promote and teach literacy. Her services, and the services of volunteers like Cindy throughout Idaho and the nation, are the instruments through which the battle of illiteracy can and will be won.●

EXECUTIVE SESSION

EXECUTIVE CALENDAR

Mr. ROBERTS. I ask unanimous consent that the Senate immediately proceed to executive session to consider the following nominations on the Executive Calendar: Calendar Nos. 726, 728, 730, 731, 732, 788, 789, 790, 796, and No. 853. I further ask unanimous consent that the nominations be confirmed, the motions to reconsider be laid upon the table, any statements relating to the nominations appear at this point in the RECORD, and the President be immediately notified of the Senate's action.

The PRESIDING OFFICER. Without objection, it is so ordered.

The nominations considered and confirmed en bloc are as follows:

DEPARTMENT OF STATE

Steven Robert Mann, of Pennsylvania, a Career Member of the Senior Foreign Service, Class of Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Turkmenistan.

Elizabeth Davenport McKune, of Virginia, a Career Member of the Senior Foreign Service, Class of Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the State of Qatar.

Melissa Foelsch Wells, of Connecticut, a Career Member of the Senior Foreign Service, Class of Career Minister, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Republic of Estonia.

Richard E. Hecklinger, of Virginia, a Career Member of the Senior Foreign Service, Class of Minister-Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the Kingdom of Thailand.

Theodore H. Kattouf, of Maryland, a Career Member of the Senior Foreign Service, Class of Minister-Counselor, to be Ambassador Extraordinary and Plenipotentiary of the United States of America to the United Arab Emirates.

THE JUDICIARY

Carl J. Barbier, of Louisiana, to be United States District Judge for the Eastern District of Louisiana.

Gerald Bruce Lee, of Virginia, to be United States District Judge for the Eastern District of Virginia.

Patricia A. Seitz, of Florida, to be United States District Judge for the Southern District of Florida.

William B. Traxler, Jr., of South Carolina, to be United States Circuit Judge for the Fourth Circuit.

FEDERAL EMERGENCY MANAGEMENT AGENCY

Robert M. Walker, of Tennessee, to be Deputy Director of the Federal Emergency Management Agency.

MONTREAL PROTOCOL NO. 4—TREATY DOCUMENT NO. 95–2(B)

Mr. ROBERTS. Mr. President, I ask unanimous consent that the Senate proceed to consider the following treaty on today's Executive Calendar, No. 22. I further ask unanimous consent that the treaty be considered as having passed through its various parliamentary stages up to and including the presentation of the resolution of ratification; all committee provisos, reservations, understandings, declarations, be considered agreed to; that any statements be inserted in the CONGRESSIONAL RECORD as if read; and I further ask consent that when the resolution of ratification is voted upon, the motion to reconsider be laid upon the table, the President be notified of the Senate's action, and, following the disposition of the treaty, the Senate return to legislative session.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. ROBERTS. I ask for a division vote on the resolution of the ratification.

The PRESIDING OFFICER. A division is requested. Senators in favor of the ratification will rise and stand until counted.

All those opposed to ratification, please rise and stand until counted.

On a divisions, two-thirds of the Senators present and having voted in the affirmative, the resolution of ratification is agreed to.

The resolution of ratification is as follows:

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocol done at The Hague on September 8, 1955 (hereinafter Montreal Protocol No. 4) (Executive B, 95th Congress, 1st Session), subject to the declaration of subsection (a), and the provisos of subsection (b).

(a) DECLARATION.—The Senate's advice and consent is subject to the following declaration:

(1) TREATY INTERPRETATION.—The Senate affirms the applicability to all treaties of the constitutionally based principles of treaty interpretation set forth in Condition (1) of the resolution of ratification of the INF Treaty, approved by the Senate on May 27, 1988, and Condition (8) of the resolution of ratification of the Document Agreed Among the States Parties of the Treaty on Conventional Armed Forces in Europe, approved by the Senate on May 14, 1997.

(b) PROVISOS.—The resolution of ratification is subject to the following provisos:

(1) SUPREMACY OF THE CONSTITUTION.—Nothing in the Treaty requires or authorizes legislation or other action by the United States of America that is prohibited by the Constitution of the United States as interpreted by the United States.

(2) RETURN OF PROTOCOL NO. 3 TO THE PRESIDENT.—Upon submission of this resolution of ratification to the President of the United States, the Secretary of the Senate is directed to return to the President of the United States the Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw on October 12, 1929, as amended by the Protocols done at The Hague, on September 28, 1955, and at Guatemala City, March 8, 1971 (Executive B, 95th Congress).

Mr. BIDEN. Mr. President, I am pleased to support Montreal Protocol No. 4, which will simplify the rules for cargo and baggage liability in international air traffic. It is important for the Senate to act now, because Protocol No. 4 has already entered into force. Consequently, U.S. carriers and cargo companies are unable to take advantage of these simplified rules, at a significant economic cost. U.S. industry estimates that Protocol No. 4 will save them $1 billion annually.

The treaty has been pending in the Senate for over 20 years. It failed to gain support not because it is controversial, but because it has been the victim of misfortune—having been paired, in its submission to the Senate, with Montreal Protocol No. 3, a treaty placing unreasonably low limits on personal liability in international air traffic. I oppose Protocol No. 3, because I believe strongly that limits on personal liability contained in the treaty are an anachronism. Such limits may have been warranted when the underlying Warsaw Convention was drafted in 1929, a time when the airline industry was in its infancy. Now, however, when international air carriers are large corporations with significant financial resources—and thus fully capable of purchasing adequate insurance—there is no justification for such limits.

For the past two decades, the aviation industry and the Executive Branch unsuccessfully sought ratification of Protocol No. 3 and No. 4. Only once did the Protocols reach the full Senate floor. In 1983, the Senate voted 50–42 to approve them, far short of the two-thirds necessary for advice and consent to ratification.

Recognizing that Protocol No. 3 cannot be approved by the Senate, the industry and the Executive have effectively abandoned the effort, and have requested the Senate to proceed with consideration of Protocol No. 4. The resolution of ratification of Protocol No. 4 will bring a formal end to the misguided effort to approve No. 3: the resolution directs the Secretary of the Senate to return Protocol No. 3 to the President.

More importantly, the industry, acting through its association, the International Air Transport Association, has taken steps to waive these personal liability limits. Consequently, most of the leading air carriers have agreed in their contracts with passengers to waive all personal liability limits, and agreed to strict liability up to 100,000 Special Drawing Rights, or about $130,000.

These are positive developments, and I commend the airlines for taking these steps. Although not all carriers have waived the liability limits, all of the major U.S. carriers have, as have many of the leading foreign carriers which fly to the United States. I urge the Department of Transportation to make every effort to ensure that all carriers involved in international air traffic which fly within or to or from

the United States do so as soon as possible.

I hope that these measures, which are based on contract, not on any domestic law or international treaty, will eventually be codified in a new international instrument—an instrument that would firmly establish international norms and provide certainty for carriers and passengers alike. Negotiations toward that end are ongoing under the auspices of the International Civil Aviation Organization (ICAO).

One sticking point in these negotiations has been the question of a ''fifth jurisdiction.'' Under the current Warsaw Convention, a suit may be brought in any one of four places: the place of incorporation of the carrier, the carrier's principal place of business, the place where the ticket was sold, and the place of the ultimate destination of the passenger. Notably missing from this list is the place where the passenger lives, or, in legal terms, his ''domicile.'' As a practical matter, most Americans will be able to sue in U.S. court under the existing four jurisdictions; but there will be cases in which a passenger buys a ticket overseas on a foreign carrier—which would probably preclude that passenger from bringing a suit in a U.S. court.

The Clinton Administration is pressing for inclusion of the fifth jurisdiction in any new international instrument. I commend the Administration for taking this position. Including a fifth jurisdiction should be considered an essential element of any new international agreement on passenger liability.

At this point, I would like to call the attention of my colleagues and the Executive Branch to a speech delivered earlier this year by Lee Kreindler regarding these negotiations. Mr. Kreindler, an aviation attorney with over four decades of experience, has provided a helpful guide to the current legal situation in this area and to the ICAO negotiations.

I ask unanimous consent that they be printed in the RECORD at the conclusion of my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See Exhibit 1.)

Mr. BIDEN. Mr. President, Montreal Protocol No. 4 is a useful step in modernizing the rules of cargo and baggage in international air traffic. I urge my colleagues to support it.

EXHIBIT 1

CLOUDS ON THE LIABILITY HORIZON AND WHAT WE CAN DO ABOUT THEM

(By Lee S. Kreindler)

I am honored to appear on this symposium, the second straight year in which I have been on your program. After all, as a plaintiff's laywer, I have spent much of the last forty five years bringing legal actions against IATA's members, the international airlines. More important than that, perhaps, I have spent most of that time being highly critical of IATA's role in promoting the Warsaw Convention and its progeny, and in defending and preserving a limit of liability that to me, and all of my clients, has been abhorrent.

Now I find myself applauding your monumental efforts, and, particularly the monumental efforts of your distinguished general counsel, Lorne Clark, to put an end to limits of liability in personal injury and death cases. I find that, after all these years, we are in synchronization, pulling together to create a system that will protect the interests of your member carriers' customers, the flying public, and their families, and at the same time preserve the interests of your airline members. To me this is an uplifting and energizing experience.

I want IATA's efforts to establish a fair and enforceable system of liability in international air law, as well as my own efforts, to succeed. I have nothing but praise for IATA's courage in leading its member airlines to waive the liability limits of the Warsaw Convention. The IATA Agreement was long and hard in coming, but it was a remarkable achievement given the political and economic realities of the world. You deserve enormous credit for bringing it about. I say that, as your long time adversary, without condition or qualification. You have done a wonderful job, for which the flying public owes you thanks.

I think it would be a great mistake, however, to revel in the glory of accomplishment, and ignore problems and threats which could very well bring this brave new dream crashing down. And so my concern now, as a friend, is that the new system, because of its inherent weaknesses, may fail. Indeed, I see clouds on the horizon, and I want to address them with you while there is still time to deal with them, so that, together, we can build a strong and lasting structure that can and will withstand the storms that are sure to come.

Problems With the IATA–ATA Agreements and the Resulting System—A Foundation Based on Contract

The basic law in international airline liability is still provided by the Warsaw Convention, which was effectively modified in 1966, with respect to transportation involving the United States, to increase the passenger injury and death limitation to $75,000. Onto this convention there have now been engrafted three agreements, the IATA Intercarrier Agreement (IIA), the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), and the ATA Intercarrier Agreement, also known as Provisions Implementing the IATA Intercarrier Agreement (IPA), applicable, at least, to those carriers which have signed the agreements.

Each of the three agreements, IIA, MIA, and IPA is a private contractual agreement sponsored by either IATA or ATA and signed by individual airlines. Some of these agreements, by some of the signatory airlines, have been incorporated in tariffs, which have been filed with the U.S. Department of Transportation. This does not, however, turn them into ''law.'' They are still private contracts which, by virtue of the tariffs, are incorporated in the airline's conditions of contract.

In the first of these agreements, IIA, the signatory airlines agreed to ''take action'' to waive the limitation of liability on recoverable compensatory damages, which, since the Montreal Agreement of 1966 has effectively been $75,000 per passenger on a substantial part of international airline travel, including all transportation involving the United States.

In the MIA the signatory carriers agree to implement the IIA by incorporating various provisions in their contracts of carriage and tariffs where necessary. Under the most important provision the carrier agrees that it will not invoke the limitation of liability in Article 22 (1) of the Convention as to any claim of recoverable compensatory damages under Article 17. In order words, each carrier waives the Warsaw limit.

The second provision each carrier agrees to in MIA is to not avail itself of any defense under Article 20 (1) of the Convention with respect to claims up to 100,000 SDRs. Article 20 (1), sometimes called the exculpatory clause, provides that the carrier can exculpate itself from liability completely if it can show it took all necessary measures to avoid the damage. Thus, in agreeing to waive this defense up to 100,000 SDRs each carrier has subjected itself to absolute or strict liability up to that amount. In not making this waiver above 100,000 SDRs the carrier has accepted the burden of proving the taking of all necessary measures. Proving that is a virtual impossibility in all cases except terrorist cases, other situations entirely caused by a third party, and possibly clear air turbulence cases.

Thus while this provision may not have substantial practical significance the principle of the carrier having the burden of proof regarding its absence of fault has become a precedent which may affect the formulation of a new convention or protocol.

Rights of Recourse, Including Indemnity and Contribution

The MIA goes on to provide that the signatory airline ''reserves all defenses available under the Convention to any such claim.'' And it adds that ''With respect to third parties, the carrier also reserves all rights of recourse . . . including rights of contribution and indemnity.''

It may be well and good for the signatory airlines to reserve all rights of recourse against a manufacturer, for example, in a contract between itself and other airline, but there is real doubt that this can have any legal and binding effect without the consent of such third party and possibly without the consent of the passenger himself. The fact that this reservation of rights is a creature of private contract, rather than law or legal judgments, is, in my opinion, a fatal flaw in the system in terms of legal enforceability.

An impleaded third party, such as a manufacturer, or its insurer, will be free to claim that the airline, or its insurer, which made a payment pursuant to IIA, was a ''volunteer'', and was a collateral source whose payment may not be created to damages owed the passenger or his estate by the manufacturer.

It is my understanding that George Tompkins and Lorne Clark have requested the manufacturers to provide a statement of policy that they will not assert a ''volunteer'' defense in the event that an airline settles a claim in excess of the applicable limit of liability in any suit for contribution or indemnity, and it is my further understanding that the request is being favorably considered.

However, in my opinion, the problem can't definitively be cured by consent of the third party defendant. Under this system the airline can offer to pay unlimited damages, and it may try to insist that a passenger or passenger's family execute a general release, releasing third parties, but the passenger does not have to accept that. The passenger can sue the airline under the IIA and MIA, as a third party beneficiary, and can maintain a wholly independent action against a negligent manufacturer or air traffic control facility. In other words there is the theoretical possibility here of double recoveries. The passenger can recover on his case against the airline, which is based on the IIA and MIA contracts and then take the position, on his case against the manufacturer, or other third party, that the airline was collateral source for which the manufacturer may not get a credit. For the recourse provisions of

IIA, MIA, and IPA to be meaningful the payment of damages by the airline would have to be the result of *law* and not private contract.

This problem of recourse runs through all three of these agreements, and, in my opinion, can be solved only by a new convention or protocol, establishing a legal basis for the payment of unlimited damages by an airline.

That is not the only problem presented by IIA agreements.

Domicile, ''Subject To Applicable Law''

IIA states as an objective ''that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.''

When one examines the MIA, however, it provides that at the option of the carrier it may include a provision in its conditions of carriage and tariffs that, ''subject to applicable law'', recoverable compensatory damages . . . may be determined by reference to the law of the domicile or permanent residence of the passenger.''

In the IPA there is no option provision. It simply states that ''subject to applicable law, recoverable compensatory damages * * * may be determined by reference to the law of the domicile or permanent residence of the passenger.''

Thus the intent of the drafters, as shown by the language of the three agreements, would appear to have been to apply the law of the passenger's domicile or permanent residence. In actual fact, however, there was no such uniform agreement to apply the law of domicile, and the language can best be explained by the political, or negotiating constraints if any agreement at all was to be achieved.

Briefly stated, the United States carriers, with the prodding of the U.S. Department of Transportation, insisted on language applying the law of domicile. To European carriers, however, their law did not apply law of domicile. Generally there courts would apply the law of the place of the accident or the law of the forum. Thus in the face of the language in IIA, pointing to law of domicile, they insisted on language making it clear that would only be at the option of the airline.

The U.S. carriers, on the other hand, all signed the IPA, and thereby accepted law of the passenger's domicile on cases against them.

The agreements may not do that, however, because the language, ''subject to applicable law'' may dictate some other law!

Let's assume, for example, a case brought under the IPA in which the deceased passenger was domiciled in Pennsylvania, which has relatively liberal death damages law. Let's say the airplane crashed into the high seas. When the case is brought in the United States will the Death on the High Seas Act be applied, or the law of Pennsylvania?

In the first instance the decision will be up to the airline, or, more likely, the airline's insurer. Let's suppose the airline, faithful to the text of the IIA agreements, makes an offer under Pennsylvania law standards. But let's assume the passenger, or the lawyer for the estate of the passenger, rejects the offer as being insufficient. The matter would then go to court. In court the passenger (or the estate's) lawyer, asserts that the law of Pennsylvania will govern damages, pointing to the IIA Agreements.

What position does the airline take in court? And what position will the court take? After all the Death on the High Seas Act is a United States statute.

As for the carrier, one might hope it would feel morally bound to accept the law of the domicile of the passenger, but history suggests that economics will determine its position, or, more precisely, its insurer's position.

Let's take a similar case under the IPA, where the airplane has crashed over land, as in the Pan Am 103 Lockerbie bombing. Let's assume the action is started in Florida, as, indeed, a significant number of Lockerbie cases were. In those Lockerbie cases the court, stating that it was applying Florida choice of law rules, applied the law of the place of the accident, Scotland.

What will the situation be under the Intercarrier Agreements including the IPA? Will the carrier, and the court, enforce the law of the passenger's domicile, or will they apply the law of the place of accident?

Again, history suggests that the parties are likely to be motivated by economics.

In short, the words, ''subject to applicable law'' are likely to introduce conflict and uncertainty in many cases brought under the IPA. I would respectfully suggest that those words be removed from the IPA Agreement, and that it simply provide that the law of the passenger's domicile will be applied.

Successive Carriage

Another problem arises by virtue of Article 30 (1) and (2) of the Warsaw Convention which deal with the liability of successive carriers. Article 30 (2) states: ''(2) . . . the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or delay occurred. . . .''

It may turn out, of course, that all carriers sign and adhere to the Intercarrier Agreement, and they will, therefore, all be subject to it. But, given the nature of the world, it is probable that some, or even many, will not sign on. If the second, or third, successive carrier is the one on which the accident happens, it may choose not to waive the limit, despite the claim by the plaintiff that the successive carrier is bound by the original contract of carriage. Then where are we?

I understand that carriers now signing the IIA Agreements are limiting their waivers of the limit to accidents occurring on their own part of the carriage, so passengers may still be subject to the limit in other cases.

But the injured passenger, or his family if he has been killed, will, nevertheless, argue that the carrier which issued the ticket must be liable for damages without limitation, and that he or his estate is an authorized third party beneficiary. An action will be brought against that carrier for unlimited damages. The Warsaw Convention, which was supposed to have simplified liability rules will be the very cause of the dispute in these cases.

If, indeed, waivers of the limit do not apply to successive carriers, then the IATA agreements will be something of a cruel hoax in successive carriage situations and may well inspire intense adverse passenger group reactions.

The 5th Jurisdiction

Article 28 of the Warsaw Convention permits suit to be brought in any one of four places; the place of incorporation of the carrier, its principal place of business, the place where the contract of carriage was made (i.e. where the ticket was sold), and, finally, the place of ultimate destination of the passenger. Notably absent is the place of the passenger's domicile. In most cases the place of the passenger's domicile will coincide with one of the places suit can be brought anyway, so there is no problem. But there are occasional cases where an American, for example, will buy a ticket while on a trip, away from home. American damages standards are considerably higher than those of other countries, generally, and in that rare case the American passenger, or his family, will be denied the higher American standards.

It is generally recognized that the place of domicile is the place which has the greatest interest in the question of damages, and the denial of domicile law is very troubling to parties and governments alike.

The United States Government, and particularly the Department of Transportation and Department of State, have taken the position that any new regime of law, in international airline transportation, must provide for suits in ''the 5th Jurisdiction'', i.e., the place of the passenger's domicile. Non American carriers have resisted the proposal, for reasons that baffle me. It seems to me that from the airline's standpoint the point is not worth fighting about, if the carriers can get an otherwise favorable system. There are simply not enough such cases to provide a real stumbling block.

The IATA intercarrier agreements do not and cannot solve the problem, and they cannot because of the Warsaw Convention's proscription against changing jurisdictional rules (See Article 32). The United States has gone along with the intercarrier agreements because of the predominant interest in getting the airlines to abandon the limits, notwithstanding their failure to adopt the 5th jurisdiction, but the point remains one of contention for any new convention or protocol.

Fault or No Fault?

Finally, important lawyers in the United States DOT seem to be locked into an anti-fault mode of thinking on any new system, whether it be based on the intercarrier agreements or a new convention or protocol. This probably goes back to attitudes developed in 1966 at the time of the Montreal Agreement, when State Department lawyers obtained from the airlines and IATA an agreement to accept absolute liability up to a limit of $75,000 as a tradeoff for perpetuation of the Warsaw Convention and its limited liability regime. The DOT has viewed absolute, no-fault, liability as being in the passenger interest. Most passenger groups, however, as well as lawyer groups which customarily represent passengers, view the fault system as a fundamental necessity which is critically important from the safety perspective for the protection of passengers as well as society in general. They point to numerous contributions to airline safety made by tort cases and their examination into both negligence and accident causation.

The contribution of the tort system to aviation safety is well recognized, also, by aviation insurers and their lawyers. Sean Gates, a London solicitor and senior partner of Beaumont and Son, one of the leading firms representing aviation underwriters, has expressed himself as strongly opposed to absolute liability for international airlines, both because he is opposed to abandonment of the fault system, and because he doesn't see why airlines alone in our society should be held to be guarantors of safety. Anthony Mednuik, one of the world's leading underwriters, and presently Managing Director of the British Aviation Insurance Group, has similarly expressed himself as strongly opposed to abandoning the fault system. He did so most recently at a large meeting in Amelia Island, Florida, in October, of the Aircraft Builders Council, which consists of both aviation manufacturers and underwriters, and again at an aviation insurance and law symposium in London in November, sponsored by Lloyds of London Press. And George N. Tompkins, Jr. one of the top airline defense lawyers in the United States has recommended the following language to the ICAO Secretariat Study Group, of which he is a member: ''No limit of liability on the recoverable damages mentioned in A above if the passenger/claimant proves negligence or

fault on the part of the carrier. This would not impose an undue burden on the passenger/claimant and would serve to preserve the ''Warsaw Convention'' as a fault based system.''

This difference of opinion on the fault system is not a factor affecting the intercarrier agreements since they are already in place and they have been based on strict liability up to 100,000 SDRs and presumptive liability above that amount if the carrier fails to show its complete absence of fault, but it will be a significant factor in the effort to achieve a new convention or protocol.

Thus we have a situation where the IATA agreements, however noble their purpose and laudable their execution, provide an insufficient basis for a satisfactory future regime in international air law, and where there is considerable doubt that, on a political level, the problems and differences of fault/no fault, limitations of venue, rights of recourse, and successive carriage, can be overcome, so as to create a reasonable new convention or protocol. The prospect exists that there will be no satisfactory new convention or protocol, and that the intercarrier agreements will fail to provide a workable system. It is uncertain where such an outcome would lead, but one virtual certainty would be complete abandonment of the Warsaw Convention, and the airlines would not be happy about that.

So, where do we go from here?

The Need to Work Together

Everyone involved, from IATA and airlines, to the United States Government and other governments, to passengers' groups and plaintiffs' lawyers, has something to lose from a failure to come up with a satisfactory new liability regime. The obvious answer to the problem is the formulation of a new and widely acceptable convention or protocol which will have the force of law to handle not only airline liability, but rights of recourse, successive carriage, choice of law and adequate venue.

The Need for Ratifiability

At the excellent Lloyds of London Press Aviation Insurance and Law Symposium in November, in London, Don Horn, Associate General Counsel for International Affairs of the United States Department of Transportation, pointed out the truism that the first requirement for any new convention (or protocol) is that it must be ratifiable.

I respectfully suggest that that is a good place to start in our consideration of the new convention or protocol. Whatever we come up with must be ratifiable. It must be ratifiable by the United States, and it must be approval by the international airlines.

Excellent preparatory work has been done by the ICAO Study Group and the ICAO Legal Committee. The pattern of a splendid convention or protocol is now clear, and available. In general it has been set forth by the Study Group. It will provide for a two tier liability system, with absolute liability up to the threshold number of 100,000 Special Drawing Rights, and negligence liability above that. It must provide for the addition of the ''fifth jurisdiction.'' In other words, passenger's domicile must be added to the other available venues, place of incorporation of the carrier, place of its principal place of business, and place where the ticket was bought.

For those international airlines and insurers who are reluctant to accept the fifth jurisdiction I would point out three things. First, there is an element of compromise inherent in the United States Government acceptance of the two tier concept on fault. The position of the U.S. has been to favor absolute liability across the board. This is not in the airline interest, and in my humble opinion, not in the public interest, but that, as I understand it, has been its position. Acceptance of the two tier system by the United States will have another laudable effect. It will insure support of the new convention or protocol in the United States on the part of passengers', consumers, and lawyers' groups who believe that the fault system is one of society's basic protections. Were the United States to hold out for absolute liability across the board, and were that part of the new Convention or protocol I would expect intense opposition to the new convention or protocol in the United States.

The second point is that in terms of cost to airlines or insurers the fifth jurisdiction is deminimus. There are, simply, very few cases where an American domiciliary buys a ticket in another country and cannot sue in the United States under one of the four presently permissible jurisdictions. I have been practicing aviation law for forty five years, and I have probably handled as many airline cases as any other lawyer in the world, and I can only remember one case involving an American passenger where I was unable to sue in the United States because of Article 28.

Finally, the overall benefit to airlines, and all others, of having a viable new convention or protocol would be enormous. It would be foolish to jeopardize its chances because of opposition to the fifth jurisdiction.

Burden of Proof on the Second Tier

As indicated above, the new convention proposed by the Legal Committee of ICAO prescribes a two tier system of liability. There is absolute liability for damage up to 100,000 SDRs and negligence liability above that. In an exercise of indecision, however, the drafters set forth three alternative provisions on who shoulders the burden of proving negligence. The concept of placing the burden on the defendant airline of showing its freedom from fault grows from Article 20 of the Convention which provides that to exculpate itself the airline must show that it took all necessary measures to avoid the damage. Generally speaking, however, it is the plaintiff who has the burden of proving negligence.

The concept of providing three alternative suggestions is not sound and will lead to confusion and uncertainty. Obviously, it is to the plaintiff's advantage to place the burden on the defendant, but I don't consider it a make or break matter. Again, it is more important to get the broad outlines of the convention established than to fight about each of its terms.

Convention or Protocol?

Similary, the question of whether this should be a brand new convention or a protocol to the Warsaw Convention is less important than the substance of the new instrument. People I respect, including Lorne Clark and George Tompkins, who know far more than I do about the politics of enacting a new convention, tell me that it will be much easier to enact a protocol, so, for that reason alone I favor it.

I would urge a note of caution, however. The Warsaw Convention has a very bad history and reputation with many people, including me and my clients. For many of them it has ruined their lives. I would eliminate all extolatory language praising the Warsaw Convention, such as the introductory language in the ICAO Legal Committee draft, regardless whether it is new convention or protocol.

Simpler and Shorter is better

I would suggest that all references to cargo be removed. It is not necessary to include it in the new instrument. In fact, it may be completely resolved by the ratification of Montreal Protocol 4. The simpler and shorter the new instrument is, the better.

LEGISLATIVE SESSION

The PRESIDING OFFICER. Under the previous order, the Senate will resume legislative session.

YEAR 2000 INFORMATION AND READINESS DISCLOSURE ACT

Mr. ROBERTS. Mr. President, I ask unanimous consent that the Senate now proceed to consideration of Calendar No. 584, S. 2392.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

A bill (S. 2392) to encourage the disclosure and exchange of information about computer processing problems, solutions, test practices and test results, and related matters in connection with the transition to the Year 2000.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the bill?

There being no objection, the Senate proceeded to consider the bill, which had been reported from the Committee on the Judiciary, with an amendment to strike all after the enacting clause and inserting in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Year 2000 Information and Readiness Disclosure Act''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds the following:

(1)(A) At least thousands but possibly millions of information technology computer systems, software programs, and semiconductors are not capable of recognizing certain dates in 1999 and after December 31, 1999, and will read dates in the year 2000 and thereafter as if those dates represent the year 1900 or thereafter or will fail to process those dates.

(B) The problem described in subparagraph (A) and resulting failures could incapacitate systems that are essential to the functioning of markets, commerce, consumer products, utilities, government, and safety and defense systems, in the United States and throughout the world.

(C) Reprogramming or replacing affected systems before the problem incapacitates essential systems is a matter of national and global interest.

(2) The prompt, candid, and thorough disclosure and exchange of information related to year 2000 readiness of entities, products, and services—

(A) would greatly enhance the ability of public and private entities to improve their year 2000 readiness; and

(B) is therefore a matter of national importance and a vital factor in minimizing any potential year 2000 related disruption to the Nation's economic well-being and security.

(3) Concern about the potential for legal liability associated with the disclosure and exchange of year 2000 readiness information is impeding the disclosure and exchange of such information.

(4) The capability to freely disseminate and exchange information relating to year 2000 readiness, solutions, test practices and test results, with the public and other entities without undue concern about litigation is critical to the ability of public and private entities to address year 2000 needs in a timely manner.

(5) The national interest will be served by uniform legal standards in connection with the disclosure and exchange of year 2000 readiness information that will promote disclosures and exchanges of such information in a timely fashion.