, the problems and differences of fault/no fault, limitations of venue, rights of recourse, and successive carriage, can be overcome, so as to create a reasonable new convention or protocol. The prospect exists that there will be no satisfactory new convention or protocol, and that the intercarrier agreements will fail to provide a workable system. It is uncertain where such an outcome would lead, but one virtual certainty would be complete abandonment of the Warsaw Convention, and the airlines would not be happy about that.

So, where do we go from here?

The Need to Work Together

Everyone involved, from IATA and airlines, to the United States Government and other governments, to passengers' groups and plaintiffs' lawyers, has something to lose from a failure to come up with a satisfactory new liability regime. The obvious answer to the problem is the formulation of a new and widely acceptable convention or protocol which will have the force of law to handle not only airline liability, but rights of recourse, successive carriage, choice of law and adequate venue.

The Need for Ratifiability

At the excellent Lloyds of London Press Aviation Insurance and Law Symposium in November, in London, Don Horn, Associate General Counsel for International Affairs of the United States Department of Transportation, pointed out the truism that the first requirement for any new convention (or protocol) is that it must be ratifiable.

I respectfully suggest that that is a good place to start in our consideration of the new convention or protocol. Whatever we come up with must be ratifiable. It must be ratifiable by the United States, and it must be approved by the international airlines.

Excellent preparatory work has been done by the ICAO Study Group and the ICAO Legal Committee. The pattern of a splendid convention or protocol is now clear, and available. In general it has been set forth by the Study Group. It will provide for a two tier liability system, with absolute liability up to the threshold number of 100,000 Special Drawing Rights, and negligence liability above that. It must provide for the addition of the "fifth jurisdiction." In other words, passenger's domicile must be added to the other available venues, place of incorporation of the carrier, place of its principal place of business, and place where the ticket was bought.

For those international airlines and insurers who are reluctant to accept the fifth jurisdiction I would point out three things. First, there is an element of compromise inherent in the United States Government acceptance of the two tier concept on fault. The position of the U.S. has been to favor absolute liability across the board. This is not in the airline interest, and in my humble

opinion, not in the public interest, but that, as I understand it, has been its position. Acceptance of the two tier system by the United States will have another laudable effect. It will insure support of the new convention or protocol in the United States on the part of passengers', consumers, and lawyers' groups who believe that the fault system is one of society's basic protections. Were the United States to hold out for absolute liability across the board, and were that part of the new Convention or protocol I would expect intense opposition to the new convention or protocol in the United States.

The second point is that in terms of cost to airlines or insurers the fifth jurisdiction is deminimus. There are, simply, very few cases where an American domiciliary buys a ticket in another country and cannot sue in the United States under one of the four presently permissible jurisdictions. I have been practicing aviation law for forty five years, and I have probably handled as many airline cases as any other lawyer in the world, and I can only remember one case involving an American passenger where I was unable to sue in the United States because of Article 28.

Finally, the overall benefit to airlines, and all others, of having a viable new convention or protocol would be enormous. It would be foolish to jeopardize its chances because of opposition to the fifth jurisdiction.

Burden of Proof on the Second Tier

As indicated above, the new convention proposed by the Legal Committee of ICAO prescribes a two tier system of liability. There is absolute liability for damage up to 100,000 SDRs and negligence liability above that. In an exercise of indecision, however, the drafters set forth three alternative provisions on who shoulders the burden of proving negligence. The concept of placing the burden on the defendant airline of showing its freedom from fault grows from Article 20 of the Convention which provides that to exculpate itself the airline must show that it took all necessary measures to avoid the damage. Generally speaking, however, it is the plaintiff who has the burden of proving negligence.

The concept of providing three alternative suggestions is not sound and will lead to confusion and uncertainty. Obviously, it is to the plaintiff's advantage to place the burden on the defendant, but I don't consider it a make or break matter. Again, it is more important to get the broad outlines of the convention established than to fight about each of its terms.

Convention or Protocol?

Similarly, the question of whether this should be a brand new convention or a protocol to the Warsaw Convention is less important than the substance of the new instrument. People I respect, including Lorne Clark and George Tompkins, who know far more than I do about the politics of enacting a new convention, tell me that it will be much easier to enact a protocol, so, for that reason alone I favor it.

I would urge a note of caution, however. The Warsaw Convention has a very bad history and reputation with many people, including me and my clients. For many of them it has ruined their lives. I would eliminate all extolatory language praising the Warsaw Convention, such as the introductory language in the ICAO Legal Committee draft, regardless whether it is new convention or protocol.

Simpler and Shorter is better

I would suggest that all references to cargo be removed. It is not necessary to include it in the new instrument. In fact, it may be completely resolved by the ratification of

Montreal Protocol 4. The simpler and shorter the new instrument is, the better.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT

Mr. ROBERTS. Mr. President, I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 584, S. 2392.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A bill (S. 2392) to encourage the disclosure and exchange of information about computer processing problems, solutions, test practices and test results, and related matters in connection with the transition to the Year 2000.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with an amendment to strike all after the enacting clause and inserting in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Year 2000 Information and Readiness Disclosure Act".

SEC. 2. FINDINGS AND PURPOSES.

(a) *FINDINGS.*—Congress finds the following:

(1)(A) *At least thousands but possibly millions of information technology computer systems, software programs, and semiconductors are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process those dates.*

(B) *The problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, government, and safety and defense systems, in the United States and throughout the world.*

(C) *Reprogramming or replacing affected systems before the problem incapacitates essential systems is a matter of national and global interest.*

(2) *The prompt, candid, and thorough disclosure and exchange of information related to year 2000 readiness of entities, products, and services—*

(A) *would greatly enhance the ability of public and private entities to improve their year 2000 readiness; and*

(B) *is therefore a matter of national importance and a vital factor in minimizing any potential year 2000 related disruption to the Nation's economic well-being and security.*

(3) *Concern about the potential for legal liability associated with the disclosure and exchange of year 2000 readiness information is impeding the disclosure and exchange of such information.*

(4) *The capability to freely disseminate and exchange information relating to year 2000 readiness, solutions, test practices and test results, with the public and other entities without undue concern about litigation is critical to the ability of public and private entities to address year 2000 needs in a timely manner.*

(5) *The national interest will be served by uniform legal standards in connection with the disclosure and exchange of year 2000 readiness information that will promote disclosures and exchanges of such information in a timely fashion.*