



International Chamber of Commerce

The world business organization

Policy statement

ICAO's revision to the Warsaw Liability System

Commission on Air Transport, 5 May 1999

Introduction

Since 1992, ICC has been involved in commenting on the attempts to update the Warsaw Liability System which governs the availability of damages to accident victims in international air transport. ICC wholly supports the achievement of a modern and satisfactory liability regime. In line with this objective, and in keeping with its top-level consultative status in ICAO, ICC is pleased to share its views on what it considers to be the main points of the ICAO Draft Convention for the Unification of Certain Rules for International Carriage by Air (hereafter also referred to as "ICAO Draft Convention").

The views expressed in this paper should be regarded as reflecting an interim position, since the final text of the ICAO Draft Convention has not yet been adopted. A diplomatic conference for the purpose of discussing the Draft ICAO Convention will be held in May 1999. ICC intends to participate actively in the diplomatic conference and may advocate more specific points, as suggested by ICC national committees, at appropriate points in the deliberation.

Summary of interim position

Subject to the following remarks, ICC endorses the ICAO Draft Convention for the Unification of Certain Rules for International Carriage by Air, because:

- ICAO attempts to achieve global uniformity;
- the creation of unlimited liability is a realistic and logical step;
- the more prominent position of the passenger based on consumer rights has been recognized;
- a more coherent system, applying also, for instance, to both the contractual and the actual carrier, has been drawn up;
- the explicit exclusion of punitive damages is welcome;
- the non-mandatory provisions on advance payments to be made to passengers, or persons entitled to claim on their behalf, are supported, if such claims are realistic.

On some points, such as the requirement of a written notice, the option of a fifth jurisdiction, the legal basis for claims exceeding 100.000 SDRs (fault to be proved by the claimant or presumed fault on the part of the carrier), the need for a definition of delay, the desirability of the regulation of the phenomenon of overbooking in a world-wide convention, as well as liability in the context of code sharing and franchising arrangements, ICC recommends and encourages further study.

Towards global uniformity

ICC's main aim is to support a framework for airline liability which is characterized by *global uniformity*. Since the beginning of the nineties, several initiatives have been developed to modernize the Warsaw System. They include but are not limited to the following:

The IATA Inter-Carrier Agreement (IIA) supplemented by the Implementation Agreement (MIA) emerged in 1995 as initiatives of several airlines to abolish the liability limits set by the Warsaw Convention. On 21 August 1996, the Chairman of the ICC Air Transport Commission submitted comments to the U.S. Department of Transportation on the IATA/ATA Agreements.

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In October 1998, the EC Regulation on air carrier liability entered into force. The main objective of this Regulation is to abolish liability limits. In addition, an article was inserted which obliges the carrier to make an advance payment to the passenger in order to alleviate the first economic needs. As is the case with the IIA/MIA, the EC Regulation will be implemented side by side with the existing Warsaw instruments. However, the Regulation only applies to carriers of the fifteen Member States, insofar as non-Community air carriers who do not apply the EC conditions on unlimited liability and advance payments are required to inform their passengers thereof when embarking at Community airports.

Although the problem of low limits has been solved by both the IIA/MIA and the EC Regulation, the much desired uniformity is further away than ever. Carriers will now be subject to a wide variety of liability regimes: Warsaw, Warsaw/Hague, Montreal Inter-Carrier Agreement 1966, IIA/MIA, the EC-Regulation, or a combination of these instruments. This was not what the drafters of the original Warsaw Convention for the Unification of Certain Rules on airline liability had in mind. Although the work of the IATA and EC has to be praised, the IIA and the EC Regulation should be regarded as interim measures, paving the way for adoption of the ICAO Convention. Consequently, it would be desirable to have the Warsaw Convention replaced by a new uniform instrument prepared at governmental level to be adopted by states world-wide.

Raising passenger limits, and unlimited liability

The wide variety of applicable instruments reflects, among other things, widespread dissatisfaction with the liability limits imposed under the current Warsaw Convention. In the beginning of the nineties, ICC proposed a so-called three tier system: a contractually agreed (by means of an Inter-Carrier agreement) carrier-paid cover, in excess of the underlying treaty defined "first tier", topped by an optional supplemental insurance cover, possibly amounting to a complete deletion of the liability limit, accepted or rejected by the individual passenger at his own discretion and expense. ICC favoured limited liability under the above-mentioned first and second tiers, whereas the optional third tier cover might be individually unlimited, although, for reasons related to technicalities of insurance, subject to an overall aggregate limit per aircraft and accident.

However, as proven by the coming into being of the EC Regulation and the acceptance of the IIA/MIA, it is now clear that unlimited liability is an achievable aim, even in terms of insurability. Moreover, unlimited liability has several advantages. *Firstly*, such a regime will bring global uniformity to the regime governing passenger claims. *Secondly*, unlimited liability will encourage parties to settle their disputes, instead of going into lengthy and expensive court battles, when trying to prove wilful misconduct. *Thirdly*, compensation should adequately reflect, and be significantly related to, the actual economic losses suffered by the victims of airline accidents. Limited liability does not achieve this. In the *fourth* place, limits are seen as a starting point for settlement negotiations as passengers expect to receive at least as much compensation as the scale of limits represents. *Fifthly*, provision has been made to the effect that liability limits are to be reviewed at regular intervals as inflation has an eroding effect on them.

From this perspective, there is no longer a need for the *three tier* system which ICC supported initially. A mandatory, treaty-defined, carrier-paid cover which is not related to any monetary limit is now recommended. Such a solution has to be dealt with outside the existing Warsaw System, preferably by a new convention, to be concluded by (ICAO) states.

In order to alleviate the heavy burden of unlimited liability, the liability should be strict up to 100.000 SDR. Beyond this amount there should be fault liability. The question remains whether to shift the burden of proof on to the passenger or not. Since the passenger enjoys the benefit of strict liability up to 100.000 SDR, there seems to be no reason to shift the burden of proof from the passenger to the carrier above that amount. The disadvantage of this option could be that it results in lengthy litigation



on the establishment of fault by claimants. On the other hand, since aviation accidents are often complex and involve technical difficulties, a presumed fault liability could be said to be preferable, for the purpose of protecting consumer's interests, and limiting protracted court cases. ICC recommends further investigation of this issue, and inclusion of an optional clause in the ICAO Draft Convention.

Compensable damages

It is welcomed that the ICAO Draft Convention (see Article 23) has specifically outlawed compensation of punitive damages. Thus, this issue, which has been often the subject of litigation in the US, may now formally be resolved by treaty law.

Advance payment to meet the immediate economic needs

The ICAO Draft Convention (Article 22 A) refers to advance payments, to be made at the choice of the carrier, in order to address the immediate needs of the persons who would, according to that provision, be entitled to such payments. There may be a problem when it is unclear who is going to decide what amount corresponds with the first economic needs. Rightly so, the ICAO Draft Convention leaves it to the discretion of the carriers of states signatory to the (draft) convention to make any advance payment. ICC supports the non-mandatory provisions on advance payments to be made to passengers or persons entitled to claim on their behalf.

Claims against third parties

Article 23 of the ICAO Draft Convention contains the basis of claims brought by a claimant *against the carrier*. This provision clarifies the situation under Article 24 of the Warsaw Convention. Airlines are now subject to a liability regime which is at least comparable to that of third parties. Any action for damages, however founded, whether under the Convention or in contract or in tort or otherwise, can only be brought subject to the conditions as are set out in the Convention. The cause of an accident can lie with the aircraft manufacturer, the ATC or other third parties involved in commercial aviation. Unjustified and artificial provisions designed to protect either second (i.e., airlines) or third parties should be avoided. On the other hand, in the light of the complexity of aviation cases, claimants would benefit from a system of "channelled liability" through the carrier.

Article 23 adequately reflects these interests. Whether necessary or not, Article 31 of the ICAO Draft Convention confirms the rights of airlines to take action against such third parties.

Cargo

The baggage and cargo provisions contained in the ICAO Draft incorporating the provisions of Montreal Protocol 4 are not controversial and should be maintained. Otherwise, reference is made to discussions within the ICC Committee on Air Cargo.