



Institute of Air & Space Law

# INTERNATIONAL AIR CARGO & BAGGAGE LIABILITY AND THE TOWER OF BABEL

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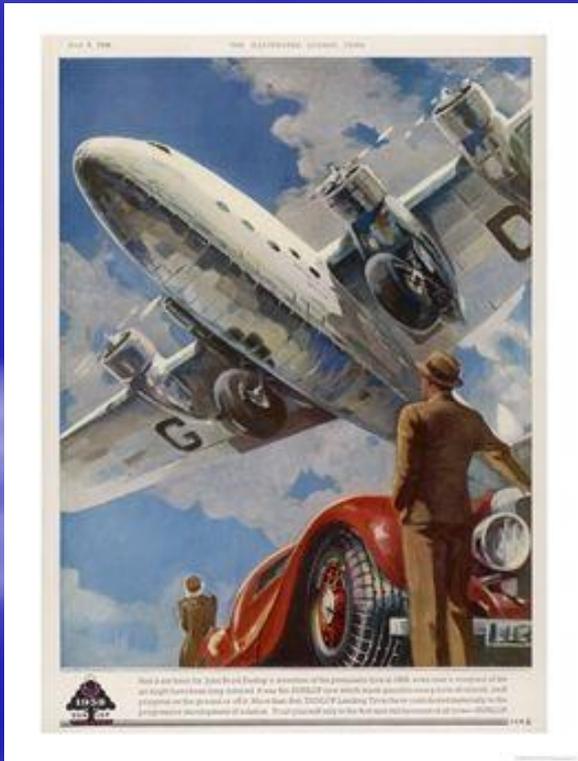
"Then the Lord said, 'If now, while they are one people, all speaking the same language, they have started to [build the Tower of Babel], nothing will later stop them from doing whatever they presume to do. Let us then go down and there confuse their language, so that one will not understand what another says.'"

Genesis 11:6

Mode	Governing Law	Liability Amount	Applicability	Defenses	Statute of Limitations
US Domestic Air	Federal common law air waybill and non-filed tariff				
International Air	Warsaw, Hague, MP4, Montreal	\$20 per kg; \$9 per lb – now 17 SDRs per kg (\$23.12) or \$11.01 per lb	Airport, unless in transshipment under air waybill: MP4: Control of the air carrier	Inherent defect; defective packing; act of war; act of public authority	Bags, 3 days; damage, 7 days; delay 14 days; 2 years suit
US Domestic water	Harter Act of 1893				
International water	COGSA (Hague Rules 1921); Visby 1968-69; Hamburg 1978	\$500 per package or customary freight unit	Tackle to tackle	17 defenses including acts of God and perils of the sea	3 days notice; 1 year suit
US Domestic motor	Carmack 1906	Full value unless released rate		Free from neg. and one of 5 c/l defenses: Act of God, pub. Enemy, pub. Authority, act or omission of shipper, inherent nature of goods	9 mo. Claims; 2 years suit
International motor	CMR Europe	Mexico 3 cents per lb; Canada \$2 per lb; Europe 8.33 SDRs per kg (\$5 lb)			
US Domestic Rail	Carmack	Full value unless released rate		Free from neg. and one of 5 c/l defenses	9 mo. Claims; 2 years suit
Rail international	CIM Europe	Europe 8.33 SDRs per kg (\$5 lb)			
US Freight forwarders	Carmack if surface	See above		See above	See above



# Legal Unification, Disunification, and Reunification



- The Warsaw Convention (1929)
- The Hague Protocol (1955)
- The Guadalajara Convention (1961)
- The Montreal Agreement (1966)
- The Guatemala City Protocol (1971)
- The Montreal Protocols (1975)
- The Japanese Initiative and IATA Intercarrier Agreements (1995-1996)
- The Montreal Convention (1999)
- The treaty regime applies that is common to both the originating and destination state.

The ... ratified the Warsaw Convention on Oct. , .

Warsaw, as amended by the Hague Protocol, became effective for the ... on Dec. , .

Effective March , , for cargo, the Warsaw Convention, as amended by the Hague Protocol, and Montreal Protocol ... , became effective for the ...

In November , , the ... ratified the Montreal Convention of , causing it to enter into force.

Again, the treaty regime common to both the originating and destination state governs carrier liability.

Most cargo movements are unidirectional, and therefore require assessing the treaty regime of both States.

# Ratifications

(as of 2008)

- UN Members – 191 States
- The Chicago Convention – 190 States
- The Warsaw Convention – 152 States
- The Hague Protocol – 137 States
- The Guadalajara Convention – 85 States
- Montreal Protocol No. 4 – 55 States
- The Montreal Convention of 1999 – 86 States

See

<http://www.icao.int/cgi/airlaw.pl>

for an up-to-date listing of High Contracting Parties.





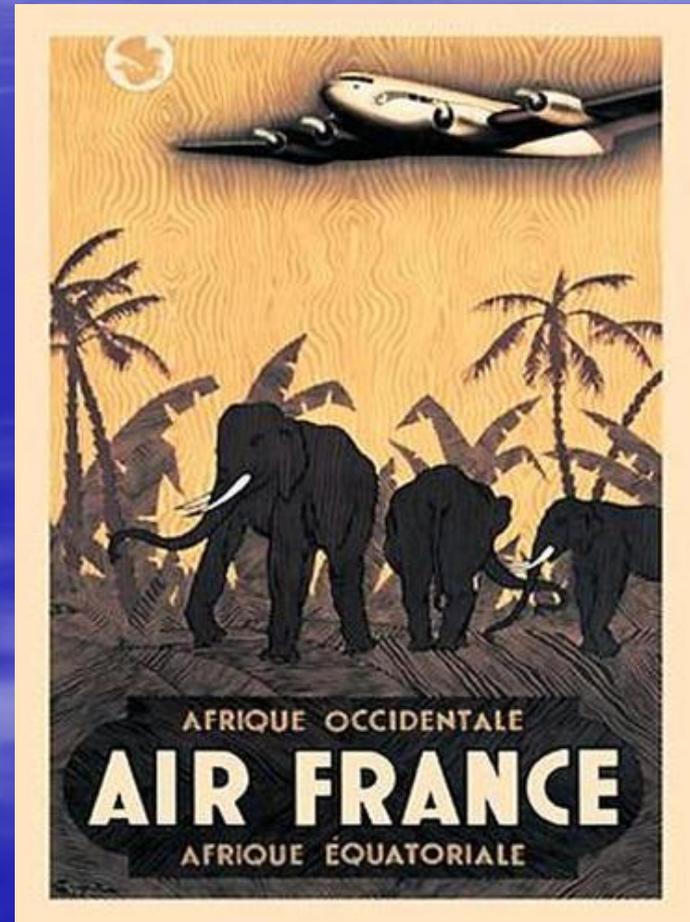
# Limits of Liability for Cargo



The Warsaw Convention (1929)	250 "gold francs" per kg (US\$20/kg; US\$9.07/lb)
The Hague Protocol (1955)	Same, but explicitly based on total weight of package lost or damaged, or total weight of affected shipment
Montreal Protocol No. 4 (1975) & The Montreal Convention (1999)	17 SDRs per kg (US\$25/kg; US\$11/lb) Based on total weight of package lost or damaged, or total weight of affected shipment
Declared Value	Up to the declared amount

# How firm are the liability ceilings?

- Under Warsaw, they could be broken if the air waybill was not delivered, deficient, or if the carrier engaged in “wilful misconduct.”
- But under Montreal and Rome, they are **unbreakable** for cargo (but not for baggage).





# THE PLAINTIFF'S CASE: Strategies for Piercing the Liability Ceiling.

1. The Transportation Was Not An International Movement
2. The Movement Was Not Transportation By Air
3. There Is No Common Treaty In Force
4. The Air Waybill Was Deficient
5. The Baggage Claim Check Was Deficient
6. The Carrier Engaged in Wilful Misconduct

## *The Transportation Was Not International Carriage*

The Warsaw Convention does not apply unless the contract of carriage designates the place of departure and place of destination as situated in the territory of two contracting states (“High Contracting Parties”), or within a single contracting state if there is an agreed stopping place within the territory of another state.

## ***The Movement Was Not Transportation By Air***

**Warsaw Convention, Art. 18(3):**

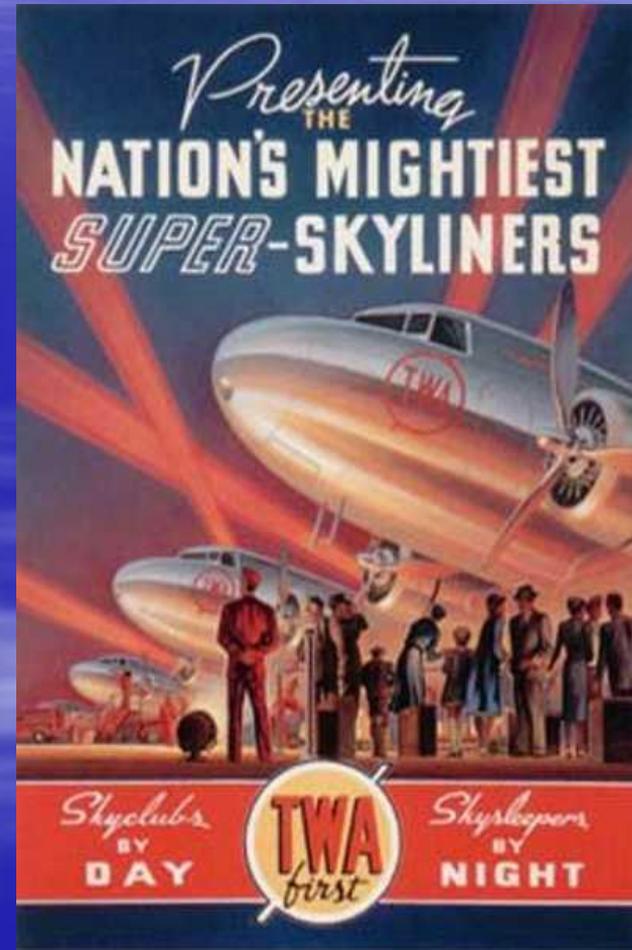
**“The period of transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during transportation by air.”**

***Victoria Sales Corp. v. Emery Air Freight (2<sup>nd</sup> Cir. 1990):***

**“All the parties agree that the loss of the . . . shipment at Emery’s warehouse, located near but nonetheless outside the boundaries of Kennedy Airport. It would appear, therefore, that the plain language of Article 18 would exclude the loss from the scope of the Warsaw Convention.”**

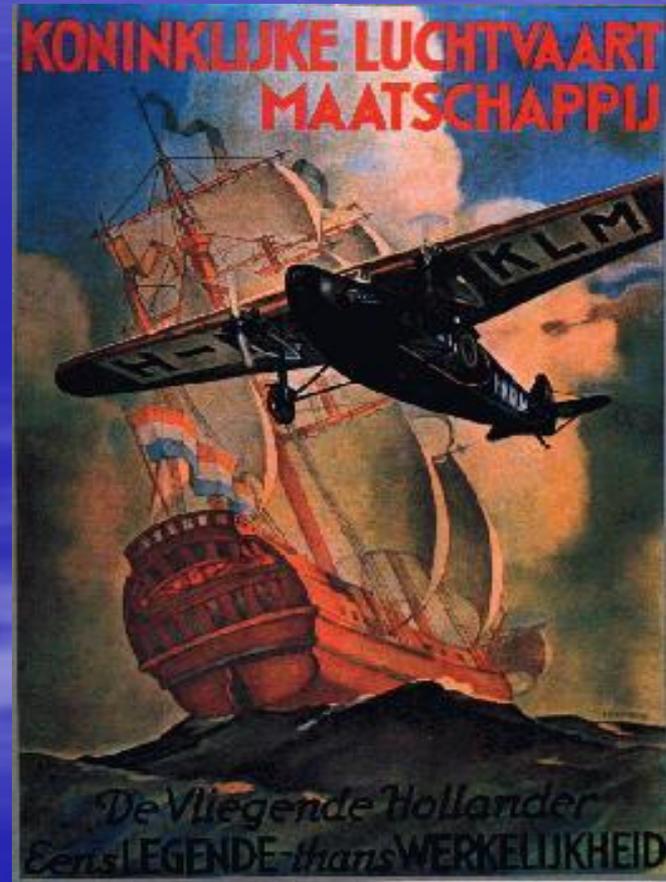
# The Movement Was Not Transportation by Air

- Under Art. 18, Warsaw does not apply unless the occurrence that caused the damage took place during “carriage by air” - while the cargo was:
  - in charge of the carrier  
*and either*
  - on board an aircraft  
*or*
  - at an airport  
*or*
- Pursuant to loading, delivery or transshipment under a contract of carriage by air, damage is presumed to have occurred during air transportation, subject to proof to the contrary.

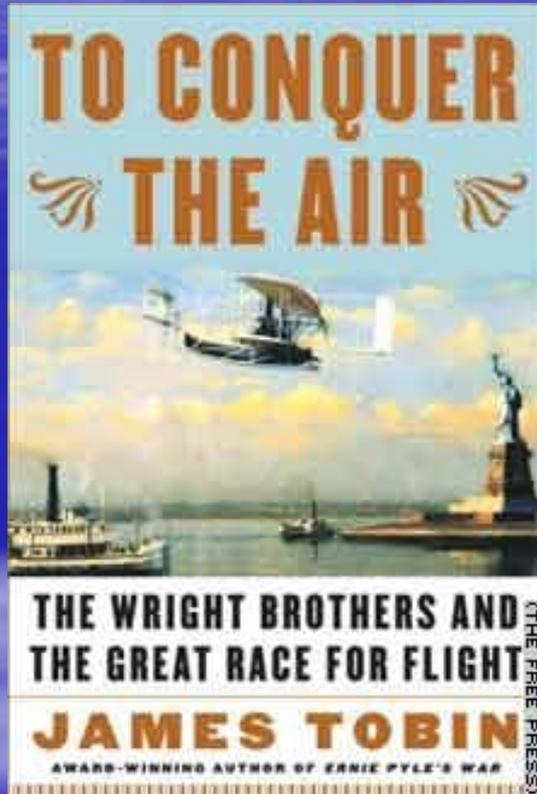


# The Montreal Convention of 1999

- Under M99, „carriage by air“ applies when the cargo is in the charge of the carrier.
- If cargo is damaged or lost while loaded, delivered or transshipped outside the airport, but subject to a contract for carriage by air, it is presumed to be carriage by air.
- M99 also applies if the carrier substitutes another mode of transportation, even without consignor's consent.



# COMBINED CARRIAGE

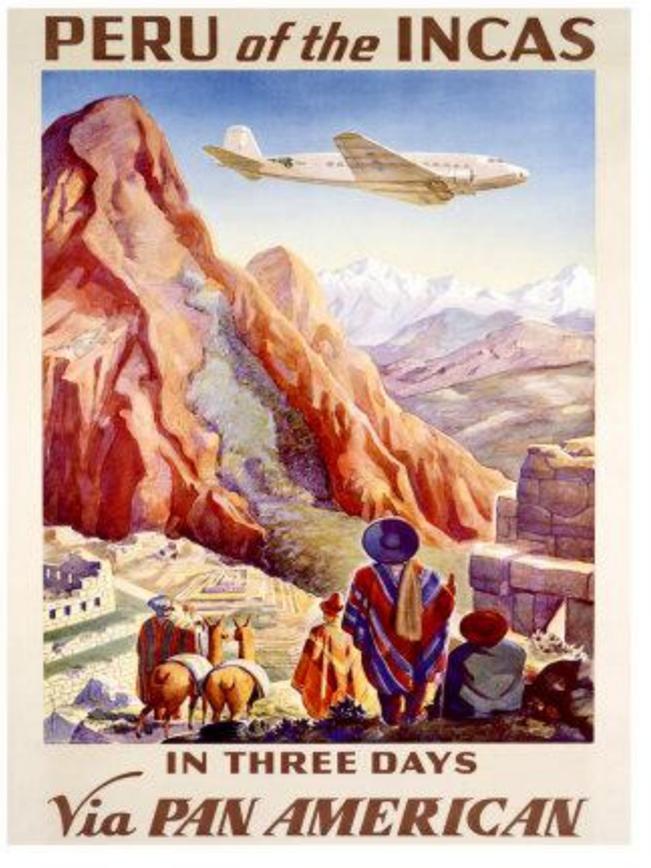


- Moreover, under Article 38, in the case of intermodal transportation (“combined carriage”), a clause can be inserted into the contract of carriage making the Convention applicable to the surface movements.

## ***There Is No Common Treaty In Force***

***Chubb & Son v. Asiana Airlines*** (2<sup>nd</sup> Cir. 2000):  
“no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States.”

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est i nat i on t at e  
( t ypi cal l y, ai r f rei ght m ovement s ar e  
uni di r ect i onal )



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## *The Air Waybill (“Air Consignment Note”) Was Deficient*

The Warsaw Convention was heavily influenced by the pre-existing rules of maritime carriage.

The Warsaw Convention, Art. 8, includes 17 specific requirements, ten of which are mandatory.

Under Art. 9 failure to include any of the ten mandatory requirements results in the carrier losing its liability ceiling:

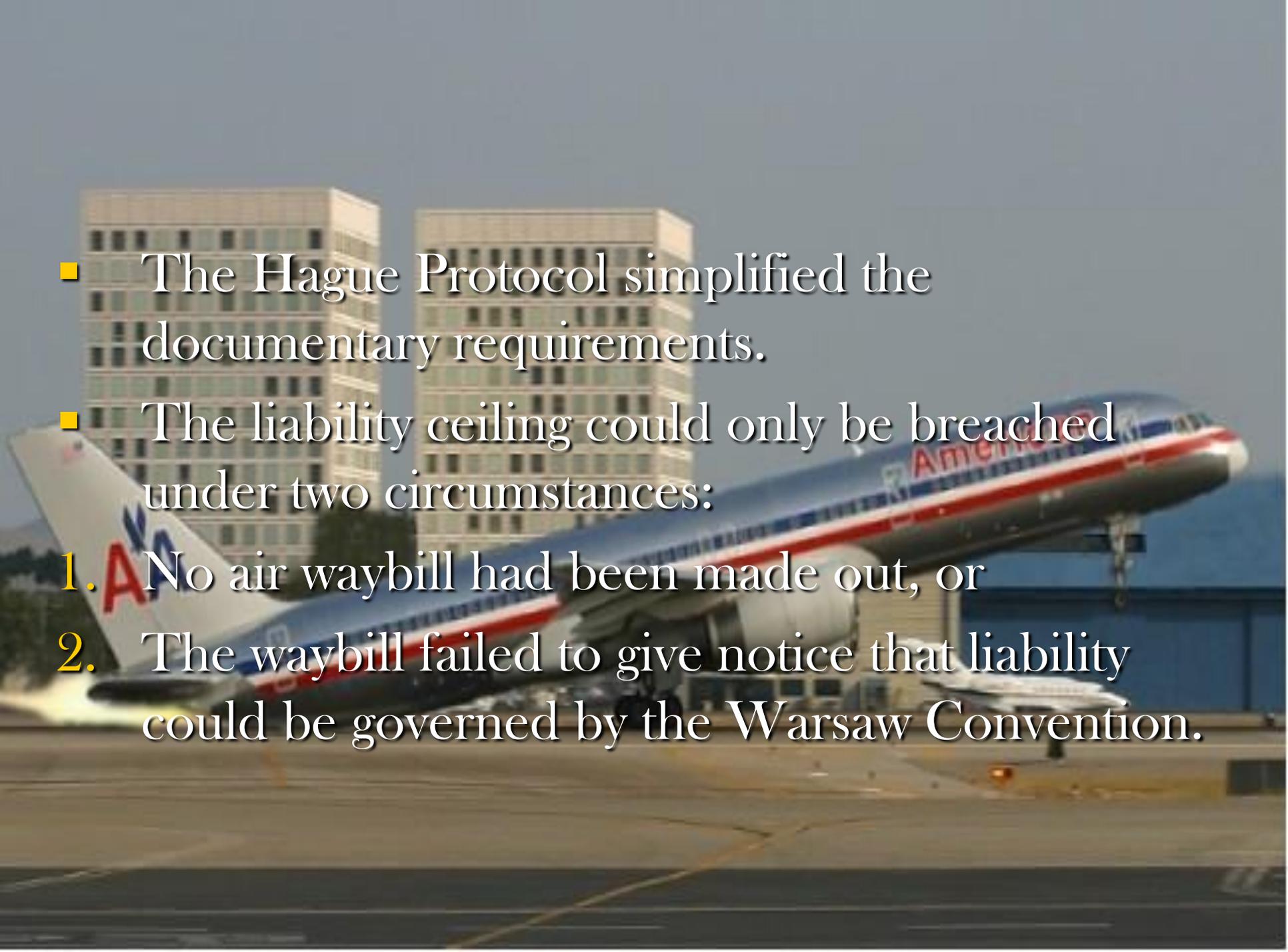
- Place and date of execution;
- Place of departure and destination;
- Agreed stopping places;
- Name and address of consignor;
- Name and address of the first carrier;
- Name and address of the consignee;
- Nature of the goods;
- Number of packages;
- Weight, quantity and volume or dimensions of the goods;
- Statement that liability is governed by Warsaw.



# THE HAGUE PROTOCOL



- Hague amended Art. 8 to reduce the number of items to be included on an air waybill to three:
  1. Place of departure and destination;
  2. Agreed stopping place in another State where the origin and destination are within a single State; and
  3. The Warsaw Convention governs liability.

- 
- An American Airlines airplane is shown on a runway, angled towards the right. The aircraft features the classic blue, red, and white livery with "American" written on the fuselage. In the background, there are several tall, multi-story buildings under a clear sky. The text of the list is overlaid on the image in a white serif font.
- The Hague Protocol simplified the documentary requirements.
  - The liability ceiling could only be breached under two circumstances:
    1. No air waybill had been made out, or
    2. The waybill failed to give notice that liability could be governed by the Warsaw Convention.



# Evolving Jurisprudence

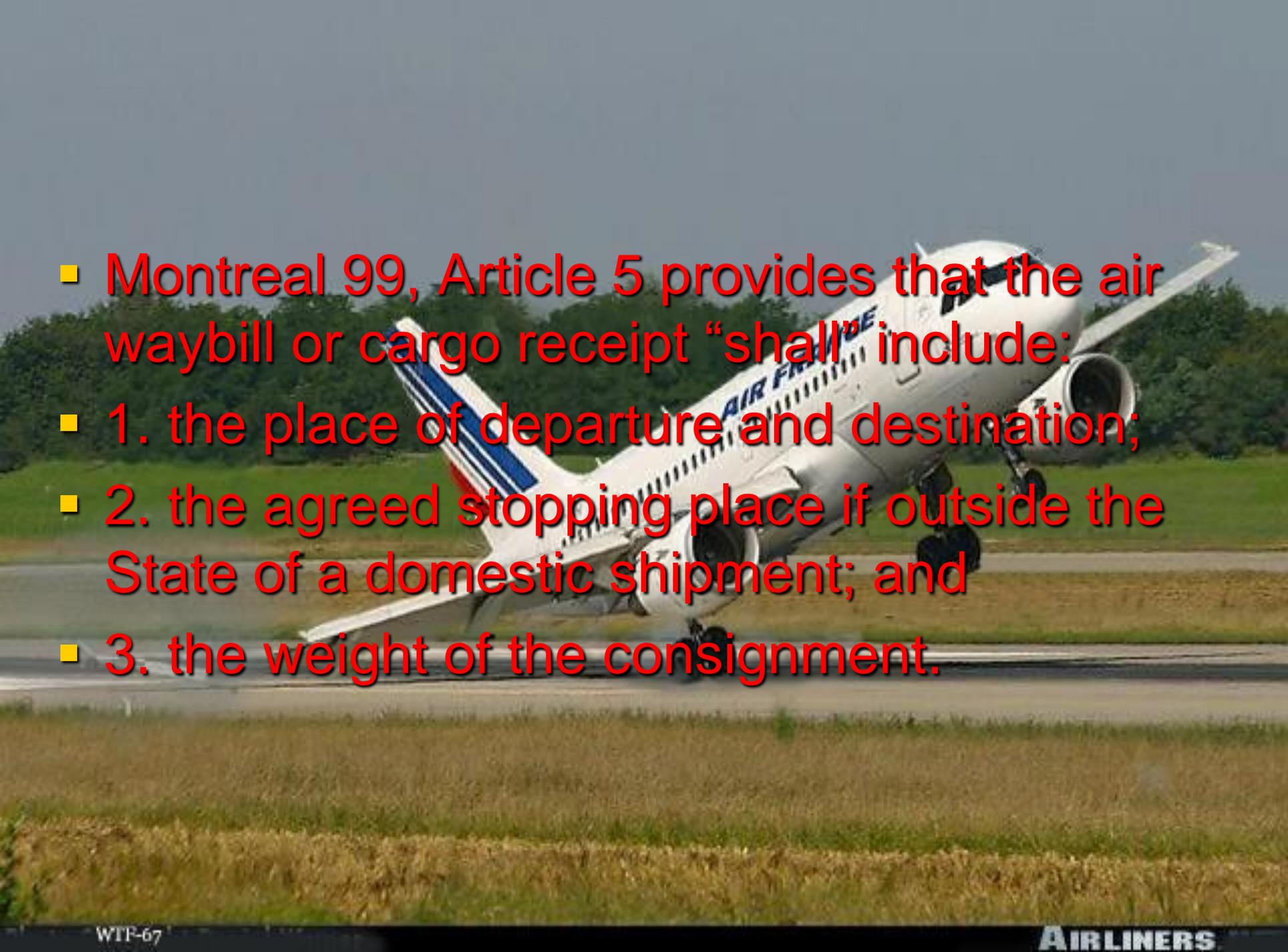
- *Though early jurisprudence forgave nonprejudicial omissions, particularly where the consignor was a commercial entity, recent cases have given Warsaw a strict construction.*

*Chan v. Korean Airlines, Ltd., 490 U.S. 122 (1989):*

- *“We must thus be governed by the text -- solemnly adopted by the governments of many separate nations . . . . [W]here the text is clear . . . we have no power to insert an amendment.”*

*Fujitsu Ltd. v. Federal Express (2nd Cir. 2001):*

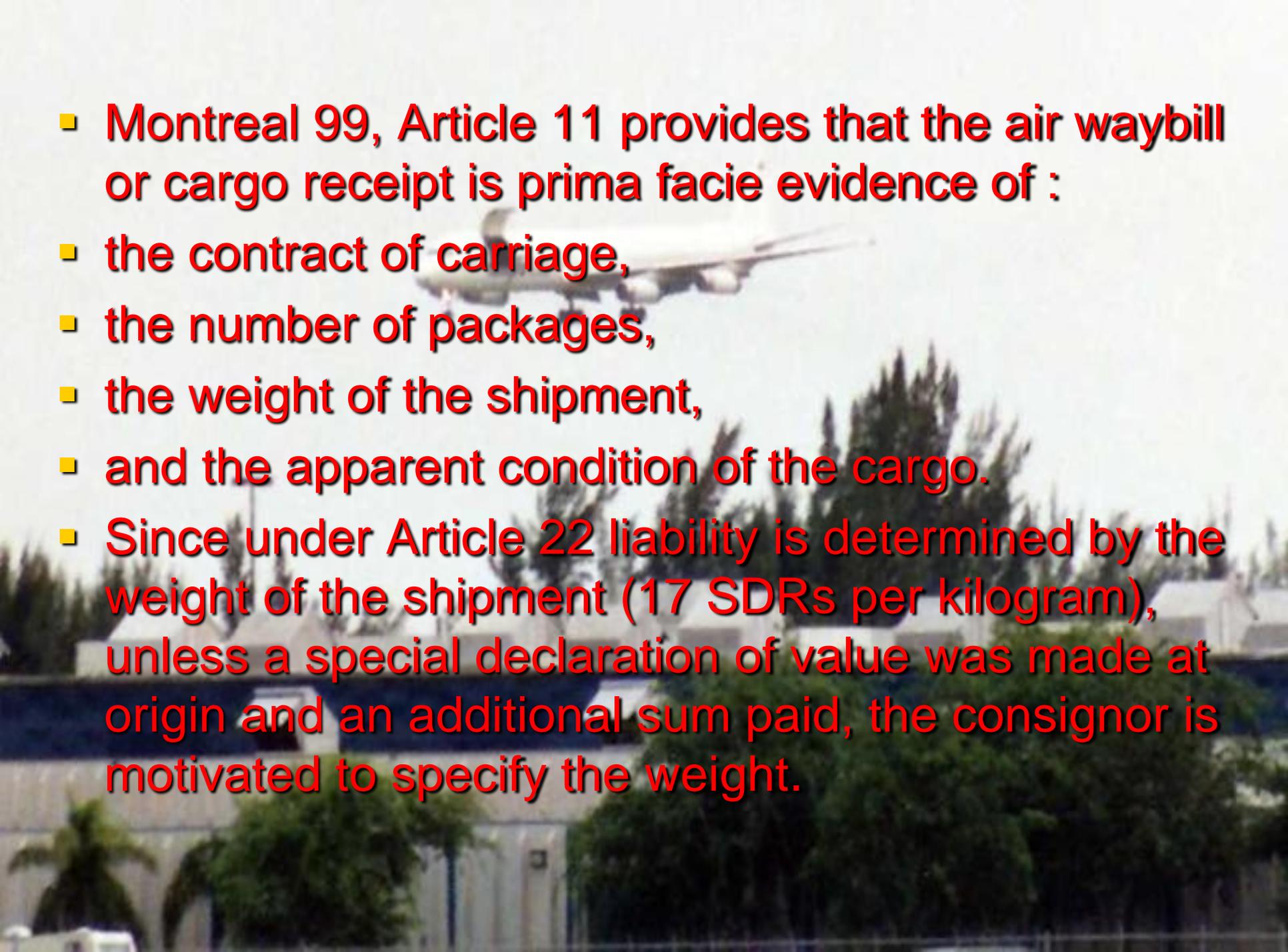
- *“the omission of any required item from the air waybill . . . will result in the loss of limited liability regardless of the commercial significance of the omission.”*

- 
- An Air France Airbus A320neo aircraft is shown in flight, banking to the right. The aircraft is white with blue and red stripes on the tail and "AIR FRANCE" written on the fuselage. The background consists of a green field and a clear sky.
- Montreal 99, Article 5 provides that the air waybill or cargo receipt “shall” include:
  - 1. the place of departure and destination;
  - 2. the agreed stopping place if outside the State of a domestic shipment; and
  - 3. the weight of the consignment.

**But, these documentary requirements have been emasculated by Montreal Protocol No. 4, and by M99.**

- The mandatory nature of documentation requirements has been eliminated.
- Art. 3(5) for passengers and baggage, and Art. 9 for air cargo, provide:
- “Non-compliance with . . . [the foregoing paragraph] shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless , be subject to the rules of this Convention including those relating to limitation of liability.”
- Further, under MP4 and M99 consignors may use simplified electronic records to facilitate shipments.



- 
- Montreal 99, Article 11 provides that the air waybill or cargo receipt is prima facie evidence of :
  - the contract of carriage,
  - the number of packages,
  - the weight of the shipment,
  - and the apparent condition of the cargo.
  - Since under Article 22 liability is determined by the weight of the shipment (17 SDRs per kilogram), unless a special declaration of value was made at origin and an additional sum paid, the consignor is motivated to specify the weight.

LEERT  
VLIEGEN  
BIJ DE N.L.S.!

**OVERASSELT**  
15 tot en met  
Woensdag 19 JULI

Tijdens de groote Vliegweek behalve K.L.M. Passagiersvluchten, Schitterende Prestaties op de Havilland-toestellen door de piloten de Heeren Southe, Bete en Bulle, een geweldige Stunt-Program, waerle Zeevliegen enz., bovendien voortdurende Lesvluchtdemonstraties van de Nationale Luchtvaartschool

Hoofdschool: Wageningen. Medeschool: Rotterdam. Verder N.L.S. Vliegopleiding te Schiphol, Vliegveld Eindhoven, Vliegveld Tiel. Chief Instructeur: de Heer Schmidt. Oms. Instructeurs: de Heeren Wily van Oort, de Mul, Postma en Agter. Inschrijven bij de N.L.S. op het Vliegveld te Dronovest.

- Moreover, since the carriage could be subjected to Warsaw Regime rules on liability, the carrier has an incentive to follow its particulars in the air waybill.

# Montreal 99, Article 10



- The consignor must indemnify the carrier for damages suffered by it by reason of the irregularity, incorrectness or incompleteness of particulars or statements provided by the consignor.
- The carrier must indemnify the consignor for damages suffered by it by reason of the irregularity, incorrectness or incompleteness of particulars or statements provided by the carrier.
- Hence, misstatements on the air waybill or customs documents should be avoided.

## ***The Baggage Claim Check Was Deficient***

Article 4 of Warsaw provided that the liability ceiling could be broken if:

The carrier failed to deliver a luggage ticket, or  
If the ticket fails to include one of the following  
three particulars:

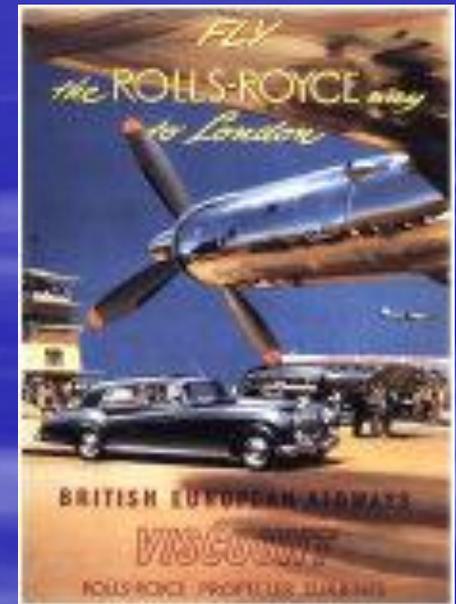
1. The number of the passenger ticket;
2. Number and weight of the packages; or
3. That carriage is subject to the liability rules of Warsaw.



# The Hague Protocol

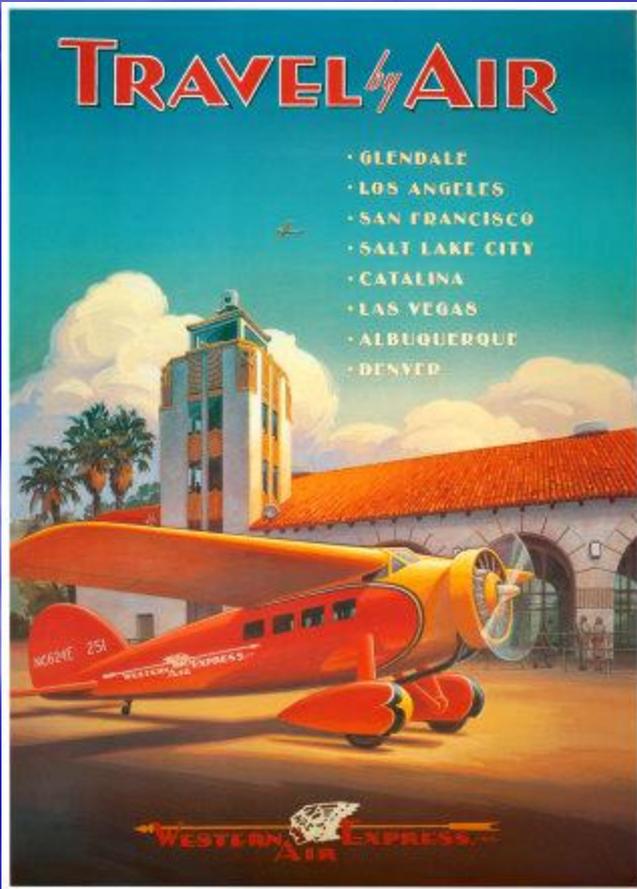
Hague reduced to two, the ways in which the liability ceiling could be pierced:

1. Failure to deliver a baggage check; or
2. The failure of the baggage check to include a notice that Warsaw applies and may limit liability.





# *Chan v. Korean Airlines* (U.S. 1989):



- “We must thus be governed by the text -- solemnly adopted by the governments of many separate States . . . where the text is clear . . . we have no power to insert an amendment.”
- Ergo: strict and narrow construction of Warsaw’s requirements.

# Article 3(5) of M99:

- “Non-compliance ... shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to . . . this Convention including those [rules] relating to limitation of liability.”





## *The Carrier Engaged in Wilful Misconduct*

*Defined in the Hague Protocol as an act or omission of the carrier or its servants or agents acting within the scope of employment with intent to cause damage or with reckless disregard for its consequences.*

*Bayer Corp. v. British Airways (4<sup>th</sup> Cir. 2000):*

*“On a mens rea spectrum from negligence to intent, [the wilful misconduct] standard is very close to the intent end. Negligence will not suffice, nor even recklessness judged objectively.”*

# wilful misconduct (Article)

## the Warsaw Convention:

- o limit on liability where the damage is caused by the carrier's wilful misconduct or such default as is considered the equivalent of wilful misconduct.

## the Hague Protocol:

- o limit on liability where the damage resulted from an act or omission of the carrier with intent to cause damage, or done recklessly with knowledge that damage would probably result.

- o irrelevant for cargo, but relevant for passenger delay, or destruction or loss of baggage



## THE DEFENDANT'S CASE

1. The Plaintiff Failed to File a Timely Claim or Suit
2. The Plaintiff Was Contributorily Negligent
3. The Carrier Took "All Necessary Measures" to Avoid the Loss, or It Was Impossible to Do So
4. The Loss or Damage Was Caused by a "Common Law" Exception to Liability





***The Plaintiff Failed to File a Timely  
Notice of Claim Or Suit Under  
Warsaw***

**Damaged Baggage: 3 days**

**Damaged Goods: 7 days**

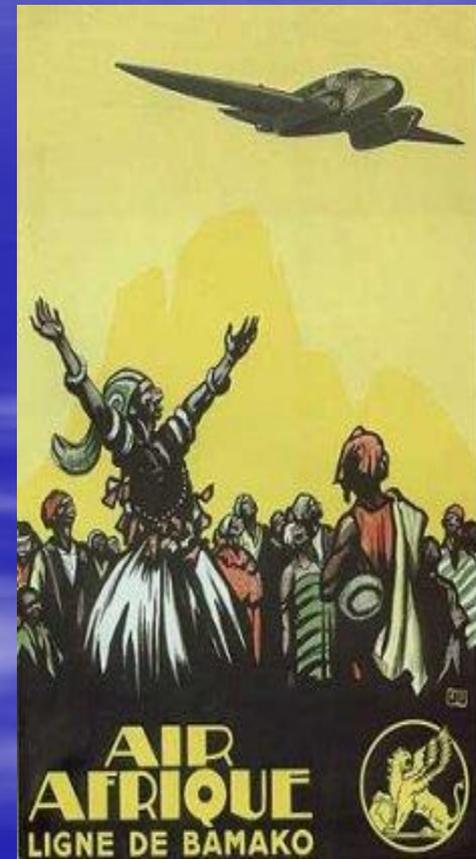
**Delayed Baggage or Goods: 14 days**

**Statute of Limitations: 2 years**





		&

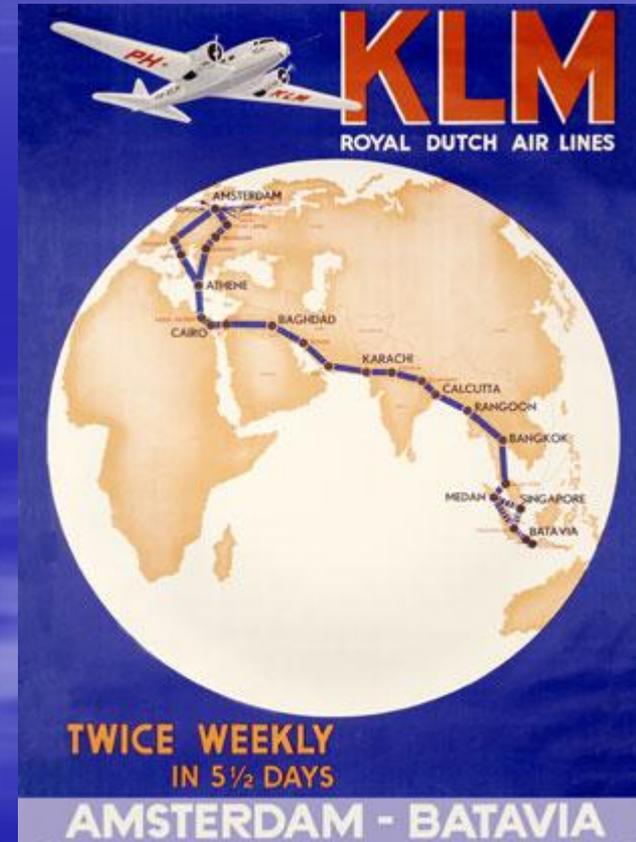


Notice must be in writing.

# time limits for ringing out

uit must be commenced  
within . years:

- from the date of arrival  
at destination,
- from the date the  
aircraft should have  
arrived, or
- from the date the  
transportation stopped.



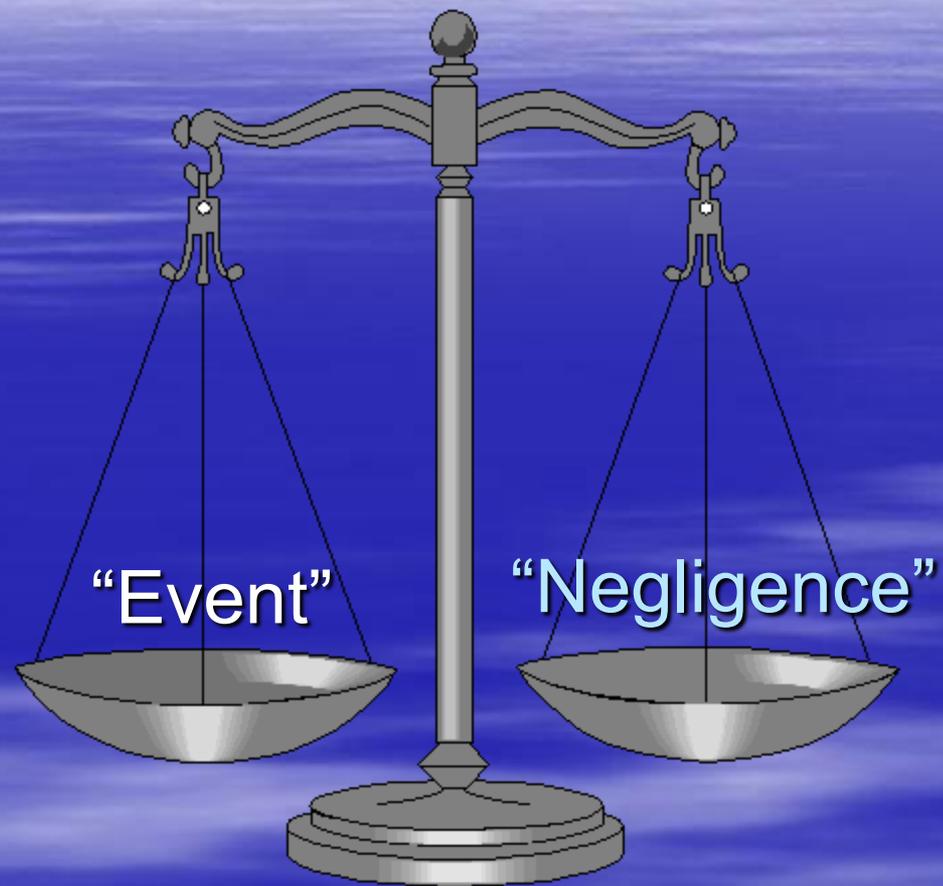


# ***The Plaintiff Was Contributorily Negligent***

**Article 21 of Warsaw: “If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may . . . exonerate the carrier wholly or partly from his liability.”**



- A similar provision was included under Art. 20 of M99:
- “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 . . . The carrier shall be wholly or partly exonerated from its liability . . . .”
- Hence, comparative fault principles apply.



"Event"

"Negligence"



*The Carrier Took “All Necessary Measures” To Avoid the Loss, or It Was Impossible to Do So*

**MP4 and Art. 19 of the Montreal Convention of 1999 reaffirm the defense for baggage and delay claims,  
But eliminate the defense for cargo.**



## ***The Loss or Damage Was Caused By a “Common Law” Exception to Liability***

MP4 and Art. 18 of the Montreal 1999 exonerate the carrier from liability if it proves the destruction, loss or damage of the cargo resulted from:

1. an inherent defect, quality or vice of the cargo,
2. defective packing by someone other than the carrier,
3. an act of war or armed conflict, or
4. an act of the public authority in connection with the transportation of the cargo.

Note: the common law defense of an “Act of God” was not included in M99.

Note also: M99 eliminated the phrase “resulted solely from one or more of the following” that had been included in MP4.

# Against whom may suit be brought?

- The Montreal Convention addresses “Successive Carriage”.
- Under Art. 36:
  - The consignor has a right of action against the first carrier;
  - The consignee has a right of action against the last carrier;
  - Either has a right of action against the carrier who had possession of the cargo during its destruction, damage, loss or delay.
- The Montreal Convention also incorporates the provisions of the Guadalajara Convention, extending its applicability beyond the contracting carrier to the “actual carrier”, who shall be liable for the carriage it performs.
- Under Art. 41, acts or omissions of the actual carrier also shall be deemed those of the contracting carrier.



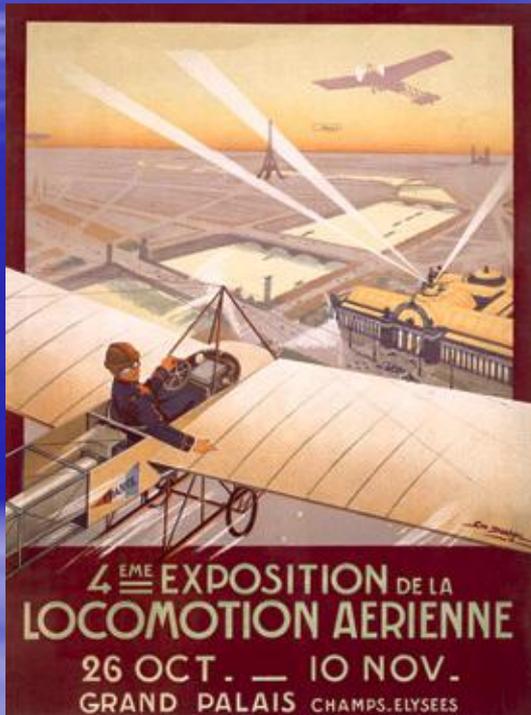
# Where may suit be brought?

Under Art. 33 suit may be brought in a court of a State party to the Convention:

- The carrier's domicile;
- The carrier's principal place of business;
- The carrier's place of business through which the contract was made; or
- The place of destination.

Additionally, under Art. 46 suit may be brought in a court of:

- The actual carrier's domicile;
- The actual carrier's principal place of business.





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welcome to the institute of

# AIR & SPACE LAW

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