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UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

Issued by the Department of Transportation
on the 12th day of November, 1996

INTERNATIONAL AIR TRANSPORT ASSOCIATION:

AGREEMENT RELATING TO
LIABILITY LIMITATIONS OF THE
WARSAW CONVENTION

Docket OST-95-232

AIR TRANSPORT ASSOCIATION OF AMERICA:

AGREEMENT RELATING TO
LIABILITY LIMITATIONS OF THE
WARSAW CONVENTION

Docket OST-96-1607

ORDER APPROVING AGREEMENTS

Summary:

By this order we finalize our Order to Show Cause 96-10-7 to the extent of approving, *pendente lite*, the IIA, MIA and IPA Agreements¹ filed by IATA and ATA, subject to conditions that: (1) the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States;² (2) the MIA's optional provision for less than 100,000 SDR's strict liability on particular routes could not apply for any operations to, from, or with a connection or stopping place in the United States; (3) the inapplicability for social agencies of the MIA's waivers of

¹ These acronyms are utilized by IATA and ATA, to refer to the three Agreements formally entitled, respectively: "The IATA Inter-carrier Agreement"; "The Agreement on Measures to Implement the IATA Inter-carrier Agreement"; and the ATA Agreement, "Provisions Implementing the IATA Inter-carrier Agreement to be Included in Conditions of Carriage and Tariffs".

² Paragraph I(4) of the ATA IPA Agreement, as we interpret it, would meet this requirement.

the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies; and (4) the IPA's provision for withdrawal from the 1966 Montreal Interim Agreement shall not be effective at this time. We defer action with respect to other proposed agreement and authority conditions.

Background:

By applications filed July 31, 1996, the International Air Transport Association (IATA), and the Air Transport Association of America (ATA), request approval of, and grant of antitrust immunity with respect to, three agreements. These agreements, in increasing details of implementation, provide for waiver in their entirety, by carriers parties to those agreements, of the limits of liability applicable under the Warsaw Convention ³ to passengers killed or injured in international aircraft accidents. ⁴ The IATA and ATA Agreements are proposed for application worldwide. The Agreements were negotiated by carriers under discussion authority granted to IATA and ATA by DOT Orders setting forth guidelines for such Agreements. ⁵

Both the MIA and the IPA Agreements provide in principal effect that:

³ Convention for the Unification of Certain Rules Relating to International Transportation by Air, with additional Protocol, concluded at Warsaw, October 12, 1929, entered into force for the United States, October 29, 1934, 49 Stat. 3000; TS 876; 2 Bevans 983; 137 LNTS 11. In principal effect the Warsaw Convention limits the liability of carriers for passengers killed or injured in international aircraft accidents to \$10,000. Under a 1966 intercarrier agreement, carriers operating to and from the United States waived that limit up to \$75,000 for journeys to and from the United States, and waived the defense, under Article 20(1) of the Convention, of carrier proof of non-negligence. Pursuant to 14 CFR 203 all carriers operating to and from the United States are required to be, and are deemed to be, parties to the 1966 agreement. Thus, the applicable limit to and from the United States is currently \$75,000.

⁴ IATA and ATA, respectively, also request an exemption from various regulations and orders, *etc.* of the Department that require adherence to the 1966 intercarrier agreement waiving the Warsaw limits to \$75,000 to and from the United States, and that the instant agreements may be substituted for the 1966 intercarrier agreement in those regulations and orders, *etc.*

⁵ Discussion authority was granted to IATA, ATA, and participating carriers, upon the request of IATA, by Order 95-2-44, and extended by Orders 95-7-15, 96-1-25, and 96-3-46. Discussion authority was granted to ATA, IATA and participating carriers, upon the request of ATA, by Order 95-12-14.

"1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.

"2. {CARRIER} shall not avail itself of any defense under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs." ⁶

The ATA IPA Agreement differs from the IATA MIA Agreement only in that (1) there is no option on specific routes to waive the defense of carrier proof of non-negligence to amounts less than 100,000 SDRs; (2) the application of the law of the domicile is not optional; ⁷ (3) it does not include a non-application of the waivers for Social Agencies; (4) it includes a specific notice provision and a provision for withdrawal from the 1966 Montreal Intercarrier Agreement with substitution of the IPA Agreement in all DOT regulations and orders, *etc.* referring to the 1966 Agreement. The IPA Agreement also includes a permissive provision to encourage other carriers to become parties to the IIA, MIA and IPA Agreements. ⁸

The Department's Show Cause Order:

By Order to Show Cause 96-10-7, issued October 3, 1966, we tentatively approved all three Agreements subject to conditions requiring that the waiver of the Warsaw liability limit be on a systemwide basis, and, with respect to application to and from the U.S., to: (1) make mandatory for the U.S. the optional (under the IATA Agreements) application of the law of the domicile; (2) preclude the less than 100,000 SDRs (approximately \$145,000) limit on strict liability (the carrier defense of proving that it was

⁶ The MIA Agreement permits a waiver of the defense up to less than 100,000 SDRs on specific routes, but only if authorized by the Governments concerned with the transportation. It was understood that such waivers for less than 100,000 SDRs would not be authorized for operations to and from the U.S.

⁷ Under this provision the carrier agrees that the law of the domicile may be applied. It does not, however, attempt to bind the claimant to this choice of law. (ATA Application, 1st. par., p. 8.)

⁸ All three Agreements provide for reservation of defenses, and the right of recourse, contribution and indemnity with respect to third parties.

not negligent applies above that amount); (3) apply to interline operations to and from the U.S.; and (4) reject the non-waiver for U.S. Social Agencies.

The Show Cause Order also proposed to include conditions attached to all certificates, permits and other authority, which would require: (1) mandatory participation in the Agreements (basically in the form proposed by ATA) by all carriers operating to and from the U.S.; (2) a "most favored nation" provision for the passenger condition that would apply any such provision, applied by a carrier in any jurisdiction, to that carrier's transportation to and from the United States; and (3) for U.S. carriers only, inclusion of the fifth jurisdiction based on the passengers' domicile or permanent residence. (Currently Warsaw limits jurisdiction to the place of incorporation or principal place of business of the carrier, the place where the ticket was purchased, or the destination.)

The Show Cause Order also requested comments on various alternatives to the fifth jurisdiction, namely: (1) an arbitration provision, with respect to damages only (carrier would not retain the defense of proof of non-negligence), with prescribed requirements for the arbitration procedures; (2) a specific notice provision that, with respect to that carrier, unlike other carriers subscribing to the fifth jurisdiction, the passenger may not be able to bring an action for damages in U.S. courts; (3) a nonrefundable accident insurance policy, with an offset of Warsaw damages, in an amount of 500,000 SDRs (approximately \$725,000); (4) a requirement that the first carrier on a trip from the U.S. insure the passenger for the whole journey, with an offset of Warsaw recoveries, including coverage for side and other trips within 6 mos. or a year; and (5) other similar alternatives.

In addition, the Show Cause Order proposed to accept the ATA request that the new agreement be considered as satisfying the requirement for participation in the 1966 intercarrier agreement waiving the Warsaw passenger liability limit to \$75,000, in all DOT regulations (*see, e.g.,* 14 CFR 203), orders, *etc.* The Show Cause Order further proposed to grant antitrust immunity, as requested.

Comments of the Parties:

Objections and comments were filed on October 24 by IATA, ATA, the International Chamber of Commerce, the Latin American airline trade association (AITAL), the Asian airline association (OAA), Korean Air Lines, Swissair, Finnair, Royal Jordanian Airlines, Kuwait Airways, Gulf Air, Lufthansa, Pakistan International Airlines, Lloyds Aviation Underwriters, the Aerospace Industries Association (AIA), Michael Milde, Paul Dempsey, and the Victims Families Associations.⁹ IATA and the foreign carriers and carrier associations generally argue that imposing the permit conditions proposed as alternatives to the fifth jurisdiction is beyond DOT's jurisdiction, and a violation of the Warsaw Convention. ATA urges approval of its Agreement without conditions, on an interim basis, and later consideration of the certificate/permit conditions. With respect to proposed conditions on the Agreement, it opposes, as unworkable in view of the foreign carrier objections, the application to interline carriers. AIA urges approval of the Agreements promptly and unconditionally as the best means to achieve the progress that has been made. Dr. Milde and Mr. Dempsey urge resolution of the difficulties through a new ICAO sponsored Convention. Lloyd's states that insurance costs under DOT's alternative permit conditions will be higher. The Victims' Families urge that strict liability should be increased to 500,000 SDRs (\$725,000) with an escalation clause; that the fifth jurisdiction be imposed; and that the other proposed DOT alternative conditions be considered on their merits. They reject arbitration (particularly under the carrier dominated ICC sponsorship) as a substitute for the fifth jurisdiction.

Answers to the Objections and Comments were filed by IATA, ATA, the Association of European Airlines (AEA), the Regional Airline Association (RAA), Air España, Lee Kriendler, and the Victims Families. IATA argues that no support has been given for the Department's conditions and that the Agreements should be allowed to become effective near November 1, without conditions, with further consideration by IATA later. AEA supports the original comments of IATA. ATA argues that the IPA Agreement should be approved as filed on an interim basis, for implementation November 1, and that ATA will work closely with the Victims

⁹ Pakistan International Airlines' and Paul Dempsey's comments were filed late, accompanied by motions for leave to late file. We will grant the motions.

Families to develop a consensus for further improvements. RAA supports ATA's original objections, and specifically opposes conditions applicable to interlining carriers. Lee Kriendler urges immediate implementation without conditions in order to take advantage of the gains made. The Victims Families support ATA's proposal for interim approval of the IPA, but only to June 30, 1998, during which time the carriers should seek voluntary adherence to the fifth jurisdiction. Air España expresses sympathy for DOT's proposed conditions as an alternative to the fifth jurisdiction, but concludes that in light of the opposition of many foreign carriers implementation of those conditions could jeopardize gains already made, and some of those conditions could be unjustifiably expensive, particularly for small carriers.

Decision:

We have decided to approve the IIA, MIA and IPA Agreements, *pendente lite*, subject only to those conditions which are generally accepted. We will defer consideration of all other matters. In the interim, we will exempt all carriers filing Agreements from applicable DOT regulations and authority conditions only to the extent necessary to implement those agreements in a manner consistent with this order, and to substitute a tariff consistent with the IPA Agreement (exclusive of withdrawal from the 1966 Montreal Interim Agreement).

The objections and comments raise fundamental questions of the scope of the Department's authority to impose permit and other authority conditions, and the procedures necessary for such imposition. These matters, including the requirements of a liability regime to be applicable to and from the United States and alternatives to the fifth jurisdiction require careful and thorough consideration. All parties agree, nevertheless, that pending such consideration the Department should accept the Agreements which have been voluntarily filed, in order to implement the gains which have been made. We agree that acceptance on an interim basis will be consistent with the public interest, subject to the conditions and limitations set forth below. As we stated in the show cause order, the agreements are a major

¹⁰ ATA notes that if the IPA is approved and granted antitrust immunity, the provision of that agreement which includes a permissible basis to urge other carriers to adhere to the agreement, will provide the antitrust immunity for further discussions.

step toward a more reasonable international liability regime.

We had anticipated that the conditions we proposed to impose on the Agreement were generally acceptable and most were anticipated by IATA. It appears that in certain respects, we may have exceeded the IATA anticipation, particularly in view of the apparent lack of consensus of IATA carriers on some matters. This appears to be particularly the case, as ATA points out, on our proposal to require applicability of the Agreements to interlining carriers. Thus we will confine the conditioning of our interim approval of these Agreements to those clearly anticipated Governmental conditions; namely:

- a. The MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States.¹¹
- b. The MIA's optional provision for less than 100,000 SDR's strict liability on particular routes, could not apply for operations to, from or with a connection or stopping place in the United States.
- c. The inapplicability, under the MIA, for social agencies of the waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies.

We also find it necessary to condition the ATA IPA Agreement to provide that carriers may not withdraw from the 1966 Montreal Interim Agreement (DOT Agreement 18900). Without a provision for application to interlining carriers, it appears that the IPA Agreement could possibly be construed as applying only to a carrier actually signing the Agreement. Thus there is no assurance that the new agreements' waivers will apply on an interline segment

¹¹ The "Explanatory Note" to the IATA IIA Agreement states: "Should a carrier wish to waive the limits of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, **or not be so required by a governmental authority**, it may rely on the law of the court to which the case is submitted." As we noted in note 10, page 10, of our Order to Show Cause 96-10-7, the requirement is that the carrier agree, at the claimant's option, to application of the law of the domicile or permanent residence of the passenger. We do not intend to direct courts as to which law must be applied, if despite the carrier's agreement and submission, the court should determine that a different law must be applied.

operated by a non-signatory carrier, even on a Warsaw journey. In these circumstances, we are unwilling to provide, at this time, that the IPA Agreement shall serve as a withdrawal from the mandated 1966 Montreal Interim Agreement.

By limiting our conditions to those clearly contemplated by IATA, *pendente lite*, we leave no basis for the carriers to withhold immediate implementation of the Agreements proposed. This will leave time for the serious consideration that the comments and other pleadings require.

There would, nevertheless, be extensive public confusion should multiple differing liability regimes applicable to and from the United States be included in carrier tariffs. Therefore, pending final action by DOT in these proceedings, we will grant an exemption from our regulations and certificate, permit and other authority conditions only to the extent necessary for the carriers to apply and file tariffs incorporating the provisions of the IPA Agreement (exclusive of the withdrawal from the 1966 Montreal Interim Agreement), and for all carriers filing Agreements to implement such agreements in a manner consistent with this order.¹³

For the reasons set forth in our Show Cause Order 96-10-7, we will grant antitrust immunity to carriers filing the respective agreements, but only insofar as required for implementation of the agreements in the manner and to the extent provided in this order.

ACCORDINGLY:

1. We approve *pendente lite* under 49 U.S.C. 41309, subject to the conditions set forth in paragraph 2, the Intercarrier Agreement on Passenger Liability (IIA), and the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), filed by IATA and by, and on behalf of, various air carriers and foreign air carriers, and the Agreement on Provisions Implementing the IATA Intercarrier Agreement to be Included

¹² See, Order 95-12-14, page 3, where we noted the importance of a single liability regime applicable to and from the United States.

¹³ We do not consider that a tariff is necessary to implement the waiver of all numerical passenger limits of liability under the Convention. The Agreements speak for themselves, and are thus self-executing under the exemption we are providing. Therefore, pending final action in this proceeding, we will only accept revisions of the Warsaw tariffs to the extent that they incorporate the provisions of the IPA Agreement (exclusive of the withdrawal from the 1966 Montreal Interim Agreement).

in Conditions of Carriage and Tariffs (IPA), filed by ATA and various air carriers and foreign air carriers (prospectively).

2. The approvals granted in paragraph 1, above, are subject to the conditions that:

a. The MIA's optional application of the law of the domicile provision is applicable to operations to, from, or with a connection or stopping place in the United States.¹⁴

b. The MIA's optional provision for less than 100,000 SDR's strict liability on particular routes, will not apply for operations to, from or with a connection or stopping place in the United States.

c. The inapplicability, under the MIA, for social agencies of the waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies.

d. The provision of the IPA that provides for carriers to withdraw from the 1966 Montreal Interim Agreement (DOT Agreement 18900) shall not be effective unless and until authorized under separate order of the Department.

3. Pending final action by DOT in these proceedings, we exempt all U.S. and foreign air carriers from our regulations and certificate, permit and other authority conditions only to the extent necessary for the carriers to apply and file tariffs incorporating the provisions of the IPA Agreement (exclusive of the withdrawal from the 1966 Montreal Interim Agreement), and for all carriers filing Agreements to implement them in a manner consistent with this order.

3. We grant immunity under the Antitrust Laws, in accordance with 49 U.S.C. 41308, solely to the extent necessary for the interim implementation of the IIA, MIA and IPA Agreements as provided in this order.

¹⁴ As noted, the requirement is that the carrier must agree, at the claimant's option, to application of the law of the domicile or permanent residence of the passenger. We do not intend to direct courts as to what law must be applied, if despite the carrier's agreement and submission, the court should determine that a different law must be applied.

3. Except to the extent specifically granted herein, we defer for later consideration and action all other requests in the Applications of the International Air Transport Association and the Air Transport Association of America, in these proceedings, and the conditions proposed in Order to Show Cause 96-10-7.

4. We grant the motions of Pakistan International Airlines and Paul Dempsey to late file their comments.

5. We will serve this order on all parties to this proceeding and the Secretary of State, the Attorney General and the Federal Aviation Administration.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

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