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APPLICATION OF THE AIR TRANSPORT ASSOCIATION OF AMERICA, Inc. FOR APPROVAL OF AGREEMENT, ANTITRUST IMMUNITY AND FOR OTHER RELIEF

Submitted September 29, 2005

COMMENTS

by

THE AIR CRASH VICTIMS FAMILIES GROUP

1. PREAMBLE

The “Air Crash Victims Families Group” is an umbrella organization of families of the KAL007, TWA800, Swissair 111, Egyptair 990, AF4590 (Concorde), Birgenair 301 associations and individuals of PAA103 (Lockerbie), US Air 427, Alaska Air 261, as well as survivors of US Air 405 and others.

Since 1989 individual bereaved family associations and subsequently the “Air Crash Victims Families Group”, as their umbrella organization, have actively participated in the negotiations that resulted in the in the adoption of the 1999 “Montreal Convention”, in the ratification process of that Convention, and in its implementation.

2. HISTORY

- 2.1 .The Montreal Convention was adopted at a Diplomatic Conference of “the International Civil Aviation Organization” (ICAO) on May 28, 1999 and entered into force on November 4, 2003, sixty days after the United States had deposited its instruments of ratification with International Civil Aviation Organization (ICAO)– as the thirtieth country.
- 2.2. Sixty six countries have so far ratified the Montreal Convention among them – apart from the United States – Canada, all of the 25 European Union (EU) countries, most of the Mid East countries, China – and others.
- 2.3. Once all of the ICAO member countries have ratified the “Montreal Convention” it will replace the predecessor Treaties

Protocols and Agreements, namely the 1929 “Warsaw Convention”, the 1955 “Hague Protocol”, The “Montreal Protocol No 4” of 1975 as well as interim contractual agreements, like the “Montreal Inter-carrier Agreement, 1966 (CAB18900), the 1995 “IATA” Inter-carrier Agreement on Passenger Liability” (IIA), its two implementing documents: “Agreement of Measures to Implement the IATA Inter-carrier Agreement” (MIA) and Air Transport Association of America (ATA) “Provisions Implementing the IATA Inter-carrier Agreement” (IPA).

- 2.4. Like the original 1929 “Warsaw Convention”, the 1999 “Montreal Convention” is an umbrella Treaty which does not only have to be ratified but has also to be implemented by each ICAO member State.
- 2.5. The European Union (EU) has implemented the Montreal Convention by Regulation (EC) 889/2002, in force since May 28, 2004, (amending (EC) 2027/1997) already in place when it deposited its instruments of ratification and by a supplemental Regulation (EC) 261/2004, in force since February 17, 2005.
- 2.6. While the United States’ deposited its instrument of Ratification as the thirtieth country and put Montreal into force as of November 4, 2003, the Treaty has not been implemented as yet.
- 2.7. Like the 1966 US Inter-carrier Agreement and the 1995 “IATA” Inter-carrier Agreement, the “Air Transport Association of America”(ATA) is now stepping in again. It is filling the gap by proposing a implementation procedure, limited to its qualified members, system wide – the “IPA of 2005” - as a bridge – to implement the Montreal Convention, until more comprehensive government rules have been put into force for all carriers, whether domestic or foreign, flying in, out or over the United States.
- 2.8. Complimenting ATA on their pro active efforts to provide in this application a consensus implementation proposal by their members, we submit the following comments:

3. COMMENTS

- 3.1. Inasmuch as the traditional air carriers operating international flights are inter related today in a maize of alliances and code sharing agreements with various companies’ flight numbers to the same plane, it is desirable that “Montreal” implementation be harmonized.

- 3.2. **The 2005 IPA proposal makes repeated reference to the harmonization with the EU Regulation 889/2002 – but does it in fact in a selective way.**
- 3.3. **It might be useful to harmonize fully the present implementation draft with the EU regulations 889/2002 and EU 261/2004 – referred to, since otherwise passengers would be treated under differing regimes on the same code share flight, depending with which partner they are ticketed. Aside from equality, lack of complete uniformity is neither efficient nor cost effective in our present economic climate. It would be costly to the carrier, confusing to the insurer and hurtful to the just bereaved families.**
- 3.4 **On page 12: the MIA lists the 5th jurisdiction as optional while On page 13: the IPA states in its original text that the carrier “may” select the 5th jurisdiction – (uniformity needed with the actual text)**
- 3.5. **On page 16: ADVANCE PAYMENTS paragraph I.B**
- (a) Article 28 of the Montreal Convention states that the carrier shall make Advance Payments Without Delay.....
 - (b) In EU 889/2002 “Annex” the air carrier must make Advance Within 15 days, after ID of the victim.
 - (c) The Advance Payment section of the proposed IPA 2005 does neither harmonize with EU889/2002 nor does it address fully the intent, the need and the spirit of “Advance payments” as expressed in Montreal article 28.
 - (d) Advance payments on future damages, as yet to be determined, are needed in the aftermath of a crash, tragedy or incident because historically the resolution of individual total damages determination takes a long time, for reasons stated below.
 - (e) With ever larger and technically advanced planes transporting an increasing number of passengers – reaching very soon up to 850 persons per flight – traveling at greater speed and higher altitudes, the number of fatalities has substantially increased – with few survivors, at best.
 - (f) In most of those crashes there are few bodies but a large number of body parts which can only be identified by DNA. (In Swissair 111 a total of 2 ½ million pieces of debris and body parts were recovered that had to be sorted out and identified)

- (g) Estates cannot be probated without a Death Certificate. A Death certificate cannot be issued by the Medical examiner without a identifiable body or one or more of their parts.
- (h) In some cases no body is recovered, in others none of the body parts can be attributed to a victim, or DNA is not sophisticated enough yet, to conduct successful matches (In Swissair 111 twenty seven casket of not identifiable body parts have been interred in special caskets, so have thousands of body parts of victims of the 9/11 WTC terrorist attacks, etc)
- (i) While there are various mechanisms to overcome the absence of death certificates the procedures are long, expensive and time consuming.
- (j) Yet, surviving families have to take care of their daily needs and obligations (mortgage payments, installment loans, credit card payments, education of their children, daily maintenance, etc). Unable to do so, they are burdened with penalties, fees, dunning letters and calls, tarnished credit, etc.
- (k) The resolution of damages today takes from eleven months in the AF4590 (Concorde crash) to five years and longer in the Singapore Airline SQ006 tragedy in Taipei, - still remaining in the courts of Singapore. Both tragedies occurred within three months from each other. They are covered by the Warsaw/Hague/IIA-MIA Treaty, Protocol and Intercarrier agreement (since then incorporated into the Montreal Convention).
- (l) The underlying problem affecting advance payments lies in the differing attitudes by the carrier and their insurers.
- (m) Victims families find out that early after a tragedy occurred: while the carrier might have a meaningful crisis management in place, being apologetic and even making a token initial advance payment, once the damages process starts to unfold, it is the carriers insurers that control the process. They hold the "power of the purse" and, as prudent businessmen they try to control, as well as limit their exposure, even if it means to delay or defeat the damages process.
- (n) In Swissair 111 a strong management decided to make initial immediate advance payments at the Halifax, NS crisis center, followed by remitting the full remainder of the SDR100,000 strict liability over the objection of their insurers. In Singapore Airlines SQ006 the carrier apologized, made a small advance payment,

paid for lost luggage at the Treaty upper limit and reimbursed burial expenses – and then the insurers invoked the article 20 innocence defense, litigated third party liability first before finally admitting liability in the court of one country but not in another – dragging out the process over five years. Those families would have direly needed the full SDR 100,000 prepayment, but did not get it.

- (o) While advance payments – as their name indicates – are made as part of total settlement, in EU Regulation 889/2002 they are not returnable (with exception) – because the payments are made within the parameter of the first step “strict liability”.

3.6. page 19 – IC (1)

Should harmonize with EU 889/2002 - amount SDR4,150.

3.7. page 20 – IC (3)

“re-characterization” should be eliminated. Not understandable.

3.8. page 24 – paragraph VI and page 27 A

The IPA 2005 applies only system wide to joining members but apparently not to code share and alliance partners. Some means should be found to make the IPA2005 uniform, mandatory for all members of the respective Alliance/code share partner.

3.9. page 29 – paragraph B – see also page 31

The need to bring legal action is often due to the insurer’s reluctance to make reasonable settlement offers or their policy to test the parameters of the Convention/previous agreements’ whose purpose is the fast resolution of the damages process.

4. RECOMMENDATIONS

4.1. Advances

- The Language should be short, straightforward and harmonized with EU 889/2002 and Montreal 28.
- The advance payment should be SDR 100,000 as explained above
- This provision's language should be simplified and the text should be shortened.

4.2. Harmonization with EU

- See above

4.3. Extention to code share – alliance

4.4. Other issues to be considered (EU 261/2004) harmonization

- Denied Boarding
- Cancellation of flights
- Care for passengers
- Right to compensation for above.

4.5. Escalation clause

- Maintenance of present day value as per Montreal article 24 and EU regulations.

4.6. Procedure

- Early review or the needed adjustments to, and approval of this application is needed.
- To facilitate the process, we are ready and able to meet with ATA and others to discuss further our Recommendations, those of others and find consensus on the final language of the 2005 IPA, at the earliest possible time.
- It is strongly recommended that DOT jumpstart for DOT the process for Government Montreal Implementation – to extend to all carriers flying from, to and over the United States, giving this matter its highest priority.
- We join ATA to offer our assistance in the process.

- The IPA 2005 with modifications could be used as the starting document towards a comprehensive rule that is urgently needed to restore an even playing field to include foreign carriers

We express our appreciation to everybody who has diligently labored to craft this Application and to those who from hereon are called upon to have to closely examine the document, and bring it to an early approval. From thereon hopefully, as early as possible to a Government Regulation, mandatory for all international and/or even domestic carriers flying from, to through and over the United States.

Respectfully submitted

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