An American Perspective of the Reform of the Warsaw Convention

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Ⅰ. Introduction

I am honored to have been invited by the Korean Association of Air and Space Law to address its members and readers on the above referenced important subject; however, the breadth of the topic requires some degree of qualification.

No individual American lawyer, no matter how experienced or accomplished in his or her respective field, can purport to speak for the United States of America, its government or any of its branches, or even a substantial segment of American citizens. America is a nation which thrives on diversity, and its diversity prevents any single view or a single perspective on almost any subject. Rather, and particularly in respect to legal and international issues, there is always more than one American perspective.

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The subject of the Warsaw Convention and the reform proposals exemplify this observation. Thus, I must commence this writing with something of a disclaimer; despite the title, I do not presume to describe an American perspective. I can only fairly articulate my views developed over nearly a quarter of a century representing individuals affected, usually unwittingly and regrettably, by this body of international law as it has been applied in American courts.

Moreover, in addition to the American trait which is typified by a multiplicity of views on any given subject, I think a further disclaimer is appropriate as to the present subject. To be honest, we must recognize that very few non-lawyer Americans know about, care about or feel strongly about the Warsaw Convention or its reform. Until someone in an American family is injured or killed on an airplane engaged in international transportation and the Warsaw Convention becomes a bitter fact of life, most Americans are totally unaware of the matters I shall discuss in this paper. Indeed, this accounts for Americas political history of long term acquiescence toward the Conventions applicability to Americans. Only lawyers and politicians whose work introduces them to this subject are likely to be in any way familiar with it, and there is a paucity of objectivity among this group.

Nonetheless, there are some important and cogent observations that can be shared with an international body in respect to the Warsaw Convention which may reasonably be considered American, and I will undertake to articulate them.

In summary, from an American perspective (although not to the exclusion of other countries), the Warsaw Convention as it has evolved to this point is an abject failure and an empty promise. It is a failure insofar as it purports to unify the rules regarding compensation for injury sustained while traveling abroad, and it is an empty promise insofar as it purports to expedite compensation.

Unification of the rules regarding compensation and expediting compensation are supposed to be its purposes. Rather than meet its desired purposes, however, the Convention remains an unjustified example of poorly conceived special treatment under the law providing favored status, protection and immunity to foreign airlines and their insurers, mostly at the expense of the families of U.S. citizens killed abroad. This is not justice. In economic terms, the Warsaw Convention provides an needless subsidy to airlines who in essence transfer the costs of injuries inflicted on and sustained by passengers to others in the industry (most commonly manufacturers, and occasionally even the U.S. taxpayers) under the dubious justification of protecting the capital of airlines. While such protection may have made sense 70 years ago when the airlines were truly infants, that time has long since passed for the transportation giants who run todays airlines.

Ⅱ. What is the Warsaw Convention?

In order to discuss the misconceptions and flaws of the Warsaw Convention, it is appropriate to start with an outline of its elements and the history of the evolution of the various modifications and revisions to the original Warsaw Convention since it was initially proposed in 1929.The Convention for the Unification of Certain Rules Relating to International Transport by Air, 49 Stat., part II, p. 3000, 2 Bevans 983, 137 L.N.T.S.

A. 1929. The Original Warsaw Convention

As written in of 1929 (although not embraced by the United States until 1934), the Warsaw Convention provides a system of compensation for passengers injured or wounded (and lost baggage) in international air transportation consisting of the following elements:

1. Presumptive liability on carriers for damages sustained by passengers

in an accident (Article 1(2)) up to the limitation of liability (Article 17, 22) (more appropriately termed a damages limitation);

2. A damages limitation of 125,000 poincare francs, each franc equivalent to 65.5 milligrams of gold at .900 finest (*Franklin Mint v. TWA*, 466 U.S. 243, 104 S.Ct. 1776, 80 L.Ed.2d 273 (1984)) approximately $8,300 (1,200,000 won) (Article 22). However, there are three exceptions to the applicability of the damages limitation; these include (a) where the carrier fails to deliver a ticket (Article 3), or (b) upon proof of dol (roughly translated into English as willful misconduct on the part of the carrier (Article 25); or (c) where the carrier has entered into a special contract providing for a higher damages limit (Article 22(1);

3. Venue (meaning jurisdictional) limitations which specify the only four places where a claim against the carrier can be brought; these are the domicile of the carrier, the principal place of business of the carrier, the ultimate destination on the ticket or where the contract of carriage (ticket) was purchased (Article 28).

4. Contributory negligence on the part of the passenger was a defense (Article 21); and

5. If the carrier established that it took all necessary measures to avoid the damage there is no right to compensation. (Article 20)

For about the next twenty years, the Warsaw Convention remained unchanged with these elements intact, but engendered a great deal of dissatisfaction.

B. 1955. The Hague Protocol

In 1955, the initial serious attempt at modification of the Warsaw

Convention was launched. This proposed modification is usually referred to as the Hague Protocol and was supposed to come into force and effect on August 1, 1963.Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air Signed at Warsaw on 12 October 1929. The delegates to the conference, including the delegate from the United States signed the Protocol, but the United States through its Congress and its agencies never ratified nor adhered to the Protocol. See, Alexander v. Eastern Airlines, Inc., 9 Aviation Law Reporter (CCH) 17844 (W.D.N.Y. 1965). Hence, the Hague Protocol as a body of rules was never adopted in the United States or by the United States, even though it was signed by 26 other countries, including the United States. 80 Harv. L. Rev. 497, 507 (1966).

In relevant part, the Hague Protocol doubled the damages limitation and replaced Article 25 of the original Warsaw Convention. The damages limitation under the Hague Protocol was raised to $16,584 (or $250,000 Poincare Francs) from the original 125,000 francs. (Article 22)

It is noteworthy that the provision of Article 22(1) which expressly provides for an exception to the damages limitation in the form of a special contract specifying a higher limit of liability was retained. Indeed, this provision later provided the basis for what was a much more important change to Warsaw which became known as the Montreal Agreement (Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol, Civil Aeronautics Board Agreement No. 18,990, approved by Executive Order No. 23,680, 31 Fed. Reg. 7302 (1966)).

Of most importance to the Hague Protocol, however, was its treatment of the exception to the damages limitation (commonly referred to as the willful misconduct exception). In the French language version, the operative word embodying the exception is dol, suggesting actionable conduct significantly more than negligence. Hague unambiguously and expressly established that

an enlarged meaning of this term applied. Under the Hague Protocol, the damages limitation exception applied if the crash resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damages or recklessly and with knowledge that damage would probably result ···(emphasis added) As indicated, this language sets forth a fairly broad standard for the type of conduct which qualifies for the limitations exception, even though under the actual language of Article 25 of the original Warsaw Convention, dol might have been narrowly read to connote willful, meaning purposeful and intentional. Hague appears to broaden this concept.

As an example, this concept was clearly used by Chief Judge Platt to instruct the jury during the trial of *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, involving an in-flight bomb explosion when he defined willful misconduct. According to the Court:

Willful misconduct is the intentional performance of an action with knowledge that the act will probably result in injury or damage, or it may be the intentional performance of an act in such a manner as to imply disregard of the probable consequences of the performance of the act. Likewise, the intentional omission of some act with the knowledge that such omission will probably result in damages or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission, would be willful misconduct. (Emphasis added.)

The above willful misconduct charge was deemed to meet the willful misconduct standard established by numerous aircrash cases. *In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 37 F.3d 804, 812-13 (2d Cir. 1994).

C. 1966. The Montreal Agreement

Pursuant to Article 22(1) of the Warsaw Convention which as previously indicated allowed for a special contracts regarding the damages limitation, the next significant effort at modification occurred in 1966 and is referred to as the Montreal Agreement. This version was in response to Americas threat of denunciation from the entirety of the treaty. In essence, the United States orchestrated a modification to the extant version of the Warsaw Convention by threatening to withdraw from the community of nations that adhered to it.

It is especially noteworthy to recall that this provision is not a treaty, but a special contract permitted under the terms of the treaty and that it applies only to flights departing from or stopping in the United States.

Montreal increases the limit of damages from the Warsaw level ($8,300) or the Hague level ($16,540) to $75,000. Additionally, the carriers were required to waive the so-called all necessary measures defense provided by Article 20(1) of the Warsaw Convention.

This version has been the most significant iteration of the treaty for the last thirty years.

D. 1971. Guatemala Protocol

In 1971, a second special contract referred to as the Guatemala City Protocol of 1971 introduced two new ideas; first, a damages limitation measured by SDRsSDRs are a composite or market basket of currencies. rather than French francs or any particular currency. The new proposed limit was increased to 100,000 SDRs (Special Drawing Rights) or approximately $140,000 for injury or death. Second, the Guatemala City Protocol also saw the introduction of a supplemental compensation plan, meaning essentially

life insurance on the passenger. See Article 8, Guatemala City Protocol.

However, Article 25 of the Convention which provides an exception to the damages limitation in the case of the willful misconduct by the carrier was excised by Guatemala. Under this version, there was no longer any way to bypass the damages limitation provided a ticket was delivered. This was its primary downfall, particularly in the United States.

Additionally, attorneys fees and other costs could be recovered depending upon the local national law applicable to the claim.

Significantly, recognizing the resistance to the Warsaw system in the United States, it was about this time the that reformers also began to tinker with the venue limitations of Article 28. As a result a formal proposal was made that the passengers place of domicile (where he or she had a permanent residence) be added as a fifth potential forum.

While the Guatemala City Protocol was signed by 21 countries, the United States was not a signatory, largely due to the elimination of the willful conduct exception.

E. 1975. Montreal Protocols

A more formal diplomatic instrument referred as to the Montreal Protocols (particularly Montreal Protocol No. 3) further refined the concept of a damages limitation expressed in terms of SDRs in 1975. And, a limit of liability set at $100,000 SDRs and the idea of a supplemental compensation plan (insurance) beyond the damages limitation were again offered. However, these ideas did not gain widespread acceptance, allowing the discontent with the Conventions rules to ruminate. The United States turned down adoption of the proposed Montreal Protocol.

F. 1992 to Today

Starting with the Japanese initiative of 1992, presumably motivated largely by the unsatisfactory and expensive litigation arising out of the crash of Japan Airlines Flight on August 12, 1985 involving the failure of aft bulkhead on a Boeing 747, the airlines of Japan once again invoked Article 22(1) of the Convention and unilaterally proposed a new special contract to eliminate entirely any damages limitation and to restrict the application of the so-called all necessary measures defense. (Article 20(1)). Of note, however, even the much heralded Japanese initiative retained the Article 28 venue limitations and no other nation or major carrier endorsed this kind of initiative.

But the Japanese initiative did lead to the 1996 IATA Intercarrier Agreements, which themselves ultimately lead to a proposed ICAO revision of the Warsaw Convention. The former: (a) purports to waive or eliminate the limit on damages; (b) preserves the Article 20(1) all necessary measures defense (which is inconsistent with the provisions of the Montreal Agreement governing flight into and out of the United States); and (c) retains the Article 28 venue limitations (which can have the effect of depriving U.S. citizens of the right to a forum in the United States, a major limitation). The details of these various documents will be described by others at this Seminar.

In 1997, however, ICAO began discussions on a new proposed Convention that provides for (a) no-fault (presumptive) liability up to $100,000 SDRs for any passenger injured in an event on an international trip; (b) liability for full compensatory damages (over 100,000 SDRs) upon proof of negligence by the carrier; and (c) an additional venue/forum choice including the passengers residence (the Fifth Jurisdiction), if the carrier has a place of business in that jurisdiction. The concept of the carriers domicile is also expanded to include wherever the carrier is a resident, presumably meaning any jurisdiction in which the airline has an office at which it conducts

business. These proposed changes to the Warsaw Convention remedy many of the shortcomings of the last sixty years.

Ⅲ. The Warsaw Convention Is A Failure.

The official English translation of the formal name of the Warsaw Convention as published in U.S. law books is The Convention for the Unification of Certain Rules Relating to International Transport by Air, 49 Stat. part II, p. 3000, 2 Bevans 983, 137 L.N.T.S. (emphasis added). Numerous American cases acknowledge that unification is one of the main purposes of the treaty.

As the complex structure described above evidences, however, uniformity as a goal is as far removed from the real world status of the Warsaw Convention structure as could be imagined. Not only does the passengers rights vary depending upon the countries which happen to constitute the particular international itinerary at issue (the affected signatory countries define which version of the Convention governs on the basis of which two versions the affected countries have executed), but the Article 28 venue choices also imply a difference in treatment depending upon which forum is selected. Indeed, in the United States, an example of this is the most recent U.S. Supreme Court case addressing the rights of passengers injured while engaged in international transportation. See Zicherman v. Korean Air Lines, 516 U.S. 116 S.Ct. 629, 133 L.Ed.2d 596 (1996).

Suffice it to say that to the extent the purpose of the Warsaw Convention involves the unification of the rules relating to an air carriers liability, the flaws and failures of the Warsaw structure and the incomplete follow-up attempts to cure these problems described in Section II above clearly demonstrates that unity is far from ascertained by this complex and confusing scheme.

Moreover, as indicated above, the Convention invokes local law to define damages in each case. It provides no entitlement of its own, nor does it define a measure of recovery of its own. Because there is always a significant variation among the contracting states with regard to which elements of loss are compensable, this has the effect of diversifying the rights of passengers killed or injured in airplane crashes, not unifying. See, e.g., Personal Injury Awards in E.U. and EFTA Countries, Macintosh & Holmes, Lloyds of London Press Limited (1994) (for a clear discussion of how the different national laws and standards of Europe produce differences in the recoveries and remedies of injured parties). This reality clearly establishes that unification cannot be achieved by a pass through concept such as Warsaw. For example, the Lloyds study mentioned above illustrates the various recoveries of a passenger who is a physician, age 40, married with two dependent children; depending on the country, compensation varies between approximately _66,000 British pounds (Sweden) to _586,000 British pounds (Switzerland). Clearly, if unification of the remedies available to the passengers is a good idea, the Warsaw system as it stands fails to achieve that end.

Moreover, as pertains to the United States, not only does every state have its own version of substantive damages law, but every state has its own version of choice of law -- the methodology of selecting conflicts of law. In this sense uniformity is not and likely will never be achieved under the Warsaw system.

Finally, and not in spite of the fact that damages vary so widely, the Convention does little if anything to expedite recoveries. One needs only cite to the experience of which this audience is well aware related to the litigation arising out of KAL 007 which goes back to a crash in 1983. Although the bulk of the claims arising out of this disaster are now concluded, the fact is that in 1998, litigation related to some of these claims is still ongoing. *Dooley v. Korean Air Lines Co. Ltd.*, 118 S.Ct. 679 (1998).

The crash of KAL Flight 007 took place on September 1, 1983 when the flight strayed into Russian air space and was shot down by a Russian interceptor.

Claims for damages were filed in several U.S. jurisdictions, including Massachusetts, New York, Michigan, California, and the District of Columbia. Within months of the accident, the cases were consolidated for coordinated proceedings before the Honorable Aubrey Robinson, a District Judge for the United States Court for the District of Columbia.

The initial issue which had to be decided in this case dealt with the requirement of the Montreal Agreement mentioned previously which specified that the notice provided to passengers explaining the Warsaw limitations on the right of recovery must be in not less than 10 point print size. The actual tickets used by KAL were less than 10 point print size. The disadvantages associated with the Warsaw Convention even as modified by Montreal caused this irregularity to be used as a way to avoid the treaty. The District Court rejected the argument. On appeal, the United States Circuit Court for the District of Columbia affirmed, leading to review by the United States Supreme Court of this issue in 1989. In this landmark case, Chan v. KAL, 490 U.S. 122, 109 S.Ct. 1676, 104 L.Ed.2d 113 (1989), the Supreme Court held that while a delivery of a ticket was a condition for the application of the treaty, the requirement in the Montreal Agreement providing for 10 point size print was not a condition for the treatys applicability. Thus, this initial attempt to avoid the treatys limitations failed.

The cases were then set for trial by Judge Robinson on the issue of willful misconduct. The case was tried to a jury in July of 1989, resulting in a finding by the jury of willful misconduct on the part of the carrier (thereby qualifying for the exception to the damages limitation in Article 25). The jury also found that the airline was guilty of egregious conduct

and awarded punitive damages in the amount of $50 Million.

This verdict was immediately appealed. In 1991, the jurys finding of willful misconduct was affirmed, but the award of punitive damages was reversed as a matter of law on the basis that the Warsaw Convention disallows an award of punitive damages even if recoverable under local law. The United States Supreme Court denied certiorari on this decision of the Court of Appeals, which is akin to an affirmance. Nonetheless, this decision to decline the opportunity to review the legal correctness of the Circuit Courts interpretation of the treaty essentially finalized the liability posture in the case.

Individual cases were then remanded to the various jurisdictions from which they had been transferred and consolidated to Judge Robinson. Presumably each case should have concluded following a damages trial in accordance with the scheduling of the various courts that had control of the several claims. However, the cockpit voice recorder and flight data recorder from the KAL 007 aircraft was recovered when the cold war tensions that had theretofore existed between the superpowers were relaxed. When KAL received the contents of the black boxes, it made a motion for a new trial to vacate the previous finding of willful misconduct on the basis of newly discovered evidence. This motion required that the cases once again be transferred and consolidated before Judge Robinson in the District of Columbia for decision. Judge Robinson denied the motion for a new trial. This decision was then appealed to the Circuit Court for the District of Columbia and affirmed.

The individual damages cases were once again returned to the various district courts in which they had originally been filed for conclusion. One of the cases which remained included the claim of the personal representative and sister of a passenger who brought suit in the Southern District of New York. This damages case went forward on the basis of

what is referred to as federal common law, one of the various possibilities of substantive law that could be applied as though it was a national local law under the treatys uniform structure. The verdict was appealed to the Second Circuit and reversed in part; however, the Supreme Court granted certiorari in 1995 and reviewed the question of the governing damages law.

As a result, in 1996, the U.S. Supreme Court significantly changed the prevailing view as to what damages law governed Warsaw claims. In essence, the Supreme Court accepted the approach that Warsaw is a pass through treaty which requires the various forums in which cases are filed to perform an independent choice of law analysis selecting the substantive principles that govern the claim under that forums choice of law rules.

With this landmark principle clarified, it could have been predicted that the remaining damages claims would have been resolved shortly following 1996.

Unfortunately, however, the Supreme Court in Zicherman ruled that the applicable governing substantive damages law was maritime law, for which there is a combination of sources, most importantly the Death on the High Seas Act (DOSHA), a United States statute written seventy-five years ago in essence providing for a wrongful death remedy for deaths on the High Seas, 46 U.S.C.S. Appx 761 et seq., and also common law judge-made rules in certain circumstances. Because of uncertainty as to the contours of this law, however, and specifically due to an inconsistency among the Circuits as to the availability of a recovery for pre-death pain under what is referred to as general maritime law, this case remains ongoing and is presently before the United States Supreme Court on this issue. Dooley v. Korean Air Lines Co., Ltd., 118 S.Ct. 679 (1998).

One point is indisputable. A fifteen-year history of litigation under any circumstances cannot be considered to be expeditious. This history

evidences how the treaty fails to meet this promise.

Finally, from an American perspective there is little doubt that the Article 28 venue limitations are flawed. The best example of this view is the case of Jackie Pflug, who was involved in a hijacking of an EgyptAir Boeing 737 which departed from Athens, Greece on November 23, 1985, headed for Cairo, Egypt, but ended up on the Island of Malta in a hostage negotiation standoff. *Pflug v. EgyptAir Corp.*, 961 F.2d (2d Cir. 1992).

Jackie Pflug and her husband were both U.S. citizens employed in Egypt as teachers of American dependents stationed abroad. The local American school soccer team enjoyed some degree of success in local competition, resulting in an invitation to a soccer tournament in Greece. Both Jackie Pflug and her husband traveled from Cairo to Greece to attend the competition. On the return trip from Greece to Cairo, Jackie Pflug was a passenger on board EgyptAir Flight 648 which was hijacked by terrorists.

Because such events were anticipated by EgyptAir, a group of sky marshals had been put in place and happened to have been on board this particular flight. After the hijacking was announced, the sky marshals and hijackers engaged in a small arms gun fight in-flight, leading to several deaths among the occupants of the aircraft, and damage to the aircraft which prevented it from being operated at normal cruise altitude. As a result of damage to the aircraft, the flight was diverted to the Island of Malta so that the aircraft could be refueled pursuant to the hijackers instructions.

Consistent with the prevalent anti-terrorist tactics of the day, the government of Malta declined to negotiate with the terrorists or provide fuel for the aircraft. In response, the terrorists who had control of the aircraft, segregated the American and Israeli passengers from all others,

and threatened to execute all five American and Israeli passengers one at a time unless fuel was provided. This threat failed to produce fuel, and the terrorists made good on their threats. One of the American passengers subjected to this treatment was Jackie Pflug. And indeed, she was shot in the head at point blank range and left for dead on the tarmac in Malta. The hijacking itself resulted in utter chaos and numerous deaths when Egyptian Anti-Terrorist Commandos later stormed the aircraft on the ground.

Miraculously, because of some kind of failure of the small arms weapons, however, Jackie Pflug survived the assault. After a harrowing ordeal, she received medical attention and ultimately made a remarkable recovery. She brought suit against EgyptAir in the United States. A routine investigation of EgyptAir indicated that the New York ticket office had incorporated in the State of New York several years before the accident. It was argued that the Article 28 requirements were satisfied against EgyptAir inasmuch as the airline, albeit an Egyptian airline, invoked the benefits and protection of the laws of the United States by incorporating in the State of New York and was therefore domiciled in New York, even if it was also domiciled in Cairo and perhaps other places in the world.

Despite this unusual substantive connection with the United States, the case was dismissed by the trial court for failure to meet the requirements of Article 28, and the dismissal was affirmed on appeal. *Pflug v. EgyptAir Corp., id.*

From an American perspective, the outcome in this case is indefensible. EgyptAir then maintained and still provides a ticket office on Fifth Avenue in New York City, competing for and promoting itself as a modern provider of transportation services for Americans abroad who need to fly on its route structure in the Mediterranean. There is simply no

justification for insulating a business such as EgyptAir from American jurisprudence given the fact that it has elected to conduct business to the extent it has in this country. Moreover, the fact that it chose to incorporate -- an entirely voluntary act which gave it an American corporate nationality -- is an equally strong basis for causing the airline to be subject to the courts of the domicile of the passenger. Indeed, it is probably true that EgyptAir, the New York corporation, is the only business in corporate form within the United States which cannot be sued in the United States for its malfeasance in connection with transportation services provided to United States citizens.

In summary, the limitations on venue (jurisdiction) and the particular venues authorized under Article 28 of the Convention constitute a flagrant shortcoming to the treaty from the American perspective and cannot be accepted in the future.

Ⅳ. Conclusion

The Warsaw Convention at its present stage of evolution imposes an unfair, anachronistic, indefensible, and counterproductive legal framework on American citizens. It constitutes an abdication by their government of its sovereign role to establish appropriate remedies for wrongful conduct inflicted on American citizens, in favor of a misleadingly named regime which works only to the satisfaction of diplomats. As has been expressed by the other contributors, it is now time to end the shortcomings of this legal structure and replace it with a workable and fair scheme as embodied in the recent ICAO proposals.The author wishes to express appreciation to colleagues Brian J. Alexander and Justin T. Green for their scholarly assistance in finalizing this submission.