Institute of Air & Space Law

INTERNATIONAL AIR CARGO & BAGGAGE LIABILITY AND THE TOWER OF BABEL

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The Impact of Air Freight on the Global Economy

Air cargo accounts for less than 10% of world trade volume, but more than 30% of world trade value.
Air cargo is primarily is high value or time sensitive commodities.
"The global air cargo industry represents almost 100 billion revenue ton-miles of transportation, an estimated $52 billion in direct revenue in 2005 and substantially more revenues in related trucking and logistics services. The air cargo industry is responsible for transporting 30 percent of the value of all international trade (including oil, minerals, and other bulk shipments). The value of international trade transported by air was $2.7 trillion in 2004, which accounted for approximately 36 percent of the value of all nonbulk international trade." Source: TIACA

"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 Protocols (1975)
- The Montreal Convention (1999)
- The treaty regime applies that is common to both the originating and destination state.

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

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. 4 – 58 States
- The Montreal Convention of 1999 – 111 States
- * As of April 1, 2014

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)	19 SDRs per kg (adjusted for inflation), the equivalent of $28/kg, or $61 per/lb, based on total weight of package lost or damaged, or total weight of affected shipment
Declared Value	Provable damages up to the declared amount

Limitations on Loss and Damage

- Baggage Loss and Damage:
- Warsaw limited liability for checked baggage to 250 francs per kg, or $9.07/kg ($20/lb); it limited liability for carry-on baggage to 5000 francs (US$182) per passenger.
- MP1 raised it to 17SDRs/kg ($25)
- M99 Raised liability to 1000 SDRs (since raised to 1131 SDRs, or approximately US$1,650).
- Delay:
- M99 raised liability to 4150 SDRs (since raised to 4694 SDRs, or approximately US$6,880).

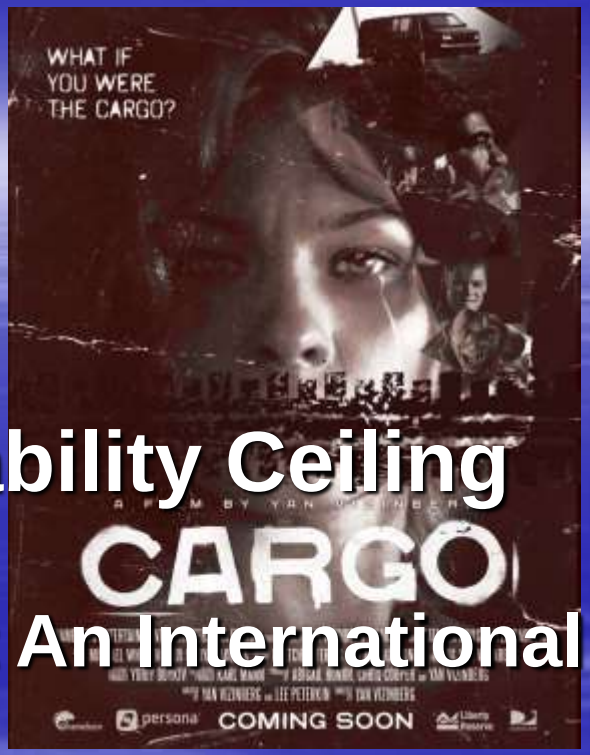
How Firm Are the Liability Ceilings?

- Under Warsaw, the limits could be broken if the carrier engaged in “willful misconduct”, or the carrier failed to provide proper documentation.
- Willful misconduct was defined by the Hague Protocol as intent to cause damage or recklessly and with knowledge that damage would probably result.

Under MP4 and Montreal 1999, for cargo, the liability limitations are unbreakable.

However, proof of willful misconduct, will break the liability ceilings for baggage or passenger delays.

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 Willful 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 (2nd 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."

Dissenting Opinion in Victoria:

- “Admittedly, Article 18 is not a good example of superior legislative draftsmanship. However, one thing is clear, and that is that the term “transportation by air” is not synonymous with “actual” air transportation could apply to ground transport ... In my opinion, the presumption that the loss resulted from an event occurring during the transportation by air means only that the loss is presumed to have occurred while the goods were in the charge of a carrier that was acting “in the performance of a contract for transportation by air.” The pertinent second sentence of Article 18(3) reads: “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 the transportation by air.” A careful parsing of this sentence supports the conclusion above expressed. The sentence begins by referring to [off airport] transportation that “takes place in the performance of a contract for transportation by air”; it concludes by saying that any damage is presumed to have occurred “during the transportation by air” (emphasis supplied). The principles of statutory construction discussed in the preceding paragraph are clearly applicable; the phrase “transportation by air” has the same meaning at the end of the sentence as it had at the beginning. To further emphasize the identity of meaning, the second time the phrase is used it is preceded by the function word “the”, which obviously refers to the prior use of the same phrase. . . . I believe that District Judge Shadur of the Northern District of Illinois correctly interpreted Article 18(3) when he said, “So long as the goods remain in the air carrier's actual or constructive possession pursuant to the terms of the carriage contract, the period of ‘transportation by air’ does not end.”

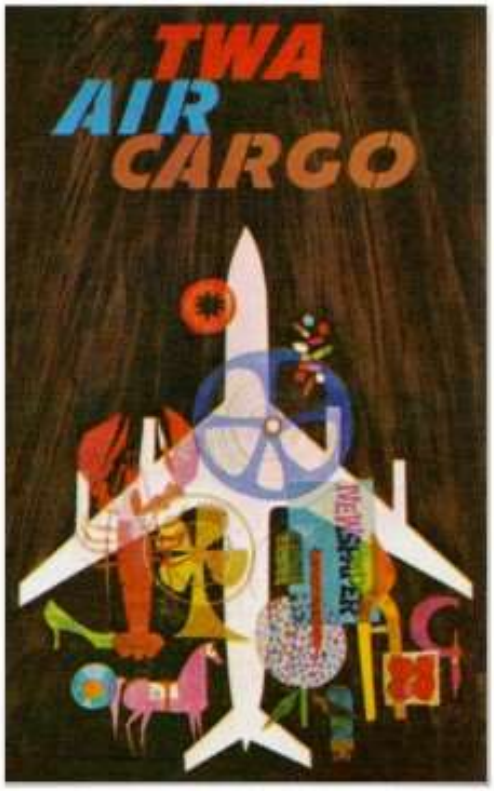
The Movement Was Not Transportation by Air

- 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

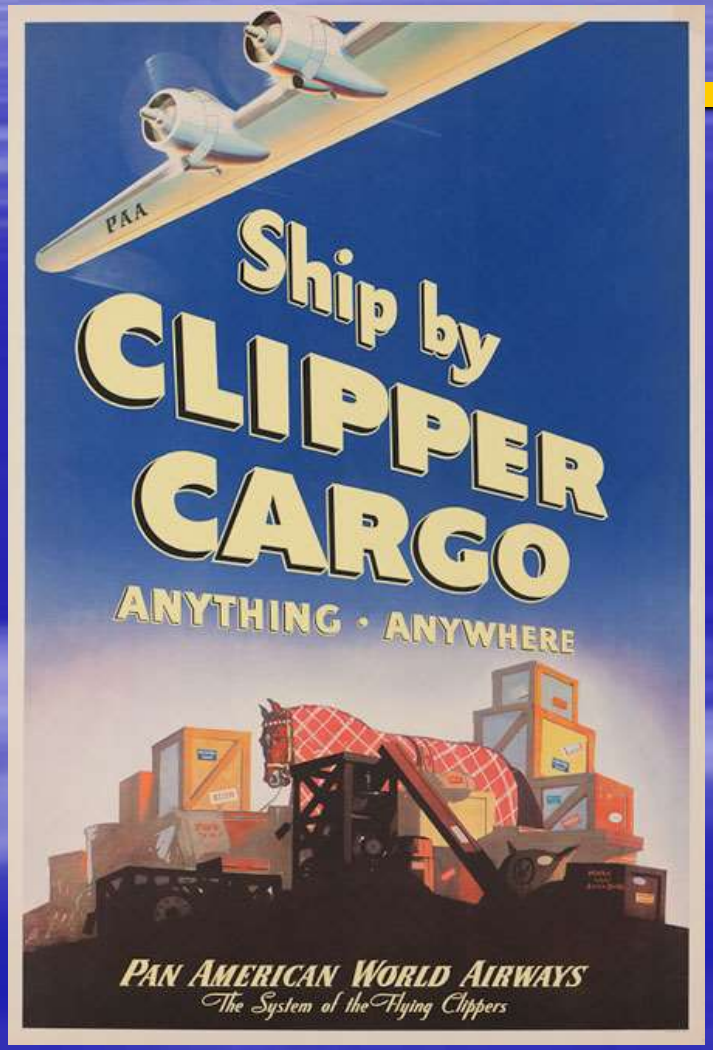
  or
- Pursuant to loading, delivery or transshipment under a contract of carriage by air, damage is presumed to have occurred during air transportation, subject to proof to the contrary.



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 carraige 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.

Hence, the convention may apply where the damage occurred on the surface leg of a through intermodal shipment, or on a domestic aircraft in successive carriage.

There Is No Common Treaty In Force

Chubb & Son v. Asiana Airlines (2nd 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."

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:

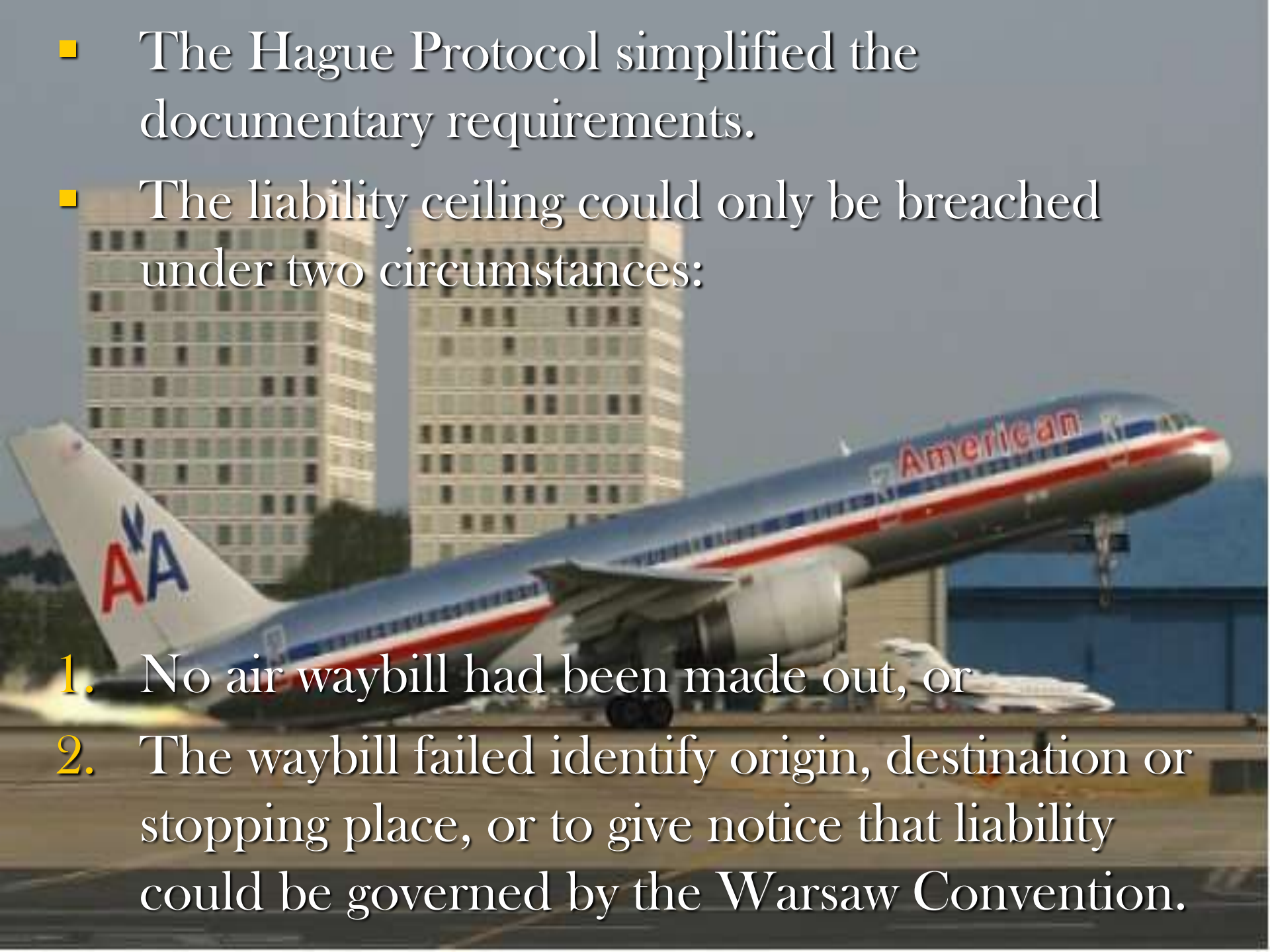
- Place and date of execution;
- Place of departure and destination;
- Agreed stopping places;
- Name and address of consignor;
- Name and address of the first carrier;
- Name and address of the consignee;
- Nature of the goods;
- Number of packages;
- Weight, quantity and volume or dimensions of the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

THE HAGUE PROTOCOL

The Hague Protocol 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.

- 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 identify origin, destination or stopping place, or to give notice that liability could be governed by the Warsaw Convention.

Evolving Jurisprudence

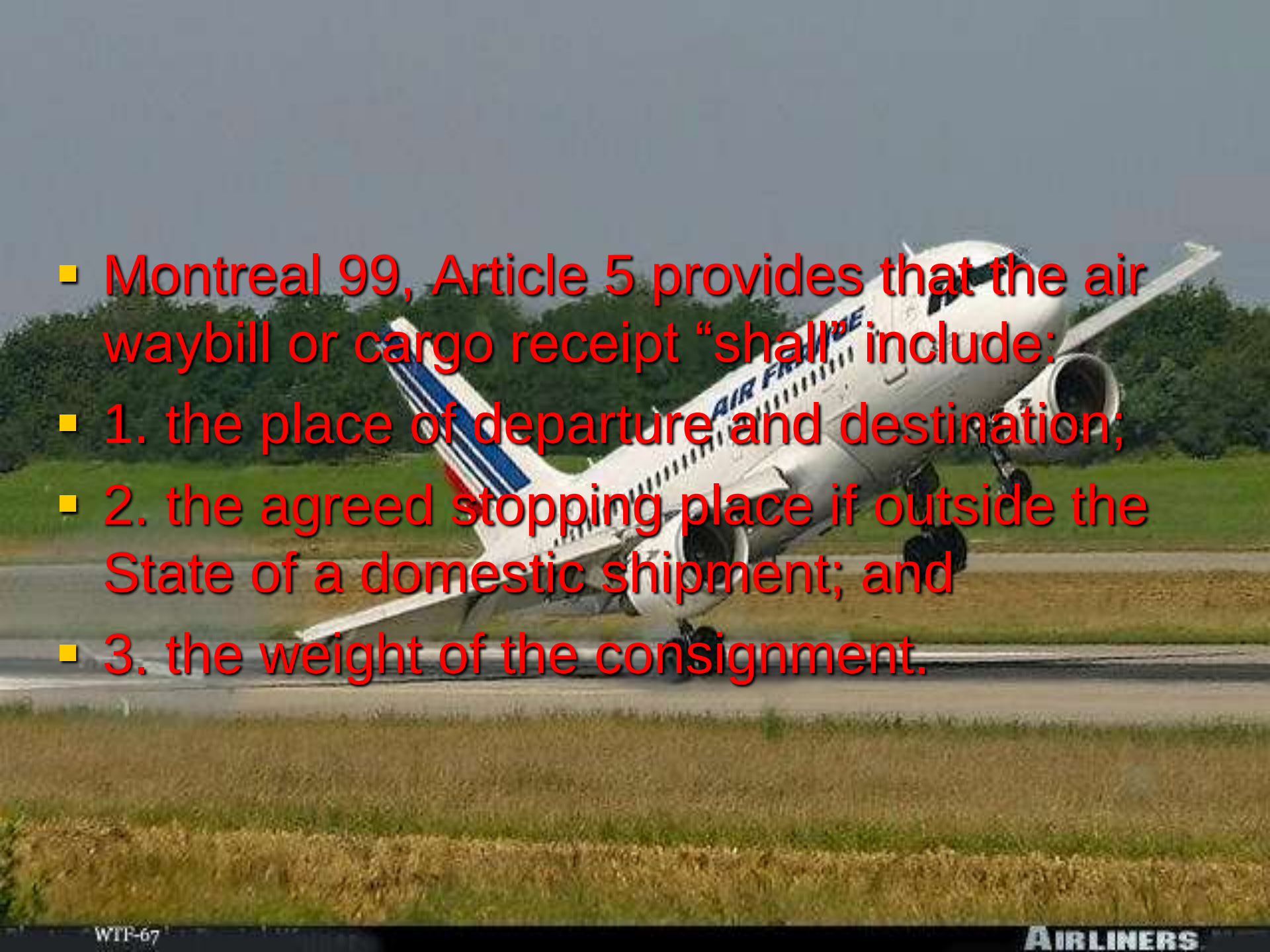
- ***Though early jurisprudence forgave nonprejudicial omissions, particularly where the consignor was a commercial entity, jurisprudence has given Warsaw a strict construction.***

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):

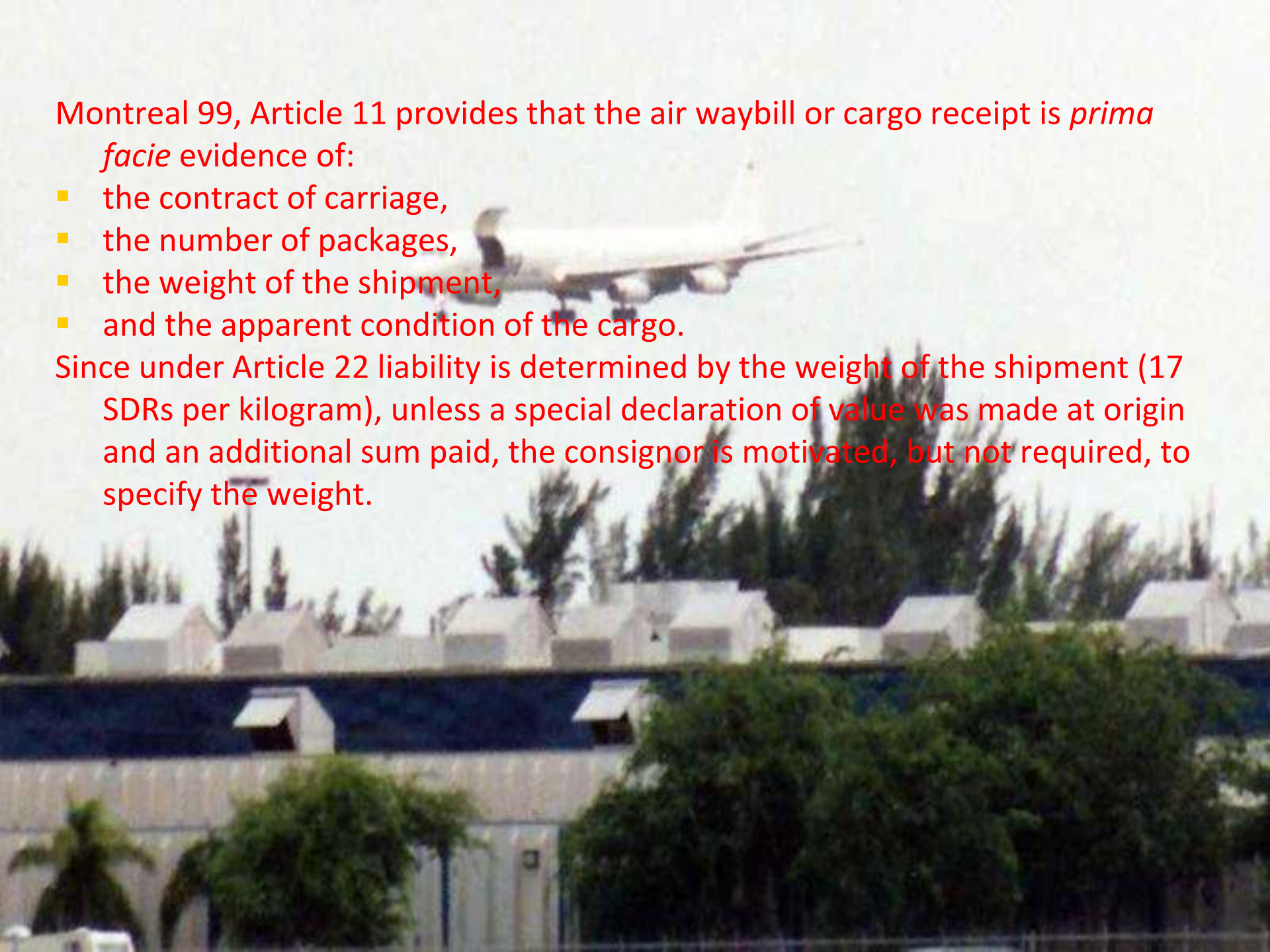
- **"the omission of any required item from the air waybill . . . will result in the loss of limited liability regardless of the commercial significance of the omission."**



- 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, but not required, to specify the weight.

- 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 of 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 of 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

The ticket failed 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.

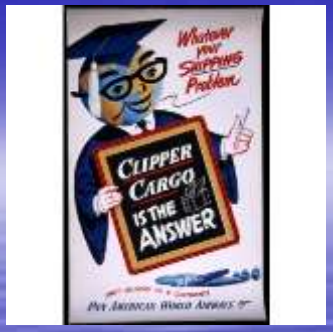
The Hague Protocol

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 Willful Misconduct

Defined in the Hague Protocol as an act or omission of the carrier ot 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 (4th 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."

Scope of Employment

- On Jan. 17, 2012, Agbasi boarded an Iberia flight from Lagos, Nigeria to Madrid, connecting there to an Iberia flight to Chicago. She had checked two pieces of luggage in Lagos. When she arrived at O'Hare, only one of her bags arrived. Her delayed bag was returned to her on January 26, 2012. She discovered that some of the items she had packed and checked were missing, including certain nutritional supplements and dried herbs and spices. Iberia claimed that the herbal supplements were removed by security forces in Lagos, Nigeria because they are banned by Spanish regulation. Agbasi maintained that the contents were stolen while in the custody of Iberia.

- "Here, Plaintiff Agbasi must not only prove that the Iberia employees removed the items with the requisite intent, but also that the alleged theft occurred within the scope of employment. . . . Under the Restatement (Second) of Agency '[c]onduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master. Only if no reasonable person could conclude from the evidence that an employee was acting within the course of employment should a court hold as a matter of law that the employee was not so acting.'" No reasonable juror could conclude that security forces at the Nigerian airport are employed to steal items from passengers as part of their service to Iberia. Nor could a reasonable juror find that theft of passengers' personal items serves the goals of Iberia, who presumably strives to offer customer service that makes passengers want to become repeat customers." Ekufu v. Iberia Airlines, 2014 WL 87502 N.D.Ill., 2014

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

Article 31—Timely Notice of Complaints

1. Receipt by the person entitled to delivery of ... cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage....

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

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

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

Time Limits for Filing Notice for Loss, Damage or Delay of Cargo

	Warsaw Convention	Hague, Montreal Protocol No. 4, and Montreal Convention of 1999
Loss	None	None
Damage to Baggage	3 days	7 days
Damage to Cargo	7 days	14 days
Delay of Cargo or Baggage	14 days	21 days

Does this em@il Constitute Adequate Written Notice?

FROM: Elisabeth Riebeling [mailto: Elisabeth.riebeling@dascher.us]
SENT: Tuesday, May 03, 2011 9:53 AM
TP: Green, Anne C. (Lan Cargo)
Subject: 045–84653822

Hi Anne,
I hope all is well!
We had some damage on the above mentioned shipment and consignee wants us to file a claim. Can you let me know if you have a claim form you need me to fill out or how we proceed on this?
Thank you,
Best Regards,
Elisabeth Riebeling
Export Supervisor
DASCHER USA
5959 West Century Boulevard, Suite 1026
Los Angeles, CA 09945 USA

- "LAN argues that this email does not itself constitute a "claim," and indicates that no "claim" was subsequently filed using LAN's claim procedures. But as plaintiffs correctly point out, Article 31 does not require that any "claim" be filed or that a formal "claims procedure" be used. It simply requires that the carrier be given written notice that there is a problem for which it may be held liable, at a time when it is possible to conduct a meaningful investigation into how the damage was caused. The May 3 email does all that. End of story. True, the email does not say, "We intend to hold you liable for the damage," but there is no treaty requirement that Article 31 notice specifically state that it intends to hold the carrier liable. . . . Furthermore, the very fact that Dascher was asking for information about how to go about filing a formal claim should have indicated to LAN that the consignor was planning to hold it liable. The email thus gave LAN both notice of its potential liability and the information needed to look into the matter promptly. It constitutes the "complaint" required by Article 31." Dascher Transport of America v. LAN CARGO, 2013 WL 7963678 (S.D.N.Y.)

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.

But comparing strict liability to negligence is like comparing apples to oranges.

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.

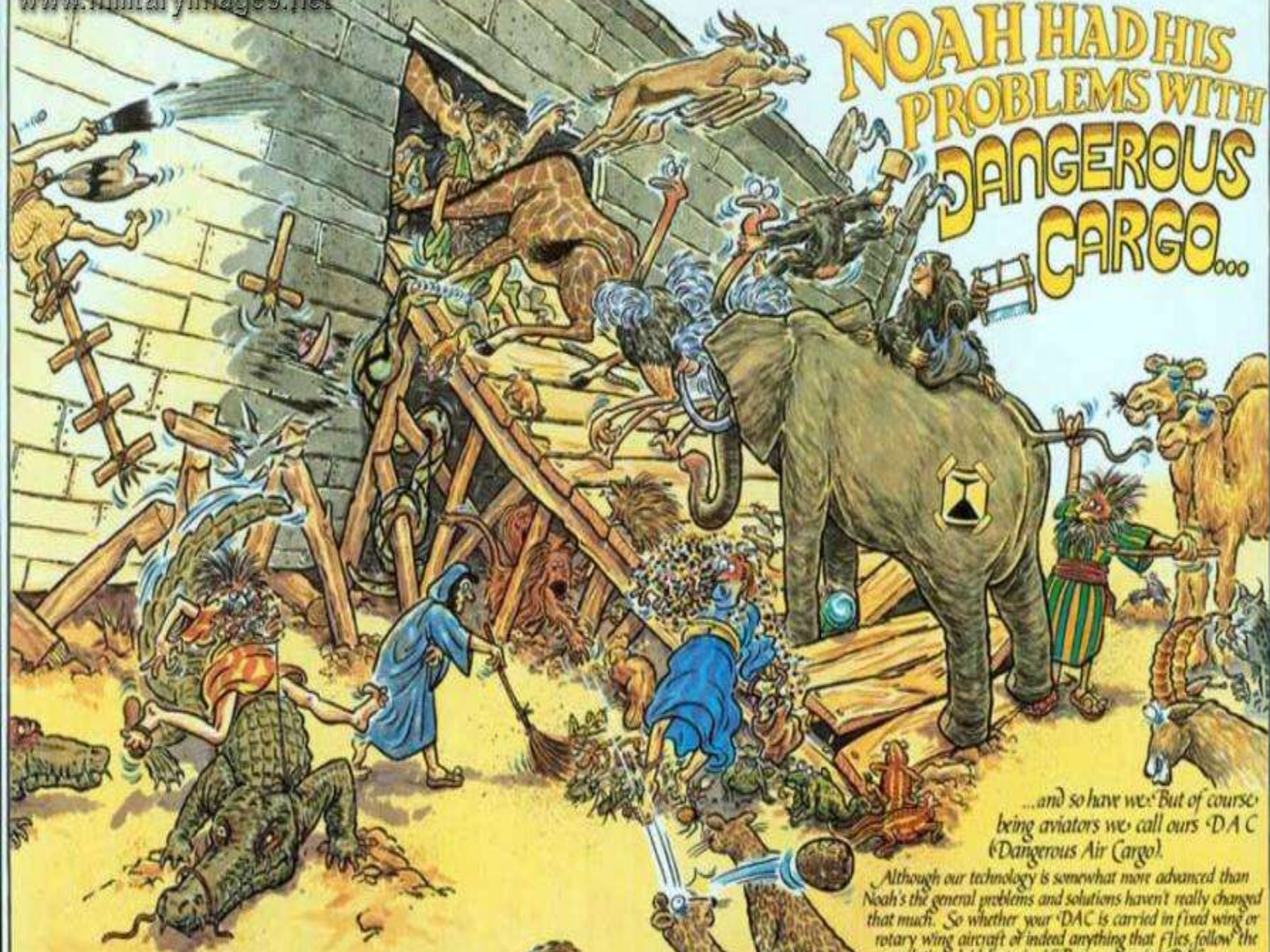
The Loss or Damage Was Caused By a "Common Law" Exception to Liability

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.**

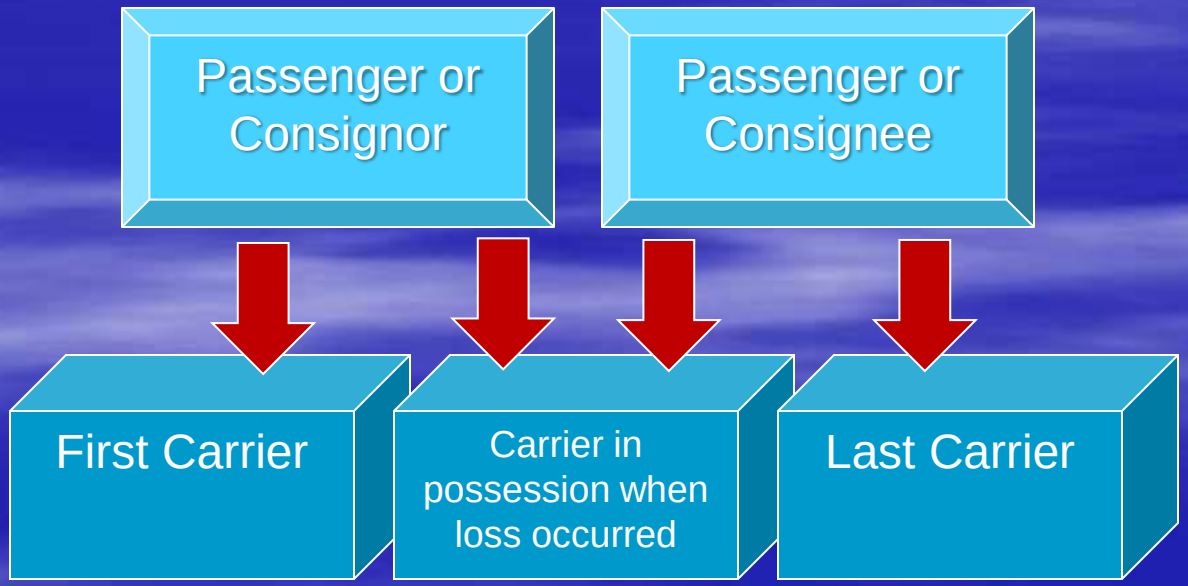
Note: the common law defense of an "Act of God" was not included in M99.

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 passenger (for baggage) or consignor (for air freight) has a right of action against the first carrier;
- The passenger or 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.



Against whom may suit be brought?

- In *Johnson v. American Airlines* the Ninth Circuit held that "only the consignor and consignee to the air waybill have standing to sue under the Convention." 834 F.2d 721, 724–25 (1987) The court affirmed the district court's grant of summary judgment to the airline on grounds that the plaintiff lacked standing to sue when her deceased mother's remains were damaged during international transport, because the air waybill listed the funeral homes in California and Ireland, respectively, as the consignor and consignee.
- 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 contracting carrier's domicile;
- The contracting carrier's principal place of business.

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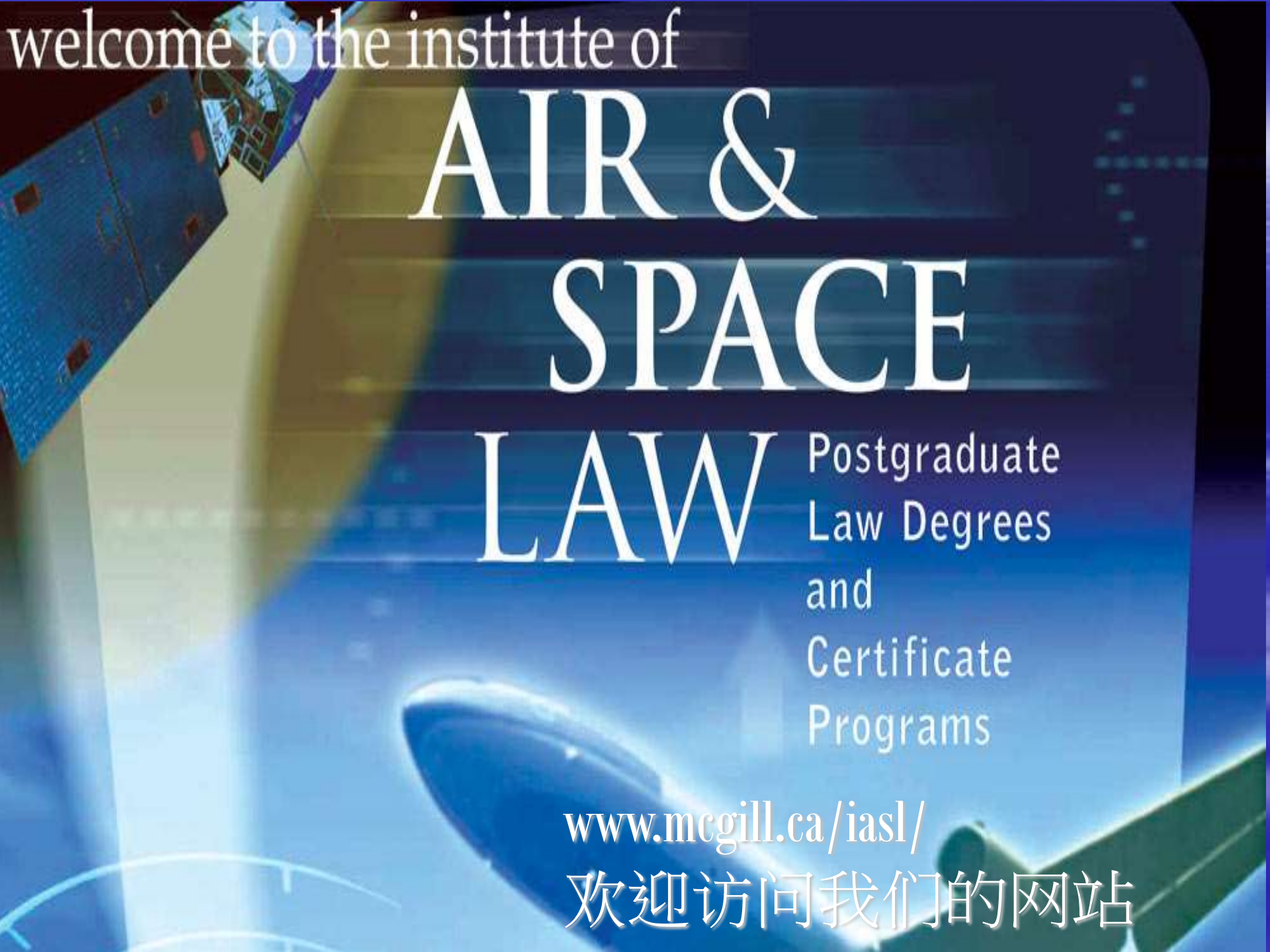
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