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"Warsaw System" and the 1999 Montreal Convention

- Background

Unification of private air law of international carriage by air became a priority very early in the history of aviation. The first airlines capable to carry passengers, mail and freight were established very shortly after WW I. On 8 February 1919 the first French airline was established – Lignes Aeriennes Farman – starting irregular flights between Paris and London; on 25 August 1919 the first international scheduled service was established between London and Paris by the Aircraft Transport and Travel Ltd. (AT&T) – the forerunner of Imperial Airways and eventually British Airways.[1]

At that time there was no established international machinery for the adoption of international conventions and the initiative was in the hands of the interested governments. The government of France by 1923 attempted to adopt national laws relating to liability in the carriage by air and realized that the complex foreign elements of such issue called for unification of law on a wide international level to prevent the unforeseeable conflicts of law and conflicts of jurisdiction. According to the international practice of that time the government of France convened the First International Conference of Air Law in October 1925 in Paris.

The diplomats assembled at the Conference did not feel comfortable with the issues of liability and unification of law; they agreed that such problems must be first studied by "technical legal experts". The Conference decided to create the "Comite International Technique d'Experts Juridiques Aeriens" (CITEJA) – a body of legal experts appointed by different governments but acting in their individual capacity. CITEJA in several sessions prepared a draft convention that was then presented for consideration to the Second International Conference of Private Air Law that met in Warsaw from 4 to 12 October 1929.[2]

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1 www.century-of-flight.net/Aviation%20History/ accessed on 20 November 2007
2 The Minutes and Documents of the Conference in French are available on ICAO CD-ROM #

CITEJA went well beyond the initiative of the French government and dealt not only with the problem of liability in international carriage by air; it established also uniform rules regarding the documents of carriage and their link with liability, rules of liability and limitation of liability and rules on the jurisdiction of courts. The resulting "Warsaw" *Convention for the Unification of Certain Rules Relating to International Carriage by Air* was signed on 13 October 1929 and became soon the widest accepted unification of private law; even today – more than two generations later – it must be recognized as a monumental piece of international law-making that pioneered new legal principles and enabled a smooth development of international carriage by air.

The unification of law introduced transparency and security to the legal relations created by international carriage by air and enabled realistic risk management through insurance. It must be recognized that the Convention was adopted in the early infancy of international air transport just two years after Charles Lindbergh accomplished the first solo flight across the Atlantic, a daring adventure at that time. By the end of 2007 in was still potentially binding on 151 States and proved its viability through complex steps towards its updating and modernization and through tortuous interpretations by different courts of law that tried to circumvent the limitation of liability. Many of its principles survived beyond 1999 when the Convention was replaced – among the consenting parties – by a new modern instrument.

- **Basic elements of the 1929 Warsaw Convention**

The basic provisions of the Warsaw Convention achieved unity of law in the following fields:

- ***The format and legal significance of the documents of carriage****:*
(passenger ticket, baggage check, air waybill)[3]. The format and the particulars of these documents have been used by the airlines for several decades. They have been modelled on the established maritime models and were rather formalistic and eventually proved to be an obstacle to electronic data processing and growing use of electronic documents.

Strict compliance with the formalities of the documents (in particular the provision that the passenger or shipper must be given a "notice" that the Convention with its limitation of liability will apply to the carriage in question)) was sanctioned by loss of limitation of liability for the carrier – a rich minefield for litigation and a source of decisions perverting the meaning of the Convention to avoid the limitation of liability.

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3 Articles 3-16 of the Convention

There have been decisions based on the timeliness of the delivery of the notice advising the passengers of the applicability of the Convention with its limits of liability, effectiveness of the notice and even the size of the fonts in which the notice was printed.[4] The linkage between the liability and the formalities of the ticket has at present no justification and there was urgent need to simplify the formalities of the documents and to enable their electronic processing.

The airlines aim at completely "ticketless" travel to minimize the cost of documentation. The IATA airlines expect to achieve 100% electronic ticketing by 31 May 2008, saving the industry up to US$ 3 billion annually![5] However, the passenger will always need some document or access to the data as evidence of the contract of carriage for accounting and taxation purposes, for immigration (to prove that return passage is available), for successive carriage and other purposes. Such a "document" need not in practice be anything more than an "alpha-numeric" code enabling the access to the central database of the airline.

- Regime of liability*:* Liability represents the core subject of the unification of law by the Warsaw Convention which governs air carrier's liability for death, wounding and other bodily injury of the passenger[6], destruction or loss of or damage to baggage and cargo[7] and liability for damage caused by delay in the carriage by air of passengers, baggage and cargo.[8]

The liability of the carrier under the Convention is based on his fault (intention or negligence), but the Convention adopted a boldly progressive attitude for its time by embodying a presumption of such fault. That was achieved by reversing the burden of proof – it is not for the passenger/claimant to prove the fault of the carrier[9] , but the carrier is presumed to be guilty of fault and can be exonerated only if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.[10]

This was truly a progressive legislative step since by 1929 the protection of the consumer was less firmly established in the legal systems and the innovative reversal of the burden of proof was a positive step toward a better protection of

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4 Mertens v. Flying Tiger, 341 F.2d, 851 (1965), Warren v. Flying Tiger, 352 F.2d 494 (1965) when the passengers received ticket "too late" and not "effectively" to arrange for personal insurance – one at the ramp of the aircraft, the other only when he was seated on board.. In the Lisi v. Alitalia, (370 F.2.d 508) case the ticket was delivered well in advance of the departure but the notice was printed in 4 point font and the court found the notice "camouflaged in Lilliputian print in a thicket of conditions of carriage… in simple truth concealed".

5 www.iata.org/stbsupportportal/et/> accessed on 21 November 2007.

6 Article 17 of the Convention

7 Article 18 of the Convention

8 Article 19 of the Convention

9 The traditional legal principle is that the claimant bears the burden of proof – *"actori incumbit probatio"*

10 Article 20 of the Convention.

the claimants. In any case, in view of the technical and operational complexity of aviation the claimant would find it very difficult to marshal the necessary evidence. However, this element favourable for the claimant was counterbalanced by the imposition of monetary limits of liability.

- Limitation of liability*:* this has been the central point of contention for decades; limitation of liability to fixed maximum monetary amounts goes contrary to the general principles of liability that compensation should amount to restitution (*status quo ante*) or equivalent monetary compensation. Yet, aviation as a nascent industry urgently needed a limitation of liability to survive and develop through the period of gradually improving safety its record and financial viability. The limitation of liability was also presented as an equitable *quid pro quo* for the aggravated regime of liability of the air carrier with its presumption of fault of the carrier.. Among other justifications for the limitation of liability was to enable the air carrier to negotiate a realistic insurance coverage within such limits; however, the practice proved that the carriers could not restrict their risk management by insurance only to the limits of liability under the Warsaw Convention but had to count with the worst possible scenario when the limits could not be invoked (e.g., in cases when the Convention would not be applicable to the particular carriage, in case of a fault in ticketing or in case of the "qualified fault"[11]).

The most likely reason for the introduction of the limits of liability was the protection of the infant industry that could not sustain its development without such protection; moreover, since at that time most internationally operating airlines[12] were state-owned and State-operated, the States party to the Convention were in fact protecting their own interests. Whatever other justifications may be formulated, limitation of liability is a departure from the common law of liability and from the concept of natural justice.

Taking into account the devastating mega-inflation of some currencies after WW I, the monetary limits of liability were expressed in a "gold clause", since at that time gold was a recognized and stable yardstick of values. The currency unit for the limits of liability was the 1927 "Poincare" (French) gold franc consisting of 65.5 mg of gold of 900/1000 fineness. The limit of liability for death, wounding or other bodily injury of a passenger was set at 125,000 francs – between 1929 and 1968 (when the US dollar was pegged at $ 35 per Troy ounce of pure gold) that represented US$ 8,300., after the 1969 devaluation some US$ 10,000.

It is to be stressed that these amounts were not "lump sums" payable under any circumstances – the claimant had to prove that the damage equalled or exceeded the amount of the limit, otherwise only the proven amount was payable.

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11 Wilful misconduct under Article 25 of the Convention

12 With the exception of the USA and Japan and some minor private operators

The liability for loss of or damage to baggage and cargo was limited to 250 francs per kilogramme, equivalent to some US$ 17 (US$ 20 after devaluation). For objects of which the passenger takes charge himself (hand luggage) the limit was set at 5000 francs (US$ 332 or US$ 400 after devaluation).[13]

No separate specific limit was set for the delay and the jurisprudence accepted that the respective passenger and cargo limitation would apply. These limits could be exceeded only under the conditions stipulated by the Convention.[14]

It is not surprising that most cases considered over the decades by the courts of law focused on the provisions enabling to exceed the limits of liability and the Courts showed a benevolent attitude to such claims. The air carriers were deemed to have "deeper pockets" and adequate insurance and that perhaps motivated the courts (in particular in the US) to resort to very flexible interpretations of the Convention to give satisfaction to the claimants.

- Jurisdiction of courts*:* the unification of the substantive private law would not achieve its purpose without the determination of the courts which may be seized of any claims. This is another field where CITEJA went far beyond the original proposals of the French government. While trying to restrict "forum shopping", the Convention left a considerable flexibility in the selection of the court. Article 28 of the Convention stipulates that an action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either

- *before the Court having jurisdiction where the carrier is ordinarily resident, or*
- *has his principal place of business, or*
- *has an establishment by which the contract has been made or*
- *at the place of destination.*

In matters of procedural law the Convention further states that questions of procedure shall be governed by the law of the Court seized of the case (*lex fori*) and that the right to damages shall be extinguished if an action is not brought within 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.

It should be noted that in 1929 the Warsaw Convention was drafted under the predominant influence of European ("civil law") concepts and its text is authentic

13 Article 22 of the Convention

14 The relevant provisions are Articles 3 (2), 4 (4) and 9 with respect to shortcomings of the documentation of carriage and Article 25 of the Convention with respect to wilful misconduct.

only in the French language, all other existing texts prepared by different governments for domestic use are unofficial translations and cannot serve as a basis of interpretation of the text.

Soon after the Convention came into force many States realized a major flaw in this unification of law – it went far beyond the unification of substantive law when imposing the strict and uniform limits of liability and thereby in fact attempted to "unify" the cost of living in a widely divergent spectrum of States. The limits of liability established by the Convention soon proved inadequate and economically unrealistic for many States and the Courts often accepted a "creative" interpretation of the Convention – a most undesirable judicial "amendment" of the real aim of the Convention. With the vastly improving safety record of the airlines, privatization of most airlines in the world and with the economic strength of the industry the low limits of liability lost any justification and steps were taken for the improvement and updating of the Convention, most of them half-hearted.

- **steps in the amendment of the Warsaw Convention**

Under Article 41 of the 1929 Warsaw Convention it was for the Government of France to take any steps for the amendment of the Convention and the convening of a diplomatic conference. However, after WW II this task was assumed by ICAO and the French government *de facto* renounced its role in favour of the ICAO Legal Committee and of Diplomatic Conferences convened by the ICAO Council.[15]

After extensive studies in the Subcommittees of the Legal Committee and of the Legal Committee itself a certain compromise was reached on the amendment of the Convention. The Council of ICAO convened a diplomatic conference at The Hague that adopted, on 28 October 1955 the

- **"*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International* Carriage *by Air Signed at Warsaw on 12 October 1929, Done at The Hague, 28 October 1955*"[16]** generally referred to as The Hague Protocol of 1955.

The Conference – out of deference to the 1929 Convention – did not wish to adopt a new convention and agreed on the form of a Protocol that would insert new text into the original Convention, modify some provisions and delete some other.

15 An explicit notice of renunciation of its role was given by France only on the very eve of The Hague Conference in 1955 when the ICAO Secretariat started to worry about the impact of Article 41 of the Convention on the Conference that was already convened.
16 ICAO Doc 7632

The result is that the Protocol cannot stand by itself but must be read together with the original Convention. Nevertheless, a new instrument of international law was created by The Hague Protocol – "*Warsaw Convention as amended at The Hague, 1955"*[17] that is separate and distinct from the original 1929 Convention. The Protocol and the Convention are to be read and interpreted together as one single instrument.

A peculiar feature is that the Protocol was drafted in English, French and Spanish, each text being of equal authenticity, while the underlying Warsaw Convention exists only in one authentic language – French. Consequently, apart from the composite French text of the Warsaw Convention as amended at The Hague, 1955, no such composite authentic text exists in English and Spanish. Again, the Convention as amended by the Protocol applies only between the parties thereto – a State party only to the original Warsaw Convention and another State party only to that Convention as amended at The Hague have no common denominator and neither of the two instruments applies in their mutual relation.

The primary object of the amendment was to increase the limits of liability with respect to passengers. These limits were considered, in particular in the United States, to be outdated and unrealistically low. The US delegation wished to have the limit of liability with respect to passengers increased at least to the equivalent of US$ 25, 000 but most delegations from the developing world considered such amount excessive.

A compromise was reached to double the "Warsaw" limit of 125, 000 francs to 250, 000 francs[18] , equivalent to some US$ 16, 600 (and US$ 20, 000 after devaluation). Such limit did not meet the needs of the United States with their high cost of living and other States in due course came to the same position as the United States. No change was made in the amount of limits with respect to baggage, personal effects and cargo.

In other respects the Protocol made only minor amendments. It contributed to some simplification of the documents of carriage and stipulated that only the absence of a notice (and not any other defect) would lead to the loss of limits of liability. The vague wording of Article 25 dealing with qualified fault ("wilful misconduct") was clarified by specifying that limit of liability could be exceeded if it is proved that the carrier or his agents acted with intent to cause a damage or recklessly and with knowledge that damage would probably result.[19] An additional Article 25 A clarifies that the limits protect also the servants or agents

17 See Article XIX of the Protocol

18 While the Warsaw Convention refers to "French franc", that currency was no longer in circulation by 1955. The Protocol refers to a "franc" as an abstract currency unit consisting of 65.5 mg of gold of 900/1000 fineness.

19 This clarification puts on equal level the Roman law concepts of *dolus malus* and *culpa lata* – *culpa lata dolo equiparatur".*

of the carriers acting within the scope of their employment.

The Protocol gradually achieved wide acceptance and by the end of 2007 136 State were party to it. Its continuing coexistence with the original 1929 Warsaw Convention is unexpected – there are States that are party both to the original Convention and the Convention as amended at The Hague; there are States that were not party to the 1929 Convention or have denounced it and are party only to the Convention as amended at the Hague; since the original Convention and the Convention as amended at The Hague are two separate and distinct instruments, it is important to determine which of the two instruments, if any, applies as common denominator to any two States.

The next step in the evolution of what was now called “The Warsaw system” came in 1961 after extensive studies by the ICAO Legal Committee and its Subcommittees. On 18 September 1961 an International Conference on Air Law held in Guadalajara, Mexico from 29 August to 18 September 1961[20] adopted the

- ***Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier.***[21]

A possible legal loophole was identified in the Warsaw Convention and that Convention as amended at The Hague. It referred to some innovative practices in international air transport – in particular in case of lease, charter or interchange of aircraft, in the practice of freight-forwarding and more recently in the practice of code-shared flights.

In such modalities of air transport the passenger or shipper concludes a contract of carriage with one entity (charterer, freight forwarder, a carrier which is not actually performing the code shared flight), while the actual carriage is performed by another entity – the actual carrier. It was perceived that such situations may make the Convention inapplicable since Article 1 (2) of the Warsaw Convention and that Convention as amended at The Hague makes the Convention system applicable only if there is a contract with the air carrier; in the modalities listed above the passenger or shipper enters into a contract with one “carrier” while the actual carriage is performed by another carrier and the Convention would not be applicable.

It is noteworthy that this new instrument was not adopted in the form of a Protocol to the Warsaw Convention but as a separate Convention supplementary to the Warsaw Convention. Much speculation was directed to this question but

20 Minutes and Documents of the Conference are in ICAO Doc 8301-CD in CD-ROM format.
21 ICAO Doc 8181

the memory of the participants of the Conference will confirm the "political" nature of this decision: if the instrument were to be Protocol, it would have to be deposited – like the 1929 Convention and the 1955 Protocol – with the Government of Poland. The communist government of Poland at that time proved to be "less than impartial" in the performance of its duties as the depositary in the controversial matters of that time (e.g., siding with North Korea against South Korea, with the German Democratic Republic against the Federal Republic of Germany and Peoples Republic of China against the Republic of China – refusing to accept the ratification of one entity and giving priority to the other). The separate Convention was deposited with the host government of the Conference – Mexico.[22]

The substance of the Guadalajara Convention is simple: it extends the applicability of the Warsaw Convention or that Convention as amended at The Hague beyond the carrier identified in the contract of carriage ("contracting carrier") and grants the Convention's regime also to the "actual carrier" defined as

> *"a person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated* [in the contract of carriage – added by ed.] *but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary".*[23]

According to the information from the depositary Government, by the end of 2007 there were eighty-four States party to the Convention. However, all substantive provisions of the Convention have now been incorporated in the 1999 Montreal Convention[24] and it will gradually lose its meaning, together with the rest of the "Warsaw system".

A ***Crisis of the "Warsaw System"*** resulted from the sudden denunciation of the Convention by the US Government. Dissatisfied by the low limit on recovery for passengers' death or injury, the US Department of State sent the notice of denunciation to the Polish Government on 18 October 1965; however, the US Government expressed hope that a new agreement could be reached before the notice of denunciation was to take effect six months later and it promised to withdraw the notice of denunciation if the limits of liability per passenger could be increased to between US $ 75, 000 and 100, 000.

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22 The Mexican government did not prove impartial either – due to continuing tension with the Vatican it refused to accept the instruments coming directly from the Holy See and they had to be forwarded through ICAO.

23 Article I (c) of the Convention

24 Convention for the Unification of Certain Rules for International Carriage by Air, signed in Montreal on 28 May 1999, Chapter V, Articles 39-48;

This notice was perceived as a serious crisis of the unification of private air law. Without the US participation in the Convention a large proportion of all international traffic would not be covered by unified law but would be subject to unpredictable conflicts of law, conflicts of jurisdiction and to unforeseeable difficulties in trying to obtain reasonable insurance coverage.

In February 1966 ICAO convened a "special meeting" in Montreal to which all contracting States were invited and that was to consider a solution that would avert the impending US denunciation of the Convention.[25] The meeting faced unusual acrimony ("a peasant should not pay for the bowl of soup for the Emperor"…) and the expectation of the US delegation to reach agreement on limit in the order of US$ 100, 000 was not supported by any other delegation. The forum of States within ICAO failed to find any solution.

The initiative was taken over by the airlines within the IATA and they reached an "interim solution" known as "Agreement Relating to Liability Limitation of the Warsaw Convention and The Hague Protocol" that is referred to as "**Montreal Agreement 1966"**[26] and was accepted by the US Civil Aeronautics Board (CAB). Just two days before the expiry of the deadline, the US notice of denunciation of the Convention was withdrawn. Where ICAO failed, a non-governmental body of the airlines succeeded in reaching a workable compromise.

The "Montreal Agreement 1966" is not an instrument of international law and is not a formal amendment of the Warsaw system. It is no more than a private agreement between the airlines and the US authorities under which the airlines accepted the regime of strict liability (renouncing their defence under Article 20 of the Convention) and a limit of US$ 75, 000 per passenger's death or injury for any flights to, from or through the territory of the US. It is just a private agreement of the airlines that on the flights involving US territory they will accept a particular interpretation and application of the Warsaw regime.

The agreement represents a *de facto* amendment of the Convention between particular subjects and with respect to particular flights. It undoubtedly eroded the unification of law and was contrary to the general precepts of the international law of treaties. The term "Agreement" would indicate a voluntary acceptance of the conditions but the airlines operating to, from or through the US territory had no choice if they wished to keep their operating permit. The "interim" nature of the agreement proved to be a mockery – it persisted for over 30 years!

ICAO had no alternative but to note this "interim" solution and it started to work on a permanent solution without delay. The matter was studied by two sessions

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25 "Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and Hague Protocol" , ICAO Doc 8584/LC/154-1 and 2 (1966).

26 In the US it is referred to as Agreement CAB 18900, approved by Order E-23680, 13 May 1966 (Docket 17325)

of a special Panel of Experts on Limits of Liability in January and July 1967[27], two sessions of the Subcommittee of the ICAO Legal Committee and the 17th session of the Legal Committee.[28] These studies did not concentrate only on the issue of limits of liability but attempted to modernize the Warsaw system in several other aspects as part of a "package". The results were formulated in the format of a Protocol-to-Protocol and adopted at an International Conference on Air Law on 8 March 1971 as

> ***"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 September1955, Signed at Guatemala 8 March 1971 "***[29]

The Guatemala City Protocol did not focus only on the increase of the limit of liability but attempted a radical modernization of the Warsaw system and pioneered new ideas that have later formed the basis of the 1999 Montreal Convention. The Protocol was confined only to the urgent issues relating to passengers and left for later consideration all aspects relating to baggage and cargo.

One of the fundamental innovations was the simplification of the passenger ticket that could be substituted by "any other means" and thus enable electronic data processing; that innovation was a remarkable progress considering the legal practices of 1971. Moreover, the formalities of the documentation were completely separated from the regime of liability and any shortcoming in the ticketing had no influence on the limit of liability.

The Protocol also introduced the regime of strict liability regardless of fault and removed the exoneration clause in former Article 20. Strict liability regardless of fault was a bold innovation for the time.

The Protocol expanded the conditions of recovery by referring to "personal injury" rather than "bodily injury", thus opening the door to compensation for mental trauma, post-traumatic shock syndrome, etc that so far was at least questionable.

All those "improvements" of the regime of liability were predicated on the existence of a limit – admittedly a very high limit of 1,500,000 "francs" of the gold value of 65.5 mg of gold of 900/1000 fineness – a sum twelve times higher than the some in the the original 1929 Convention and at that time equivalent to US$ 100, 000. It is important that this limit with respect to passengers was to be an absolute limit and that it was to be unbreakable under any circumstance – be it for any shortcomings in the documents of carriage or "wilful misconduct" (Article

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27 ICAO Doc 8839-LC/158
28 Montreal, 9 February-11March 1970, ICAO Doc 8877-LC/162
29 ICAO Doc 8932

25 was deleted). The authors of the text thus wished to prevent the frequently used “legal” techniques to exceed the limits of liability under the old system.[30]

The Guatemala City Conference was essentially a dialogue between the US and the rest of the world, all States being sincerely anxious to accommodate the understandable economic needs of the US. However, without previous preparation the US came at the last minutes of the Conference with additional demands.

One of them was to provide in the instrument for permission to States to operate in their territory a “national supplement” to the limit in the form of additional insurance that would not add anything to the liability of the carrier. This request was accommodated in a new Article 35A.

The second additional request of the US was to add to the four jurisdictions in Article 28 of the Convention a “fifth jurisdiction” in the place of carrier’s establishment if the passenger has his domicile or permanent residence in the territory of the same State. Other delegations believed that this additional jurisdiction would give an unfair advantage to US passengers who would have almost always access to US courts – notorious for their relatively high compensation awards compared with the courts in other States. In spite of serious doubts even this wish of the US was accepted with the understanding that regardless of the choice of the court the absolute limit of liability cannot be ever exceeded.

Since the Protocol was drafted to meet the needs and requirements of the US, the Conference believed that the Protocol should require for its entry into force not only ratification by thirty States, but specifically also the ratification by the United States. This is the idea behind the otherwise incomprehensible provision of Article XX of the Protocol that does not mention the United States but refers to 1970 statistics of passenger-kilometres of five States that represent at least 40% of all international carriage. There could not be any such five States unless the United States are among them.

The Guatemala City Protocol was a bold and honest effort to modernize private international air law and introduced several progressive elements valid at present. However, it never came into force since the US did not ratify it and it is now a dead letter. The fatal flaw of the Protocol was its absolutely unbreakable limit of liability – such a condition even in the case of criminal intent was hardly acceptable not only to the US (who could have bypassed it by a “national supplement”) but also to the civil law countries as it would contradict their constitutional concepts of “public order”. In any case, many States avoided ratification of the Protocol waiting – in vain – for the first such step by the United States.

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30 It remains questionable whether the unbreakability of the limit would not be against the “public order” in many States when it would be supposed to apply even in case of intentional damage.

Soon after the Guatemala City Conference attention was drawn to the "unfinished business" - the problem of cargo that was not dealt with in the Guatemala City Protocol. The Legal Committee of ICAO prepared a draft protocol and a Diplomatic Conference was convened in Montreal in September 1975.[31] Against all expectations the main task of the Conference was embodied only in what is now "Montreal Protocol N. 4"[32] while the preceding "Additional Protocols of Montreal" No. 1, 2 and 3 deal with a problem that was not even on the agenda of the Conference when it convened.

The problem singled out by the US delegation was the expression of the limits of liability in the "gold clause" in French gold franc or in "francs" as an abstract currency unit defined by their gold content. This clause was meaningful and convincing as long as gold was a steady yardstick of values and a Troy ounce of gold was officially worth US$ 35.00. However, by 1968-69 de Gaulle's France requested exchange of their vast stock of "Eurodollars" for gold at the standard parity and that caused devaluation of the US dollar as well as creation of a free market for gold. Many countries followed the US example and abolished the gold par value of their currency and gold was thus "demonetized" and became just another commodity the price of which was determined by the market laws of supply and demand. Gold is no longer a stable yardstick of values.

In the light of these developments the "gold clause" in the Warsaw system lost its relevance. The International Monetary Fund by that time also abolished the gold parity of currencies and created the concept of "Special Drawing Right" (SDR) as a new yardstick of values. The SDR is not a real currency but a measure of values defined every day from a floating basket of the leading trading currencies – often called "paper gold". Those leading currencies are EURO, Japanese yen, Pound Sterling and US dollar. Originally in 1969 one SDR equalled one US dollar. The current rate is 1 US $ = 0, 627505 SDR (or 1 SDR = US$ 1, 5936) but it is subject to daily changes.[33]

The Conference adopted "***Additional Protocols of Montreal" No. 1, 2 and 3***[34] that have the sole purpose of replacing the "gold clause" in the original 1929 Warsaw Convention, in that Convention as amended at The Hague 1955 and in that Convention as amended at The Hague and by the Guatemala City Protocol of 1971 by translating the limits of liability from the gold clause into the SDR[35].

Protocols No. 1 and 2 came into force for 48 and 49 States, respectively. Protocol No. 3 is a peculiar instrument – it is a Protocol-to-Protocol-to-Protocol

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31 Minutes and Documents in ICAO Doc 9154-CD (CD-ROM format)
32 ICAO Doc 9148
33 The values quoted are from the IMF web page and apply for 21 November 2007.
34 ICAO Docs 9145, 9146 and 9147
35 Thus 125, 000 francs became 8, 300 SDR, 250 francs 17 SDR, 5000 francs 332 SDR, 250, 000 francs 16, 600 SDR and 1,500,000 francs 100, 000 SDR

that was to be a separate and distinct instrument to be known as the *"Warsaw Convention as amended at The Hague 1955, at Guatemala City, 1971 and by Additional protocol No.3 of Montreal, 1975"*; it could have come into force by ratification by any thirty States without the condition that the USA must be among them; however, other States did not show interest to join such instrument without the support of the US.

The proper work assigned to the Montreal Diplomatic Conference in 1975 was to adopt updated rules for the carriage of cargo. That was accomplished with a remarkable success in the Montreal Protocol No.4[36] of 25 September 1975 with a full title

> "***Additional 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 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975****."*

The Protocol was ratified by the end of 2007 by 53 States but all its substantive provisions have been adopted in the 1999 Montreal Convention and enjoy wide applicability.

The Protocol left the limit of liability for loss of or damage of cargo at the same level as the original 1929 Warsaw Convention, the equivalent of the 250 francs being 17 SDR per kilogram and that limit cannot be exceeded under any circumstances. There was no pressure to increase this amount since the carriage of cargo normally involves business people carrying adequate insurance.

Of great importance is the adoption of the regime of strict liability of the air carrier for the loss of or damage to cargo regardless of fault; the only exoneration of the carrier could be if he proves that the loss of or damage to cargo resulted solely from inherent defect, quality or vice of that cargo, defective packing of that cargo performed by a person other that the carrier or his servants or agents, an act of war or armed conflict or an act of the public authority carried out in connexion with the entry, exit or transit of that cargo. It is the first time that an international unification of law introduced strict liability with respect to carriage of cargo and this progressive measure could reduce expensive litigation.

The Protocol also substantially simplified the documentation of carriage and separated it completely from the regime of liability. The air waybill could be substituted by "any other means which would preserve a record of the carriage to be performed" and that opens the door to electronic data processing and considerable savings; if such "other means" are used, the carrier must on request deliver a receipt for the cargo permitting identification of the consignment and access to the record preserved by the "other means".

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36 ICAO Doc 9148

This Protocol responded to the needs of the air transport industry and of the consignors and offered the first ray of hope that in due course the entire liability system in international air transport could be modernized.

After the 1975 Montreal Conference ICAO (or, more precisely, its member States) made no further effort to modernize the Warsaw system for over twenty years; all action was limited to the "flogging of a dead horse" by repeated exhortation to States to ratify Protocols No. 3 and 4. The Assembly Resolutions on this subject were adopted by full unanimity, but no action by States followed.[37]

The lack of any progress in the modernization of the Convention caused major dissatisfaction and frustration to governments and airlines alike. The main concern, although never openly expressed at the ICAO meetings, has been the possibility that the USA and other developed countries might denounce the unsatisfactory Convention owing to its unsatisfactory limits and thus throw international air transport into the unpredictable and uninsurable maze of conflict of laws and conflict of jurisdictions.

A series of unilateral actions were taken for practical application to bridge the deadlock reached in international law-making:

- many airlines, in particular in the developed countries, unilaterally increased in their tariffs the limit of liability to passenger's death or injury to 100, 000 SDR (currently almost US$ 1,6 million);

- Italy adopted this limit of 100, 000 SDR by law for all Italian carriers and for all other carriers operating to, from or through Italy;[38]

- The *Japanese initiative* is the name usually given to the decision of all Japanese air carriers, with the approval of the Government of Japan, to waive, as of 20 November 1992, the limit of liability in the international carriage by air in a two-tier system: up to 100, 000 SDR strict liability for proven damage would be accepted without defence and beyond that sum, without any monetary limitation, liability would be based on presumed fault with reversed burden of proof (i.e., with the defence of "all necessary measures" under

37 The last such resolution was adopted in October 1995 (A-31, Appendix C). By that time deliberations were progressed within IATA and only four weeks after the ICAO Assembly Resolution the IATA Kuala Lumpur Annual General Meeting adopted a new initiative of its member airlines on the subject.

38 Italian Law No. 274 of 7 July 1988; this law was adopted in the wake of a ruling by the Constitutional Court of Italy that the Warsaw/Hague limit of liability was violating the constitutional rights of passengers.

Article 20 (1) of the Convention.[39]

The **"Japanese initiative"** was a major historic innovation, indicating the industry's willingness and ability to accept liability without any monetary limits.

- The Japanese initiative was followed by other airlines within IATA and on 31 October 1995 the IATA Annual General Meeting in Kuala Lumpur adopted the ***Intercarrier Agreement on Passenger Liability*** followed by the ***Measures to implement the IATA Intercarrier Agreement***[40]. Like the Japanese initiative, the IATA Agreement was to be included in the carriers' tariffs and would waive the limit of liability for recoverable compensatory damages for death or bodily injury of a passenger; the airlines also agreed not to use the defence under Article 20 of the Convention for claims up to 100, 000 SDR. The IATA Passenger Liability Agreement came into force on 14 February 1997 and it was claimed that it came into force for airlines carrying some 80% of all international air passengers.

- A multilateral (regional) legislative step was taken by the European Union which adopted, as a law applicable to both international and domestic carriage by air of its member States, as of 17 October 1998, a ***Council regulation on air carrier liability***[41]. The essence of the Regulation is waiver of the limits of liability for death and bodily injury of a passenger, coupled with the strict liability up to 100, 000 SDR.

The unilateral actions of airlines, States or group of States created a *de facto* massive amendment of the Warsaw system but had a fundamental flaw: they could modify the practical application of the provisions relating to the limit of liability (which is permitted by Article 22 (1) of the Convention as a "special contract"). However, they cannot amend any substantive provision of the Convention that in itself has "imperative" nature.[42] Thus the unilateral actions would remain "attached" to the underlying existence and peremptory provisions of the Warsaw/Hague system. That Convention can be amended only in accordance with the rules of international law.[43] No amount of unilateral or collective "patchwork" can replace the appropriate process of amendment of the Convention and establish a solid international legal regime to be applied uniformly by the courts of law.

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39 Text in Lloyd's Aviation Law, Vol. 11:22 (1992)

40 Text in Annals of Air and Space Law, Vol. XXI-1, pp.293-303

41 Official Journal, L. 285 of 17 October 1997

42 Article 32 of the Convention declares "null and void" any special agreements or clauses purporting to infringe the rules lid down by the Convention.

43 Vienna Convention on the Law of Treaties of 23 May 1969 – Part IV – Amendments and Modifications of Treaties, Articles 39-41

ICAO was initially a reluctant player in any effort to modernize the system after 1975; yet, it was the only forum in which the modernized unification of law could be accomplished.

The ICAO Council initiated new action on 15 November 1995[44], just two weeks after the IATA Annual General Meeting that had adopted the Passenger Liability Agreement. Without any reference or credit to the IATA action, the Council amended the general work program of the Legal Committee by inserting a new item "*The modernization of the Warsaw System and review of the ratification of international air law instruments*".

The work progressed in an unusual procedure: instead of appointing a Rapporteur and a Special Subcommittee of the Legal Committee, a "Secretariat Working Group" was established – a non-representative body not foreseen in the applicable rules and established practices and composed of "experts" selected by the President of the Council in his discretion.

The 30th session of the Legal Committee met at Montreal from 28 April to 9 May 1997 and after chaotic discussions prepared three alternative drafts of the liability regime – a sure prescription for a failure of the Diplomatic Conference where a two-thirds majority vote is required. However, the Committee considered this draft to be "final" and ready for presentation to a Diplomatic Conference.

The Council did not follow the recommendation of the Committee but in a clear "censure" of the Committee's views convened two more meetings of the "Secretariat Study Group" and later another unprecedented body appointed by the President – the "Special Group on Modernization and Consolidation of the 'Warsaw System'" (SGMW). That body met at Montreal from 14 to 18 April 1998 and produced a consolidated text daringly called "Text approved by the 30th session of the ICAO Legal Committee and refined by the Special group on the modernization and consolidation of the Warsaw system".

The expression "refined" is an audacious understatement – the SGMW in fact substantially changed the Legal Committee's text, aligned the draft fully on the IATA Passenger Liability Agreement and the 1997 EC Council Regulation and removed all alternatives. It also accepted the US requirement to create a "5th jurisdiction" as was provided for in the Guatemala City Protocol.[45]

The Diplomatic Conference met in Montreal from 11 to 28 May 1999 and faced some firmly established benchmarks that appeared non-negotiable – those were the principles of the Japanese initiative with the two-tier regime of liability, those principles as embodied and already widely applied under the IATA Passenger Liability Agreement and under the EC Regulation.

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44 C-DEC 146/3
45 Text in DCW No.3

Although there was a deep cleavage of opinions on the complete removal of a liability limit and on the 5th jurisdiction, a "Consensus package" [46] concocted by a closed group called "Friends of the Chairman" was presented to the session, met with thunderous applause and was declared to be accepted "by consensus" without any vote.

The procedure under which the new Convention was adopted may be open to severe criticism and the "pressure for consensus" left some bitterness in several delegations. However, the result was the

- ***"Convention for the Unification of certain Rules for International Carriage by Air", signed at Montreal on 28 May 1999***"[47]

In spite of the seriously flawed procedure, the resulting Montreal Convention 1999 is a good international instrument that achieved several positive aims:

- it consolidated into one single instrument the components of the fragmented "Warsaw System" (fragmented by a Protocol, then Protocol-to-Protocol and finally Protocol-to-Protocol-to Protocol) and took – almost verbatim – the best elements of the "old" system, the Guatemala City Protocol of 1971, Protocol Nos. 3 and 4 of 1975 and the Guadalajara Convention of 1961, including the modernization and simplification of the documents of carriage;

- the text of the new instrument is authentic in Arabic, Chinese, English, French, Russian and Spanish;[48]

- it accepted the industry's progressive initiative to apply, for death or injury of a passenger, strict liability up to 100, 000 SDR with no monetary limit of liability above that amount subject to "reversed burden of proof"; this is expected to expedite recovery and avoid lengthy and costly litigation;

- it introduced the 5th jurisdiction – not a revolutionary change but a logical jurisdiction of the claimant if it were not for the peremptory condition of the 'old" Article 28;

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46 DCW Doc No. 50

47 ICAO Doc 9740

48 In fact, all drafting during the Conference was done only in English and the other versions are just translations prepared by the professional language officers of the Secretariat, most of them non-lawyers

- it requires the air carrier to submit a proof of adequate insurance guaranteeing the availability of financial resources in case of aircraft accident.[49]

The 1999 Montreal Convention is a new, separate and independent instrument, not an amendment of the "Warsaw System". Its provisions will prevail over any other rules of international carriage by air between States who are also parties to the "old" instruments.[50] It came into force on 4 November 2003 and by the end of 2007 it was ratified by 81 States.

Its actual scope of applicability is *de facto* extended because any return flight from a State party to a State that is not party to the Convention is covered by the Convention;[51] that can lead to absurd situations when two passengers sitting next to each other can be subject to different systems of liability depending on their different points of origin and destination. Nevertheless, there are still some dwindling situations where between the non-parties the Warsaw/Hague system would be applicable.

On the proposal of the delegation of China the Conference adopted an innovative provision in Article 56 of the Convention that enables a State composed of territorial units with different legal systems to accept the Convention either for the entire territory or only one of them; the intention obviously was to address the issue of the special administrative territories of Hong Kong and Macau and the term "Hong Kong clause" was coined[52]. It was expected that for Hong Kong the Convention would be applicable first while China may require some time to accept it. In reality, China ratified the Convention well before it became applicable for Hong Kong.

The Montreal Conference of 1999 was a success but several "missed opportunities" must be noted. The Convention failed to clarify the vague and imprecise term "accident" that is the key trigger of liability for the death or injury to passenger. The proper and logical interpretation of this term should be that "accident" is an event closely connected with the operation of the aircraft; however, some judicial decisions have interpreted the term in a rather "creative" manner[53] bordering on the absurd and placing the carrier into the position of an insurer of any conceivable risk. The Montreal Convention failed to accept the

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49 The Convention does not define what "adequate insurance" is; in practice operators of large aircraft carry insurance in excess of $ 1 billion; it is also a reality that the operators of the developing countries frequently pay higher insurance premiums than those from the developed world who own more modern fleet and have years of damage-free record.

50 Article 54

51 Article 1, 2.

52 M. Milde *Liability in international Carriage by Air: The new Montreal Convention,*, Uniform Law Review, NS – Vol. IV, 1999-4, p.859

53 In Olympic Airways v. Husain the fact that the stewardess did not locate another seat in non-smoking compartment for an asthmatic passenger was considered to constitute an "accident" causing death of that passenger.

term “event” adopted by the Guatemala City Conference in 1971.

The Montreal Conference also, perhaps by oversight, failed to extend the 5th jurisdiction to claims with respect to baggage, cargo and delay.

It is also to be regretted that the Guatemala City reference to “personal injury” was not retained and that the Convention keeps the expression “bodily injury” with its ambiguity whether or not it applies also to “mental trauma”, “post-traumatic shock syndrome”, etc.

Much leeway has been left to jurisprudence and that is not conducive to uniform interpretation of the unified law. The jurisprudence will have to lead the way and the 1999 Montreal Convention may be expected to stay in force at least for a generation.

The Nine Freedoms of the Air