Air Carrier Liability under the Warsaw Regime and the Montreal Convention

by
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CONVENTION
POUR
L'UNIFICATION DE CERTAINES RÈGLES
RELATIVES AU
TRANSPORT AÉRIEN INTERNATIONAL,
PROTOCOLE ADDITIONNEL
ET
PROTOCOLE FINAL

Adoptés par la IIe Conférence Internationale de Droit Privé Aérien réunie à Varsovie du 4 au 12 Octobre 1939.
Warsaw is the most successful private law instrument in history.
Purposes of Warsaw
“Convention for the Unification of Certain Rules Relating to International Carriage by Air.”

Unification of Law… uniform procedure, documentation and regime of substantive law applicable worldwide

Limit carrier liability so as to foster growth of the nascent commercial airline industry.
Warsaw’s Quid Pro Quo

Recovery irrespective of negligence, in exchange for limitations on carrier liability.

Reversed burden of proof; once the passenger proves there was an accident, the carrier may exonerate itself by proving freedom from negligence.
Warsaw Convention

Requires that carriers issue passenger tickets and baggage checks for checked luggage;

Liability measured in gold Francs, consisting of 65½ milligrams gold of millesimal fineness 900;

Limits a carrier's liability for passenger death or bodily injury to 250,000 Francs (approximately $8,300), unless the passenger proves wilful misconduct on the part of the carrier;

Limits liability to 250 francs per kilogram (approximately $9.07 per lb.) for checked luggage and cargo, and 5,000 Francs for the passenger’s hand luggage.

No limits on liability if the carrier failed to provide proper documentation;

No liability if the carrier took all necessary measures to avoid damage, or it was impossible to do so.
Which Legal Regime Applies?

The original Warsaw Convention of 1929, unamended;
The Warsaw Convention as amended by Montreal Protocol No. 1 of 1975;
The Warsaw Convention as amended by the Hague Protocol of 1955;
The Warsaw Convention as amended by the Hague Protocol and Montreal Protocol No. 2 of 1975;
The Warsaw Convention as amended by the Hague Protocol and Montreal Protocol No. 4 of 1975;
The Montreal Convention of 1999, or
Domestic law, if it is deemed that the transportation falls outside the conventional international law regime, or if the two relevant States have failed to ratify the same liability convention.
These Conventions establish rules of carrier liability governing:

1. Passenger death, bodily injury or delay
2. Baggage loss, damage or delay, and
3. Cargo loss, damage or delay

In international air carriage.
LIABILITY CONVENTION RATIFICATIONS

UN Members – 192 States
The Chicago Convention – 191 States
The Warsaw Convention – 152 States
The Hague Protocol – 137 States
The Guadalajara Convention – 86 States
Montreal Protocol No. 1 – 49 States
Montreal Protocol No. 2 – 50 States
Montreal Protocol No. 4 – 58 States
The Montreal Convention of 1999 – 111 States

* As of April 1, 2015
See
http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx
for an up-to-date listing of High Contracting Parties.
COMPENSATION HAS ALWAYS BEEN THE PROBLEM

- **Warsaw Convention of 1929**
  - Capped liability at $8,300, unless the carrier engaged in willful misconduct or improper documents provided;
- **The Hague Protocol of 1955** doubled liability to $16,600
- **The Montreal Agreement of 1966** raised liability to $75,000
COMPENSATION HAS ALWAYS BEEN THE PROBLEM

- The Warsaw Convention of 1929 capped liability for personal injury at $8,300, unless the carrier engaged in willful misconduct or issued improper documentation; the carrier could avoid liability if it had taken “all necessary measures” to avoid the loss, or it was impossible to do so:

- The Hague Protocol of 1955 doubled liability to $16,600 and clarified what was meant by “willful misconduct” as “intent to cause damage or recklessly and with knowledge that damage would probably result”;

- The Montreal Agreement of 1966 raised liability to $75,000;

- Montreal Protocol No. 1 reset Warsaw liability at 8,300 SDRs;

- Montreal Protocol No. 2 reset Warsaw/Hague liability at 16,600 SDRs;

- IATA intercarrier agreement of 1995 waived Warsaw’s ceilings on liability up to 100,000 SDRs; and

- The Montreal Convention of 1999 imposes strict liability up to 100,000 SDRs, and presumptive liability beyond.
## ICAO Inflation Adjustments Effective 2010

<table>
<thead>
<tr>
<th></th>
<th>Convention</th>
<th>ICAO adjustments</th>
<th>US dollar equivalent</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Passenger death or injury</td>
<td>100,000 SDRs</td>
<td>113,100 SDRs</td>
<td>$169,300</td>
<td>Passenger death or injury</td>
</tr>
<tr>
<td>Cargo loss and damage</td>
<td>17 SDRs per kg</td>
<td>19 SDRs per kg</td>
<td>$29.43 per kg</td>
<td>Cargo loss and damage</td>
</tr>
</tbody>
</table>
## Compensation Payable Under Montreal Convention

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Destruction, loss, damage or delay in relation to the carriage of cargo</td>
<td>17 SDRs per kilogram</td>
<td>19 SDRs per kilogram</td>
</tr>
<tr>
<td>Destruction, loss, damage or delay with respect to baggage</td>
<td>1,000 SDRs for each passenger</td>
<td>1,131 SDRs for each passenger</td>
</tr>
<tr>
<td>Damage caused by delay in the carriage of persons</td>
<td>4,150 SDRs for each passenger</td>
<td>4,694 SDRs for each passenger</td>
</tr>
<tr>
<td>Damage sustained in case of death or bodily injury of a passenger</td>
<td>100,000 SDRs for each passenger</td>
<td>113,100 SDRs for each passenger</td>
</tr>
</tbody>
</table>

As on 24th July, 2014, $1 = SDR 0.650244
Top Causes of Loss: Aviation Claims (€1m +)

No. of Claims
- Plane crash: 23%
- Ground handling: 18%
- Mechanical failure: 16%
- Hard landing: 9%
- Damage by foreign object: 8%
- Other: 26%

By value
- Plane crash: 37%
- Over/undershot runway/taxiway: 22%
- Ground handling: 15%
- Mechanical failure: 12%
- Hard landing: 4%
- Other: 9%

Source: Allianz Global Corporate & Specialty. Data based on accident years 2009-2013
# Advisen Loss Insight: Top 10 Aviation Losses

<table>
<thead>
<tr>
<th>Company</th>
<th>Accident Date</th>
<th>Total Loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air France - KLM</td>
<td>6/1/2009</td>
<td>$750,000,000</td>
</tr>
<tr>
<td>Malaysian Airlines</td>
<td>3/8/2014</td>
<td>$261,500,000</td>
</tr>
<tr>
<td>Asiana Airlines Inc.</td>
<td>7/6/2013</td>
<td>$130,000,000</td>
</tr>
<tr>
<td>Afriqiyah Airways</td>
<td>5/12/2010</td>
<td>$123,000,000</td>
</tr>
<tr>
<td>Malaysian Airlines</td>
<td>7/17/2014</td>
<td>$97,300,000</td>
</tr>
<tr>
<td>Air France - KLM</td>
<td>6/1/2009</td>
<td>$94,500,000</td>
</tr>
<tr>
<td>Air India Limited</td>
<td>5/22/2010</td>
<td>$50,000,000</td>
</tr>
<tr>
<td>Bond Offshore Helicopters Ltd</td>
<td>4/1/2009</td>
<td>$20,194,600</td>
</tr>
<tr>
<td>Colgan Air, Inc.</td>
<td>2/12/2009</td>
<td>$19,000,000</td>
</tr>
<tr>
<td>Wideroes Flyveselskap AS</td>
<td>9/15/2010</td>
<td>$12,500,000</td>
</tr>
</tbody>
</table>

## Widening Loss
Malaysia Airlines quarterly net profit/loss, in millions of ringgit

<table>
<thead>
<tr>
<th>Year</th>
<th>Net Profit/Loss (in millions of ringgit)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2012</td>
<td>-500</td>
</tr>
<tr>
<td>2013</td>
<td>-400</td>
</tr>
<tr>
<td>2014</td>
<td>-300</td>
</tr>
</tbody>
</table>

Source: the company
The Wall Street Journal
Global Loss Atlas - 10 Major Non-Nat Cat Losses 2014*

The 10 major reported losses of 2014 from across the insurance industry, excluding those caused by Natural Catastrophes.

4 February
UK, Shropshire
Biomass Power Station
Fire
$230m

7 July
USA, Texas
Chemical Complex
Fire
USD TBC

24 July
Mali
Air Algerie AH5017
Aviation Crash
USD TBC

22 March
Argentina, Mendoza
Refinery Fire
$180m

17 July
Ukraine
Malaysia Airlines MH17
Aviation Crash
USD TBC

15 June
Russia, Siberia
Refinery
Fire
$800m

16 April
South Korea, en route to Jeju
Sewol (ferry)
Sinking
$140m

16 May
Kazakhstan
Satellite Loss
$217m

14 July
Libya, Tripoli
Tripoli Airport
Aircraft damage from fighting
up to $750m

8 March
Indian Ocean
Malaysia Airlines MH370
Disappearance
USD TBC

*As of August 30, 2014

All information is taken from public sources, and loss estimates, as shown here, should not be taken as confirmation by AGCS of reported losses.

Sources include BBC, Insurance Insider, theindependent.com, The Shropshire Star, www.zee.com, WDR.

Where loss figure is stated as TBC this indicates no loss estimate had been identified at time of writing. This loss atlas does not include liability or financial lines losses. Loss locations are approximate for illustrative purposes.

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## Market share for top aircraft Insurers as of Dec. 31, 2012

### Based on 2012 direct premiums written

<table>
<thead>
<tr>
<th>Rank</th>
<th>2012 Insurer</th>
<th>2012 Premiums written ($M)</th>
<th>2012 Market share (%)</th>
<th>2012 Year-over-year premium change (%)</th>
<th>2012 Incurred loss ratio (%)</th>
<th>2012 Premiums written ($M)</th>
<th>2012 Year-over-year premium change (%)</th>
<th>2012 Loss ratio (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>American International Group</td>
<td>372.6</td>
<td>19.61</td>
<td>-6.24</td>
<td>53.73</td>
<td>289.3</td>
<td>37.20</td>
<td>66.20</td>
</tr>
<tr>
<td>2</td>
<td>Allianz Group</td>
<td>226.1</td>
<td>11.90</td>
<td>-8.18</td>
<td>38.53</td>
<td>189.3</td>
<td>-14.51</td>
<td>51.04</td>
</tr>
<tr>
<td>3</td>
<td>Starr International Co.</td>
<td>189.8</td>
<td>9.99</td>
<td>60.84</td>
<td>46.54</td>
<td>19.8</td>
<td>30.57</td>
<td>41.22</td>
</tr>
<tr>
<td>4</td>
<td>ACE Ltd.</td>
<td>141.6</td>
<td>7.45</td>
<td>303.51</td>
<td>NM*</td>
<td>13.4</td>
<td>-46.83</td>
<td>NM*</td>
</tr>
<tr>
<td>5</td>
<td>Berkshire Hathaway Inc.</td>
<td>121.9</td>
<td>6.42</td>
<td>-10.58</td>
<td>44.18</td>
<td>96.1</td>
<td>4.09</td>
<td>40.94</td>
</tr>
<tr>
<td>6</td>
<td>Chubb Corp.</td>
<td>104.6</td>
<td>5.51</td>
<td>4.19</td>
<td>68.18</td>
<td>63.2</td>
<td>3.84</td>
<td>72.68</td>
</tr>
<tr>
<td>7</td>
<td>HCC Insurance Holdings Inc.</td>
<td>89.2</td>
<td>4.69</td>
<td>-8.39</td>
<td>53.42</td>
<td>112.4</td>
<td>-4.17</td>
<td>51.46</td>
</tr>
<tr>
<td>8</td>
<td>XL Group plc</td>
<td>87.2</td>
<td>4.59</td>
<td>-8.47</td>
<td>3.81</td>
<td>39.8</td>
<td>-8.00</td>
<td>38.92</td>
</tr>
<tr>
<td>9</td>
<td>Munich-American Holding Corp.</td>
<td>80.7</td>
<td>4.25</td>
<td>5.87</td>
<td>34.75</td>
<td>0.0**</td>
<td>-87.82</td>
<td>NM**</td>
</tr>
<tr>
<td>10</td>
<td>Old Republic International Corp.</td>
<td>78.9</td>
<td>4.15</td>
<td>-2.13</td>
<td>32.11</td>
<td>25.0</td>
<td>-2.77</td>
<td>46.43</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td><strong>1,492.4</strong></td>
<td><strong>78.57</strong></td>
<td><strong>7.93</strong></td>
<td><strong>40.02</strong></td>
<td><strong>848.3</strong></td>
<td><strong>4.43</strong></td>
<td><strong>53.59</strong></td>
</tr>
<tr>
<td><strong>Industry total</strong></td>
<td></td>
<td><strong>1,899.6</strong></td>
<td><strong>100.00</strong></td>
<td><strong>5.56</strong></td>
<td><strong>39.24</strong></td>
<td><strong>1,160.5</strong></td>
<td><strong>3.44</strong></td>
<td><strong>54.09</strong></td>
</tr>
</tbody>
</table>

Data is as of July 9, 2013.

- Based on NAIC statutory P&L statement filings. U.S. files only. May include business written outside of the U.S. if reported in NAIC statements.
- Direct data is derived from Exhibit of Premiums and Losses. Net data is derived from Insurance Expense Exhibit.
- Data shown is a consolidation of data of the statutory filers within the SNL-defined group structures.
- Based on a top-tier analysis, which includes SNL groups and unaffiliated single companies.
- Combined ratios displayed are before policyholder dividends.
- * ACE reported negative direct and net losses for the period. NM = not meaningful.
- ** Munich-American Holding Corp. reported very small net written premiums amounting to $34,000, causing its loss ratio to not be meaningful.

Source: SNL Financial
Top Causes of Loss by total value (2009-2013, insured losses over €100,000 / $136,455)

1. Grounding
2. Fire
3. Aviation crash
4. Earthquake
5. Storm
6. Bodily injury (including fatalities)
7. Flood
8. Professional indemnity
9. Product defects
10. Machinery breakdown

So far in 2014, 80% of the major reported losses come from aviation incidents or from fires.
THE MONTREAL CONVENTION OF 1999

PASSENGERS

Incorporating most of the liability provisions of the IATA Intercarrier Agreements, the Convention establishes a two-tier liability system, with strict liability for death or bodily injury up to 100,000 SDRs, and presumptive liability in an unlimited amount;

The carrier’s liability may be discounted by the claimant’s negligence or wrongful act;

If the claimant’s damages exceed 100,000 SDRs, the carrier has two defenses: (1) freedom from fault; or (2) the damage was solely caused by a third person;

“Punitive, exemplary or other non-compensatory damages” are not recoverable;

No provision was made for recovery of emotional damages;

Carriers must maintain adequate insurance to cover their liability;

The Convention’s liability limits shall be reviewed every five years and adjusted for inflation;

The claimant may recover court costs and attorney’s fees if the amount of damages awarded exceeds any written settlement offer made within six months of the accident but before suit is commenced;

The Convention establishes a “fifth jurisdiction” (the passenger’s principal and permanent residence) for personal injury or death (but, oddly, not cargo and baggage) actions; and

The Convention incorporates the Guadalajara Convention extending liability to both the actual and contracting carrier.
THE MONTREAL CONVENTION OF 1999

AIR FREIGHT

The Convention incorporates many of the provisions of MP4 relating to cargo;

Unless special value is declared, loss and damage and delay of baggage results in maximum liability of 1,000 SDRs; destruction, loss, damage, or delay of cargo results in liability capped at 17 SDRs per kilogram; cargo liability ceilings cannot be broken;

There is no carrier penalty for noncompliance with the new documentation requirements; and

Arbitration clauses may be included in cargo air waybills.
IATA supports universal ratification of MC99

Universal ratification of MC99 by states will provide significant benefits to all parties.

- Passengers will benefit from fairer compensation and greater protection. Under MC99 claims are subject to a much more generous compensation in the case of death or injury. MC99 abolished the arbitrary limits that existed under the Warsaw Convention system and established a two-tier strict liability regime. Claims in excess of the MC99 liability limits may succeed unless the carrier can show that it was not guilty of negligence in causing death or injury. Thus, the possibility of uncompensated losses in a major aircraft accident case is significantly reduced.

- MC99 also includes a number of other consumer friendly provisions such as advance compensation payments and a wider choice of jurisdictions in which to bring claims.

- Liability limits are reviewed by ICAO every five (5) years, ensuring MC99 remains modern and relevant.
In the carriage of air cargo involving countries that have not ratified MC99 but continue to be subject to the Warsaw Convention 1929 (WC29) and Hague Protocol 1955 (HP55) regimes, physical paper records are required in order for the carrier to rely on the liability limits set out in the Convention. This means that paper documents of carriage such as the air waybill must accompany the shipment throughout its journey.

- MC99 permits the use of electronic air waybills (e-AWBs) and other documents of carriage, without impacting the carrier’s ability to rely on the liability limits set out in the Convention. Thus, MC99 is a pre-requisite for paperless air cargo initiatives such as e-freight. Eliminating paper from the air cargo supply chain will deliver cost savings and environmental benefits while also improving accuracy, shipment times and security.

- MC99 also offers unbreakable liability limits for cargo carriers. Thus, carriers enjoy predictability in respect of their potential liability making it easier to obtain insurance, avoid protracted litigation and simplify claims handling. Shippers can organize specific insurance for any high value, low weight items. Shippers and those involved in the air cargo supply chain will benefit from the ability to make claims without the need for expensive and time consuming litigation. IATA and FIATA (representing freight forwarders worldwide) are working collaboratively to promote such adoption by states worldwide.

- Finally, airlines will benefit from greater certainty about the rules governing their liability across their international route network. IATA is thus advocating for the urgent ratification of MC99 by all remaining states.