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Preface

The book is dedicated to Mr. Hans Ephraimson-Abt, the father of air crash victims' protection and a unique person who helped me enormously in writing it.

Hans Ephraimson-Abt, who became an internationally known advocate for families of air-crash victims after the death of his daughter on Korean Air Lines Flight 007, shot down by Soviet fighter planes in 1983, died on October 18 2013 in Short Hills, N.J. He was 91.

Born in Berlin, Germany, in 1922, he was a refugee in Switzerland and immigrated to the USA in 1949. Hans never drove a car, he loved staying connected to neighbours, friends and family, had a keen mind and old-world European style. He is survived by his children Viviane (Paul) and Hans (Karen), and grandchildren Dylann, Alec and Sam. His daughter, Alice, died on Korean Airline's Flight 007 in 1983 and since then he was dedicated to helping families of air crash victims.

In the 30 years since, as a result of their work, significant advances on behalf of victims' families have been made.

In 1996, Congress passed the Aviation Disaster Family Assistance Act, which empowered the National Transportation Safety Board to notify the families and the Red Cross to help care for them. In 1997, a new international aviation agreement raised the amount for which an air carrier was liable when an international flight crashed. The previous limit, set in 1966, capped carriers' liability at \$75,000 per passenger, except in rare cases where families could prove the airline guilty of willful misconduct. The 1997 agreement, which Mr. Ephraimson-Abt helped broker, raised the cap to \$139,000. For families seeking greater damages, the new agreement also relieved them of the burden of proving willful misconduct.¹

¹ Hans Ephraimson-Abt, Air-Crash Victims' Crusader, Dies at 91: http://www.nytimes.com/2013/10/27/us/hans-ephraimson-abt-air-crash-victims-crusader-dies-at-91.html?pagewanted=2&_r=1

He recently attended the 38th International Civil Aviation Organization meeting as the chairman of the Air Crash Victims Family Group. The ICAO endorsed a policy on assistance to aircraft accident victims and their family and this was a major achievement in his 30 years “aviation work”.

He was the most spirited, proactive and extraordinary gentleman and will be missed by so many... He was a uniquely kind and enormously considerate person!

His loss, though not unexpected, leaves a lot of orphans. There is no one who could replace him. The ACVFA won international respect because of his exquisite education, his respect and his understanding for all people of different cultures, age and religion. He was a unique person with seemingly fragile appearance, but he demonstrated strength and determination even in his last days. His sense of humor in situations sometimes a bit tense or difficult indeed reflected an unusual intelligence to solve the problems elegantly.

In the fight for victim’s rights, his contribution cannot be outweighed. He proved to be a great asset and help, mentor and guide every step of the way. He showed how a gentle smile and a warm handshake could open up the hearts! His ability to turn a chance meeting into a lifelong friendship was the most unique aspect of his multifaceted personality. The greatest achievement he ever had was to gather people from different countries and cultures and make these relationships possible. There is an expression: “life is the art of meeting people”, and in this sense Mr. Ephraimson-Abt was a great artist!

Anna Konert

Introduction

...the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends.¹

The issues raised in the book refer to the development of aviation law in recent years, except the aspects of aviation safety. The aim of the book is to characterize current issues of the international, European and national aviation law regarding air crash victims' protection.

The achievements of the International Civil Aviation Organization (ICAO) were a great inspiration for the authors. ICAO has a sovereign body, the Assembly, and a governing body, the Council. The Assembly, comprised of all Member States of ICAO, meets not less than once every three years and is convened by the Council at a suitable time and place. An extraordinary meeting of the Assembly may be held at any time upon the call of the Council or at the request of not less than one-fifth of the total number of Member States. ICAO's 191 Member States and a large number of international organizations are invited to the Assembly, which will establish the worldwide policy of the Organization for the next three years. At these sessions, the complete work of the Organization in the technical, economic, legal and technical cooperation fields is reviewed in detail, and guidance is given to the other bodies of ICAO for their future work as prescribed in Article 49 of the Convention on International Civil Aviation. Each Contracting State is entitled to one vote, and decisions of the Assembly are taken by a majority of the votes cast except when otherwise provided for in the Convention.²

On 28 September – 8 October 2010, at the 37th triennial Session of its Assembly, the 190 Member States of ICAO focused on policies and regulations that will deliver on systematic and consistent improvements to the level

¹ Preamble to the Chicago Convention of 1944.

² <http://legacy.icao.int/Assembly37/>

of safety, security and environmental sustainability of the sector in the years to come. Ministers and high-level officials from a number of Member States and representatives from some 30 international organizations, representing all aspects of international civil aviation, participated in the 37th Session.

On 24 September – 4 October 2013, at its 38th triennial Assembly, ICAO was hosting national/provincial dignitaries and over 1,000 Ministers and other high-level officials.

Opening Ceremony Guests:

John Baird, Minister of Foreign Affairs, Canada

Pauline Marois, Québec Premier

Laurent Blanchard, Mayor of Montréal

Ban Ki-moon, UN Secretary General

Main Assembly Press Conference:

Roberto Kobeh González, ICAO Council President

Raymond Benjamin, ICAO Secretary General

Air Cargo Cooperation Press Conference:

Raymond Benjamin, ICAO Secretary General

Kunio Mikuriya, WCO Secretary General

Oliver Evans, Board Chairman, TIACA

Boubacar Djibo, Director, ICAO Air Transport Bureau

Siim Kallas, Vice-President of the European Commission made his opening remarks:

“President, distinguished delegates,

This assembly will set the stage for the future development of international aviation. What is decided here over the next two weeks can – and should – have paramount importance in creating the regulatory conditions that this vital global industry needs to secure its future growth.

On safety, ICAO’s work has progressed well and in line with the resolution of the 37th assembly. We are pleased that a new Annex 19 was incorporated into the Chicago Convention on Safety Management.

On air navigation and air traffic management, after the successful 12th Air Navigation Conference, we hope the assembly will be able to agree on the global air navigation plan and set out the right roadmap and priorities for the eventual modernization of the world’s ATM system.

On security, using last year's high-level aviation security conference as a starting point, we want to help ICAO progress towards a more secure security system that is also more efficient. We believe this can be achieved by increasing mutual recognition between states and regions, as well as risk-based rules.

On air transport, I would recall the conclusions of the 6th ICAO Air Transport Conference on key areas such as market access, liberalization of air carrier ownership and control, fair competition and consumer rights.

Europe supports these conclusions.

Finally, we all know that the public and aviation world want and expect us to reach an agreement on aviation and the environment, and aviation emissions in particular.

On this, I would like to state the following. This assembly is the best forum to deliver the global solution that aviation needs. I believe such a solution is now within reach.

For aviation to keep growing, it must be seen as a responsible global citizen. Our aim is to find global consensus, by promoting more advanced technologies, using sustainable alternative aviation fuels, better procedures in air navigation and – last but not least – providing for market-based measures. We need all these elements for a successful outcome.

Given the growth forecasts in aviation, market-based measures are integral to the global response to the challenge posed by aviation emissions. It is notable that the world's aviation industry calls for MBMs as part of that response, as confirmed by the work that they have carried out over the last few years. We welcome IATA's proposals on a global scheme as a very positive step forward.

Europe believes firmly that at this ICAO Assembly we should decide to develop, by 2016, a global market-based measure for international aviation that can start in 2020. Until that date, countries or groups of countries should – within certain parameters – be able to deploy national and regional MBMs. We also want to see a fair and equitable solution that can accommodate the special circumstances of some states.

In supporting such a “package”, Europe has moved a long way over recent months. International aviation will benefit enormously from a global approach if we are in a position to agree. It is a unique opportunity and a pivotal moment to forge a meaningful global solution.

President, distinguished delegates, we have a lot of hard work ahead of us. I sincerely wish that this conference succeeds [sic] in its ambitious goals.

Thank you.”³

³ Speech – Opening remarks to the 38th ICAO Assembly.

The main Issues of the 38th Assembly were as follows:

– Global Plans

The 38th Assembly endorsement of two complementary ICAO global plans, guiding aviation safety and air navigation developments over the coming 15 years, were critical to its success. Both plans are instrumental to safely and efficiently managing the projected doubling of air transport capacity globally through 2030 without significant negative impacts on global passenger and cargo movements.

– Shoring-up Cargo Supply Chain Security while Ensuring the Free-Flow of Trade

The 38th Assembly enjoyed the participation of the World Customs Organization and highlighted the increased priority being placed on determining cargo security solutions, which don't delay or otherwise obstruct world trade. The major industry trade group TIACA joined the press conference on this topic.

– Economic Policy Progress

The Assembly was asked to endorse the targets and work program relating to the results of the ICAO Air Transport Conference earlier this year, where agreement was forged on new approaches to liberalize market access while safeguarding fair competition, and to foster regulatory convergence in key areas of international air transport such as consumer rights, taxes and fees.

– Climate Change and an Aviation MBM

The developments relating to a Market-Based Measure (MBM) for international aviation emissions were top-of-mind at this event. ICAO was looking for acknowledgement that it has met the targets set for it by the 37th Assembly, as well as clear indication of its climate change roadmap through the next triennium.

– Election of new ICAO Council

The assembly delegates decided at A38 which countries would be privileged to serve on ICAO's prestigious governing Council through its new triennium, a body made up of 36 States' representatives.⁴

⁴ <http://www.icao.int>

The book refers to new progress and challenges in the air law with respect to air crash victims' families protection. The aim of the book is to analyze the current issues of the international, European and to some extent national aviation law, especially:

- Warsaw-Montreal system,
- Rome system,
- Montreal Convention 2009,
- European Regulation 261/2004,
- Annex 13 to the Chicago Convention,
- In 2001 ICAO issued the *Guidance on Assistance to Aircraft Accident Victims and their Families* (Cir 285),
- European Regulation 996/2010.

As IATA indicates, the Montreal Convention 1999 (MC99) established a modern, fair and effective regime to govern airline liability to passengers and shippers on international flights. It was envisaged as the single universal liability regime for international carriage by air, replacing the earlier Warsaw Convention system that had developed haphazardly since 1929. Universal ratification of MC99 would provide many benefits:

- Passengers would enjoy better protection irrespective of the route or ticket type;
- Airlines would enjoy certainty about the rules governing their liability across their international route networks;
- Shippers would be able to use electronic documents of carriage in air cargo, enabling the removal of paper.⁵

Today, more than a decade after MC99 came into force (2003), only 103 (54%) of ICAO Member States have ratified it. A number of major states such as Bangladesh, Indonesia, Russia, Sri Lanka, Thailand, the Philippines and Vietnam have yet to become parties to MC99. As a result, the patchwork of earlier liability regimes that MC99 was designed to replace continues to cause many issues.⁶

On behalf of the industry, IATA presented a Working Paper to the 38th Assembly, hoping to accomplish two key points:

- Increase the awareness of MC99 among ICAO Member States;
- Request the ICAO Assembly to strongly urge all Member States who have not done so to ratify MC99 as soon as possible.⁷

⁵ <http://www.iata.org/policy/icao-assembly/Pages/icao-montreal-convention.aspx>

⁶ Ibid.

⁷ Ibid.

There is a need for MC99 ratification as it is essential for worldwide unification of the rules for carriage by air in one document. *Chubb vs. Asiana Airlines* is a guiding case⁸. The issue was that the United States had ratified the Warsaw Convention 1929 but not the Hague Protocol 1955 and Korea had ratified Hague 1955 but not the Warsaw 1929. Therefore the claim was made and decided that no treaty relationship existed between the two countries within the Warsaw system. The solution was therefore that the US bundled Hague 1955 (after 48 years) into the ratification process of MC99 – in 2003⁹.

The MC99 is seen as fair and reasonable balance between the states and the vast improvement of the carrier's liability regime. Accepting the interests of all parties is a breakthrough in the international civil aviation. The success of the Convention can speak in the sense that, first, it fulfilled the task of modernizing the outdated system of Warsaw, founded seventy years before and, despite numerous changes, not corresponding to the modern socioeconomic and legal requirements. Second, it prevented the disintegration of this system, which has become a patchwork of different legal systems. This is because it combines the most relevant provisions resulting from the acts supplementary to the Warsaw Convention. Changes in the liability of the carrier made by MC99 is an expression of the universal trend to better protect the interests of passengers injured in plane crashes, especially in relation to personal injury.

Following the success of the 1999 Montreal Convention, the international aviation community decided to modernize the Rome system as well (Convention for the Unification of Certain Rules to Damage Caused to Third Parties on the Surface, generally referred to as the Rome Convention of 1933, the Brussels Protocol of 1938, the Rome Convention of 1952 (Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface) and the Montreal Protocol of 1978).

Sweden then presented a resolution to revisit the Rome Convention of 1932 – updated in 1952 – covering damages caused by foreign airplanes on the ground. The Rome Convention of 1952 attracted only 49 ratifying countries (after 3 States, including Canada, had denounced it). The events of 9/11 resulted in considerable changes not only in aviation security issues, as the 33rd ICAO General Assembly passed several resolutions strongly condemning the use of aircraft as weapons of mass destruction, but also in aviation insurance

⁸ <http://openjurist.org/214/f3d/301/chubb-son-inc-v-asiana-airlines>

⁹ See *US Senate Ratification Hearing Report* <http://gpo.gov/fdsys/pkg/CRPT-108er18/html/crpt-108er/htm>

issues.¹⁰ It was clear that the two issues: general risk and unlawful interference should be treated separately. Therefore, during the 33rd Session of the International Civil Aviation Organization Legal Committee held in Montreal from 21 April 2008 to 2 May 2008, two draft Conventions were produced (Draft Convention on Compensation for Damage to Third Parties, resulting from Acts of Unlawful Interference Involving Aircraft, hereinafter *Unlawful Convention Draft*; and Draft Convention on Compensation for Damage Caused by Aircraft to Third Parties, hereinafter *General Risk Convention Draft*).

While Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied boarding compensation system in scheduled air transport created basic protection for passengers, the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays. Therefore, the Community had to raise the standards of protection set by that Regulation both to strengthen the rights of passengers and to ensure that air carriers operate under harmonized conditions in a liberalized market. Accordingly, Regulation (EEC) No 295/91 was repealed. Regulation (EC) 261/2004¹¹ introduced important new rights for air passengers in the event of denied boarding, long delay, cancellations and downgrading. The Regulation took effect on 18 February 2005 and sets a minimum level of quality standards in order to protect passengers. There are several others to which the same principle of equal treatment could be applied to justify revising the text. These issues can only be properly addressed by revising the text of the Regulation so that the rights and obligations it creates are explicit and consistent with the principle of equal treatment. The Regulation should be revised to address the other areas of the text that are unclear.¹²

As IATA indicates, airlines are committed to looking after their passengers and the overlapping passenger rights regimes around the world create difficulties for the industry and confusion for passengers. The patchwork of regimes defeats the purpose of providing passengers with clear, transparent rights that they can count on. Clear information to passengers on their rights should be the governments' and the industry's first priority.¹³

¹⁰ J.W. Lee, The regime of compensable damage in the modernized Rome conventions: A comparison between article 3 of the general risks convention of 2009 and article 17 of the Montreal convention of 1999, p. 3.

¹¹ Official Journal of the European Union, L46, pp. 1–7 (17-2-2004).

¹² EVALUATION OF REGULATION 261/2004, Final report, February 2010 (http://ec.europa.eu/transport/passengers/studies/doc/2010_02_evaluation_of_regulation_2612004.pdf).

¹³ <http://www.iata.org/policy/icao-assembly/Pages/icao-passenger-rights.aspx>

In response to this, the industry unanimously adopted a set of principles at the IATA 2013 Annual General Meeting. The principles call on governments to develop consumer protection regulations that:

- Are clear, unambiguous, aligned with international conventions, without extra-territorial implications and comparable with regimes in place for other modes of transport;
- Allow airlines the ability to differentiate themselves through their customer service offerings above a basic common standard;
- Ensure passenger access to information concerning their rights, fares, including taxes and charges, the actual operator of the flight, and regular situational updates in the case of service disruptions;
- Do not compromise the industry's top priority of safety, and exonerate airlines from liability for safety-related delays and cancellations;
- In the case of denied boarding and cancellations, entitle passengers to re-routing, refunds or compensation where circumstances are within the airlines' control;
- In the case of delays, entitle passengers to re-routing, refunds or care and assistance; and acknowledge that when such delays or disruptions are beyond the control of airlines, market forces should determine the care and assistance available to passengers.¹⁴

These principles offer a way for air transport stakeholders to seek greater convergence in the passenger rights.

On behalf of the industry, at the 38th Session of Assembly IATA presented the Working Paper and the following goals:

- Request that ICAO, through the appropriate bodies, utilize the principles in Attachment 1 as the basis for the development of ICAO's high-level non-prescriptive core principles on consumer protection;
- Invite member States to consider incorporating these principles into existing and future passenger rights regimes.¹⁵

A high general level of safety should be ensured in aviation and all efforts should be made to reduce the number of accidents and incidents to ensure public confidence in air transport. The sole objective of safety investigations should be the prevention of future accidents and incidents without apportioning blame or liability. The problem is that there are no unified and harmoni-

¹⁴ Ibid.

¹⁵ Ibid.

zed rules in this regard. Account should be taken of the Chicago Convention of 1944, which provides for the implementation of the measures necessary to ensure the safe operation of aircraft. Particular account should be taken of Annex 13 to the Chicago Convention and of its subsequent amendments, which lay down international standards and recommended practices for aircraft accident and incident investigation. During its 32nd Session in October 1998, the International Civil Aviation Organization Assembly considered the subject of assistance to aircraft accident victims and their families. Following the discussion, the Assembly adopted Resolution A32-7. Resolution No. 2 of the International Conference on Air Law, which was held in Montreal from 10 to 28 May 1999, recognized the tragic consequences that flow from aircraft accidents. The conference was mindful of the plight of aircraft accident victims and their families and took into account their immediate needs. In so doing, the conference urged air carriers to make advance payments, without delay, based on the immediate economic needs of aircraft accident victims and their families. The conference also encouraged States that are parties to the Convention for the Unification of Certain Rules for International Carriage by Air, adopted on 28 May 1999, in Montreal, to take appropriate measures under national law to promote such action by carriers. In 2001 ICAO issued the *Guidance on Assistance to Aircraft Accident Victims and their Families* (Cir 285), which will be replaced in the nearest future by a new manual, updating and expanding relevant guidance by incorporating latest lessons and developments in the area of family assistance. At the EU level, we are witnessing the ongoing work on the implementation of a new European regulation 996/2010 on investigation into accidents and incidents in civil aviation and their prevention. So the problem is widely discussed and requires detailed analysis.

The analysis of these regulations shall respond to the following questions: What is the tendency with regard to the compensation of damages caused by air accidents: should this question be regulated by international, European or national law? What is the role of ICAO in this regard? Are there also any regional organizations that are of importance? What should be done to provide the appropriate protection for victims of air accidents?

The book also illustrates the emergence of new problems of international, European and national law and the evolution of certain concepts in the field of aviation law, such as force majeure.