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The Crisis of Unification of Private Air Law

~~~ Problems and Solutions ~~~

by

Angela Cheng-Jui, Lu

Institute of Air and Space Law,
McGill University,
Montréal, Quebec, Canada

A thesis submitted to the Faculty of Graduate Studies and Research
in Partial fulfilment of the requirement for the degree of
Master of Laws

January 1997

Abstract

This thesis deals primarily with the air carrier's liability in the case of passenger death or bodily injury under Warsaw System. It analyzes the problems of today and tries to offer solutions for the present crisis of the Warsaw System for the future.

The first chapter concentrates on an brief introduction of the development of the Warsaw System from the original Warsaw Convention, to the 1996 ICAO new draft instrument. The chapter gives the trend of development and explains the different characteristics of each Warsaw instrument.

The second chapter analyses the shortcomings of the original Warsaw Convention by comparing the rationales of the air carrier's limited liability in 1929 and the requirements of today. In this way, this thesis seeks to present the limited liability of air carriers as unreasonable and out of date.

In order to offer the suggestions and possible solutions for the future, the third chapter analyses the merits and shortcomings of the Warsaw Instruments, unilateral or group action, the ECAC recommendation, the IATA Intercarrier Agreement and its implementing Agreement, and the ICAO new draft instrument. Finally, for the integrity of the air carrier's liability, this thesis also briefly criticizes the shortcomings of baggage liability under the present Warsaw System and offers a better solution for baggage liability in the future.

In the last chapter, the author introduces the related legal regime of the Republic of China, compares it with the Warsaw System and attempts to develop a method to link the Republic of China with the rest of world in the field of private air law.

Résumé

Cette thése traite principalement de la responsabilité du transporteur aérien en cas de mort ou de blessure du passager sous le régime varsovien. Elle analyse les problèmes contemporains et essaie d'offrir des solutions afin de résoudre la crise actuelle du régime varsovien pour l'avenir.

Le premier chapitre se concentre sur une brève introduction des développements du régime varsovien, de la convention de Varsovie originelle au nouveau rojet conventionnel de l'O.A.C.I. de 1996. Ce chapitre donne les tendances de l'évolution et explique les différentes caractéristiques de chaque instrument varsovien.

Le deuxième chapitre analyse les faiblesses de la convention de Varsovie originale en comparant les justifications de la responsabilité limitée des transporteurs aériens en 1929 et les besoins d'aujourd'hui. A cet égard, la thése cherche à présenter la responsabilité limitée des transporteurs aériens comme inacceptable et totalement périmée.

Afin d'offrir des suggestions et des solutions possibles pour l'avenir, le troisième chapitre analyse les avatages et les inconvénients des instruments varsoviens, des actions multilatérale ou unilatérales, de la recommandation de la C.E.A.C., l'accord de l'A.I.T.A. entre les transporteurs aériens relatif à la responsabilité envers les passagers et son accord de mise en application ainsi que le nouveau projet de l'O.A.C.I. Enfin, pour une vision intégrale de la responsabilité du transporteur aérien, cette thèse aussi critique brièvemet les lacunes de la responsabilité pour les bagages sous le régime varsovien actuel et offre une meilleure solution pour une future responsabilité des bagages.

Dans le dernier chapitre, l'auteur présente le régime juridique concerné de la République de Chine, le compare avec le régime varsovien et essaie de développer une méthode pour établir un lien entre la République de Chine et le reste du monde dans le cadre du droit privé aérien.

Acknowledgments

I would like to express my sincere gratitude to my thesis supervisor, Professor Dr. Michael Milde, Director of the Institute of Air and Space Law, McGill University, Canada; and Dr. C.V. Chen, my former professor in the Law School, National Cheng-Chi University, Taiwan, who helped and encouraged me to get a scholarship to study in the field of aviation law. I would especially like to thank The China Aviation Development Foundation for sponsoring my studies at the Faculty of Law of McGill University.

Furthermore, I would like to express my sincere thanks to the following people who helped me to get information for my thesis:

Dr. Marina Donato, Dr. Ludig Weber, Dr. Louis Haeck, IATA Legal and Corporate Secretary Division (Mr. Robert Donald, Ms. Marla Weinstein & Ms. Ferial Akairib), Mr. Svan T. Brise, Mr. Harold Caplan, Ms. Mia Wouters, Mr. George N. Tompkins Jr., Mr. Andrew J. Harakas, Mr. R.J. Allan, Mr. Chu-Cheng Huang & Mr. Michael Sheng-Ti Gau.

I also want to thank my dear friends, Mr. Ben Singer, Ms. Donna Blois, Ms. Melissa Knock & Ms. Celine Bourgoin, for helping me to edit my English draft and French résumé. I will treasure the friendships I have made with these people during my time in Canada always.

The Crisis of Unification of Private Air Law

~~~ Problems and Solutions ~~~

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ABBREVIATIONS

Air. L.	Air Law
Air & Sp. L.	Air and Space Law
Ann. Air & Sp. L.	Annals of Air and Space Law
Avi. Week. & Sp. Tech.	Aviation Week & Space Technology
B. & C. Avi.	Business & Commercial Aviation
Comm. Y. B.	Commodity Year Book
Cmnd.	UK Command Papers
ECAC	European Civil Aviation Conference
EC	European Community
F. Int'l	Flight International
H.C.	House of Commons and Command
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICC	International Chamber of Commerce
Int'l Fin. Statis.	International Financial Statistics
I. Ins. L. Rev.	International Insurance Law Review
ICAO J.	ICAO Journal
Int'l Fin. Statis.Y. B.	International Financial Statistics Yearbook
IMF	International Monetary Fund
J. Air L. & Com.	Journal of Air Law and Commerce
Lloyd's Avi. L.	Lloyd's Aviation Law

Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly
Off. J. EC	Official Journal of the European Communities
The Avi. Q.	The Aviation Quarterly
The Eco.	The Economist
Trans R	Transportation Law Review
Y.B.Miner.	Minerals Yearbook
W.A. Trans. Statis.	World Air Transportation Statistics
ZLW	Zeitschrift für Luft-und Weltraumrecht

I dedicate this thesis to my beloved grand parents ——

Madam Yung Yu Teng and Mr. Yen Lu

Without them, I would not be what I am today.

Introduction:

1. Objectives

As a result of dramatic technological progress, international air transportation has become a very important element in the lives of millions of people. Naturally, "Air Law" has also gradually attracted a great deal of attention from lawyers, scholars and the aeronautics industry. This thesis will focus on one of the key issues in private international air law: air carriers' limited liability in the Warsaw System.

Air carriers' limited liability has been perhaps the most controversial issue involving the Warsaw System, witnessing some seventy years of vigorous debate. The original Warsaw Convention,[1] the Hague Protocol,[2] the Guadalajara Convention,[3] the Montreal Inter-carrier Agreement 1966,[4] the Guatemala City Protocol,[5] the Montreal Additional Protocol Nos.1,[6] 2,[7] 3[8] and the Montreal

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

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

[3] *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*, 18 September 1961, ICAO Doc. 8181 [hereinafter *Guadalajara Convention*].

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

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

[6] *Additional Protocol No. 1 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929*, 25 September 1975, ICAO Doc. 9145 [hereinafter *Montreal Protocol No. 1*].

[7] *Additional Protocol No. 2 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the*

Protocol No. 4,[9] the latest IATA Inter-carrier Agreement,[10] and its implementing Agreement[11] have all sought to address the issues of carrier liability, with varying degrees of success. Presently we are eager to know the future of the Warsaw System, its current problems and how we can solve them. What can States and international organizations do, other than simply wait for these amendments (other than the Hague Protocol) to the Warsaw Convention to enter into force? What can we learn from the various unilateral actions, such as the Italian patchwork, the Japanese initiative, and the British and Australian amendments to their respective domestic legislation? What are the solutions for the crisis of unification of private air law? Is the IATA 1995 Intercarrier Agreement and its subsequent Implementation Agreement the best approach for increasing limits of liability? These are the key issues this thesis seeks to address. Also, being a citizen of the Republic of China, I will address the issue of how the Warsaw System should be implemented with respect to the Republic of China.

Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25th September 1975, ICAO Doc. 9146 [hereinafter *Montreal Protocol No. 2*].

[8] *Additional Protocol No. 3 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air, signed at Warsaw on 12th of October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971*, 25 September 1975, see ICAO Doc. 9147 [hereinafter *Montreal Protocol No. 3*].

[9] *Montreal Protocol No. 4 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol done at the Hague on 28th of September 1955*, 25 September 1975, ICAO Doc. 9148 [hereinafter *Montreal Protocol No. 4*].

[10] *IATA Intercarrier Agreement on Passenger Liability.* An official copy of the IATA Intercarrier Agreement may be obtained from IATA. For the text of the Agreement, see (1996) XXI:I Ann. Air & Sp. L. 293 [hereinafter *IATA Intercarrier Agreement* or *IIA*].

[11] *Agreement on Measures to Implement the IATA Intercarrier Agreement,* an official copy of this Agreement may be obtained from IATA. For the text of the Agreement, see (1996) XXI:I Ann. Air & Sp. L. 299 [hereinafter *IIA's Implementing Agreement* or *MIA*].

2. The Importance of Unifying Private International Air Law

Given the boom in technology, global business and international tourism, it is imperative to have a unified system of private international air law. This system would help prevent the various conflicts of law between different domestic laws as well as conflicts of jurisdiction and "forum shopping", with individuals looking for the court which may best serve their interests..

The following scenario illustrates of the need for a unified system of private international air law: a French citizen, currently resides in Denmark, buys a passenger ticket for a flight from Geneva to London at a Swedish travel agency in Stockholm. The aircraft operated by the American PAA crashes in Belgian territory and the passenger is seriously injured.[12]

It is evident from the above example, that if we do not have an unified system of international law, many difficulties arise while deciding what kind of law should be used to settle the legal relations between the air carrier and the passenger (or the consignors of transported goods). Should we use the law of *locus contractus*, departure, destination, *lex fori*, the law of the flag, or the law of the carrier's principle place of business? If we cannot solve this initial question, then we will be unable to decide the cause of action of the lawsuit: strict liability, fault, or absolute liability. How much compensation should be sought? Are there any limits of liability? How do we avoid "forum shopping"?

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[12] M. Milde, *The Problems of Liability in International Carriage by Air* (Praha: University Karlova, 1963) at 17.

From the inception of the development of the legal regime of international aviation, the Comité International Technique d'Experts Juridiques Aériens, known as International Technical Committee of Juridical Air Experts [CITEJA] has worked on the problems relating to the unification of the requirements of documents of carriage, as well as the liability of the carrier.[13]

But, due to the increasing cost of living, particularly in the developed countries, the regulation of limits of liability provided by the Warsaw System has become utterly outdated. Whether the scope of compensation should include non-economic loss or not has caused serious conflict between the jurisdiction of the United States and the rest of world. There is no time to lose in making sure that recovery is consistent with increases in the cost of living.

[13] *Ibid.* at 19-22.

Chapter 1 Warsaw System -- Air Carrier's Limited Liability for Passenger Injury

1.1 Foreword

For the international carriage by air, the fact is that the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention"), signed on 12 October 1929, has been justly hailed as the most successful unification of private law. Impressively, the Warsaw Convention achieved almost universal international application on 10 July 1993; 124 States have become the parties to the Convention.[14]

The principle features of this international convention are as follows:[15]

--- The Convention applies to the carriage of passengers, baggage and cargo (Article 1);

--- Standard documents of carriage are prescribed and required, if the carrier undertakes the carriage without such documents, the carrier has to face absolute and unlimited liability or simply unlimited liability (Articles 3-16);

--- In the event of passenger's death or injury and loss or damage of baggage or cargo, the Convention presumes the carrier is liable, thus shifting the burden to carrier to prove absence of fault (Articles 17-21);

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[14] M. Milde, "'Warsaw' System and Limits of Liability--Yet Another Crossroad?" (1993) XVIII:I Ann. Air & Sp. L. 201 at 202 [hereinafter "Warsaw Crossroad"].

[15] B. Cheng, "Air Carriers' Liability for Passenger Injury or Death" (1993) XVIII:3 Air & Sp. L. 109 at 112 [hereinafter "Air Carriers' Liability"].

--- The carrier's liability is limited to fixed amounts except for willful misconduct; there are various limits for passenger, baggage and cargo; the unit of this fixed amount is gold franc (Articles 22 & 25);

--- After considering the interest of air carriers and passengers, consignors, four defined jurisdictions are prescribed by Convention (Article 28);

--- Rights to damages is extinguished in two years (Article 29);

--- The rules established by the Convention are exclusive and mandatory, they will override or invalidate domestic legislation, conditions of carriage or contractual arrangements which contravene its provisions, especially when the offending stipulation are disadvantageous to the consumers (Article 23, 24 & 32).

The Warsaw Convention was built as an uniform private international air law some 67 years ago, regretfully, for the present world, it is obviously not perfectly working, particularly with respect to the limitation of carriers' liability. Indeed, the Warsaw System is generally conceived as in a state of crisis. In order to solve the problems faced by the system, it is requisite for us first understand its origins and historical developments.

1.2 The Origin of Air Carriers' Limited Liability

At the very beginning of the international aviation industry, the principle of air carriers' limited liability was adopted under Article 17 of the Warsaw Convention as a *quid pro quo* for *res ipsa loquitur*,[16] to foster the aviation industry,[17] and to provide a uniform and comprehensive scheme of liability to compensate victims.[18]

Times change. The cost of living increases every year and is, of course, higher today than in 1929. Moreover, the air transport industry has long ago outgrown its infancy, thus, the rationales for air carriers' limited liability in 1929 are hardly convincing today. From the Warsaw Convention to the IATA Inter-Carrier Agreement of 1995, a significant number of unilateral and multilateral efforts have attempted to address the weaknesses in the Warsaw System.

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[16] *Ibid.*

[17] See Milde, "Warsaw Crossroad", *supra* note 14 at 206.

[18] *Eastern Airlines, Inc.* v. *Floyd et al.*, 23 Avi. 17,367 (Fed. Sup. Ct. 1991) at 17,367.

1.3 The Development of the Warsaw System in the Field of Limited Liability

1.3-1 The Original Warsaw Convention

Since entering into force, especially after the Second World War, the Warsaw Convention has been very controversial and has faced a great deal of criticism. Although the Convention has its shortcomings, it is obvious that it could not have become so widely accepted for so long without some remarkable merits. As one noted authority in this field, Professor Bin-Cheng has commented on the Warsaw Convention:

> In fact, the authors of the Convention succeeded in establishing a regime which was extremely advanced for its time. It is comprehensive, simple, effective, and on the whole fair to the different parties concerned. It extends, in scope, ··· not only to the carriage of cargo, but also to that of passengers and baggage. By means of a system of international uniform law applicable in like manner to carriage by air subject to the law of any of the contracting States and as defined in the treaty, the Convention largely eliminates problems of conflicts of law and of jurisdiction from carriage by air coming within the ambit of the Convention.[19]

The hard core of the Convention lies in the provisions addressing the liability of the air carrier. Its principle features are as follows:[20]

(1) Liability is based on the fault of the carrier. That is to say that "a wrong doer or tortfeasor must be at fault for him to be compelled to compensate the injured".[21] In the field of Air Law, the Warsaw Convention stipulates that the air carrier is

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[19] B. Cheng, "Fifty Years of the Warsaw Convention Where Do We Go from Here?" (1979) 28 ZLW 373 [hereinafter "Fifty Years of the Warsaw"].

[20] According to Article 17-25 of the *Warsaw Convention*. See also Milde, "Warsaw Crossroad", *supra* note 14 at 204-206.

[21] R.I.R. Abeyratne, "Liability for Personal Injury and Death under the Warsaw Convention and its Relevance to Fault Liability in Tort Law" (1996) XXI:I Ann. Air & Sp. L. 1 at 2 [hereinafter "Warsaw Convention Relevance"].

presumed liable and there must be an "accident"[22] which caused the damage, including the death or wounding of a passenger or any other bodily injury suffered by the passenger. The accident must occur "on board the aircraft or in the course of any of the operations of embarking or disembarking".[23] The carrier is liable for damage to baggage and goods if the occurrence which caused the damage took place during the carriage by air.[24]

(2) The fault of the carrier is presumed and the burden of proof is reversed. In 1929 this was a bold provision as it clearly removed the burden of proof from the claimant which was the governing principle at the time. Due to the technical and operational complexity of air transport, it would be very difficult for the claimant to undertake this kind of burden of proof.

(3) The amount of liability is limited but can be increased by special contract between the passenger and carrier. The amounts of the limits are expressed in gold francs and may be converted into national currency in round figures.[25] This constitutes a departure from the general principle of compensation requiring *restitutio in integrum*, or return to the *status quo ante*.[26]

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[22] The word "accident" is not a legal term which has clear definition. In aviation context, sometimes the "accident" is given a broad definition than it is considered. Commonly, an accident is usually, from the victim's point of view, referred to a fortuitous or unexpected nature of event. The 1966 Montreal Agreement tried to avoid this term, but this concept is emphasized by Article 17 of the Warsaw Convention; for more details, see P. Martin *et al.*, eds., *Shawcross and Beaumont: Air Law,* 4th ed., vol. 1 (London: Butterworths, 1996) at VII (153); see also *Air France* v. *Saks*, 18 Avi. 17,606 (9th Cir. 1984), aff'd 18 Avi. 18,538 (Fed. Sup. Ct. 1985); Milde, "Warsaw Crossroad", *supra* note 14 at 204, footnote 11.

[23] This concept is emphasized by Article 17 of the *Warsaw Convention*; see also *Rullman* v. *Pan Am*, 18 Avi. 17,688 (N.Y. Sup. Ct. 1983).

[24] This concept is emphasized by Article 18 of the Warsaw Convention. For more detail, see Milde, "Warsaw Crossraod", *supra* note 14 at 204, footnote 12.

[25] See *Warsaw Convention*, art. 22. See also R. Mankiewicz, *The Liability Regime of the International Air Carrier* (Denver: Kluwer Law and Taxation Publisher, 1981) at 113.

[26] See Milde, "Warsaw Corssroad", *supra* note 14 at 205.

1.3-2 1955 Hague Protocol

Inasmuch as the gold clause in Article 22 of the Warsaw Convention had been applied at an artificially fixed official price, and due to the great depreciation of gold in general, the resulting unrealistically low limits of liability made the United States urge other countries to increase the limits of liability.[27]

The Hague Protocol of 1955, prepared by the International Civil Aviation Organization ("ICAO") Legal Committee, and adopted by a diplomatic Conference convened by ICAO, doubled the limit of liability with respect to "person" in addition to making other amendments.[28] Although there are 116 States which are parties to this Protocol, it is significant that the United States did not ratify the Protocol. The U.S. viewed the increase to the limitation of liability to be inadequate. Most ICAO Member States also now consider the Convention, as amended by the Hague Protocol, outdated for present proposes.[29]

1.3-3 Guadalajara Convention

The Guadalajara Convention was adopted to remedy a flaw in the Warsaw System, and entered into force on 1 May 1964. By August 1995, it had 70 member parties.[30]

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[27] See Cheng, "Air Carriers' Liability", *supra* note 15 at 113.

[28] See Milde, "Warsaw Crossraod", *supra* note 14 at 208. "Other amendment" means simplified and modernized the document of carriage and harmonize the concept of "willful misconduct" between common law and civil law.

[29] M. Milde, "IATA Inter-Carrier Liability Agreement" (From Warsaw to The Hague, Guatemala City, Montreal and Kuala Lumpur) (Lecture Notes for a Presentation at the Republic of Korean Air Force Academy) 19 November, 1995 [unpublished] at 2 [hereinafter "IATA Inter-Carrier Liability Agreement"].

[30] See ICAO, "Status of Certain International Air Law Instruments" (1995) 50:6 ICAO Journal 33 at 33-36.

The exclusive purpose of the Guadalajara Convention is to extend the application of the Warsaw System to include both the "contracting carrier"[31] and the "actual carrier".[32] The Guadalajara Convention allows for redress where a carrier seeks to exonerate itself by reason of a lack of contractual relations with the passenger or cargo consignor.

1.3-4 Montreal Inter-Carrier Agreement and the "New Zealand Package"

A. 1966 Montreal Inter-Carrier Agreement (the "Montreal Agreement")

Due to the perception that the increase of the limitation of liability was inadequate, the United States denounced the Warsaw Convention on 15 November 1965. There was no consensus on either holding a diplomatic conference, or on a specific draft of new provisions to address the limitation of liability and other problems in the Warsaw System. Airlines of the world (except those of the United States) did not want to face the possible chaotic situation of conflicts of laws, conflicts of jurisdiction, unlimited liability, unpredictable settlements and dramatic increases in insurance premiums which would arise if the Warsaw Convention was no longer applicable to the largest proportion of international air transport at that time,[33] therefore, the aviation industry reached an informal solution, namely the Montreal Agreement which was sponsored by IATA.[34] Article 22(1) of the Warsaw Convention, allows the adoption of a special

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[31] See *Guadalajara Convention*, art. 1(b).
[32] See *ibid.*, art. 1(c).
[33] See Milde, "Warsaw Crossroad", *supra* note 13 at 211.
[34] See Milde, "IATA Inter-Carrier Liability Agreement", *supra* note 29 at 2.

contract whereby the carrier and the passenger may agree to a liability limit higher than that which is provided. The Montreal Agreement is considered to be such a special contract under Article 22(1). Under this agreement, for carriage to, from or via the U.S. territory, the carriers agreed: (i) to increase limits of liability to U.S. $75,000 (inclusive of legal fees and costs) or U.S. $58,000 (exclusive of legal fees and costs) in case of death or bodily injury of a passenger; (ii) not to invoke a defense under Article 20(1) of the Warsaw Convention-- namely accepting strict liability; and (iii) print a specified notice of liability in ten-point type size.[35]

Although this agreement was accepted by most of the world's airlines and represented a *de facto* amendment of the Warsaw Convention (at least for carriage to, from or via the U.S. territory), this agreement was unfortunately not accepted by governments and did not really achieve the goal of unifying private international air law. The Montreal Agreement of 1966 is not an instrument of international law under the Vienna Convention on The Law of Treaties (the "Vienna Convention)[36] but only airlines' agreement to apply the Warsaw System in a particular manner.

B. New Zealand Package

At the same time as the Montreal Agreement was introduced, ICAO reviewed the Warsaw System and a number of sessions were held by ICAO to review the Warsaw System: there were two sessions of an panel of experts were held on the limits for

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[35] See *1966 Montreal Agreement*, art. 2.

[36] *Vienna Convention on The Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331 [hereinafter *Vienna Convention*].

Passengers in International Transport by Air[37]; two sessions on the Sub-Committee of the Legal Committee[38] and the 17th Session of the Legal Committee.[39] These meetings not only concentrated on the rule of limited liability but also sought to balance the, at times, conflicting needs of the United States (which was eager to increase the limitation of liability) and of the rest of world (which did not view an increase to the limitation of liability to be necessary so soon). During the 17th Session, New Zealand presented a formal proposal to establish a modernized legal regime for the unification of private air law. Because this proposal attempted to deal with a variety of problems with the Warsaw System, it looked like a "package", not simply a single amendment, and therefore became known as the "New Zealand Package". The principal elements of this package were as follows: (i) the monetary limit of liability would be unbreakable, increased to U.S. $100,000 and automatically and annually increased by 2.5 percent; (ii) carriers would undertake absolute liability for death or injury of a passenger subject only to the defense of contributory negligence; (iii) the domestic law would enable the courts to award costs, if the carrier did not offer reasonable compensation within the applicable limit ("settlement inducement") and; (iv) the court of the victim's domicile or permanent residence

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[37] The two sessions were held in January and July 1967, see Milde, "Warsaw Crossroad", *supra* note 14 at 211. See also ICAO, *Subcommittee of the Legal Committee on the Question of Revision of the Warsaw Convention as Amended by the Hague Protocol: Documentation*, ICAO Doc. 8839-LC/158 (1969) I at 73-82 & 123-133 [hereinafter "ICAO Documentation"].

[38] The two sessions were hold from 18 to 29 September 1968 and from 2 to 19 September 1969, see "ICAO Documentation", *supra* note 37 at 1 & 81.

[39] The session was hold from 9 February to 11 March 1970, see Milde, "Warsaw Crossroad", *supra* note 14 at 212. See also *Proposal of the Delegation of New Zealand*, LC/Working Draft No. 745-15 in ICAO Doc. 8878-LC/162 at 364 [hereinafter *Proposal of New Zealand*].

would have jurisdiction, in addition to the jurisdiction set out in Article 28 of Warsaw Convention.[40]

Although the New Zealand Package was not eventually accepted by the diplomatic conference, it established a very good basis for the Guatemala City Protocol which followed.

1.3-5 1971 Guatemala City Protocol

From the beginning of the Warsaw System, its amendment has amounted to a dialogue between the United States and the rest of the world. Gradually, the rest of the world has come to understand the problem the United States has with the Warsaw System, and made concessions to American needs.[41] In March 1971, ICAO held a diplomatic conference to create some new rules and to amend the Warsaw Convention and the Hague Protocol. This conference created the instrument known as the Warsaw Convention as amended at The Hague, 1955, and signed at Guatemala City, 1971.[42]

The main features of this Protocol are as follows:

(i) To simplify the documents of carriage for passengers and checked luggage. This is to say that "any other means which would preserve a record of the information indicated in the place of departure and destination and stopping place may be

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[40] See Milde, "Warsaw Crossroad", *supra* note 14 at 212-213. See also *Proposal of New Zealand*, *supra* note 39 at 364.

[41] M. Milde, "Warsaw Requiem or Unfinished Symphony? (From Warsaw to The Hague, Guatemala City, Montreal, Kuala Lumpur and to...?)" (1996) Pt. I The Avi. Q. 37 at 39 [hereinafter "Warsaw Requiem or Symphony"].

[42] See *1971 Guatemala City Protocol*, art. XVII.

substituted for the delivery of the document".[43] For example, airlines can issue tickets by computer. Thus, it is possible to issue an "individual or collective" document of carriage, permit the introduction of electronic data processing for a formal ticket or baggage check and assimilate the documentation used in other means of mass transport.[44]

(ii) The carriers undertake strict liability regardless of fault for damages sustained in the case of death or personal injury.[45] Noted professor Dr. M. Milde has commented on this provision as follows:

> The introduction of strict liability in mass transport is a bold development in the unification of private law which represents remarkable progress in the interests of the passengers and is believed to be conducive to fast settlement of claims and avoidance of litigation and definitely in the interest of the traveling public. At the same time, it represents a considerable burden for the air carriers who have to assume strict liability for events which may be completely beyond their control.[46]

(iii) This protocol set a separate and distinct limit of liability for damage caused by delay in the amount of 625,000 francs.[47]

(iv) For death or "personal"[48] injury the limit of liability was increased to 1,500,000 francs for the aggregate of the claims, however founded, with respect to each passenger.[49] This limit was "unbreakable" and has removed any possibility of exceeding the limit even in case of non-delivery of the ticket, inadequate notice to the passenger or willful misconduct.[50] At that time, it was believed that this limit would

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[43] See *ibid.*, art. II & III.

[44] See Milde, "Warsaw Crossroad", *supra* note 14 at 215.

[45] See *1971 Guatemala City Protocol*, art. IV.

[46] See Milde, "Warsaw Crossroad", *supra* note 14 at 215-216.

[47] See *Warsaw Convention*, art. 22(1)(b) as amended by *1971 Guatemala City Protocol*, art. VI.

[48] It use the term of "personal" injury in stead of "bodily" injury, therefore this protocol allow compensation for mental distress.

[49] See *Warsaw Convention*, art. 22(1)(a) amended by *1971 Guatemala City Protocol*, art. VIII.

[50] See Milde, "IATA Inter-Carrier Liability Agreement", *supra* note 29 at 3.

satisfy more than 80 percent of the typical claims in the United States and would exceed the real economic need in most other countries. Moreover, the new Article 35A offered a provision of "domestic supplement" to provide for the special needs of the United States.[51]

(vi) For loss, damage or delay of baggage, the limit of liability was increased to 15,000 francs.[52] Compared to other means of transport, this limit remained very low and thus required additional personal insurance.[53]

(vii) Article VIII of this protocol, the new Article 22(3)(a) & (b), stipulates that the cost of the action includes lawyer's fees which the court considers reasonable. These provisions, known as the "settlement inducement clause", were viewed as assisting in expediting the settlement of claims.[54] It should be noted that lawyer's fees would not be taken into account in applying the limits under the new Article 22(3)(c).

(viii) Additional jurisdiction was included by the protocol so that an action may be brought before one of the Courts in the territory of one of the High Contracting Parties, before the Court in the jurisdiction of which the carrier has an establishment, or before the court in the jurisdiction in which the passenger has his domicile or permanent residence.[55]

The entering into force of the Guatemala City Protocol was obstructed because of the world-wide fixed official price of gold. While this protocol was waiting to enter into force, States were aware that the International Monetary Fund (IMF) was going

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[51] See Milde, "Warsaw Crossroad", *supra* note 14 at 216.
[52] See *Warsaw Convention*, art. 22(1)(c) as amended by *1971 Guatemala City Protocol*, art. VI.
[53] See Milde, "Warsaw Crossroad", *supra* note 14 at 216-217.
[54] See *ibid.* at 217.
[55] See *1971 Guatemala City Protocol*, art. XII.

to express the parities of currencies in terms of Special Drawing Right ("SDR").[56] Thus, the fact that this protocol's limitation of liability provision was expressed in gold francs made it difficult for many States to accept, especially the United States which is still not satisfied by the limit of liability set out in this protocol. Moreover, the United States represented at least 24 percent of the international scheduled air traffic in 1970 and, according to Article XX, paragraph one of this protocol,[57] this protocol will never enter into force without the ratification of the United States.

1.3-6 1975 Montreal Additional Protocol Nos. 1 to 3 and the Montreal Protocol No. 4

In 1975 the Montreal Conference was convened by ICAO in anticipation of the proposed Second Amendment to the IMF Article of Agreement.[58] This conference produced four protocols and expressed the currency of liability limits by SDR. The first three Additional Protocols amended the gold clause respectively in the original Warsaw Convention ("Montreal Protocol No. 1"), the Hague Protocol ("Montreal

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[56] See Cheng, "Air Carriers' Liability", *supra* note 15 at 115.

[57] *1971 Guatemala City Protocol*, art. XX(1) stipulates:
This Protocol shall enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, represented at least 40 percent of the total international scheduled air traffic of the airlines of the member States of the International civil Aviation Organization in that year. If, at the time of deposit of the thirtieth instrument of ratification, this condition has not been fulfilled, the protocol shall not come into force until the ninetieth day after this condition shall have been satisfied. This Protocol shall come into force for each State ratifying after the deposit of the last instrument of ratification necessary for entry into force of this Protocol on the ninetieth day after the deposit of its instrument of ratification.

[58] A. Chayes, *et. al.*, *International Legal Process*, vol. 2 (Boston: Little Brown & Co., 1969) at 461-476.

Protocol No. 2") and the Guatemala City Protocol ("Montreal Protocol No. 3"), respectively, with regard to passenger liability (limited to the sum of 100,000 SDR for the aggregate of the claims). Montreal Protocol No. 4 amended the liability for cargo in the original Warsaw Convention and the Hague Protocol in the same way-- by expressing the limits in SDRs.[59]

Especially, we have to note that the entering into force of Montreal Protocol No. 3 is completely different from the Guatemala City Protocol: Montreal Protocol No. 3 can be brought into force by any 30 ratifications[60] and does not depend on the attitude of the U.S.. A State which ratifies Montreal Protocol No. 3 becomes a party to the Warsaw Convention as amended at The Hague, at Guatemala City Protocol and at Montreal Protocol No. 3, once the Montreal Protocol No. 3 enters into force.[61] However, States are unwilling to ratify Montreal Protocol No. 3 until the United States does so, due to the United States' importance both as a market and as a carrier nation.[62]

Montreal Protocol No. 3 is based on the Guatemala City Protocol and only amends that part of the protocol which addresses the limit liability (increased the limit to the sum of 100,000 SDR for the aggregate of the claims) and the number of ratifications required. The Guatemala City Protocol allows each participating State to establish a supplementary compensation plan ("SCP").[63] Namely, each High Contracting Parties could establish and operate a system domestically to supplement the compensation

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[59] *Ibid.*
[60] *Montreal Protocol No. 3*, art. VIII.
[61] *Ibid.*, art. V & VII.
[62] See Cheng, "Air Carriers' Liability", *supra* note 15 at 116.
[63] See the newly added Article 35A under Article XIV of 1971 Guatemala City Protocol.

payable to the claimants under the Warsaw System. The U.S. Government had developed an SCP which was approved by the Civil Aeronautic Board ("CAB") in July 1977 as an inter-carrier agreement. The United States Senate's Committee on Foreign Relations sent a report[64] to the Senate for advice and consent, but the Senate declined to give its advice and consent for the ratification of Montreal Protocol No. 3. The majority in the Senate believed that carriers should undertake unlimited liability for personal injuries or death to individual passengers.[65] Until now, the United States has not ratified Montreal Protocol No. 3 and probably it will never ratify this protocol due to the perceived inadequate limit of liability. Thus, the Montreal Protocol No. 3 is not likely to enter into force.[66]

1.3-7 Unilateral and Group Actions

As a modernized unification of private air law has not entered into force since the adoption of Montreal Protocol No. 3 and Montreal Protocol No. 4, the dissatisfaction with the Warsaw System has compelled unilateral action by both States and airlines which have sought to make *de facto* amendments to the Warsaw System.[67]

A. European Union and ECAC

A-1. Foreword

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[64] United States Senate, *Montreal Aviation Protocols 3 and 4*, 101st Congress (2nd session) Executive Report 101-21 at 9-10.

[65] N.M. Matte, "The Warsaw System and The Hesitations of The US Senate" (1983) VIII:I Ann. Air & Sp. L. 151 at 158-160.

[66] See "Status of Certain International Air Law Instruments", *supra* note 30, until now Montreal Protocol No. 3 only has 21 ratification and it requires 30 ratification by signatory States.

[67] See Milde, "IATA Inter-Carrier Liability Agreement", *supra* note 29 at 3.

In the early 1970s, the "Malta Group" was formed, comprised of a number of Western European government lawyers concerned with air law. They suggested to both States and airlines, that they rely on a "special contract" stipulated under Article 22 (1) to increase the limit of liability instead of amending the Convention. The Malta Group also suggested to the States and airlines that they take initiative in making a condition of licensing to have carriers voluntarily raise the limit of liability to 100,000 SDR.[68] Since this time, there have been a series of unilateral or group actions and recommendations from scholars which play a very important role in carrier liability under the Warsaw System in Europe.

A-2. 1985 Italian Patchwork

Italy is a signatory to all major public and private international civil aviation conventions and a supporter of the orderly development of the air transport industry.[69] But in 1985, the Italian Constitutional Court delivered a decision which held that Article 22(1) of the Warsaw Convention, both in its original form and as amended by the Hague Protocol, offends the basic principles of the Italian Constitution.[70] As a result of this decision, the government submitted a bill which: conformed with the decision of the Constitutional Court, provided a remedy for reinstating some acceptable limits of liability, and implemented a law fixing limits for

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[68] See Cheng, "Air Carriers' Liability", *supra* note 15 at 118.

[69] G. Guerreri, "Law No.274 of 7 July 1988: a remarkable piece of Italian Patchwork" (1989) XIV:4/5 Air & Sp. L. 176 [hereinafter "Italian Patchwork"].

[70] G. Guerreri, "The Warsaw System Italian Style: Convention Without Limits" (1985) X:6 Air & Sp. L. 294.

anticipating the entry into force of Montreal Protocol No. 3, in an attempt to reduce international criticism against limits established in such a unilateral manner.[71]

The main features of this Italian patchwork are the following: (i) these provisions will apply to the international air carriage of persons performed by all Italian carriers and foreign carriers which operate to, from or through Italian territory;[72] (ii) increase the limits of liability for death or injury to 100,000 SDR[73] and; (iii) the carrier is obligated to obtain insurance coverage up to 100,000 SDR per passenger from a solvent insurer without which the aircraft cannot fly in Italian territory; the insurer should meet the conditions of insurer's solvency requirement.[74]

A-3. 1992 British Carriage by Air Act Order[75]

According to Regulation 2407/92 of the Council of European Union[76] ("Council Regulation"), if an air carrier wishes to have access to scheduled intra-community air service, the air carrier must have an operating license from the competent authority of the Member State within which the carrier is based, as determined by its principal place of business and its registered office.[77] The Council Regulation also set out standard conditions for granting carriers an operating license, which provide that they

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[71] See Guerreri, "Italian Patchwork", *supra* note 69 at 177.

[72] *Law No. 274 of 7 July 1988 on the Limit of Liability in International Air Carriage of Persons*, Gazzetta Ufficiale Della Repubblica Italiana, Roma, No. 168,19 July 1988, art. 2 & 2(1)(a) [hereinafter *Law No. 274 on Limit of Liability*]

[73] *Ibid.*, art. 2(1)(a).

[74] *Ibid.*, art. 3.

[75] A copy of 1992 British Carriage by Air Act Order may obtained from the Secretary and Legal Adviser's Office of Civil Aviation Authority in U.K.

[76] EU, *Council Regulation (EEC) No. 2407/92 on 23 July 1992 on licensing of air carrier* (1992) No. L240/1 Off. J. EC [hereinafter *C.R. No. 2407/92*].

[77] See *ibid.*, arts. 2(c) & 4(5).

must hold an "Air Operator's Certificate" and must meet certain financial fitness criteria.[78] Each Member State has the right to execute its own regulations which adopt these criteria, provided that they do not conflict with Community Law.

In the United Kingdom, the competent authority is the Civil Aviation Authority ("CAA") and operating licenses are granted pursuant to the Licensing of Air Carrier Regulations 1992.[79] Regulation 11(1)(b) provides that:

> An air carrier with a valid operating license granted by the CAA in accordance with the Council Regulation--shall enter into a special contract with every passenger to be carried for remuneration or hire, or with a person acting on behalf of such a passenger, for the increase to not less than the Sterling equivalent of 100,000 Special Drawing Right, exclusive of costs, of the limit of the carrier's liability under article 17 of the Warsaw Convention 1929 and under article 17 of that Convention as amended at The Hague in 1955 . . . .

Therefore, since January 1993 the United Kingdom has used the requirements of air carrier licenses to increase the limit of liability to 100,000 SDR.

A-4. After 1992, The Development of Carriers' Liability for Passenger Injury in Europe

A-4-1. Brise Report[80]

In 1991, a report entitled *Study on the Possibilities of Community Action to Harmonize Limits of Passenger Liability and Increase the Amounts of Compensation*

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[78] See *ibid.*, arts. 9(1) & 5 & Annex..

[79] This is a statutory instrument--1992 No. 2992, titled *Civil Aviation--The Licensing of Air Carriers Regulations 1992*, this regulation was made on 1 December, 1992; Laid before Parliament on 4 December, 1992 and came into force on 1 January, 1993.

[80] It is a report submitted by Mr. Sven T. Brise to the Commission of the European Communities pursuant to Contract No. C1, B 91, B2-7040, SIN 001556, dated 15 September 1991; vols. 1 & 2 (appendices). This report has been kindly provided by Mr. Svan T. Brise [hereinafter *Brise Report*].

for International Accident Victims in Air Transport was written by Mr. Sven T. Brise ("Brise Report").

This report indicated the following problems of Warsaw System:[81] (1) the limit of liability is too low and out of date; (2) the System only protects one of several potentially liable industries, therefore, victims have to bear costly claims against unprotected co-liable parties like manufactures, airports, and air traffic control operators . . . etc.; (3) because of inflation, the same amount of compensation today corresponds to approximately one fifth of its original value in 1975; (4) under the Guatemala City Protocol and Montreal Protocol No. 3, the concept of "unbreakable" limit conflicts with constitutional law in some countries within the European Community.[82] The report also recommended that the European Community work on a salient regime which is briefly introduced below.[83]

The report highly recommend the European Community continue to rely on the Warsaw - Hague instruments as a first tier of consumer protection because these instruments are already globally in force and combine them with:

(1) a second tier of protection --- by the means of contractual airline commitments. The existing Montreal Agreement could serve as a model to preserve a maximum of highly desirable global uniformity, this could be achieved by maintaining the Montreal Agreement in amended form, expanded generally to international traffic and could

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[81] *Ibid.*, vol. 1 at 5-6 & 14-15.

[82] The concept of "unbreakable" limit is against the tradition in common law countries within European Community, *e.g.* France. See H. Mazeaud & A. Tunc, *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, vol. III: 2573 (Paris: Éditions Montchrestien, 1960) at 735. See also Cass., 3 April 1959, Pas., 1959, I, 773; Germany --BGB 275, 278, 280; Belgium --cfr. Depage, P. 1109; Cass., 25 September 1959, Pas., 1960 1, 113; Italy -- civ. code 1681 and navigation code 409. For more details, see *Brise Report*, *supra* note 80, vol. 1 at 35.

[83] See *Brise Report*, *ibid.* at 6.

raise the limit to a level partially restoring the purchase value of the proposed Guatemala/ Montreal Protocol limit, as it stood in 1971);

(2) a third tier of optional insurance protection --- mandatorily offers another cover. At the same time, there is a possibility for each passenger to decide whether to accept the offer or not;

(3) a redrafted format for the "Notice to Passengers" --- this would advise the passenger of the specific applicable limits and also confirm the mentioned scope of optional cover which allows the passenger to decide whether or not to purchase additional coverage for the journey identified in the ticket.

The Report also emphasizes that these improvements could easily be affected by the application of modern computer technology without any significant additional administrative workload on carriers, travel agents or any other involved intermediaries.

For more detailed regulation, the Report also suggests the following:[84]

According to Article 22(1) of the Warsaw Convention, or provided in the Convention as amended by the Hague Protocol, the carrier agrees, through the Contract of Carriage, that all international transportation by the carrier as defined in the said treaty instruments, includes a location in one of the Member States of the European Community as a point of origin, of destination or agreed stopping place:

(1) The limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of ...(Mr. Brise suggests ECU 250,000)...., exclusive of legal fees and costs;

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[84] *Ibid.* at 16.

(2) The Carrier shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger, avail itself of any defense under Article of 20(1) of the said treaty instruments;

(3) The Carrier shall allow each passenger to have an option to buy insurance to cover costs in excess of the present limited liability when he or she buys his or her international transportation within a Member State of the European Community. This third tier protection should be up to a certain level or no less than . . . (Mr. Brise suggests ECU 1,000,000).

A-4-2 EC Consultation Paper

On 5 October 1992, the Commission of the European Communities("EC") issued a Consultation Paper titled *Passenger Liability in Aircraft Accidents: Warsaw Convention and Internal Market Requirements*[85] ("Consultation Paper").

Professor Bin-Cheng commented on the Consultation Paper as follows:[86]

> The Consultation Paper recognizes that world-wide uniformity in that limit has not been possible to attain, . . . It sees a need for the limit to be harmonized among EC Member States, . . . because of the uncertainties surrounding the coming into force of Montreal Additional Protocol No. 3,. . . reliance on the Hague Protocol, in combination with contractual carrier commitments prompted by licensing requirements may be the only feasible way to apply improved compensation rules throughout the EC without weakening further the Warsaw System.

A-4-3. ECAC Recommendation[87]

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[85] Reference: VII. C.1-174/92-8; ES/LG/MGT.

[86] See Cheng, "Air Carriers' Liability", *supra* note 15 at 109.

[87] *Report of the eighth meeting of the Working Group "II" on Intra-European air transport policy (EURPOL-II/8)*, Paris, 29 March 1994, Secretariat of European Civil Aviation Conference. Reference: EC 9/9.4/2.5/6-0530 [hereinafter *ECAC Recommendation*].

The European Civil Aviation Conference ("ECAC") also provided a recommendation which was prepared by ECAC's Working Group II on Intra-European Air Transport Policy (EURPOL-II/8).

This recommendation included the following points:[88] (i) try to introduce a European Inter-Carrier Agreement; (ii) increase the Warsaw System carrier's liability for damage in case of death or injury to be "at least" 250,000 SDR per passenger; (iii) offer a pay-out -- 5 percent of the liability limit to cover medical cost and up to 10 percent in the case of death; this lump sum should be received by the passenger who has suffered the damage, or those dependents were entitled to compensation from the carrier within ten days of the event which the damage occurred; the lump sum may be offset against any subsequent sums paid on the basis of carrier liability but is not returnable under any circumstances; (iv) compensate uncontested claims as soon as possible and at least within three months of the claim being made.

This recommendation also encourages carriers from third States, which have a point of origin, or destination or agreed stopping place within the territory of an ECAC Member State, to participate in the inter-carrier Agreement as well.[89]

A-4-4. Proposal of European Commission (the "EC Proposal")[90]

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[88] *Ibid.*, "Recommendation to the Air Carriers and their Associations", Pt. III, App. 2 at 12.

[89] See *ibid.*, "Recommendation to the ECAC Member States", Pt. II, App. 2 at 11.

[90] Commission of the European Communities, *Proposal for a Council Regulation on Air Carrier Liability in Case of Accidents*, 12 December 1995, Brussels, COM (95) 724 Final, 95/0359 (SYN). See also Off. J. EC, No. C 104/18, 10 April 1996 [hereinafter *EC Proposal*].

Since the third aviation package has created an internal aviation market, the rules for operation of domestic and international air services have been largely harmonized. In the meantime, Article 7 of Council Regulation (EC) No. 2407/92[91] requires air carriers to be insured to cover liability in case of accidents. Therefore, Member States of the European Union have taken different steps to increase the liability limit under the Warsaw System. For this reason, different terms and conditions of carriage exist between different Member States and the liability rules for domestic and international transport.[92] To avoid the fragmentation of internal markets, the "Proposal for a Council Regulation on Air Carrier Liability in Case of Accidents" was submitted by the Commission of the European Communities on 15 February 1996[93] to protect internal aviation markets of the EC. Hopefully, this proposal will be entered into force as early as 1 January 1997.[94]

This proposal urges that: (i) the community air carriers' liability for a passenger's injury or death should be up to the sum of ECU 100,000 (currently about U.S. $125,000 or £ 81,000[95]). Within this range, the carrier should waive any defense under Article of the Warsaw Convention;[96] the values set out above should be updated in accordance with economic developments;[97] (ii) the European Community

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[91] See *C.R. No. 2407/92*, *supra* note 76, art. 7 on licensing of air carrier: "An air carrier shall be insured to cover liability in case of accidents, in particular in respect of passengers, luggage, cargo, mail and third parties.".

[92] See *EC Proposal*, *supra* note 90, preamble.

[93] *Ibid.*

[94] H. Caplan, "The Millennium Has Arrived: Compensation for Death and Injury in International Air Travel" (1996) 4:3 Int'l Ins. L. Rev. 84 [hereinafter "Millennium Arrived"]. See also *EC Proposal*, *supra* note 90, art. 10.

[95] See *ibid.*, at 87.

[96] See *EC Proposal*, art. 3.

[97] See *ibid.*, art. 8.

air carriers should without delay or at least not later than ten days after the damaged occurred offer up-front payment to the person entitled to compensation a lump sum of up to ECU 50,000 in proportion to the injury sustained and in any event a sum of ECU 50,000 in case of death; (iii) the said up-front payment could be offset against any subsequent sum to be paid with respect to the liability of the Community air carriers, but is not returnable under any circumstances;[98] (iv) one more jurisdiction, namely the passenger's domicile, should be added into the jurisdictions regulated under Article 28 of the Warsaw Convention.[99] Once this proposal approved by the Council of Ministers, it will automatically apply in all Member States of European Community, six month after published in the Official Journal.[100]

Basically, this proposal was designed for the air carriers in EC. Since the European Union has already created a internal aviation market, its actions will certainly effect the world's air transportation market. Therefore, we need to pay attention to this proposal.

B. 1992 Japanese Initiative

For domestic carriage, the liability of Japanese carriers has been unlimited since 1 April, 1982. Like the United States, Japan is another country which has been eager to

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[98] See *ibid.*, art. 4.

[99] See *ibid.*, art. 7.

[100] H. Caplan, "Unlimited Air Carrier Liability- A View from the Sideline" (Proceedings of the 15th Annual Conference of the Aviation Law Association of Australia & New Zealand, Queenstown NZ 30 September 1996) 1 at 10.

increase the air carriers' limits of liability for international air transport. Although the limit of liability for the death or injury of a passenger set at 100,000 SDR was the highest in the world (e.g. 1975 Montreal Additional Protocol No. 3, 1985 Italian Patchwork, 1992 British Carriage by Air Act Order), it was still too low to be acceptable given the general level of compensation which prevails in Japan.[101]

The reasons that the Japanese airlines adopted the principle of unlimited liability in 1992 can be summarized as follows:(i) limits of liability expressed in SDR are not stable[102];(ii) to ratify Montreal Protocol No. 3 will not help to increase the limits of liability because it does not have an automatic increase provision and is biased in favor of protecting the airline industry; (iii) Japan has traditionally imposed criminal responsibility on persons involved in accidents which result in death and as it is customary in Japan to link compensation to the outcome of a pending criminal case, to raise the liability limits could change this concept; (iv) the domestic Japanese carriers were governed under an unlimited liability regime since 1982. This decreased the cost of negotiations but did not increase insurance costs. Thus, the government wanted to govern domestic and international air carrier's liability under the same legal regime; (v) the compensation for personal injury or death in automobile accidents includes loss of earnings, loss of solatium or consortium and funeral expenses;[103] (vi)

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[101] K. Hayashida, "Waiver of Warsaw Convention and Hague Protocol Limits of Liability on Injury or Death of Passenger by Japanese Carriers"(1993) 42 ZLW 144 at 145 [hereinafter "Waiver of Limits of Liability"].

[102] M. Sekiguchi, "Why Japan Was Compelled to Opt for Unlimited Liability" (1995) XX: II Ann. Air & Sp. L. 337 at 345. The Author also pointed out that "In 1975, 100,000 SDR was equivalent to ¥35,700,000. while in 1994 it was equivalent to only ¥15,000,000, has been reduced 58 percent" [hereinafter "Japanese Unlimited Liability"].

[103] See "Japanese Unlimited Liability", *ibid.* at 338. For more details, see "Civil Traffic Accident Suits-Compensation Award Standards" [also known as the *Red Book*].

Japanese airlines use this new provision and their safety record to increase their competitiveness in the world.[104] Hence, Japan Airlines, All Nippon Airways and Japan Air System got together and amended the condition of carriage for passengers. This entered into force on 20 November, 1992.

The main features of the amended conditions of carriage can be summarized as follows: (i) carriers waived the limits of liability for the injury or death of a passenger under Article 22 of the Warsaw Convention and Hague Protocol; (ii) airlines agree not to avail themselves to any defense provided by Article 20(1) of the Warsaw Convention up to the sum of 100,000 SDR, exclusive of the costs of the action and reasonable lawyer's fees in the view of the court; (iii) airlines still have the right which is stipulated under Article 21 of Warsaw Convention; (iv) the currency of SDR should be expressed in accordance with the value of the currency at the date when the payment for the damage is negotiated.[105]

Although the two tier system was borrowed from the Brise Report,[106] the Japanese Initiative still surprised the airline industry. It will cause a disparity in liability between Japanese and non-Japanese air carriers and the possibility of forum shopping, inasmuch as Japan is the only jurisdiction which allows a victim to seek full compensation.[107]

C. 1995 Australia Amended to the Civil Aviation Carriers' Liability Act 1959

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[104] See "Japanese Unlimited Liability", *ibid.* at 345-350.
[105] See "Waiver of Limits of Liability", *supra* note 101 at 145-146.
[106] See Cheng, "Air Carriers' Liability", *supra* note 15 at 119.
[107] See "Waiver of Limits of Liability", *supra* note 101 at 146-147.

The carrier's limit of liability for domestic carriage in Australia was increased from A$180,000 to A$500,000 effective on 18 October 1994.[108] In 1995 Australia also enacted amendments to its Civil Aviation Carriers' Liability Act 1959,[109] which increased the carriers' liability limit to SDR 260,000 (about U.S. $ 390,000).[110] This amendment entered into force on 20 January 1996.

The main features of this amendment are introduced below:[111]

First of all, the amended act increase the carrier's limited liability under international carriage up to SDR 260,000. Secondly, there must be an acceptable contract of insurance between the carrier and its insurers. This contract must meet the "prescribed requirements"[112] and must satisfy and be issued a certificate by the Minister for Transport via Civil Aviation Safety Authority ("CASA").

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[108] T. Pyne, "Developments in Australian Carriers' Liability Legislation" (1996) Pt. I The Avi. Q. 78 [hereinafter "Australian Legislation"].

[109] *Civil Aviation (Carriers' Liability) No. 2 of 1959.* An Act relating to Carriage by Air [Assented to 21st April, 1959.], A.J. Arthur, *Australia Commonwealth 1959. The Acts of The Parliament of The Commonwealth of Australia Passed During The Year 1959 in First Session of the Twenty-third Parliament of The commonwealth, with Appendix, Tables, and Index* (Canberra: Commonwealth Government Printer, 1959).

[110] See Milde, "IATA Inter-Carrier Liability Agreement", *supra* note 29 at 4.

[111] See "Australian Legislation", *supra* note 108 at 78-80.

[112] The prescribed requirements are as follows, for more details, see "Australian Legislation", *supra* note 108 at 79.

- the "prescribe requirements" (which apply in respect of personal injury liability cover *only*) are that:
  - the policy must provide indemnity in respect of each passenger for not less than:
    - domestic carrier under Part IV A$500,000;
    - international carriage SDR 260,000;
  - the insurer's liability to indemnify is not affected by "any breach of a safety-related requirement imposed by or under any Act or by (CASA);
  - the insurer's liability to indemnity is not contingent upon the financial condition or solvency of carrier. This and the above requirement are regarded as met if the carrier has a policy which satisfies US FAR Part 205, extends to carriage to, from and in Australia and contains a similar provision to that immediately above;
  - the insurer is authorized to conduct insurance business in Australia or is authorized under the law of another country which imposes similar underwriting

The most remarkable part of this amended act is its emphasis on the importance of insurance. This is also the issue we should concentrate on when considering the future of Warsaw System and the best method for protecting passengers.

1.3-8 Non-Governmental Organizations' Actions

A. International Chamber of Commerce ("ICC")[113]

The ICC policy statement on the attempts to preserve and update the Warsaw System on passenger liability in international air transport was adopted by the Commission on Air Transport at its meeting on 18 June 1993 and granted authorization by the Presidency on 20th June 1993.

The ICC supports the recent initiatives in Europe by the ECAC and the European Community in increasing the passenger limits, except for the issue of excess compensation on the basis of a more restrictive legal regime than the principle of "no fault" to avoid destroying the whole system by different defined contractual commitments.

In its statement, the ICC preserves the "first tier" protection, the limited liability, defined by the Warsaw Convention and Hague Protocol and the "second tier" protection, namely the contractually agreed liability between passenger and carrier, set up by the 1966 Montreal Agreement. The ICC also suggests a "third tier"

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requirements to those in Australia. The Minister may publish a list of countries not acceptable for this purpose.

[113] See ICC, *Policy Statement on the Attempts to Preserve and Update the Warsaw System on Passenger Liability in International Air Transport*, ICC document 310/409 Rev.

protection of passenger paid insurance which is based on each passenger's own choice and not inconsistent with Warsaw Convention Art. 22 (1). At the same time, the ICC urged that the limit of Intercarrier Agreement should be regularly, and possibly automatically, updated as soon as the SDR-based consumer price index has grown beyond 20 percent.

B. IATA 1995 Inter-Carrier Agreement and the following Implementing Agreement

B-1 IATA 1995 Inter-carrier Agreement (the "IIA")[114]

In June 1995, the International Air Transport Association ("IATA") convened the Airline Liability Conference in Washington D.C.. Again, the impetus for this conference was the U.S. pressure to address the inadequacy of liability limitation provided by the Warsaw System. Expertly, this conference recommended to increase the carriers' limits of liability. After the conference, IATA held meetings of two working groups, both groups met on 25 and 26 July in London England and on 7 and 8 August 1995 in Washington D. C.. These meetings established a possible solution for the crisis of unification in the field of carriers' liability.[115]

This new Intercarrier Agreement on Passenger Liability was adopted on 31 October 1995 in Kuala Lumpur at the IATA Annual General Meeting.[116] This

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[114] For the text of *IIA*, see (1993) XXI:I Ann. Air & Sp. L. at 293.

[115] See Milde, "Warsaw Requiem or Symphony", *supra* note 41 at 43.

[116] On 31 October 1995 this agreement was signed by 12 airlines, and until 25 November 1996, seventy seven airlines have signed this agreement. For more details, see App. A of this thesis.

agreement should enter into force no later than 1 November 1996 or upon receipt of requisite government approvals, whichever is later.[117]

The main features of this agreement are as follows: (i) carriers completely waive all limits for passenger liability; (ii) compensation should be based on the law of the domicile of the passenger up to 100,000 SDR; (iii) the defenses offered by the Warsaw Convention will remain available to the carriers; (iv) carriers are given flexibility in establishing their conditions of carriage and tariff filings according to the applicable governmental regulations.[118]

According to paragraph three of the Explanatory Note of IIA on Passenger Liability, the above (i) and (ii) should be emphasized as quoted as follows:[119]

> Such waiver by a carrier may be made conditional on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages under the Intercarrier Agreement. But this is an option. Should a carrier wish to waiver the limits of liability but not insist on the law of the domicile of the passenger governing the calculation of the recoverable compensatory damages, or not be so required by a governmental authority, it may rely on the law of the court to which the case is submitted.

However, the proposition is still far from perfect. The optional waiver of defenses under Article 20 (1) of the Warsaw Convention is not practical enough and the concept of the "law of domicile" may not convince the court which has jurisdiction in a particular case. The most serious difficulty is that the concept of the "law of domicile" does not have a world-wide acceptable and unified definition.[120] Does its

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[117] See *IIA*, art. 3.
[118] See Milde, "Warsaw Requiem or Symphony", *supra* note 41 at 43.
[119] For the text of the explanatory note of *IIA*, see (1996) Ann. Air & Sp. L. XXI:I at 293.
[120] *Ibid.*

Implementing Agreement solve the problem of IIA? The following discussion might help to solve the puzzle: (Please see B-2 and 3.2-2 (c))

B-2 IIA's Implementing Agreement (the "MIA")[121]

From 1 January to 1 February 1996, IATA Legal Advisory Sub-Committee on Passenger Liability met at Miami and adopted the Agreement on Measures to Implement the IATA Intercarrier Agreement (the "MIA"). The Director General of IATA was scheduled to declare this Agreement to be effective on 1 November, 1996 by the Director General of IATA, or at a later date, in order for requisite Government Approvals to have been obtained for this Agreement and the IATA Intercarrier Agreement of 31 October 1995.[122]

The major differences between IIA and MIA are as follows:[123]

-- (I) The carrier is obligatory to waive the defense under Article 20 (1) of the Warsaw Convention.

-- (II) The "domicile of passenger" was interpreted by the MIA in IIA as the "permanent residence of the passenger".

When the MIA was first opened to the public, the U.S. Department of Transportation (DOT) decided to direct American air carriers to follow this new approach and review air carriers promptly, but carefully, to ensure that carriers were meeting the objective of reforming the system,[124] the ECAC and the EC seemed like

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[121] For the text of the *MIA*, see (1996) XXI:I Ann. Air & Sp. L. at 299.

[122] *Ibid.* See *MIA*, art. V(3). Until 25 November 1996, forty-six airlines have signed this Implement Agreement. For more details, see App. B of this thesis.

[123] P.P.C. Haanappel, "News from International Organization" (1996) XXI:2 Air & Sp. L. 90.

[124] Main DOT Public Affairs Page at http://www.dot.gov/affairs/dot17896.htm

following this new IATA approach.[125] On 3 October, 1996 DOT issued an Order to Show Cause 96-10-7[126] to "conditionally approve"[127] the IIA and MIA. Compared with other airlines which signed the IIA and MIA unconditionally, IATA recognized that the conditional approval of the IATA Agreement by the U.S. DOT would relieve signatory carrier of the obligations set out in IIA and MIA.[128]

After receiving a series of objections and comments from IATA, the ICC, foreign carriers[129] and legal experts[130] and Victims Families Associations . . . etc.[131], the

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[125] See "News from International Organization", *supra* note 123 at 90.

[126] USA, DOT, *Order to Show Cause*, Order 96-10-7, 3 October 1996 (Docket OST-95-232 & OST-96-1607).

[127] *Ibid.* The conditions which DOT tentatively proposed to attach to their approval of the *IIA* and *MIA* are as follows:

> a. The optional application of the law of the domicile provision would be made mandatory for operation to, from, or with connection or stopping place in the United States.
>
> b. The agreement's optional provision for less than 100,000 SDR's strict liability on particular routes, could not apply for any operations (including interline operations) to, from, or with connections or an agreed stopping place in the United States.
>
> c. The provision for waiver of the Warsaw passenger liability limit, in its entirety, would be applicable on a systemwide basis.
>
> d. For transportation to and from the U.S., the provisions of the agreement would apply with respect to any passengers purchasing a ticket on an airline party to the agreements, including interline travel on carriers not party to the agreements. The carrier ticketing the passenger, or, if that carriers is not a party to the agreements, the carrier operating to or from the United States, would have the obligation either to ensure that all interlining carriers were parties to the Agreements, as conditioned, or to itself assume liability for the entire journey. (See Warsaw Article 30(1) and (2))
>
> e. The inapplicability for social agencies of the waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies.

[128] "The International Passenger Liability Regime", The Final Resolutions of 52nd Annual General Meeting. The original text may be obtained from IATA.

[129] See *infra* note 132. *e.g.* The foreign air carrier includes Korean Air Lines, Swissair, Finnair. . . etc.

[130] See *infra* note 132. *e.g.* Letter of M. Milde, Director, Institute of Air and Space Law, McGill University, to P.V. Murphy, Deputy Assistant Secretary for Aviation and International Affairs, Department of Transportation (unpublished). This letter is distributed during the International Conference "Air and Space Law Challenges: Confronting Tomorrow", held by Institute of Air and Space Law, McGill University and Canadian Bar Association, from 25 to 27 October, 1996.

[131] See *infra* note 132.

DOT issued an Order Approving Agreements (Order 96-11-06)[132] which approved the IIA but only conditionally approved the MIA with certain conditions.[133] As time goes by, DOT eventually figured out that IIA and MIA are indeed acceptable for most airlines in this world and accepted the suggestions and criticisms coming from every different standpoint. On the 8 January, 1997, DOT issued Order 97-1-2[134] to approve *pendente lite* the IIA and MIA, permit the MIA to be substituted for the 1966 Montreal Interim Agreement and grant discussion authority and antitrust immunity to IATA and all related persons and organizations between now and 30 June, 1998[135].

Currently, there are 80 air carriers who have signed the IIA. "The signatories include virtually all of the world's major international airlines, representing more than 80 percent of scheduled international air transport."[136] After approved by both U.S.

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[132] USA, DOT, *Order Approving Agreements*, Order 96-11-06 (Docket OST-95-232 & OST-96-1607). The original text may be obtained from http://www.dot.gov/general/orders/nov96/ord961106.html

[133] *Ibid.* The original conditions issued by Order 96-11-06 are reproduced as follows:

> (1) the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States;
>
> (2) the MIA's optional provision for less than 100,000 SDR's strict liability on particular routes could not apply for any operations to, from, or with a connection or stopping place in the United States;
>
> (3) the inapplicability for social agencies of the MIA's waivers of the limit and Article 20(1) carrier defense of proof of non-negligence shall have no application to U.S. agencies; . . ..

[134] USA, DOT, *Order on Reconsideration*, Order 97-1-2 (Docket OST-95-232 & Docket OST-96-1607). The original text may be obtained from http://www.dot.gov/general/orders/aviation.html

[135] *Ibid.* The original order issued by Order 97-1-2 are summarized as follows: (1) this Order modifies the Order 96-11-6 and approves *pendente lite*, the IIA, MIA and IPA(Provisions Implementing the IATA Intercarrier Agreement to be Included in Conditions of Carriage and Tariffs); (2) this Order permits the IPA as well as MIA to be substituted for the 1966 Montreal Interim Agreement; (3) this Order grant discussion authority and antitrust immunity to ATA (American Transport Association), IATA, the Victims Families Associations and all other persons and organizations between now and 30 June, 1997; (4) this Order continue to defer action with respect to other agreement and authority conditions proposed in our Order to Show Cause 96-10-7, issued on 3 October, 1996.

[136] IATA Press Release No. 28, 25 November, 1996.

DOT and the European Commission, IIA has entered into force globally.[137] Hopefully, the MIA will enter into force globally soon as well.

From the 1966 Montreal Inter-Carrier Agreement to the 1995 IATA Inter-Carrier Agreement, IATA tried to change the *status quo* resulting more from American pressure than a real desire for change. In nature, the limitation of liability is a right of the air carrier; so it could be waived by the latter if it is willing to. There will be no obstacle if IATA and the carrier would prefer to offer the greatest protection to passengers, regardless of any directives from the U.S. authorities.[138]

In the future, IATA should still play a valuable role in fulfilling its primary objects of providing the means for collaboration among the air transport enterprises and studying the problems relating to this industry.[139] At the same time, IATA also could cooperate with ICAO to undertake a socio-economic analysis of the limits of liability (Please see the following discussions at 1.3-9) and help to establish a liability regime which will be satisfactory to all Contracting States to the Warsaw System.[140] The development is optimistically expected in the near future.

1.3-9 ICAO -- Governmental Organization's Action

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[137] IATA Press Release No. 1, 15 January, 1997.

[138] G.N. Tompkins, Jr., "The Light from the East Finally Illuminates the United States Department of Transportation" 1 at 1,2. [unpublished at the time of writing this thesis]. A copy of this article may be obtained directly from Mr. George N. Tompkins; see also H. Caplan, "Implementation of IIA & MIA Following DoT Order 96-11-6" (1996) Private Memorandum No. 3 for IATA 961202 [unpublished] at 8 [hereinafter "IIA,MIA and DoT"]. This report has been kindly provided by Mr. Harold Caplan.

[139] *IATA Act of Incorporation of Act of Incorporation Articles of Association Rules and Regulations*, 17th ed., November 1991, s. A, art. 3.

[140] See *infra* note 143.

Since ICAO resumed the work of CITEJA (which drafted the Warsaw Convention in 1929), it has never stopped revising the Warsaw System.[141] The possible revision of the Warsaw Convention was considered during the first sessions of the ICAO Legal Committee in the years 1948 to 1951.[142]

In 1995, the Council of ICAO set out the future work as the following: (i) at its 142nd Session,[143] the Air Transport Bureau of the Organization should coordinate with IATA to undertake socio-economic analysis of the limits of liability, which the Council could use this information to establish the limits of liability to the satisfaction of all Contracting States; (ii) at its 145th Session,[144] it sought to merge the 'Action to Expedite Ratification of Montreal Protocol Nos. 3 and 4 of the Warsaw System' and the 'Study of the Instruments of the Warsaw System' into a single item entitled 'Review of the question of the ratification of international air law instruments'; (iii) the Council noted that the Assembly has repeatedly advised Contracting States to ratify those international instruments which have not yet entered into force; (iv) the Council also noted a recommendation submitted by the Legal Committee and already adopted by ECAC (for this said recommendation, see above discussion at 1.3-7-A-

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[141] *e.g.* ICAO Legal Committee, 9th Session, September 1955, drafted to amend Warsaw Convention as known as the Hague Protocol; 1966 ICAO Special Meeting recommended ICAO Council to held a diplomatic conference to consider the proposal from U.S.; the 17th Session of the Legal Committee of ICAO drafted texts to revise Warsaw-Hague System and submitted this text to ICAO Council; for more details, see M. Milde, "ICAO Work on The Modernization of The Warsaw System" (1989) XIV:4/5 Air L. 193 at 194 ff [hereinafter "ICAO Work"].

[142] See *ibid.* at 193-196. For more details, please refer to *ICAO Legal Committee, 2nd Session*, ICAO Doc. 6014, LC/III (1948); *ICAO Legal Committee, 3rd Session*, ICAO Doc. 6024, LC/121 (1948); *ICAO Legal Committee, 4th Session*, ICAO Doc. 6027, LC/124 (1949); *ICAO Legal Committee, 5th Session*, ICAO Doc. 6029, LC/126 (1950); *ICAO Legal Committee, 7th Session*, ICAO Doc. 7157, LC/130 (1951).

[143] *ICAO Council 142nd Session*, ICAO Doc. 9665-c/1116, C-Min. 145/1-28 (1995).

[144] ICAO, Assembly 31st Session, Legal Commission, Agenda Item 38: *Work Programme of the Organization in the Legal Field*, ICAO A31-WP/55, LE/3 (1 August, 1995) [hereinafter *ICAO A31-WP/55, LE/3*].

4.3)[145]; (v) during its 146th session, it established a study group to assist the Legal Bureau in developing a mechanism within ICAO to accelerate the modernization of the Warsaw System.[146] During the Council's 147th session, this study group presented the results of their deliberations on Warsaw System. Due to the diversity of socio-economic circumstances and varying costs of living in different parts of world, the study group believed that the world-wide unification of limited liability would be hard to achieve under the present Warsaw System. Therefore, the study group recommended developing a new instrument which is in line with the present needs and to consolidate and modernize the Warsaw System.

During the Council's 149th session, this new instrument ("ICAO New Instrument") was presented to the Council by the study group. The most important features of this new instrument are outlined below:[147]

(a) a two-tier liability regime for recoverable compensatory damages in case of injury or death of passengers, including:

(i) liability of the air carrier up to 100,000 SDR irrespective of the carrier's fault;

(ii) liability of the air carrier in excess of 100,000 SDR on the basis of the carrier's negligence;

(iii) the defense of contributory negligence of the passenger or claimant being available in both instances;

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[145] See ICAO, A31-WP/55,LE/3, *supra* note 142, attachment--General Work Programme of The Legal Committee (2) "Review of the Question of the ratification of international air law instruments".

[146] ICAO, Council-147th Session, *Report on Modernization of the "Warsaw System"*, ICAO C-WP/10381 (5 March 1996) at 1 [hereinafter "Modernization of the 'Warsaw System'"].

[147] ICAO, Council-149th Session, Progress *Report on Modernization of the "Warsaw System"*, ICAO C-WP/10470 (20 September, 1996), the original text see attachment B "*Draft New Warsaw Instrument [ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air]*" [hereinafter *ICAO draft new instrument*].

(b) revision of the limit of liability for baggage and modernization of the provisions regarding ticket and other documentary requirements;

(c) have this new instrument include elements of Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, Montreal Protocols as well as, to the extent that they are appropriate and are consistent with the foregoing.

Currently, the IATA Intercarrier Agreement and its implementing agreement have not successfully unified the carrier's liability in case of death or injury of passenger; unilateral actions and group actions still work on their own. The ICAO new instrument hopefully could lead us out of the darkness of the present disparities of private air law.

Chapter 2 The Problems and Solutions

The evolution of the Warsaw System and the various unilateral actions which resulted from inflation of the monetary units applicable under the Warsaw regime, plus the issue of the outdated limited liability . . . etc., have left most developed countries eager to increase their liability limitation to catch up with their high cost of living and to try to raise the limit of liability by unilateral actions.[148] These disparities have substantially eroded the unification of private international air law.

To solve the above crisis of the unification of private air law, we should again explore the nature of this issue with more up-to-date perspectives:

2-1 The Rationales of Limitation of Liability

According to Dr. H. Drion's seminal study (Hereinafter, "DR"), there are eight rationales of limitation liability.[149] But are these rationales still as valid for today's international air transport world (Hereinafter, "Analysis")?

DR(a) -- *Analogy with Maritime law with its global limitation of the shipowner's liability:*

In its first stage of development, air law was strongly influenced by maritime law which is evidenced by the fact that the possibility of a global limitation of liability in air law has even been considered by CITEJA.[150]

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[148] L. Weber, "International Organization, (b) IATA" (1994) XIX:I Ann. Air. Sp. L. 652 at 674.

[149] H. Drion, *Limitation of Liability in International Air Law* (The Hague: Martinus Nijhoff, 1954) at 12-44 [hereinafter *Limitation of Liability*].

[150] *Ibid.* at 13.

Analysis -- *Although the basic rules of limited liability to passenger injury in both Maritime law and air law are very similar with each other, Maritime law is no longer a good example for air law.*

(1) Basically, civil aviation transports primarily passengers as opposed to cargo, but maritime is *a contrarie*. In the field of limits of liability, Maritime law is no longer a good example for air law.

On the basis of movement, in 1994 the total number of passengers carried by sea was 33,322,200 and by air 96,482,000.[151] In the first three quarters of 1995, the total number of passengers carried by sea was 24,151,000 and by air 79,052,000.[152] The most important thing is that the nature of the compensation to passenger and cargo is totally different and should not be discussed in the same breath.

(2) Even if the Maritime transportation and civil aviation both carried the same number of passengers, the limitation of liability in maritime law is still higher than found in air law.

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[151] Central Statistical Office, *Monthly Digest of Statistics*, February 1996, No. 602, London: HMSO, Table 13.12, at 85. The table shows that in 1994, passengers carried by sea in European continent and Mediterranean Sea area is 33,288,000 and in the Rest of world is 34,200. At the same period of time, the passengers carried by air is 60,882,000 in European continent, 3,966,000 in Mediterranean Sea area and 31,634,000 in the Rest of World.

[152] *Ibid.* The table shows that in 1995, passengers carried by sea in European continent and Mediterranean Sea area during the first quarter is 5,095,000, during the second quarter is 8,938,000, during the third quarter is 10,094,000. The passengers carried by air in European continent during the first quarter is 11,108,000, during the second quarter is 17,467,000, during the third quarter is 21,652,000 and in Mediterranean Sea area during the first quarter is 710,000, during the second quarter is 1,105,000, during the third quarter is 1,340,000. The passengers carried by sea in the rest of world during the first quarter is 1,300, during the second quarter is 12,100, during the third quarter is 10,600. The passengers carried by air in the rest of world during the first quarter is 6,913,000, during the second quarter is 8,477,000, during the third quarter is 10,280,000.

The basic rules on liability and compensation for personal injury to passengers in Maritime law can be found in the Athens Convention [153] which was prepared and conceived under the auspices of the International Maritime Organization (IMO). With two exceptions, (1) the limited amount of liability between the Warsaw and Athens Conventions differs and; (2) the Warsaw Convention does not require that the limited amount of liability based on gold francs be converted into the national currency of the State of the court seized of the case on the basis of the "official value" of that currency, the rules of these two conventions are basically the same. The Athens Convention was amended by the 1976 Protocol[154]. Article 2(1) & (3) of the 1976 Protocol provides limited liability which equals to 46,666 SDR.[155] The 1990 London

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[153] *Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974*, see H.C. 1975/76 Cmnd. 6326, XLIV; see also Comité Maritime International, *International Conventions on Maritime Law* (1987) at 292-305 [hereinafter *Athens Convention*].

Article 7 of the *Athens Convention* provides: "The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 700,000 francs per carriage. Where in accordance with the law of the court seized of the case damages are awarded in the form of periodical income payments, the equivalent capital value of those payments shall not exceed the said limit."

Article 9 of the *Athens Convention* provides:

> (1) The francs mentioned in this Convention shall be deemed to refer to a unit consisting of 65.5 milligrams of gold of millesimal fineness 900.
>
> (2) The amounts referred to in Article 7 and 8 shall be converted into the national currency of the State of the court seized of the case on the basis of the official value of that currency, by reference to the unit defined in paragraph 1 of this Article, on the date of the judgment or the date agreed upon by the parties. If there is no such official value, the competent authority of the State concerned shall determine what shall be considered as the official value for the purpose of this Convention.

For more details, see Order 96-11-06, *supra* note 133 at 296-298.

[154] *1976 Protocol to the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea*, see H.C. 1976/77 Cmnd. 6765, XLV; see also Comité Maritime International, *International Conventions on Maritime Law* (1987) at 306-311 [hereinafter *1976 Protocol*]

[155] *1976 Protocol*, art. 2(1) provides:

> (1)Article 7, paragraph 1 of the Convention is replaced by the following text:
>
> 1. The liability of the carrier for the death of or personal injury to a passenger shall in no ease exceed 46,666 units of account per carriage. . .
>
> (3) Article 9 of the Convention and its title are replaced by the following:
>
> Unit of Account or Monetary Unit and Conversion

Protocol[156] which raised the limited liability to equal SDR 175,000.[157] [Hereinafter, the Athens Convention, 1976 Protocol and 1990 London Protocol will be refer to the Athens System].

Compared to the Athens System and Warsaw System, the Warsaw System's major treaty which has entered into force, namely the Hague Protocol of 1955, provides a limit only equivalent to 16,600 SDR, which is much lower than that of the 1976 Protocol of Athens System. Even the limit provided by the London Protocol under Athens System which equivalent to 175,000 SDR is still higher than that of the Guatemala City Protocol and its additional Protocols under Warsaw System, which is equal to 100,000 SDR.[158]

DR(b) -- *Necessary protection of a financially weak industry*

When the air transportation industry was in its infancy, the public interest far exceeded its financial outlook. At that time, almost all airlines were either owned or heavily subsidized by the government. Therefore, the limitation of liability was a remedy to limit the losses and an expression of the public interest in making aviation enterprises economically possible.[159]

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1. The Unit of Account mentioned in this Convention is the Special Drawing Right as defined by the International Monetary Fund . . ..

For more details, see *supra* note 136 at 306.

[156] *Protocol of 1990 to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974* [hereinafter *1990 London Protocol*], see T.J. Schoenbaum, *Admiralty and Maritime Law*, 2d ed. (USA: West Publishing Co., 1994), app. D at 857-862.

[157] For more details, see *1990 London Protocol*, art. 2. See also *Brise Report*, *supra* note 80, vol. I at 44.

[158] See *Brise Report*, *ibid.* at 44.

[159] See Drion, *supra* note 149 at 15 .

Analysis -- *Air transportation industry is not in infancy any more.*

According to the IATA World Air Transportation Statistics, in 1995, the world's scheduled airlines had an estimated operating profit of U.S. $14,000 million, on all operating revenue which totals U.S. $274,000 million (excluding domestic operations in the Russian Federation). This operating result represents 5.1 percent of the total operating revenues.[160]

The statistics also show that the world's leading carriers collectively earned more than U.S. four billion dollars in net profit.[161] Although profits are not yet universal, fewer than half a dozen of carriers before taking into account the impact of financing costs or hefty restructuring charges are losing money on their operations.[162]

According to 1995 Annual Report of the ICAO Council, preliminary estimates indicate that in 1995 the world's scheduled airlines, as a whole, experienced an improved operating result for the third consecutive year.[163]

Even if the airline industry is not wealthy enough, it is the passenger, turns to be protected rather than the airline industry, or the governments which own or heavily subsidize the airline industry; i.e. it is time for us to develop a reasonable regime to protect passengers rather than the air transportation industry or governments, because it is the airline that controls everything, e.g. operating and maintenance of aircraft, notwithstanding that the passengers could only buy tickets and rely on the airline to offer the transportation. On the other hand, the function of insurance could be helpful

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[160] IATA, *World Air Transport Statistics* (6/96) No. 40 at 5.
[161] K.O'Toole, "The Top Fifth Airlines" [31 July-6 August 1996] F. Int'l. 31.
[162] See *ibid.* at 31-32.
[163] ICAO, *Annual Report of the Council 1995*, ICAO Doc. 9667 (1996).

to raise the limitation of liability under Warsaw System. (The problems related to insurance, let's discuss in the following).

DR(c) -- *Catastrophical risks should not be borne by aviation alone.*

"It is reasonable not let aviation bear the full consequence of catastrophical accidents caused by it."[164]

Analysis -- *It does not satisfactorily address the actual levels of compensation to ensure fair and equitable treatment for all parties.*[165]

First of all, when a passenger travels by air, there is a contract between the passenger and airline. The airline is invested with the duty to carry the passenger safely to the destination. With the march forward of higher technology, it is almost impossible for claimants or passengers to understand everything related to aircraft; most of the passengers simply purchase tickets, board the plane then wait to arrive at their destination. In sum, the airline which is in total control of the operation is in a better position than passengers to prevent the accident. For example, airlines could do their best to train pilots to fly a certain type of aircraft properly or ensure the best practices in aircraft.

Secondly, after the airlines pay the compensation to claimant, there are no provisions prohibiting airlines from seeking subrogation from other co-liable parties.

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[164] See Drion, *supra* note 149 at 18.
[165] See *Brise Report*, *supra* note 80, vol. 1 at 19.

Thirdly, it is hard to classify, in advance, the percentage of compensation which should be paid by certain joint-liable parties.

DR(d) -- *Desirability that the carrier or operator be able to insure his liability risks.*

Unlimited liability for the carrier or operator will almost necessarily cause some parts of the liability to be left uncovered by insurance. On the other hand, Article 14(b) of the Rome Convention 1933 set aside the limitation of liability if the operator failed to take out the necessary insurance. If one does not accept the system under Rome Convention, the desirability of the carrier being able to insure their liabilities is not a sound reason for limiting these liabilities.[166]

Analysis -- *Airline industry insurance today already covered a very wide range. To get rid of limited liability or to raise it will not change the range of liability risks ensured by airline industry.*

Airline industry insurance at least covered the following range:

(1) All risk hull insurance:[167] there are three general categories of all risk hull insurance coverage: (i) all risk - not in motion[168]; (ii) all risk - not in flight[169]; (iii) all

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[166] See Drion, *supra* note 149 at 20-21.

[167] A.J. Harakas, *Aviation Insurance: A New York Perspective* (Thesis, Institute of Air and Space Law, McGill University, 1990) at 80 [hereinafter *Aviation Insurance*].

[168] All risk - not in motion : provide insurance for physical damage while the aircraft is on the ground and not moving under its own power. For more details, see *ibid.* at 81.

[169] All risk - not in flight: provide insurance for aircraft's stationary or taxiing. For more detail, see *ibid.*

risk - ground and flight[170]. War risk and exposure to sabotage are normally included in the all risk liability as well.[171]

(2) Loss of use insurance: protects an aircraft owner or operator for loss of the earning power of an aircraft when it is out of service for repairs following an accident.[172]

(3) Third party liability: provides the coverage for third-parties injured or killed as a result of an aviation accident.[173]

(4) Bodily injury, excluding passenger liability: provides the coverage for bodily injury, sickness, disease, mental anguish or death, suffered by any person other than passengers because of an occurrence arising from the ownership, maintenance or use of any insured aircraft.[174]

(5) Passenger liability: provides the coverage for bodily injury, sickness, disease, mental anguish or death, suffered by a passenger due to any occurrence arising out of the ownership, maintenance or use of any insured aircraft.[175]

(6) Property damage liability: provides insurance for damages which are the result of an injury to or destruction of property, including loss of use, because of an occurrence resulting due to the ownership, maintenance or use of any insured aircraft.[176]

(7) Medical payments: provide the coverage for medical, surgical, ambulance, hospital, professional nursing service and, in the event of death, reasonable funeral

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[170] All risk - ground and flight : provide full coverage for the aircraft when it is on the ground or in flight. For more details, see *ibid.*

[171] See *Brise Report*, *supra* note 80, vol. 1 at 21.

[172] See Harakas, *supra* note 167 at 88.

[173] See *ibid.* at 92.

[174] See *ibid.* at 94.

[175] See *ibid.* at 95.

[176] See *ibid.* at 96.

expenses resulting from bodily injury which is caused by an accident. This could either include or exclude the pilot or crew members.[177]

(8) Cargo, baggage and miscellaneous insurance: covers the liability exposure relating to cargo, baggage, and various kinds of liability risks which are all unaffected by passenger liability limits, irrespective of level.[178]

To sum up, at present airline industry liability insurance has already covered a very wide range which even includes war risk and exposure to sabotage. There should be no problem for the airline industry to insure the range of its liability risk even if the industry had to raise or remove the limited liability. On the other hand, probably many people will ask -- once we remove or raise the limits of liability, will the insurance premiums increase significantly?

As stated above, airline industry insurance already covers a very wide range of its liability risks, less than half of the overall liability premium will reflect the Warsaw passenger liability risk.[179] Therefore, to remove or raise the limits of liability will only affect the specific part airlines' liability insurance costs which might increase. In practice, most European flag carriers, under the regulation of their national law or contractual commitment, have raised their limited liability up to the 100,000 SDR proposed by Montreal Protocol No. 3. This increase of liability is not known to have caused any other insurance rate increases.[180]

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[177] See *ibid.* at 97.
[178] See *Brise Report*, *supra* note 80, vol. 1 at 20.
[179] *Ibid.*
[180] *Ibid.*

As to total abolish of the limits of the Warsaw Convention, although annual global costs of aviation claims are considerable, the cost of hull and liability insurance premiums is generally less than 1 percent of airlines' operating costs.[181] According to a report of the European Commission:" An increase or a removal of the [Warsaw] limit will . . . only represent a minimal increase in the cost of insurance premiums -- it would comprise about 0.1 percent to 0.35 percent of total operating costs ...".[182]

In conclusion, neither the range of the airline liability insurance nor the costs of the insurance premium would be a appealing consideration in limiting air carriers' liability just for insuring their liability risks.

DR(e) -- *Possibility for the potential claimants to take insurance themselves.*

The frequency of an occurrence and the amount of damages involved in each occurrence determine the size of the risk to be insured. Generally the risk can better be grouped by looking at the risk-creating activity because most of the factors determining the incidence can be ascertained by them. On the other hand, if the transportation of passengers involves a greater than average risk, the special risk can better be classified by passengers in the form of travel insurance.[183]

Analysis -- *We still have the same necessity, but it does not mean that we should ignore to raise the limits of liability of carrier.*

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[181] See Caplan, "Millennium Arrived", *supra* note 94 at 84.
[182] *Ibid.*
[183] See Drion, *supra* note 149 at 21-28.

At the present, the airline industry liability insurance covers a tremendously wide range, including even the risk of war and exposure to sabotage (for more detail, please refer to the discussion below DR(d)). These are impossible for the airline industry to control. To ask airlines to undertake the risks which is not resulted from them or are impossible to ascertain by them is too demanding.

The purpose of a contract of insurance is:

> [T]o organize the sharing among a large number of persons of the cost of losses which are likely to happen only to some of them (or to happen at an earlier time to some than to others). It is therefore characteristic of the contract that the amount of the premium is not intended to be equivalent to the value of the insurer's contractual performance (if any) but is calculated in relation to the likelihood that performance will be required (or will be required within a certain time).[184]

Therefore, passengers should be encouraged to insure themselves for risk which is beyond the control of airlines.

In addition, the rule of supply and demand applies to the aviation liability market as well as other industries. If there are more passengers to insure themselves, passenger could have more protection, on the other hand, the cost of insurance will go down as well. In the long-term perspective, if the potential claimants purchase insurance themselves, the world insurance market may provide a better protection for all passengers. Now is the time for us to consider this approach, since we are struggling for the future of the Warsaw System.

But all of these facts do not mean that we should ignore the necessities of raising the air carrier's limits of liability. No matter what, airline is in the best position to protect passengers (for details, please refer to the discussions below DR(c)).

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[184] M. Parkington *et al.*, eds., *Macgillivray & Parkington on Insurance Law* (London: Sweet & Maxwell, 1988) at 1.

DR(f) -- *Limitation of liability as a counterpart of the aggravated system of liability imposed upon the carrier and operator.*

There is no collective interest or economic unity through which insurance can be evaluated with respect to the liability for passengers under the Warsaw System. Therefore, it is unreasonable to assume that private air law conventions have made the liability of the carrier more stringent than it would have been without the limited liability through the *"quid-pro-quo"* argument.[185]

According to Dr. Drion's opinion, Art. 23 of the Warsaw Convention, which invalidates any contractual clauses relieving a carrier of liability or fixing a lower limit, is a much sounder argument than *"quid-pro-quo"*.[186]

Analysis -- *Although the "quid-pro-quo" argument is not so important, we still have some other considerations.*

Today, some scholars assert that air carriers should waive any defense under Article 20(1) of the Warsaw Convention, namely to accept strict liability. We could ignore the so called *"quid-pro-quo "* argument as alleged by Dr. Drion, but not to overturn the fault theory of tort on which air carrier's liability under Warsaw System are based. The fault theory was introduced by the international conference on private international law, which sought to resolve the problems caused by injury to persons by the proliferation of machinery during the evolution of the air industry and the

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[185] See Drion, *supra* note 149 at 28-30.
[186] See *ibid.* at 30-36.

airline industry is responsible for igniting the faulty machinery and should compensate those passengers who are injured by them.[187]

It does not seem to be fair for air carriers to undertake unlimited liability, especially when the air accident was caused by events which might beyond the carriers' control. By the way, there does not exist valid reason for air carrier to undertake unlimited liability which might be better distributed through passengers insurance for part of potential travel accidents.

DR(g) -- *Avoidance of litigation by facilitating quick settlements.*

By limiting the carrier's liability to a certain amount of an average claim (unless the actual damages are far below the amount of the limit) the carrier will generally be prepared to offer the limit without discussion. The disadvantage of limited liability is that it can bestow benefits to individuals who do not need them, and at the expense of others.[188]

Analysis -- *It is impossible to facilitate the litigation by limiting air carrier's liability.*

(1) Lift the limits of liability by arguing 'willful misconduct'.

After an air accident, the passengers or the persons entitled to compensation start to face a large number of expenses, which may include the expense for funerals, lawsuits and medical services for example. At the same time, the limits of liability are

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[187] See "Warsaw Convention Relevance", *supra* note 21 at 2.
[188] See Drion, *supra* note 149 at 36-40.

terribly low. According to Art. 25 of the Warsaw Convention, claimants try to lift the limits of liability by arguing the air carrier's willful misconduct. For example, almost thirteen years after the KAL 007 accident and eight years after the Pan Am Lockerbie disaster, many claims are still pending. The Lockerbie disaster and the related litigation are at least partly responsible for Pan Am's subsequent bankruptcy.[189]

(2) Does the Warsaw Convention create a cause of action?

In Dr. G. Miller's opinion:

> [T]he problem raised by the question of whether the Warsaw Convention creates a cause of action can be formulated as follows: does the Convention create a specific right of action, independently of any underlying contractual or tortuous situation? or does it only provide a set of rules which will in part replace the appropriate domestic rules normally applicable to an action existing independently of the Convention?[190]

This can be analyzed by comparing the opinions from the practical sides of both civil law countries and common law countries as follows:

The "cause of action" used for common law countries rarely presents itself as an issue in civil law countries. If a plaintiff in a civil law country could not rely on the contract of carriage, he or she could turn to all tortuous liability. An example would be the Article 1382 ff. of the Civil Code of France.[191]

On the other hand, in common law countries, especially in the United States,[192] most courts held that the Warsaw Convention does not create a cause of action, but only creates a presumption of liability from given the occurrences of the accident.[193]

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[189] P.S. Bechky, "Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation" (1994-1995) 60 J. Air L. & Com. 455 at 456-457.

[190] G. Miller, *Liability in International Air Transport* (Denver: Kluwer, 1977) at 224 ff [hereinafter *Liability in Air Transport*].

[191] See Miller, *ibid.* at 231.

[192] In the case of wrongful death, most of the difficulties of "cause of action" in these case in United Kingdom, Australia, and Canada have been take care by the legislation which implements the Convention. For instance, *Carriage by Air Act* in United Kingdom; Section 12(2) of the *Australian Civil*

Therefore, we could conclude that the Warsaw System in the United States does not provide a clear range of the individuals who should be entitled to compensation, nor does the Warsaw System addresses the problem of choice of law. Although these could be decided by the law of the court seized of the case, they are indeed issues for claimants to argue and would easily cause delay of the litigation.

(3) Physical injury and mental distress

Under Article 17 of the Warsaw Convention, the carrier is liable for "damage" sustained in the event of the death, wounding or any other bodily injury suffered by a passenger. None of these words can tell us, if "damage" refers to physical injury only or includes mental distress as well.

In practice, some courts held that bodily injury might well refer to a more general category of physical injuries like internal injury caused by physical impact, yet not

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Aviation (Carriers' Liability) Act in Australia; *Canadian Carriage by Air Act* in Canada. In the cases other than wrongful death, no difficulties have arisen, because there is always a cause of action based on tort, contract or bailment. For more detail, see Miller, *Liability in Air Transport*, *supra* note 187 at 229-231.

[193] For instance, see *Komlos* v.. *Compagnie Nationale Air France*, 3 Avi. 17,969 (S.D.N.Y. 1952); *Winsor Adm'r* v. *United Airlines, Inc.*, 5 Avi. 17,509 (E.D.N.Y. 1957); *Noel* v. *Linea Aeropostal Venesolana*, 5 Avi. 17,125 (S.D.N.Y. 1956), aff'd, 5 Avi. 17,544 (Fed. Sup. Ct. 1957); *Fernandez* v. *Linea Aeropostal Venesolana*, 5 Avi. 17,634 (S.D.N.Y. 1957); *Spenser* v. *Northwest Orient Airlines, Inc.*, 7 Avi. 17,820 (S.D.N.Y. 1962); *Nortarian* v. *Trans World Airlines, Inc.*, 9 Avi. 17,871 (W.D. Pa. 1965); *Zousmer* v. *Canadian Pacific Airliens*, Ltd., 11 Avi. 17,381 (S.D.N.Y. 1969); *Sheris* v. *The Sheris Co.*, 12 Avi. 17,394 (Va. Sup. Ct. 1972); *Kahn* v. *Trans World Airlines, Inc.*, 12 Avi. 18,032 (N.Y. Sup. Ct. 1973); *Burnett* v. *Trans World Airlines, Inc.*, 12 Avi. 18,405 (N.M. D. Ct. 1973); *Rosman* v. *Trans World Airlines, Inc.*, 13 Avi. 17,231 (N.Y. App. Ct. 1974); *Husserl* v. *Swiss Air Transport Co.*, 13 Avi. 17,603 (S.D.N.Y. 1975) (This case concluded as follows: "the Convention is neutral with respect to the existence of a cause of action and merely conditions and limits any action which exists under otherwise applicable law."); *In Re Hijacking of Pan American Airways Aircraft at Karachi International Airport*, 22 Avi. 17,741 (S.D.N.Y. 1990); *In Re Air Disaster in Lockerbie*, 22 Avi. 17,735 (E.D.N.Y. 1990) & 17,858 (E.D.N.Y. 1989); *Eastern Airlines* v. *King*, 21 Avi. 18,278 (Fla. 3d. 1987) aff'd 22 Avi. 17,816 (Fla. Sup. Ct. 1990); *Morgan* v. *United Air Lines Inc.*, 23 Avi. 17,438 (D. D.C. 1990); *Eastern Airlines, Inc.* v. *Floyd et al.*, 23 Avi. 17,367 (Fed. Sup. Ct. 1991) & 17,811 (11th Cir. 1991); *In Re Korean Airlines Disaster of September 1, 1983*, 24 Avi. 18,157 (D. D.C. 1994). For example, the cases which express the contrary view are as follows: *Salamon* v. *KLM*, 3 Avi. 17,768 (N.W. County 1951); *Warshaw* v. *TWA*, 14, Avi. 18,297 (Pa. E.D. 1977); *Adler* v. *Malev Hungarian Airline*, 23 Avi. 18,157 (S.D.N.Y. 1992).

necessary to mental injuries.[194] Some courts express the totally contrary views.[195] The Article IV of 1971 Guatemala City Protocol changes the word "bodily injury" to "personal injury", but does this mean that mental injuries should be compensable under the Warsaw System as well? The 1971 Guatemala City Protocol has not yet entered into force, therefore, this question cannot be answered. There is a great deal of diversity related to this issue. This is yet another issue that a claimant could argue and destroy the progress of litigation.

(4) The type and amount of damage for recoverable damage

Under Art. 22 of the Warsaw Convention, it was not possible to find anything which provided the type and amount of damage required. These issues will have to be decided by the applicable law of the court seized of the case. In recent U.S. awards, damages were divided into "pecuniary damages" and "nonpecuniary damages"; the amount of pecuniary and non-pecuniary damages awarded in air accidents cases can be significant.[196]

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[194] For example, see *Cie Air France* v. *Consorts Teichner* (1987) 23 European Transportation Law 87; *Eastern Airlines, Inc.* v. *Floyd et al.*, 23 Avi. 17,367 (Fed. Sup. Ct. 1991) & 17,811 (11th Cir. 1991).

[195] For instance, see *Air France* v. *Saks*, 18 Avi. 18,706 (9th Cir. 1984) aff'd 18 Avi. 18,538 (Fed. Sup. Ct. 1985) ; *Georgopoulos* v. *American Airlines Inc.*, (Supreme Court of New South Wales, No. S11422/1993); *Husserl* v. *Swissair*, 13 Avi. 17,603 (S.D.N.Y. 1975); *Palagonia* v. *Trans World Airlines Inc.*, 442 N.Y.S. 2d 670.

[196] *Pecuniary damages refer to the losses which could be calculated and recompense in money. Under death damages, the categories of damage type, for instance, include: (1) Loss of Support and Services; (2) Loss of Inheritance; (3) Funeral Expenses; (4) Loss of Parental Care and Guidance. Under personal injury damages, the categories of damage type, for instance, include: (1) Direct Expenses - Medical and other; (2) Lost Earnings; (3) Loss of Earning Capacity.

*Nonpecuniary damages refer to the losses which could be readily calculated in monetary amounts. Under death damages, the categories of damage type, for instance, include: (1) Loss of Society and Companionship; (2) Decedents Pre-Death Pain and Suffering; (3) Mental Injury - Anguish, Grief and Sorrow; (4) Loss of Consortium. Under personal injury damages, the categories of damage type, for instance, include: (1) Pain and Suffering; (2) Mental Anguish, Distress; (3) Loss of Enjoyment of Life; (4) Disfigurement; (5) Permanent Injuries - Disability; (6) Loss of Consortium (non-injured spouse); (7) Loss of Parental Care and Guidance.

In the United States, of the 16 death claims, the total amount of damages awarded was U.S. $15,366,452. Of this amount, the average pecuniary award was U.S. $379,725 (39.5 percent of the total amount), and the average nonpecuniary award was U.S. $580,678 (60.5 percent of the total amount).[197] The reason that extremely high compensation is usually found for the nonpecuniary damages is that there is no specific method of calculation for verdicts.[198] In other words, the claimants will try to fight for the compensation caused by nonpecuniary damages. In conclusion, the type and amount of damages opens an easy way for delaying the litigation.

DR(h) -- *Unification of the law with respect to the amount of damages to be paid.*

Because its international character, aviation industry suffers more from the multitude of national laws than activities which remain within the boundaries of one State. On the other hand, for carriers to determine their liability in advance is necessary for them to protect themselves.[199]

Analysis -- *It is very hard to unify the law with respect to the amount of damages to be paid.*

For more detail, see R. Hedrick, " The New Intercarrier Agreement on Passenger Liability: Is it a Wrong Step in the Right Direction?" (1996) XXI:II Ann. Air & Sp. L. 135 at 146 [hereinafter "New Intercarrier Agreement"].

[197] See *ibid.* at 147.

[198] *Ibid.*

[199] See Drion, *supra* note 149 at 41-42.

Because of inflation, living expenses and the values placed on injury and loss of life are quite different from country to country, it is very hard to find a uniform amount of damages to be paid.

Until now, under the Warsaw System, only the Warsaw Convention and the Hague Protocol have entered into force, but a civil aircraft flying to, through or via the United States has to follow the 1966 Montreal Agreement. The EC countries would like to raise the limits of liability for death or personal injury to 100,000 SDR, at least within their internal civil aviation market. Australia and Italy adopted the same approach as the EC countries. At the same time, Japanese air carriers have undertaken unlimited liability for death or personal injury in air accident case.

In summary, most of the countries in the world follow different rules when dealing with the Warsaw actions. In some instances the national law might substantially preempt the convention? (for more details, please see the discussion below DR(g)). To limit air carriers' liability in order to unify the amount of damages paid does not look feasible, at least for now.

2-2 The Economic Aspect of the Limited Liability under the Warsaw System

2-2.1 The Sum of the Compensation Are Converted with Different Basis

Within the Warsaw System, some countries are High Contracting Parties only to the Warsaw Convention itself[200]; most countries are Parties to the Hague Protocol[201]. Even the High Contracting Parties of the above two instruments will refer the sum of compensation to the basis of gold francs, but there is still diversity in this issue. In United States, 250 French gold francs should be converted into a sum of $23.19 on the basis of the "official" rate of exchange applying in 1978.[202] On the other hand, in Australia, the court held that conversion of french gold francs shall be in accordance with the gold value of such currencies at the date of judgment.[203] Some of the High Contracting Parties who ratified the Guatemala City Protocol and its additional Protocols and the EC countries and Australia refer the sum on the basis of SDR.

Therefore, the Warsaw System could not even offer a unified basis for referring the sum of compensation and, the inflation of gold and SDR even more seriously erode this system. For more details, please see the following discussions below 2.2-2.

2-2.2 The Inflation of Gold or Special Drawing Right Erode the Warsaw System

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[200] For example, United States, Indonesia, Sri Lanka . . . etc. For more details, see "Contracting Parities to the Convention for the Unification of Certain Rules Relating to International Carriage by Air and the Protocol Modifying the Said Convention" (1993) XVIII:II Ann. Air & Sp. L. at 372-389.

[201] *Ibid.*

[202] *Trans world Airlines Inc.* v. *Franklin Mint Corporation*, 18 Avi.17,778 (Fed. Sup. Ct. 1984) [hereinafter *TWA* v. *Franklin Mint*].

[203] *Polatex Trading Co. Pty. Limited* v. *Scandinavian Airlines System and Singapore Airlines Limited* (District Court of New South Wales, No. 23603/81). See also J. Barrett, "Australian Court refuses to follow Franklin Mint" (1985) X:6 Air & Sp. L. 292 at 292-293.

What are the requirements which an ideal unit of account should fulfill? According to Dr. A. Tobolewski,[204]

> [I]t should be stable on international markets; commonly adopted and easily convertible, and, of more importance, it should have a uniform value and stability in terms of the purchasing power of different States in relation to national currencies....should: not be seriously affected by fluctuations in national currencies and should be easily convertible into national currencies at the exchange rate; it should have at least some relevance to conversion at various points in time, to consumer prices and the purchasing power of a given currency in a given State; the uniform value of a unit should fulfill the requirements of States, carriers, users, and insurers to have a common denominator for all claims, damages, payments, and insurance risks notwithstanding the place where they occurred or are due.

Do gold and SDR work well as ideal unit of account? In the years, since gold was first used as a medium of exchange and a store of value, the price of gold has been changed dramatically. Except during the World Wars, currencies were allowed to fluctuate over a fairly wide range in terms of gold. Even during times of peace, the price of gold fluctuated dramatically.

The inflation of the price of gold could be obviously assesses by the following figures:[205] from approximately 1928 until 1933, in Washington, the price of gold (U.S. $/per fine ounce) was around $20.67;[206] after January 1934, the United States and other States fixed the price of gold at $35 per fine ounce[207]. But the market price of gold in 1963 was U.S. $35.09; in 1968 the price was $38.63; in 1969 it was $41.09; in 1970 $35.94; and by 1971 the price was $40.81. This says that for a long time the official price of gold did not reflect the market price at all and artificially

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[204] A. Tobolewski, "The Special Drawing Right in Liability Convention: An Acceptable Solution?" (1979) Llyod's MCLQ 169 at 174-175 [hereinafter "SDR in Liability Convention"].

[205] Except the author specifically add footnotes besides the figures, the others see Appendix D of this thesis.

[206] C.N. Gerry & T.H. Miller, "Gold, Silver, Copper, Lead and Zinc in Washington" (1932-1933) Statistical Appendix to Y.B. Miner. at 133.

[207] See "SDR in Liability Convention", *supra* note 204 at 171.

stabilized at 1934 prices until 1971.[208] The market price of gold had, in fact, changed dramatically since 1929 (for more details, please see Appendix C).

On the other hand, although there is no officially stabilized price for gold, the market price of gold in 1973 was $97.33 and in 1974 it was $159.25 (for more details, please see Appendix C). Therefore, if a court held a verdict for the plaintiff in accordance with the Warsaw Convention under the circumstance of personal injury or death in 1973 and 1974 respectively, the compensation which the claimant could get in 1974 would have been only 61 percent of that which the claimant could get in 1973. The inflation of gold obviously eroded the Warsaw Convention and the Hague Protocol which are the only two instruments in force under the Warsaw System.

In 1975, Montreal Additional Protocols No. 1 to 4 went further than other international transportation conventions to set up a new Unit of Account - Special Drawing Right - to express the maximum liability of air carriers.[209] From 1 July, 1974 to 31 December, 1980, a basket of 16 currencies had been in use to determine the interest rate on the SDR;[210] on 1 January, 1981, the International Monetary Fund began to use a basket of five currencies[211] for determining the SDR's valuation. The

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[208] *Ibid.*

[209] See *ibid.* at 169.

[210] IMF, *Users' Guide to the SDR* (Washington D.C.: IMF, 1995), App. I at 35.

[211] These currencies, the weight of them in the present basket (the weights begin on 1 January, 1991), and the derived currency amounts (which will remain fixed until December 31, 1995) are as follows:

Currency	Weight(percent)	Currency Amount
U.S. Dollars	40	0.5720
Deutsche mark	21	0.4530
Japanese Yen	17	31.8000
French franc	11	0.8000
Pound sterling	11	0.0812

* The currencies that determine the value of the SDR are reviewed every five years. The weight of these five currencies is reviewed at the same time to ensure it broadly reflect the relative importance of these currencies in international trade and reserves. The weight is based on the value of the exports of

value of the currencies of the basket are based on their market exchange rates for the U.S. dollars and "the U.S. dollar equivalents of each of the currencies were summed to yield the rate of the SDR in terms of the U.S. dollars".[212] Therefore, the fluctuation of these currencies greatly effect the stability of SDR's valuation.

In accordance with the Additional Protocol No. 3 to the Warsaw Convention, although it is not in force, we assume that the carrier's liability in the carriage of a passenger is limited to the sum of 100,000 SDR for the aggregate of claims. We could know how the exchange rate of SDR fluctuate, for example: the rate (namely, U.S. dollar per SDR) in 1995 is 77.73 percent of the in 1981 rate.[213] Consequently, if a court held a verdict for the plaintiff under the circumstance of personal injury or death and converted the compensation on the basis of SDR in 1981 and 1995 respectively, the claimant's compensation in 1981 (U.S. $116,396) would be only 77.73 percent of that which the claimant could get in 1995 (U.S. $151,695). Another example, if a court held a verdict for a plaintiff under the circumstance of personal injury or death and converted the compensation on the basis of SDR into national currencies, in 1996 April in the United States, the victim could receive compensation from the airline of approximately U.S. $145,086 but in June U.S. $144,290; in Britain in April

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goods and services of the members issuing these currencies and the balances of their currencies officially held by members of the Fund over the five-year period. For more details, see IMF, *Int'l. Fin. Statis*. (1996) XLIX: 6 at X ; see also IMF, *Users' Guide to the SDR* , *supra* note 210 at 36.

[212] See "SDR in Liability Convention", *supra* note 204 at 172.

[213] Reproduce the SDR Rates from 1981 to 1996 as follows, for more details, see IMF, *Int'l. Fin. Statis.* (1996) XLIX:8 at 4.

* The average of US Dollars per SDR of the year: 1981 (1.17916); 1982 (1.10401); 1983 (1.06900); 1984 (1.02501); 1985 (1.01534); 1986 (1.17317); 1987 (1.29307); 1988 (1.34392); 1989 (1.28176); 1990 (1.35675); 1991 (1.36816); 1992 (1.40838); 1993 (1.39633); 1994 (1.43170); 1995 (1.51695); Jan. 1996 (1.46779); Feb. 1996 (1.46625); Mar. 1996 (1.46181); Apr. 1996 (1.45086); May 1996 (1.44464); Jun. 1996(1.44290).

approximately £95,748 but in June £93560; in France in April approximately f 740,809 but in June f 746,960; in Germany in April approximately DM 218,511 but in June DM 220,384; in Japan in April approximately ¥15,590,941 but in June ¥15,707,409.[214] A final example can be seem if on November 12, 1996, if a court held a verdict for a claimant under the circumstance of personal injury or death and converted the compensation on the basis of SDR into national currencies, the claimant could get compensation U.S. $145,930; one day later, the claimant could only get U.S. $145,520.[215]

Finally, SDRs are also determined by an outside agency (namely, national currencies) which change from time to time. The value of national currencies are calculated in accordance with IMF rules, are different from day to day, and are related to the internal economy of countries.[216] The fluctuation of SDR has pushed the current maximum carrier's liability far away from the track for the unification. Is the special drawing right an acceptable solution in liability convention? This must be seriously considered.

2-2.3 From the Respect of Different Living Cost in Different Countries

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[214] The exchange rate of the mentioned national currencies units per U.S. Dollar in April and in June are as follows: (1) Pound sterling per U.S. dollar in April is 0.659937, in June is 0.648410; (2) French francs per U.S. dollar in April is 5.1060, in June is 5.1768; (3) Dutch mark per U.S. dollar in April is 1.50608, in June is 1.52737; (4) Japanese yen in April is 107.46, in June is 108.86. For more detail, see IMF, *Int'l. Fin. Statis.* (1996) XLIX:6 at 4; IMF, *Int'l. Fin. Statis.* (1996) XLIX:8 at 4.

[215] Resource: record of daily exchange rate of US Dollars per SDR from Bank of Montreal Main Office in Montreal. The rate of US Dollars per SDR on 12 November, 1996 is 1.4593; on 13 November, 1996 is 1.4552. All this information may be obtained from Bank of Montreal Main Office in Montreal.

[216] See "SDR in Liability Convention", *supra* note 204 at 179.

For many years, the limit of liability of an air carrier has been a matter of the dissatisfaction between developed countries and the rest of world. Because living costs differ greatly among countries, every claimant may have a different claim in sum. How can one put the same regulation of limits of carriers' liability on different countries and different needs, and how should the low-income economies countries' air carriers handle the terribly high insurance fees just to reach the same limited liability which is asked by high-income economies countries, if considering the difference in gross national product ("GNP") per capita of countries (for details, refer to the table in Appendix D)[217] The average GNP of low-income economies (those with a GNP per capita of U.S. $725 or less in 1994) is 15 percent of that of middle-income economies (those with a GNP per capita of more than U.S. $725 but less than U.S. $8,956 in 1994) and is only 1.6 percent of that of high-income economies (those with a GNP per capita of U.S. $8,956 or more in 1994).

If civil aircraft owned and operated by Kenya Airlines flew from Nairobi (Kenya) via Amsterdam (The Netherlands) to New York (United States), and crashed in New York's Kennedy International Airport, the nationalities of passengers on this flight are very likely quite diverse. The lawsuits for personal injury and death would be held in the United States. According to the compensation schedule mentioned above, compensation should not be used as a tool for enrichment but should return the claimant to the position he or she was in before the accident. Since the cost of living will generally be lower in countries with low GNP than those with high GNP, is it fair

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[217] IMF, *From Plan to Market -- World Development Report 1996* (New York: Oxford University Press, 1996) at VII, 181 & 188-189.

to ask airlines to pay the same amount of compensation (e.g. 100,000 SDR) to every passenger when they are residents of different countries? This amount will not be enough for a claimant who lives in the developed world, but probably would likely help the claimant who lives in a developing country to become rich. This is not the purpose of compensation.

From the very beginning of the drafting of the Warsaw Convention, till that of the ICAO New Draft Instrument, nobody knows how drafters calculated the maximum limits of liability of air carriers in the event of passenger injury or death. Eight thousand hundred SDR, U.S. $75,000 and 100,000 SDR all appear to be well enough to make most about people feel comfortable at the time of drafting. Before making a decision about the maximum limit of carrier liability, it would be batter to ask the United Nations to offer figures which would help to access the correct amount for most countries to pay and to provide a rationale for this amount.

2-3 The Original Spirit of the Warsaw Convention[218]

According to Article 36 of the Warsaw Convention: "[T]he Convention is drawn up in French in a single copy . . .,". When we consider the limited liability of air carriers, it is important to read the text of the Warsaw Convention in the original French version.

The third sentence of Article 22(1) of the Warsaw Convention reads as follows: ". . . Toutefois par une convention spéciale avec le transporteur, le voyageur pourra

[218] Interviewed with Mr. Harold Caplan at the Air Law Forum in Washington D.C. on 3 June, 1996 and Dr. M. Milde at McGill University on 14 August, 1996.

fixer une limite de responsabilité plus élevée." Compare this to the English version which used by United States and other English-speaking countries. ". . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability", we could find out that the French text gives the passengers an active role to request the carrier more actively to raise their limited liability by special contract than the English version. Therefore, when we consider increasing the limits of carriers' liability, we should not ignore that the passenger can even at present more actively request the higher limitation liability, without any new governmental conventions to raise carriers' liability to meet today's needs.

2.4 The Substantive Problems of Air Carriers' Liability

After analyzing the problems of the Warsaw System, we can borrow the view of the EC Consultation Paper; the real issues we are facing are as follows:

(i) Should the amount of compensation be limited or unlimited?

(ii) If the amount of compensation should be limited, what measure should we take to increase and harmonize the amount of compensation?

(iii) Should the above measures be taken under the Warsaw System or is it necessary to draft a new Convention to reach the aim of unification of private air law?[219]

Since we have realized the problems which need to be solved for the future of the Warsaw System, the issues to be discussed in the following chapter include: the shortcomings and merits of amendments to the Warsaw System; Intercarrier agreements and proposals from Europe and the possible future of the Warsaw System.

[219] See Cheng, "Air Carriers' Liability", *supra* note 15 at 109.

Chapter 3 Critique and Reform of the Warsaw System on Passenger Injury

3.1 The Purpose of Compensation

As previously discussed, the most important purpose of "compensation" is for the air carriers to compensate the victims and restore them to the *status quo ante*. Hence, on one hand, compensation should not be mandatorily limited by international convention and should not be effected adversely by inflation. The victim should be able to sue for loss - past, present and future.[220] On the other hand, compensation should not be used as a tool for unjust enrichment.[221] Thus, compensation should return the claimant back into the position he or she was in prior to the accident.

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[220] J.G. Fleming, *The Law of Torts*, 8th ed. (U.S.A.: The Law Book Company Limited., 1992) at 37.

[221] W.P. Keeton *et al.*, *Prosser and Keeton on Torts*, 5th ed. (USA: West Publishing Co., 1984) at 608-615.

3.2 Analysis of Different Amendments to the Warsaw System and Different Solutions

The Warsaw Convention entered into force some 63 years ago, in 1933. Some provisions of the Convention are unacceptably outdated, but there are still about 126 States are parties to the Warsaw Convention,[222] and all major States are either parties to the original Convention or as amended at The Hague in 1955; some States are even parties to both.[223] Because the Convention is outdated, there is a perceived need for amendments. There have also been intercarrier agreements, States' and airlines initiatives, a recommendation and a proposal which attempt trying to mach contemporary needs. However, are these new instruments really helpful for the crisis of the Warsaw System? We will discuss the question in the following.

3.2-1 Draft a New Convention

A. Draft a New Convention Suggested by Legal Experts

Although the Warsaw Convention still regulates some of the basic rules in the field of private international air law, in the view of the well-organized and technologically highly developed air transport industry, it has demonstrated many shortcomings,[224] which have been summarized by Professor Bin-Cheng has summarized the shortcomings of the Warsaw System as follows: (i) inasmuch as the Warsaw

[222] See "Status of Certain International Air Law Instruments", *supra* note 30 at 33-36.

[223] B. Cheng, "Sixty Years of the Warsaw Convention: Airline Liability at the Crossroads" (1990) Pt. 2 39 ZLW 3 [hereinafter "Sixty Years of the Warsaw"].

[224] See Cheng, "Fifty Years of the Warsaw", *supra* note 19 at 376.

Convention was drawn up during the infancy of the air transport industry, it is presently outdated and cannot balance carriers' and passengers' benefits; (ii) the drop in the official price of gold and the setting of an official price for gold has resulted in a limit of liability for passenger injury and death which is unacceptably low; (iii) the Inter-Carrier Agreement and various State and industry unilateral actions have caused the Warsaw System to no longer be a single regime ; (iv) we need to ensure that the victim can receive full compensation and received it promptly and effectively; (v) we have to regulate the liability of carrier and those associated with the carrier (e.g. manufacturers, air traffic controllers and other government agencies) in one legal regime.[225]

In 1987, in response to these shortcomings, Professor Bin-Cheng and Mr. Peter Martin drafted a new convention which was adopted by the Fourth Lloyd's of London International Aviation Law Seminar (the "Alvor Draft Convention" or the "Draft Convention").[226] This draft convention[227] sought to establish a new regime and combine the Warsaw System and the Rome Convention.[228] The primary provisions which differ from the Warsaw System are as follows: (i) carriers undertake "absolute liability" for passengers' injury or death[229] (There are scholars who assert

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[225] See *ibid.* at 374-383. See also Cheng, "Sixty Years of the Warsaw", *supra* note 223 at 320-324.

[226] This seminar was held at Alvor, Portugal. from 11 to 16 October, 1987.

[227] For more details, see Cheng, "Sixty Years of the Warsaw", *supra* note 223 at 3 ff. See also Lloyd's of London Press, Papers from the Forth International Aviation Law Seminar, The Alvor Praia Hotel, Alvor, Algarve, Portugal, 11-16 October, 1987 (1988).

[228] *Convention on damage caused by foreign aircraft to third parties on the surface on 7 October 1952*, ICAO Doc. 7364 [hereinafter *Rome Convention*].

[229] B. Cheng, "A Reply To Charges of Having Inter Alia Misused The Term Absolute Liability in Relation to The 1966 Montreal Inter-Carrier Agreement in My Plea for an Integrated System of Aviation Liability" (1981) 6 Ann. Air & Sp. L. 3 at 9. In this article, Professor Cheng points out that:

that carriers undertake "strict liability")[230] which is inherited from the 1966 Montreal Inter-Carrier Agreement (Articles 17 & 20) and impose an unbreakable limit of 100,000 SDR per passenger without prejudice (Articles 22, 24, 25 & 25A); (ii) a periodic review of the limits of liability (Article 42); (iii) addition of a fifth jurisdiction -- the passenger's domicile or permanent residence (Article 28); (iv) specify the causes of exemption from liability, such as inherent defect, act of war or of public authorities (Article 18); (v) a right of subrogation once the carrier pays the compensation, he could acquire a right of action to against the person who has by his fault caused the damage (Article 30A); (vi) waiver of governmental immunity (Article 30B); (vii) ensure the carriers can meet their liability under the Draft Convention (Article 35B).[231]

The provisions of this new convention are evidence of its thoroughness. It provided almost all of the basic regulations related to carriers, passengers and governments and covered all possible situations such as carriers' right of subrogation, governmental immunity and ensuring of carriers' liability . . . etc. It also raised carriers' unbreakably limited liability to 100,000 SDR, but offered the causes of exemption from liability to balance carriers' unbreakable liability.

> [A]bsolute liability differs from strict liability in that absolute liability will arise whenever the circumstance stipulated for such liability to arise are met, it mattering not by whom the damage is caused or how it is caused. The normal defenses are not available. Liability arises absolutely. In contrast with strict liability, there is no requirement of a causal relationship between the person to be held liable and the damage complained of , although the conditions prescribed for absolute liability will normally require a causal relationship between one or more of the circumstances stipulated for such liability to arise and the damage.

[230] See M. Mateesco-Matte, "Should The Warsaw System Be Denounced or 'Integrated'?" (1980) Ann. Air & Sp. L. V at 201 [hereinafter "Warsaw System Be Denounced or 'Integrated'"].

[231] See Cheng, "Fifty Years of the Warsaw", *supra* note 19 at 338 ff.

On the other hand, as living costs continue to increase, 100,000 SDR still does not seem enough. Because of the ongoing concern regarding the level of compensation, the IATA Intercarrier agreements and other unilateral actions continue to be discussed. The United States and most developed countries would have ratified the Montreal Protocol No, 3 long time ago, if this were not an issue. The 1971 Guatemala City Protocol and Montreal Additional Protocol No. 3 and the Alvor Draft Convention all have the same problem. The carrier's unbreakable liability is against the constitution law of many countries. Governmental immunity and ensuring of carriers' liability under Alvor Draft Convention will also need the corporations of every parties of this convention and this corporations will be very hard to achieve.

Furthermore, the new system only needs to achieve the integration or unification of the liability regime for the carrier, the aircraft operator and the third parties on the surface; it does not really relate to "all the interested parties". The affected party could only sue the carrier or aircraft operator for compensation, thereby freeing the aircraft manufacturer, air traffic control authorities and other parties. The result of this could be that the claimant would not receive satisfactory compensation. Also, the right of subrogation will maintain the original problem in private air law, namely the conflict of laws. Hence, at least certain guidelines are required for the right of subrogation, but the Alvor Convention did not even mention this matter.[232] (The consideration of the fifth jurisdiction will be discussed in the analysis of IATA 1996 Intercarrier Agreement which follows.)

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[232] See Mateesco-Matte, "Warsaw System Be Denounced or 'Integrated'?", *supra* note 230 at 203 ff.

The Alvor Draft Convention is a scholarly brainchild which has not been presented to any international organization, which therefore has less chance to scrutinize this convention. It is impossible to reach the unification of private air law by having scholars academically draft a convention without consideration of the political will of States. The draft convention is a very good reference for unifying the Warsaw System in the future but it is unavoidable to have a convention adopted at the level of governments.

B. Draft a New Convention by ICAO

According to ICAO's 'Procedure for Draft Conventions',[233] the Chairman of the Legal Committee should appoint a Rapporteur[234] to undertake a study and prepare a report on the matter. Within three months or less, a report should be presented to a Special Sub-Committee of the Legal Committee.[235] The Legal Committee could then draft a new Convention and present it to the Council. In accordance with the 'Procedure for Approval to the Draft Conventions', the Council could circulate this draft to the Contracting States and such other States and international organizations which the Council may indicate. Every State is free to provide its own comments and an international conference could be convened, although such conference must be held not less then six months after the date of transmission of the draft to States for consultation and preparation.[236] Through this process, States may be able to arrive at

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[233] See *Rules of Procedure of the Legal Committee in ICAO*, ICAO Doc. 7669-LC/139/4 at Attachment A [hereinafter *ICAO Rules of Procedure*].

[234] See *ibid.*, Rule 17.

[235] See *ibid.*, Rule 12(b).

[236] See Milde, "Warsaw Requiem or Symphony", *supra* note 41 at 48-49.

a consensus and make it easier to achieve the goal of unification of private international air law. However, the time limit inherent in this process could prevent some States from arriving at the required consensus.

Thankfully, the ICAO New Draft Instrument is now coming out; it indeed synthesizes elements of the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, and Montreal Protocols No. 1 to 4. Once this new instrument enters into force, it will give us a new air transportation convention to eliminate the problems of conflicts of laws and conflicts of jurisdictions. While we can greatly anticipate its coming into force, it is impossible for us to simply to wait. Other options are included in the following discussions.

3.2-2 The Existing Warsaw System and Other Similar Regimes

Eventually, we need to have a Governmental International Convention for air carrier's liability in the field of personal injury or death. Otherwise, endless unilateral actions or intercarrier agreements will easily lead to further dis-unification of private air law. Before the new convention really can take the place of the present Warsaw System, we still need a solution to eliminate or at least to reduce the conflicts of laws and jurisdictions. Let's analyze the merits and shortcomings of the proposals of the reformed regime in an attempt to develop a solution.

A. Guatemala City Protocol and Montreal Additional Protocol No. 3

International organizations could provide a reformed regime for the Warsaw System in order to update the only existing unified body of private international air law. Examples of such attempts in the past include the following:

(i) Both the Council of ICAO at its 145th Session[237] and General Assembly Resolution A 27-3[238] emphasized the need to ratify the instruments of the Warsaw System. The 31st Session of the ICAO General Assembly attempted to resurrect Montreal Protocol No. 3 of 1975 (which should be read together with the Guatemala City Protocol of 1971) from its ashes.[239]

There are many reasons why Montreal Protocol No. 3 did not enter into force after being signed in 1975. First of all, most countries are waiting for the ratification of the U.S., but to have a satisfactory SCP for U.S. Senate's approval to ratify Montreal Protocol No. 3 is unlikely. Secondly, Montreal Protocol No. 3 does have many shortcomings. An analysis follows.

(1) Montreal Protocol No. 3 creates the possibility of confusing the air transportation industry and passengers.[240]

If four 1975 Montreal Protocols were brought into force, there would be eight treaties in the Warsaw System plus the 1966 Montreal Intercarrier Agreement which is not a treaty but is as important as the eight treaties. The eight treaties are: the Warsaw Convention, the 1955 Hague Protocol, the 1961 Guadalajara Convention,

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[237] ICAO, *Council-145th Session*, ICAO Doc. 9665-c/1116, C-Min. 145/1-28 (1995).

[238] ICAO, *Assembly- 27th Session*, ICAO Doc. 9551, A27-RES(1989).

[239] ICAO General Assembly-31st Session, Legal Commission, Agenda Item 38: *Work Programme of The Organization in The Legal Field*, A31-WP/55,LE/3, 1 January, 1995.

[240] B. Cheng, "What is Wrong with the 1975 Montreal Additional Protocol No. 3?" (1989) XIV:6 Air. L. 220 at 222-224 [hereinafter "Montreal Additional Protocol No. 3"].

the 1971 Guatemala City Protocol, the three Montreal Additional Protocols Nos. 1 to 3 and Montreal Protocol No. 4. There are 44 combinations within these eight treaties, for example, only the Warsaw Convention, Warsaw - Hague, Warsaw - 1966 Montreal Agreement, Warsaw - Hague - 1966 Montreal Agreement, Warsaw - Hague - 1966 Montreal Agreement - Montreal Protocol No. 1-Montreal Protocol No. 2 . . . etc.

It is very hard for passengers to know and assert their right within these 44 combinations. Montreal Protocol No. 3 does not really help to unify the Warsaw System, but gives the claimant one more area of possible confusion.

(2) Once the Montreal Protocol No. 3 is in force reviewing the limits will be impossible.[241]

Although the Montreal Protocol No. 3 was designed to incorporate the Guatemala City Protocol, according to Article VIII of Montreal Protocol No. 3, Montreal Protocol No. 3 could be brought into force independently. Obviously, the actions of most of States tell us that the coming into force of the Guatemala City Protocol will be almost impossible.

The contents of Art. III of Montreal Protocol No. 3 is as follows:

> In Article 42 of the Convention -
> (1) Without prejudice to the provisions of Article 41, Conference for the Parties to the Protocol done at Guatemala City on the eighth March 1971 shall be convened during the fifth and tenth years respectively after the date of entry into force of the said Protocol for the purpose of reviewing the limit established in Article 22, paragraph 1 (a) of the Convention as amended by that Protocol.[242]

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[241] See *ibid.*, at 224-225.
[242] See *Montreal Protocol No. 3*, art. III.

By reading this article carefully, it can tell that the so-called " the said Protocol" refers to the Guatemala City Protocol. Therefore, since it is impossible for the Guatemala City Protocol to be in force, to review the limit will be impossible as well. In this circumstance, Montreal Protocol No. 3 does not reach its purpose of incorporating the Guatemala City Protocol and, in addition, it creates some technical handicaps.

(3) Omission of notice of limitation of liability[243]

Compare Art. 3 of Warsaw - Hague with Art. 3 of Warsaw - Hague - Guatemala City Protocol - Montreal Protocol No. 3, paragraph (2) & (3) of the latter Article 3 reads as follows:

> (2) Any other means which would preserve a record of the information indicated in *paragraph 1 (a) and (b).* of the foregoing paragraph may be substituted for the document referred to in that paragraph.
> (3) Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability [Emphasis added].[244]

The latter Article 3 attempts to simplify the documents of carriage for passengers. For example, airlines can issue tickets by computers and assimilate the documentation used in other means of transportation. But, at the same time, Article 3 removes all the sanctions for non-compliance with the provisions on documents of carriage from the Convention. Passengers cannot even prevent the carrier from refusing to deliver a ticket. It really posts certain advantages to simplify the documents of carriage, but Article 3 of the Warsaw - Hague - Guatemala City Protocol - Montreal Protocol No.

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[243] See Cheng, "Montreal Additional Protocol No. 3", *supra* note 240 at 225-229.
[244] See *1971 Guatemala City Protocol*, art. II (3).

3, ignores the fact that an adequate notice is the most important safeguard of consumers' rights; a simple deletion does not really advance the Warsaw System.

(4) Absolutely unbreakable liability will be against the national laws of some countries and their concept of "public order"

According to Art. II of Montreal Protocol No. 3, "in the carriage of persons the liability of the carrier is limited to the sum of 100 000 Special Drawing Right for the aggregate of the claims".[245] This is to say, that once the Montreal Protocol No. 3 is in force, the carrier's liability in the event of passenger injury or death will be absolutely unbreakable regardless of a faulty document or willful misconduct. So-called 'absolutely unbreakable liability' is totally contrary to the consumer's interest or *contra bonos mores*. In fact, the carriers would be protected by such unbreakable limit even in case of the damage was caused by a criminal act committed by carriers or his employees.

Furthermore, absolutely unbreakable liability may even be in conflict with constitutional or other national laws of a particular country, for example Japanese Civil Code and Constitution.[246]

(5) Supplemental compensation plans seem to try to reduce carrier's liability instead of increasing passenger protection.

Under 35A of the Warsaw Convention - The Hague - Guatemala City Protocol - Montreal Protocol No. 3, the establishment of a supplemental compensation plan is a

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[245] See *Montreal Protocol No. 3*, art. II (1).

[246] T. Mercer, "Unlimited Liability to Passengers: 'The Japanese Initiative' and its Consequences or 'Whither the Warsaw System'?" (1993) 12:20 Lloyd's Avi. L. 1 at 3.

separate regime which is parallel with the carrier's liability under Warsaw System. It reads as follows:

> No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:
> (a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;
> (b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;
> (c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;
> (d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system.[247]

Does SCP really work?

Here is an example: a French citizen, whose permanent residence is Belgium , traveling from Canada to the Netherlands via the United States on a British airline. In this situation, if many States have established similar SCPs, the insurance fee would be very expensive and the coverage would completely overlap. If a lawsuit followed, the procedure to solve this SCP tangle would be complicated. On the other hand, if none of the States establish this regime, the passenger, in the event of personal injury or death, could get, at most, 100,000 SDR of compensation from carrier. That is to say, that the SCP will reduce the compensatory benefit to consumer.[248]

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[247] See *1971 Guatemala City Protocol*, art. XIV.
[248] See Cheng, "Montreal Additional Protocol No. 3", *supra* note 240 at 235-236.

In addition, SCP is a radical new concept in tort law. It is the first insurance plan which forces passengers to pay for the premiums to protect themselves against an airline's fault.[249]

SCP seems very carrier-oriented and addresses an inherent injustice under the Warsaw System. It is not surprising that it is still so difficult for the Guatemala City Protocol and Montreal Protocol No. 3 to enter into force after so many years.

(6) Fifth jurisdiction - a big mistake in the history of Warsaw System

Under Art. IX of the Guatemala City Protocol, one more jurisdiction was added into Article 28 of the Warsaw Convention. The idea of having an additional jurisdictions strongly emphasized by United States. The most persuasive reason for adding the fifth jurisdiction was to encourage, or at least to allow, victims or their survivors to sue the defendant in the location which is most convenient for them -- their domicile or permanent residence.[250] Except for the matter of convenience for victims or their survivors, if the victims or their survivors were ordinarily or permanently residents of the United States, they could benefit from the application of U.S. laws, including U.S. laws on damages as well.[251] But, once more we need to seriously consider whether it is helpful for unifying jurisdiction under the Warsaw system.

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[249] L.S. Kreindler, "The view from the United States -- an Interim Solution?" (1992) 11:4 Lloyd's Avi. L. 2 at 3.

[250] A.I. Mendelsohn, "Warsaw: In Transition or Decline?" (1996) XXI:4/5 Air & Sp. L. 183 at 186.

[251] B. Cheng, "A Fifth Jurisdiction without Montreal Additional Protocol No. 3, and Full Compensation without the Supplemental Compensation Plan" (1995) XX:3 Air & Sp. L. 118 at 119 [hereinafter "Fifth Jurisdiction and Full Compensation"].

What is "domicile"? What is "permanent residence"? Generally speaking, domicile or permanent residence refers to the place where a person is physically present and intends to remain or return. A domicile or residence serves as a link between a person and a place.[252] They are also the connecting factors between the facts of a case and the choice of law. Considerations for choosing a domicile or permanent residence varies, and includes the predictability of results, simplification of judicial task, and status' concern for its domiciliaries.[253] Therefore, different definitions of these two terms differ from State to State and even in the same State, different courts' interpretations of these two terms will create certain conflicts.

For example, if a person was born and raised in Latin American, then works in United States but retains family connections in his own country, where should his domicile or permanent residence be located? The same circumstance applies to a person who is originally Turkish and works in Germany or someone of Spanish origins who works in France or Switzerland or a Jamaican working in Great Britain.[254] Where should be his domicile or permanent residence? The answer really depends upon the purpose which the law wants to serve and different courts' interpretation of the law.[255] There is no unified interpretation and standard to decide upon a particular person's domicile. To add one more jurisdiction will not reduce the problem we have, but it will cause lots of other problems.

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[252] R.A. Leflar, L.L. McDougal III & R.L. Felix, *American Conflicts Law*, 4th ed. (USA: The Michie Company Law Publishers, 1986) at 17. See also E.F. Scoles & P. Hay, *Conflict of Laws* (USA: West Publishing Co., 1984) at 173.

[253] See *ibid.*, at 17.

[254] A.F. Lowenfeld, "A Postscript and Warning" (1996) XXI:4/5 Air & Sp. L. 187 at 187-188.

[255] See Leflar, McFougal & Felix, *supra* note 252 at 19.

On the other hand, according to Art. XII of Guatemala City Protocol, the added paragraph to Art. 28 of Warsaw Convention reads as follows:

> In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the High Contracting Parties, *before the Court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same High Contracting Parties.[Emphasis Added]*

This new paragraph will only benefit the case where (1) the passenger has a permanent residence in the territory of one of the High Contracting Parties and (2) the carrier has an establishment in that country. If we completely follow the new paragraph to execute the fifth jurisdiction, we could easily find out that under existing Article 28 (1) of the Warsaw Convention and the Hague Protocol, the court where the passenger has his permanent residence and the carrier has its establishment will automatically be one of the four competent jurisdictions.[256]

Is the fifth jurisdiction needed? Unlikely. Should we consider this requirement again? Yes.

B. ECAC Recommendation and EC Proposal

The Treaty Established the European Economic Community (the "EEC Treaty").[257] The objectives of the EEC Treaty are mainly to harmonize the

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[256] See Cheng, "Fifth Jurisdiction and Full Compensation", *supra* note 251 at 119-120.

[257] *Treaty Establishing the European Economic Community*, 25 March 1957, 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]. *EEC Treaty* established the European Economic Community (Common Market), signed on 25 March 1957 and effective on 1 January 1958. *EEC Treaty* was first amended on 8 April 1965. It was amended again by the Treaty of Accession of Denmark, Ireland and the United Kingdom, signed on 22 January 1972; the Treaty of Accession of Greece, signed on 28 May 1979; and the Treaty of Accession of Spain and Portugal, signed on 12 June 1985. The *EEC Treaty* was amended again by the Single European Act in 1992 to provide for the establishment of the internal market. For more details, see CCH, *Common Market Reporter* (England: Commerce Clearing House, Inc., 1987).

development of economic activities in the European Community then to forge the economies of its signatories into a single common market.[258]

Therefore, the ECAC Recommendation and the EC Proposal are designed only for the EEC aviation market not for unifying the whole Warsaw System. For example: the currency of the EC Proposal is different from the one under Warsaw System; the EC Proposal uses the term - 'death, wounding or any other bodily injury' but the existing Warsaw System uses the term - 'death or bodily injury'.[259]

With the aviation industry a booming and a global industry, it is impossible for a group of States to regulate the universal aviation activities in isolation, but (or at least) the group actions are closer to universal unification than unilateral actions. Within the ECAC Recommendation and the EC Proposal, there are some shortcomings. If the group actions will offer some help for universal unification of private air law, we should avoid similar shortcomings in the future.

In practice, the up-front payment is very hard to execute. In the event of personal injury, it is probably easier to tell who has suffered the damage and airlines could offer the 5 percent to 10 percent of the limit (ECAC recommendation) or a lump sum of up to ECU 50,000 (EC Proposal) to cover medical costs. In the case of death, it could be very complicated and time-consuming to identify the so-called "the persons entitled to compensation". The Recommendation and the Proposal do not offer a very precise range for this matter.[260] Once it is open for decision by any court which seizes the

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[258] See the *EEC Treaty*, art. 1-8.

[259] P. Martin, "The 1995 IATA Intercarrier Agreement: An Update" (1996) XXI:3 Air & Sp. L. 126 at 127 [hereinafter "IATA Update"].

[260] *EC Proposal*, art. 2(d) only generally regulate as follows: "'[P]ersons entitled to compensation' means the victims and/or persons, who in the light of the applicable law, are entitled to

case, in accordance with *lex fori* or special contract, there will be many different results. We are far away from the point of unification; up-front payment does not appear like a good step for the unification of private air law.

Secondly, there are the same things to consider regarding up-front payments and speedy settlement of the uncontested part of the claim under the ECAC Recommendation. Also, once there are delays in the settlement of claims, what kind of solutions are there, in looking at a new regime, such as speedy settlement of claims, the ECAC Recommendation did not address this matter.[261]

Thirdly, the EC Proposal did not preserve the carrier's right of recourse against the legally responsible parties. A noted solicitor, Mr. Harold Caplan, recommend copying Article XIII of the 1971 Guatemala City Protocol to cover this oversight.[262] The new regulation reads as follows: "Nothing in this Proposal [Convention] shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person."

Fourthly, according to Article 5 of the EC Proposal, adequate information related to an air carrier's conditions of carriage will only be given "on request" to passengers, instead of mandatorily, expressly and clearly informing them. This neglect will cause many problems in the future, particularly under the electronic ticketing system.[263] A noted solicitor Mr. Peter Martin suggested that the transparency of information

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represent the victims in accordance with a legal provision, a court decision or in accordance with a special contract."

[261] L.Weber & A. Jakob, "Reforming the Warsaw System" (1996) XXI:4/5 Air & Sp. L. 175 at 180 [hereinafter "Reforming Warsaw"].

[262] H. Caplan, "The European Proposal on Compensation for Airline Passenger Death and Injury - Bold, Imaginative and Flawed" (1996) Lloyd's Avi. L. 15:5 1 at 5 [hereinafter "European Proposal"].

[263] See Martin, "IATA Update", *supra* note 259 at 127.

should be mandatory and provided by the Computer Reservation System ("CRS") or by travel agents and other intermediaries who would be responsible for ruining the benefits of victims of accident by failing to inform passengers of the conditions of carriage.[264]

Even if the ECAC Recommendation has been adopted by the ECAC and the EC Proposal has entered into force, they would only offer a unified regime for Europe. On the other hand, these two instruments did not really apart from the Warsaw System. Most of the provisions under these two instruments are very similar to the existing Warsaw System. This is a good opportunity for us to look forward to the unification of private of air law step by step, from unilateral to regional to universal.

C. 1996 IATA Intercarrier Agreement and Its Implementing Agreement

After so many unilateral actions, the unification of Warsaw System has almost been forgotten. Finally IATA initiated the 1995 Intercarrier Agreement and its implementing agreement and tried to unify the Warsaw System and increase the limits of carrier liability via the intercarrier agreement and the special contract between airline and passenger.

However, IIA and MIA were initiated by IATA, which is only an association of air lines. Both of IIA and MIA provide neither a compulsorily unified regime of private air law, nor an amendment of the Warsaw system. Also it cannot change the mandatory provisions under Article 32 of the Convention; that is to say, nothing in

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[264] *Ibid.*

these two Agreements affects the rights of passengers or claimants otherwise available under the Warsaw Convention.[265]

Once these two agreement enter into force, the air carrier's liability regime will be more complex than now, because every air carrier could follow different regimes under Warsaw System. For instance, some carriers will follow the original Warsaw Convention only, some of them will follow Warsaw-Hague regime, some of them will follow Warsaw-Hague-1966 Montreal Agreement, some of them will follow Warsaw-Hague-1995 Intercarrier Agreement, some of them will follow Warsaw-Hague-Guatemala City Protocol-1995 Intercarrier Agreement and its implementing agreement . . . etc. There will be tens of different combination of liability regimes.

Also, once the operational waiver of limited liability under IIA is executed, the results will be complex as well, because every carrier will waive the limits under very different circumstance. In the same aircraft, the carrier's limits of liability will be fundamentally different to every different passenger depending on the points of origin and destination, domicile or permanent residence, etc.

On the other hand, it is not clear what the impact of the Intercarrier Agreement's concept of "no limit liability" will be on the insurance premiums paid by carriers. An IATA working group believes that the waiver of liability limits will mitigate the insurance cost, because: (1) airlines' insurance policies are ready to set up for the risk of the existing limits under the Warsaw System being broken; (2) to compensate victims or their survivors in accordance with the law of the passenger's permanent residence could create a predictable environment for compensation; (3) to waive the

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[265] See Milde, "Warsaw Requiem or Symphony", *supra* note 41 at 44.

limits of liability could reflect the real long-term costs of compensatory damage and will moderate the insurance costs. But, this is only what the IATA working group believes, other views should be considered (For more details, please see the following discussion, 3.3). Furthermore, the provisions under these two agreements are also not clear about what the situation would be in the case of successive carriage by different carriers which are not all IIA and MIA parties.[266] The concern about insurance cost should be as *sine qua non* in such agreements, but this concern was totally missing at the time of drafting these agreements.[267]

Under the unacceptable example of the Guatemala City Protocol and the strong pressure of United States, these two agreements adopted the fifth jurisdiction as well. IIA and MIA did not emphasis that the fifth jurisdiction should be the place where the passenger has his domicile and the carrier has an establishment. For example, if there was a person with a permanent residence in United States who was traveling in Singapore, but suddenly decided to meet a client in London, and the person bought a ticket in Singapore and fly to London. The aircraft crashed at a small town near London. In this case, there is nothing related to United States, except the victim has permanent residence there. Probably to sue the airline in United States will even give the plaintiff in this case lots of inconveniences.

On the other hand, "what happens if non Americans legitimately sue in the U.S., as did the Pan Am/Lockerbie victims?"[268] The fifth jurisdiction will not make any sense.

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[266] See *ibid.* at 45.

[267] P. Martin, "The 1995 IATA Intercarrier Agreement: Proposed Special Contract Amendments to the Warsaw Convention - Will They Work?" (1966) XXI:1 Air & Sp. L. 17 at 20 [hereinafter "Special Contract Amendments"].

[268] See *ibid.*, at 21.

Furthermore, some passengers and their families probably prefer the existing jurisdiction under Article 28 of the Warsaw Convention than the fifth jurisdiction.[269]

There may also be some difficulties related to the transparency of the information with regard to conditions of carriage. Under IIA and MIA, there is no provision for asking air carriers to offer the mentioned information compulsorily. Should passengers ask for liability information every time they buy tickets? Can passengers get this information via CRS? There are lots of difficulties that we need to be overcome.[270]

Under IIA and MIA, air carriers could reserve their rights of recourse against any other person, including rights of contribution or indemnity, but what is the attitude of the third party? When there is a settlement between the air carrier and passenger under IIA and MIA, will the third parties be voluntarily bound by the settlement? Or, will they try to challenge either their obligation to pay or the quantum of payment?[271]

Hence, the new IATA Intercarrier Agreement and its Implementing Agreement did offer a new approach to solve the disparity of liability limits in private air law, however, there is still a lot of work ahead as many unaddressed problems remain.

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[269] *Ibid.*
[270] *Ibid.*
[271] See *ibid.* at 21-22.

3.3 Insurance Premium

Within the air transport industry, today there were already many unilateral actions which increase the limits of liability. The Japanese Initiative even waives the limits. Once most of the air carriers start to execute IIA and MIA, or the ICAO new draft instrument enters into force, what will be the impact on the insurance market and will insurance rates rise or not? After a fatal accident, if we want the settlement under these instruments with no limits of liability to be executed smoothly, we really need to put some serious thought into these instruments. The most important question we should ask is, after increasing the limits of air carrier's liability, will the insurance rates rise or not.

The insurance rate of individual airlines depend on a number of factors, e.g. (1) normal business rules of supply and demand;[272] (2) exposure and frequency;[273] (3) the excessively long litigation.[274] Generally, insurance is a highly cyclical business. When profits are good due to insurance premiums and investment income, with costs and losses balanced, new investors are attracted to the market. However, a rate war then begins. Prices and profitability go down and investors look elsewhere for profitability. Rates increase and the cycle starts all over again.[275] Sometimes, the reduction of availability of reinsurance also forces the underwriter to "retain a higher portion of a risk on their own books".[276]

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[272] See Brise Report, *supra* note 80, vol. 1 at 21.

[273] P. Lundblad, "Supplemental Compensation Plans - Who Needs Them?" (1992) 11:2 Lloyd's Avi. L. 1 at 3 [hereinafter "Supplemental Compensation Plans"].

[274] E.G. Tripp, "Insurance Update" (1994) March B. & C. Avi. 60 at 63.

[275] See *ibid.* at 62.

[276] See *ibid.* at 63.

As to exposures, some of them are predictable, e.g. traffic volume, aircraft types, route characteristics and historic loss record.[277] Some of them are not, e.g. "average passenger 'value' and various quality-related considerations".[278] Exposure to war and sabotage are usually covered by all risk hull insurance.[279] Logically, except the factors from the insurance market, the insurance rate could be reduced by the reduction in exposure and litigation compared to before.[280]

Take the United States as an example:

> In 1960, major U.S. scheduled airlines carried 58 million passengers on board 3.8 million flights and suffered 67 accidents, 12 of them with fatalities . . . Last year [1995], U.S. major airlines carried 550 million passengers on 8.2 million flights, suffering 33 accidents, two of them with fatalities. Instead of a fatal accident every 316,000 departures, as in 1960, there was a fatal accident once in every 4 million departures in 1995.[281]

Therefore, compared to the explosive growth of air transportation in the last 35 years (from 1959 to 1995), there are more passengers, more flights, more aircraft, the accident rate is not really increasing.[282]

But at this time, when the airlines trying to waive the limits of liability to achieve the unification of Warsaw System, the figures for 1995 show that fatal accidents of world airlines are increasing. In 1995, the fatal accidents totaled 57 and the number of resulting fatalities were 1,215, much higher than the annual average for the decade (respectively, 44 and 1,084). Between January and December 1996, the TWA flight

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[277] See *Brise Report*, *supra* note 80, vol. 1 at 21.
[278] *Ibid.*
[279] *Ibid.*
[280] See "Supplemental Compensation Plan", *supra* note 273.
[281] C.A. Shifrin, "Aviation Safety Takes Center Stage Worldwide" (4 November, 1996) Avi. Week & Sp. Tech 46.
[282] *Ibid.*

800, midair crash in India and the crash of the hijacked Ethiopian jet in Moroni have already killed hundreds of passengers.

Under the IIA and MIA, it is predictable that the insurance premium for passenger liability insurance will be calculated in accordance with the highest risk as defined by the claims on behalf of the passengers with domiciles in the country which has the highest levels of compensation.[283] That is to say that insurance premiums will probably increase under the IIA and MIA instead of remaining the same, which was urged by IATA study group.

The monetary limitations are conceived too low by most countries. The increasing of insurance premiums under the new unlimited regime is hard to avoid. Generally speaking, insurance premiums are less than one percent of airlines' operating costs (under an increase or the removal or Warsaw limit, the insurance premium will comprise about 0.1 percent to 0.35 percent of total operating costs).[284] What should be done is that once the airline still wants to offer its service in the field of air transport industry and the insurance premium will not be raised unreasonably, the airline should undertake the burden of increasing insurance premium to achieve the purpose of protecting passengers.

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[283] W. Müller-Rostin, "The IATA Intercarrier Agreement - The Thoughts of an Yet Unconvinced" (1996) 15:14 Lloyd's Avi. L. 1 at 2 [hereinafter "IATA Agreement"].

[284] See Caplan, "Millennium Arrived", *supra* note 94 at 84.

3.4 The Best Method for the Unification of the Liability Regime

The process of unification of private international air law is in crisis. However, until now, none of the international organizations involved in this process has succeeded in providing on acceptable new draft convention. Moreover, the one provided by Professor Bin-Cheng and Mr. Peter Martin is not satisfactory to most people and has not even been submitted officially to ICAO or IATA, or any of their High Contracting Parties or Members.

In conclusion, if the Warsaw System is denounced and the international community is unable to arrive at a new legal regime acceptable to all States, we will face the risk of having an even more fragmented regime of private international air law. In view of this possibility, integrating the Warsaw System is a safe and more efficient way to deal with this crisis in the field of private international air law. At least the current Warsaw Convention offers some basic rules governing the air transport industry. These are pointed out by noted Professor Dr. Michael Milde as follows: (1) the definition of international carriage; (2) required document of carriage; (3) the air carrier's liability regime; (4) four unified jurisdictions; (5) a specific provision on combined carriage performed partly by air and partly by any other mode of carriage; (6) the provisions of Warsaw Convention are mandatory.[285]

For modernizing the Warsaw System, ICAO and IATA must cooperate to issue a questionnaire to ICAO's Member States and try to understand what as international organizations they should work on in the near future. From the 72 States (40 percent of the 184 ICAO Contracting States) which replied to the socio-economic

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[285] See Milde, "Warsaw Crossroad", *supra* note 14 at 204-207.

questionnaire, 52 respondents are not satisfied with the level of present limits. We should also note that in 1994 the air carriers registered in these 52 States produced almost 80 percent of total international scheduled passengers and passenger-kilometers performed. Only the United States, Switzerland and Japan suggested that there should be no limited liability.[286]

Obviously, what we should do at this moment is to preserve the Warsaw System and update the limits of liability for carriers. From the unilateral or group actions discussed above, the 1995 IATA IIA and MIA and ICAO new draft instruments, we know that there should be increases in the limit of liability and compromises made between the different needs of the Contracting States. The compensation should be unlimited and based on the individual of claimants. Hence, we should consider the following suggestions based on the merits of ICAO new draft instrument and Japanese Initiatives:

(1) The new draft regime of the Warsaw System should be a governmental convention. The most important contribution of the ICAO new draft instrument is that ICAO could establish the unified legal regime of the air carrier's liability between governments.[287]

(2) Two-tier mandatory system which originates from the Japanese Initiative: for compromising the interest of passengers and air carriers. It is impossible to avoid

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[286] ICAO, 147th Session of The Council, Air Transport Committee, *Socio-Economic Analysis of Air Carrier Liability Limits*, ICAO AT-WP/1769 (4 January, 1996).

[287] P.S. Dempsey, "Pennies from Heaven - Breaking through the Liability Ceilings of Warsaw" addressed to the International Conference "Air and Space Law Challenges: Confronting Tomorrow" held by Institute of Air and Space Law, McGill University and The Canadian Bar Association from 25-27 October 1996. This article will be published in (1997) XXII:I Ann. Air & Sp. L.

increasing the present limits of liability. A two-tier system almost is the consensus of every unilateral or group actions and even the IIA, MIA and ICAO new draft. The most acceptable way has been suggested by Japanese defense lawyer; Yasuomi Hayashida, the limits of liability under Warsaw System should work as the minimum compensation.[288]

(a) The first tier: "strict liability" as adopted by ICAO new draft. With regard to claims for death or other bodily injury of a passenger within the meaning of Article 17 of the Convention, the air carrier should be strictly liable up to a certain amount. This amount is acceptable for most countries (for example, within the ICAO new draft convention adopt the amount as 100,000 SDR), but the carrier preserve certain defense.[289]

The requirement of the first tier could be deemed reasonable. Due to the highly technical and expert evidence required and the probable distance from the plaintiff's home to the site of accident, the carrier could have many more advantages than the passengers. On the other hand, the carriers should not be liable if the death or injury resulted solely due to the passenger's state of health of or from the normal operation of the aircraft, or both.

(b) The second tier: Within this tier, the carrier's liability regime should be based on fault as provided by the original Warsaw Convention. The carriers preserve all the defense. If passengers would like to urge for the unlimited liability, they would have to prove that the accident was caused by the carrier's willful misconduct.

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[288] S. Gates, "Japanese Solution - Is It an International Answer?" (1993) 12:8 Lloyd's Avi. L. 1 at 2 [hereinafter "Japanese Solution"].

[289] See *ICAO New Draft Instrument*, *supra* note 147, art. 7.

Today, any industry should undertake the greatest part of liability if its negligence injures a consumer, but, from the basic principle of torts, it is still hard to justify that we should impose liability without fault on a carrier or indeed on any party. Even the liability regime will be work as a governmental policy, airline should not be the one to delivery the compensation.[290]

(3) Periodically update the amount set up in the first tier: The cost of living is becoming higher and higher; at the same time the monetary unit (e.g. SDR) will be inflated by world economic conditions and/or at least the basket of five national currency. ICAO, IATA and other related international organizations could cooperate to periodically review (e.g. every five or ten years) the socio-economic conditions of all Contracting States and help establish a reasonable and updated amount for the first tier liability regime. This way, the liability regime will not be easily affected by the inflation of the monetary unit and will not be totally out of date as is the case today.

(4) The air carrier liability regime should not interfere with the liability of third parties: The Warsaw System basically deals with the legal relationship between the carrier and passenger, but nothing in the carrier's liability regime shall "prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person".[291]

(5) The future new instrument should urge the High Contracting States to issue the certificate to the carrier registered under its law only when the carrier has an acceptable contract of insurance between carrier and its insurers and to cover the

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[290] See "Japanese Solution", *supra* note 288 at 3.

[291] See *ICAO New Draft Instrument*, *supra* note 147, art. 31.

possible liability whichever may be imposes on it.[292] The only reason that we strongly emphasize the importance of insurance is that it is the best way to make sure that the carriers could undertake all possible liability, especially when the liability could be unlimited.

(6) As to the 5th jurisdiction, it could cause more problems than it solves (for more details, please refer to the former discussion under 3.2-2.1 A & C). We should not adopt the fifth jurisdiction under the new instrument. Otherwise, the diversity of definition and interpretation of 'passenger's domicile or permanent residence' will simply cause another crisis in the near future.

(7) The limits and the defenses under the Warsaw Convention shall be retained with respect to the subrogation claimed by all social insurance bodies[293] or by the employers and private life or accident insurers who may have rights of recourse.[294]

Most of European countries have well-developed social insurance systems. The passengers already could be covered by these systems. In these countries, the unlimited liability will benefit the social insurance carrier than the passenger who suffer the damage. Therefore, the limits and the defenses under the Warsaw Convention shall retained as to all social insurance bodies. Otherwise, the unlimited liability will be a biggest waste of the air carriers' and their insurers' financial resources.[295]

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[292] See ICAO, "Modernization of the 'Warsaw System'", *supra* note 146, App. A at A-10.
[293] See "IATA Agreement", *supra* note 283 at 3.
[294] See Caplan, "IIA, MIA and DoT", *supra* note 138 at 7.
[295] See "IATA Agreement", *supra* note 283 at 3.

The 7 items listed above are just few brief suggestions for the air carrier's liability regime in the future. If ICAO's new draft instrument enters into force, this will certainly help the unification of air carrier's liability regime. If there is no of governmental convention in force, IATA should play the lead role in the unification of air carrier's liability. They should not hesitate, particularly not because of pressure from a single country.

3.5 A Note on Common Liability for Damage to Cargo and Baggage

Under Warsaw System, except in the event of personal injury or death, air carriers also undertake the liability of damage to baggage and cargo. Another shortcoming of the Warsaw System is that the compensation for damage to cargo is still too low and the compensation for damage to baggage under the Warsaw System is still based on the weight of the baggage.

As one legal study has pointed out, " in the early days of air transport, maritime law was the yardstick for the drafting of air law agreements and the debt of air law to maritime law is quite evident from the analogies to be found in the texts of the Conventions in both fields"[296]. But, after so many developments in air law, both the flexibility and superiority of air law are over maritime law.[297]

The primary elements for claiming compensation against an air cargo or baggage carrier were set out in the Warsaw Convention and The Hague Protocol. The elements for a claim are: a carrier; a contract of carriage and cargo or baggage.

The liability regime of both maritime and air law provide that the cargo carrier shall be liable for loss, damage or delay (Articles 18 to 30 of the Warsaw Convention 1929, Article 4(2) of the Hague Rules 1924[298] and the Visby Rules 1968[299]) and that compensation is based on the weight of the cargo. Today, with the increasing cost of living and most of damages of cargo are already cost effectively covered by existing

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[296] A.M. Briant, "International Carriage of Cargo: A Comparative Study of The Liability of The Carrier in Maritime and Air Transport Law" (1993) XVIII:I Ann. Air & Sp. L 45 at 47.

[297] *Ibid.*

[298] *International Convention for the Unification of Certain Rules of Law Relating to Bills of Loading on 25 August 1924*, 120 LNTS [hereinafter *Hague Rules*].

[299] *Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Lows Relating to Bills of Loading on 23 February 1968*, 1977 UKTS 83 [hereinafter *Visby Rules*].

transport insurance.[300] Therefore, the ICC Policy Statement on Cargo and Baggage Liability in International Air Transport urges States to ratify the Montreal Protocol No. 4 without awaiting Montreal Protocol No. 3's in force to increase and update the cargo liability.[301] The ICAO new draft instrument increase cargo liability up to the same limit provided by Article VII of Montreal Protocol No. 4.[302]

On the other hand, similar transport insurance arrangements are not really available for passenger baggage.[303] Therefore, should the compensation for damage to baggage still be based on the weight of the baggage as is still the case in maritime law? For example, one pound of expensive wool sweaters and other relatively expensive items of clothing commonly found in baggage could be entitled to the same as or less compensation than for a pound of bricks.

In view of this, it is suggested that the limited liability on damages of baggage, in air transport should not be based on weight. Rather, baggage liability should offer a reasonable lump sum payment as compensation for the loss, per passenger, (e.g. a limit of 1,000 SDR per individual passenger for all checked baggage.)[304] To avoid the above mentioned unfair example, increasing the limits of liability of baggage should not be delayed by that of passenger liability. The right time for air law to find its own approach and not to simply follow maritime law in the field of baggage liability.

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[300] International Chamber of Commerce, *Policy Statement on Cargo and Baggage Liability in International Air Transport*, ICC Doc. No. 310/416 Rev. 2 [hereinafter *ICC Cargo and Baggage Policy*].

[301] *Ibid.*

[302] See *ICAO new draft instrument*, *supra* note 147, art. 21(2) at A-9.

[303] See *ICC Cargo and Baggage Policy*, *supra* note 300.

[304] See *Montreal Protocol No. 4*, *supra* note 9, art. 2(1)(c). See also *ICC Cargo and Baggage Policy*, *supra* note 298; Weber & Jacob," Reforming Warsaw", *supra* note 261 at 179.

Chapter 4 The Position of Republic of China, Taiwan[305]

The Republic of China's economy has changed rapidly since the mid-1980s; it has gone from agricultural and manufacturing activities to scientific, technological and service industries. Currently, the Republic of China is ranked as the world's 12th largest trading nation by the World Bank, with a per capita GNP topping U.S. $12,439. In the future, the Republic of China seems likely to commit itself as the Asia-Pacific operations center and as a regional hub of international activities. Taiwan's foreign trade has grown, reaching U.S. $178.4 billion in 1994. Exports and imports have both reached new highs in term of aggregate value, with an annual trade surplus peaking at U.S. $18.7 billion in 1987. In 1995, the aggregate value of Taiwan's imports was U.S. $103.6 billion and the Foreign Exchange Reserves was U.S. $90.31 billion.[306]

With this economic development, there are now ten domestic airlines, and four of them operate internationally. There are also 26 foreign airlines operating in Taiwan. In total, there is flight service between Taiwan and 40 major cities, e.g. London, Paris, New York, Los Angeles, Vancouver, Tokyo, Singapore, Sydney . . . etc.[307] Citizens

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[305] Briefly introduce the Geography of Republic of China, Taiwan as follows:

(1) Location: Eastern Asia, Islands Bordering the East China Sea, Philippine Sea, South China Sea, and Taiwan Strait, north of the Philippines, off the Southeastern coast of People Republic of China.

(2) Area: total area: 35,980 sq. km; land area: 32,260 sq. km including Taiwan island, the Pescadores, Matsu, and Quemoy.

For more details, see http://www.taiwanese.com

** Within this chapter, because there are not enough publications in Taiwan in the field of Air Law and there is no law suits related to the Warsaw System adjudicated in Taiwan. If the text without precise citations will be translated by the author's personal view.

[306] See http://www.gio.gov.tw, Republic of China Executive Yuan Government Information Office Home Page [hereinafter *Executive Yuan Home Page*].

[307] Dr. C.V. Chen, "A Missing Link of the Warsaw Liability System: An Republic of China (Taiwan) Perspective" (Address to the International Conference "Air and Space Law Challenges: Confronting Tomorrow" held by Institute of Air and Space Law, McGill University and The Canadian

of many States fly to Taiwan for both business and tourism. In 1995, there were 2.33 million inbound visitors, arriving from all over the world.[308] If the Republic of China cannot be brought under the umbrella of the Warsaw System, the result will be an unpredictably dangerous one for the air transport industry and potentially passengers of all countries. For example, airlines and passengers would not be able to rely on the unified regime of air carrier's liability.

Under Warsaw Convention, Article 1 provides that the Convention is only applicable to the transportation (1) from one High Contracting Party to another; (2) within the territory of a single High Contracting Party, but there is a stopping place within a third State whether it is a High Contracting Party or not. Article 37 & 38 provide that a 'High Contracting Party' means a State which ratifies or adheres to the Convention. A State's adherence to the Convention may include its colonies or territories.

Hence, the question could be raised, will the carriage from London to Taiwan be regarded as international carriage? To answer this question we have to ask -- whether or not the Republic of China is a High Contracting Party of the Warsaw Convention. If not, what is the best way to bring Republic of China under the umbrella of the Warsaw System? What kind of liability regime would be used in Taiwan once there is a lawsuit related to damages to passengers, baggages or cargo due to an accident? This situation can be analyzed as follows:

Bar Association from 25-27 October 1996.) This article will be published in (1997) XXII:I Ann. Air & Sp. L.

[308] See *Executive Yuan Home Page*, *supra* note 306.

A. Is the Republic of China a High Contracting Party of the Warsaw Convention?

In 1929, the government of the Republic of China sent a representative, vested with full authority, to join the drafting and signatory session of the Warsaw Convention.[309] But till now the Republic of China has not ratified and deposited the instrument in accordance with Art. 37 of the Warsaw Convention. Hence, the Republic of China is not a High Contracting Party of the Warsaw Convention.

On the other hand, People's Republic of China effectively ratified and became a High Contracting Party of the Warsaw Convention and the Hague Protocol respectively in 1958 and 1975.[310] When the People's Republic of China ratified the Warsaw Convention, she also declared that the convention "shall of course apply to the entire Chinese territory including Taiwan".[311] In fact, none of the legal regimes under the People's Republic China are effective in Republic of China. Will the Warsaw Convention be applied in the Republic of China, Taiwan or will she become a part of High Contracting Party of Warsaw Convention just because of People Republic of China's unilateral declaration? We doubt it. Indeed, there are lots of different opinions from the courts in diversity of High Contracting Parties of Warsaw Convention.

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[309] For more details, see Liste des Pays Représentés et de Leurs Délégués, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929 Varsovie (Warszawa 1930).

[310] See "Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the said Convention Signed at the Hague on 28 September 1955" (1993) XVIII:II Ann. Air & Sp. L. at 373.

[311] P. Martin & E. Martin, *Shawcross and Beaumont Air Law*, 4th ed., vol. 2 (London: Butterworths, 1996) App. A, No. 8 at A 21.

The Italian court in the case *Fratelli Martinez* v. *Thai Airway, Alitalia, Tribunal of Naples*[312] clearly express its opinion that the Republic of China was not a party to the Warsaw Convention. The same opinion was expressed by a German court in the case *Landgericht Mönchengl ladbach.*[313]

On the contrary, some American courts consider the Republic of China to be a High Contracting Party, but their reasons for believing this are incorrect. In *Atlantic Mutual Ins. Co.* v. *Northwest Airlines, Inc.*,[314] the court held that (1) according to the unilateral declaration of People's Republic of China at the time of ratifying the Warsaw Convention, the Warsaw Convention should apply to the entire territory of China including Taiwan; (2) according to the President's Memorandum[315], and the declarations of over 100 other nations and the United Nation have done the same that "formally recognized the People's Republic of China as the sole government of China, in its entirety, and withdraw recognition from the Republic of China."[316]; (3) in accordance with *M. K. Lee* v. *China Airlines, Ltd.*,[317] under Article 38, a declaration of adherence to the Convention by a State may include its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any territory under its suzerainty. The court has taken the adherence of

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[312] *Fratelli Martinez* v. *Thai Airway, Alitalia, Tribunal of Naples* (1989) XIV:4/5 Air L. at 213.

[313] Landgericht Mönchengladbach, (9 0 58/87) 24 February 1988; 1988 Trans. R. 283.

[314] *Atlantic mutual Ins. Co.* v. *Northwest Airlines, Inc.*(24 Avi. 17,122) (796 F. Supp. 1188) (E.D. Wisc. 1992) (1992 Westlaw 197222) [hereinafter *Atlantic* v. *Northwest*].

[315] President's Memorandum for All Department and Agencies: Relations with the People of Taiwan, reprinted in 1979 U. S. Code Cong. & Admin. News 36, 75.

[316] See *Atlantic* v. *Northwest, supra* note 314.

[317] *M. K. Lee* v. *China Airlines, Ltd. et al.* (21 Avi. 17) (669 F. Supp. 979, 980) (C. D. Cal. 1987).

Hong Kong and Taiwan as examples. Therefore, both the mentioned courts hold that the Republic of China, Taiwan is a party of the Warsaw Convention.

Of course, we could easily point out the mistakes of the mentioned courts. First of all, it is absolutely wrong to regard the Republic of China, Taiwan, as a High Contracting Party just because People's Republic of China unilaterally declared that Taiwan is a part, or a province, of China. According to Article 2 (1) (g) of Vienna Convention[318], the Contracting Party means "a State which has consented to be bound by the treaty and for which the treaty is in force". Until now, the People's Republic of China's sovereign power has never covered Taiwan. If the mentioned courts do regard Taiwan as part of the People's Republic of China and held that Taiwan should be bound by the Warsaw Convention, it will totally violate the letter and spirit of the Vienna Convention. Furthermore, Hong Kong is Great Britain's colony until August, 1997, but Taiwan has never been the People's Republic of China's colony, protectorate, territory under its mandate, etc.. As Korean scholar Tae Hee Lee states, the People's Republic of China has declared that the Warsaw Convention should apply to the entire Chinese territory, including Taiwan, but the Republic of China has its own legal regime.[319]

B. Is there any Possibility that a Lawsuit Related to the Warsaw Carriage will be Brought into the Court under the Legal Regime of the Republic of China?[320]

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[318] See *supra note* 36.

[319] T.H. Lee, "The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries" (1986) XI:6 Air. L. 242 at 242-243.

[320] Within this part, except the articles coded from the authorized English-version, the others are translated by the author of this thesis.

Under Article 28 of the Warsaw Convention, the action for damages 'must' be brought, at "the option of the plaintiff", in the territory of one of the High Contracting Parties. But the Republic of China is not a part of the Warsaw Convention. Once a lawsuit is brought to any court in the Republic of China, the court definitely could accept it, start to judge it and not be bound by Article 28 of the Warsaw Convention. The likelihood of this case's happening may be quite low, but the possibility always exists.

C. What Kind of Legal Provisions will be Used by the Taiwanese Court When It Judges a Case Related to Warsaw Carriage?

The related provisions of carrier's liability under Taiwanese Legal Regime need to be introduced at this point. They will be compared to the merits and shortcomings of the Warsaw System.

C-1. Legal Regime of Air Carrier's Liability in Republic of China

(1) Under the Civil Code of Republic of China (the "Civil Code")[321] -- General provisions, the "carrier" in Civil Code does not specify certain mode of transportation.

> Article 634: The carrier is liable for any loss, injury or delay in the delivery of the goods entrusted to him, unless he can prove that the loss, injury or delay is due to *force majeure*, or to the nature of the goods, or to the fault of the sender or of the consignee.
>
> Article 654: The carrier of passengers is liable for any injury suffered by the passenger in consequence of the transportation, and for delay in the transportation, unless the injury is due to *force majeure* or to the fault of such passenger.

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[321] Civil Code of 1929. For more detail, see *The Civil Code of The Republic of China*, trans. C.L. Hsia, J.L.E. Chow & Y. Chang (Shanghai: Kelly & Walsh, Limited, 1930) at 61-63, 162-169.

Article 659: A statement in a ticket, receipt or other document delivered by the carrier to the passenger, excluding or limiting the liability of the carrier, is ineffective, unless it can be proved that the passenger expressly agreed to such exclusion or limitation of liability.

Article 216: Unless otherwise provided by law or by contract, damages shall be only for the injury actually suffered and for the profit which has been lost.
Profit is deemed to have been lost which could have been normally expected, either according to the ordinary course of things, or according to the projects or preparations made, or according to other special circumstances.

Article 222: Liability for intentional acts or gross negligence cannot be released in advance.

(2) Under Chinese Civil Aviation Law (the "Aviation Law")[322]and related provisions

A. Aviation Law:

Article 67: Where death or bodily injury or damage to movable or immovable property occurs as a result of aircraft accident, the owner of the aircraft shall be liable regardless of whether such accident is due to wilful action or negligence. The owner of the aircraft shall also be liable for damage caused by force majeure. The same applies to damage caused by falling or dropping of objects from the aircraft.

Article 69: Aircraft operator or carrier shall be liable for damage in case of death or personal injury of a passenger resulted from an event which took place on board the aircraft or in the course of embarking or disembarking. However, if the damage was caused or contributed to by the negligence or other wrongful act of the passenger, the aircraft operator or carrier shall be wholly or partly exonerated from his liability for compensation.

Article 70: Where damage is caused by the wilful action or negligence of the airman or a third party, the owner, the lessee or borrower of aircraft has the right to claim compensation from such airman or third party.

Article 71: Where there is a special contract providing for the amount of compensation for damage to passengers and cargo or duty personnel on board the aircraft, such contract shall prevail; where there is no special contract, the Ministry of Communications will, pursuant to related provisions of this Law and making reference to the international standards for such compensation, prescribe rules for compensation and submit to the Executive Yuan for approval and promulgation.
Special contract provided for in the preceding paragraph shall be in writing.

Article 72: The owner of an aircraft or civil air transport enterprise shall, prior to applying respectively for registration in accordance with the provisions of Article 8 or for issue of permit in accordance with the provisions of Article 44[323], effect liability insurance.

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[322] *Chinese Civil Aviation Law of 1953 as amended on 4 January 1974 and 19 November 1984* (hereinafter *Aviation Law*)

[323] Article 44 of *Aviation Law*:

> Where the amount of liability insurance referred to in the preceding paragraph has been prescribed by the Ministry of Communications, such amount shall be used for effecting liability insurance.
>
> Article 75: Litigation over damages provided for in Article 67 shall be under the jurisdiction of the court at the place where damages have occurred.
>
> Litigation over damages provided for in Article 69 shall be under the jurisdiction of the court at the place concluding the contract of carriage or at the destination of carriage.

B. Related provisions:

Article 3 and 4 of the Regulations Governing Compensation for Damages to Passengers and Cargo Abroad Civil Aircraft of 1982 (the "Air Carrier Compensation Regulations") for wrongful death or severe injury, provides New Taiwanese Dollars (the "NT $") 750,000 (approximately equal to U.S. $27,233)[324] as the minimum compensation and NT $1500,000 (approximately equal to U.S. $54,466)[325] as the maximum compensation. For non-severe injury, it provides NT $500,000 (approximately equal to U.S. $18,155)[326] as a minimum compensation.

Article 6 of the same regulations provide that the air carrier should not avail itself to Articles 3 and 4 which limit the carrier's liability if the damage is caused by its gross negligence.

"The operator of a civil air transport enterprise shall apply through CAA for approval of the Ministry of Communications and then register with the authorities concerned according to law before starting business.

Such permit shall become invalidated and CAA shall notify authorities concerned of the revocation of its registration, if the enterprise fails to make aircraft available to start operation within six months of the issue of the permit, or the enterprise after starting operation has suspended business for more than six months, unless an extension justified by special circumstances is applied for and approved.

The provisions of the two preceding paragraphs shall apply to the general aviation, the air freight forwarder and the airport ground service as appropriate."

[324] The exchange rate between US dollars and New Taiwanese Dollars on 29 November 1996 is 1: 27.54 (per US dollar/New Taiwanese dollar).

[325] *Ibid.*

[326] *Ibid.*

(4) The provisions related to choice of law and jurisdiction are also provided by the Law of Governing the Application of Laws to Civil Matters Involving Foreign Elements (Article 9 & 25)[327] and the Code of Civil Procedure of the Republic of China (Article 2(2) or 2(3) ,3, & 6).[328] All of these cooperate with Article 75 of the Aviation Law. The possible jurisdictions will be as follows: (1) passenger's domicile; (2) where the carrier is ordinarily resident, or has its principal place of business; (3) has an establishment by which the contract has been made; (4) the place of destination; (5) the place of the defendant's property.

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[327] Article 9 of the *Law of Governong the Application of Laws to Civil Matters Involoing Foreign Elements*:

" An obligation arising from a wrongful act shall be dealt with by *lex loci delicti*; provided; however, that this shall not apply where such act is not considered to be wrongful under the law of the Republic of China.

The claim for compensation or for taking other measures arising out of wrongful acts shall be limited to those which are acceptable by law of the Republic of China."

Article 25 of the *Law of Governong the Application of Laws to Civil Matters Involoing Foreign Elements*:

"Where the law of a foreign country is applicable under this Law, but the provisions therein are in contrary to the public order and good morals of the Republic of Chin, such foreign law shall not be applied."

[328] Article 2(2) of the *Code of Civil Procedure of the Republic of china*: "An action against a private juristic person or any corporate body which may be made a party to the action is subject to the jurisdiction of the court at the place where the head office or the principal business establishment of such juristic person or corporate body is located."

Article 2(3) of the *Code of Civil Procedure of the Republic of china*: "An action against a foreign juristic person or any foreign corporate body which may be made a party to the action is subject to the jurisdiction of the court at the place where the head office or the principal business establishment of such juristic person or corporate body in the Republic of China is located."

Article 3 of the *Code of Civil Procedure of the Republic of china*:

"Jurisdiction over an action concerning property rights against a person whose domicile is not found in the Republic of China, or unascertainable, may be exercised by the court at the place where the defendant's attachable property or the subject matter of the claim is located.

If the property of the defendant or the subject matter of the claim happens to be an obligatory right, the place where the obligator has his domicile or where the thing given in security for the debt is located shall be deemed to be the locus of the defendant's property or of the subject matter of the claim."

Article 6 of the *Code of Civil Procedure of the Republic of china*: "Jurisdiction over an action against a person having an office or a business establishment, in so far as it concerns the business of such office or establishment, may be exercised by the court at the place where the office or business establishment is situated."

C-2. Analysis of the Laws in the Republic of China in the Field of Air Law

(1) The level of different laws under the same legal regime

According to the rule of that the specific law is superior to the general law, the Aviation Law is superior to the Civil Code in the field of air carrier liability. As to the Consumer Protection Law (the "CP Law"), although it has some provisions, which related, it does not really provide a liability especially for air carriers.[329] The CP Law may be a good reference, however, it will not be the focus of the following discussions.

(2) The range of provisions provided under Aviation Law

Aviation Law provides many provisions related to the air transportation industry, including the definitions of related terms (Article 1-2), the authority of the air transportation industry (Article 3 and 4), the nationality and registration of aircraft (Article 7-22), the requirements of the technical personnel who work in the air transportation industry (Article 23-26), the required equipment of airports (Article 27-34), provisions related to air transport safety (Article 35-43), the requirement or issuing the certificate to air transportation industry and the obligation of the industry (Article 44-57), the limit of foreign air carrier and the aircraft registrated under laws of other countries (Article 58-61), the investigation of air accidents (Article 62-66), compensation liability (Article 67-76-1), related punishment of violating the provision under Aviation Law (77-91) . . . etc.

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[329] *1994 Consumer Protection Law*, art. 7 [hereinafter the *CP Law*] provides that: the service provider (could be air carrier) should be liable for the damage sustained by the consumer, but could reduce his liability by proving without negligence.

The Aviation Law is not a regime which is only related to liability regime. The related provisions are not completely well done either. The shortcomings of the Aviation Laws will be discussed below.

(3) Analysis of the liability regime under Aviation Law

First of all, the subject and object of the liability regime are not clear. For example: (I) why should the owner of an aircraft undertake the absolute liability for injured people and damaged property (Article 67), if they are not the actual carrier or never operate any carriage but simply lease the aircraft to the actual carrier. (II) What is the object of liability under Article 67? Is object the third party on the ground or does it also includes the passenger and baggage. From the wording of Article 67, it is difficult to know. Is it possible that this is the liability regime to the third parties? It is difficult to say because the wording of this article is extremely different with the Rome Convention, which is the only convention we have and it regulates the liability of air carrier to third parties.

(4) The Type of Liability Regime:

Follow the discussion under 2 (II) under Article 67, the owner of an aircraft should undertake absolute liability and he cannot defend himself by the reason of *force majeure*. Under Article 69, it is not expressly prohibited for the carrier to defend himself by the reason of *force majeure*. When comparing Article 69 of the Aviation Law and Article 654 of the Civil Code, it seems that the air carrier cannot defend for himself by the reason of *force majeure* because law did not expressly state that the air

carrier can use this defense. On the other hand, if Article 69 and 67 of the Aviation Law are compared, the answer will not as likely to be so positively.

If there is a lawsuit in the case of a passenger's injury or death brought in Taiwan at this moment, for protecting passengers, it would be better to adopt the more conservative explanation. The air carrier undertakes absolutely liability in the case of passenger's death or injury under Aviation Law. This is only a possible explanation and the best way to clarify is to modify the Aviation Law and let the law speak for itself.

(5) Liability Insurance

It is very important for the air transportation industry to have enough insurance to handle their increasing liability. It is the air carrier or the person who really executes the carriage that requires enough insurance to cover any possible liability. Article 72 of Aviation Law only requests the owner of an aircraft to have enough insurance to cover any the possible liability. What if the owner of the aircraft never operates the carriage of passengers? It is best to begin by thinking of insurance which is the best way for protecting passengers. On the other hand, the real air carrier may never be requested to have enough insurance to cover their liability. The most important component in the spirit of Article 72 will be eliminated by this oversight.

(6) Inadequate Provisions Relating to the Document of Carriage

Under the Aviation Law there is no single word related to the document of carriage which could notify passengers, consignors the liability of carriers. Under Article 659 of the Civil Code, it only states that, unless the passenger expressly

agreed to limit or exclude the air carrier's liability, the air carrier will not be able to limit or exclude his liability by any means. This is to say that there is nothing to ensure that the passengers will not be notified of the air carrier's liability before boarding. They will not have time to purchase additional insurance for themselves or find another way of getting more protection; consignors will not have the opportunity to get additional insurance for their cargo either. This strongly violates the spirit of protecting passengers who do not have equal power to airlines in the modern world.

(7) Limitation of Liability Is Too Low and the Way the Limitation Been Set Up Is Illegal.

At present, prior to the IATA Intercarrier Agreement and its Implementing Agreement entering into force or the ICAO new draft instrument is adopted, most States and airlines follow the 1966 Montreal Intercarrier Agreement. Therefore, the limitation of air carrier's liability is at least U.S. $75,000. If we compare the limits of air carrier's liability under the legal regime of the Republic of China with the 1966 Montreal Intercarrier Agreement, the air carrier's limited liability under the legal regime of the Republic of China, without distinguishing international or domestic carriage, is very low under the legal regime of the Republic of China. It will certainly not offer passengers enough protection.

Furthermore, the limitation of air carrier's liability is regulated by the Air Compensation Regulations. According to Article 5 of Law Governing Standard on Law and Regulation (the "Standard Law")[330], the limitation of air carrier's liability

[330] *Law Governing Standard on Law and Regulation of 1970*, art. 5 [hereinafter *Standard Law*]: (1) The constitution or law regulate expressly that certain event should be regulated by law; (2) the events

which will definitely affect people's rights should be regulated by law instead regulations. The limited liability is too low and should be increased and regulated by law as soon as possible.

D. The Best Approach for the Future

In today's international community, people travel and do business all over the world. Even a small country could influence world air travel. It goes without saying that the Republic of China would like to commit itself as the Asia-Pacific operations center and as a regional hub of international transportation. There are flight services between Taiwan and 40 other major cities in the world.

From the stand point of the Republic of China, there are many political obstacles to it being official member of the United Nations or any other governmental organization, but the Republic of China could cooperate with international community and obey the international conventions on the basis of good faith. Because of the likelihood of hundreds of people of many nationalities sitting in one airplane, unifying the air carriers' liability for international carriage must rely on a multi-national Convention. If the Republic of China would like to join the Warsaw System, there are at least two ways for it to work on this goal.

First, the Republic of China could adopt the provisions under the Warsaw System as a guide for revising its own Aviation law in the future. In this way, although Republic can not be a party of the Warsaw System, at least when there is a lawsuit

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related to the rights or obligations of people; (3) the constitution of the organization of Republic of China; (4) the other important event which should be regulated by laws.

brought in Republic of China, the result will not be too different with other court in the rest of world. It will be easier for carriers to measure their possible liability and get enough insurance in due course.

Secondly, carriers and passengers could agree to apply the rules under the Warsaw System via the contract of carriage, in the event of an accident. This is also the way that the carrier and passenger are doing now if the carriage will be via the Republic of China. Contract of carriage is only a private contract. Eventually, for the purpose of unification of law and joining the international community, the first way is highly recommended.

Thirdly, the international community should recognize that the Republic of China has its own legal regime. It is necessary to bring the Republic of China under the shelter of the Warsaw System, which surely not because Taiwan is a part of People's Republic of China, but because by this way it could protect the nationals from different countries more when they travel to, from or via the Republic of China.

Conclusion

Although the air transportation industry is booming, private international air law is undergoing a profound and far reaching crisis regarding unification. The world needs to pay attention to this matter and attempt to cooperate with international organization.

For a safe and stable resolution of this crisis, the best approach would be to integrate the existing Warsaw System and to get rid of the limits of liability or at least to increase the limits of the air carrier's liability by all means. In order to deal with unlimited liability or high limit of liability for passenger injury or death as well as damage to baggage, certain guidelines should be established for the air transportation industry and require the carriers to get enough insurance for themselves.

At a time when most developed countries are eager to raise the limit of liability, we must ask whether it is possible for third world carriers to undertake the same limit liability or, indeed, unlimited liability? An attempt should be made to reach a balance between developed countries and developing countries. The two-tier system would certainly be a good solution, allowing the claimant to receive compensation according to their claim. It could also balance the inequities among people from variety of countries.

Moreover, to provide more reasonable compensation for citizens of all countries, international community should try to put the Republic of China under the umbrella of the Warsaw System. In the field of private air law, there is a great deal of work to do and not a moment to should be wasted!

BIBLIOGRAPHY

LEGISLATION

United Kingdom

1992 British Carriage by Air Act Order, the original text of this act may obtained from the Secretary and Legal Adviser's Office of Civil Aviation Authority in U.K.

Civil Aviation--The Licensing of Air Carriers Regulations 1992 No. 2992, the original text of this regulation may be obtained from Secretary and Legal Adviser's Officer of Civil Aviation Authority in England.

Italy

Law No. 274 of 7 July 1988 on the Limit of Liability in International Air Carriage of Persons, Gazzetta Ufficiale Della Repubblica Italiana, Roma, No. 168,19 July 1988, art. 2 & 2(1)(a) [hereinafter *Law No. 274 on Limit of Liability*]

Civil Code 1681.

Navigation Code 409.

Australia

Civil Aviation (Carriers' Liability) No. 2 of 1959. An Act relating to Carriage by Air [Assented to 21st April, 1959.], A.J. Arthur, Australia Commonwealth Acts 1959 The Acts of The Parliament of The Commonwealth of Australia Passed During The Year 1959 in First Session of the Twenty-third Parliament of The Commonwealth, with Appendix, Tables, and Index, Commonwealth Government Printer, Canberra, 1959.

Germany

BGB 275, 278, 280.

Japan

Civil Traffic Accident Suits-Compensation Award Standards [also known as the Red Book].

Republic of China, Taiwan

Chinese Civil Aviation Law
Chinese Civil Air Regulations

Civil Code of 1929

Consumer Protection Law of 1994

Governing Standard on Law and Regulation of 1970

CASES

Australia

Georgopoulos v. *American Airlines Inc.*, (Supreme Court of New South Wales, No. S11422/1993.

Belgium

cfr. Depage, P. 1109; Cass., 25 September 1959, Pas., 1960 1, 113.

France

Cass., 3 April 1959, Pas., 1959, I, 773.

Cie Air France v. *Consorts Teichner* (1987) 23 European Transportation Law 87.

Germany

Landgericht Mönchengladbach, (9 0 58/87) 24 February 1988; 1988 Transportation Law Review 283.

Italy

Fratelli Martinez v. *Thai Airway, Alitalia*, Tribunal of Naples (1989) XIV:4/5 Air L. at 213.

United States

Adler v. *Malev Hungarian Airline*, 23 Avi. 18,157 (S.D.N.Y. 1992).

In Re Air Disaster in Lockerbie, 22 Avi. 17,735 (E.D.N.Y. 1990) & 17,858 (E.D.N.Y. 1989).

Air France v. *Saks*, 18 Avi. 18,706 (9th Cir. 1984) aff'd 18 Avi. 18,538 (Fed. Sup. Ct. 1985).

Atlantic mutual Ins. Co. v. *Northwest Airlines, Inc.* (24 Avi. 17,122) (796 F. Supp. 1188) (E.D. Wisc. 1992) (1992 Westlaw 197222) [hereinafter *Atlantic* v. *Northwest*].

Burnett v. *Trans World Airlines, Inc.*, 12 Avi. 18,405 (N.M. D. Ct. 1973).

Eastern Airlines, Inc. v. *Floyd et al.*, 23 Avi. 17,367 (Fed. Sup. Ct. 1991) & 17,811 (11th Cir. 1991).

Fernandez v. *Linea Aeropostal Venesolana*, 5 Avi. 17,634 (S.D.N.Y. 1957).

In Re Hijacking of Pan American Airways Aircraft at Karachi International Airport, 22 Avi. 17,741 (S.D.N.Y. 1990).

Husserl v. *Swiss Air Transport Co.*, 13 Avi. 17,603 (S.D.N.Y. 1975).

Kahn v. *Trans World Airlines, Inc.*, 12 Avi. 18,032 (N.Y. Supp. Ct. 1973).

Komlos v. *Compagnie Nationale Air France*, 3 Avi. 17,969 (S.D.N.Y. 1952).

In Re Korean Airlines Disaster of September 1, 1983, 24 Avi. 18,157 (D. D.C. 1994).

M. K. Lee v. *China Airlines*, Ltd. et al. (21 Avi. 17) (669 F. Supp. 979, 980) (C. D. Cal. 1987).

Morgan v. *United Air Lines Inc.*, 23 Avi. 17,438 (D. D.C. 1990).

Nortarian v. *Trans World Airlines, Inc.*, 9 Avi. 17,871 (W.D. Pa. 1965).

Noel v. *Linea Aeropostal Venesolana*, 5 Avi. 17,125 (S.D.N.Y. 1956), aff'd, 5 Avi. 17,544 (Fed. Sup. Ct. 1957).

Palagonia v. *Trans World Airlines Inc.*, 442 N.Y.S. 2d 670.

Polatex Trading Co. Pty. Limited v. *Scandinavian Airlines System and Singapore Airlines Limited* (District Court of New South Wales, No. 23603/81).

Rosman v. *Trans World Airlines, Inc.*, 13 Avi. 17,231 (N.Y. App. Ct. 1974).

Rullman v. *Pan Am*, 18 Avi. 17,688 (N.Y. Sup. Ct. 1983).

Salamon v. *KLM*, 3 Avi. 17,768 (N.W. County 1951).

Sheris v. *The Sheris Co.*, 12 Avi. 17,394 (Va. Sup. Ct. 1972).

Spenser v. *Northwest Orient Airlines, Inc.*, 7 Avi. 17,820 (S.D.N.Y. 1962).

Trans world Airlines Inc. v. *Franklin Mint Corporation*, 18 Avi.17,778 (Fed. Sup. Ct. 1984).

Warshaw v. *TWA*, 14, Avi. 18,297 (Pa. E.D. 1977).

Winsor Adm'r v. *United Airlines, Inc.*, 5 Avi. 17,509 (E.D.N.Y. 1957).

Zousmer v. *Canadian Pacific Airlines*, Ltd., 11 Avi. 17,381 (S.D.N.Y. 1969).

SECONDARY MATERIALS

Books

Central Statistical Office, *Monthly Digest of Statistics*, February 1996, No. 602, London: HMSO

Chayes A., et. al., *International Legal Process*, vol. 2 (Boston: Little Brown & Co., 1969).

Chinese Civil Aviation Law and Chinese Civil Air Regulations, trans. Lung W.W. (Taipei: Wu-Chou Publication Co., 1972)

Comité Maritime International, *International Conventions on Maritime Law* (1987)

Drion H., *Limitation of Liability in International Air Law* (The Hague: Martinus Nijhoff, 1954).

Emery W.L. et al. eds., *Commodity Year Book* (New York: Commodity Research Bureau, 1976).

Fleming J.G., *The Law of Torts*, 8th ed. (U.S.A.: The Law Book Company Limited., 1992).

Harakas A.J., *Aviation Insurance: A New York Perspective* (Thesis, Institute of Air and Space Law, McGill University, 1990).

IATA, *World Air Transport Statistics* (6/96) No. 40.

IMF, *International Financial Statistics* (1996) XLIX: 6.

IMF, *International Financial Statistics* (1996) XLIX:8.

IMF, *International Financial Statistics Year Book* (1981)

IMF, *Users' Guide to the SDR* (Washington D.C.: IMF, 1995).

Keeton W.P. et al., *Prosser and Keeton on Torts*, 5th ed. (USA: West Publishing Co., 1984).

Knight-Ridder Financial/ Commodity Research Bureau, *The CRB Commodity Year Book* (New York: John Wiley & Sons, 1996).

Leflar R.A., McDougal III L.L. & Felix R.L., *American Conflicts Law*, 4th ed. (USA: The Michie Company Law Publishers, 1986).

Mankiewicz R., *The Liability Regime of the International Air Carrier* (Denver: Kluwer Law and Taxation Publisher, 1981).

Martin P. et al., eds., *Shawcross and Beaumont: Air Law*, 4th ed., vol. 1 (London: Butterworths, 1996).

Martin P. & Martin E., *Shawcross and Beaumont Air Law*, 4th ed., vol. 2 (London: Butterworths, 1996).

Mazeaud H. & Tunc A., *Traité Théorique et Pratique de la Responsabilité Civile Délictuelle et Contractuelle*, vol. III: 2573 (Paris: Éditions Montchrestien, 1960).

Miller G., *Liability in International Air Transport* (Denver: Kluwer, 1977)

Milde M., *The Problems of Liability in International Carriage by Air* (Praha: University Karlova, 1963).

Parkington M. et al., eds., *Macgillivray & Parkington on Insurance Law* (London: Sweet & Maxwell, 1988).

Scoles E.F. & Hay P., *Conflict of Laws* (USA: West Publishing Co., 1984).

The Civil Code of The Republic of China, trans. Hsia C.L., Chow J.L.E. & Chang Y. (Shanghai: Kelly & Walsh, Limited, 1930).

Tobolewski A., *Monetary Limitations of Liability in International Private Air Law* (Thesis, Institute of Air and Space Law, McGill University, 1981).

Volundardottir K., *Liability in International Air Transport: An Icelandic Perspective*/c (Thesis, Institute of Air and Space Law, McGill University, 1993).

Articles

Abeyratne R.I.R., "Liability for Personal Injury and Death under the Warsaw Convention and its Relevance to Fault Liability in Tort Law" (1996) XXI:I Ann. Air & Sp. L. 1.

Barrett J., "Australian Court refuses to follow Franklin Mint" (1985) X:6 Air & Sp. L. 292.

Bechky P.S., "Mismanagement and Misinterpretation: U.S. Judicial Implementation of the Warsaw Convention in Air Disaster Litigation" (1994-1995) 60 J. Air L. & Com. 455.

Briant A.M., "International Carriage of Cargo: A Comparative Study of The Liability of The Carrier in Maritime and Air Transport Law" (1993) XVIII:I Ann. Air & Sp. L 45.

Caplan H., "The European Proposal on Compensation for Airline Passenger Death and Injury - Bold, Imaginative and Flawed" (1996) Lloyd's Avi. L. 15:5 1.

Caplan H., "The Millennium Has Arrived: Compensation for Death and Injury in International Air Travel" (1996) 4:3 Int'l Ins. L. Rev. 84.

Caplan H., "Unlimited Air Carrier Liability- A View from the Sideline" (Proceedings of the 15th Annual Conference of the Aviation Law Association of Australia & New Zealand, Queenstown NZ 30 September 1996).

Caplan H., "Implementation of IIA & MIA Following DoT Order 96-11-6" (1996) Private Memorandum No. 3 for IAIA 961202 [unpublished].

Chen C.V., "A Missing Link of the Warsaw Liability System: An Republic of China (Taiwan) Perspective" (Address to the International Conference "Air and Space Law Challenges: Confronting Tomorrow" held by Institute of Air and Space Law, McGill University and The Canadian Bar Association from 25-27 October 1996.) This article will be published in (1997) XXII:I Ann. Air & Sp. L.

Cheng B., "A Fifth Jurisdiction without Montreal Additional Protocol No. 3, and Full Compensation without the Supplemental Compensation Plan" (1995) XX:3 Air & Sp. L. 118

Cheng B., "A Reply To Charges of Having Inter Alia Misused The Term Absolute Liability in Relation to The 1966 Montreal Inter-Carrier Agreement in My Plea for an Integrated System of Aviation Liability" (1981) 6 Ann. Air & Sp. L. 3.

Cheng B., "Air Carriers' Liability for Passenger Injury or Death" (1993) XVIII:3 Air & Sp. L. 109.

Cheng B., "Fifty Years of the Warsaw Convention Where Do We Go from Here?" (1979) 28 ZLW 373.

Cheng B., "Sixty Years of the Warsaw Convention: Airline Liability at the Crossroads" (1990) Pt. 2 39 ZLW 3.

Cheng B., "What is Wrong with the 1975 Montreal Additional Protocol No. 3?" (1989) XIV:6 Air. L. 220.

"Contracting Parties to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 and the Protocol Modifying the said Convention Signed at the Hague on 28 September 1955" (1993) XVIII:II Ann. Air & Sp. L. 373.

Dempsey P.S., "Pennies from Heaven - Breaking through the Liability Ceilings of Warsaw" addressed to the International Conference "Air and Space Law Challenges: Confronting Tomorrow" held by Institute of Air and Space Law, McGill University and The Canadian Bar Association from 25-27 October 1996. This article will be published in (1997) XXII:I Ann. Air & Sp. L.

Gates S., "Japanese Solution - Is It an International Answer?" (1993) 12:8 Lloyd's Avi. L. 1.

Gerry C.N. & Miller T.H., "Gold, Silver, Copper, Lead and Zinc in Washington" (1932-1933) Statistical Appendix to Year Book Minerals 133.

Guerreri G., "Law No. 274 of 7 July 1988: A Remarkable Piece of Italian Patchwork" (1989) XIV:4/5 Air & Sp. L. 176.

Guerreri G., "The Warsaw System Italian Style: Convention Without Limits" (1985) X:6 Air & Sp. L. 294.

Haanappel P.P.C., "News from International Organization" (1996) XXI:2 Air & Sp. L. 90.

Hayashida K., "Waiver of Warsaw Convention and Hague Protocol Limits of Liability on Injury or Death of Passenger by Japanese Carriers"(1993) 42 ZLW 144.

Hedrick R., " The New Intercarrier Agreement on Passenger Liability: Is it a Wrong Step in the Right Direction?" (1996) XXI:II Ann. Air & Sp. L. 135.

IATA, "The International Passenger Liability Regime", The Final Resolutions of 52nd Annual General Meeting (1996) The original text may be obtained from IATA.

ICAO, "Status of Certain International Air Law Instruments" (1995) 50:6 ICAO Journal 33.

Kreindler L.S., "The view from the United States -- an Interim Solution?" (1992) 11:4 Lloyd's Avi. L. 2.

Lee T.H., "The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries" (1986) XI:6 Air. L. 242.

Liste des Pays Représentés et de Leurs Délégués, II Conférence Internationale de Droit Privé Aérien, 4-12 Octobre 1929 Varsovie (Warszawa 1930).

Lowenfeld A.F., "A Postscript and Warning" (1996) XXI:4/5 Air & Sp. L. 187.

Lundblad P., "Supplemental Compensation Plans - Who Needs Them?" (1992) 11:2 Lloyd's Avi. L. 1.

Martin P., "The 1995 IATA Intercarrier Agreement: An Update" (1996) XXI:3 Air & Sp. L. 126.

Martin P., "The 1995 IATA Intercarrier Agreement: Proposed Special Contract Amendments to the Warsaw Convention - Will They Work?" (1966) XXI:1 Air & Sp. L. 17.

Mateesco-Matte M., "Should The Warsaw System Be Denounced or 'Integrated'?" (1980) Ann. Air & Sp. L. V 201.

Matte N.M., "The Warsaw System and The Hesitations of The US Senate" (1983) VIII:I Ann. Air & Sp. L. 151.

Mendelsohn A.I., "Warsaw: In Transition or Decline?" (1996) XXI:4/5 Air & Sp. L. 183.

Mercer T., "Unlimited Liability to Passengers: 'The Japanese Initiative' and its Consequences or 'Whither the Warsaw System'?" (1993) 12:20 Lloyd's Avi. L. 1.

Milde M., "A Letter to P.V. Murphy, Deputy Assistant Secretary for Aviation and International Affairs, Department of Transportation" This letter is distributed during the International Conference "Air and Space Law Challenges: Confronting Tomorrow", held by Institute of Air and Space Law, McGill University and Canadian Bar Association, from 25 to 27 October, 1996.

Milde M., "IATA Inter-Carrier Liability Agreement" (From Warsaw to The Hague, Guatemala City, Montreal and Kuala Lumpur) (Lecture Notes for a Presentation at the Republic of Korean Air Force Academy) 19 November, 1995 [unpublished].
Milde M., "ICAO Work on The Modernization of The Warsaw System" (1989) XIV:4/5 Air L. 193.

Milde M., "Warsaw Requiem or Unfinished Symphony? (From Warsaw to The Hague, Guatemala City, Montreal, Kuala Lumpur and to...?)" (1996) Pt. I The Avi. Q. 37.

Milde M., "'Warsaw' System and Limits of Liability--Yet Another Crossroad?" (1993) XVIII:I Ann. Air & Sp. L. 201.

Müller-Rostin W., "The IATA Intercarrier Agreement - The Thoughts of an Yet Unconvinced" (1996) 15:14 Lloyd's Avi. L. 1.

O'Toole K., "The Top Fifth Airlines" [31 July-6 August 1996] Flight International 31.

Pyne T., "Developments in Australian Carriers' Liability Legislation" (1996) Pt. I The Avi. Q. 78.

Sekiguchi M., "Why Japan Was Compelled to Opt for Unlimited Liability" (1995) XX: II Ann. Air & Sp. L. 337.

Shifrin C.A., "Aviation Safety Takes Center Stage Worldwide" (4 November, 1996) Avi. Week & Sp. Tech 46.

Tobolewski A., "The Special Drawing Right in Liability Convention: An Acceptable Solution?" (1979) Llyod's MCLQ 169.

Tompkins G.N., Jr., "The Light from the East Finally Illuminates the United States Department of Transportation". [unpublished at the time of writing this thesis]. A copy of this article may be obtained directly from Mr. George N. Tompkins.

Tripp E.G., "Insurance Update" (1994) March B. & C. Avi. 60.

USA, DOT, Order to Show Cause, Order 96-10-7, 3 October 1996 (Docket OST-95-232 & OST-96-1607).

USA, DOT, Order Approving Agreements, Order 96-11-06 (Docket OST-95-232 & OST-96-1607).

Weber L., "International Organization, (b) IATA" (1994) XIX:I Ann. Air. Sp. L. 652.

Weber L. & Jakob A., "Reforming the Warsaw System" (1996) XXI:4/5 Air & Sp. L. 175.

TREATIES

1976 Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974, the text of this protocol could be obtained from Comité Martime International, *International Conventions on Maritime Law*, 1987 at 306-311.

Additional Protocol No. 1 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929, 25 September 1975, ICAO Doc. 9145.

Additional Protocol No. 2 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, signed at Montreal on 25th September 1975, ICAO Doc. 9146.

Additional Protocol No. 3 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air, signed at Warsaw on 12th of October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, 25 September 1975, see ICAO Doc. 9147.

Agreement on Measures to Implement the IATA Intercarrier Agreement, an official copy of this Agreement may be obtained from IATA. For the text of the Agreement, see (1996) XXI:I Ann. Air & Sp. L. 299.

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

Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, the text of this convention could be obtained from Comité Martime International, *International Conventions on Maritime Law*, 1987 at 292-305.

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

Convention on damage caused by foreign aircraft to third parties on the surface on 7 October 1952, ICAO Doc. 7364.

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, 18 September 1961, ICAO Doc. 8181.

IATA Intercarrier Agreement on Passenger Liability. An official copy of this Agreement may be obtained from IATA. For the text of the Agreement, see (1996) XXI:I Ann. Air & Sp. L. 293.

International Convention for the Unification of Certain Rules of Law Relating to Bills of Loading, 25 August 1924, 120 LNTS.

Montreal Protocol No. 4 to Amend the Convention of the Unification of Certain Rules Relating to international Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol done at the Hague on 28th of September 1955, 25 September 1975, ICAO Doc. 9148.

Protocol of 1990 to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggae by Sea, 1974, the text of this protocol could be obtainded from Schoenbaum T.J., *Admiralty and Maritime Law*, 2nd ed. (USA: West Publishing Co., 1994) 3, app. D, at 857-862.

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, 28 September 1955, ICAO Doc. 7632.

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929 as Amended by the Protocol done at the Hague on 28th September 1955, 8 March 1971, ICAO Doc. 8932.

Protocol to Amend the 1924 International Convention for the Unification of Certain Rules of Laws Relating to Bills of Loading, 23 February 1968, 1977 UKTS 83.

Protocol of 1990 to Amend the Athens Convention Relating to the Carriage of Passengers and Their Luggage by Sea, 1974 in T.J. Schoenbaum, Admiralty and Maritime Law, 2d ed. (USA: West Publishing Co., 1994), app. D.

Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11.

Vienna Convention on The Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331

Documents and Working Papers

ICAO, Assembly- 27th Session, ICAO Doc. 9551, A27-RES(1989).

ICAO General Assembly-31st Session, Legal Commission, Agenda Item 38: Work Programme of The Organization in The Legal Field, A31-WP/55,LE/3, 1 January, 1995.

ICAO, Assembly 31st Session, Legal Commission, Agenda Item 38: Work Programme of the Organization in the Legal Field, ICAO A31-WP/55, LE/3 (1 August, 1995).

ICAO, Council 142nd Session, ICAO Doc. 9665-c/1116, C-Min. 145/1-28 (1995).

ICAO, Council-145th Session, ICAO Doc. 9665-c/1116, C-Min. 145/1-28 (1995).

ICAO, 147th Session of The Council, Air Transport Committee, Socio-Economic Analysis of Air Carrier Liability Limits, ICAO AT-WP/1769 (4 January, 1996).

ICAO, Council-147th Session, Report on Modernization of the "Warsaw System", ICAO C-WP/10381 (5 March 1996).

ICAO, Council-149th Session, Progress Report on Modernization of the "Warsaw System", ICAO C-WP/10470 (20 September, 1996), the original text see attachment B "Draft New Warsaw Instrument [ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air]".

ICAO Legal Committee, 2nd Session, ICAO Doc. 6014, LC/III (1948).

ICAO Legal Committee, 3rd Session, ICAO Doc. 6024, LC/121 (1948).

ICAO Legal Committee, 4th Session, ICAO Doc. 6027, LC/124 (1949).

ICAO Legal Committee, 5th Session, ICAO Doc. 6029, LC/126 (1950).

ICAO Legal Committee, 7th Session, ICAO Doc. 7157, LC/130 (1951).

ICAO, Subcommittee of the Legal Committee on the Question of Revision of the Warsaw Convention as Amended by the Hague Protocol: Documentation, ICAO Doc. 8839-LC/158 (1969).

ICC, Policy Statement on the Attempts to Preserve and Update the Warsaw System on Passenger Liability in International Air Transport, ICC document 310/409 Rev.

ICC, Policy Statement on Cargo and Baggage Liability in International Air Transport, ICC Doc. No. 310/416 Rev. 2.

Rules and Regulations

EU, Council Regulation (EEC) No. 2407/92 on 23 July 1992 on licensing of air carrier (1992) No. L240/1 Off. J. EC.

IATA Act of Incorporation of Act of Incorporation Articles of Association Rules and Regulations, 17th ed., November 1991, s. A, art. 3.

Rules of Procedure of the Legal Committee in ICAO, ICAO Doc. 7669-LC/139/4 at Attachment A.

Proposals

Commission of the European Communities, Proposal for a Council Regulation on Air Carrier Liability in Case of Accidents, 12 December 1995, Brussels, COM (95) 724 Final, 95/0359 (SYN). See also Off. J. EC, No. C 104/18, 10 April 1996.

Proposal of the Delegation of New Zealand, LC/Working Draft No. 745-15 in ICAO Doc. 8878-LC/162 at 364.

Reports and Papers

EC Consultation Paper, Reference: VII. C.1-174/92-8; ES/LG/MGT.

ICAO, *Annual Report of the Council 1995*, ICAO Doc. 9667 (1996).

IMF, *From Plan to Market -- World Development Report 1996* (New York: Oxford University Press, 1996).

Lloyd's of London Press, *Papers from the Forth International Aviation Law Seminar*, The Alvor Praia Hotel, Alvor, Algarve, Portugal, October 11-16, 1987 (1988).

Study on the Possibilities of Community Action to Harmonize Limits of Passenger Liability and Increase the Amounts of Compensation for International Accident Victims in Air Transport, a report submitted by Mr. Sven T. Brise to the Commission of the European Communities pursuant to Contract No. C1, B 91, B2-7040, SIN 001556, dated 15 September 1991; vols. 1 & 2 (appendices). A copy of this report may be obtained directly from Mr. Sven T. Brise.

Report of the eighth meeting of the Working Group "II" on Intra-European air transport policy (EURPOL-II/8), Paris, 29 March 1994, Secretariat of European Civil Aviation Conference. Reference: EC 9/9.4/2.5/6-0530. So called "ECAC Recommendation".

United States Senate, Montreal Aviation Protocols 3 and 4, 101st Congress (2nd session) Executive Report 101-21.

Internet Information

Main DOT Public Affairs Page at http://www.dot.gov/affairs/dot17896.htm

The Republic of China Executive Yuan Government Information Office Home Page at http://www.gio.gov.tw[hereinafter Executive Yuan Home Page].

USA, DOT, Order Approving Agreements at
http://www.dot.gov/general/orders/nov96/ord961106.html

Special Contract

Japan

All Nippon Airways, condition of carriage, paragraph 16 (c) (4)(a)(i).

News

IATA News No. 28, 25 November, 1996.

President's Memorandum for All Department and Agencies: Relations with the People of Taiwan, reprinted in 1979 U. S. Code Cong. & Admin. News 36, 75.

Appendix A

List of Carriers Signatory to the IATA Intercarrier Agreement on Passenger Liability As of 25 January, 1997

1. Aer Lingus plc
2. Aerolineas Argentinas S. A.
3. Aeromexpress
4. Aerovías de México, S. A. de C. V. (Aeromexico)
5. Air Afrique
6. Air Aruba
7. Air Baltic Corporation SLA
8. Air Canada
9. Air Exel Commuter
10. Air France
11. Air Mauritius
12. Air New Zealand
13. Air UK Group Limited
14. Air Vanuatu
15. Alaska Airlines
16. All Nippon Airways Co., Ltd.
17. Allegheny Airlines, Inc.
18. American Airlines
19. American Trans Air, Inc.
20. Augsburg Airways GmbH
21. Austrian Airlines
22. Azerbaijan hava Yollary
23. British Airways p.l.c.
24. Canadian Airlines International
25. Cathay Pacific Airways Ltd.
26. Cimber Air A/S
27. Continental Airlines Inc.
28. Croatia Airlines
29. Crossair
30. Delta Air Lines, Inc.
31. Deutsche BA Luftfahrtgesellschaft mbH
32. Deutsche Lufthansa AG
33. Egyptair
34. Finnair OY
35. Garuda Indonesia
36. GB Airways
37. Hawaiian Airlines
38. Iberia
39. Icelandair
40. Japan Air System Co. Ltd.
41. Japan Airlines Co. Ltd.
42. Jet Airways (India) Pvt Ltd.
43. Kenya Airways
44. Kiwi International Air Lines
45. KLM Cityhopper B. V.
46. KLM Royal Dutch Airlines
47. Korean Air Lines Co., Ltd.
48. LAPSA Líneas Aéreas Paraguayas
49. Luxair
50. Maersk Air Ltd.
51. Malaysia Airlines
52. Malev - Hungarian Airlines Public Ltd. Co.
53. Martinair Holland N.V.
54. Midwest Express Airlines, Inc.
55. Northwest Airlines, Inc.
56. Pakistan International Airlines (PIA)
57. Piedmont Airlines, Inc.
58. PSA Airlines, Inc.
59. Qantas Airways Limited
60. Reeve Aleutian Airways, Inc.
61. Regional Airlines
62. Royal Air Maroc
63. SABENA
64. Sandi Arabian Airlines Corp.
65. Scandinavian Airlines System (SAS)
66. Singapore Airlines Ltd.
67. South African Airways
68. Swissair
69. TACA
70. TAP Air Portugal
71. TAT European Airlines
72. Trans World Airlines Inc. (TWA)
73. Transavia Airlines C. V.
74. Trinidad & Tobago BWIA International
75. Tyrolean Airways - Tiroler Luftfahrt - AG
76. United Airlines
77. UPS Airlines
78. US Air, Inc.
79. Varig S. A.
80. VIASA

Appendix B

List of Carrier Signatory to the Agreement on Measures to Implement the IATA Intercarrier Agreement
As of 25 January, 1997

1. Air Baltic Corporation SIA
2. Air Canada
3. Air France
4. Air New Zealand
5. Alaska Airlines
6. Allegheny Airlines, Inc.
7. American Airlines
8. American Trans Air
9. AMR Combs BJS, Inc.
10. AMR Eagle, Inc.
11. Austrian Airlines
12. British Airways p.l.c.
13. Canadian Airlines International
14. Cathay Pacific Airways Ltd.
15. Continental Airlines Inc..
16. Crossair
17. Delta Air Lines, Inc.
18. Deutsche BA Luftfahrtgesellschaft
19. Deutsche Lufthansa AG
20. Finnair OY
21. GB Airways
22. Hawaiian Airlines
23. Icelandair
24. Kenya Airways
25. Kiwi International Air Lines
26. KLM Royal Dutch Airlines
27. Korean Air Lines Co., Ltd
28. Luxair
29. Maersk Air Ltd.
30. Midwest Express Airlines, Inc
31. Northwest Airlines
32. Piedmont Airlines, Inc.
33. PSA Airlines, Inc.
34. Qantas Airways Limited
35. Reeve Aleutian Airways, Inc.
36. SABENA
37. Scandinavian Airlines System (SAS)
38. Singapore Airlines Ltd.
39. Swissair
40. TAT European Airlines
41. Trans World Airlines Inc (TWA)
42. Transavia Airlines C.V.
43. Tyrolean Airways - Tiroler Luftfahrt - AG
44. United Airlines
45. UPS Airlines
46. US Air, Inc.
47. Varig S.A.

Appendix C

The average market prices of gold per year (US$/ fine ounce)[331]

1963 --	35.09	1991 --	362.18
1964 --	35.00	1992 --	343.74
1965 --	35.00	1993 --	359.67
1967 --	35.00	1994 --	384.22
1968 --	35.00	1995 --	384.16
1968 --	38.63	1996 I --	400.29
1969 --	41.09	1996 II --	390.12
1970 --	35.94	1996 Feb. --	404.48
1971 --	40.81	1996 Mar.--	396.33
1972 --	58.61	1996 Mar.--	396.33
1973 --	97.33	1996 Apr. --	393.14
1974 --	159.25	1996 Apr. --	393.14
1975 --	161.03	1996 May --	391.94
1976 --	124.82	1996 Jun. --	358.27
1977 --	147.72		
1978 --	193.24		
1979 --	306.67		
1980 --	607.87		
1981 --	459.64		
1982 --	375.91		
1983 --	423.83		
1984 --	360.23		
1985 --	317.31		
1986 --	367.70		
1987 --	446.40		
1988 --	436.93		
1989 --	382.92		
1990 --	383.61		

[331] Reproduced. For more details, see IMF, *Int'l Fin. Statis. Y. B.*, (1981) at 78-79; W.L. Emery *et al.* eds., *Comm. Y. B.* (New York: Commodity Research Bureau, 1976) at 173; W.L. Emery *et al.*, eds., *Comm. Y. B.*, (New York: Commodity Research Bureau, 1984) at 163; Knight-Ridder Financial/ Commodity Research Bureau, *The CRB Comm. Y. B.* (New York: John Wiley & Sons, 1996) at 108; IMF, *Int'l Fin. Statis.* (1996) XLIX:8 at 80.

Appendix D

1994 GNP per Capita (Dollars)[332]

Low-income economies: average GNP is 380 w; excluding China and India, the average is 360 w

Rwanda -- 80
Mozambique -- 90
Ethiopia -- 100
Tanzania[333]-- 140
Burundi -- 160
Sierra Leone -- 160
Malawi -- 170
Chad -- 180
Uganda -- 190
Madagascar -- 200
Nepal -- 200
Vietnam -- 200
Bangladesh -- 220
Haiti -- 230
Niger -- 230
Guinea-Bissau -- 240
Kenya -- 250
Mali -- 250
Nigeria -- 280
Yemen, Rep. -- 280
Burkina Faso -- 300
Mongolia -- 300
India -- 320
Lao PDR -- 320
Togo -- 320
Gambia, The -- 330
Nicaragua -- 340
Zambia -- 350
Tajikistan -- 360
Benin -- 370
Central African Republic -- 370
Albania -- 380
Ghana -- 410
Pakistan -- 430
Mauritania -- 480
Azerbaijan -- 500
Zimbabwe -- 500
Guinea -- 520
China -- 530[334]
Honduras -- 600
Senegal -- 600
Côte d'Ivoire -- 610
Congo -- 620
Kyrgyz Republic* -- 630
Sri Lanka -- 640
Armenia* -- 680
Cameroon -- 680
Egypt, Arab Rep. -- 720
Lesotho -- 720
Georgia* -- not available
Myanmar -- not available

"w" weighted averages.

"*" Estimates for economies of the former Soviet Union are preliminary; their classification will be kept under review.

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[332] Reproduced. For more details, see IMF, *From Plan to Market -- World Development Report 1996* (New York : Oxford University Press, 1996) at 188-189.

[333] Here "Tanzania" covers mainland Tanzania.

[334] This data is estimated by World Bank.

Middle-income economies: average GNP is 2,520 w

Lower-income economies: average GNP is 1,590 w

Bolivia -- 770
Macedonia, FYR -- 820
Moldova* -- 870
Indonesia -- 880
Philippines -- 950
Uzbekistan -- 960
Morocco -- 1,140
Kazakstan* -- 1,160
Guatemala -- 1,200
Papua New Guinea -- 1,240
Bulgaria -- 1,250
Romania -- 1,270
Ecuador -- 1,280
Dominican Republic -- 1,330
Lithuania* -- 1,350
El Salvador -- 1,360
Jordan -- 1,440
Jamaica -- 1,540
Parguay -- 1,580
Algeria -- 1,650
Colombia -- 1,670
Tunisia -- 1,790
Ukraine* -- 1,910
Namibia -- 1,970
Peru -- 2,110
Belarus* -- 2,160
Slovak Republic -- 2,250
Latvia* -- 2,320
Costa Rica -- 2,400
Poland -- 2,410
Thailand -- 2,410
Turkey -- 2,500
Croatia -- 2,560
Panama -- 2,580
Russian Federation* -- 2,650
Venezuela -- 2,760
Botswana -- 2,800
Estonia* -- 2,820
Iran, Islamic Rep. -- not available
Turkmenistan* -- not available

Low- and Middle- income: average GNP is 1,090 w

Sub-Saharan Africa -- 1,090 w
East Asia and Pacific -- 460 w
South Asia -- 860 w
Europe and Central Asia -- 2,090 w
Middle East and N. Africa -- 1,580 w
Latin America and Caribbean -- 3,340 w

Upper-middle-income economies: average GNP is 4,460 w

Brazil -- 2,970
South Africa -- 3,040
Mauritius -- 3,150
Czech Republic -- 3,200
Malaysia -- 3,480
Chile -- 3,520
Trinidad and Tobago -- 3,740
Hungary -- 3,840
Gabon -- 3,880
Mexico -- 4,180
Uruguay -- 4,660
Oman -- 5,140
Slovenia -- 7,040
Saudi Arabia -- 7,050
Greece -- 7,700
Argentina -- 8,110
Korea, Rep. -- 8,260

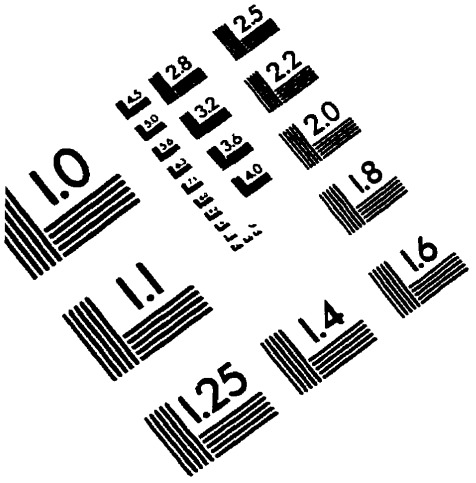
High-income economies: average GNP is 23,420 w

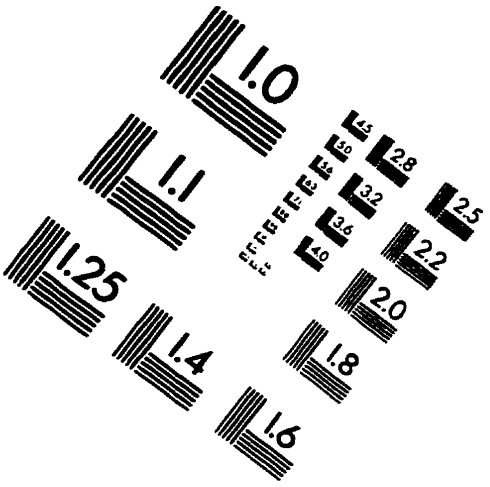
Portugal -- 9,320
New Zealand -- 13,350
Spain -- 13,440
Ireland -- 13,350
♣Israel -- 14,530
Australia -- 18,000
United Kingdom -- 18,340
Finland -- 18,850
Italy -- 19,300
♣Kuwait -- 19,420
Canada -- 19,510
♣Hong Kong -- 21,650
Netherlands -- 22,010
♣Singapore -- 22,500
Belgium -- 22,870
France -- 23,420
Sweden -- 23,530
Austria -- 24,630
Germany -- 25,580
United States -- 25,880
Norway -- 26,390
Denmark -- 27,970
Japan -- 34,630
Switzerland -- 37,930
♣United Arab Emirates -- not available

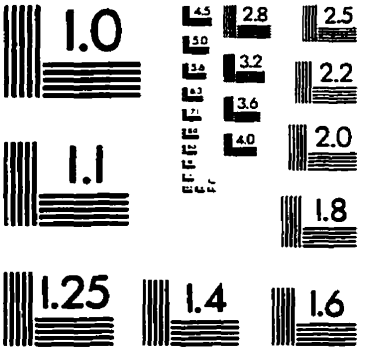
World average GNP is 4,470 w in 1994.

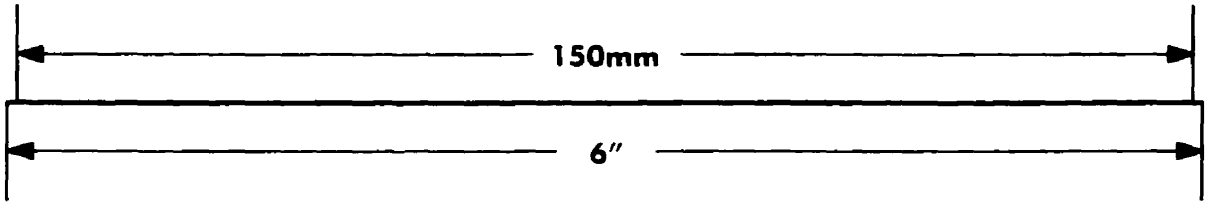
"♣" Economies classified by the United Nations or otherwise regarded by their authorities as developing.

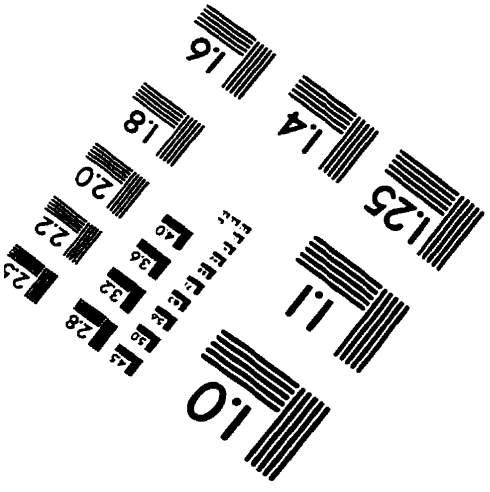
IMAGE EVALUATION TEST TARGET (QA-3)

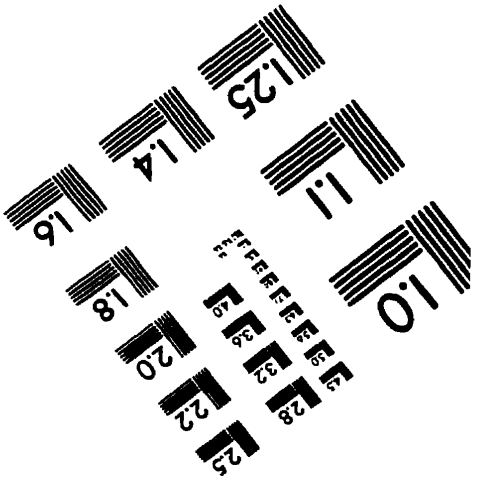












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