# The Conflicting Interests - The Warsaw System Crisis

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**A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the degree of Master of Laws (LL.M)**

 **August 1997**

# ABSTRACT

Private international air law encompasses the delicate balance of interest between the air carriers and the consumers of their service. This balance is made by states according to their socioeconomic and political conditions. Since these conditions differ among states, another, yet more complex conflict of interests arises between states as to how the interest of air carriers and consumers should be balanced. This difference between states has been, and still is, the biggest obstacle in the way of unifying private international air law.

Giving an overview of the present situation and the possible future implications, this thesis highlights the balance of interest of the successive private international air law instruments and examines the factors that lead thereto. This thesis further analyses the crisis of unified private international air law and the actions taken to confront it by examining the reasons behind it in order to understand the current situation and apprehend the future.

# RÉSUMÉ

Le droit international privé aérien doit trouver un fragile équilibre entre les intérêts respectifs des transporteurs aériens, et des consommateurs utilisant leurs services. Cet équilibre est organisé par les Etats en fonction de leur situation politique et socio-économique. La diversité des conditions socio-politico-économiques de chacun d'eux génère alors une nouvelle dissension entre les Etats, celle-là plus complexe, relative aux modalités d'organisation de cet équilibre des intérêts des transporteurs et des consommateurs. Cette diversité constitue encore l'obstacle le plus important entravant l'unification du droit international privé aérien.

Ce mémoire présentant une analyse globale de la situation actuelle et de ses éventuelles futures conséquences nous permet de mettre en évidence les différents instruments que le droit international privé aérien a précédemment utilisés pour organiser cet équilibre des intérêts des transporteurs et des consommateurs, ainsi que les facteurs qui en ont favorisé l'adoption. Puis il propose une analyse détaillée de la crise frappant le droit international privé aérien uniforme et des solutions qui y sont apportées, soulignant plus particulièrement les causes de cette crise, avec pour objectif une meilleure appréhension de l'avenir.

# ACKNOWLEDGMENTS

As I stand at the edge of a new stage in my life, I look back and find myself burdened with gratitude to people whose support helped the successful completion of the passed stage of my life. I hope those people find in the following words an expression, of at least part, of the gratitude I owe them.

First and foremost, I would like to express my gratitude to a legendary professor whose growing knowledge makes him even humbler; a professor who always reminds me of the old Arabic adage "I will be a slave to those who taught me even just a letter". Dr. Milde: you have taught me much more than just a letter; thank you very much.

Further thanks are certainly due to all the professors and experts that came to the Institute of Air and Space Law from around the globe to share their invaluable knowledge and experience.

My deepest gratitude goes, without saying, to my family. You were, as always, the torch that guided me in my darkest nights; the everlasting resort that I could always turn to. Unfortunately, no words would ever be enough to express my thanks.

Since McGill's "friendly staff" were always considered in the category of friends, there is no need to thank each separately here. To the good friends that I made in this great year in Montreal, to all the friends whose friendship made the long cold winter in Montreal warm, easy and joyful: thank you all.

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# INTRODUCTION

The main function of private international air law is balancing the interests of air carriers and the consumers of their service. For domestic air transport, each state makes this balance of interest according to certain socioeconomic and political factors that prevail in that state. For international air transport, since each state has different socioeconomic and political conditions, states desire a different balance of interests between the carriers and the consumers. This causes a conflict of interest between states as to how the interests of air carriers and consumers should be balanced internationally. Thus, before balancing the interest of carriers and consumers internationally, the conflicting interests of states should first be balanced.

Since the Warsaw Convention,[1] the first unification of private international air law, was made at a time when states had similar socioeconomic and political conditions, it was a successful unification of private international air law. The similarities in the socioeconomic and political conditions did not, however, perpetuate. Some states started to experience vast changes in their conditions while others did not.

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[1] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, 137 L.N.T.S 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838 [hereinafter *Warsaw Convention*].

These differences in conditions triggered the Warsaw Convention crisis and since then has been the main reason behind the Warsaw System crisis.

Since the socioeconomic and political conditions changed for some states and not for others, the former states wanted a change in the balance of interest of the Warsaw Convention. Because no multilateral updating of the Warsaw Convention, and later on of other instruments in the Warsaw System, took place, the unified international air law started to face an obsoleteness crisis. In addition, because the states that wanted a change started taking unilateral actions to amend the Warsaw System, the System started facing a disunification crisis.

The first Warsaw System crisis took place in 1965 when the United States of America (US) gave a notice of its denunciation of the Warsaw Convention. This crisis was solved by the airline industry through the International Air Transport Association (IATA) by the adoption of the 1966 Montreal Agreement.[2] When, afterwards, the rules of the Montreal Protocol became obsolete for the US and the rules of the Warsaw System became obsolete for other countries, the situation was confronted by the International Civil Aviation Organization (ICAO). ICAO tried to update the unified private international air law, but failed. ICAO arranged for the Guatemala City

[2] *Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, 13 May 1966, CAB Order No. 18900, CAB Order E-23680 (docket 17325) [hereinafter *Montreal Agreement*].

Protocol[3] and the Montreal Protocols Nos. 1, 2, 3, and 4,[4] but failed to bring them into force. This meant that the only balance of interest in force was that of the obsolete Warsaw Convention or of the Warsaw Convention as amended by the Hague Protocol.[5]

Accordingly, some states and airlines, out of frustration, gave up on reaching a unified updating of the Warsaw System, and started taking unilateral actions to *de facto* amend the Warsaw System. This has pushed the situation, in the 1990's, to an unbearable major crisis level . Again, IATA had a saying in that situation. IATA, in 1995, prepared, adopted and managed to implement an intercarrier agreement that

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[3] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955*, 8 March 1971, ICAO Doc. 8932 [hereinafter *Guatemala City Protocol*].

[4] *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, 25 September 1975, ICAO Doc. 9145 [hereinafter *Montreal Protocol No. 1*]; *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on the 28 September 1955 and at the Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc. 9146 [hereinafter *Montreal Protocol No. 2*]; *Additional Protocol No.3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on the 28 September 1955 and at the Guatemala City on 8 March 1971*, 25 September 1975, ICAO Doc. 9147 [hereinafter *Montreal Protocol No. 3*]; *Montreal Protocol No.4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929*, ICAO Doc. 9148 [hereinafter *Montreal Protocol No. 4*].

[5] *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929*, 28 September 1955, ICAO Doc. 7632. [hereinafter *Hague Protocol*].

would *de facto* amend the Warsaw System, and update some of its obsolete rules.[6] Although this IATA solution managed to update the Warsaw System, it was considered only as a temporarily solution and was criticized, mainly, because the Warsaw System consists of international legal instruments concluded among states and, thus, can only be effectively amended by states. Accordingly, ICAO decided to put things in order by drafting a new convention, to be adopted by states, that would update private international air law in a unified way.

The draft text of the new convention was reviewed, studied, and revised by the ICAO Legal Committee in 1997.[7] The Legal Committee adopted the final draft text and submitted it to the ICAO Council for further consideration and revision. The ICAO Council approved the draft text and is expected to call for a diplomatic conference to consider the modernization of the Warsaw System in 1998. The diplomatic conference will have the full capacity to adopt the draft text as it is, amend it, adopt a completely different instrument, or even refuse the modernization of the Warsaw System.

Taking into account the conflict that arose in the Legal Committee and the way it was settled, there is an indication that the draft text adopted by the Legal Committee

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[6] IATA adopted the Intercarrier Agreement on Passengers Liability (IIA) in 1995, and then adopted the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIP) in 1996.

[7] *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, ICAO Doc. LC/30-Drafting Group Report (1997) [hereinafter *ICAO Draft Convention*].

would be a possible compromise that could be adopted by the diplomatic conference. However, due to the low percentage of participation in the Legal Committee and the high percentage of inactive participation thereof, the latter indication is in question. Thus, the future of private international air law, which will be in the hands of the diplomatic conference, is far from clear.

# CHAPTER 1

## The Balance of Interest Between the Carriers and the Consumers

### I. INTRODUCTION:-

Humans are social beings that must live in a society in order to survive. However, one commentator noted that:

> A universal feature of human society has been conflict. Individuals have individual interests. On occasions, they conflict with each other. If a society is to survive it must develop a system of resolving conflicts between individuals, and conflicts between individuals on the one hand and the community on the other. The law is the system of resolving those conflicts.[8]

Indeed, this is true in private air law, since the main objective of private air law is resolving conflicts, existing between air carriers (hereinafter carriers) and consumers of its service (hereinafter consumers). Resolving the conflict of interests cannot be done by preserving the interests of both parties, but rather by finding a compromise by which the interests of the parties are balanced. Thus, the following section will discuss the areas in which the conflict of interests arise and the ways (legal tools) these

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[8] S.M. Waddams, *Introduction to the Study of Law*, 2d ed. (Toronto: Carswell Company Limited, 1983) at 1.

conflicts can be avoided or resolved. The next section of this chapter will discuss the political, social and economic factors that affect the balance of interests formula.

Such conflicts take place in domestic private air law and private international air law. In private international air law, however, a further conflict arises between states and their legal systems. Since each state favours a certain balance formula between consumers and carriers that corresponds to its economic, social and political conditions and since states have different economic, social and political conditions, conflicts between states arise as to what balance formula should be adopted to regulate air transport internationally. The effect of this conflict on private international air law will be studied throughout this thesis .

## II. THE LEGAL TOOLS BY WHICH THE INTERESTS OF THE CARRIER AND THE CONSUMER CAN BE BALANCED :-

The legal principles adopted to balance the interests of carriers and consumers in each area of conflict are considered as legal tools by which the conflicting interests of carriers and consumers can be balanced.

It should be mentioned, however, that in determining the balance formula the balance should be made in a form of a package within the aspect of all tools rather than

individually within the aspect of one tool. For example, the balance of interest in the liability regime aspect does not have to be made in the aspect of the liability regime itself by choosing a liability regime that takes into account the interest of both the carrier and the consumer, but the liability regime can be determined in favour of the consumer, for instance, and the balance can be made later by using a different tool like the liability limits, by limiting the carriers liability.[9]

These tools are:-

**A. The Limits of Liability:-**

Limiting the carrier's liability gives a great advantage for the carrier in its relation with the consumers. Because carriers have to insure their liability risk, the insurance premium forms a part of their operating expenses. Accordingly, the lower the limits of liability, the cheaper the insurance premium becomes.[10] Not necessarily - premiums are primarily dictated by accident records, prior claims etc.

The concept of limits of liability has been borrowed for air law from maritime law. In the latter the notion has been reasoned in different ways but perhaps the most

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[9] The thirty-first session of the ICAO Legal Committee recognized this while adopting the new private international law draft instrument. The Committee, for example, left the issue of "fifth jurisdiction" to be decided in light of the liability regime.

[10] This applies as a general rule; however, the actual insurance premium would reflect wether, and if so how, these limits can be exceeded.

pragmatic reason for limiting the shipper's liability is the high risk that accompanies the carriage by sea. Thus, it was thought that leaving the shipper responsible alone for that high risk would negatively affect the development of and investment in maritime carriage. Taking into account the great economic and political importance of maritime carriage the latter effect was to be avoided by limiting the shipper's liability.[11] The same reasoning can be given to limitation of liability in air transport but, as will be seen later, the notion of limited liability has had many implications and development in air transport.

**B. The Unit of Compensation:-**

Connected to the limits of liability is the currency unit in which the limits of liability are set. Setting the limits by using a currency that is not affected by inflation, like the Special Drawing Rights (SDR), can be considered in the consumer's benefit. Otherwise the limits would become unrealistically low and have to be adjusted periodically.

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[11] D.A. Hadjis, *Liability Limitation in the Carriage of Passengers and Goods by Air and Sea* (LL.M. Thesis, Montreal: Institute of Air ans Space Law, 1958) at 14.

### C. Means by which the Limits Can Be Broken:-

In a limited liability regime, giving consumers the ability to break the limits of liability if some conditions are met, (e.g., if the damage was caused by the carrier's willful misconduct),[12] is an advantage to the consumers. This is because consumers can be fully compensated if the damage exceeded the limits of liability in that case.

### D. The Conditions of Liability Under the International Legal Instrument:-

#### 1. The Damages for which the Carrier is Liable (Recoverable Damages):-

The legal instrument may limit the damages for which the carrier would be liable for. For example, the carrier can be made liable only for bodily injury but not mental injuries.

#### 2. The Compensation for which the Carrier is Responsible:-

After determining the damages for which the carrier is liable for, the legal instrument may further limit the compensation that can be obtained for such damages. For instance, the consumers can be allowed to obtain compensation only for material

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[12] See *Warsaw Convention, supra* note 1, art. 25.

damages (funeral expenses, loss of income, etc.) but not moral damages (pain and suffering, loss of life expectancy, etc.) or economical damages and not non-economic damage.[13]

### 3. The Place and Time where the Damage Takes Place:-

The carrier's liability, under the legal instrument, may be further restricted to include only damages that took place in a certain geographic area or at a certain point in time. For example, the carrier can be made liable only for damages that took place on board the aircraft or in the course of embarking or disembarking of the passengers. [14]

### 4. The Nature of the Act that Caused the Damage :-

Moreover, the carrier's liability can be limited to damages that were caused by a certain act only. It could be required, for example, that the damage be caused by an "accident" and not merely an incident or "event".[15]

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[13] As would be seen later, the Warsaw Convention, for example, makes the carrier liable only for compensatory damages .

[14] For example, see *Warsaw Convention, supra* note 1, art.17.

[15] *Ibid.*

## E. The Liability Regime:-

The liability regime is an important factor in balancing the interest of carriers and the consumers of their service. One or more of the following liability regimes can be used:

### 1. Fault Liability Regime :-

This regime is the least favourable for consumers, because under this regime the consumers have to prove all the elements of fault liability regime in order to be compensated, *i.e.*, the carrier's act or omission, the carrier's fault, the damage sustained, the causal link between the faulty act and the damage.

### 2. Fault Liability Regime with the Reversal of the Burden of Proof:-

This regime is more favourable for consumers since the burden of proof is reversed, *i.e.*, consumers do not have to prove the carrier's fault to get compensated. However, the carrier can prove that the damage was not due to its fault to avoid liability.

### 3. Strict and Absolute Liability Regimes:-

These regimes are the most favourable for consumers. Strict and absolute liability regimes are no-fault liability regimes *i.e.*, neither does the consumers have to prove the carrier's fault nor can the carrier prove that the damage was not caused by its fault to avoid liability. The difference between strict liability on the one hand and absolute liability on the other is that the first requires a causal link between the act and the damage so the carrier can avoid or reduce liability in case of contributory negligence or acts of third parties, while the in absolute liability no such causal link is required.[16]

## F. The Scope of Application of the International Legal Instrument Governing the Carriers' Liability:-

Generally, all international legal instruments were made applicable for international carriage only.[17] Nevertheless, widening the scope of applicability to

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[16] For more details, see B. Cheng, "A Reply to Changes of Having Inter Alia Misused the Term Absolute Liability" (1981) V1 Ann. Air & Sp. L. 3-13.

[17] This was the case in the Warsaw Convention of 1929 and the amendments thereto and also in the other successive international air law instruments. For the definition of international carriage by air, see *Warsaw Convention, supra* note 1, art. 1. Generally the carriage by air is considered international if the point of departure and final destination, as shown in the documents of carriage, are in two different contracting parties to the international legal instrument, or solely within the territory of on contracting party if there is an agreed stopping point in the territories of another contracting party.

include domestic carriage as well does not directly affect the interest of either party. Rather, its effect takes place after determining the other factors (*e.g.*,the liability regime).

### G. The Documents of Carriage:-

The documents of carriage can be used as a tool in balancing the carriers' and consumers' interests. For example, requiring some elements to be in the documents of carriage and not allowing the carrier to avail itself of the limits of liability if it failed to include these elements or to deliver the documents of carriage, is one way of using this tool.[18]

### H. Jurisdiction:-

Legally speaking, determining jurisdiction should not be a factor that would affect the financial interest of either party. However, since practice has classified some courts as more generous than others in granting compensation and since forum shopping has become a trend, determining the courts that have jurisdiction to look into the liability cases has become an important factor in balancing the interest of the

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[18] Article 3 of the Warsaw Convention, for example, requires the carrier to deliver a passenger ticket for the passenger containing certain elements under the sanction that the carrier would not be able to avail itself of the limits of liability if it failed to do so. See *Warsaw Convention, supra* note 1, art. 3.

carriers and consumers. Accordingly, expanding the jurisdiction of generous courts would be a vast advantage for consumers.[19]

## III. POLITICAL, ECONOMIC AND SOCIAL FACTORS THAT AFFECT THE BALANCE FORMULA:-

We have seen that the objective of air law is to maintain a certain balance between the conflicting interests of carriers and consumers. In addition, we have discussed the legal tools by which this balance can be achieved . The question to address is the kind of balance that should be maintained. Or, what are the political ,economic and social factors that play a role in determining the balance formula?

When balancing the interests of carriers and consumers, the state, through the law, takes into account, mainly, the following two factors:

### A. The Financial Health (Economic Well-being) of its Air Transport Industry:-

Because of the great importance of the air transport industry for states, this factor plays an important role in determining the balance formula. The importance of

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[19] For details about the jurisdictions of the Warsaw Convention, see chapter 2 of this study.

air transport industry for states can be classified as follows:-

(1) On the economic level , the air transport industry is an essential element to any nation's economy, since air transport industry:

(a) Generates a large number of qualified jobs for the nation's citizens, thus helping to keep the unemployment rate low. For example, it has been estimated in 1994 that the air transport industry produced about 22 million jobs.[20]

(b) Is important for each state's communication and commerce which are necessary not only for states' economies but also for their survival. As one source noted, "the commercial airline industry carries 1.25 billion passengers and 22 million tons of cargo, about a quarter of the world's manufacturing exports based upon value.. and it accounts for one trillion dollars a year in economic production ".[21]

© Is an integral part of the tour and travel industry which is considered to be the biggest industry in the world.[22] "The tour and travel industry generates more than $3.5 trillion of GNP.... It employs 127 million people or one out of every 15 workers. It

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[20] Economic Benefits Study Revisited, ICAO Rev. (Feb. 1994), at 19.

[21] P.S. Dempsey, "Airlines in Turbulence: Strategies for Survival " in P.P.C. Haanappel, R.A. Janda & J. Wilson, eds., *Government Regulation of International Air Transport, Cases and Materials* (Montreal, Institute of Air and Space Law, 1995) at 46 [hereinafter "Airlines in Turbulence"].

[22] *Ibid.*

accounts for 12.9% of worldwide capital investment, more than $442 billion a year".[23]

(2) On the political level , the importance of the air transport industry can be attributed to its military value to states. As one commentator wrote " air power is not composed alone of the war-making components of aviation. It is the total aviation activity - civilian and military, commercial and private".[24]

Besides being essential for national security, the air transport industry is considered as an industry that adds to each state's prestige .

**B. The Well-being of the Consumers and Order in the Society :-**

In determining the balance formula, states also consider the welfare of their citizens. Thus, if social order is to be maintained, the balance should be made in a way to achieve justice by rendering each side his or her due and by obliging the side that caused the damage (the carrier in this case) to compensate for the damage it has done. This is especially true since the damage caused by aircraft accidents can be potentially enormous, both to the victims and their families. As one commentator explains:

> Unlike other types of accidents and transportation tragedies, victims of air crashes and their families remain exposed and involved in

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[23] *Ibid.*

[24] Hadjis, *supra* note 11 at 23.

> aircraft accidents for many years. Thus, the families suffer not only from their immediate trauma, but also from the absence of subsequent closure due to disappearance of the bodies, the unrelenting media attention, the misplaced interest of self-appointed "experts" who may relate some unconnected prior experience to a different future tragedy, the lengthy legal actions, the lack of documentation explaining the cause of the tragedy, the apathy of the parties responsible for the air crash, and the crass commercialism of their insurance.[25]

Moreover, the states also consider the interest of third parties like the manufacturers of the aircraft, air traffic controllers, airport authorities, and trial lawyers. Aircraft manufactures, air traffic controllers, and the airport authorities are potential defendants in legal cases against the air carrier. Accordingly, their interest conflicts with that of the air carriers. This conflict is maximized if the air carrier is subject to a less strict liability regime than their liability regime. Since these third parties have a big economic value to states and since they have powerful lobbies in states, their interests are usually considered attentively when determining the air carriers liability regime. Furthermore, the interest of trial lawyers in some states is considered when adopting the air carrier's liability regime.[26] Trial lawyers also have, in some countries, powerful lobbies that affect the states' decision as to what liability regime should govern the air carriers liability.[27]

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[25] H. Ephraimson-Abt, "The Past and Future Promise of Warsaw: A Passenger's Point of View" (1996) XXII:I Ann. Air & Sp. L. 117.

[26] The interest of trial lawyers conflict with that of the air carriers in the sense that the trial lawyers are in favor of high liability limits, in order to get higher legal fees, while the air carriers are not.

[27] For more details, see chapter 4 of this study.

Accordingly, the interest of the consumers should be considered when deciding the balance formula in order to achieve justice and thus, social order and stability. Domestically, the interest of consumers is protected ( preserved) when a democratically elected government responds to pressure from consumers and other support groups.

At the international level, the picture is more complicated. As has been mentioned earlier, each state has its own unique economic , social, and political conditions. Thus, each state favours a different balance formula that best adapts to its conditions. Accordingly, when balancing the interests of consumers and carriers internationally, a conflict of interest between states is most likely to arise. Therefore, if uniformity is to be achieved in private international air law states must settle their differences and reach a compromise.

# CHAPTER 2

## The Balance Formula in Private International Air Law Instruments

In this chapter the balance formula adopted by the successive international air law instruments and the amendments thereto will be examined.

### I. THE WARSAW CONVENTION OF 1929:-

First the balance of the original Warsaw Convention will be highlighted, then the factors that affected this balance will be examined.

#### A. The Balance of the Warsaw Convention:-

##### 1. The Limits of Liability and the Currency Unit of Compensation:-

The Warsaw Convention adopted a limited liability regime in which the

carrier's liability was limited to 125,000 Francs for death or wounding of passengers and 250 francs per kg for loss or damage of checked baggage and goods and a sum of 5000 francs per passenger for the loss or damage of carrion baggage.[28]

**2. The Legal Means for Breaking the Limits:-**

The limits of the Warsaw Convention are not, however, unbreakable. As a sanction, the carrier is not allowed to avail himself of the limits of liability if he:

(1) Accepts a passenger without delivering a passenger ticket for him or her.

(2) Accepts luggage without a luggage ticket being delivered or goods without an air consignment note being made out and/or if the luggage ticket, or the consignment note does not contain the particulars required by the convention.[29]

Moreover, the Convention does not allow the carrier to avail himself of the limit of liability if the damage was caused by his wilful misconduct[30].

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[28] See *Warsaw Convention*, art. 22.

[29] *Ibid.*, arts. 3 , 4, 9.

[30] *Ibid.*, art. 25.

### 3. The Conditions of Liability:-

A distinction should be made between the conditions required for liability for damage to passengers on the one hand and damage to checked baggage and goods on the other.

In regard to passengers, the Warsaw Convention makes the carrier liable only for two kinds of damages:

(1) Damage for the death and wounding or other bodily injuries of passengers.

(2) Damage occasioned by delay.

As a condition of the carrier's liability for the first kind, the damage must be caused by an accident on board the aircraft or in the course of embarking or disembarking therefrom.[31] As far as delay is concerned, Article 18 of the Warsaw Convention does not expressly require any conditions of liability as such, except for the requirement of the carrier's fault.

As for checked baggage and goods, the Convention makes the carrier liable for the loss, destruction, or damage thereto. The condition of the carrier's liability in this

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[31] Ibid., art. 17.

case is that the damage take place during the carriage by air as defined in Article 18.[32]

In all kinds of damages, however, the carrier is liable only for compensatory damages as spelled out in Articles 17, 18 and 19 (e.g., damage sustained, damage occasioned). Thus, any punitive damages would fall outside the scope of the Convention.

**4. The Liability Regime:-**

The Warsaw Convention has established a fault liability regime with a reversal of the burden of proof. Thus, although the carrier is not liable unless the damage is caused by his fault, there is a presumption thereof; this presumption relieves the consumer from the duty of proving the carrier's fault. Nevertheless, the carrier can avoid liability by proving the contrary, *i.e.*, that the damage was not caused by his fault, or in other words, that he and his agents took all the necessary measures to avoid the damage or that it was impossible to take such measures.[33]

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[32] *Ibid.*, art. 18(2) states:
[t] he carriage by air... compromises the period during which the luggage or goods are in charge of carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

[33] See *ibid.*, art. 20.

**5. The Scope of Application:-**

The Warsaw Convention applies only to international carriage as defined in Article 1 of the Convention.[34]

**6. The Documents of Carriage:-**

The Warsaw Convention adopted a similar regime for the passenger ticket, the luggage ticket and the consignment note. The Convention requires the inclusion of certain particulars in the passenger ticket, the luggage ticket and the consignment note (Articles 3, 4, and 8 respectively). Furthermore, the Convention expressly states that "the absence, irregularity or loss of" these documents would not prevent the application of the Convention, nor alter the existence of the contract of carriage. Nonetheless, while the Convention obliges the carrier to deliver a passenger and luggage tickets to passengers; it gives the carrier, in case of carriage of goods, the right to ask the consignor to make and hand in a consignment note.

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[34] For the definition of international carriage by air, see *Warsaw Convention*, art. 1. See also *supra* note 17.

**7. Jurisdiction:-**

Article 28 of the Warsaw Convention gives the plaintiff the choice of bringing the action in:- (1) The ordinary place of residence of the carrier; or (2) the principle place of business of the carrier; or (3) the place where the carrier has an establishment by which the contract of carriage was made or 4- the place of the final destination of the passenger or the goods.

**B. The Factors that Affected this Balance:-**

It is obvious that the drafters of the Warsaw Convention intended to favour the carrier's interest over that of the consumer. The drafters granted the carrier the benefit of a fault limited liability regime and gave the consumers, in return, only the benefit of a reversal of the burden of proof and the ability to break the limits in certain circumstances only; the drafters also made the carrier liable only for certain kinds of damages and required strict conditions for establishing the carrier's liability. Indeed, the drafter's tendency of favouring the carriers' protection is obvious.

The reasons behind establishing (adopting) a balance formula more advantageous to carriers are understandable. Firstly, at the time the Warsaw

Convention was drafted, the air transport industry was at its infancy stage; not only was the industry weak and infant (the first airline was established only 10 years before the Warsaw Convention) but, in addition flying itself was considered as a hazardous adventure.[35] Thus, adopting such a balance formula was a means of financially protecting the weak industry from the conflicting interest of consumers. In light of the growing importance of air transport, especially at the military level, since the world was then emerging from the First World War and heading for the Second World War, the protection of the air transport industry was not questioned. In fact, the protection was even encouraged by states since almost all commercial airlines were owned and operated by the states themselves.[36] Second, the drafters of the Warsaw Convention were influenced by maritime law where a balance formula had also been adopted in favour of the shipowners. The influence on the limits of liability as a major factor in the balance formula, for example, is obvious; One commentator noted that influence as follows :-

> Many of the members of the conference of 1925 ( and the subsequent ones) were lawyers, who shortly before had prepared the Brussels Maritime convention, which provide[s] for the limited liability of the shipowner; since the limited liability was justified in favour of the shipowner, why shouldn't be so for the air carrier? Aircraft were of great purchase and operational value and delicate instrumentalities;

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[35] See P.S. Dempsey, "Pennies From Heaven: Breaking Through the Limits of Liability Ceiling of Warsaw" (1996) XXII:1 Ann. Air & Sp. L. 267 at 269 [hereinafter "Breaking the Limits"].

[36] M. Milde, "Warsaw Requiem or Unfinished Symphony? (from Warsaw to The Hague, Guatemala City, Montreal, Kuala Lumpur and to ...?)" manuscript [unpublished] at 45. Later published in [July 1996] Part I The Aviation Quarterly 37-51 [hereinafter "Warsaw Requiem"].

catastrophe accidents were not rare. [37]

Finally, it should be mentioned that no serious conflicts arose between states in accepting the balance formula adopted by the Warsaw Convention. The fact that only 30 states (mainly European) were represented at the Warsaw conference contributed greatly to that end. Since those states had similar economic, political, and social conditions, reaching a balance formula acceptable to all states was feasible. The Convention was eventually, until 21 August 1997, signed and ratified by 140 states. The reason for such universal acceptance of the Warsaw balance formula springs from the fact that almost all states had, at that time, similar, if not identical, economic, political and social conditions, and even those who had slightly different conditions were encouraged to join the Convention for the sake of unification of private international air law. Unfortunately, as would be seen later, these fine days and unique conditions of similarities did not perpetuate the unification of private international air law.

## II. THE HAGUE PROTOCOL OF 1955:-

The Hague Protocol increased the limits of the Warsaw Convention (concerning damages to passengers only) to double the Warsaw limits and brought some minor amendments to the Warsaw Convention concerning the documents of carriage and the

[37] Hadjis, *supra* note 11 at 18.

liability of the servants. However, these amendments did not profoundly, if at all, alter the balance formula, since even though the limits were increased they were actually only adjusted to inflation, which means that the value of the limits as set by the Warsaw Convention was not altered. Furthermore, the other amendments of the Hague Protocol to the Warsaw Convention were so trivial to affect the balance of the Warsaw Convention.[38]

## III. THE GUADALAJARA SUPPLEMENTARY CONVENTION OF 1961:- [39]

As with the Hague Protocol the Guadalajara Supplementary Convention, which was made applicable to the Warsaw Convention, did not profoundly alter the Warsaw Convention balance formula, since it only clarified the distinction between the liability regime of the actual carrier and that of the contractual carrier, enhanced the scope of application of the Warsaw Convention to include the actual carrier, and further expressly provided for the inclusion of the carrier's servants in the limited liability regime.

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[38] The Hague Protocol entered into force on the first of August 1963.

[39] *Convention Supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to the International Carriage by Air Performed by a Person Other than the Contracting Carrier*. ICAO Doc. 8181[hereinafter *Guadalajara Convention*]. This Convention came into force on the 1 of may 1964, ninety days after it had obtained the requisite fifth instrument of ratification.

## IV. THE MONTREAL AGREEMENT OF 1966:-

As has been mentioned earlier, the similarities among states in economic, social and political conditions that allowed states to reach a universal balance formula did not persist. The first major socioeconomic metamorphoses arose in the US, which led the US to formally reject the old Warsaw Convention balance formula and that of the Hague by not ratifying the Hague Protocol and later giving notice of its denunciation of the Warsaw Convention. As will be discussed in details later, the main objections of the US to the Warsaw balance formula were its low limits of liability and the obsolete fault liability regime, which gives the carrier a vast advantage over the consumers.

No efforts by states were made to preserve the uniformity of private international air law.[40] However, the uniformity was, to a certain limit,[41] saved by the airline industry, through IATA, whereby the US airlines and those major airlines flying to the US, with the approval of the US CAB, concluded the Montreal Agreement among themselves.

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[40] Some efforts, however, were made by ICAO. But these efforts did not succeed in accommodating the US needs and thus did not convince the US to withdraw its notice of denunciation. For more details about these efforts see chapter 5 of this study.

[41] Although the Montreal Agreement established a different limits of liability and a different liability regime the main frame of the Warsaw Convention has not been altered and ,thus unification of very important rules within the main frame of Warsaw remained unified.

The Montreal Agreement, which was made applicable to any contract of air carriage in which the US was a point of destination, departure, or merely an agreed stopping point, profoundly modified the balance of the Warsaw Convention. Indeed, the Montreal Agreement has shifted the balance formula from being more favourable to carriers to becoming more favourable to consumers; the limits of liability were raised from about US $10,000 to US $75,000 inclusive of legal costs and fees (or US $58,000 exclusive of legal cost and fees); the carrier was subjected to a strict liability regime by preserving the presumption of fault and not allowing the carrier to use the defence of Article 20 of the Warsaw Convention.

Accordingly, the US withdrew its notice of denunciation of the Warsaw Convention since its immediate needs were accommodated by the Montreal Agreement. Thus, uniformity of private international air law was, to a certain extent, preserved.

## V. THE GUATEMALA CITY PROTOCOL OF 1971:-

The Guatemala City Protocol was intended to modernize the prereading balance formula and bring it in line with the enormous economic, social, and political changes

that occurred since the Warsaw Convention.[42] But this Protocol never came into force and most certainly never will.[43]

The Guatemala City Protocol brought considerable amendments to the Warsaw Convention. It simplified the documents of carriage regime; it provided for the carrier's strict liability and increased the limits of liability up to the equivalent of US $100,000 expressed in a gold clause. These limits, however, were deemed unbreakable. Thus, contrary to the Warsaw Convention, the Guatemala City Protocol did not allow these limits to be broken in any case, as in, for example, wilful misconduct or non-compliance with the requirements of the documents of carriage. The Protocol further extended the kinds of compensable damages to include "mental injuries" in addition to "bodily injuries".[44] Moreover the Guatemala City Protocol extended the choice for the consumers concerning court's jurisdiction by giving jurisdiction under the Protocol to the courts of the passenger's residence. Finally, the Protocol allowed the adoption of a "supplementary compensation plan" by states that would offer consumers

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[42] These changes are mainly: the end of the infancy stage of the airline industry, the growing social pressure on states to end favoring the carrier in the balance formula, the increasing cost of living, the inflationary trends, etc.

[43] As would be seen later the 30th Session of the ICAO Legal Committee, when discussing modernizing the Warsaw System, did not consider bringing the Guatemala City Protocol into force as an option or a way of reaching this modernization.

[44] This was achieved by changing the term "bodily injury" to "personal injury".

compensation in excess of that stipulated by the Guatemala City Protocol.[45]

The balance of interest of the Guatemala City Protocol was considered more favourable to consumers than the balance of the Warsaw Convention. However, in light of the circumstances that existed at that time,[46] the balance of the Guatemala City Protocol was deemed more favourable to the carriers.

## VI. MONTREAL PROTOCOLS NOS. 1, 2 AND 3 :-

The Montreal Protocols Nos. 1, 2 and 3 amended the unit of compensation from being expressed in a gold clause to be expressed in the Special Drawing Rights (SDR). This amendment was necessitated by the demonetisation of gold which have become " just anther commodity finding its value on the market according the general principles of supply and demand".[47] As with the Guatemala City Protocol, the Montreal Protocols Nos. 1, 2, and 3 have not yet come into force and never will.[48]

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[45] *Guatemala City Protocol,* art. 35 A .

[46] Mainly the financially strong airline industry and the weak consumers.

[47] See "Warsaw Requiem", *supra* note 36 at 47.

[48] See *supra note* 43.

## VII. THE MONTREAL PROTOCOL NO. 4 :-

Montreal Protocol No. 4 brought some amendments to the Warsaw System with regard to cargo in order to bring the cargo regime up to the modern level that the passengers regime was expected to reach after the Guatemala City Protocol.

Those changes to the cargo liability regime were similar to those brought by the Guatemala City Protocol to the passengers liability regime, in that they simplified the requirements of the documents of carriage, adopted a strict liability regime, and deemed the limits of liability unbreakable.

# CHAPTER 3

## The Warsaw System Crisis and the Reaction of States and Airlines.

### I. THE WARSAW SYSTEM CRISIS:-

International air transport is a complex cross-border activity that should be regulated, on both the private and public levels, coherently. Particularly, liability rules in international air transport are very delicate. Without their unification internationally, the operation of international air transport would be impeded; conflicts of laws and conflicts of jurisdictions regarding liability in international air transport would, indeed, complicate and prolong the settlement of liability disputes, which would reflet negatively on both the consumers and the carriers.[49] The Warsaw Convention, and its amendments that have entered into force, has served its purpose of unifying the major

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[49] See ICAO letter to states LE 3/27, 3/28 - 91/3:
Unification of law relating to international carriage by air, in particular unification of law relating to liability, is of vital importance for the harmonious management of international air transport. Without such unification of law complex conflicts of law would arise and the settlements of claims would be unpredictable, costly, time consuming and possibly uninsurable. Furthermore, conflicts jurisdictions would arise which would further aggravate the settlement of liability claims.

aspects of private international air law by receiving wide universal acceptance.[50]

However, due to the lapse of time that rendered some of the Warsaw Convention rules obsolete, and due to the disunification in certain rules of the Convention that resulted mainly from some unilateral state's efforts to update the old Convention, the Warsaw Convention has been facing some major crises.

Accordingly, it can be said that the Warsaw crisis consists of the following two elements:-

**A. The Disunification of Private International Air Law:-**

The Warsaw System faced several successive disunification crises. The first was in 1965 when the US gave notice of its denunciation of the Warsaw Convention.[51] As explained earlier, this crisis was eased, but not actually cured, by the airlines adoption of the Montreal Agreement of 1966 which convinced the US to withdraw its

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[50] Until 21 August 1997, 140 countries were party to the Warsaw Convention which renders the Warsaw Convention one of the most universally accepted conventions.

[51] The reason why the denunciation by only one state (the US) of the Warsaw System would result in a crisis is the high amount of traffic that this country has. According to ICAO studies the total number of passengers in North America in 1995 was 0.5 billion passengers (42% of world total) and the North American airlines had an average of 0.9 trillion rpk (39% of world total).

notice of denunciation.[52]

In general, the Warsaw System faces a disunification problem because of being a system rather than just a single convention, *i.e.*, the method that was chosen to amend the convention (by a protocol to protocol to protocols) has contributed greatly to the disunification of private international air law. An amending protocol was not meant to preempt the preceding convention or protocol. Thus, states that ratify a certain protocol would be subject to this protocol in their relations with other states that ratified the same protocol while the latter states would be subject to the old protocol or convention in their relations with other states that did not ratify the latest amendments. Accordingly, even within the Warsaw System, states' relations could be governed by different regimes.[53]

Furthermore, as it would be seen later, the unilateral reactions of states and airlines to the Warsaw crisis have contributed to the disunification of private international air law.[54]

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[52] The reason why this crisis was only eased but not cured is that although the frame of the Warsaw Convention was preserved, a different liability regime was found for the passengers with destination, origin and stopping points in the US. Further this de facto amendment has been a step in the direction of the further disunification that has resulted from unilateral acts of states to *de facto* amend the Convention.

[53] The reason why not all states ratified the latest amendments of the Warsaw System would be discussed in details later on.

[54] For more details, see chapter 4 of this study.

## B. The Obsoleteness of the Existing Unified Private International Air Law Rules:-

The obsoleteness of the Warsaw System rules was caused by the failure to amend the System to meet the huge technical and financial changes that occurred after the Warsaw Convention was drafted.

### 1. The Technological and Financial Changes:-

The Warsaw Convention was drafted in 1929 to meet the conditions prevailing at that time. Even the last enforced amendment to the Warsaw Convention was made in 1955.[55] Thus, the technological and financial conditions that the Convention was made to serve have changed dramatically since that time.

On the technological level, the aviation technology at the time of the Warsaw Convention was still in its experimental stages. One source notes that:

> Aviation was then a relatively primitive endeavour, with aircraft made of wood, fibre, and some metal, powered by piston-driven gasoline fired engines, flown with stick and rubber by daring "barn

[55] This amendment was that of the Hague Protocol. Further, even the amendment of the Guadalajara Convention was made only in the 1961 and the *de facto* amendment of the Montreal Agreement was made only in 1966.

> storming" pilots who took-off and landed from dirt strips and navigated with visual landmarks and compass. With the limited technology available, the margin of safety for international air travel was disconcerting.[56]

Presently, aviation technology has attained a high level of development.[57] It is even being voiced that aviation has become technologically mature by reaching its technological peek.[58]

On the financial level, the air transport industry has changed dramatically from being a financially weak industry that needs protection to being a financially strong industry. Despite the loses the industry has accumulated,[59] the industry is still considered fit and fiscally strong enough to defeat the need for the protection it was given under the Warsaw System.

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[56] "Breaking the Limits", *supra* note 36 at 269.

[57] Air transport is now considered to be one of the safest means of transportation.

[58] The reason for that is that military aviation technology has reached a higher development level and that high technology was not employed in civil aviation for its inviability economically, like not employing the supersonic technology in civil aviation.

[59] "Airlines in Turbulence", *supra* note 21 at 18:

> From 1977 to 1992, the global air transport industry earned gross revenue of just over $2 trillion, while operating expenses were $1.96 trillion; operating profit was 2% of the revenue, and net profit was a maeger 0.6% of revenue. Worldwide, airlines have experienced a $15 billion shortfall over the last four years.

**2. The Failure to Update the Warsaw System:-**

The failure to internationally update the Warsaw System has perpetuated the Warsaw System crisis. The reason why states failed to modernise the Warsaw System will be discussed, in details, later on in this study. In short, the efforts to uniformly modernise the Warsaw System by bringing Montreal Protocols Nos. 3 and 4 into force have failed due to the acts of one state. Professor Milde summarizes the reason for the failure to bring this modernized version of the Warsaw System into force as follows:

> Those who participated in the 1971 Guatemala City Conference and the 1975 Montreal Conference will recall that at that time only one country urgently required an amendment to the Warsaw System -the US. The Conferences were in fact a dialogue between the US and the rest of the world. The "rest of the world" recognized the practical problems of the US and made vast concessions to accommodate their needs. The Guatemala City Protocol was a compromise between the US and the rest of the world; Article XX of the Protocol makes it clear that the Protocol cannot enter into force without ratification by the US. In 1975 the Montreal Conference further accommodated the wishes of the US and further amended the Guatemala City Protocol by replacing the gold clause with the SDR; however, Protocol No. 3 created a new, separate and distinct instrument- "Warsaw Convention as amended at The Hague, by the Guatemala City Protocol and by Additional Protocol No. 3" which can enter into force upon ratification by any 30 states. Ratification by the US is not an indispensable condition for its entry into force.[60]

Professor Milde continues:

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[60] See "Warsaw Requiem", *supra* note 36 at 47.

> The world kept waiting for the action of the US to ratify Protocol No. 3 and states were delaying their own actions pending the result of ratification by the US Senate. It must be mentioned with full frankness that all US administrations have been honestly committed to the ratification of the modernised Warsaw System but the difficulties arise in the Senate in view of the conflicting interests of the influential pressure groups, in particular the powerful lobby of the trial lawyers.[61]

In conclusion, the weak financial and technological conditions that have justified the carriers' protectionism-oriented balance formula in the Warsaw Convention are no longer valid to justify such balance formula at present. Accordingly, since efforts to update the old balance formula have uniformly failed, the Warsaw System has been facing a major crisis. This crisis has been made worse by some unilateral acts to ease the it disunifying private international air law.

## II. THE REACTIONS TO THE WARSAW SYSTEM CRISIS:-

The Warsaw System crisis has reached an unbearable level; unrealistically low limits of liability, obsolete fault liability regime, unpractical document of carriage system, etc. Since efforts to modernise the Warsaw System have failed, some states and airlines, out of the frustration to uniformly modernize the Warsaw System, have begun to take unilateral steps to *de facto* amend the Warsaw System.

The reactions to the Warsaw System crisis can be classified as follows:-

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[61] *Ibid.*

### A. Unilateral Actions by States:-

#### 1. Italy:-

The Italian response to the Warsaw System crisis was unique. In 1985 the Italian constitutional court, in Decision No. 132/1985, deemed that the limits of the Warsaw Convention as amended at the Hague were unconstitutional "incompatible with the constitutional principles of the fundamental liberties granted to all citizens under the constitution of 1948" .[62] Later on, in 1988, the Italian parliament approved Law No. 274 which encompassed the later judgment.[63] That law, which increased the limits of the Hague Protocol for death or injury of passengers to 100,000 SDR, was made applicable to all Italian air carriers wherever they operate and to all other foreign air carriers when they operate to, from, or through Italy.

#### 2. The United States of America:-

Beside the *de facto* amendment of the Montreal Agreement, which can be attributed to the actions of the US, the US has been *de facto* amending the application of Warsaw System in the US by case law. The US courts have been interpreting, or

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[62] See G. Guerreri, "The Warsaw System Italian Style: Convention Without Limits" (1985) X Air L. 294-305.

[63] See G. Guerreri, "Law No. 274 of July 1988: A Remarkable Piece of Italian Patchwork"(1989) XIV Air L. 176-182.

even misinterpreting, the Warsaw Convention in favour of the consumers in order to balance the vast advantages that carriers enjoy under the Warsaw Convention and even the Montreal Agreement. The US courts have been using any loophole in the Warsaw System to break the limits of the carrier's liability. They have deemed the carrier's failure to give a notice of a certain size font worthy of breaking the limits of liability;[64] regarded the carrier in default with Article 3 of the Warsaw Convention if he did not deliver the passenger ticket at a certain point in time;[65] and, finally, considered the carrier grossly negligent in cases where the damage was caused of accidents beyond his control.[66]

Furthermore, in its answer to ICAO questionnaire on air carrier liability, the US has expressed its intention to take a unilateral action to terminate the limits of liability for both national and foreign air carriers for "all international journeys ticketed in the United States and all United States citizens or permanent residents

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[64] See *In Re Crash Disaster at Warsaw, Poland, on March 14, 1980*, 16 Avi 18,249 (1980). It should be mentioned, however, that this rule was reversed by the US Supreme Court in *Elisa Chan, et al. V. Korean Airlines*, 21 Avi 18,228(1989).

[65] See *John Lisi, etc., al. v. Alitalia-Linee Aeree Italiane*, 9 Avi 18,374 (1966). The United States' Court of Appeals held that "we read article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitations of liability."

[66] See *In Re Korean Airlines Disaster of September 1, 1983*, 19 Avi 17,596 (1991)

travelling internationally on tickets issued outside the United States".[67]

**3. Other States:-**

Other developing and developed states from around the globe have taken unilateral actions to modernise the Warsaw System. For example, Australia increased the limits of some of its air carriers' liability to SDR 260,000; and Belgium did the same but only up to SDR 100,000. Denmark, the United Kingdom and Switzerland have increased the limits of liability of all their national air carriers to SDR100,000.[68]

**B. Regional Actions by States:-**

The regional joint actions by states can be illustrated by Recommendation 16/1 of the Sixteenth Plenary Session of the European Civil Aviation Conference (ECAC).[69] The Recommendation urged carriers to enter into an intercarrier agreement to raise their limits of liability to at least SDR 250,000. Anther example can be found in the

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[67] ICAO, *Socio-Economic Analysis of Air Carriers Liability Limits*, ICAO Doc. AT-WP/1769 at A-3(1996), app. at A-3 [hereinafter "ICAO Socio-economic Analysis"].

[68] *Ibid.*

[69] The ECAC states are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Monaco, Netherlands, Kingdom of the, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, turkey, United kingdom.

decision of the Commission of the European Union that proposed a Council Regulation on air carrier liability which would subject the carriers for a strict liability regime up to ECU 100,000 and fault liability thereafter with no limits of liability.

### C. Actions by Airlines:-

Spontaneously, carriers from around the world have agreed to increase their limits of liability. Some airlines from Austria, Brazil, Bulgaria, Canada, Colombia, Finland, France, Luxembourg, New Zealand, Portugal, Sweden, And the United Arab Emirates, have increased their limits of liability up to SDR 100, 000. Some German carriers, even, increased their limits of liability up to SDR 250, 000. And, finally, all Japanese air carriers have amended their conditions of carriage to be subject to a strict liability regime up to SDR 100, 000 and have presumed fault regime beyond SDR 100, 000 with no limits of liability at all.[70]

### D. Joint Actions by Airlines Through IATA:-

In addition to the 1966 Montreal Agreement,[71] IATA asked, in 1993, for antitrust immunities ,from the European Commission and the US Department of Transportation (DOT) to discuss the issue of modernizing the Warsaw System,

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[70] See "ICAO Socio-economic Analysis", *supra* note 67 at A-4.

[71] For more details, see chapter 2 of this study.

particularly the low limits of liability for international air carriers. After being granted antitrust immunities,[72] IATA, in 1995, convened an airline liability conference in Washington. The conference concluded that the limits of liability of the Warsaw System are "grossly inadequate and should be revised as matter of urgency"; and that, however, this should be done with preserving the Warsaw System. The conference, further, urged the governments, through ICAO, to update the Warsaw System, and in particular to bring Montreal Protocol No. 4 into force as a matter of urgency which should be considered separately from Montreal Protocol No.3 .[73]

Later, at the Kuala Lumpur IATA conference in 1995, IATA adopted the Intercarrier Agreement on Passenger Liability (IIA), which was signed at that time by twelve carriers[74]. The IIA was considered as an "umbrella accord" that encompassed the general understanding of the airlines to waive the limits of liability, thus, allowing passengers full recovery of compensable damages for death or injury to passengers. It

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[72] The European commission granted an unconditional immunity, while the US DOT granted a conditional immunity. The DOT required, inter alia, that the liability of the international air carriers, towards passengers on international routs ticketed in the US and any US citizens and permanent residents traveling on any international rout, should be a strict liability with no limits of liability, similar to the regime in force for US domestic air transport.

[73] The conference, further, objected to the conditions set by the US DOT order that granted antitrust immunities to IATA, since it would, inter alia, create unnecessary discrimination among passengers based on nationality. It should be mentioned that due to these rather strict conditions the Washington conference failed to come up with an intercarrier agreement to update the Warsaw System.

[74] This Agreement was later on and until the thirteenth of January 1997, signed by 80 airlines .

also waived any defence under the Warsaw Convention, either up to a certain monetary limit, or without limits.

In 1996, the Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA), that was drafted by the IATA Legal Advisory Sub-Committee on Passengers Liability, was opened for signature to airlines.[75]

The MIA is an intercarrier agreement under which the airlines undertake to amend their conditions of carriage to comply with the regime founded by the MIA. The regime adopted by the MIA is very similar to that encompassed in the "Japanese incitive": a strict liability regime up to SDR 100 000, and a presumed fault liability regime beyond SDR 100,000.[76] Furthermore, the MIA gives the carriers the option of accepting the application of the law of the domicile or permanent residence for determining the recoverable compensatory damage. Moreover, the carriers are given the chance, subject to necessary government authorization, to adopt limits lower than the SDR 100 000 on specific routes that could be well covered by lower limits.

The Air Transport Association (ATA) has also adopted its own implementing agreement (IPT). Although the IPT, like the MIA, is made in the lines of the IIA, it

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[75] Until January 1997 the MIA was signed by 47 airlines.

[76] In other words the carrier can not use the defense of article 22(1) for claims under article 17 if the claim does not exceed SDR 100, 000 and can do so in excess of SDR 100, 000 .

implements the IIA in a slightly different way than the IPT.

On November 1996, the US DOT approved the IATA package.[77] This approval was, however, accompanied by some conditions that could have challenged the application of the whole agreement.[78] The conditions were:-

(1) that the application of the law of the domicile as provided in the MIA be obligatory in the case of passengers having origin, destination, stopping points in the US; and

(2) that the optional provision that allowed the carrier to adopt limits lower than SDR 100,000 on some specific routes, not be used by carriers on routes from, to, or stopping in the US.[79]

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[77] The IIA, MIA, and IPT.

[78] The US DOT conditions were attacked and criticized by many interested parties and schoolers. See, for example," Letter of M. Milde, to P.V. Murphy, Deputy Assistant Secretary for Aviation and International Affairs, Department of Transport. Printed in documents of McGill Conference: *Air and Space Law Challenges: Confronting Tomorrow* (Montreal : Institute of Air and Space Law, 1996) at 4 [ unpublished]. See Also L.S. Clark "The IATA Liability Agreement: How the US DOT May Be Snatching Defeat from the Jaws of Victory" (1997) XXII:I Ann. Air & Sp. L. 67-71.

[79] The order has required more conditions such as:-
(1) The provision for waiver of the Warsaw passenger liability limits, in its entirety, would be applicable on a system wide basis.
(2) For transportation to and from the U.S. , the provisions of the agreement would apply with respect to any passenger purchased a ticket on an airline party to the agreement, including interlining travel on carriers not party to the agreements. The carrier ticketing the passenger, or, if that carrier is not a party to the agreements, the carrier operating to or from the United Sates, would have the obligation either ensure that all interlining carriers were parties to the agreements, as conditioned, or

On 8 January 1997, the US DOT, at the request of IATA, issued Order 97-1-2 by which the DOT retreated from its previous conditions and accepted the IATA package unconditionally.

Since the limited presumed fault liability regime is to the carrier's advantage, it is legitimate to wonder why the carriers would spontaneously give away that advantage by agreeing to subject themselves to a regime of limited and/or strict liability. It is utopian to assume that the reasons for the airlines' action were strictly fairness and the consumers' well-being. In fact, the airlines took these actions for one or more of the following reasons:-

(1) Carriers wanted to avoid being subjected to a stricter regime which might be adopted by states in the future.

(2) By agreeing on a somewhat unified regime and by preserving, to some extent, the Warsaw System, the carriers hoped to avoid long and costly litigations. Without unification of private international air law, litigation would be very complex, costly and lengthy. Accordingly, carriers wanted to avoid that by preserving the Warsaw System frame. Moreover, by accepting an unlimited liability regime, the carriers can avoid the

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to itself assume liability for the entire journey. (See Warsaw Article 30(1) and (2) ).

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

See DOT Order to Show Cause 96-10-7.3.

prolonged litigation that result from using the legal means of backing the liability limits , *i.e.*, proving wilful misconduct or non delivery of the documents of carriage.

(3) Carriers with an unlimited and/or strict liability regime will have a competitive advantage over carriers subject to the former limited fault liability regime; for the first regime is more favourable to the consumers than the second.

(4) Mega carriers in favour of liberalization (e.g., open skies policies ) might think of the latter competitive advantage as a means to reach liberalization. [80]

## III. THE EVALUATION OF THESES ACTIONS:-

All the aforementioned actions, put together, only palliated the Warsaw System crisis. In other words, although these actions have, to a certain extent, solved the obsoleteness problem of the Warsaw System, they did not solve the disunification problem, but, in fact, only made it worse.

As Mr. Poonoosamy, the Rapporteur to the 30th ICAO Legal Committee Conference, stated in his report on the Modernization and Consolidation of the Warsaw System:-

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[80] As would be seen later, big airlines have an insurance advantage over small and medium airlines under an unlimited liability regime. Accordingly, small and medium carriers would face difficulties competing and might eventually be thrown out of the market.

> Self-evidently, a major shortcoming of the Warsaw System, which ironically was designed for the unification of certain rules relating to the carriage by air, is now its very lack of uniformity on a most crucial point of the system. With the various permutations within the Warsaw System (including the instruments which are not yet in force), it is estimated that there are potentially some 44 different combinations of liability regimes.

too many quotes!!

Mr. Poonoosamy continues:

> As Professor Bin Cheng, Emeritus Professor of Air & Space Law in the University of London, pointed out more than 20 years ago:
> "The resultant situation is, therefore, one of utter chaos. Not even an expert in the field is always able to tell which regime a particular carrier comes under unless he is armed with a multitude of reference data, not all of which is always readily available. Even legal advisers and judges are confused. This possibility is in itself prejudicial to the interest of the public. But apart from the confusion consequential prejudice which this multiplicity of liability creates, the present system or rather lack of system breeds inevitable discrimination among users of air transport.

The rapporteur finally concludes that :

> [t]he current disunification of the Warsaw System carries the seeds of its destruction. Yet the disunification of the Warsaw System will not be to the advantage of either passengers or carriers since its benefits, for example, in removing choice of jurisdiction conflicts outweigh its disadvantages which arise primarily from limitation of liability."[81]

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[81] *Report of the Rapporteur of the 30th Session of ICAO Legal Committee on the Modernization and Consolidation of the Warsaw System*, of ICAO Doc. LC/30-WP/4 (1996), app. A.

Furthermore, all these reactions create legal complexity and uncertainty. First, it is well-known that the Warsaw Convention is an international convention between states and according to the general principles of international law and the law of treaties, it can only be amended by the states party thereto and not by unilateral actions of states or airlines.

As for the airlines legal capacity to conclude such agreements, Article 32 of the Warsaw Convention states that "any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down in this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, *shall be null and void* " *(* emphasis added *)*. However, the Warsaw Convention permits that its rules not be abided by in some aspects where it expressly allows so.[82]

Despite the wide acceptance of the IATA agreements, the IATA solution is only a temporary one. Professor Milde asserts that "the Kuala Lumpur Agreement does not represent the end of the road; it is only a temporary and pragmatic "Band-Aid" solution showing a possible way out of the impasses in which the states have been for some 30 years".[83]

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[82] Article 22 of the Warsaw Convention, for example, permits the increase of the limits of the carrier's liability by a special contract with the passenger. See *Warsaw Convention, supra* note 1.

[83] See "Warsaw Requiem, *supra* note 36 at 55.

What could make the IATA Agreement more problematic is that Article 20 of the Warsaw Convention allows the limits of liability to be exceeded by a special contract between the passenger and the carrier, while the IIA is an agreement between airlines. Thus, the obligation of carriers under this Agreement is towards other carriers rather than the passengers. This could raise the following legal problems:-

(1) If a carrier party to an IATA Agreement concludes a contract of carriage with a passenger contrary to the IATA Agreement, the question arises as to whom that airline is responsible to that violation - the other airlines or the passenger? And, what is the penalty of this violation? In that case the carrier is not responsible to the passenger, the contract of carriage concluded with the passenger should prevail over the IATA Agreement since the obligation under the IATA Agreement is towards other carriers party to the agreement not the passengers. Yet, it is far from clear what the penalty of this violation is, if there is one at all; and what measures other carriers can take to remedy the situation and avoid future violations.

(2) The latter problem is further complicated due to the fact that the Warsaw Convention considers the documents of carriage only as *prima facie* evidence. Thus, if the real intention of the parties to the contract of carriage is to be examined in each case, litigation would be very complex and lengthy.

In short, although all the aforementioned actions, to a certain extent, solved the obsoleteness crisis of the Warsaw System, they only made its disunification crisis worse. Furthermore, all the solutions found by these actions have serious inherent defects which would result in legal implementation problems.

# CHAPTER 4

## Socioeconomic Analysis of the Warsaw System Crisis

### I. INTRODUCTIONS:-

When domestically regulating air transport, states balance the interests of airlines and consumers according to their socioeconomic and political conditions. However, when balancing the interests of airlines and consumers internationally, a conflict of interest between states is likely to arise since each state might have different conditions that need to be accommodated by different balance formulas. Thus, states should reach a compromise as to which balance formula should be adopted in order to avoid the chaos that would otherwise result from the disunification of private international air law.[84]

The Warsaw Convention of 1929 was adopted at a time when states had similar socioeconomic and political conditions, so it was a successful unification of private international air law, since no conflict of interest arose between states. Nevertheless,

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[84] See chapter 3 of this study.

by the lapse of time, some states had dramatic changes in the conditions affecting the balance formula, while other states did not have any changes. Thus, a conflict between states started taking place. Since all efforts to reach a compromise that would save the unified private international air law failed,[85] the states that needed the change could not bear the situation and started taking unilateral actions to *de facto* amend the old balance formula. Accordingly, the Warsaw System started to face disunification crisis.

The first conflict arose in 1965 between the USA and the rest of the world. The US wanted to change the old balance formula of the Warsaw Convention because it had special socioeconomic conditions.[86] Thus, the US gave notice of its denunciation of the Warsaw Convention. In 1966, the aviation industry through IATA, avoided the disunification problem that would have resulted from the US denunciation of the Warsaw Convention by adopting the Montreal Agreement, which *de facto* amended the Warsaw Convention and accommodated the US need for change.[87] Although the Montreal Agreement solved the disunification problem that would have resulted from the US denunciation of the Warsaw Convention, it was the first step to the more

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[85] The Guatemala City Protocol, the Montreal Protocols Nos. 1, 2, 3, and 4 which never entered into force and never will.

[86] These conditions are mainly:- (1) The US never ratified the Hague Protocol, thus it had the old Warsaw Convention limits. (2)The US had a very high cost of living compared to other states, thus the Warsaw limits were inadequate for it. (3) Domestically, the US carriers were never subject to a limited liability regime.

[87] Accordingly, the US withdrew its notice of denunciation later on. See chapter 2 of this study for more details.

complex disunification crisis that we are facing today.

Presently, the conflict is between developing countries on the one hand and developed countries on the other or, in other, words between countries with big airlines and countries with small or medium airlines. In general, developed countries have socioeconomic conditions that necessitate a change in the old balance formula that is carrier protection oriented. However, although not all developing countries were satisfied with the old balance formula, they were all still keen on maintaining some carrier protection in the future balance formula.

According to a study conducted by ICAO:

> The dissatisfaction with the present situation (regarding the carries' limits of liability towards passengers) was fairly general throughout the world. It ranged from 5 to 8 (63 per cent) responding States in Asia/pacific to both States in North America. In the other four geographical regions dissatisfaction was expressed by 11 of 14 (79 per cent) responding States in Africa; 20 to 30 (67 per cent) in Europe; 8 to 9 (89 per cent) in Latin America/Caribbean and 6 to 8 (75 per cent) in the Middle East.[88]

It should be mentioned that this ICAO study was based on a questionnaire prepared by ICAO and sent to states. Only seventy-two states (40 per cant of ICAO's members) responded to the questionnaire. Thus, the results are not very accurate, and

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[88] "ICAO Socio-economic Analysis", *supra* note 67 at 2. ICAO conducted further studies concerning the limits of liability in regard to cargo and baggage to find that only 41 states (out of the 72 responding states) are dissatisfied with the current situation regarding baggage, and only 35 states were dissatisfied with the current situation regarding cargo.

the claimed "general dissatisfaction" is not as general as it may sound. Moreover, even if this claimed dissatisfaction is general, or even universal, it does not mean that there is a general or universal agreement between states as to how this dissatisfaction should be solved. In other words, there is still a conflict between states as to what balance formula should be adopted.[89]

Because this conflict was not solved, despite all the efforts made to reach an international compromise,[90] some states and airlines have taken unilateral actions to de facto amend the Warsaw System. This has resulted in anther, yet more complex, disunification crisis. One commentator noted that:

> This concept of uniformity has been described as "a precious international gift which so far has not been insufficiently recognized in the current debate on the value of the Warsaw System". *The most trenchant problem has been to maintain uniformity while different economic conditions prevail and to cope with the increasing*

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[89] If we take, for example, the limits of liability, which is one the of the most controversial matter among states, we can see that although most states are not satisfied with the current limits, states disagree on the limits to be adopted. The responses to the ICAO questionnaire indicates, as would be seen later, that most countries from Africa, Latin America/Caribbean and Middle East were in favor of liability limits not exceeding SDR 100,000. While other states from Asia/Pacific, Europe, and North America stated that they would not settle down for any limits bellow SDR250,000, even 21 of these states were in favor of unlimited liability.

[90] See *Guatemala City Protocol*, *supra* note 3, *Montreal Protocol No. 1*, *supra* note 4; *Montreal Protocol No. 2*, *ibid*; *Montreal Protocol No.3*, *ibid*; *Montreal Protocol No.4*, *ibid.*

*disparity between industrialized and developing countries.*[91]

## II. THE SOCIOECONOMIC CONDITIONS AFFECTING THE DESIRED BALANCE FORMULA IN DEVELOPED AND DEVELOPING COUNTRIES:-

In general, developed countries have socioeconomic conditions that are best accommodated by, *inter alia*, a strict unlimited liability regime or a strict liability regime up to a certain monetary amount and unlimited fault liability regime thereafter, either with a reversal of the burden of proof or without. Developing countries, on the other hand, have socioeconomic conditions that are best served by a more carrier protectionist regime: either presumed fault limited liability regime, fault unlimited liability regime, or strict liability regime up to a certain monetary amount and fault unlimited regime thereafter.

The difference in the socioeconomic conditions between developing and developed countries that requires different balance formulae can be summarized as follows:-

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[91] S.H. Shin. "The Warsaw System: Liability and the Common Interest" (1997) XXII:I Ann. Air & Sp. L. 261 at 262 [emphasis added].

**A. The Cost of Living:-**

The first economic condition that differs and, thus causes a conflict between developed and developing countries is the cost of living. Developed countries with a high cost of living desire higher limits for the carriers liability or even no limits at all. Developing countries with low cost of living, on the other hand, desire lower liability limits for the carrier's liability.[92]

The courts' awards for international death and injury cases would illustrate the vast difference between developing and developed countries. In the US, for example, according to a study by the General Accounting Office on aviation disasters, the average recovery for wrongful death in international aviation accidents are US $ 200,000 for cases settled without trial, and US $330,000 for cases that are litigated.[93] While these amounts are considered to be relatively low in the US , as compared to the US domestic aviation accidents awards (almost half the amount),[94] they are considered

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[92] This is only normal because the low limits in developed countries would be insufficient to compensate the damage done to the consumer while it would be sufficient to remedy the damage in developing countries.

[93] United States, General Accounting Office, *International Aviation Implications of Ratifying the Montreal Protocol No. 3* (Washington, D.C.: The Office, 1990) at 5.

[94] Dempsey asserts that:

> The Rand's Institute for Civil Justice studied 2,200 death cases from 25 major US domestic airline accidents between 1970 and 1984 and found that the average award to families of people killed in such accidents was $321,300 during the first half of that period, and $408,500 in the second

to be enormously high in other parts of the world. In the Gulf countries, for example, which are considered to be some of the richest developing countries, the awards do not even come close to 1/8th of the US awards. The following table shows the limits of compensation in some of the gulf countries.[95]

| COUNTRY | LIMITS |
|---|---|
| SAUDI ARABIA | $27,000 |
| U.A.E. | $41,000 |
| OMAN | $13,000 |
| QATAR | $28,000 |
| KUWAIT | $34,000 |

This vast difference in the costs of living and judicial awards between developing and developed countries constitutes a large obstacle for adopting a unified

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half, about a third of which was attributed to non-economic damages( e.g., mental anguish, pain and suffering), much of which would not be recoverable under Warsaw. It also studied the litigation and settlement results in 14 accidents involving 890 deaths under tickets covered by Warsaw/Montreal, finding that the $750,000 ceiling was imposed in only 11% of the deaths. The average compensation for passengers flying on Warsaw/ Montreal tickets was $78,587, while the average recovery for these not restricted by Warsaw was $474,990.
See "Breaking the Limits", *supra* note 35 at 274.

[95] See F. Alzayani. *Liability and Insurance Issues in the Gulf Region.* (Kuwait Airways insurance and Safety Conference, Kuwait, 1995) [unpublished].

private international air law instrument with a limited liability regime that would be acceptable to all countries.

**B. Social Pressure:-**

Connected to (A) above, countries with high cost of living, in which the limits of the carrier's liability are inadequate, face social pressure to adjust or abolish the limits of liability to meet the high cost of living in their society.[96]

Moreover, these countries face pressure to increase the carrier's liability limits or abolish them from other third parties in the society. For example, developed countries face pressure from the aircraft manufacturers, airport authorities, air traffic controllers (ATC). The latter are effected by the liability regime of air carriers because they are potential defendants in some death and injury cases against the air carrier. Since none of these parties' liability is limited, while the air carries liability is limited, they lobby to put pressure on the states to put a limit to, what they think, is unfair carrier protection. Furthermore, some countries face pressure from trial lawyers. In the US the powerful trial lawyers lobby against any attempt to adopt a liability regime that would protect the carriers or limit their liability.[97]

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[96] This pressure is maximized by the increasing interest of the media and families support groups in the issue of the carriers liability.

[97] Because the low limits of the carriers' liability means low compensation to the consumers and thus low legal fees for the lawyers.

On the other hand, countries with low cost of living, in which the limits are adequate, do not face such social pressure. The only pressure these countries face is, on the contrary, from their national airlines that require the protection offered to them by the Warsaw System.

**C. The Ownership of the National Airlines:-**

Countries with state owned airlines, mainly developing countries, are generally keener on a carrier protectionist balance formula. Specifically, a strict unlimited liability regime would burden their state-owned, usually uneconomic, airlines with extra expenses and debts.

Countries with privately owned-airlines, mainly developed countries, do not have the burden of subsidizing their airlines' extra expenses and debts. Therefore, these countries are usually more influenced by domestic pressure for consumer protection.

**D. The Domestic Liability Regime of Air Carries :-**

Developed countries with a domestic air carrier liability regime that is less carrier protectionist have another reason to desire an international liability regime that is more consumer protectionist oriented. This reason springs from the fact that the

airlines of these countries have adjusted their conditions to the strict domestic liability regime, thus the effect of the international strict liability regime would be mitigated for them. The airlines of other states which are not used to such regimes would need more time to adjust their conditions to survive in such a regime.

One commentator asserted the following:

> In relative terms, carriers which are already exposed, by law, contract or in reality to the consequences of unlimited passenger liability, will suffer mild consequences, since they are already paying an insurance premium which is arguably commensurate with the exposure. These airlines are thus in a relatively strong position to decline immediate demands for premium increases.

He continues

> the category of airlines which may thus escape immediate rate increases if limits are abolished or raised includes all US and Japanese carriers and, in addition but to varying degrees, all non-US carrier which are parties to CAB 18900 (the Montreal Intercarrier Agreement of 1967).[98]

**E. Insurance:-**

The fact that some airlines of certain countries have an advantage, in their liability insurance, over other airlines constitutes another obstacle in the way of

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[98] S. Brise, "Economic Implications of Changing Passenger Limits in the Warsaw Liability System" (1997) XXII:I Ann. Air & Sp. L. 121 at 128.

reaching a universal compromise balance formula.[99]

The insurance premium each airline pays depends on the risk exposure of that airline and its size (the economies of scale).[100] Accordingly, since each airline has different risk exposure and different economies of scale, the effect of an increase in the limits of liability or an abolishment of the limits would differ from one airline to another in such a way that some airlines would have an insurance advantage over the others.[101]

ICAO's secretariat summarized the factors by which the risk exposure of airlines is measured as follows:-

> In general insurance will take a number of factors into account in arriving at the rate charged for given airline liability exposure, such as: the amount of traffic carried; the geography of the routes served, particularly if these involve countries as Japan or the United States

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[99] It could be argued that although this advantage existed at the time of the Warsaw Convention it did not consist an obstacle in the states' way to reach a compromise. However, under a strict unlimited liability regime this advantage would be maximized to the extent that some states would not be able to afford it. Thus, under a strict liability regime the difference in the liability insurance premium consists a big obstacle in the states' way to reach a compromise.

[100] For the definition of risk exposure, see Brise, *supra* note 98 at 127. The term risk exposure "is used to denote a higher or lower degree of risk. It includes, as main elements, the expected frequency of claims and the expected average claim amounts. It has nothing to do with comparative pressure on rates in the marketplace, although that may ultimately prove to be the dominant price factor."

[101] *Socio-Economic Analysis of Air Carrier Liability Limits by IATA*, reprinted in ICAO Doc. AT-WP/1773 (1996) at 2 [hereinafter "IATA Socio-economic Analysis"].

> where awards for personal injury are high; the exposure to risk on war insurance coverage; the nature of the route mix (such as domestic and/or international) and the liability regimes governing these routes; the types of passengers carried (businessmen, tourists, domicile) and the loads involved; the airline's claim history and premiums it has paid; the amount of each claim the airline agrees to pay before calling in the insurer, that is the "deductible"; the airline's reputation and known safety consequences; the type and age of aircraft operated; any particular liability exposure affecting the airline in question; and the rates which comparable airlines are paying. However as significant as all these elements may be, the most important of all is the capacity of the market, that is the sum of the risk exposure which each insurer is prepared to take. [102]

The other element that affects the insurance premiums the airlines pay is the size of the airline (economies of scale). The bigger the airline the more and better insurance offers it attracts; thus the cheaper the insurance premium becomes. In fact, big airlines pay higher insurance premiums than smaller airlines. However, relatively those premiums are cheaper than those of smaller airlines. It should, however, be mentioned that small airlines can enjoy the advantage of the economies of scale by concluding a poll insurance agreement with the insurers.

Muddled reasoning

Since big airlines of developed countries have less risk exposure and bigger economies of scale, they would have an advantage over small and medium airlines. The question is: What is the estimated increase in insurance premiums that a new strict unlimited liability regime will bring and how vast is the advantage that big airlines would have over small and medium airlines (how big is the gape between small air

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[102] See "ICAO Socio-economic Analysis", *supra* note 67 at 4.

lines and big airlines) ?

The increase or abolishment of the airlines' limits of liability would result in an increase in the compensation amounts claimed by consumers, meaning higher risk exposure. If the risk exposure increases, the airlines' insurance presumes will rise accordingly. Now to answer the first question: What is the expected increase in the insurance premiums? Due to a lack of data, it is impossible to accurately calculate this expected increase. Some experts suggest that the increase in the insurance premiums would be around 30 per cent.[103] Others estimate the increase to vary from 0 to 150 per cent.[104] The increase itself does not raise a conflict between states if it is distributed evenly. What actually causes the conflict between states is that the percentage of the increase will not be the same for all airlines. Now to answer the second question: How vast is the advantage that big airlines would have over other airlines?

According to IATA:

> In the event of an increase in the limit, the estimated increase premium for the policy covering inter alia passenger liability ranged from 0 to 30 per cent in Africa, 35 per cent in Latin

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[103] *Ibid* at 5.

[104] IATA believes that the increase in the insurance presumes would not be enormous since: (1) Some airlines already face the risk of breaking the limits of liability in some liberal jurisdictions such as the US. (2) Applying the law of the domicile rule would make the awards more realistic and moderate. (3) Under an unlimited liability regime the insurers would be able to calculate the insurance presumes on a realistic basis. See, "IATA socio-economic analysis", *supra* note 101 at 2.

> America/Caribbean , 5 to 50 per cent in Europe, 100 per cent in the Middle East, and 25 to 150 per cent in Asia/Pacific. Some of the air carriers pointed out that any increase to the premium would be dependent upon the behaviour of the particular insurance company and the London insurance market; some predicted their estimates of a high increase in premiums upon liability limits up to SDR250,000. One air carrier estimated an increase of 25 per cent if all airlines adopted higher limits.[105]

According to ICAO the effect of the increase would be trivial. The ICAO secretariat asserts that:

> It would appear that even in a worse case scenario any increase in fares corresponds to the increased costs concerned would in most cases be well under U.S. $2 per round trip (with the highest exception remaining in a single dollar figure) which may be compared with the average international round trip fare paid of about U.S. $620 in 1994.[106]

The ICAO Secretariat further, trivialized the impact of the increase or abolishment of the limits by comparing the increase to the huge operational cost of airlines. They noted that :

> [F]igures on the increase in the insurance premiums, whether in percentage terms or in global amounts, may appear to be large, but these must be put in the context of what they may represent in terms of increase in the over-all cost of operation and, ultimately, in terms of any corresponding increase in fairs.[107]

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[105] *Ibid.*

[106] See "ICAO Socio-economic Analysis", *supra* note 67 at 5.

[107] *Ibid.*

This argument, however, is not as sound as it may appear to be. Seven Brise refuted the latter argument as follows:

> The oft repeated general observation that the liability premiums make up that fraction of industry operating costs is at best though-provoking. In an industry which is known to be comparative, bordering on suicidal, and where individual companies without exception are under constant pressure to reduce cost, no avoidable cost item, big or small, is acceptable. New cost are therefore resisted, unless they add value to the product which motivate a higher price, or adds market share. Any other attitude would imply that airlines are run as charitable institutions, which is an absurd thought. A slightly more meaningful background for attempts to measure the cost impact of reform would be to compare aggregate insurance costs for scheduled carriers - currently around US $2 billion per annum- with the corresponding annual profit figure - estimated to be around US $5.5 billion; a figure which, one might add, has fallen below previous forecasts, due to recent substantial increase in fuel cost. Airlines sensitivity to cost increases, regardless of cause, is permanent. Mounting risk exposure - now that the cost increasing effect of higher limits seems to be generally understood - is therefore unlikely to be silently accepted by any airline without careful analysis of the effect that the proposed reform is likely to have, cost-wise and competition-wise.[108]

Some experts try to further mitigate the effect of the insurance gap between big airlines and small airlines by asserting that small airlines of developing countries already enjoy the advantage of having cheaper labour costs than big airlines of developed countries.[109] Thus, the insurance advantage that big airlines would have

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[108] Brise, *supra* note 98 at 122-123.

[109] Labor cost is one of the highest operational cost for airlines and thus plays a big role in competition between airlines. For more information, see "Airlines in Turbulence", *supra* note 15 at 55.

under the new strict unlimited liability regime would only balance the low labor cost advantage of small airlines. Although this argument is theocratically true, in reality it is not. Small airlines had difficulties competing with big airlines even with the one-sided low labor cost advantage. Thus, if that advantage is taken away from them or balanced by giving big airlines an insurance advantage, competition for small airlines would be harder if not impossible.

To conclude, the difference in the liability insurance premiums between big and small airlines, and the competitive advantage resulting therefrom, would be an obstacle in the states' way of reaching a new unified balance formula.

## III. CONCLUSION :-

The vast difference in the socioeconomic conditions between states, mainly between developing and developed states, has been a stumbling block in the way of updating private international air law in a unified way.

The reason why a compromise has not been reached, so far, and seems very unlikely to be reached in the near future, is that any sacrifice by states to reach a compromise would be so great that no state would be able to afford its consequences.

The small airlines of developing countries would, under a new strict regime, be burdened with new expenses and debts. This might result in the bankruptcy and loss of these airlines, if they are privately-owned, or burden the governments owning them with extra expenses and debts that they cannot afford, if they are state-owned. With the growing importance of the air transport industry, developing countries can not give away the control of the infrastructure of the air transport service to and from their territories by surrendering that service to foreign air carriers. [110]

Moreover, some developing countries, in which the old limits of liability are, if not completely adequate, not badly in need of an immediate change, wonder why they should accept a change that would not benefit them or their citizens, but rather would only harm their national airlines.[111]

The big airlines of developed countries, on the other hand, are only going to face a trivial effect if a more liberal balance formula is adopted. Since these developed countries face no pressure from their national airlines, but rather face enormous social

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[110] For more details about the importance of the air transport industry, see chapter one of this study.

[111] The reason why citizens of some developing countries would not benefit from the increase in the limits of liability is mainly because the courts awards' in their countries are in line with the low cost of living in their countries. Thus, the increase in the limits of liability would not, necessarily, mean higher awards for them.

pressure from consumers and third parties in the society, they are keener on consumer protection than on air carrier protection.

# CHAPTER 5

## ICAO's Reaction to the Warsaw System Crisis and the Future of Unified Private International Air Law.

### I. INTRODUCTION:-

ICAO, an international governmental organization of 185 states, has been involved in the process of adopting, unifying, and updating private international air law.[112] However, ICAO's efforts to confront the Warsaw System crisis have not been very successful. ICAO's reactions to the Warsaw System crisis has been late, slow, and, often, in vain.

The first Warsaw System crisis, in 1965, upon the US notice of denunciation of the Warsaw Convention, was confronted by ICAO but solved by IATA. ICAO's efforts to convince the US to withdraw its notice of denunciation failed.[113] It was the

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[112] ICAO has the capacity to prepare a new private international air law instruments and also arrange for the amendment of the Warsaw System. As far as the Warsaw Convention is concerned, although Article 41 of the Warsaw Convention gives France the capacity concerning the amendment of the Warsaw Convention, France gave away this capacity to ICAO since 1955.

[113] ICAO called for a special meeting on limits for passengers under the Warsaw Convention and the Hague protocol. This meeting did not have the characteristics of a diplomatic conference thus did not have the capacity to take

1966 IATA Intercarrier Agreement that persuaded the US to withdraw its notice of denunciation.[114]

Moreover, all the succeeding efforts by ICAO to update the Warsaw System, except the Hague Protocol and the Guadalajara Supplementary Convention, were in vain. The Guatemala City Protocol, the Montreal Protocols Nos. 1, 2, 3, and 4, which were sponsored by ICAO to amend the Warsaw Convention, or the Warsaw Convention as amended by a certain protocol, never came into force and never will. [115]

As for the reactions to the current Warsaw System crisis, although both IATA's and ICAO's reactions came only after the situation deteriorated to a chaos level of disunification, IATA's reaction, again, was prior to that of ICAO. In fact, the reaction of IATA has triggered ICAO's reaction. IATA adopted the IIA in 1995 and implemented it, in 1996, by the MIA.[116] On the other hand, ICAO's reaction started

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enforceable decisions. The meeting, in fact, did adopt some recommendation, but these recommendations were never implemented. For more information see M. Milde, "The Warsaw System and Limits of Liability - Yet Another Crossroad?" (1993) XVIII:I Ann. Air & Sp. L. 201 at 210.

[114] It was only one day after the acceptance of the 1966 Montreal Agreement by the US Civil Aeronautical Board (CAB) that the US withdrew its notice of denunciation of the Warsaw Convention.

[115] For more information, see chapter 2 of this study.

[116] For more details, see chapter 3 of this study.

only in 1996, and no meaningful results were reached until now.[117]

In November 1995 the ICAO Council adopted the item "Modernization of the Warsaw System and Review of the Question of the Ratification of International Air Law Instruments" to be on the agenda of the thirty-first legal committee meeting .[118]

Furthermore,

> [t]he Council also decided that a Secretariat Study Group be established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System". Having considered the Study Group's recommendations on the 14 March 1996 at its 148 Session, the Council decided to refer this matter to the Legal Committee as well as to request the Legal Bureau, assisted by the Study Group, to present a first draft of the new instrument recommended by the Study Group to the Council. The Legal Bureau presented a first draft of the new instrument to the Council on 2 October 1996 at its 149th session. Upon consideration of the draft instrument, the Council placed special emphasis on the urgency of modernizing the Warsaw System and the need for the Legal Committee to finalize work on the new instrument by the close of its 30th Session, so that a Diplomatic Conference could be convened as soon as possible thereafter to formally adopt the new instrument.[119]

Indeed, the Legal Bureau and the Study Group came up with a draft instrument that was approved by the ICAO Council, studied by the Rapporteur of Legal

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[117] ICAO was inactive towards the Warsaw System crisis since the adoption of the Montreal Protocols in 1975, and its actions thereafter were just the encouragement of states to ratify the Montreal Protocols.

[118] See, *Report of ICAO Secretariat on the Issue of Modernizing the Warsaw System*, ICAO Doc. LC/30-WP/2 (1997) at 2.

[119] *Ibid.*

Committee, and submitted to the 30th Session of the Legal Committee that met in Montreal between 28 April and 9 May 1997.[120] Later, the ICAO Council approved the draft text, sent state letter (LE 4/51-97/65) to states to comment on the draft text, and is expected to call for a diplomatic conference to consider the matter of modernizing the Warsaw System.[121]

## II. THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE:-

### A. Introduction:-

The Legal Committee spent the bulk of its time addressing agenda item number 4 titled " Modernization of the Warsaw System and Review of the Question of Ratification of International Air Law Instruments". Working on the basis of consensus, the Committee considered the draft text of the new Warsaw instrument article by article.

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[120] See M. Milde " "Warsaw" System- from Requiem to Resurrection?" [ to be published later in 1997] Lloyd's Aviation Quarterly [hereinafter "Warsaw Resurrection"]. Professor Milde assert that:

> The procedure adopted for the work in ICAO in 1996 strangely departed from the well established and observed " Procedure for the Preparation of Draft Conventions" which would require a Secretariat study, report by a Rapporteur, session of a Special Sub-Committee of the Legal Committee and a session of the Legal Committee.

[121] A diplomatic conference can approve, amend, or completely disapprove the draft text and draft a new text.

The 30th Legal Committee was an illustration of the conflict between developing and developed states concerning the balance of the consumers' and the carriers' interests. Although both were, in principle, in favour of modernizing the Warsaw System, developed countries were in favour of more consumer protection, while developing countries opted for increased carrier protection.

It should be mentioned, however, that the Legal Committee meeting did not completely illustrate the conflict of interest for the following reasons:

(1) The percentage of representation at the meeting was low. Less than one-third of ICAO's members were represented (61 states out of 185 states attended).

(2) A large number of the states that were represented were inactive. Their attendance was motivated by a desire to observe the positions and intentions of other states rather than an active contribution to resolving the conflict.

(3) Even with this low percentage and inactive participation, a number of crucial aspects, like the liability regime, were not agreed upon by the Committee and were left for consideration by the diplomatic conference.

Accordingly, the dimensions of the conflict between developed and developing countries were not completely uncovered at the 30th Session of the Legal Committee. The balance formula encompassed in the draft text approved by the Committee does not necessarily establish a compromise that would be automatically approved at the

diplomatic conference to adopt the draft text. [122]

## B. The Balance of Interest Formula Adopted In The Draft Text and the Views of States:-

### 1. The Unit of Compensation:-

The draft text adopted the Special Drawing Rights (SDR) as the unit of compensation for the carrier's liability. The SDR is a wise choice for it is a monetary unit that is less effected by inflation. Thus, the limits of liability in the new convention, if there are any, would not have to be adjusted to inflation periodically or as often as other units of compensation would need to be.[123]

### 2. The Limits of Liability:-

The draft instrument adopted different limits of liability for the carriers liability.

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[122] The diplomatic conference is expected to take place in 1998.

[123] There were no objections in the Legal Committee to adopting the SDR as the unit of compensation. However, as would be seen later, some delegates raised doubts regarding the need for an escalator clause with the existence of the SDR as the unit of compensation . In other words, why should there be a need for an escalator clause if the SDR is a unit of compensation not effected by inflation?

### 2.1 The Carriers' Liability for Death or Injury of the Passengers:-

The draft instrument adopted an unlimited liability regime concerning the carrier's liability for death or injury of the passengers. This was adopted regardless of the opposition from a few developing countries which favoured a limited liability regime, even if the limits were extremely high (as high as 250,000 or even 330,000 SDR).[124] In fact, the desperate need of the majority of developed countries for an unlimited liability regime blocked, and will continue to block, any attempt from other states to adopt any specific limits for the carriers liability concerning death or injury of the passengers. Thus, it seems that developing countries drew back, and will draw back at the diplomatic conference, from requiring a limit of liability to requiring carriers' protection in other fields (e.g., the liability regime). In other words, developing countries view their acceptance of the unlimited liability regime as a bargaining tool to achieve carriers' protection in other fields.

### 2.2 The Carrier's Liability Regarding Baggage:-

Unlike the carrier's liability for death or injury of the passengers, the carrier's liability for the loss or destruction of the baggage (checked, unchecked, personal

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[124] "[A] few delegations proposed that there should be a numerical limit, with the possibility of an updating mechanism. It was stated that developing states would, because of insurance costs, find it difficult to accept a regime of unlimited liability". Draft Report on the Work of the Legal Committee During its 30th Session, ICAO Doc. LC/30-WP/ 7-4 at 4-18.

carrion baggage) is limited. However, the Committee did not agree on a monetary amount for that limit (although it stated a sum of SDR 1,000 as an indication, in conformity with the Guatemala City Protocol) and left that matter to be decided at the diplomatic conference.

### 2.3 The Carrier's Liability for Cargo:-

As the carrier's liability for baggage, the carrier's liability for cargo is limited. Moreover, the Legal Committee indicated that the limits would be approximately SDR 17 per kilogram (in conformity with Montreal Protocol No. 4) but, in fact, did not agree on what the limit should be and left this decision to the diplomatic conference.

### 2.4 The Carrier's Liability for Delay:-

Although the draft instrument, like the original Warsaw Convention, did not specify any limits for the carrier's liability for delay, the amount of compensation is expected to be around SDR 4150 regarding delay of passengers (in harmony with Montreal Protocol No.3); for the delay of baggage and cargo, the amount of compensation is not expected to exceed the limits for their loss or destruction.[125]

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[125] See "Warsaw Resurrection", *supra* note 120 at 5-6.

### 3. The Escalator Clause:-

The draft instrument adopted an escalator clause by which the limits of liability can be periodically reviewed and adjusted to inflation. Article 21, Paragraph 5 of the draft text outlines two ways by which this adjustment can take place:

(1) The ICAO Council is obligated to review the limits of the carrier's liability every five years and has the authority to raise these limits (adjust them to inflation) if the inflation rate exceeded 10 per cent. The adjusted limits would be adopted by the vote of two-thirds of the ICAO Council and shall enter into force after six months of the submission to the states party, unless two-third of the states party register their disapproval with the ICAO Council.

(2) One-third of the states party to the new instrument can request that the ICAO Council follow the latter procedure at any time, provided that the inflation rate exceeds 30 per cent.

Although this escalator clause was accepted with minimal opposition in the Legal Committee, it is unlikely to be easily accepted at the diplomatic conference for the following reasons:

(1) The escalator clause was not prepared by the Secretariat but proposed by the Kingdom of the Netherlands at the conference. Thus, states did not have enough time

to study the proposal and evaluate its consequences.

(2) Some states, as India, doubt the need for an escalator clause if the unit of compensation is a unit that is not affected by inflation *i.e.*, the SDR.

(3) Not only does Article 21(5) give the ICAO Council a function not recognized by the Chicago Convention, but it also invents a new way of amending international treaties not recognized by the Vienna Convention on the Law of Treaties.[126]

(4) It is unlikely that states, especially those in favour of low limits of liability, would accept that an international convention they are party to be amended by a council they are not a member of, especially if that amendment is against their political will. Moreover, in some countries this procedure might be unconstitutional.

Accordingly, although the escalator clause would be an excellent way to avoid the obsoleteness of the limits of liability and, thus, a crisis similar to that of the Warsaw System, its acceptance might face some difficulties at the diplomatic conference.

**4. The Means for Breaking the Limits of Liability:-**

Since the draft text does not provide for limits on the carrier's liability

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[126] See *ibid* at 11. Professor Milde estimated that " while such procedure is not expressly foreseen in the Vienna Convention on the Law of Treaties, there is no legal obstacle to such an innovation *if agreed by states.* " [emphasis added]. But the question here is:- would the states accept it or not?

concerning death and injury to passengers, we can no longer speak about legal means for breaking the limits of liability in that field. The means, however, still exist for the carrier's liability concerning loss or damage of cargo and baggage and delay. Nevertheless the draft text has eliminated the failure to deliver a baggage check or an airway bill as a mean of breaking the limits of liability.[127] The only remaining means for breaking the carrier's limits of liability is willful misconduct of the carrier. In the wording of Article 21/2/c of the draft text "the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."

**5. The Conditions of Liability:**

Again a distinction should be made regarding the carrier's liability for:-

**5.1 Death or Injury for Passengers:-**

Article 16(1) of the draft text makes the carrier liable for death or bodily or mental injury[128] for the passengers, provided the following conditions are met:

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[127] *ICAO Draft Convention, supra* note 7, art. 21 (2).

[128] The draft text expressly provide for the carrier's liability for mental injury. This is an improvement over the Warsaw Convention which only provide for "bodily injury"; a term that has caused some considerable difficulties in some judicial systems in trying to interpret it and figuring if it includes mental injuries or not.

(1) the damage was caused by an accident; and

(2) the damage took place on board the aircraft or in the course of embarking or disembarking of the passengers.

### 5.2 Damage to Baggage:-

The carrier is liable for the loss or destruction of or damage to the baggage if "The damage was caused by an event[129] that occurred on board the aircraft or in the course of embarking or disembarking or at any time when the baggage was in the charge of the carrier".[130] As for unchecked baggage, the only condition the draft text stipulates is that the damage be caused by the fault of the carrier.[131]

### 5.3 Damage to Cargo:-

The carrier's liability for the loss or destruction of, or damage to cargo is limited to damage taking place during the carriage by air.[132]

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[129] Contrary to the case of death or injury to passengers, the draft text does not require an accident, but only an event, as a condition to the carrier's liability for the loss or destruction of or damage to the baggage.

[130] See *ICAO Draft Convention, supra* note 7, art. 16(2).

[131] See *Ibid.*

[132] See *ibid.*, art. 17(1). For the definition of "carriage by air " see *ibid.*, art 17(4).

### 5.4 Damage Caused by Delay:-

The only condition that the draft text stipulates is the fault of the carrier *i.e.* the carrier or its servants did not take all necessary measures that could reasonably be required to avoid the damage or that it was possible for it or them to take such measures.[133]

## 6. The Liability Regime:-

The draft text adopted different liability regimes concerning the carrier's liability for passengers, checked baggage, unchecked baggage, delay, and cargo.

### 6.1 Death or Injury to Passengers:-

Although there was a consensus, as has been mentioned earlier, in the Legal Committee as to the adoption of an unlimited liability regime, no consensus was reached regarding the liability regime to be adopted. The Committee agreed, however, that there should be at least two tiers of liability regimes. Thus, Article 20 of the draft text included three alternatives, in square brackets, concerning the liability regime to be adopted, and left the matter to the diplomatic conference to decide the liability

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[133] See *ibid.*, art. 18.

regime of the carrier concerning death and injury to passengers.

The three alternatives adopted similar limits and liability regime for the first tier. They all provided that the limit of the first tier should be SDR 100,000 , and that the carrier's liability for claims up to that limit should be absolute ( the carrier is liable for the damage regardless of its fault and without a general requirement of a causal link between the carrier's act and the damage sustained).[134] The three alternatives, however, differ in the number of tiers to be adopted and the burden of proof in each tier, as follows:

(1) Alternative One adopts a two-tier liability regime. In regard to the second tier, this alternative gives each state, at the time of its ratification of the Convention, the opportunity to place the burden of proof on the carrier or the passengers. The choice that a state makes is binding on it and its carriers.

(2) Alternative Two also adopts a two-tier liability regime. Concerning the second tier, this alternative establishes a fault liability regime without the reversal of the burden of proof. However, this alternative gives each state, at the time of its ratification of the Convention, the chance to

> declare that in any action brought before a Court within its territory, the liability of the carrier for damages arising under Article 16, paragraph 1 shall be limited to 100,000 Special Drawing Rights,

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[134] In an absolute liability regime the Convention itself prescribe when and for whose acts the carrier's liability arise, without requiring a general causal link between the carrier's act and the damage.

> unless the damage so sustained was due to the fault or neglect of the carrier or its servants or agents acting within their scope of employment.[135]

(3) Alternative Three establishes three tiers of liability. As mentioned before, the first tier is up to SDR 100,000 with an absolute liability regime; the second tier is from SDR 100,00 to a certain monetary limit, that would be set later by the diplomatic conference, with a fault liability regime and with a reversal of the burden of proof; the last tier would start from the upper limit of the second tier without an upper limit for it, with a fault liability regime without the reversal of the burden of proof.

Although all three alternatives try to offer a compromise between the aforementioned conflicting interests of states, all three would create legal problems if adopted. Professor Milde highlighted the "inherent faults" of these alternatives as follows:

(1) Alternative One "would not solve the problem and would possibly introduce serious disunity in the system of liability and unsolved conflicts - how to solve the problem if the state of departure, the state of destination, the State of the carrier and the forum made different "decelerations" under proposed Article 20?"[136] It could be added that this alternative might cause legal problems concerning the definition of the term

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[135] Draft Article 20.

[136] See "Warsaw Resurrection ", *supra* note 121 at 10.

"airlines of a state". The question remains whether this term, used in Article 20, refers to the state of registry of the airline or the state of domicile (where the airline has its permanent place of business), or even the state of ownership of the airline?

(2) Alternative Two would "lead not only to disunity of the system but also to active "forum shopping" to bring the claim to a court not requiring the claimant to prove carrier's fault."[137]

(3) Professor Milde describes Alternative Three as the " most far-fetched since it would introduce a three-tier system".[138]

To conclude, the Legal Committee agreed on an absolute liability regime up to SDR 100,000 for the first tier. But the Committee did not agree on the path the carrier's liability would take thereafter. The Committee decided to include three alternatives and to leave that decision to the diplomatic conference.

### 6.2 Damage to Baggage:-

The draft text adopted an absolute liability regime for damage to checked

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[137] *Ibid.*

[138] *Ibid.*

baggage.[139] Thus, the carrier is liable for the loss or destruction of, or damage to checked baggage regardless of its fault (even though it or its servants/agents took all necessary measures to avoid the damage or it was impossible for them to take such measures). Furthermore, since this liability regime is absolute, a causal link is not necessarily required between the carrier's act and the damage, rather the new instrument itself describes when the liability arises and when the carrier can be exonerated from liability.[140]

As for unchecked baggage, the instrument adopted a fault liability regime with a reversal of the burden of proof. The carrier is presumed to be liable for the damage it causes unless it proves that it or its servants/agents were not at fault (that the carrier or its servants/agents took all necessary measures to avoid the damage or it was impossible for them to take such measures).[141]

### 6.3 Damage to Cargo:-

The same liability regime that was adopted for checked baggage was adopted for cargo *i.e.* absolute liability regime. Thus, that which was said for checked baggage

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[139] See *ICAO Draft Convention, supra* note 7, art. 16 (2).

[140] For more details, see the conditions of liability and exoneration from liability.

[141] See *ICAO Draft Convention, supra* note 7, art. 16(2).

can also be said for cargo.

### 6.4 Damage Resulting from Delay:-

The same regime that was adopted for unchecked baggage was adopted for delay, *i.e.*, fault liability regime with the reversal of the burden of proof. So, the same explanation for unchecked baggage applies to delay.

### 7. The Scope of Application:-

The draft text has only included drafting improvements over the original Warsaw text concerning the scope of the Convention's application. Thus, the draft instrument still applies only for international carriage by air of passengers, baggage, and cargo.[142]

Furthermore, the draft text included the necessary provisions of the Guadalajara Convention to regulate the liability of the actual carrier along with that of the contractual carrier.[143] Thus, the scope of application of the draft text is widened to include both the contracting and the actual carrier, "the former for the whole of the

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[142] See *ibid.*, art. 1, for the definition of international carriage by air for the purposes of applying the draft instrument.

[143] See *ibid.*, ch. V.

carriage contemplated in the agreement, the latter solely for the carriage which it performs".[144]

Moreover, Article 2 of the draft Convention expressly states the inclusion of the carriage performed by states in the scope of the instrument's application.[145] However, Article 2 expressly excludes the carriage of postal items for the scope of application of the Convention.

**8. The Documents of Carriage :-**

The draft Convention has simplified the regime of the documents of carriage for the benefit of the carrier without prejudicing the interest of the consumers. The simplified regime requires minimum information on the documents of carriage and further allows the non-delivery of the documents of carriage if they were substituted by "any means which preserves the information".[146] This simplification is "a major achievement for the airlines currently spending some 30% of their operating cost on

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[144] *Ibid.*, art. 34.

[145] Draft Article 48, however, states that:-
a state may at any time declare by a notification addressed to the Depository that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircrafts'' registered in that state, the whole capacity of which has been reserved by or on behalf of such authorities.

[146] See *ibid.*, art. 3 and 4.

"distribution" ".[147] Yet, it would not endanger the interest of the consumers.

### 8.1 The Passenger Ticket and the Baggage Check:-

The only required information in the passenger ticket or its substitution is the place of destination and departure. If the place of destination and departure are in the same country, and the carriage involves stopping places in other countries, at least one stopping place should be indicated on the ticket. As for the baggage, the draft text requires the carrier to deliver only a "baggage identification tag" for each piece of baggage.

Furthermore, the carrier is required to give the passenger written notice that the Convention may, if applicable, limit the carrier's liability for death or injury, loss or destruction of baggage and delay. The text, however, does not prevent the carrier from availing itself from the limits of liability, like the Warsaw Convention did, for the failure to deliver the documents of carriage and/or delivering irregular documents that does not include the required information or the liability notice.[148]

### 8.2 The Air Waybill:-

The required information in the Air Waybill is the same as that required

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[147] See "Warsaw Resurrection", *supra* note 120 at 6.

[148] *ICAO Draft Convention, supra* note 7, art. 3(5).

in the passenger ticket plus an indication of the nature and weight of the consignment.[149] Furthermore, the daft text does not sanction the carrier for its non-delivery of the Air Waybill and/or the delivery of an irregular Air Waybill. [150] However, the carrier is not obliged, for cargo, to give any notice, whether written or not, concerning the possibility of the application of the Convention and the limits of liability.

**9. Jurisdiction:-**

The Legal Committee agreed on the inclusion of the four jurisdictions of the original Warsaw Convention in the new draft instrument.[151] However, no agreement was reached on the adoption of the "fifth jurisdiction".[152] Thus, the matter of the fifth jurisdiction was left in square brackets for further consideration and decision by the diplomatic conference.[153]

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[149] *Ibid.*, art. 5.

[150] Ibid., art. 8.

[151] See chapter 2 of this study for more details.

[152] The fifth jurisdiction gives jurisdiction to the courts in the territory of the passenger's domicile or permanent residence if the concerned carrier operates service to and from that territory and/or has an establishment there.

[153] The discussion of the fifth jurisdiction took an unusual path at the Legal Committee. After the chairman asked the US to introduce its fifth jurisdiction proposal, some 18 countries, including developed European countries, made comments rejecting that proposal. Instead of putting that proposal to vote, the chairman announced a coffee brake. After the coffee break the chairman notified

The US's need for a fifth jurisdiction is not novel. The US has been asking for the fifth jurisdiction since the Guatemala City Protocol. Although the US need for fifth jurisdiction was accommodated by the Guatemala City Protocol, it would not be easily accommodated in the new convention. The simple reason for this is that the Guatemala City Protocol established an unbreakable limited liability regime. Thus, it did not matter which court had jurisdiction as long as the liability was limited and unbreakable. Nonetheless, under an unlimited liability regime, and since some courts are considered more generous than others, determining which courts have jurisdiction plays a big role. Thus, some states wanted to narrow the scope of courts having jurisdiction to exclude those generous courts. Accordingly, solving the fifth jurisdiction conflict would be one of the biggest tasks confronting the diplomatic conference.

It should be mentioned that Article 28 of the draft text introduced the possibility of permitting arbitration regarding passengers claims in addition to cargo claims. This matter did not marshal consensus at the Committee and was left in square brackets for

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that there is a general disapproval of the fifth jurisdiction proposal but asserted that the matter should be further discussed since the proposal was submitted by the US which is a country that weights heavily in the aviation field. Afterwards, the disapproving countries started retreating and agreed with a proposal to leave the matter till after the liability regime is agreed upon. It could be said that developed disapproving countries thought that the opposition of developing countries is bigger than theirs'. Thus, if they approved the fifth jurisdiction proposal, even thought they do not in fact agree, it might put some pressure on the developing countries to make compromises in other fields, like the liability regime, and then these developed states would give up the fifth jurisdiction. Otherwise, why would the developed countries that disapproved the fifth jurisdiction proposal want to wait until other matters are solved, if they, in principle, disapprove the fifth jurisdiction.

further consideration by the diplomatic conference.

**10. Exoneration :-**

It has been mentioned that fault liability regime requires, *inter alia*, a faulty act by the carrier and a causal link between the act of the carrier and the damage. Strict liability, however, requires only a causal link between the act, whether faulty or not, and the damage. In an absolute liability regime neither a causal link nor a faulty act is required. Since the draft text adopted different liability regimes concerning damage to passengers, baggage, cargo, and delay the exoneration differs accordingly. Draft Article 19 sets the general principle that "if the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or person from whom he or she derives rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage"[154]. While Article 19 sets the general principle, Articles 16, 17, and 18 sets some details concerning the exoneration from liability.

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[154] Article 19 does not set as a general principle that the carrier is exonerated from liability if the damage was not caused by its act, but it only provide that the carrier is exonerated from liability if the damage was contributed to by the act or omission of the claimant.

### 10.1 Damage to Passengers and Baggage :-

Besides the general exoneration of contributor negligence, Article 16(1) stipulates that the carrier shall be exonerated from its liability if the death or injury resulted solely from the state of health of the passenger. Paragraph 2 further exonerates the carrier from liability if the damage to baggage resulted solely from "the inherent defect, quality or vice of baggage". As for unchecked baggage, since the draft adopted a fault liability regime therefor, the carrier shall be exonerated from liability if the damage was not caused by its act and/ or that the act was not faulty even if committed by the carrier.[155]

### 10.2 Damage to Cargo:-

Aside from the general contributory negligence exoneration, Article 17 exonerates the carrier from liability if the damage to cargo

resulted solely from one or more of the following:-

a- inherent defect, quality or vice of that cargo;

b- defective packing of that cargo performed by a person other than the carrier or its servants or agents;

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[155] The carrier is considered at fault under the new instrument if it or its agents/servants fail to take all necessary measures to avoid the damage or if it was possible for them to take such measures.

c- an act of war or armed conflict;

d- an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

### 10.3 Delay:-

The carrier is exonerated from liability for delay if the damage was not caused by its own act and/or if that act was not faulty.

## C. Conclusion :-

It is very clear that the new draft adopted a balance of interest more consumer-protectionist oriented. In fact, even if the matters which were put in square brackets, are adopted at the diplomatic conference in accordance with the desires of developing countries, the draft text would still offer a regime more favourable to consumers than any of the other Warsaw System instruments.

While the draft text offers the carrier only the advantage of a simplified regime for the documents of carriage, it offers the consumers, *inter alia*, the following advantages over the various Warsaw System instruments:

(1) enhancement and/or the abolishment of limits of liability;

(2) better liability regime. (Absolute and/or fault with the reversal of the burden of

proof);

(3) less strict conditions of liability.

(4) the assurance that the limits would not be eroded by inflation (the Escalator Clause).

(5) The possibility of expanding the courts with jurisdiction (the fifth jurisdiction) and/or the acceptance of arbitration for passengers cases.

## III. CONCLUSION:-

After 21 years of hibernation, ICAO woke up to take a big step in the way of modernizing the unified private international air law. ICAO did a tremendous job in preparing for the Legal Committee Conference and preparing a draft instrument for updating and unifying private international air law. The Legal Committee, in turn, made considerable progress in breaking the ice of conflict between states concerning the balance of interests. The future of unified private international air law will be in the hands of the diplomatic conference, and will depend on the ability of states to reconcile their conflicting interests.

# CONCLUSION

Air transport is a complex international activity that requires coherent international regulation in order to avoid the chaos that would otherwise result. Liability rules, which include the balance of interests between carriers and consumers, are particularly sensitive matters in private international air law. Without global unification of which, the operation of international air transport is impeded; conflicts of laws and conflicts of jurisdictions regarding liability in international air transport complicates and prolongs the resolution of liability disputes, negatively impacting on both the consumers and the carriers.

The international community enjoyed the unification of private international air law for only a short period of time after the Warsaw Convention. Unified private international air law started, afterwards, to face a series of disunification crises that endangered its existence and thus the operation of international air transport.

These crises were confronted by both ICAO and IATA. All IATA's efforts succeeded, while not all efforts by ICAO were successful. IATA's efforts resulted in

the 1966 Montreal Agreement and the 1996 Kuala Lumpur Agreement. On the other hand, although ICAO made tremendous efforts in preparing the Hague Protocol, the Guadalajara Supplementary Convention, the Guatemala City Protocol, the Montreal Protocols Nos. 1, 2, 3, and 4, only the Hague Protocol and the Guadalajara Supplementary Convention have entered into force. Recently, ICAO prepared a new draft instrument to replace the old Warsaw System, and organized the 30th Session of the Legal Committee which revised the draft text of that instrument. The ICAO Council approved the text, gave notice to the states thereof and asked them to comment on the text, and is expected to call for a diplomatic conference to formally adopt a new instrument of private international air law in 1998. It is still too early to evaluate the latter effort by ICAO since the matter is dependent on the result of the diplomatic conference.

An observer of the current, which could perhaps be the last, Warsaw System crisis would find that history is ironically repeating itself. Just as the first Warsaw System crisis, in 1966, was first confronted and, to a certain limit, solved by IATA, the current crisis was first confronted by IATA. And just like the 1966 Montreal Agreement did not completely solve the crisis, the 1996 Kuala Lumpur Agreement, the IIA, was only considered as a temporary solution. But will the current ICAO efforts face the same destiny as its efforts after the 1966 Montreal Agreement? Would the diplomatic conference succeed in modernizing a unified version of private international air law?

And if the diplomatic conference does adopt a new convention, will this new convention enter into force, or face the same unfortunate destiny of the Montreal Protocols?

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# APPENDIX I

## Draft Convention for the Unification of Certain Rules for International Carriage by Air

# DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

## [TEXT APPROVED BY THE DRAFTING GROUP]

THE STATES PARTIES TO THIS CONVENTION;

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo;

CONVINCED that collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests;

HAVE AGREED AS FOLLOWS:

## Chapter I

## General Provisions

### Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage

between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

### Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

## Chapter II

## Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

### Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage shall be delivered containing:

a) an indication of places of departure and destination;

b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, loss of or damage to baggage, and delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonethless, be subject to the rules of this Convention [including those relating to limitation of liability.]

**Article 4 - Cargo**

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

**Article 5 - Contents of Air Waybill and Cargo Receipt**

The air waybill and the cargo receipt shall include:

(a) an indication of the places of departure and destination;

(b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the nature and weight of the consignment.

**Article 6 - Description of Air Waybill**

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

**Article 7 - Documentation of Multiple Packages**

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 4 are used.

**Article 8 - Non-compliance with Documentary Requirements**

[ Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.]

**Article 9 - Responsibility for Particulars of Documentation**

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

**Article 10 - Evidentiary Value of Documentation**

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the nature, weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie*

evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

**Article 11 - Right of Disposition of Cargo**

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

**Article 12 - Delivery of the Cargo**

1. Except when the consignor has exercised its right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

### Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given them by Articles 11 and 12, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

### Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the cargo receipt.

### Article 15 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

## Chapter III

## Liability of the Carrier and Extent of Compensation for Damage

### Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

[3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date of which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.]

[4.] Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

**Article 17 - Damage to Cargo**

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if it proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

**Article 18 - Delay**

1. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[2. For the purpose of this Convention, delay means the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to expect from a diligent carrier to do so, having regard to all the relevant circumstances.]

**Article 19 - Exoneration**

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

**Article 20 - Compensation in Case of Death or Injury of Passengers**

**[Alternative 1**

1. Subject to paragraph 2, the carrier shall not be liable for damages arising under Article 16, paragraph 1 and which exceed 100,000 Special Drawing Rights[1]:

(a) if the carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for it or them to take such measures; or

(b) unless the damage so sustained was due to the fault or neglect of the carrier or of its servants or agents acting within their scope of employment or agency.

2. At the time of ratification, adherence or accession, each State Party shall declare which of either subparagraph (a) or subparagraph (b) of the preceding paragraph 1 shall be applicable to it and its carriers. A State Party which has declared that subparagraph (b) shall be applicable to it, may later make such a declaration in respect of subparagraph (a) instead. All declarations made under this paragraph shall be binding on all other States Parties and the Depositary shall notify all States Parties of such declarations.

**Alternative 2**

1. The liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights[1] if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. Notwithstanding paragraph 1 of this Article, any State Party may by notification to the Depositary at the time of ratification or acceptance, or thereafter, declare, that in any action brought

before a Court within its territory, the liability of the carrier for damages arising under Article 16, paragraph 1 shall be limited to 100,000 Special Drawing Rights[1], unless the damage so sustained was due to the fault or neglect of carrier or of its servants or agents acting within their scope of employment. The Depositary shall inform all other States Parties accordingly and shall keep current a list of States Parties having made such declaration.

**Alternative 3**

1. Subject to paragraph 2 of this Article, the liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights[1] if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. The liability of the carrier above an amount of [ ][2] Special Drawing Rights shall be subject to proof that the damage sustained by the passenger was due to the fault or neglect of the carrier or its servants or agents acting within their scope of employment.]

**Article 21 - Limits of Liability - Conversion of Monetary Units**

1. (a) In the case of damage caused by delay to passengers as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][3] Special Drawing Rights.

(b) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][2] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

2. (a) In the carriage of cargo. the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][4] Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay

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[1] This amount was set as a tentative figure.

[2] No amount was set.

[3] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

[4] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(c) The foregoing provisions of paragraphs 1(a), 1(b) and 2(a) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

3. The limits prescribed in Article 20 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

4. (a) The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

(b) Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 4(a) of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of [1 500 000][4] monetary units per passenger with respect to Article 20; [62 500][5]

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[5] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

monetary units per passenger with respect to paragraph 1(a) of this Article; [15 000][4] monetary units per passenger with respect to paragraph 1(b) of this Article; and [250][4] monetary units per kilogramme with respect to paragraph 2(a) of this Article. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

(c) The calculation mentioned in the last sentence of paragraph 4(a) of this Article and the conversion method mentioned in paragraph 4(b) of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 20 and 21 as would result from the application of the first three sentences of paragraph 4(a) of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 4(a) of this Article, or the result of the conversion in paragraph 4(b) of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

5. (a) Without prejudice to the provisions of Article 21 paragraph 6 of this Convention and subject to sub-paragraph (b) below, the limits of liability established under this Convention shall be reviewed at five year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention, upon condition that this inflation factor has exceeded 10 per cent. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 4(a) of this Article.

(b) The adoption of the revision shall require the vote of two-thirds of the ICAO Council at a meeting called for that purpose and shall then be submitted by the Council to each State Party. Any such revision provided for under this Article shall become effective six months after its submission to the States Parties, unless within three months a majority of the States Parties register their disapproval with the Council. The Council shall immediately notify all States Parties of the coming into force of the revision so adopted.

(c) Notwithstanding sub-paragraph (a) of this paragraph, the procedure referred to in sub-paragraph (b) of this paragraph shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in sub-paragraph (a) has exceeded 30 per cent since the date of entry into force of this Convention or since the date of the previous revision. Subsequent reviews using the procedure described in sub-paragraph (a) of this paragraph will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present sub-paragraph.

6. A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided by for in this Convention or to no limits of liability whatsoever.

**Article 22 - Invalidity of Contractual Provisions**

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

**Article 23 - Basis of Claims**

1. In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. For the purposes of this Convention the term "damages" does not include any punitive, exemplary or other non-compensatory damages.

**Article 24 - Servants, Agents - Aggregation of Claims**

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if it proves that he or she acted within the scope of his or her employment, shall be entitled to avail himself or herself of the limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

**Article 25 - Timely Notice of Complaints**

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt

in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

**Article 26 - Death of Person Liable**

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

**Article 27 - Jurisdiction**

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

[2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to and from which the carrier operates services for the carriage by air [and] [or] in which the carrier has an establishment.]

[3. For the purposes of paragraph 2 of this Article, "establishment" means premises leased or owned by the carrier concerned from which, [through its own managerial and administrative employees,] it conducts its business of carriage by air.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

**Article 28 - Arbitration**

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

### Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

### Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

### Article 31 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

# Chapter IV

## Combined Carriage

### Article 32 - Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

# Chapter V

## Carriage by Air Performed by a Person other than the Contracting Carrier

### Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes an agreement for carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier ") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

### Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

### Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20 and 21 of this Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 21 of this Convention, shall also affect the actual carrier.

**Article 36 - Addressee of Complaints and Instructions**

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

**Article 37 - Servants and Agents**

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he or she proves that he or she acted within the scope of his or her employment, be entitled to avail himself or herself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he or she is, unless it is proved that he or she acted in a manner that prevents the limits of liability from being invoked in accordance with Articles 20 and 21 of this Convention.

**Article 38 - Aggregation of Damages**

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to the carrier concerned.

**Article 39 - Addressee of Claims**

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

### Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business.

### Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

### Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

## Chapter VI

## Final Provisions

### Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

### Article 44 - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents, from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

**[Article 45 - Insurance]**

[ Every carrier is required to maintain insurance or other form of financial security, including guarantee, covering its liability for such damage as may arise under this Convention in such amount, of such type and in such terms as the national State of the carrier may specify. The carrier may be required by the State into which it operates to provide evidence that this condition has been fulfilled.]

**Article 46 - Carriage Performed in Extraordinary Circumstances**

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

**Article 47 - Definition of Days**

The expression "days" when used in this Convention means calendar days not working days.

**Article 48 - Reservations**

No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

*[Final clauses to be inserted.]*

- END -

# APPENDIX II

## IATA Intercarrier Agreement on Passenger Liability

## IATA Intercarrier Agreement on Passenger Liability

*Whereas*: The Warsaw Convention system is of great benefit to international air transportation; and

*Noting that*: The Convention's limits of liability, which have not been amended since 1955, are now grossly inadequate in most countries and that international airlines have previously acted together to increase them to the benefit of passengers;

**The undersigned carriers agree**

1. To take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention* as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger.
2. To reserve all available defences pursuant to the provisions of the Convention; nevertheless, any carrier may waive any defence, including the waiver of any defence up to a specified monetary amount of recoverable compensatory damages, as circumstances may warrant.
3. To reserve their rights of recourse against any other person, including rights of contribution or indemnity, with respect to any sums paid by the carrier.
4. To encourage other airlines involved in the international carriage of passengers to apply the terms of this Agreement to such carriage.
5. To implement the provisions of this Agreement no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.
6. That nothing in this Agreement shall affect the rights of the passenger or the claimant otherwise available under the Convention.
7. That this Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become a party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
8. That any carrier party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers parties to the Agreement.

Signed this_____ day of _____ 199__

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* "WARSAW CONVENTION" as used herein means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw, 12th October 1929, or that Convention as amended at The Hague, 28th September 1955, whichever may be applicable.

# APPENDIX III

## Agreement on Measures to Implement IATA Intercarrier Agreement

## Agreement on Measures to Implement the IATA Intercarrier Agreement

I.

Pursuant to the IATA Intercarrier Agreement of 31 October 1995, the undersigned carriers agree to implement said Agreement by incorporating in their conditions of carriage and tariffs, where necessary, the following:

1. {CARRIER} shall not invoke the limitation of liability in Article 22(1) of the Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention.
2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs* [unless option II(2) is used ].
3. Except as otherwise provided in paragraphs 1 and 2 hereof, {CARRIER} reserves all defences available under the Convention to any such claim. With respect to third parties, the carrier also reserves all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

II.

At the option of the carrier, its conditions of carriage and tariffs also may include the following provisions:

1. {CARRIER} agrees that subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2. {CARRIER} shall not avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claims which does not exceed 100,000 SDRs, except that such waiver is limited to the amounts shown below for the routes indicated, as may be authorised by governments concerned with the transportation involved.

[Amounts and routes to be inserted]

3. Neither the waiver of limits nor the waiver of defences shall be applicable in respect of claims made by public social insurance or similar bodies however asserted. Such claims shall be subject to the limit in Article 22(1) and to the defences under Article 20(1) of the Convention. The carrier will compensate the passenger or his dependents for recoverable compensatory damages in excess of payments received from any public social insurance or similar body.

III.

Furthermore, at the option of a carrier, additional provisions may be included in its conditions of carriage and tariffs, provided they are not inconsistent with this Agreement and are in accordance with applicable law.

IV.

Should any provision of this Agreement or a provision incorporated in a condition of carriage or tariff pursuant to this Agreement be determined to be invalid, illegal or unenforceable by a court of competent jurisdiction, all other provisions shall nevertheless remain valid, binding and effective.

V.

1. This Agreement may be signed in any number of counterparts, all of which shall constitute one Agreement. Any carrier may become Party to this Agreement by signing a counterpart hereof and depositing it with the Director General of the International Air Transport Association (IATA).
2. Any carrier Party hereto may withdraw from this Agreement by giving twelve (12) months' written notice of withdrawal to the Director General of IATA and to the other carriers Parties to the Agreement.
3. The Director General of IATA shall declare this Agreement effective on November 1st, 1996 or such later date as all requisite Government approvals have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October 1995.

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* Defined if necessary