THE ROAD TO MONTREAL:
Developments in Airline Liability for International Flights
& the Impact on Aviation Manufacturers in the U.S.

by

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On 28 May 1999, an historic agreement was signed by 52 nations (now 53 as Uruguay signed on 9 June) setting forth new international flight liability rules aimed at superseding *The Warsaw Convention of 1929*.

In an ICAO ("International Civil Aviation Organization) news release on that date, the President of the Council of ICAO, Dr. Assad Kotaite, boasts:

> "We have succeeded in modernizing and consolidating a seventy-year old system of international instruments of private international law into one legal instrument that will provide, for years to come, an adequate level of compensation for those involved in international air accidents."

The new *CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR*, to be commonly referred to as *The Montreal Convention of 1999*, is only an "agreement" by the signing nations' authorized representatives. It has no legal effect until instruments of ratification are deposited with ICAO by 30 nations. In the United States, "ratification" requires the approval of a super-majority (two-thirds) of the Senate. Once the 30th ratification is deposited, *The Montreal Convention* will enter into force 60 days thereafter.

Based upon the history of the United States' inability to ratify Warsaw amendments like the Guatemala and Hague Protocols (even though it played a major role in developing them), ratification by the U.S. Senate is far from a certainty.[1] However, with the concessions made by other nations to placate the United States, ICAO's Legal Bureau Expert, Arie Jakob, is "hopeful for full ratification, as there is no evidence that Montreal will not be embraced by the participating nations, including the United States."

With all the nuances of the various States' requirements for ratification around the world, even if one is as "hopeful" as ICAO, *The Montreal Convention* is not expected to enter into force for at least two or three years.

In the meantime, the IATA sponsored Intercarrier Agreements (as published in each

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[1]A detailed examination of the history of *The Warsaw Convention* in the United States is discussed in an article found in the ABC Law Report of Fall, 1997, *The New Warsaw and Its Impact on Aviation Manufacturers*.

international carrier's U.S. Department of Transportation Tariff), in conjunction with the amendments to *The Warsaw Convention* made under *Montreal Protocol No. 4* (discussed below), will be the controlling law in effect in the United States for the foreseeable future.

This article will seek to provide (1) an overview of developments in the United States since the Department of Transportation approved the airlines' waiver of liability limits in early 1997; (2) an outline of the key provisions in the new *Convention*; and (3) the probable impact of these historical developments on aviation manufacturers both before and after ratification of *The Montreal Convention*.

Post-IATA Developments: *Montreal Protocol No. 4*

On January 14, 1977, *Montreal Protocol No.4* ("MP4") was transmitted to the United States Senate by then President Gerald R. Ford in order to "bring the legal regime which has developed under the 1929 *Warsaw Convention* into today's world."[2] The purpose behind MP4 was to implement changes to *The Warsaw Convention* accomplished by the 1955 *Hague Protocol* to which the United States had never become a party.

MP4 remained pending before the Senate Foreign Relations Committee for over 20 years. In 1977, and again in 1981, Committee hearings were held regarding MP4, but no action was taken. In 1983, MP4 was reported favorably to the Senate, but failed to be approved by the required two-thirds majority. Between 1989 and 1991, the Committee again reported the *Protocol* favorably to the Senate, but it never reached the floor.[3] The problem with MP4 (which primarily deals with updating cargo provisions) was its packaging with *Montreal Protocol No. 3* which amended the passenger liability limit provisions in such a way that many Senators believed insufficient to cure their strong concerns regarding Warsaw's low liability limits.

However, MP4 was given new life by the carriers' recent voluntary Intercarrier Agreements (referred to as the "IIA" and "MIA") sponsored by the International Air Transport Association (IATA) which, in effect, waived the Warsaw limits.

In response to the new life given to *Montreal Protocol No. 4* by the IATA agreements, the 30th country finally ratified it, and it entered into force around the world 90 days thereafter on June 14, 1998.[4] Once the *Protocol* was ratified by the 30th country, the United States Senate moved quickly and ratified MP4 on September 28, 1998. President Clinton signed the instrument of ratification on November 5, 1998 and *Montreal Protocol No. 4* entered into force

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[2]*Message From The President of the United States Transmitting Two Related Protocols Done at Montreal on September 25, 1975,* Senate Doc. No. 89-118, page IV.

[3]*Senate Report on Montreal Protocol No. 4,* S. Exec. Rep. No. 105-20, p.2 (August 25, 1998).

[4]*Senate Report on Montreal Protocol No. 4,* S. Exec. Rep. No. 105-20, p.4 (August 25, 1998).

in the United States on March 4, 1999.[5]

The IATA agreements' influence on the MP4 implementation is made clear in the *Senate Report on Montreal Protocol No. 4*, which states:

> "Further, all major U.S. airlines and many major foreign airlines have now waived the *Conventions's* passenger liability limit. For claims below 100,000 SDRs[6] (approximately $130,000), carriers have also waived the defense under Article 20(1) of the *Convention* that they have taken all necessary measures to avoid the damage or that it was impossible to do so. To the extent claims exceed 100,000 SDRs, the carriers have retained the right to assert the defense.
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> By waiving the liability limit, the carriers have essentially agreed to pay all compensatory damages, without monetary limit, subject to the retained defense of non-negligence described above. Since the carriers have waived the limit, the level of the limit and the basis for breaking it are essentially irrelevant. The Committee expects that in the near future all airlines operating in the United States will have joined the major airlines, both U.S. and foreign, that have already taken that action, and urges the Department of Transportation to take all appropriate action to ensure that result."[7]

Although "urged" by the Senate to have all airlines agree to the waiver, the D.O.T. has not made agreement a condition precedent for obtaining a foreign air carrier permit to fly to and from the United States, as was the case with *The Montreal Agreement of 1966*.[8] As of 30 June 1999, however, 122 carriers had signed onto the *Intercarrier Agreement on Passenger Liability* ("IIA") and 88 had signed onto the companion *Agreement on Measures to Implement the IATA Intercarrier Agreement* (MIA).[9] The IATA reports that the IIA signatories "carry well in excess

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[5]See 144 Cong. Rec. S11059 (Sept. 28, 1998) and *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S.Ct. 662, 674, n. 14 (1999).

[6]Special Drawing Rights which are rates of currency exchange set by the International Monetary Fund based upon U.S., German, British, French and Japanese currency.

[7]*Senate Report on MP4*, p.13.

[8]Peter Schwazkopf, U.S. Department of Transportation Legal Division.

[9]See the legal section of IATA's official website at "www.iata.org/legal/" for up to date statistics on signatories to the IIA and MIA.

of 90 percent of the world's scheduled international air traffic."[10]

The significant provisions of MP4 include the following:

- **Article 24** clarifies the fact that "the treaty preempts passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty."[11]

- **Article 25** defines "willful misconduct" as "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly with knowledge that damage would probably result."[12]

- **Article 25A** "makes it explicit that the employees and agents of the carrier acting within the scope of their employment are covered by the *Convention's* limits of liability to the extent the carrier is entitled to invoke those limits."[13]

- **Article 30A** clarifies the fact "that the *Convention* is silent as to the carrier's rights of recourse under local law against any parties who may have caused or contributed to the damages for which the carrier is liable."[14]

Probable Impact on Aviation Manufacturers Prior to the New *Convention* Taking Force

For "international" accidents occurring prior to the entry into force of *The Montreal Convention* and its ratification by the United States Senate, the IATA Intercarrier Agreements (IIA/MIA), in conjunction with *Montreal Protocol No. 4*, will apply. Unless other U.S. courts follow the 11th Circuit's lead and apply the new *Convention* retroactively (which is unlikely), IATA/MP4 may well apply to international aviation litigation in the United States for the next five years or more.

Even though MP4 has the power of a treaty, and is therefore, "the Supreme Law of the

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[10]*IATA 1999 Annual Report* for the 55th Annual General Meeting, 31 May - 1 June 1999, Rio de Janeiro Brazil, by Pierre J. Jeanniot, O.C., Director General.

[11]See *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 119 S.Ct. 662, 674. (1999), in which the U.S. Supreme Court ruled that MP4 has clarified the *Convention's* rule of exclusivity.

[12]See *Cortes vs. American Airlines, Inc.*, 177 F.3d 1272 (11th Cir. 1999) in which the 11th Circuit overturned a district court's willful misconduct finding, remanding the case for further proceedings based upon their decision that *Montreal Protocol 4's* new willful misconduct definition applied retroactively to this case.

[13]*Senate Report on MP4*, page 15.

[14]*Senate Report on MP4*, page 16.

Land,"[15] it is preempted by the IATA Agreements pursuant to Article 22(1) of the *Convention* which permits carriers to agree to "a higher limit of liability" by "special contract." The result should be a substantial benefit to aviation manufacturers with products on commercial aircraft.

Due to the difficulty in proving the additional defense given to the carriers for amounts exceeding 100,000 SDR's,[16] they will have virtually strict liability (their only set-off being the contributory negligence of the passenger) up to approximately $130,000, and unlimited liability above that point, but for the very unusual cases involving totally unforeseen and unavoidable terrorism or acts of God.

For this reason, plaintiffs' counsel will likely be motivated to focus large and expensive air disaster litigation on the airlines, from whom they can fairly easily obtain full recovery. This litigation will likely focus more on damages, with the liability fight following after settlement or judgment between the airline and a third party, usually a manufacturer.

However, due to the nature of carriers' liability pursuant to a "special contract", such actions may prove problematic and require judicial interpretation as to whether carriers have agreed to unlimited liability under the IIA and MIA that they would not have otherwise been exposed to. If a U.S. court determines that carriers consented to liability they did not otherwise have, they may well be barred as a "volunteer" from seeking contribution or indemnity actions against aviation manufacturers under either U.S. contract or tort law.

The Montreal Convention of 1999

Once it enters into force and is ratified by the Senate, *The Montreal Convention* will control the legal liability for international aviation litigation in the United States. Airline tariffs will necessarily be amended to correspond to the new *Convention's* liability regime, but will reflect international treaty provisions regarding liability, rather than contractual terms.

After much debate, compromise and consensus, the following significant changes were agreed to at the Montreal International Air Law Conference, culminating in the new *Convention*:

- **Article 21** sets forth the new compensation scheme for death or injury to passengers.

•The carrier will not be able to exclude or limit its liability up to 100,000 Special Drawing Rights (approximately $130,000).

•The carrier can only avoid liability for damages exceeding 100,000 SDRs if it can

[15] *U.S. Constitution*, Article VI.

[16] "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 20(1).

prove that (a) the damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) that such damage was solely due to the negligence or other wrongful act or omission of a third party.

- **Article 24** provides for the increase in the liability limits at 5 year intervals through an ICAO review of the accumulated rate of inflation from States whose currencies make up Special Drawing Rights. If found to exceed 10 percent, ICAO shall revise the limits accordingly, to be made effective 6 months after notification to the States, providing the majority of States do not register their disapproval of such a revision.

  ICAO shall revise the limits within less than 5 years if the inflation factor has exceeded 30 percent and one-third of the States express a desire to make such a revision.

- **Article 28** allows for advance payments in aircraft accidents resulting in passenger death or injury if required by national law, stating that such payments shall not constitute a recognition of liability and may be offset against amounts later paid as damages by the carrier.

- **Article 33** restates the old Warsaw jurisdictional limitation (domicile or principle place of business of the carrier; location of carrier's place of business through which the contract of carriage was made; or the place of destination of the flight), but adds a "fifth jurisdiction" for passenger injury or death cases to include the passenger's principal and permanent residence, if in a State which the carrier operates passenger air services and conducts passenger air business from leased or owned premises.

Probable Impact on Aviation Manufacturers Under the New *Convention*

Despite the optimism of ICAO, some feel that *The Montreal Convention's* future is far from certain. "IATA believes an entirely new *convention* may not be achievable and prefers a more focused treaty instrument reflecting the principles in the IIA/MIA regime."[17]

Assuming U.S. ratification and ultimate entry into force, *The Montreal Convention* should still prove to be a boon to aviation manufacturers with exposure to lawsuits in the United States.

- While the burden on carriers to avoid unlimited liability is lessened from the unlikely Article 20(1) defense, carriers still carry the burden to disprove any fault for damages over $130,000. Based upon the complexity of international air disaster investigation (evidenced by the NTSB's ongoing effort regarding TWA Flight 800), it should prove to be a challenge for airlines to prove a total lack of fault for most losses.

[17] *IATA 1999 Annual Report* for the 55th Annual General Meeting, 31 May - 1 June 1999, Rio de Janeiro Brazil, by Pierre J. Jeanniot, O.C., Director General.

- The inflation factor guards against the longtime problem with the Warsaw limits being out of date. Clearly the bigger the first tier limit imposed upon airlines, the more advantageous for manufacturers.

- Unless the U.S. Congress passes new legislation requiring advances encouraged under *Montreal*'s Article 28, it will not have an effect in the United States. The language of this article infers that if no such national requirement exists, the recognition of liability or offset questions may still be at issue, possibly opening the door for a volunteer defense, as discussed above.

- It is possible that the "fifth jurisdiction" could lead to greater exposure to U.S. courts in foreign air losses involving Americans. However, U.S. plaintiffs have always had the right to sue an aviation manufacturer in the United States even though barred from suing the airline under the Warsaw scheme, and would still have the protection of a *forum non conveniens* defense.

On balance, the longer the interim period of IATA and MP4 controlling, the better for the defense of the aviation manufacturing industry. However, regardless of the scheme which falls into place for the long run, the historic change to the 70 year old Warsaw system should prove to have a longstanding beneficial effect on aviation manufacturers' involvement in international accident cases. Manufacturers will hopefully only find themselves in lawsuits in which there is a real good faith question as to the involvement of their product. Otherwise, plaintiffs will be motivated to focus all of their attention and resources on the carriers.