ECONOMIC AND LEGAL DEVELOPMENTS ON CARRIAGE OF GOODS BY AIR

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"As far as air freight is concerned, we are only beginning to see the horizon . . . ."

Sir William Hildreth, C.B.,OBE,LLD.
Director General IATA,
Montreal, 1965.

"It is true that a great deal has been said and written about this newest form of cargo transportation, but it is also true that there remains a vast desert of ignorance about it."

Richard Malkin
New York, 1973

ABSTRACT

The Air freight industry is a progressive industry which requires progressive laws. Over the years, carriage of goods by air has evolved from a mere by-product of air-passenger carriage to a full-fledged remarkably profitable market characterized by fast-paced economic developments on the one hand, but slow-paced legal developments on the other hand. The primary source of the law regulating the industry is international treaties. One of the most important of them is the Warsaw Convention which now risks losing its utility because of its obsolescence. It is very important, therefore, that the various protocols amending, as well as the new conventions supplementing, it are given the required ratifications to enter into force as soon as possible. Unless and until that is done, however, case law remains the most significant recourse for narrowing the gap between the economic and legal developments.

SOMMAIRE

L'industrie du fret aérien est en plein expansion et ses lois doivent devélopper en fonction. Simple constituant négligeable du trafic passagers autrefois, le trafic fret est devenu au cours des années une industrie à part entier, tres rentable et marquée par des devéloppements économiques galopants, d'une part, et par des devéloppements légaux qui traînent, d'autre part. La plupart des lois qui gouvernent l'industrie proviennent des traités internationaux dont l'un des plus important, la Convention de Varsovie, s'avère de plus insatisfaisante en raison de son obsolescence. Alors, devient-il impératif que soient ratifiée toutes les protocoles portant sa modification ainsi que les nouvelles conventions supplémentaires en vue de leur mise en rigueur dans les meilleurs délais. Entretemps, la jurisprudence restera l'instrument le plus important pour réduire l'écart entre devéloppements économiques et devéloppements légaux.

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INTRODUCTION

Rabbi Harold Kushner says in his book, 'When Bad Things Happen to Good People', that a creative scientist or historian does not make up facts, but orders them; he sees connections between them rather than seeing them as random data. A creative writer does not make up words, but arranges familiar words in patterns which say something fresh to us. This author does not necessarily agree that that observation is generally true, but this thesis does almost exactly what the Rabbi observed.

It will be both pretentious and presumptuous for this thesis to lay claims to any spectacular novelties in the Air Cargo industry that do not exist already in any of the existing literature on the subject. It only attempts to order both the economic and legal facts and to make a connection between them rather than leaving them to drift in their different directions. In doing so, the author is mindful not to make it a fact-cataloguing exercise, for if that happens, the work will founder on the rocks of superficiality and will be worth very little. A significant feature of the thesis is its change of emphasis on certain issues.

History of Air Cargo

It would be agreeable to give a brief history of carriage of goods by air. The concept of Air Cargo can be traced as far back as 1709. In that year, King John V of Portugal granted a patent to Father Bartholomeo de Guzmao who had devised a rather

weird airship of iron.[1] The patent read:

> "We . . . make known that Father Bartholomeo Lourenzou de Guzmao has discovered an instrument . . . . By this instrument one can deliver important messages and troops to distant countries . . . which interest us more than it does other sovereigns on account of the great extent of our possessions; one can avoid, therefore, the great distances of colonies . ... and furthermore, we can obtain all the necessities from said colonies much sooner and with greater speed . . . . (my underlining)."

Needless to say, King John intended to use air transportation for the economic exploitation of the Portuguese Colonies.

However, whereas air transportation of passengers and mail gathered momentum much earlier, it was only in the early part of the twentieth century that evidence of transportation of goods by air was recorded, and that was in the United States of America. Groenewege pinpoints 1910 as the date when a 60 pound bolt of silk was flown from Dayton to Columbus, Ohio, in the U.S. It was fastened to a wing because there were no

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[1] Wilson and Bryan : Air Transportation, p. 4.

cargo carrying facilities on board. The sixty-five mile flight took sixty minutes.[2]

Another source reports the same historical landmark differently. The first shipment of express matter by air in the United States was a shipment of silk valued at $1000 by a Wright bi-plane from Dayton to Columbus, Ohio, in November 1919. The package of express matter was carried on the passenger's lap.[3]

From the meshes of the recorded facts above, some points can be noted. First, it is a sterile exercise to dwell much on dates in the history of air cargo in isolation from the air transport industry in general. It will suffice to know, as Magdélénat puts it, that the history of air freight follows the progress of aviation in general.[4] Second, silk was the first recorded cargo. The weight and bulk of that commodity might have been the underlying reason for its qualification for air freight. Today, however, goods of astounding weight and bulk are shipped by air. Third, the fact that the consignment was carried on a 'passenger's lap' or was fastened to the wing of the plane (however it must

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[2]Groenewege and Heitmeyer: Air Freight, Key to Greater Profit, p. 18.

[3]Wilson and Bryan: Air Transport, op.cit. p.303.

[4]Magdélénat: Le Fret Aérien, p. 4.

have been carried) shows that facilities for air cargo in the then aircraft were nil. The consignor of that consignment would envy the cargo facilities in our modern cargo planes.

The first commercial venture in air cargo was attempted in the Winter of 1919. A four-motor military bomber, the largest airplane then in existence, carried one thousand pounds of merchsndise from New York to Chicago. Bad weather and fuel difficulties made it necessary for the plane to land at Pittsburgh and again near Cleveland. The latter landing caused damage to the wings of the plane and the experiment was stopped. In 1926, the idea was resurrected and in 1927, Ford-Stout Air Services recorded over two million pounds of freight traffic, all of it for the Ford Motor Company.

In Europe, transportation of goods by air began as early as 1919, with the establishment of the first commercial international air service between London and Paris. By the late 1930s, air consignments had become a common sight at most airports - both domestic and international. At first, commodities tended to be of a special kind (e.g. newspapers and cut flowers) and very few were sent long distances, which was not surprising considering the novelty and high rates of air transport then.

In other parts of the world, transportation of goods by air can safely be said to have begun as early or as late as aviation took roots in those parts. Thus in Africa, there

were shadows of the industry as a result of the aviation spill-over to the colonies from the colonial states like Britain and France. But the industry began to assume significant importance only when those colonies became independent nation states, establishing their own national airlines, and concluding bilaterial aviation agreements with the advanced aviation countries such as the United States and the Netherlands.

Air transport was stimulated during the second World War. After the war, air freight took off extremely well and continued to grow rapidly. Three factors favoured the growth. First, post-war reconstruction and rehabilitation required urgent shipments of badly needed material and relief to long distances. Second, many and improved aircraft used in the war, as well as highly skilled engineering and war production capabilities were turned over to commercial aviation. Third, airports were improved to meet the new challenges.

From the 1960s, the introduction of more efficient aircraft such as the jets, enabled the airlines to progressively reduce air freight rates, thereby providing an added incentive to the growth of the industry. To cap it all, the entry of the super jumbo aircraft into the air freight market, with wider cargo compartments and better cargo carrying facilities gave the industry another great leap forward.

Terminology

As it may have been noticed, a number of terms have already been used and will be used in greater frequency hereafter. It is pertinent to explain the context in which they are used in this paper. The exercise is on 'explanation' and not on 'definition.' Definitions lead to further definitions, impose on the terms defined artificial limits which will not serve the purpose of the subject matter in which the terms defined are used here.

The term 'air freight' is either the service of carrying goods for remuneration or the commercial or revenue deadload carried.[5] 'Air cargo' can be simply goods carried by air or any property carried on an aircraft other than mail, stores and baggage,[6] or a comprehensive term covering all forms of deadload, namely, mail, company stores, passengers' baggage, and commercial freight.[7]

The Warsaw Convention refers to 'cargo' generally in contra-distinction to passengers, mail and baggage.[8] 'Cargo', therefore, includes 'freight'. In both the United States and

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[5]See ICAO Doc. 8235-C1937.

[6]As used in Annex 9 of Chicago Convention.

[7]See Wilson and Bryan:Air transport, op.cit. p.323.

[8]Aee Articles 2 & 18 of Warsaw Convention, for example.

United Kingdom, cargo and freight are used interchangeably.

For the purpose of this thesis, the distinction between the two terms is innocuous. They are both used interchangeably to refer to goods carried by air. So are the terms 'consignment' and 'shipment'. These two latter terms, borrowed from marine transport are very common in the Law Reports. Other terms used are explained in the text.

Scope

The thesis covers all consignments or shipments by air covered by an air waybill, as well as goods forming the contents of unaccompanied baggage. It takes a panoramic rather than an indepth view of some economic and legal developments in the industry. The concentration is on international carriage while domestic carriage is referred to for illustrative or comparative purposes. Both public and private international law conventions are examined,but the latter is given more emphasis.

CHAPTER I

ECONOMIC DEVELOPMENTS

Generalities

This chapter simply discusses the reasons for air freight and commodities suitable for transportation by air; air cargo trends in different regions of the world; and the development of cargo aircraft and routes.

1.1 Reasons for Air Freight

The reasons for using air freight in any particular situation and the purpose underlying its use often involve subjective judgements peculiar to the individual concerned.[9]

1.1.1. Speed

The phenomenal speed of the aircraft compared to other conventional means of transportation makes transportation of goods from one place to another much faster. Thus speed is the principal advantage of carriage of goods by air. However, speed of air transportation should not be confined to the speed of the aircraft alone. For optimum advantage, speed of transportation in the air must be matched by reasonable speed on the ground in getting the shipment quickly from the shipper

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[9]Stanford Research Institute (Emery Air Freight): How to identify Potential Uses of Air Freight, p. 47.

through ground handling and clearance controls to the consignee. Otherwise, the aircraft speed is negated and not worthy of the eulogies in the text books.

Another point must be made about speed. This concept has assumed a misleading dimension. Speed is not an end in itself and so cannot be rightly concluded to be the ultimate reason for air cargo. There are many concievable circumstances where speed is not a consideration for transporting goods by air.

> "It should be noted that the generalization that all types of goods require fast transportation is erroneous."[10]

It is important to have this issue in its correct perspective. The over emphasis placed on speed per se tended to make it synonymous with emergency transportation in the minds of early shippers. For if there is no emergency, why bother about speedy carriage of goods by air? The early years of the industry were accordingly confined to emergency operations. Shippers lost sight of the other reasons for and advantages of air shipment. It took a very long time for some smart shippers to realize that there was much more to transportation of goods by air than merely flying drugs and blankets to distant disaster areas, or flying a machinery

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[10]Wilson and Bryan: Air Transport, op.cit. p. 328.

spare part in order to keep a production line going.

> "These shippers were not interested in speed for speed's sake, but in what speed could accomplish for the consignee in terms of profit.[11]

It is, therefore, unfortunate that some modern authorities can still make postulations such as this:

> "Considering that the airline's client has chosen carriage by air because of its speed, the convention declares the carrier without any qualification, liable for damage occasioned by delay in the carriage by air."[12]

Respectfully, not all airlines' clients today necessarily choose carriage by air because of its speed. "Speed is an extremely important advantage of air transport, but not the only one."[13]

1.1.2. Total Cost Concept (TCC)

With so many cheaper means of transporting goods such as road, rail and water, available why bother to ship them by a

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[11] Cook: International Air Cargo Strategy, p. 111.

[12] Mankiewicz: The Liability Regime of The International Air Carrier, p. 186.

[13] Groenewege: Air Freight, Key to Greater Profit, op.cit. p. 56.

very expensive means - air? This seems to be the question asked and unsatisfactorily answered by early shippers and some inadequately informed modern shippers. The air transport industry has been notably successful in the competition for the carriage of passengers. In contrast to this achievement, the industry has been less successful, notably less successful, in the competition for the carriage of freight.

Part of the explanation lies in the fact that a considerable proportion of the total volume of cargo carried by the other forms of transport is made up of bulk commodities such as oil, coal, iron ore, and grain that because of their relatively low value per unit of weight are not, and it will take a very long time if ever, for them to become part of the market for air transport. Another reason is that whereas the various forms of surface transport are primarily concerned with freight, the air trasnport industry has thus far had operating costs too high for any except a relatively few kinds of freight and has, therefore, concentrated its attention on passengers traffic.[14]

Nevertheless, it is absolutely misleading to consider and compare cost of air transportation of goods in the light of chargeable rates, that is, shipping costs, only. A comprehensive comparison which considers the direct shipping

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[14]See ICAO Doc. 8235-C1937, p.7 for a detailed discussion on the issue.

costs as well as indirect and intangible costs must be made to arrive at a more rational decision whether to ship by air or not.

> "It must be borne in mind, when making direct cost comparisons, that savings in indirect and intangible costs, particularly over the longer periods, can be substantial to the point of overriding other considerations and swinging the overall distribution costs in favour of air."[15]

This overall distribution cost is what some in the industry call the Total Cost Concept (TCC). Others call it the Total Distribution Cost (TDC).[16] The concept takes into account all costs relating to the distribution system, including inventory related costs and transportation related costs. Inventory related costs include costs of holding inventory in storage and transit. The former includes the value of inventories itself, as well as associated costs of warehousing. Seaboard World Airlines estimated that warehousing of overseas inventories can add as much as twenty-five per cent to the cost of the product.[17] In respect of the

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[15] Groenewege: Air Freight, Key to Greater Profit, op.cit. p. 78.

[16] Taneja: The U.S. Air Freight Industry, p. 112.

[17] Ibid, p. 115.

latter, it has been demonstrated that in-transit goods tie up capital and are detrimental to the fulfilment of early cash recovery objectives of the consignee. For some commodities, particularly those identified as air eligible, use of air freight can reduce some of these inventory related costs.

The concept further demonstrates the benefits of effective time saving. Air freight is no longer placed at a comparative analysis with other modes of freight since costs are traded off against time. As a result, the use of air transport for freight can be sold as demonstrably the cheapest choice for certain products and situations in the light of sales and profit turn-over within the time saved. Time saved has a very significant effect on such factors as insurance and interest on capital. It also has a strong influence on customer satisfaction and affords flexibility in adapting to changing market conditions. Conversely, customer dissatisfaction arising from damage or pilferage to goods in transit can result in lost and good will.

Let us examine an illustration of air versus surface cost comparison. The freight is electronic computers and parts. It is shipped from New York, United States, to Paris, France, via an International Air Transport Association (IATA) member airplane. By surface, it goes from New York to Le Havre by ship, and from Le Havre to Paris by rail.[18]

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[18]The example is taken from Groenewege. Air Transport, Key to Greater profit, op.cit. p. 831.

DIRECT COSTS	AIR	SURFACE	AIR	SURFACE
NET WEIGHT	1200 lbs.	1200 lbs.	6000 lbs.	6000 lbs.
GROSS WEIGHT	1250 lbs.	1475 lbs.	6250 lbs.	7375 lbs.
CUBIC VOLUME	92 cu.ft.	118 cu.ft.	460 cu.ft.	590 cu.ft.
DECLARED VALUE FOR INSURANCE	$9,500.00	$9,500.00	$47,500.00	$47,500.00
DOOR-TO-DOOR SHIPPING TIME (AVERAGE)	2 days	20 days	2 days	20 days
PACKING or CRATING, INCLUDING LABOUR	$35.00	$90.00	$175.00	$450.00
PICK-UP and DELIVERY CHARGES	$36.77	$41.40	$126.59	$145.77
TRANSFER CHARGES	NIL	$6.30	NIL	$29.70
FREIGHT CHARGES	$337.50	$188.10	$1,437.50	$940.30
INSURANCE	$11.88	$95.00	$59.38	$475.00
DOCUMENTATION CHARGES	NIL	$27.50	NIL	$36.50
TRANSIT WAREHOUSING & WHARFAGE	NIL	$25.00	NIL	$45.00
INTEREST ON CAPITAL	$2.60	$26.00	$13.00	$130.00
TOTAL	$423.75	$499.30	$1,811.47	$2,252.27
SAVING ON DIRECT COSTS ALONE	+ $75.55 or 15.13%		+ $440.80 or 19.57%	
SAVING IN DELIVERY TIME (AVERAGE)	18 days		18 days	

In the final analysis, it is possible to show in a substantial number of cases that, on a Total Cost Concept basis the difference between air and surface freight transportation costs is negligible. Or even, as revealed in certain highly publicized instances, air freight is the better dollar-and-cent bargain.[19]

However, even the Total Cost Concept is not the ultimate reason for air freight.

> "In spite of (the advantages),I am hardly inclined to recommend TCC as the last word in determining the value of air freight to the shipper/ purchaser. It is not."[20]

1.1.3. Increased Profitability

The higher cost for shipping goods by air recedes in importance when an open door to profit opportunities is considered. Air freight increases profits in a good number

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[19]Cook: Air Cargo Strategy, op.cit. p. 111.

[20]Ibid, Forward by Richard Malkin, p. iv.

of ways. Hitherto unreached markets can be exploited, product market life can be increased, and premium-price markets can be reached fast. The use of air freight, therefore, broadens market horizon. The shipper can capture the impulsive buyers with new products while they are still fresh and while publicity and promotions are still at their peak. Moreover, fluctuations in prices of products can be reduced by fast transfer of goods from one market to another where they are in season and can even be sold at a premium.

The market for some products and the requirements for some supply items may be time limited. For a saving in transit time to be significant, the demand requirement or useful life of the commodity must be short relative to the transit time itself. There are two types of time-limited situations: situations in which the demand for the commodity is time-limited, and situations in which the useful life of the commodity is short. In the former case, we have examples like christmas trees, newspapers, fashion wears, popular records and campaign buttons. This is the so called fad market. In the latter case, perishable goods such as cut-flowers, vegetables and fruits are good examples.

French table wines are normally transported by surface. However, Beaujolais is shipped by air because this particular wine is consumed while young. It has a relatively short

life.[21]

1.1.4. Urgency

This has been one of the traditional reasons for air freight - and it is still very much alive today.

> "Speed is only indispensable when goods are urgently needed, and the types of goods have little to do with the urgency of the need."[22]

In community and private life, and in almost any aspect of business activity, emergencies may arise in which some commodity, equipment or machinery part is so desperately needed that cost of transporting it is no object. Air freight has proved the best means to meet such emergency situations. It may not be advantageous to use air freight for normal procurement or distribution of food and medicine to some parts of a country or the world, but when there is a natural disaster, such as flood and earthquake,or a general wave of sickness, air freight is sought after desperately. History is replete with such examples, as had happened in Italy,

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[21]Taneja: The U.S. Air Freight Industry, op.cit. p.117.

[22]Wilson and Bryan: Air Transport op.cit. p. 328.

China, the United States, and Africa, to name only a few.

Ominously, where nature does not cause an emergency, man creates one. The air freight industry stands to gain anyway. The Vietnam War is a good example. But an even more apt example is the Berlin Blockade of 1948. It is reported that on one single day in April 1949, 1,398 landings were made at Berlin's three airfields and 12,940.9 tons of cargo were unloaded.[23] The Falklands War is a very recent case.

Industrial emergencies are the most common. The air lift of a major item of equipment or replacement part such as a propeller shaft for an immobilized ship, emergency lift of steam boilers, or similar equipment are situations in which it would be possible, theoretically, to carry emergency supplies, but the size and expense of the equipment involved and the high degree of uncertaintity with respect to the timing and geographic location of a possible emergency make such provisioning economically impractical. The companies concerned rely on air freight to cover shortage situations in which the expense of inventorying against rare or infrequent requirements is prohibitive.

The same is the case where many major parts or components

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[23]Hildreth and Nalty: 1001 Questions Answered About Aviation History, p. 370.

of industrial equipment, some types of home appliance, and automobile parts can be a critical requirement but the recurrence of the need for a substitute is so infrequent as to make local inventory of such parts or equipment components impractical. Rather, it is found to be more profitable in these cases to centralize the supply of such parts, meeting requirements by air lifting the parts to the point needed.

It is no wonder then that as early as 1927, two million pounds of freight traffic was recorded for the Ford Motor Company alone.[24] In 1944, according to the statistical data published by George S. May Business Foundation, fifty-six per cent of all industrial products shipped by air were repair parts.

1.1.5. Contribution To The Development of National Economies

In the developed countries, with their developed economies and transportation infrastructure, air transport is a consumer product like any other. In the developing countries, such as in Africa, however, the situation is different. Their fate is not only that of unexploited resources, but it is more of the lack of good means of transportation, for no civilization can thrive where transportation is inadequate. More so, in

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[24] Wilson and Bryan: Air Transport, p. 303 Supra.

a continent where the economies of the countries are largely dependent on the export of agricultural and natural resources. The need for good means of transporting the raw materials cannot be over-emphasized. Within the countries themselves, an effective means of transporting and distributing their produce, both inter se and intra se is not a luxury but a necessity.

Mr. Rajasfetra, Managing Director of Air Madagascar, in an address to the Symposium organized jointly by the Institut du Transport Aérien (ITA) and the Massachusetts Institute of Technology (MIT) on the 9th and 10th of October 1980, pointed out that in Africa, the aircraft plays a much more important role than in economically developed countries owing to the inadequacy or even inexistence of road, rail, waterway and maritime infrastructure,and the difficulty of operating in the rainy season in inter-tropical zones.[25]

Air transport in the developing countries is, therefore, primarily an instrument of economic development with its role as a consumer good taking second place. The aircraft has proved to be the most effective means of transporting passengers and goods to land-locked regions like Chad Republic, where surface transport is exceptionally slow.

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[25]ITA Bulletin No. 37-E, (November) 1980, p. 877 at 879.

expensive and unreliable. The transportation of the export produce from these areas is vital to their economies. The African case can be summed up with this observation:

> "However indispensable passenger air transport may be, air freight is also important for Africa because it may become a useful tool for developing the economies of the countries."[26]

Like in Africa, the economies of Israel and Latin American countries have been strengthened by air transport for carrying their agricultural produce to Northern markets.[27] It will be erroneous, however, to have the impression that it is only the economies of the developing countries which stand to gain from the Air Cargo industry. The developed countries profit from it too, and very much.

Many of the world's major airlines are state-owned, with the United States of America as a notable exception. These airlines have realized that as passenger revenue continued to drop dangerously, they have to give more attention than they did before to air freight for year-end profits. The carriers have taken such steps as the establishment of air cargo departments,and the acquisition of all-cargo aircraft.

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[26]Address by Mr. W. Binaghi, President of the Council of ICAO, at the African Air Transport Conference, ICAO Doc. 8462-A1719, p. 21.

[27]Gitwitz Betsy, Politics of International Air Transport, p. 20.

They are realizing profits. The economies of Canada and the Netherlands, for example, are gaining to some extent from such profits realized by Air Canada and the Koninklijke Luchtvaart Maatschappij (KLM) respectively.

1.1.6. Others

There are other reasons in addition to those discussed above, why some shippers prefer air freight to the other modes of freight. Some goods are specially suited for air freight. These are goods with a relatively high value of weight for which air transport cost represents a small proportion of the total value and protection from damage or theft is important. Some examples are furs, art works and jewellery. In this category also are goods required to be carried with or soon after the passengers going by air, but are too large or heavy to be carried as personal baggage. Examples are business samples and personal pets.

1.2. Transportable Goods

The preceding section made some adversions to some goods which are suitable items of air cargo. This section will throw more light on that, stress the progression from the early traditional and limited list of transportable goods to the modern and more expanded list, and explain the underlying reason for this progression.

1.2.1. Traditional Items Of Air Freight

When aviation was in its infancy, air cargo was severly unemphasized in comparison to air passengers. It was a luxury to travel by air and more luxurious to transport goods by that means. The prevalent consciousness was that goods could only be transported by air only when it was absolutely necessary, that is, in cases of emergency. Hence, the air cargo industry was mainly concerned with flying drugs and blankets to a distant disaster area, or flying a spare part to nip a potentially costly production shutdown in the bud. The aircraft in existence had inadequate or no cargo facilities so that shippers who had wished to consign goods by air for other reasons, were seriously restrained by the kind of goods the carriers would accept.

Understandably, therefore, air freight then consisted of goods of light weight and small size such as newspapers, and clothing, high value goods such as jewellery and currency notes and gold bullion, emergency goods such as food and medicine and spare parts of machinery.

It would be interesting to know the goods which were specifically 'forbidden' to be carried by air

> ". . . live animals,corpses and human remains (sic), articles of extreme fragility and articles valued at

$25,000 each (and above) . . . ."[28]

Packages of goods weighing more than two hundred pounds and packages exceeding one hundred and thirty-two inches in length and girth combined or in excess of twenty inches by twenty-four inches by forty-four inches[29] needed special arrangements before they could be accepted for shipment.

1.2.2. Today's Freight

Changed times brought about advanced technology and a re-orientation on the attitude towards air freight shippers considered the traditional reasons for transporting goods by air as only a few among others. There were expansions of belly-loading and upper deck compartments with better facilities for a good variety of cargo. Some aircraft were designed and manufactured exclusively for cargo. Ground handling facilities and personnel were improved to take good care of different types of cargo. The end result is an enlarged list of items suitable for air freight.

KLM can, therefore, be heard to advertise as early as 1956 that it could transport any cargo except giraffes. To which it has been wondered:

". . . en 1979, si même les giraffes

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[28]Wilson and Bryan: Air Transport, op.cit. p. 308.

[29]Ibid, Footnote 2

ne peuvent peu être transportées par avion avec les 'super-guppy' ou les galaxy."[30]

Air Canada currently advertises:

"We can ship almost anything, any size, anywhere."[31]

Live animals are common air freight today. Unfortunately, a cargo of live animals seems to be synonymous with a cargo of incidents as decided cases bear testimony.[32] This is not to say, however, that all live animals transported by air have generated one kind of dispute or another. Afterall, a herd of cattle has been transported uneventfully and profitably from North America to Malawi, in Central Africa. Many monkeys have been transported safely from Africa, India, Pakistan and the Philippines to the United Kingdom and the United States for experiments by manufacturers of polio vaccine. A variety of animals is carried regularly from the tropics to zoos and circuses in other parts of the world. Race horses, dogs and day-old chicks are common consignments too.

Corpses and animal remains are no longer excluded from air cargo. There is, however, a disagreement on their legal

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[30] Magdelénat : Le Fret Aérien, op.cit. p. xi

[31] T. V. Commercial CFCF Channel 12 - (Montreal);

[32] See, for example, Park Davis V. BOAC (1958) US & CAVR 122.

classification. The French, in the case of Djedraoui C. Tamisier,[33] hold that corpses are not goods. The Americans, on the other hand, hold, in Compton v American Airlines,[34] that they are no different from other goods. For the purposes of this thesis, that disagreement is trivial. What is of significance is that corpses fall in the category of air freight which is transported at very high premium.

Express transportation of small packages is a new market for air freight.[35] The Memphis-based Federal Express now handles about one hundred thousand parcles and letters nightly. Its profits for 1981 were recorded at $59.3 million.[36]

Other goods which are transported at very high premium include those of very high intrinsic value, for example, jewellery and currency and goods whose transportation involved high risk and/or inconveniences, for example, radioactive materials. Whether these sorts of goods can be transported depends on the preparedness of the carrier to take the risk and the shipper's ability to pay the high charges.

Nevertheless, there are some goods which can not be carried by air even today on account of their bulk or inherent danger. Inspite of the technological improvement of the

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[33] RFDA (1953), p. 494.

[34] 7 AVI. 17-559.

[35] See ITA Weekly Bulletin No. 22/81, p. 543-547.

[36] See TIME, February 15th, 1982, p. 48.

modern aircraft the available space therein is not unlimited. As for dangerous goods, they are more adequately treated in the later part of this thesis.

1.3. Trends in Air Freight - Regional Surveys

The air freight industry has been growing steadily since 1945,[37] even taken into account the various economic recessive periods in different parts of the world. Whereas in 1961 the scheduled airlines of ICAO contracting states recorded a freight traffic volume of 2,320 million tonne-kilometres,[38] in 1968, 8,000 million tonne-kilometres was recorded.[39] As the number of ICAO contracting states swelled, and the number of air lines increased manifold, so did the volume of freight traffic, so much so that in 1980, the volume had ballooned to 30 billion tonne-kilometres. Between 1962 and 1971, the industry, excluding the USSR which joined ICAO as late as 1970, maintained an annual growth rate of 17% as compared to 10.5% during the period of 1951-1961.[40] In 1981, the International Air Transport Association (IATA) forecast an annual growth of

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[37] 1945 is the year taken to mark the birth of the modern air freight industry. Smith: Air Freight, p. 31.

[38] ICAO Doc. 8235-C/937, p. 5.

[39] ICAO Circular 97-AT/18, p. 6.

[40] Smith: Air Freight, op.cit., p. 31 and ICAO Doc. 8235-C/937, op.cit., p. 11.

7.7% over the period 1981-1985.[41] This decline in growth rate of air freight cannot be a cause for alarm as it reflects the general state of world economic recession. In any case, the air freight growth rate is much higher than passenger growth rate for the same period.

We can now have an overview of the freight traffic trends in the respective regions of the world.

1.3.1. Europe

The freight traffic for Europe is classified differently by different studies. Some studies subsume the region under North Atlantic, North and Mid Pacific, Europe, Local Europe, and so on.[42] The International Civil Aviation Regional Air Freight Study, 1970,[43] classifies it as Europe-Mediterranean Region. This latter classification is so wide as to cover not only the countries of Europe but also some countries in North Africa such as Algeria, Morocco, Libya and Tunisia, as well as some countries in the Middle East such as Israel, Syria, and Lebanon.

The ICAO study revealed that in 1968, that region carried

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[41] World Airline Cooperation Review, Vol. 16 No.2 (1981) p. 20.

[42] Smith: Air Freight, op.cit. p. 35, also IATA Returns 1971.

[43] ICAO Circular 97-AT/18.

more than twenty-five per cent of the world's total air freight. Because of the very limited importance of domestic traffic, the region represented nearly fifty per cent of the world's international freight traffic. There were fifty-six airlines in the region engaged in international freight traffic, but the distribution among them was so uneven that ninety per cent of the traffic was performed by twelve airlines of which one was an all-cargo airline. A little less than forty per cent of the tonne-kilometres were performed by all-cargo traffic.

The commodities shipped by air to or from the region included food and live animals, beverages and tobacco, crude materials, vegetables, cut-flowers, chemicals, manufactured goods, and machinery parts. In 1968, states in the region accounted for fifty-five per cent of the total world trade, and trade within the region amounted to forty per cent of the world total. With such a favourable climate of international trade, it is not surprising that air freight flourished in the region.

Within that period, it is worth noting, the scheduled international freight traffic of thirty-four ICAO member states of the region had increased nearly five-fold, marking an annual growth of nearly twenty-two per cent (21.7%). In the light of this growth, civil aviation administrations, airport authorities and airlines in the region forecast very bright

prospects for the industry in the coming years. Aéroport de Paris, anticipated an increase of twenty per cent per year between 1970 and 1980, while the Association of Commercial Airports in the Federal Republic of Germany forecast an annual increase of twenty-five per cent. Boeing, Lockheed and McDonnell Douglas made projections of twenty per cent annual freight traffic growth for the freight traffic of the airlines operating in the region.

These forecasts were frustrated by some unforeseen intervening factors. The United States Deregulation Policy which received the official stamp of the Administration in 1978 dealt a hard blow to the North Atlantic route. "While some freight carriers believe airline deregulation is primarily a U .S. domestic phenomenon, activities on international routes suggest that the deregulated environment has spread outside the U.S. as well. The North Atlantic is the most apparent example, with an intensified rate war that is threatening losses for some of the carriers involved. This is an important point as the North Atlantic is still one of the most active in terms of air freight traffic.[44]

Contrary to the forecasts by the various airports' authorities, from 1979 to 1980, the terminal freight traffic

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[44]ITA Weekly Bulletin No. 2 - January 12, 1981, p. 27.

of fifty European airports fell by two per cent.[45] However, Frankfurt, and Paris maintained slight progress, albeit less than forecast, but London, Copenhagen and Cologne declined heavily.

There were other factors. The economic recession, inflated fuel prices, and high costs, these adverse developments led later forecasters to lower annual growth projections to eight to ten per cent.

Another significant factor is the erosion of the importance of European scheduled carriers in the air cargo traffic. The challenges have come from two quarters. There have emerged carriers from Europe's developing trading partners. The French airline, UTA, for example, faces able competition from Air Afrique, Cameroon Airlines and Nigeria Airways, in transporting freight to and from Africa. An even stiffer challenge to the European scheduled carriers comes from Charter carriers. Luxemburg's 'Cargolux' is competing favourably world-wide with its 747 freighters.[46] German Cargo Services is making its presence felt in the market for the transport of cut-flowers and vegetables from East Africa. Whatever the growth in air freight traffic, therefore, the

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[45] ITA Weekly Bulletin No. 30 - September 14, 1981, p. 77

[46] See Airline Executive - January 1982, p. 12-14.

traditional European carriers will no longer carry as much proportion of that freight as they did before due to the penetration of new carriers into that market.

However, the big carriers are not watching these challenges nonchalantly. Competition in the air freight industry is now as keen as it is the case in the passenger industry. Unlike in the air passenger case, the carriers appreciate that fierce competition will not be to their advantage, neither will it be for the interest of air shippers. There is no room for competition at any cost. Instead, cooperation with healthy competition is the working philosophy. It has been suggested that the scheduled airlines should concentrate on the densest routes and on the main markets, while the charter carriers take over the traffic abandoned by the schedules.[47] Of great significance also is the creation of SFAIR - Cargo in France.[48] The new airline is expected to work in co-operation with its big brothers, thereby, avoiding any 'wildcat-competition'.

1.3.2. Africa

Air freight is underutilized as a tool for African

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[47] ITA Weekly Bulletin No. 2 - January 12, 1982, op.cit. p. 37.

[48] ITA Weekly Bulletin No. 21 - June 1, 1981, p. 523.

economic development. Relatively little trade by air between African States, although opportunities exist for an exchange of products which are not duplicated and which too often are now imported from other continents, is carried on. The air capacity available from Africa to Europe and the Americas is far from being filled with African exports. Yet known markets exist for many commodities, only a portion of which have been exploited.[49]

In 1968, International Trade in all commodities by African States amounted to $11,720 million of exports and $11,480 million in imports. Only nine per cent of this volume of trade was between states of the region, the remainder being inter-regional - mainly with Western Europe. It was estimated that of the total freight traffic involved, less than one per cent (0.04%) was carried by air, ninety-five per cent of it was carried by sea and the remainder, by rail, river and road.[50]

The explanation for this disparity is mainly the fact that a larger part of the total weight of the freight consists of bulk goods, such as oil, ores and timber, that cannot move regularly by air. Air exports from Africa consisted largely of perishables, while air imports were to a large extent manu-

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[49]See UNDP/ICAO Project RAF/74/021, p. 9.

[50]See ICAO Circular 104 - AT/25 (1971), p. ix.

factured goods. Thus, the weight, value, and freight revenue yield of air imports far exceeded air exports, so that the airlines concerned were faced with serious problems of traffic and revenue imbalance.

Before African states became independent, air services in Africa were shadowy and even absurd.

> "In the 1950s, a trip between Abidjan and Accra - two capital cities barely 300 miles (480 km) apart, - required three separate flights over several days: Abidjan - Paris, Paris - London, and London - Accra."[51]

Some authors and news media have made so much fuss about the 'proliferation of airlines' in post-independent Africa. The Ghana Airways was particularly singled out for ridicule as an airline which was established only for 'National prestige'. This author does not pretend to hold brief for Ghana Airways. But suffice it to state that after misjudged priorities and over-enthusiastic political rhetorics are sorted out, there remains something more than 'national prestige' to the establishment of African Airlines. The so-called proliferation of airlines was prima facie, an antithesis to the status quo ante - a positive reaction to the colonial neglect of air transport industry in Africa.

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[51] Gidwitz Betsy, Politics of Air Transport, op.cit. p. 176.

Be that as it may, the question continued to be asked, this time from well-intended quarters, whether that development was merely a manifestation of national desires to 'show the flag' or a rational step in economic development. The politicians did not have to give the answer.

Of the total freight carried in 1968, African airlines carried about 170 million tonne-kilometres, eighty-nine per cent on their international scheduled services, and eleven per cent on their domestic services. Between 1970 and 1975, African airlines share of the world's international scheduled traffic increased from 3.8 per cent to 4.3 per cent, and the domestic traffic share increased from 0.7% to 0.9%. The two shares represented 2.4% of the world's scheduled airline traffic, a proportion identical to Africa's 2.4% of the world's gross national product for 1973. African share has been growing steadily since then.

In 1974, the African Civil Aviation Commission (AFCAC) requested the United Nations Development Programme (UNDP) to finance a study to be carried out by the International Civil Aviation Organization to determine the contribution that civil aviation can make to the development of the national economies of African states. In 1977, a report of the study

was published.[52] The report contains some facts relevant to the development of the air freight industry in Africa. In particular, horticultural products, cut-flowers, meat, fish, and industrial products were identified as potentially profitable air freight commodities.

Western Europe is a major importer of fruit and vegetables such as pineapples, strawberries, melons, mangoes, avocadoes, green-beans, and so on. In 1975/76, Africa South of the Sahara exported 105,000 tonnes of a total of 205,000 tonnes exported to that region that year. The leading African exporters were Ivory Coast, Kenya, Senegal, Mali, Upper Volta, Rwanda and Niger. Of that amount, 20,000 tonnes were exported by air; the rest by sea. The main reason for the lower air freight was given as too high air traffic in West Africa to justify the exporters profit. The governments in East Africa, however, set lower tariffs. The principal carriers on the West African route, UTA and Air Afrique, were urged to reduce rates for the shipment of certain fruit and vegetables. It was then projected that at normal growth, air exports would double by 1980.

Cut-flowers are another attractive air market. The

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[52]The study was titled: 'Studies to Determine the Contribution that Civil Aviation can make to the Development of the National Economies of African States: The final report is contained in Doc. UNDP/ICAO Project RAF/74/021.

demand is enormous in Europe. In 1976, Africa exported 7 per cent of Europe's total import of the commodity, realizing a revenue of $3.3 million. Kenya and Ivory Coast were Africa's principal exporters. The market has very good prospects of growth. Although Europe appeared to be self-sufficient, the situation is changing. Higher energy and labour costs have made glass-house production in Europe less profitable. Europe is, therefore, turning more to imports to satisfy its demand. In 1980, for example, the demand more than doubled. This is unquestionably an opportunity for the air cargo industry in Africa to get hold of.

Considerable trade in meat goes on in Africa. Aviation is suitable for the export of chilled choice cut meat. Botswana flies 14 tonnes of choice meat to Switzerland, and 16 tonnes to Reunion Island weekly. Intra-Africa wise, Cameroon Airlines flies chilled meat from Cameroon to Equatorial Guinea, regularly, and Sahelian producers fly choice beef-cuts to Abidjan. If constrainst like the tax policies of importing states and competition from frozen meat export are well taken care of, there will be greater prospects for air freight in this commodity. Much of Europe is closed to African imports of meat for sanitation reason. However, cattle diseases are being effectively eliminated. There is no reason why African exporters cannot take advantage of

their Lomé Convention quotas.

Air freight plays a valuable, albeit small, part in the export of fish from Africa to Europe. About 2,500 tonnes of fresh ocean fish, shrimp and crayfish were exported by air in 1975. Many thousands of tonnes were sent by sea in frozen form. However, fresh fish in Europe fetches double the price of frozen fish. The UNDP/ICAO project reveals that African states can realize a fifty per cent profit on chilled fish exported by air, and even higher profits on live lobsters and certain high grades of shrimp. Shipping fresh fish by air is difficult, but the difficulty is not insurmountable. The demand in Europe is very high, Africa's supply is abundant for export. It has been established that fresh fish export by air from Africa requires very little capital investment and can bring large capital returns in foreign exchange.

Industrial products are also potential air freight market for Africa. UTA flew peugeot parts from France to Nigeria for the latter's peugot assembly plant at Kaduna. However, that enterprise was stopped by the Nigerian Government in 1979 mainly in order to revamp the business at the Lagos Seaport and boost the economy of the new Port Harcourt and Calabar Ports. However, manufactured goods such as fashionable wears and electronic equipment are still being shipped into that country by air in significant quantities.

Light industry in Africa was mainly directed towards import subsituation; little that it produces can be exported. The situation is changing for the better as sub-regional bodies emphasize industrial development and individual states begin to produce certain goods for themselves and their neighbours. As this trend develops, it is hoped that air freight will play a vital role in the distribution of high-value commodities such as hand-made textile materials like Ghana's 'Akwete', leather, wood and metal products.

The UNDP/ICAO Report further identified the main constraints to the air cargo industry in Africa. African airline costs and tariffs are the highest in the world.[53] The lower the value of the freight, the more critical becomes the cost of air transport. For this reason, air tariffs usually render the export of middle value commodities marginal or unprofitable. To get around this constraint, special tariffs called 'commodity rates' are offered by airlines on a very wide range of agricultural products. However, there is a limit beyond which airlines cannot go in reducing rates.[54]

Commodities transported to Europe attract lower fares, mainly to fill the planes which would otherwise return half-

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[53] UNDP/ICAO Project RAF/74/021, op.cit. p. 16.

[54] See Goodson R. 'To Charge any less is giving it away'; Interavia - August 1981, pp. 805-807.

empty. But cargo shipped from Europe to Africa attracts higher rates. Unfortunately, some African governments have taken measures which could serve to reduce the volume of the south bound air freight. One such measures is the customs policy by which duties are charged on the Cost Insurance and Freight (CIF) value of air imports. Whereas this policy serves them well in the case of goods transported by sea, whose tariffs can be as much as five times lower than air tariffs, applying the same policy wholesale to air freight is most disadvantageous and unprofitable to the air importers.

Another very serious constraint is the protectionist aviation policy in Africa which does turn out to be very restrictive to air exports. This policy is designed to protect the national airlines by minimizing competition, but it does backfire in certain respects. Mali has been cited as an example where such restrictions resulted in adverse effects on her economy.[55] Her horticultural produce are in the increase. Scheduled services between Mali and Europe serve only France. Consequently, the horticultural co-operative was unable to fill orders from importers in Germany, Switzerland and Scandinavia. The Malian government had to be persuaded to permit charter flights to land at Bamako and carry fruits and vegetables to

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[55]UNDP/ICAO Project RAF/74/021, op.cit. p. 19.

markets outside France.

It will be noted that Gabon and Rwanda have recently signed an air agreement to facilitate the exchange of fruits and vegetables from Rwanda for entrepôts goods from Gabon. Another accord is likely to be signed (as soon as the senseless Chadean Civil War comes to an end) by the governments of Gabon, Chad and Centre Afrique, establishing an all-cargo air service between Pointe Noir (Gabon), Bangui (Centre Afrique) and N'Djamena (Chad) to provide the inland countries, Chad and Centre Afrique, speedy access to and from the sea.

1.3.3. America

North America and South America are two sub-regions with a world of difference in the air cargo industry. The former consisting mainly of the United States and Canada, is a giant not only in the American Continent but also in the world. The latter has an air freight industry deserving of some study.

Brazil and Argentina are very important countries in South America, and together, account for the greater part of that subregion's imports and exports. Agriculture is a basic and vital activity in the sub-region and is the mainstay of Paraguay, Columbia and Guyana. Brazil is on records as the world's second exporter of food-stuffs, and Argentina ranks

fourth in the world for her agricultural balance of imports and exports.[56] Mining products represent almost all exports from Venezuela, Bolivia, Surinam, and the bulk of exports from Peru, Chile, Ecuador and Guyana.

They trade mainly with North America and intra-se· Japan and West Germany have emerged as important customer countries. Meat is exported by air to France from Argentina. In 1960, South America recorded 8.8% of the world's total air freight traffic.[57] The annual growth since then has been almost static, if not falling. The 1977 records, for example, showed a fall.[58]

In contra-distinction to the situation in South America, the story of the air freight industry in North America is a glamorous one. Statistically, in 1960, North America accounted for 54.9% of the world's total air freight traffic. In 1971, the region began to feel the effects of the spirited competition by other regions. Her share of the world's air freight traffic dropped to 51.9%. However, the region continues to maintain her leading position, without any serious challenge from any region, in total domestic air freight

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[56] ITA Weekly Bulletin No. 38 - November 9, 1981, p. 996.

[57] ICAO Doc. 8235-C/937, op.cit. p. 71, Table 3.

[58] Taneja: The U.S. Air Freight Industry, op.cit. p. 78, Table 4-1.

traffic. The United States accounts for 83% and Canada, 4% (87% total) of the world's domestic traffic.[59] Furthermore, of the world's thirty top freight carriers in 1980, fourteen of them came from this sub-region alone.[60]

Most of the international freight in North America is transported across the North Atlantic. Canada for example, exports horse meat and lobsters to Europe. Other products transported on East-bound flights include machinery, electronics, scientific instruments, clothing, aircraft parts, pharmaceutical products, plastics and printed matter. Those transported west-bound are almost of the same kind in the main, but also include shoes, toys,sports equipment and internal combustion engines.[61]

It is feared,however, that this prosperous air cargo route will experience lower traffic growth from now on. The slow down of economic activity of the North Atlantic countries is the underlying basis for this pessimistic prediction.[62]

The Trans-Pacific route is of some considerable importance. There is significant air freight traffic to and from North America on this route. To a very small extent, there is freight traffic too to the Middle East, Africa and South

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[59]Smith: Air Freight, op.cit. p. 35.

[60]ITA Weekly Bulletin No. 2 - January 12, op.cit. p. 53.

[61]Bernard Péguillan: Trend In Air Freight On The North Atlantic - ITA Study 1981/No.6 pp. 60-61.

[62]Ibid, p. 74.

America.

1.3.4. Asia and The Pacific[63]

This region comprises four sub-regions, encompassing thirty-two sovereign states, twenty-five of which are ICAO contracting states; and a large number of dependent states. It accounts for more than half of the world's population, one-fifth of the land surface, one-fifth of the world's gross national product and about fifteen per cent of World Trade. Most of the countries in the region have achieved relatively high rates of growth in output and foreign trade,with low rates of inflation during the past decade.

The future development of international air passenger and freight traffic in the region depends on the rate of economic growth of the countries therein, and also of their main trading and tourist generating partners outside the region. The principal commodities exported by air from or within the region vary from country to country. Agricultural produce, textiles and handicrafts, are exported from the Western sub-region which consists of India,Pakistan, Burma, and so on. Machinery, clothes,scientific and electronic equipment are exported from Japan, Hong Kong and Korea, which

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[63]Se generally, Daniel Molho: ICAO Regional Air Transport Report on Asia and the Pacific - ITA Weekly Bulletin No. 14 - April 13, 1981, pp. 351-361.

form the North Eastern sub-region. Australia and New Zealand which, among other states, make up the South Eastern sub-region, export chilled meat,fish, horticultural produce and sheepskins goods.

In 1978, the Asia Pacific region recorded 3.56 billion in international scheduled freight tonne-kilometres, about 21 per cent of the total world air freight traffic. This compares with 10 per cent of world traffic in 1968 and reflects a higher rate of growth during the decade of 23 per cent per annum, than for the airlines of any region. Ten international freight carriers account for 95 per cent of the freight transported in the region. The three most important ones are Japan Airlines, Korean Airlines and Singapore Airlines. With the emergence of the People's Republic of China as an aviation nation of considerable import, one would expect another leap forward in the region's air freight traffic.

There are two major constraints to the air cargo industry in this region. The first is airport congestion. Freight traffic, is heavily concentrated at the major centres where such cities as Tokyo, Hong Kong, Seoul and Singapore are located. These cities and their respective airports together account for more than 85 per cent of the air freight traffic recorded above. The second constraint is fuel costs. Between 1973 and 1974, the fuel cost share of the total airlines

operating costs increased from 12 to 20 per cent. Further fuel price increases in 1979/80 have raised the average fuel cost share to about 25 per cent.

The impact of these fuel cost increases was felt more in this region than in any other. There are rising hopes now of falling fuel prices. They must be cautioned against very high hopes, however. Oil prices are rather mecurian since they are influenced more by politics than economics.

Be that as it may, international freight traffic growth assessed on the expected impact of these constraints as well as the regions historic traffic trends is 14 to 17 per cent over the 1978-88 period.

1.4. Other Developments

There are two other areas in aviation where there have been some noteworthy developments - developments which are vital to both the passenger and freight industries.

1.4.1. Cargo Aircraft

The early part of this thesis threw a ray of light on the type of aircraft used when the air cargo industry was in its infancy. But for a sound development of the industry, technically better and economically suitable aircraft were absolutely necessary. Improved and efficient aircraft would

not only provide cargo facilities, but will significantly lower the handling costs, the hourly operating costs of the aircraft by increasing daily utilization, and will reduce freight rates. In the final analysis, all parties concerned - carrier, shipper and consignee - stand to gain.

Substantial growth of air freight is heavily dependent on effective competition with surface modes of transportation. This calls for extensive reduction in air freight rates. Only an efficient cargo aircraft with lower operating costs can make such reduction possible.

In the early 1930s, the DC-3 was introduced into the market. With a cargo capacity of less than four tons and an average speed of one hundred and fifty miles per hour, the aircraft could not make profit even at thirty cents per ton-mile which was almost seven times the rate charged by the trucking industry.[64] The DC-6A Liftmaster was then introduced. It had faster speed of two hundred and fifty miles an hour, a bigger capacity of seventeen tons, and a long range performance that allowed over-night delivery. But this plane had a major defect. The floor height was high relative to the truck-bed load. This made loading and off-loading more difficult, resulting in increased handling costs. Lockheed's L-1049, was no good. Like the other two piston-powered aircraft mentioned above, was also

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[64]Brown, S. H.: Air Cargo Comes of Age - cited by Taneja: U.S. Air Freight Industry, op.cit. p. 155.

susceptible to the high cost of loading and off-loading. It took more than an hour to load seven tons of freight on the L-1049.

The advantages of efficient loading became more apparent than ever before and manufacturers applied their minds and talents to it. Two turbo-prop aircraft emerged. Canadair's 'swing-tail' cargo plane, the CL-44 enjoyed much popularity,[65] and the military were attracted by Lockheed's Hercules L-100.

The desire for lower operating costs and easier handling was far from satisfied. So came the jet aircraft - the DC-8 and B-707 being the pioneers. Consequently, aircraft operating costs fell considerably from thirty cents per revenue ton-mile to twelve cents in 1963. This development warranted a significant reduction in air freight rates. The level of service offered to shippers was also raised due to the aircraft faster speed. Boeing's Quick-Change B-727 entered the market in the late 1960s. But total operating costs began to rise steadily from 1973 because of the abrupt increase in fuel prices and the inflation. Fuel economising aircraft were badly needed.

The B-747 arrived in two models: the all-cargo, and the combi and convertible. Besides fuel economising, the B-747 had specially designed high pallets and much greater speed.

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[65] Hildreth and Nalty: 1001 Questions Answered About Aviation History, op.cit. p. 352.

McDonnell Douglas rolled in the DC-10AF and Lockheed, the C-5A.

Yet the aircraft manufacturing industury is not resting on these laurels. The 1980s have been referred to as the 'decade of derivatives'. In this decade, the objective is to produce a derivative aircraft from the existing ones rather than a totally new design since the manufacturer's non-recurring and recurring costs are reduced significantly in the case of derivative aircraft. An all-cargo version of the DC-10 and L-1011 is currently in the market. Further production of L-1011 has been discontinued. Derivatives of aircraft such as the stretched DC-10, the DC-9 Supper 80 freighter and the Lockheed L-100 Dash 50 are intended to be offered to the industry in the very near future.[66]

Finally, the design of a future large military/civil commonality all-cargo aircraft conceived by the United States Military Airlift Command (MAC)[67] deserves to be mentioned. It is conceived as an all-cargo civil transport for augmenting military airlift during periods of national crisis. The C-XX, as it is called, emphasizes system commonality as a means of reducing future airlift system costs through cost sharing of a

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[66]Taneja: The U.S. Air Freight Industry, op.cit. p. 175.

[67]ITA Weekly Bulletin No. 31 - September 22, 1980, p.723.

common military/civil aircraft. Lockheed and Douglas have already completed the Cargo/logistics Airlift System Study (CLASS) to determine user reaction to an advanced aircraft of that sort, with an air cargo system having significantly improved operating efficiency and cost. In particular, this proposed aircraft is expected to provide a link in the inter-modal transport chain (sea, road and rail).[68] It would carry large marine containers of greater height and width and length. It is also hoped that the aircraft would minimize aircraft ground time, save 25 per cent in block fuel and engine thrust and reduce operating costs by 15 per cent.

The aircraft manufacturing industry has offered much to the air cargo industry. It is still desirous to make more contributions. This is a valuable incentive for the further growth of the industry. One only wished that manufacturers will make it easier and cheaper for carriers to purchase these aircraft.

1.4.2. Cargo Traffic Rights.

Transit rights are necessary in order that the economic developments discussed so far can be meaningful and productive. The practice of States entering into bilateral agreements derives its validity from Article 6 of the Chicago Convention.

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[68] More on Containerization and Inter Modal transport infra., Chapter 5.

That article urges states to conclude air bilaterals in order to exchange traffic rights for the purpose of scheduled services only. Article 5(2) of the same Convention, on the other hand, intended that for the purposes of nonscheduled services, mere prior notice rather than prior authorisation was enough to grant traffic rights. Unfortunately, many states have in practice refused to give effect to this generous provision of the convention.

It was a conventional practice for states to include, inter alia, the carriage of cargo in their bilateral air agreements. But a tendency soon arose among many states to consider the operation of all-cargo services as an activity not covered by standard bilateral air agreements. At first, this appeared to be a mere exercise in logic. But as history teaches us, many big quarrels in the world have such insignificant origins, progress into howls and barks, and if something effective is not done, some of them finally metamorphose into shooting wars.

And so the United States and Italy did not argue lightly about such a provision but disagreed so strongly that the case was submitted to an arbitration tribunal.[69] The tribunal decided that both the objective of the agreement, that is, the U.S./Italy Bilateral, and the intention of the parties

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[69]Wassenbeigh: Aspects of Air Law and Civil Air Policy in the Seventies, p. 59 et.seq.

led to the conclusion that the operation of all-cargo services was covered.

Nonetheless, increasing number of states now deal separately with all-cargo services. Furthermore, there are many situations where scheduled services cannot effectively and profitably perform the rôle of all-cargo services, hence the need for non-scheduled services. To deal with this situation, states are concluding multilateral agreements on commercial rights of non-scheduled services.

In Europe, the ECAC member states party to the Paris Agreement of 1956, may not require prior authorization, and states may not legislate to require prior authorization for the transportation of air freight exclusively within their respective territories. However, such service could be stopped after commencement if and when a state realized that the service has become harmful to the interest of its scheduled services.[70] This progressive measure was re-inforced in the ECAC third session of 1959 where it was recommended that distinctions based on the place of origin or destination of traffic made in bilateral agreements between the states members of the conference should not be applied to intra-European freight on scheduled services, so that operators of such services entitled to operate on any route specified in a

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[70]Article 2(2)(a) Paris Agreement 1956.

bilateral agreement between member states may pick up or discharge at any European point specified on such a route freight destined for or coming from any other European point.[71]

The members of the Association of South-East Asian Nations (ASEAN) meeting at Manila in 1971, agreed among other things, that aircraft engaged in non-scheduled commercial flights which do not harm scheduled services may be admitted freely to their territories, for purposes of taking on or discharging passengers and cargo. In particular, they agreed to admit aircraft transporting freight exclusively provided that on each flight, the total freight does not exceed four tonnes.[72]

The Manila Agreement is more generous than the ECAC's. However, it does appear, like it is the case of Paris 1956, that such services could be discontinued after commencement if there is evidence of harm to the scheduled services of a member state.

For North America, multilateral agreements such as the Memorandum of Understanding between ECAC member states on the North Atlantic Charters and the various bilateral agreements on charter services concluded by the different states, provide some traffic rights relevant to air cargo. The ECAC Memorandum

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[71]European Civil Aviation Conference (ECAC) Resolution 40(1).

[72]Manila Agreement Article 2(d).

of Understanding[73] provided that signatories could include charter flights in their respective bilateral agreements or arrangements under such conditions as they might consider appropriate.[74] The bilateral agreement for non-scheduled service between the United States and Canada concluded in 1974, is also significant. In that agreement the non-scheduled traffic stipulated consisted of passengers and goods.[75]

For other countries, all-cargo charter flights are generally governed by the regulations applicable to own-use charter or single entity charter. There are no specific provisions on all-cargo flights as distinct from passenger flights. The African region does not seem to have such clear-cut and multilaterally ordained authorization in the like of Paris 1956 or Manila 1971. This is understandable in the light of Africa's tight-fist attitude when it comes to giving out traffic rights even among African States themselves. It does appear, however, that prior authorization is readily granted when states are persuaded that such traffic rights will be helpful to their economies and that they will not

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[73]Doc. ECAC/INT. S/8.

[74]Annex VII of the Memorandum of Understanding.

[75]Annex B, I(A) & (E) of the US/Canada Bilateral

stand to be exploited. Such is the case with Mali and Kenya where traffic rights, as mentioned earlier, have been given to some European charter carriers to transport their horticultural produce.

All the same, since the 'tight-fist' policy, whatever was the justification, is generally counter-productive, one hopes that African governments will be more flexible on this issue. No nation stands to gain much today from either, creating "great blocs of closed air', or using the 'air which God has given to everyone' as a means of domination or exploitation of a weaker state. Over and above, now that African governments agree that air freight is vital to the development of their national economies, it is suggested that the African Civil Aviation Commission (AFCAC) take immediate steps to make a positive and specific recommendation of general application to the member states granting all-cargo traffic rights in the like of article 2(2)(a) of Paris Agreement 1956, and 2 (d) of Manila 1971. There is no productive justification for leaving this issue to the unlimited discretion of individual African governments.

Conclusion

Our survey of the economic developments reveals heartwarming prospects for the air freight industry. More and

varied goods are being shipped by air for more and varied reasons than ever before. The aircraft manufacturing industry is meeting the air freight industry's demands. Through multilateral and bilateral agreements, more traffic rights are being given for the purposes of air cargo. Economically, therefore, the industry is sound and the future is promising. However, the industry cannot be appraised from the economic perspective alone. To do so will be tantamount to pulling the industry from one direction only - it will keel over. The legal side of it is equally important and deserving of the same painstaking examination. It is to that side that the thesis will now turn.

CHAPTER 2

THE LAW ON AIR FREIGHT

"The Law is like a slow-witted tortoise that allows an eternity to pass between each step."

J. K. Hugessen C. J.
Quebec Superior Court

2.1. Generalities

All sorts of things - some nice, some nasty - have been said about the law. The Rosseau School of Thought, for example, argues that nature is good, and civilization, bad; that by nature all men are equal, becoming unequal only by class-made institutions; and that law is an invention of the strong to chain and rule the weak. In an apparent response to that argument, the Nietsche School of Thought claims that nature is beyond good and evil; that by nature all men are unequal, consequently, the weak invented morality to limit and deter the strong. One could wander afar into this interesting field of law, but the temptation will be resisted. Suffice it only to state, clearly and forcefully, that in the air transport industry, there is no room for the weak and the strong. Where a 'strong' purports to exploit a 'weak' in a bilateral air agreement, the so-called weak will denounce the agreement and there will be nothing for the so-called strong

to gain. Where the carriers only stand to gain, their clients will run away and there will be no profit for the airlines. On the other hand, where the clients only stand to gain, the carriers will go bankrupt and be grounded as had been the case of Laker and Braniff. In that case, the clients will pay more in the long run.

Mutual benefit, therefore, is the first rule of the game in air transportation. Unfortunately, mutual benefit, like good order in a society, is not self-executing. Goodwill on the part of the parties is desirable but is often not enough to bring it about. Only good laws and good courts do.

2.2. National Laws

Laws do not just spring up like the flowers on a tree, they are necessitated by new facts of life. Thus the emergence of the new phenomenon of air transportation warranted nations to make new laws - both public and private - to regulate it. As early as 1784, the Paris Police introduced a law forbidding balloons to fly without a special licence. The law further made it an offence to manufacture and send up balloons and other aerostatic machines to which spirit heaters, fireworks and other dangerous fire hazards might be fitted.[76] Other nations followed suit with their own safety laws.

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[76] Matte: Treatise on Air-Aeronautical Law, p. 21

In recent times, national public air laws are more evident in government regulations on licensing, tariffs, rates and safety, with their national aviation boards or departments acting as the regulatory agencies. In the United States, for example, the Civil Aeronautics Board (CAB) was responsible for the control of all cargo domestic market entry and exit, and rates until 1977 when the industry was deregulated. However, some carriers and shippers have been heard to challenge CAB's post deregulation rules eliminating tariff filing requirements and the carriers obligation to transport specific shipments such as hazardous materials and live animals.[77]

It would be erroneous to conclude that the jurisdiction of the national aviation authorities is limited to the domestic market only. In the United Kingdom, for example, although the Civil Aviation Authority (CAA) is not competent to license foreign carriers (the Secretary of State for Trade is), the Authority nevertheless controls international fares of foreign carriers in the same way as it does for the British carriers. The national boards have authority even where the tariffs and rates are made through such international machinery as the International Air Transport Association (IATA). The Canadian Transport Commission (CTC) is another

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[77]Taneja: The U.S. Air Freight Industry, op.cit. p.17

good example. Although this commission is not as autonomous as say, the CAB, it still has very considerable powers not only domestically but also internationally. Though the commission does not license foreign carriers (they are designated by the Canadian government in her different bilaterals) the designated carriers must still file their tariffs and rates to it for approval or disapproval. More significantly, non-designated international carriers have to apply to the commission for permission to operate in Canada. Once upon a time, Flying Tiger, a United States all-cargo carrier applied to this commission for a permit to transport some cattle from Canada. The commission rejected the application.

An area where national laws particularly pinch the freight industry is customs regulation. It has been mentioned earlier how customs duties charged on the Cost Insurance and Freight (CIF) basis render air imports very expensive and often unprofitable in Africa. That regulation is unsuited for air freight and one hopes that the African governments concerned will revise it.

But even more problematic is the provision in the Chicago Convention which allows national laws to regulate the entry into and exit from a contracting state of passengers, crew and

cargo.[78] The same Convention makes a 180 degree turn around to trammel the national laws.

> ". . . clearance . . . shall be applied and carried out in such a manner as to retain the advantage of speed inherent in air transport."[79]

One can appreciate the Convention's after-thought, but at the same time, one must not lose sight of the realities. A state party to the Convention may legitimately refuse to ratify the Annex and proceed to implement its own unprogressive laws untrammelled. Besides, the Annex itself is highly controversial:

> "It is a sweeping document . . . . The annex has been subject to 11 amendments and it now contains more than 250 Standards and Recommended Practices."[80]

Without going into the legal implications of the ICAO Standards and Recommended Practices, a cumbersome provision of this kind is vulnerable to manipulation by fertile juristic

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[78]Article 13, Chicago Convention.

[79]Annex 9, Chicago Convention.

[80]'The Convention On ICAO . . . . The First 35 Years' p. 18.

minds in respect of its interpretation and application.

Thus in Samuel Leiser v United States Customs,[81] the appellant was travelling from Frankfurt, Germany, to Gander, Canada via Paris. He carried some diamonds of considerable value. Due to adverse weather conditions, his plane overflew Gander and he was obliged to land at Boston airport. He had already made arrangements to continue his journey as originally planned when he was questioned by the Boston Customs. He did not declare the diamonds since he did not consider that he had entered the United States territory. But the United States Court of Appeal held that he had entered the United States according to that country's laws, and ordered the seizure of Leiser's diamonds. Hartigan J. ruled:

> "We believe that section 1497 subjected to forefeiture the diamonds which appellant failed to declare regardless of the fact that he came into this country involuntarily and with no 'intent to unlade'"

Leiser may be a correct decision according to United States laws, but it can hardly be said to be a just decision. The

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[81](1956) U.S.& C.A.V.R. - p. 416

decision of the Dakar Court of Appeal in Ministère Public et Administration de Douanes v Schreiber et Air France,[82] is to be preferred.

In that case, Schreiber was travelling from Monrovia, Liberia, to Geneva, Switzerland, via Dakar. Upon arrival at Dakar airport, and being in transit, he did not declare to the customs the fact that he was carrying diamonds in his baggage to Europe. The tribunal Correctionnel de Dakar held Schreiber guilty and ordered the confiscation of the diamonds; but the Dakar Court of Appeal reversed the decision.

It is true that Annex 9 - Chapter 5 of the Chicago Convention provides that passengers, cargo, etc. in transit can, in special circumstances, undergo an inspection. However, the spirit of the Convention, as well as good sense, militate against such a provision being used as a carte blanche. It is unacceptable to use that provision for legitimate transactions such as the transportation of legitimately acquired jewelleries. The Dakar Court of Appeal rightly stated:

> ". . . il est vrai que la même annex 9 . . . stipule qu'une inspection de bagages en transit aérien peut avoir lieu dans des cas speciaux

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[82] RFDA (1957) p. 355.

> "determinés pas les authorités competentes. Mais considerant qu'il résulte de l'esprit de la convention que cette inspection exceptionnelle ne saurait avoir lieu que pour des raisons tant nationales qu'internationales d'orde public ou de securité . . . notamment les cas s'il s' agissait de contrabande d'armes de querre ou de stupéfiants . . . ."

Customs activity is part of the distribution system of the air freight industry, and how it functions affects the industry. The International Civil Aviation Organization has made some proposals for improving customs procedures to expedite air imports.[83] One hopes that states will give effect to these proposals as much as possible and revise their national laws accordingly. If the status quo is maintained, not only the air freight industry will be hurt but legitimate international trade as well.

As regards private law, the relationship between the parties to a contract of carriage by air is governed by the

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[83]See ICAO 1970; Annex 9 Chicago Convention, Chapter 4; ICAO Council Recommendation - Circular 119 - A7/31, pp.27-31.

relevant national Contract and Tort laws, particularly in domestic transportation. The airline is regarded as a common carrier and is regulated accordingly.

> "I see no reason why a man who carried goods by a machine that travels through the air should not be a common carrier or assume the liabilities of a common carrier if he acts in a certain way."[84]

For domestic transportation, the carrier is generally empowered to make the conditions of carriage and file them with the competent civil aviation authority for approval. Where those conditions are approved or not disapproved, they become effective, binding on all the parties to the contract, and take precedence over any other rule of law governing the same contract.

In Lichten v Eastern Airlines,[85] the appellant travelled from Miami to Philadelphia in defendant's aircraft. One of the two pieces of her baggage was mis-delivered to some unknown person in Newark, New Jersey. Later, the bag was re-

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[84] Per McKinnon J. in Aslan v Imperial Airways Ltd. (1933) USAVR 6

[85] 189 F 2nd, p. 939

delivered by the respondent to the appellant. However, appellant found that some contents of the bag which consisted of jewellery valued at $3,187.95 was missing. She sued to recover the value of the lost jewellery. The carrier invoked one of its tariffs which relieved it from liability for the loss of property such as jewellery carried in a passenger's baggage with or without the carrier's knowledge; and another tariff which stipulated that carriage of valuables such as jewellery was at the risk of the passenger. The appellant took the position that although the said tariffs had been approved by the Board pursuant to the power invested on it by the Civil Aeronautics Act, the Act should nevertheless not be interpreted to allow the Board to modify the Common Law rule that a common carrier may not by contract relieve itself from liability for the consequences of its own negligence. The court held that the common law rule could not invalidate the provisions of the tariffs.

Lichten has been followed in other cases. Thus in Graham Blair v Delta Airlines,[86] the plaintiff sued to recover for tort damages of mental pain and anguish arising from gross negligence in handling of his wife's remains by the carrier. The carrier sought the protection of a provision of its tariffs which relieved it from liability in any event

[86](1972) 344, Supp. 360.

for any consequential or special damages arising from the transportation whether or not the carrier had knowledge that such damages might be incurred. Fulton C.J., citing an early decision in Kirksey v Jernigan,[87] agreed that damages were recoverable for mental anguish caused by the tortious handling of human remains with the knowledge that such consequences would arise to the surviving relatives. Nevertheless, he followed Lichten, ruling:

> "Apparently, the plaintiff is attempting to challenge the validity of defendant's tariff. This challenge cannot be presented to this court . . . ."

Private national laws apply in some cases to international transportation of goods by air, where the Warsaw Convention expressly so provides or where the Convention does not make any provisions at all. In the case of international transportation, however, any provision of an approved tariff, or any law for that matter, that is inconsistent with a provision of the Warsaw Convention will be pro tanto void.

> "Any provision tending to relieve the carrier of liability or to fix a lower

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[87] 45 SO. 2nd, p. 188.

> "limit than that which is laid in this convention shall be null and void . . . ."[88]

Some cases in which the Warsaw Convention allows national private laws to apply in international transportation are in the areas of Wilful misconduct and the determination of the time limit for bringing an action. In the former, it provides:

> ". . . if the damage is caused by his wilful misconduct or by such default on his part as in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.[89]

Unfortunately, different national laws determined what conduct amounts to wilful misconduct on such divergent bases that the issue became a jurisprudential controversy. In some Civil Law countries, such as Germany, Netherlands and Switzerland, 'faute lourde is considered to be equivalent to 'dol.' France followed this line of reasoning until 1957 when, like Belgium, she considers conduct equivalent to 'dol'

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[88]Article 23, Warsaw Convention.

[89]Article 25, Warsaw Convention.

to be an 'in-excusable fault'."[90] The Common Law countries such as the United States and England, consider 'wilful misconduct' to be an intentional or deliberate act with knowledge of the probability of damage.

This provision in Article 25 can, therefore, hardly be said to have been helpful in the unification of private air law rules. It is not surprising then that the Hague Protocol amending Warsaw withdrew the determination of what amounts to wilful misconduct from national laws by setting its own objective criteria.[91]

The Convention also leaves the method of calculating the period when the two years within which to bring an action, to be determined by the national laws of the court to which the case is submitted.[92] Some courts appear to have gone too far in their exercise of this delegated power. The Cour de Cassation Francaise in 1977 interpreted the provision as a prescription rather than the limitation meant by the Convention.[93]

Finally, where the Convention makes no provision, national laws fill the gap. There is a big gap, for example,

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[90]Matte: Treatise On Air - Aeronautical Law, op.cit.p.423.

[91]Article XIII, Hague Protocol.

[92]Article 29(2), Warsaw Convention.

[93]Matte: Treatise On Air - Aeronautical Law, op.cit. Footnote 209, p. 429.

in the case of compensation for damage arising from delay. Some countries have passed legislations to fill that gap. The Union of Soviet Socialist Republics (USSR) and Spain are two countries which have enacted such legislations.

2.3. International Laws

2.3.1. The Chicago Convention

One should never lose sight of the fact that the air freight industry is part of the general aviation industry. Accordingly, the international conventions regulating the air transport industry regulate the air freight industry directly or indirectly. The Chicago Convention, which is the most important public international air law convention had as its objective the development of international civil aviation in a safe and orderly manner, the establishment of international air transport services on the basis of equality of opportunity, and the promotion of a sound and economically viable industry.

The air freight industry, benefits from this Convention in many ways. Particularly, it benefits directly from its provisions which deal with traffic rights,[94] safety of flights[95]

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[94] Articles 5 and 6, for example.

[95] Articles 10, 11, 12, etc.

facilitation[96] and through the activities of the International Civil Aviation Organization which is the creation of the Convention.[97]

2.3.2. The Warsaw Convention

This Convention, signed at Warsaw on October 12, 1929, is the bedrock of private international air law. It is the end-product of the labour of some of the greatest minds of its age and our time. Inspite of its old age and the pressures from a dynamic society and air transport industry which render some of its provisions outmoded, it still deserves tremendous credit and respect. Its main objective is the unification of certain private law rules relating to international transportation by air. This objective is self evident in its formal title: 'Convention for the Unification of Certain Rules Relating to International Transportation By Air'.

It has two other objectives: to afford a more definite basis of recovery by passengers and shippers thereby tending to lessen litigation; and to limit the carrier's liability thereby protecting the industry from calamitous claims. Unfortunately, some courts are overly sympathetic to either the

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[96] Articles 13 and 28, for example.

[97] Chapter VII of the Convention.

carrier or the claimant. In either case, such sympathy does not only 'cloud' the court's objectivity and render suspect its judgement, but is also likely to negate the Convention's objectives.

The Convention has, however, been subjected to very serious criticisms by both jurists and laymen, especially in respect of its provisions on the carrier's monetary limitations on liability. One author, disgustedly writes:

> "Airline Liability for death or injury is archaic, still based on the quaintly named Convention for the Unification of Certain Rules Regulating to International Carriage by Air signed at Warsaw in 1929. The subject is controversial and very confused. Damages vary greatly depending on airline, the place of the accident and where the ticket was bought."[98]

And Justice Kaufman said in Lisi v Alitalia:[99]

> "The Convention's arbitrary limitations on liability are advantageous to the carrier."

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[98]Moynahan: Airport Confidential, p. 66.

[99]9 Avi. 18 120.

The greatest threat to the convention has been posed by the United States, so much so that it has been concluded - justifiably or unjustifiably:

> ". . . USA, the state having the greatest share in breaking up the uniform legal system of international air carriage . . . ."[100]

However, air cargo claimants, unlike the air passenger claimants, have not been heard to complain very much about the monetary limits. It seems they compare their situation with that of their counter-parts in the marine cargo industry. In that case, they have a cause to be complacent as marine cargo limits are much lower than Warsaw's air cargo limits. The apparent contentment with the Warsaw cargo limits may have justified the Montreal Protocol No.4's retention of that amount (250F or 17SDR per kilogram).

However, there are other provisions in the Warsaw Convention which no longer serve the interest of the Air Cargo industry well. These provisions are examined in the later part of the thesis. Nonetheless, it will not be prudent to pull down the entire Warsaw edifice for these or other reasons.

100Jerzy Rajski: ICAO and the Development of Air Law - International Air Transport, p. 64

The consequence will be jungle-like chaos in international air transport litigation. A rational course to take is to retailor the Convention's seriously outdated provisions to meet the new facts of life. So far, efforts in this direction have been made through a number of amending protocols which have come to be collectively known as the 'Warsaw Satellites' or the 'Warsaw Regime'.

2.3.3. The Hague Protocol

The obsolescence of the Warsaw Convention of 1929 began to get the attention of law-makers in 1951. The congress delegates of the International Civil Aviation Organization (ICAO) decided to draft an additional protocol with certain amendments instead of drawing up a new convention altogether. A diplomatic Conference convened at The Hague in 1955 for that purpose, adopted a protocol which has come to be known as Hague Protocol, with twenty-six signatories. The United States, not satisfied with some of the articles adopted, especially the limitations on liability, refused to sign the Protocol. In 1963, the Protocol came into force having recieved the required number of ratifications.

States party to the Warsaw Convention which have not ratified the Hague Protocol are still governed by the obsolete provisions of Warsaw 1929. This is certainly a serious disadvantage of their own making. The United States, in a

desperate and rather intimidating recourse, concluded a collateral agreement, called Montreal Agreement 1966, with some airlines flying to, from or stopping-over in the United States. This Agreement is of very limited effect and of no relevance to the air cargo industry.

The lesson for the non-ratification of the Hague Protocol can be illustrated with the case of Lisi v Alitalia.[101] The decision given in that case by the United States court may receive applause in a social welfare centre (courts are not welfare centres,however), but legally it does not seem to be satisfactory.

Lisi claimed for wrongful death, personal injuries and property damage incurred in defendant's aircraft which crashed shortly after take-off from Shannon, Ireland. Lisi claimed Alitalia was excluded from the Warsaw limits in Article 22 because the notice of exculpatory provisions in the passenger ticket was both 'unnoticeable' and 'unreadable'. Granted that the notice was 'camouflaged in Lilliputian print in a thicket of conditions of contract' that amounted to constructive non-inclusion of the notice. So what?

Article 3 of the Warsaw Convention unamended, which applies in the United States, enjoins the carrier to include,

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[101] 13 Avi. 17, 191.

interalia, a statement that the transportation is subject to the rules relating to liability established by the Convention. It excludes the carrier from availing himself of the provisions which exclude or limit liability only

> ". . . if the carrier accepts a passenger without a passenger ticket having been delivered . . . ."

This is in contra-distinction to Article 4 respecting baggage check. It is only in that Article, not in Article 2, that not only the non-delivery of a baggage check but also

> ". . . if the baggage check does not contain the particulars set out . . . the carrier shall not be entitled to avail himself of . . . ."

As far as a passenger ticket is concerned in the unamended Warsaw Convention, it is submitted, non-inclusion of notice may not deprive a carrier of the Warsaw limits. Only the non-delivery of the ticket can. The decision in Lisi is, therefore, suspect.

Lisi can be contrasted with Montreal Trust Company v Canada Pacific.[102] The facts in this case were similar to those in Lisi to the extent only that the notice was unreadable and so amounted to constructive non-inclusion. The

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[102] 14 Avi. 17, 510.

judge applied not the original Warsaw Article 3, but the amended version of Hague Protocol (Article III). The Hague amendment provides for exclusion of the Convention's exculpatory provisions where there is a non-delivery of the passenger's ticket or where the ticket does not contain the notice of the application of the Warsaw Convention conditions to the journey. The decision in Montreal Trust is good law because it was the amended Warsaw provision that was applied.

Hague Protocol affects the air freight industry directly in many areas. The particulars which must be included in an air waybill as provided in Article 8 of Warsaw Convention have been slashed down.[103] Among the particulars dropped from the original list is the mention of consignor and consignee in the air waybill. The importance of this amendment is demonstrated in Chapter 3 (infra), on the issue of competence to bring an action against the carrier. The amendment further reduces the frequency of cases based on the omission of certain particulars in the air waybill. The protocol also makes it no longer doubtful, in Article XIII, that agents and servants of the carrier may be covered by the limits of liability provided in Article 22 of Warsaw. The Protocol also extends the period a claimant has to give notice of damage to the carrier. In

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[103]Article VI, Hague Protocol.

cases of baggage, it extends it to seven days; cargo, fourteen days; and delay, twenty-one days.[104]

Of particular importance is the addendum to Article 23 of Warsaw. A carrier ordinarily is not allowed to make a provision tending to relieve him of liability or fixing a lower limit than that laid down in the Warsaw Convention. This addendum, however, makes it legitimate for a carrier to make such a provision in the case of loss or damage resulting from the inherent defect, quality or vice of the cargo carried.[105]

Finally, the original Convention stipulates that its provisions do not apply to international transportation by air performed by way of experimental trial or in extra-ordinary circumstances.[106] Hague appears to say that the Convention applies in both circumstances except only the provisions of Articles 3 to 9 inclusive of Warsaw relating to documents of carriage will not apply in those circumstances.[107]

2.3.4. The Guadalajara Convention

The Guadalajara Convention was borne out of the necessity to solve the impasse of distinguishing the legal effects of a

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[104]Article XVI, Hague Protccol.

[105]Article XII, Ibid.

[106]Article 34, Warsaw Convention.

[107]Article XVI, Hague Protocol.

contracting carrier and an actual carrier. The signatories realized that the Warsaw Convention did not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage. To compound the issue further, the Warsaw Convention did not define who a contracting carrier was. It was therefore, considered desirable to formulate rules to apply in such circumstances. On September 18, 1961, a Convention to that effect was signed at Guadalajara.

Before the Convention, it was considered that if to evade his obligations, a carrier used the services of a third party, notably in chartering an aircraft, the owner of the aircraft and his agents must be considered as subsidiaries of the charterer who is liable for their acts.[108] But the Tribunal Fédéral Suisse, in the case of Jacquet v Club Neuchârelois d'Avion[109] held the view that since the Warsaw Convention did not define the carrier it could be held that it was the owner of the aircraft instead who should incur the liability charged to the carrier. In yet another decision, the Tribunal de Première Instance de Genève (2e ch.) in S . . . C..B...[110] held that the carrier, in the sense of the Convention is the

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[108] Matte: Treatise On Air - Aeronautical Law, op.cit. p. 445.

[109] RFDA (1958) p. 82 at p.. 86.

[110] RFDA (1958) p. 405 at p. 406.

one who, in his own name, is required to transport persons. baggage or goods by means of the air, it was not necessary for him to be either the owner or the operator of the aircraft. In cases of charter, it is the charterer who incurs the carrier's liability.

The courts ran into a bigger obstacle in establishing the legal regime which should govern the actual carrier in relation to the contracting carrier who concluded the agreement to transport but leaves it to be performed by another carrier. Legal writers questioned which of the two carriers would be liable, or could both carriers be held liable?[111]

The Guadalajara Convention provided the answers. However, the Convention does not apply to cases of substitution or hire, to the carrier's agents or servants, nor to forwarding agents except in certain circumstances. Substitution is judged on the basis of the contract of carriage. In the case of lease of an aircraft, without a crew, only the lessee who contracts and performs the transportation by using a leased aircraft is the carrier in the sense of the Warsaw Convention. Servants and agents who conclude contracts of carriage for an airline or another are not covered.

The Convention governs where a travel agency has chartered an aircraft and sells tickets to the passengers. The

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[111]Matte: Treatise On Air - Aeronautical Law, op.cit. p. 447 et.seq.

owner of the aircraft, as the actual carrier, will be subject to the Warsaw regime, as well as the travel agency (charterer) as the contracting carrier. Where an air freight forwarder has concluded contracts of carriage, in the sense of the Warsaw Convention, with the consignor, the airline will be subject to the Warsaw Convention as the actual carrier while the freight forwarder will be liable as the contracting carrier.

The contracting carrier is a person who,as a principal, makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor.[112] An Actual Carrier is a person,other than the contracting carrier, who by virtue of authority from the contracting carrier, performs the whole or part of the carriage.[113] If the Actual Carrier performs the whole or part of the carriage, both the contracting carrier and the Actual Carrier shall, except as otherwise provided in the Convention, be subject to the rules of the Warsaw Convention; the former for the whole of the carriage contemplated in the agreement, the latter, solely for the carriage which he performs.[114]

The Convention makes a startling provision.[115] The acts and omissions of the actual carrier and of his servants and

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[112]Article Ib, Guadalajara Convention.

[113]Article Ic Ibid.

[114]Article II Ibid.

[115]Article III Ibid.

of his servants and agents acting within the scope of their employment shall in relation to the carriage performed by the actual carrier be deemed to be also those of the contracting carrier. In effect, the contracting carrier will be liable for the acts or omissions of the actual carrier, actual carrier's agents and servants for the purposes of, Article 25 of the Warsaw Convention as amended by the Hague, without a limit to his liability. On the other hand, the acts and omissions of the contracting carrier, his servants and agents acting within the scope of their employment, shall in relation to the carriage performed by the actual carrier be deemed to be those of the Actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention.

In other words, the amended Warsaw Convention's Article 25 will not apply to the Actual carrier as far as the provision of Article III of Guadalajara is concerned. That is, for the acts of the contracting carrier, his agents and servants, the Actual carrier will not be liable without limits. It may make sense. But what is difficult to appreciate is why the same does not apply to the contracting carrier for the acts of the actual carrier, his agents and servants. Article III, to this extent, therefore, does not seem to accord with Equity's sense of fairness.

Guadalajara introduced another important development in the area of competent jurisdictions to bring an action. The Warsaw Convention provides that a plaintiff can bring an action either before the court of the domicile of the carrier, or of his principal place of business through which the contract was made, or before the court at the place of destination.[116] To these four fori, Guadalajara adds another two: the court of the domicile of the Actual Carrier, and the court of the Actual Carrier's place of business.[117]

2.3.5. Montreal Protocol No. 4

Montreal Protocol No. 4 is one of three other Protocols drafted and adopted by the Diplomatic Conference convened in Montreal in 1975. Montreal Protocol No. 4 intended to provide for the Air Cargo industry in the same way as the Guatemala Protocol which was adopted in 1971, was designed to serve air passengers.

Among the Warsaw Convention provisions which have become unpopular are those defining the contents of the documents of carriage. Largely based on maritime law, these provisions require excessive attention to form in the drafting of these documents, which constantly affects the simplification and accordingly the speeding-up of the operations governing the

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[116]Article 28, Warsaw Convention.

[117]Article VIII, Guadelajara Convention.

performance of a transport contract - and with no serious justification at that.[118] Montreal Protocol No. 4 introduced two main changes to the air waybill: a receipt for cargo and a new and shorter list of mandatory particulars.

In the carriage of cargo an air waybill shall be delivered. However, any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.[119]

There are three particulars which must be contained in the air waybill or receipt: an indication of the places of departure and destination; if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place; and an indication of the weight of the consign--ment.[120] Non-compliance with the provisions relating to the

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[118]Legrez François: The Warsaw Convention - Reviewing the Record, p. 589.

[119]Article III, of Amending Article 5, W.C.

[120]Article III, Amending Article 8, W.C.

documents of carriage does not, however, affect the existence or the liability of the contract of carriage which shall remain subject to the rules of the convention including those relating to limitation of liability.[121]

It will be interesting to briefly contrast these renovative provisions with the relevant old Warsaw provisions. Article 5 of Warsaw recommends the issuance of a consignment note. It states that the absence, irregularity or loss of the document does not affect the contract of carriage. The rider gives the carrier a false sense of security since the absence of a consignment note and or the irregularity of some particulars in it affects the carrier's liability as later provided in Article 9. Article 8 requires the inclusion of seventeen particulars in a consignment note. Few of them are useful, many are a surplusage.

One can understand why Montreal Protocol No. 4 is little impressed by the consignment note and its particulars in the light of its stance on the liability system. According to this Protocol, the carrier will be liable ipso jure for damage suffered in respect of the consignment. The mere fact that the damage occured during the transportation is sufficient for the carrier to be liable. He can only extri-

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[121]Article III, Amending Article 9, W.C.

cate himself from the liability if he proves that the destruction, loss of or damage to the cargo resulted solely from one or more of the following reasons: inherent defect, quality or vice of the cargo, defective packing of the cargo performed by a person other than the carrier or his servant or agent, an act of war or an armed conflict, an act of public authority carried out in connection with the extry, exit, or transit of the cargo.[122] There is also a partial defence of contributory negligence.[123]

The defence of an act of public authority carried out in connection with the entry, exit or transit of the cargo could be of some interest not only to the carrier, but also to the consignor and consignee. Some research has revealed that most of the goods reported lost is in fact stolen at the airports in either the carrier's warehouses or by the carrier's agents and servants during loading and off-loading, or in the customs clearance house.[124] If goods in the charge of the customs are lost, then the controversy whether the carrier should be held liable in such circumstances or not,[125] will

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[122]Article IV, Montreal Protocol No. 4.

[123]Article VI(2), Ibid.

[124]Moynahan: Airport Confidential, op.cit. p.51, et.seq.

[125]See e.g. Favre v Sabena (1950) USAVR. 392, and Caisse Parisienne de Re-escompte v Air France, RFDA (1955) 439.

no longer arise. The carrier will not be liable, but the consignor or consignee need not feel disappointed at this development. He may have an even better remedy by suing the offending public authority outside the Convention with a possibility of unlimited claims. Provided, of course, the state concerned has not passed some obnoxious legislation giving the offending public authority immunity from an action of this sort.

It is important to point out that the Protocol maintains the monetary limits provided in the Warsaw Convention.[126] It only changes the expression from Poincaré francs to Special Drawing Rights (17 SDR per kilo), as defined by the International Monetary Fund. The limits provided in the Protocol cannot be exceeded (except in the case where special value of the goods has been declared) for any reaason, whatever the cause of damage, wilful or not, gross negligence or not.[127] In effect, this Protocol has destoryed the claimant's last and oft-used weapon for breaking the Warsaw limits of liability - the provision in Warsaw's Article 25. The propriety of this measure can be questioned since the Protocol has not raised the monetary limits for cargo as it is the case for passengers

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[126]Article VII, Montreal Protocol No. 4.

[127]Article VII(2), Ibid.

and baggage.

But even more surprising is the fact that the Protocol did nothing positive on the vexed issue of delay to cargo, as its counterpart, Guatemala did for delay to passengers and baggage.[128] Professor Matte states that if the cargo itself has sustained damage because of delay, then the regime of strict liability comes into effect. If the cargo has not been directly affected and it is only the delay in delivery which has caused harm to the claimants, the case of liability will be subjected to the regime of presumed fault. The unbreakability of the limit put forward in the new Article 24 is applicable to cases of liability for delay whatever the seriousness of the fault which is proved. The limit of 17 special Drawing Rights per Kilogramme will be the basis of reference for delayed cargo, the same as for lost or damaged cargo.[129]

This is a clear case of casus omissi. One would be tempted to contend that an action in Delay does not fall within the purview of a Protocol which deliberately washed its hands off the issue. And as it has been posited:

> ". . . if a case is entirely unprovided for by a statute either directly or in-

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[128]Article VII of Guatemala Protocol.

[129]Matte: Treatise On Air - Aeronautical Law, op.cit.p. 499.

"directly, then it must remain
nobody's child - a luckless
orphan of the law."[130]

Nevertheless, one agrees with Matte that where the cargo is damaged because of delay, then the Protocol's provisions come into play (since the Protocol does not concern itself with how the damage was caused). But one can agree with him only that far. Where the cargo has not been directly affected, and it is only the delay in delivery which has caused the damage to the claimant, then the lacuna in the Warsaw Convention in respect of the recoverable damages surfaces. The claimant, having proved such damage cannot, it is respectfully submitted, be caught by the new Article 24. Accordingly, the so-called limit of 17SDR per kilogramme will be inapplicable; for in this case, the weight of the cargo is irrelevant. The courts will, however, not leave the 'unprovided for remain unprovided without doing an injustice'. Like in the case of Warsaw, it is further submitted, the recoverable damage will be assessed not on the basis of the Convention's limits, but on the Common law principle as established in Hardly v Baxendale.[131]

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[130] C. K. Allen: Law In The Making, p. 497.

[131] (1854) 9 Exchequer 341.

In the alternative, if there exists a national law providing for the recoverable damage in such cases, as there exist in the USSR and Spain, then the court will apply such law if it applies in that forum. Montreal Protocol No. 4 needs an amendment in respect of Delay to cargo.

As far as the consignor or consignee is concerned, Montreal Protocol No. 4 is of very limited value. The simplification of the contents in and requirement of an air waybill is of some significance. Text writers also seem to overstress the so-called Strict Liability Concept as one of the advantages of the Protocol. When the catalogue of defences available to the carrier is considered it is doubtful whether it can still be rightly said that the Protocol introduced a Strict Liability Concept.

The Montreal Protocols have not yet come into effect - seven years after they were adopted. The United States is becoming uncomfortable with the fact that it is still governed by the old Warsaw provisions. It is also becoming embarassing for her that she has not ratified the Protocols which were largely the results of her own urging and leadership. On November 10, 1981, the Senate Committee on Foreign Relations voted by 16 to 1 to report favourably to the Senate for advice

and Consent to Ratification of Montreal Protocols No. 3 and 4.[132]

2.4. Case Law

National and international legislations are very important sources of the law on air transport, but not the only. Case Law is another important source. Unlike national and international regulations which issue from national legislatures and diplomatic conferences, case law issues from the courts - it is judge-made law. The question of whether a judge can or cannot make law is now moot, and to a common-law lawyer it may even be a ridiculous question to ask. For, the common law, created by the royal courts of Westminster is a judge-made law.[133]

As far as the Civil Law is concerned, judge-made law is not of primary importance though case law is assuming increased importance in that system over the years. Some civil law lawyers' general attitude to judge-made law is epitomised in the words of Professor Pierre Lapaule:

> ". . . a judge renders his decision for thousands of reasons: the day of the

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[132]Marian Nash: Montreal Protocols To The Warsaw Convention - The American Journal of International Law, Vol. 76 No. 2, April 1982, p. 412 ,et.seq.

[133]David and Brierly: Major Legal Systems in the World, p. 348.

> "trial was too hot, his digestion was bad, he slept while the best evidence was introduced, he dislikes personally the lawyer on one side, he has read an article in the newspaper the day before, he quarrelled with his wife, he is allergic to a witness . . . . In many cases, and inspite of his scrupulous conscience, the legal reasoning of the judge is an a posteriori epiphecnomenon."[134]

One can appreciate why a decision made by a person susceptible to that frame of mind should not be raised to the sacred status given in the common law. However, it is not every decision given by every judge that attains that status. The bad decisions are either over ruled or distinguished away. The good ones remain good law. Moreover, in the common law system, not just anybody is appointed a judge. They are not only highly trained professionals, but respectable personalities who even the mighty British Parliament, which is said could 'make a man a woman', holds in great esteem. Sir Winston Churchill, for example, was proud to announce in the British Parliament in 1954 that British Judges were "one of

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[134]Essays on Jurisprudence, p. 87

the greatest assets of the English race and part of the message which Great Britain could convey to the world."[135]

The primary function of any judge (civil or common), nonetheless, is not to make law. Why then do they make laws after all? When a case comes before a judge, he looks first for an enacted law governing it. In the preponderance of cases, he finds one and is bound to apply it without an option for manoueverability. Once in a while, however, he finds that the case is a 'luckless orphan of the law' (unprovided for) or that the law governing it needs serious interpretation, or even that the law governing it is so obsolete or absurd that it cannot be applied to the facts in issue without doing injustice.

These conditions which necessitate a judge to make laws arise in cases of transportation by air. The Warsaw Convention, for example, was adopted in 1929 when the air transport industry was only fledging. Surely, the drafters of that Convention, not withstanding their wisdom and good intentions, could not have foreseen and provided for all the technological and economic developments which have taken place in the industry. As Lord Denning said in Pett v Greyhound Racing (not air transport case), "Much water has passed under the bridge

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[135]Ibid, p. 96.

"since 1929".[136]

Where the Convention did provide, some of the provisions have become obsolete. Yet Sachs L. J. insists that "law is a living thing, moving with the times, and not a creature of dead or moribund ways of thought".[137] Here then lies the principal advantage of case law. It is consonant with realities, adapts to the changing needs of society, it is borne out of experience and it is the product of the felt necessities of the time. This is in contra-distinction to legislations which take a long time and procedure to be amended. Hague Protocol took eight years after adoption to come into force, even then some countries have not ratified it and are still governed by the obsolete Warsaw provisions. The Montreal Protocols adopted in 1975, have not received the required ratifications to come into force. Yet, the air transport industry is developing fast.

Case Law has been most valuable in the area of interpretation of private air law conventions - the Warsaw Concention in particular. The judges have done more than just interprete the Convention, as Donaldson J. pointed out in Corocraft Ltd. v PanAm Airways.[138]

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[136](1968) 2WLR at. 1476.

[137]Porter v Porter (1969)3ALL ER. at. p. 644.

[138](1969) IQB, 616.

> "Judges do not act as computers into which are fed the statute and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. They are not legislators, but refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing."

The courts have sought to give the Warsaw Convention a purposeful construction. They agree that it should be interpreted in a manner that will carry out the framers' intent.[139] But they refuse to allow 'the language of the provisions to become a verbal prison, for the letter killeth but the spirit gives life',[140] or to view the Convention as frozen in the year of its creation.

Thus in Samuel Montagu v Swiss Air Transport Ltd,[141] plaintiff claimed that the defendant's air waybill was defective because the statement giving notice of the application of the Warsaw Convention to the contract of transportation in

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[139] Day v TransWorld Airlines 13 Avi. 17, 647.

[140] Eck v United Airlines 9 Avi. 17, 322

[141] (1966) 2 Q.B. 306.

the consignment note went further than required. Lord Denning ruled in favour of the defendant saying:

> "I do not think we should give a strict interpretation to Article 8(g) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business."

While governments are inadvertently working against the uniformity of private international law on transportation by air by ratifying or not ratifying some Protocols amending the Convention, thereby causing different rules to be applied in different countries, the courts on the other hand, continue to work hard to maintain uniformity. They do so by applying the Convention, as far as possible, in such a way as to produce uniform results even when it is applied in a country having a doctrinal basis for its legal system quite different from the others.

In Block v Compagnie National Air France,[142] Wisdom, an American circuit Judge, ruled:

> "The binding meaning of the terms is the French legal meaning. The principle of the primacy of the French Legal System thus means a

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[142] 8 Avi. 18, 355, affirmed 10 Avi. 17, 518.

> "harmonizing construction of the convention."

And applying this decision in the English court, Lord Denning ruled:

> "The United States Court of Appeal has held that the binding meaning of the terms is the French legal meaning . . . . If such be the view of the American courts, we surely should take the same view. This Convention should be given the same meaning throughout all the countries who were to be parties of it."[143]

This is not to say that the courts of one country are bound by the decisions of the courts of another country strictu sensu. Lord Diplock did not leave room for doubt on this issue when he said:

> "As respects decisions of foreign courts, the persuasive value of a particular court's decision must depend upon its reputation and its status, the extent to which its

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[143] Corocraft Ltd. v. PanAm Airways (1969) IQB 616 Appeal Court decision.

> "decisions are binding upon courts of co-ordinate and inferior jurisdictions in its country, and the national law reporting system . . . . Your Lordships will not be fostering uniformity if you were to depart from your prima facie view . . . in order to avoid conflict with a decision of a French Court of Appeal that would not be binding upon the Courts of France."[144]

The courts made another impression in respect of the defence of all 'necessary measures' provided in the Warsaw Convention.[145] It was found that the defence was more theoretical than practical. It can be proven that a certain step had been taken but no carrier can satisfactorily prove that everything that had to be done has been done. In Manufacturers Hanover Trust Co. v Alitalia,[146] Conner J, established the defence of 'all reasonable measures' instead:

> ". . . This court concludes that

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[144] Fothergill v Monarch Airlines (1980) 3 WLR 209.

[145] Article 20(I), Warsaw Convention.

[146] 14 Avi. 17, 710.

> "the phrase 'all necessary measures' cannot be read with strict literality, but must be construed to mean 'all reasonable measures'. Afterall, there could scarcely be a loss of goods - and consequently no call for operation of Article 20 - were a carrier to have taken every precaution literally necessary to the prevention of loss."

In the regime of liability, the courts felt frustrated by the monetary limits provided in the Convention.[147] Sometimes the judges watched helplessly as claimants, who deserved better, walk out of their temples of justice with peanuts. In order to get around such injustice some courts went to even embarrassing lengths to hold the carrier deprived of availing himself of the Convention's limits to liability. Some of those measures attracted severe criticisms from even brother judges. Thus Moore J., dissenting in the Lisi case (supra), has this to say:

> "The majority in their opinion indulge in treaty making . . . .

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[147] Article 22, Warsaw Convention.

> "(they) do not approve of the terms of the treaty and, therefore, by judicial fiat, they rewrite it. They think a one-sided advantage is being taken of the passenger which must be offset by a judicial requirement . . . ."

Some courts beat the Convention's limits by ruling that the carrier had been caught by the provisions of Article 25, Warsaw Convention according to their interpretation of whatever amounted to Wilful misconduct. Incidentally, when Montreal Protocol comes into force, this route to higher claims will be closed without making an alternative opening.

Conclusion

The laws regulating the air cargo industry come from many soruces. The three main sources, however,are national enactments, international conventions, and case law. National laws are of more importance in domestic transportation, some national laws regulate international transportation too. It is the international conventions which are the main regulators of international carriage by air. The Chicago Convention is the principle Convention regulating the public law aspect, while the Warsaw Convention (and its amending Protocols) is

responsible for the private law aspect. Case law is the main instrument of interpretation and administration of the provisions of these conventions. It does more: by providing for cases where the Conventions failed to make provisions; by exposing the Conventions' provisions which are obsolete, absurd or unrealistic, the application of which would harm rather than help the present day air transport industry, thereby calling attention for their amendments by the responsible international agencies. The rôle of case law in international transportation will further be seen in the chapter following.

CHAPTER 3

SPECIFICS

This chapter deals with some specific aspects of international carriage of cargo by air which have generated a reasonable amount of contention in the courts. It illustrates the change of attitudes to some of the issues over the years.

3.1. The Contract of International Carriage by Air

The Warsaw Convention governs international transportation that falls within the provisions of its Article 1(2). The Convention applies of its own force to such transportation. The choice of the parties is of no moment. The Convention, however, makes mention of 'the contract made by the parties'. The relevance of that contract is only in respect of the consent of the carrier to transport the passenger or goods and the consent of the passenger or consignor that the transportation take place and on certain routes. Whatever else falls under the Warsaw Contract of Carriage. Thus, Desmond J. stated in Ross v PanAm,[148]

> "The Convention speaks of transportation under a 'contract' . . . . The Convention becomes the law of the carriage

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[148] 2 Avi. 14, 911.

> "when the 'contract' of the parties provides for passage between certain described termini. When such is the contract, then the Convention has automatic full impact, by its own terms and not because the parties have so agreed."

The Convention applies even where the transportation is gratuitous as long as the carrier has consented to transport the passenger or the goods.

As far as carriage of goods is concerned, the transportation by air comprises the period during which the baggage or goods are in charge of the carrier whether in an airport or on board an aircraft or in the case of a landing outside an airport, in any place whatsoever. Transportation by surface could amount to transportation by air if such transportation takes place in the performance of a contract for transportation by air for the purpose of loading, delivery or transshipment.[149]

In the Norwagian case of Fjildstad v Braathen S.A.F.E.,[150] the carrier was liable for a dog that was killed outside the

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[149] Article 18, Warsaw Convention.

[150] 3 Arkiv for Luftrett (1966), reported in 1966 Yearbook of Air and Space Law at p. 442.

airport. Just before loading, the dog was frightened in its case. One of the employees of the carrier opened the case in order to calm the dog. The dog ran away and was killed by a car outside the airport.

And in Cie. UTA et Cie Air Afrique v. Sté Electro-Entreprise,[151] electronic goods shipped from Paris to Lomé, Togo, were off loaded at Cottonou airport (Benin) because the aircraft could not land at the agreed Lomé airport. The goods were then transported by truck from Cottonou to the Consignee at Lomé, in the course of which they were damaged. The French Cour de Cassation held that the goods were damaged in the course of transportation by air within the meaning of Article 18(3) of the Warsaw Convention.

Unlike the case of injury to passengers, it is not difficult to ascertain that goods have been damaged in the course of transportation by air. It is, however, not so easy to ascertain who is competent to bring an action to recover for the damaged goods.

3.2. Locus Standi

The courts generally have never favoured inter-meddling in a suit that in no way belongs to one by maintaining or

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[151] RFDA (1979) p. 310.

assisting either party. The raison d'etre for this attitude is to stop people without legal interest in a matter from stirring up litigations and strife. In Neville v London Express,[152] Viscount Haldaner stated:

> ". . . it is unlawful for a stranger to render officious assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest for its prosecution or defence."

And in Wallis v Duke of Portland,[153] Loughborough L. C. ruled that a person having the legal interest "must bring (a suit) upon his own bottom and at his own expense."

In international carriage by air, the courts have more or less maintained these views. Thus, in Horrace Greely v KLM,[154] plaintiff brought an action against the defendant to recover for his lost baggage which allegedly contained jewellery of considerable worth. He also purported in the same suit to represent the interest of some other passengers who

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[152](1919) AC at p. 390.

[153]3 Ves. at. p. 502.

[154]15 Avi. 15, 082.

had suffered some loss too but had accepted inadequate settlements out of court. The court ruled that the plaintiff's interest was not co-extensive with those of the other passengers and as such could not bring an action on their behalf.

There are certain provisions in the Warsaw Convention which touch on the issue of legal competence. In Article 13 (3), if the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation. In Article 14, the consignor and consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name whether acting in his own interest or in the interest of another provided that he carries out the obligations imposed by the contract. Article 30(3) avers to the consignor and consignee as parties who can institute actions against certain carriers. Article 26(2), however, does not provide for the consignee, but for 'the person entitled to delivery' as the party competent to bring a complaint to the carrier in case of damage to the cargo.

It is easy to identify the consignor in any given case, but it is not equally easy to identify the consignee, as the

Convention does not define a 'consignee'. Is the consignee one so named in an air waybill or the 'person entitled to delivery'? Unfortunately, the Convention makes the identification of even the 'person entitled to delivery' not easy as it empowers the consignor to stop goods in transit and direct delivery to any other person.[155] Moreover, the consignee has a right under the Sale of Goods law to reject goods or cancel orders in certain circumstances. In this maze it is not a comfortable exercise to identify, a priori, who is the 'person entitled to delivery'.

The courts have held that it is only the consignor and consignee named in the air waybill who can claim against the carrier. That was the decision in Manhattan Novelty v Seaboard and Eastern.[156] According to the decision, when carriage is governed by the Warsaw Convention, only the disclosed consignor and consignee may sue for loss of the goods. Another party may not sue even though he has some proprietory interest in the goods.

The temptation to question the validity of that decision cannot be resisted. The Convention admittedly requires the mention of the consignor,[157] and if the case so requires,

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[155]Article 12, Warsaw Convention.

[156](1958) US&CAVR 311.

[157]Article 8(d) Warsaw Convention.

the consignee,[158] in the air waybill, among other particulars. Be that as it may, there can still be a valid contract of carriage governed by the Convention in the absence of an air waybill.[159] Moreover, the Hague Protocol and the Montreal Protocol No. 4 do not include the consignor and consignee as particulars to be included in the air waybill. The fact that the case was not governed by the amending protocols not withstanding, the rule in Manhattan does not have a good basis.

Yet, in Holtzer Watch Corp. v Seaboard and Western AL,[160] Rivers J. attempted to defend it:

> "It is reasonable that the carrier be subject to suit only by those whom it knowingly dealt with, that is, by the consignor or consignee named in the air waybill."

One may be persuaded that it is reasonable for the carrier to be subject to suit by those whom it knowingly dealt with; but one cannot be persuaded that the air waybill is the only means by which a carrier can know those he deals with. Would the carrier not know those he deals with in the

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[158] Article 8(f) Ibid.

[159] Article 5(2), Warsaw Convention.

[160] (1958) US&CAVR 142.

case where an air waybill is not issued? or where a receipt is issued instead? The carrier can know those he deals with from the provisions of the Convention or from the terms of the 'contract' - which may even be an oral one.

It is submitted that the decisions in Manhatten Novelty and Holtzer Watch Corp. were the products of their time - a time when the courts were inclined to be more sympathetic to the carriers and the fledging aviation industry.

The absurdity of the judicial rule discussed above, and the ambiguity of Article 26(2) came to the open in the 1979 case of American Banana Company Inc. v Venezolana International de Aviacion SA VIASA.[161] It became clear that the consignee named in an air waybill may not necessarily be the 'person entitiled to delivery'. of the goods at the end of the transportation, as long as the consignor could stop or dispose of the goods in transit and the consignee in the air waybill has a right to cancel orders. Should the consignee named in the air waybill who no longer has any proprietory rights in the goods have the legal interest to bring suit against the carrier on the mere ground that he was named in the bill? Should a person entitled to delivery - and even received the goods - not be competent to sue the carrier on the flimsy ground that he was not mentioned in the air waybill? Or must

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[161] 15 Avi. 17, 286

such a person ask the 'consignee' named in the document to bring action on his behalf?

In American Banana Company, the consignee named in an air waybill had cancelled the orders three days before the flight and the cargo, at the consignor's orders, was delivered to another consignee whose name was not placed in the consignment note. In the belief that only the consignee named in the bill can sue the carrier, the actual receipient of the cargo asked the original consignee named in the bill to sue the carrier for damages in respect of the cargo. The majority of the Appeal Court Judges held that the original consignee was competent to sue the carrier by virture of its status as the consignee of record, that is, the consignee named in the air waybill.

But in a dissenting judgement, Supiano J. held that where it is shown that a consignee has no interest in the goods consigned, he cannot maintain an action against the carrier for damage to the goods.

> "The mere fact that plaintiff is the consignee named in the air waybill, although it is not the actual consignee, that is, the party to whom the goods were delivered, by the carrier at the direction of the consignor, may

"not serve to give plaintiff an ownership of special interest in the goods . . . ."

It is submitted that the dissenting judgement is better. It clears an amgiguous situation. Thus, the person entitled to delivery is a consignee. The competent consignee to claim against the carrier for damaged goods is the one who has proprietory interest in the damaged goods.

As stated earlier, the consignor is competent to bring action against the carrier (Articles 14 and 30(3)). In Panalpina International Transport Ltd. v. Densil Underwear Ltd.,[162] the carrier delayed transportation of goods to a Nigerian consignee. The consignee who lost the christmas market for the goods, as a result of the delay, rejected the goods and the consignor was constrained to dispose of them at a big loss. When the carrier demanded payment of the freight, the consignor conterclaimed for the difference between the goods sold and what he would have realized had the original consignee not cancelled the order. The consignor was awarded the difference between what he claimed and what the carrier claimed as the cost of transporting the goods.

Where the consignor does not suffer any direct damage, like in the case above, for example, and the goods have been delivered to the consignee designated by him, it seems he

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[162](1981) 1 Lloyds LR 187.

may not successfully claim for damage to the goods unless the consignee assigns his right to the consignor. The right conferred on the consignor shall cease at the moment when that of the consignee begins.[163] The consignee's right begins at the moment of the arrival or supposed arrival of the goods at the place of destination.[164] One would like to think that the wide competence provided in Article 14 would be seen in this light if that Article were to have any purposeful meaning.

The carrier can bring action against the consignor or consignee. The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill. The consignor shall indemnify the carrier against all damage suffered by the carrier or by any other person to whom the carrier is liable by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished.[165] This provision is of particular significance in cases where the consignor conceals the nature of the goods or where he does not declare their true value.

Thus in the Australian case of Angus v Qantas Airways,[166]

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[163]Article 12(4), Warsaw Convention.

[164]Article 13(1) Ibid.

[165]Article 10, Ibid.

[166](1980) USAVR 1543.

a consignment of jewellery from Germany to New South Wales failed to arrive at its destination. The consignee recovered the full value of the goods. The carrier impleaded the West German domiciled consignor for indemnity for default in non-declaration of the true value of the consignment. It did not succeed, however, because according to Sheppard J., 'to attempt to serve the consignor in West Germany would be tantamount to an invasion of that country's sovereignty by a judicial fiat'.

From the facts of the case, the carrier alleged that the consignor did not declare the value of the jewellery. It is surprising then, that he did not resist the consignee's claim for the true value of the jewellery but preferred to pay and implead the consignor for indemnity instead. The Convention provides, if the carrier has not been caught by any other provision stipulating otherwise, that the consignee can only receive the full value of the goods if that value had been declared.[167]

The carrier may also bring action against the consignor to recover payment for freight. The Panalpina case (supra) is illustrative of the point. Furthermore, where the consignee fails to pay the freight in accordance with Article 13(1) of the Convention, the consignor must pay the agreed freight

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[167]Article 22(2), Warsaw Convention.

as well as the expenditures incurred by the carrier in execution of orders given by the consignor in the exercise of his right of disposition of the cargo in Article 12(1).[168]

However, the carrier can maintain an action against the consignee who fails to pay the freight or/and other expenditures incurred[169] instead of going after the consignor. Thus, in Swissair v Palmer,[170] a shipper in London consigned goods to defendant by plaintiff's aircraft. The consignor did not pay the freight and consignee resisted the carrier's claim for payment on the ground that the consignor did not have his authority to ship the goods in question. The court held that evidence of previous dealings between the consignor and the defendant consignee amounted to an ostensible authority for the consignor to ship the goods. The carrier accordingly recovered the freight from the defendant.

The issue of competence becomes more controversial when parties other than the carrier, consignor or consignee are involved. In Pilgrim v National Union Fire Insurance Co.,[171] the plaintiff's action against the carrier was dismissed on the ground that it was neither a consignor nor

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[168]Mankiewicz: The Liability Regime of International Air Carriage, op.cit. p. 86.

[169]Article 13, Warsaw Convention.

[170](1976) 2 Lloyds LR 604.

[171](1960) USAVR 373.

consignee. Peter Quinn J. ruled:

> "Articles 13, 14, and 15 of the Warsaw Convention vest the right to bring an action against the carrier in the consignor and consignee and in no others; others having an interest in the goods must look to the consignor or consignee."

This case is distinguishable from Holtzer Watch Corp. (supra) in that while in Holtzer the ratio decidendi is that only a consignor or consignee named in an air waybill can sue a carrier, in Pilgrim, only a consignor or consignee, named or unnamed in the bill, can bring an action. Pilgrim, therefore, appears to be less restrictive than Holtzer: It is, nonetheless, suspect as it excludes other people with the necessary interest in the goods from bringing actions against the carrier. Unfortunately, the fallacy in Pilgrim persisted for a pretty long time[172] before it was successfully controverted.

The first unsuccessful attempt was made in the South African case of PanAm v SA Fire and Accident Insurance.[173]

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[172]See for example, Bart v British West Indian Airways, (1967) 1 Lloyds LR 239.

[173](1965) 3 SA 150 (AD)

In that case, among other facts in issue, was the question whether in the absence of a consignment note, the carrier could still contend that he was liable only to the consignor or consignee, and to no other person. Steyn C.J. was of the view that the Convention did not limit the right of action against the carrier to the consignor and the consignee, and that even if it did, the absence of a consignment note resulted in forefeiture by the carrier of the benefit of that limitation so that he could be sued by any person with the necessary interest. The majority of his brother judges, however, disagreed with the Chief Judge's 'heresy', and held that the Convention limits the right of action to the consignor and consignee. They went further to hold that 'this' was not one of the provisions in the Warsaw Convention affected by the absence of or omission in the consignment note.

With all respect, the majority's ruling is erroneous. There is no provision in the Warsaw Convention or its amending Protocols excluding people other than the consignor or consignee from suing the carrier. The rule that it is only the consignor or consignee who can sue the carrier is, like the rule that only the consignor or consignee named in an air waybill can sue the carrier, a judicial creation, and not a Warsaw provision.

In 1979, (nineteen years after the decision in Pilgrim)

the break-through came in the case of Leon Bernstein Commercial Corporation v PanAm.[174] Plaintiff was an undisclosed principal of International Reptiles Corporation, the consignor named in the air waybill covering a cargo of diamond python snake-skins from Singapore to Valencia, Spain. The cargo was misdelivered to Venezuela where it was impounded by the local customs. The undisclosed principal sued the carrier to recover the value of the consignment. Bloom J. held that the carrier was liable to the undisclosed principal. He stated:

> "The Warsaw Convention should not be interpreted so narrowly to restrict to consignor and consignee . . . to defeat the right of the true owner."

On appeal, the point was made that to allow other people besides the consignor and consignee to sue would subject the carrier to double liability. Affirming Bloom J's decision, the Appeal Court ratiocinated:

> "If it can be established upon the trial that plaintiff is, indeed, the undisclosed principal of the consignor named in the

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[174] 15 Avi. 17, 954.

> "air waybill, and had title to the goods at the time of the loss, defendants will not be making any liability payments to the wrong party, nor will plaintiff be unjustly enriched by any award of damages."

It is suggested that a carrier should be the least enthusiastic about barring a person with the necessary interest in goods from bringing action under the Warsaw Convention. The carrier may run the risk of being sued outside the Convention in tort (with possibly higher claims) as was the case in the marine case of Schiffahrt-und Kholen G.M.B.H. v Chelsea Maritime Ltd. (The Irene's Case).[175] There, the plaintiffs were C.I.F. buyers of the cargo on board the defendant's vessel, Irene Success,from Norfolk, Virginia, to Hamburg, West Germany. The cargo was damaged in the course of the voyage. The plaintiffs alleged that the damage was caused by defendant's negligence. However, the plaintiff could not sue in contract since they did not hold the bill of lading. The court had to decide whether they could sue in tort even though they were not owners of the goods when the damage was caused. Lloyd J. ruled that a reasonable carrier would surely have contemplated that the person who was likely

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[175](1981) 2 Lloyds LR, 635.

to suffer the damage was the person at whose risk the goods were at the time in question, and although such a person was likely to possess the additional characteristic that he could sue in contract as holder of the bill of lading, that was no reason for excluding someone who did not possess that additional characteristic from the reasonable contemplation of the carrier. He declared:

> "The person at whose risk the goods are is . . . . a universal concept which is equally at home in tort or contract. It means simply, the person who will suffer if the goods are lost or damaged."

The arguement might be raised that Article 24 of the Warsaw Convention excludes actions in tort in cases covered by Article 18 and 19 of the Convention. This arguement may not be helpful in this case. For the carrier having first of all claimed that the claimant is not competent to sue him under the Convention, cannot be heard in another breath to say that the Same Convention which does not cover the claimant, excludes him from seeking a remedy elsewhere. In other words, the carrier cannot approbate and reprobate.

Admittedly, the Convention does not apply to persons as such but the kind of transportation and one could argue fur-

ther that though the claimant cannot sue under the Convention, nevertheless, the transportation from which the cause of action arose is governed by the Convention and Article 24 is applicable accordingly. This ingenious arguement can still not be allowed to stand. The courts have pointed out repeatedly the need to give the Convention a purposeful and meaningful construction. It will be contrary to the spirit of the Convention to suggest that Article 24 was intended to prevent a person with the necessary interest in damaged or lost goods from getting any kind of remedy whatsoever. A judge would not allow his court to be the forum for the perpetuation of such an injustice.

A consignor can be sued by third parties. A person who suffers damage by reason of irregular, incorrect or incomplete particulars inserted in an air waybill can claim from the offending consignor.[176] It is concievable that a consignor may send a package without declaring its real dangers, in order not to be refused, and that nearby goods are destroyed or contaminated because of this package. If this occurs, the consignor must indemnify the owner of the goods which are lost in this manner.[177]

In a case of this sort, what is the extent of the con-

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[176]Article 10(2), Warsaw Convention.

[177]Matte: Treatise On Air - Aeronautical Law, op.cit.p. 402.

signor's liability to the third party, that is, how much can the third party recover? The consignor cannot invoke the protection of Article 22 of the Convention to limit his liability, in spite of the fact that Article 24(1) stipulates that in the cases covered by Articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention. Article 22 limits the liability of the carrier and not that of any other persons. The consignor is not the carrier's agent or servant. However, the Hague Protocol amending Article 10(2) of Warsaw, stipulates that a person suffering such damage may proceed against the carrier instead of the consignor, but the consignor shall indemnify the carrier for the claim.[178]

Hague complicates the issue a little. If the action is brought against the carrier, will the liability be limited? On first thought, one would say no, for the damage was not caused by the carrier, his agents or servants, for Article 22 to come into play. On second thought, it is more reasonable to answer in the positive. Prima facie, a carrier's liability is limited. The liability becomes unlimited only when the carrier fails to get an air waybill, or fails to meet the mandatory requirements of an air waybill; or when he or his servants or agents are quilty of wilful misconduct. The con-

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[178]Article VIII Hague Protocol.

signor, even if he is guilty of wilful misconduct, is not a servant or agent of the carrier and Article 25 of Warsaw cannot operate against the carrier. The claimant who chooses to sue the carrier in this case, stands to claim for limited liability. If he desires a higher claim, he had better go against the offending consignor himself in tort.

3.3. . The Air Waybill

3.3.1. General Provisions:

Articles 5 - 11 of the Warsaw Convention contain provisions on the consignment note, otherwise called the air waybill. In Article 5(1) the carrier has a right to require the consignor to make out an air waybill and hand over to him. The consignor, on the other hand is given the right to require the carrier to accept the air waybill. According to Article 6, the air waybill made out in three original parts shall be handed over to the carrier with the goods. Both the consignor and carrier shall sign the bill - the former, before handing it over, the latter, on acceptance of the goods. But Hague Protocol, Article V, amending Warsaw, enjoins the carrier to sign the bill prior to the loading of the cargo on board the aircraft.

What is the significance of the amendment? The amend-

ment reflects modern realities of air transportation, which is often door-to-door rather than airport-to-airport, by taking account of the air carrier's justified reluctance to have the details of the air waybill completed upon the shipper's doorstep by a truck driver. A claimant is not prejudiced so long as he has at the time of pick-up, actual or constructive notice of the limitation liability-as well as some evidence that the goods were accepted by the airline's agent.[179]

The point must be made clear that the contract of transportation comes into existence when the goods have been accepted by the carrier, not when the air waybill is signed. After acceptance of the goods and before signing of the bill, the carrier cannot, for example, exercise his right to refuse to carry the goods without breaching the contract of carriage.

The marine case of The Ardenes[180] is illustrative of this point. In that case, Lord Goddard C.J. explained:

> "The contract has come into existence before the bill of lading is signed, it is signed by one party only and handed by him to the shipper usually after the goods

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[179]Yale Law Review - 1960 Vol. 69, p. 993 et. seq.

180(1951) IK.B. 55 at 59.

> "have been put on board. No doubt if the shipper finds that the bill contains terms with which he is not content or does not contain some term for which he has stipulated, he might, if there were time, demand his goods back, but he is not . . . for that reason prevented from giving evidence that there was in fact a contract entered into before the bill of lading was signed."

The carrier does not have to sign the air waybill when the goods are accepted, usually when they are delivered to him or his agents. Miller states that:

> "This overcame the difficulty facing the carrier of having to complete the air waybill when the goods were accepted, i.e. usually on delivery to him or his agents. If the air waybill was not issued, or completed at that time, the carrier could lose the benefits of the Convention's limitations of lia-

"bility. This risk is now eliminated and it follows that goods can safely be accepted by freight forwarders."[181]

With respect, 'the risk' is not eliminated by the amended Article 6(3). There are two facts in issue in Article 6 of Warsaw. First, an air waybill shall be 'made out' by the consignor and be handed over with the goods (Art 6 (1)). Second, the carrier shall 'sign' on acceptance of the goods (Art 6(3)). There is a difference between making out the air waybill by the consignor and signing it by the carrier. The Hague amendment extends the time of signing the bill by the carrier. Article 9 of Warsaw, on the other hand, penalizes the carrier if an air waybill is not 'made out', it does not penalize him if it is not 'signed'. The risk, therefore, is on the 'making out' not the 'signing' of the bill.

Thus in United International Stables Ltd. v Pacific Western Airlines Ltd.[182] an action for damages arising out of the destruction of part of a cargo of horses by order of the Captain of the aircraft, Seaton J. ruling on the issue of the air waybill explained:

". . . the words 'made out' in Article 9 can be interpreted by looking at the

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[181]Miller: International Carriage of Cargo by Air - LL.M. Thesis (McGill), p. 26.

[182](1969) 5 DLR (3rd) 67 at p. 73.

> "Convention and particularly Article 6. That Article clearly indicates that the making out of an air waybill is quite a different step than (sic) the signing of it. The first paragraph of Art. 6 provides that it shall be made out and handed over. Signatures are dealt with in subsequent paragraphs. To say that it was not made out until it has been signed . . . would be to say that it was not made out until the cargo is delivered. The Article distinguishes making out from signing and the first paragraph does not read intelligently if 'made out' means 'signed'.

In this light, it is submitted that the amended Article 6(3) is of no consequence. Signing the air waybill is immaterial as far as Article 9 is concerned. It is the 'making out' which is material. Therefore, it is Article VII of Hague Protocol amending Article 9 of Warsaw which appropriately eliminated the risk. By virture of this amendment, the carrier shall no longer be penalized for accepting goods without an air waybill having been made out. He will only be penalized if the cargo is loaded on board the aircraft, with his consent, without an air waybill having been made out.

Thus the amended Article 9 extends the time of 'making out' the bill, unlike Article 6(3) which extended only the time of signing the bill.

It should be noted that when Montreal Protocol No. 4 comes into force, Article 9 of Warsaw as well as its amended version by Hague will be rendered ineffective. Montreal provides that non-compliance with the provisions of Articles 5 to 8 of Warsaw Convention shall not affect the existence or liability of the contract of carriage which shall, nonetheless, be subject to the rules of the Convention including those relating to limitation of liability.[183] The carrier will no longer be deprived of the Convention's limits of liability for the irregularity of particulars in, as well as the absence of, a document of carriage.

3.3.2. Legal Effects of the Bill

The consignor shall make out an air waybill in three original parts and hand over with the goods. In reality, however, it is the carrier who issues or gives out an air waybill to be filled by the consignor, for example, the Standard IATA air waybill for member airlines.[184] Although the Convention provides for three original parts of the air waybill,

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[183]Article III, Montreal Protocol No. 4 amending Article 9, Warsaw Convention.

[184]IATA Resolution CSCI - CSC 3 (01) 600 No. 2

the carrier, in line with the IATA General Conditions of Carriage, usually requires additional copies of the air waybill, but none of these has the status of an original part.[185] However, in reality, the legal status of the extra copies is the same as that of the original parts.

Thus, in Cooper Finer Inc. v PanAm,[186] an air carrier made nine copies of the air waybill in addition to the three original parts. The carrier rejected the cargo afterwards and returned it to the consignor, recalling the original parts and some of the copies. The consignor fraudently used an unrecalled copy and obtained undeserved payments from the plaintiff. The plaintiff sued the carrier to recover for the damage he had suffered through its negligence. Defendant argued vigorously that only the original parts which he had recalled were material and effective and that it had no duty to recall the copies. The court was not persuaded by that arguement. Carroll J. ruled:

> "That arguement is without force
> . . . . It was the carrier's custom
> to take up all copies which were
> signed or bore its reception stamp.
> . . . Without a copy of the bill of

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[185] Mankiewicz: The Liability Regime of International Air Carrier, op.cit. p. 63, et.seq.

[186] 9 Avi. 17, 776.

> "lading (sic) bearing the reception stamp of the carrier and thereby signifying that shipment . . . had been made, the consignor could not have obtained the undeserved payment."

Plaintiff recovered.

The evidentiary value of the air waybill is of particular significance. The air waybill is prima facie evidence of the conclusion of the contract, of the receipt of the goods, and of the conditions of transportation. The particulars in the air waybill do not have the same evidentiary value.[187] The statements in the bill relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages shall be prima facie evidence of the facts stated, and would appear to operate as evidence against the carrier.[188] The statements relating to the quantity, volume and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

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[187]Article II, Warsaw Convention.

[188]See, for example, Sté Mitjaville v Sté Air Algerie RFDA (1950), p. 322.

But the Convention does not seem to have provided for the evidentiary weight of some other important statements which it requires to be part of the contents of the bill. What, for example, is the evidentiary weight of the statement relating to the declared value of the amount of the value declared for purposes of Article 22(2)? This question arose in the case of L & C Mayers Company v KLM.[189] In that case, the space in an air waybill for the special declararion of value had been filled in with the total customs value of the shipment. The carrier tendered in evidence claiming that the space was blank at the time of the execution of the air waybill. The court believed the carrier's story and held:

> ". . . the air waybill in this case is, by itself, prima facie evidence of the contract between these parties but evidence may be recieved to establish the actual agreement."

It will be noted that the statements for which Article 11(2) of Warsaw provides have been eliminated by Hague Protocol.[190] Should the parties voluntarily insert them, nevertheless, it seems Article 11(2) of Warsaw will still come into

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[189] 3 Avi. 17, 929.

[190] Article VI, Hague Protocol.

play and apply to the voluntary statements with equal force, since Hague Protocol left this Article untouched.

3.3.3. Negotiability

While an air waybill serves as an important instrument of proof, it is not a document of title. Consequently, its transfer does not affect ownership of the goods or rights and liabilities arising out of the contract of carriage.[191] This statement should not be taken to mean that the possession of an air waybill by someone not entitled to is of no consequence whatsoever. It has already been shown in the case of Cooper Finer Inc. (supra) how a consignor was able to use the unrecalled copy of an air waybill to obtain an undeserved payment and the negligent carrier was held liable to the defrauded party.

If the carrier obeys the orders of the consignor for the disposition of the goods to a consignee different from the originally agreed one without requiring the production of the part of the air waybill delivered to the consignor he will be liable without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.[192] This provision intimates a situation where some-

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[191]Gazdik J. G.: Law of Contracts Relating to Carriage of Goods by Air, p. 68.

[192]Article 12(2), Warsaw Convention.

body who is in lawful possession of an air waybill can legitimately obtain the goods inserted therein from the carrier.

As a matter of fact, the entire provisions of Article 12 of Warsaw Convention amount to a serious erosion of the non-negotiability concept of the air waybill. Interestingly, this could be one of the reasons underlying the Convention's silence on the issue of negotiability of the air waybill. If any meaning were to be read from the silence, the provisions of Article 12 and 15 would make it a rational deduction that the Convention favours negotiability of the bill. It is not surprising, therefore, that the Hague Protocol actualized this implication by adding to Article 15 of Warsaw that nothing in the Convention prevents the issue of a negotiable air waybill.[193]

It is the carriers, through their association (IATA), who are vehemently against the negotiability of the air waybill. They insert on the air waybill as a condition of the contract that the bill is non-negotiable. The grounds for their opposition are not unreasonable and are based on practical rather than legal considerations. First, they claim that unlike the bill of lading where only one copy is issued, the supplementary copies of an air waybill will cause lots of problems regarding negotiability. Goods will have to wait for a long time on

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[193]Article IX, Hague Protocol.

arrival for the carrier to identify the actual consignee holding the finally endorsed air waybill. This delay in delivery is against the fundamental advantage of air transportation. Second, the carrier will incur extra expenses by employing specialists to handle negotiable documents.

Magdelénat advances another ground:

> ". . . . Contraiment au transport Maritime où le connaisement assure que la marchandise est a bord d'une navire précis (identification et localisation facile, donc plus de securite), le fret aérien n'est pas toujour placé en un seul lot et l'avion n'est jamais designé".[194]

The issue becomes even more complicated when the rôle of the banks on negotiability is considered. The core of negotiability of a document of carriage, as a cue from the bill of lading demonstrates, is not just the passing of title to the goods from one person to another, it is the intricacies of documentary sale. In a documentary sale, the seller is paid upon delivery to a designated local bank of a negotiable bill of lading, thus obviating the risk of buyers rejection or non-payment and the consequent necessity of suing the buyer in a

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[194] Magdelénat: Le Fret Aérien, op.cit. p. 119.

foreign jurisdiction. Although the buyer must pay before he can inspect the goods, he at least has the assurance that goods corresponding to the description in the bill are in the carrier's custody. The buyer's bank which usually finances the sale through a letter of credit, receives the negotiable bill from the seller's bank and holds it as security until the buyer repays the loan or executes further security for released goods. If the arguement that only a consignor or consignee and no other person with the necessary interest in the goods can bring action against the carrier is sustained as it has been so done by some courts, the banks will refuse to have anything to do with an air waybill, and that affects the value of an air waybill as a negotiable document of carriage.

Another problem arises in respect of Article II of the Warsaw Convention. Under that Article, a carrier is competent to deny the receipt of the goods or the correctness of their description in his own waybill. The problem is, however, said to be resolved by the Hague Conference's interpretive resolution that Article II is permissive, not mandatory and yields to contrary stipulations in the air waybill.[195]

Beaumont[196] asserts that national law rather than the Warsaw Convention determines the negotiability of a document

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[195] Transporting Goods by Air - Yale Law Journal, Vol.69 (1959-60), pp. 1000-1001.

[196] Beaumont: Negotiability of Air Waybill - 1957 Journal of Business Law, pp. 134-135, Footnote 49.

of carriage. Although some national laws dealing with negotiability of bills are framed so as to apply regardless of the type of carrier issuing the bill, some enumerate the carriers who may do so, and such enumeration rarely include the air carrier. It can be rationalized that such non-inclusion or express exclusion is due to the fact that states, considering the international character of air transport, might deem it prudent to leave the issue of negotiability of the air waybill (for international carriage in particular) to be regulated by the responsible international regulatory agencies. Or, some states considering the new Article 15(3) of Warsaw, as amended by Hague Protocol, might conclude that the issue has been taken care of by the more competent authority. It may, therefore, be more appropriately concluded that the issue of negotiability of the air waybill finally rests in the hands of the carriers and their association, the International Air Transport Association (IATA).

3.3.4. Particulars in the Air Waybill

The Warsaw Convention, in Article 8, enumerated a long list of seventeen particulars that should be contained in an air waybill. In Article 9, it makes the inclusion of ten of the seventeen particulars mandatory; punishment for non-inclusion of any of them is as severe as it is the case for

non-delivery at all of an air waybill - loss of the Convention's limitations of liability as contained in Article 22. The Convention, like other international treaties, is not quite close to the actual life of what it regulates. The courts, on the other hand, are closer to realities and by virture of that fact, better appreciate the usefulness of many of the particulars.

Accordingly, the courts rather than follow the Convention to the letter and give unreasonable judgements, devised what may be called the 'Prejudice Test'. The non-inclusion of a particular in a given case is not fatal because the Convention says so, simplicita, it is only fatal where it is established to be prejudicial to the claimant. Thus, in American Smelting & Refining Co. v Philippine Airlines,[197] six cases of gold were shipped from the United States to Hong Kong. The aircraft crashed near Hong Kong and the gold was lost. The defendant accepted to pay up to the Warsaw limits but the plaintiff sought to exclude the limits because the air waybill did not contain the particular on 'agreed stopping places', a mandatory particular in Article 9. The court held that without the agreed stopping places being specifically provided in the air waybill, common sense would show that a journey of that length would necessitate stopping at a place at least to refuel. It stated:

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[197](1954) USAVR 221.

> "Contrary to plaintiff's contention, however, it is a general principle of construction with respect to treaties that they be reasonably and liberally construed so as to carry out their obvious purposes. . . . It cannot be doubted that no casual connection existed between the omission and the accident. Plaintiff's loss would have been the same whether or not the stopping places appeared on the face of the air waybill."

The dictum in American Smelting & Refining Co. was reinforced in the case of Corocraft Ltd. v Pan American Airways.[198] In that case, plaintiff's consignment of a cartoon of jewellery was stolen by one of defendant's servants. The carrier argued that his liability was limited to Nineteen Pounds, being the sterling equivalent of 250 gold francs per kilogram. The value of the goods declared for customs purposes was 2,959 Pounds, but no value was declared for carriage. Plaintiff claimed the custom value on the ground that the air waybill did not contain particulars concerning volume or dimensions as required by Article 8(1) of Warsaw. This omission,

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[198](1969) IQB 616 (Decision of the Appeal Committee of the House of Lords).

he claimed, deprived the carrier of the Convention's limit of liability. The Appeal Court held that the omission of that particular, in this case, was not fatal, accordingly, carrier's liability was limited to nineteen pounds. Widgerly L.J. declared:

> ". . . the omission of any of these particulars shall not affect the rights of the parties under the contract if the particular omitted was not necessary or useful to determine the amount of the freight or to determine any other condition upon which the parties were prepared to enter into the contract."

It is amazing how claimants can ignore more reliable grounds and base their claims on the less important ones. It is submitted, if a digression is permitted, that the carrier in Corocraft deserved to be deprived of the Warsaw Convention's limits of liability, but on a different ground. Theft by the carrier's servant in the course of his employment is wilful miscounduct par excellence. The consequence of wilful misconduct as provided in Article 25 of the Convention is to deprive the carrier of the provisions of the Convention which limit his liability. Significantly, Lord Denning who was one of the judges in Corocraft (he delivered the judgement), gave a relevant decision later in Rustenberg Platinum Mines Ltd. v

legal position quite absurd.[200]

Cognizant of the flood of criticisms from both jurisprudence and doctrine, Hague Protocol slashed down the particulars to three and made only one of them, the requirement of notice of the applicability of the Warsaw Convention, mandatory.[201] Montreal Protocol No. 4 went further to make the non-inclusion of any particular inconsequential to the carrier's liability.[202]

In addition to the obvious consequences of these amendments, there are some which are not so obvious. As far as the Hague amendment is concerned, the carrier need not shout hallelujah too loudly. The 'Prejudice Test' is a double edged weapon. Just as the courts used it effectively and commendably to extricate the carrier from the Convention's severe provisions, there is no reason why the same test cannot be used against him in certain circumstances. Where the non-inclusion of a particular is prejudicial to the claimant, even though the inclusion of that particular is not man - datory, the courts, it would appear, might allow the claimant to recover the full value of the consignment.

The case of Annie B. Hill v Eastern Airlines,[203] can be

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[200] 16 JALC (1949) p. 399 et. seq.

[201] Articles VI and VII, Hague Protocol.

[202] Article III (amending Warsaw's Art. 9), Montreal.

[203] 15 Avi. 17, 951.

used to illustrate the point. There, the claimant's baggage was lost in the cause of transportation. The carrier accepted to pay up to the Warsaw limit of $9.07 per pound up to forty-four pounds which is the maximum free baggage allowance in tourist class. The claimant asked for $1,000 being the full value of the baggage on the ground that the space for the weight of baggage in the baggage check was not filled. The court held that the omission of the weight contravened Article 4 of the Convention and claimant was awarded the full value.

If that case were decided in a forum where the Hague Protocol applied, instead of the United States where it did not, then, the omission of the weight would not have been caught by any express provision to justify the exclusion of the Convention's limits since that particular is not mandatory. However, it is submitted, the court would have had to apply the 'Prejudice Test'. How could the compensation for the loss have been computed in the absence of the weight of the baggage since liability for baggage is based on weight where the special value is not declared? The carrier's maximum recoverable weight of forty-four pounds is arbitrary and inconsistent with the Warsaw liability regime. The maximum might be an approved tariff, nevertheless, it is tantamount to setting a lower limit of liability and offends Article 23

of the Warsaw Convention. The omission of the weight of the baggage in the baggage check was, for all intents and purposes, prejudicial to the plaintiff's claim.

3.4. Successive Carriers

Transportation to be performed by several Successive Air Carriers is deemed, for the purposes of the Warsaw Convention, to be one undivided transportation, if it is regarded by the parties as a single operation. It is immaterial whether it is agreed upon under the form of a single contract or a series of contracts, and it cannot lose its international character merely because one contract or a series of contracts is to be performed entirely within the same contracting state.[204]

It is the intent of the parties which makes a successive carriage with one or several contracts. In Parke-Davis v BOAC,[205] the parties intended the transportation to be one contract of carriage though three air waybills where issued. In the case of one contract of transportation to be performed by various successive carriers and falling within the definition set out in Article 1 of the Warsaw Convention, each carrier who accepts passengers, baggage or goods will be subject to the rules set out in the Convention and will be deemed

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[204] See, for example, Elizabeth Egan v American Airlines, 9 Avi. 18, 247; also Art. 1(3) Warsaw Convention.

[205] 5 Avi. 17, 838.

to be one of the contracting parties to the contract of transportation in so far as the contract deals with that part of the transportation which is performed under his supervision.[206]

In respect of baggage and goods, the passenger or consignor shall have a right of action against the first carrier and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss of damage was occasioned. These carriers shall be jointly and severally liable to the passenger, or to the consignor or the consignee.

In those jurisdictions where the Guadalajara Convention applies, it can be helpful to consider Articles I and II of that Convention when reading Article 30 of Warsaw. Thus, in the Dutch case of N. V. Organ Ltd. and Organ Inc. v The Co-operative Vereniging and Netherlands Luchtvracht Groupage Centrum U. A. Seaboard World Airlines,[207] plaintiffs claimed damages from defendants for the loss of a consignment valued at U.S.$104,887.50. The first defendant, a freight forwarder, contracted with the plaintiffs to transport the consignment

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[206]Article 30, Warsaw Convention.

[207]No. 382, IATA LR (1971).

from Schiphol, Netherlands, to New York, U.S.A., and issued a consignment note in which the first and second plaintiffs were named as consignor and consignee respectively. The document did not contain the statement that the carriage was governed by the Warsaw Convention. Seaboard carried the goods, and from its cargo shed at J.F.K., the consignment got lost. However, Seaboard had issued a waybill which complied with Warsaw requirements. The bill showed the first defendant as consignor and another freight forwarder as consignee. The plaintiffs argued that Seaboard's liability was not limited by the Warsaw Convention because the first consignment note issued by first defendant was defective, and that Seaboard was the 'Actual Carrier' who performed the carriage by authority of the first defendant, the 'contracting carrier' within the meaning of Guadalajara. But first defendant argued that it acted solely as a freight forwarder, and not as a carrier. Seaboard also contended that it contracted as principal for first defendant, that plaintiffs had no right of action under the air waybill as they were not named therein.

The court held that first defendant acted as a carrier in the circumstances, and was liable as the contracting carrier without limits of liability consequent upon its defective note of consignment; that plaintiffs as consignor and consignee, had no locus standi to bring the action simul-

taneously, the first plaintiff as consignor having lost his right to the second plaintiff as consignee to sue the carrier; that Seaboard by issuing an air waybill to first defendant in respect of their contractual agreement, acquired the position of a contractural carrier so that its rights and obligations were governed by the contents of the air waybill and by the Warsaw Convention and was therefore not liable as an 'Actual Carrier', since Guadalajara Convention was not applicable in the Netherlands. The plaintiff's action against Seaboard was, therefore, misconceived.

That was no easy case, but the judge sorted out the issues remarkably well. The case did not fall under the provisions of successive carriage as that was not the intention of the parties in the original contract of transportation between the plaintiffs and the first defendant. And it could not be governed by Guadalajara Convention as that Convention had not been ratified by the Netherlands, the forum of the court. Plaintiffs could not succeed against the second defendant, Seaboard, either as successive carrier or as 'Actual Carrier'.

It has been stated that in successive carriage, the consignor should bring action against the first carrier. In the absence of any other express indication in the air waybill, the carrier who has received the goods from the consignor and

who is entrusted with the carrying out of the first leg of the transportation is deemed to be the first carrier. The consignee will go against the last carrier. A carrier who had been recovered from, but who was not actually responsible for that part of transportation in which the damage arose, could turn round and sue the real offending carrier for indemnity.

Such was the case in Connaught Laboratories Ltd. v Air Canada, Aerolineas Nacionales Del Ecuador S.A.[208] The plaintiff consigned polio vaccine to Air Canada for carriage to Quito, Ecuador. Air Canada carried the consignment to Miami and arranged for Aerolineas to carry it from there to Quito. The vaccine had arrived at Miami as scheduled, but was about forty-eight hours late arriving at Quito. As a result, the vaccine was completely damaged and had to be destroyed. Connaught claimed from Air Canada; Air Canada turned round and claimed from Aerolineas. The court gave judgement for Connaught against Air Canada, and for Air Canada against Aerolineas, for full value of the consignment. Similarly, in Trans World Airlines Inc. v Alitalia,[209] it was held that Trans World deserved to be indemnified by Alitalia for the goods damaged while being transported from Los Angeles, U.S.A.

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[208](1979) 23 O.R. (2nd) 176.

[209](1978) 149 Cal. Reptr. 411.

to Pisa, Italy, by the successive carrier, Alitalia.

3.5. Carriers Liability Regime

3.5.1. General Provisions

The carrier is liable for damage sustained in the event of destruction or loss of, or damage to the goods if the occurence which caused the damage so sustained took place during the transportation by air.[210] The carrier is also liable for damage occasioned by delay in the transportation of the goods.[211] The period of transportation of goods is much longer than the period of transportation of passengers by air. For the purposes of carriage of goods and baggage, the transportation by air shall comprise the period during which the goods are in the charge of the carrier whether in an airport or on board an aircraft or in case of a landing outside an airport, in any place whatsoever.[212] Although these are examples or instances where or when goods could be said to be in the charge of the carrier, that list is not exhaustive. Damage to, destruction, loss and delay of goods in the carrier's or his agent's (such as the freight forwarder's) warehouse outside an airport awaiting transportation or del-

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[210]Article 18 (1), Warsaw Convention.

[211]Article 19, Ibid.

[212]Article 18(2), Ibid.

ivery can still be said to have occurred during the period of transportation as long as those goods are said to be in the charge of the carrier.

It is also important to have the provision of Article 18 (3) in mind. The period of transportation by air shall not extend to any transportation by land, by sea or river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or trans-shipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

3.5.2. Destruction, loss of, and damage to goods.

Goods are destroyed when they are physically destroyed or they, or part of them are so altered as to make them unfit for the purpose for which they were intended. They are lost when their location or even their existence is not known or reasonably ascertainable, or they cannot be delivered to the designated consignee. Goods are damaged when they still have some economic value and utility.[213]

Lost and destroyed goods are similar to the extent that in either case, they are wholly without economic value or utility to the consignor or consignee, and in both cases,

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[213] Mankiewicz: The Liability Regime of International Air Carrier, op.cit. p. 168 et. seq.

notice as required in Article 26(2) of Warsaw Convention is not necessary. Damage, on the other hand, no matter how severe, does not necessarily amount to destruction and loss. However, the carrier's liability for damage is the same as for the destruction or loss of goods. The recoverable damage is different as damaged goods still have some economic value to the claimant. In the case of damage to goods, a notice under Article 26(2) is a sine qua non to a successful claim of damages.

The carrier's liability in any case is limited to 250 Poincaré francs or 17 Special Drawing Rights per kilogram, unless a special declaration of value had been made at the time when the consignment was handed over to the carrier and a supplementary sum paid, if the case so requires.[214] Thus in American Smelting and Refining Co. v Philippine Al. (supra), Wasservoge J. refusing plaintiff's claim above the Convention's limits of liability ruled:

> ". . . plaintiff specifically advised defendant that it did not desire any insurance of the cargo. Yet, if plaintiff's position were sustained by the court, a judgement in its favour would in effect, hold defendant liable as an insurer of the full value of the ship-

[214] Article 22(2), Warsaw, Art. VII; Montreal No. 4

"ment even though defendant was
paid only the usual cargo rate."

And in Herman Wolf & Co. Ltd. v Braniff International Airlines,[215] plaintiff's furs worth $47,500 shipped from Peru to London, were not delivered to the designated consignee. The plaintiff was awarded only $6,565.68, the Convention's limit, in the absence of proof of special declaration or wilful misconduct.[216]

Wilful misconduct, or the omission of certain mandatory particulars in, or non-issuance of the air waybill, could operate to enable the claimant to recover the full value of the goods, according to Warsaw Convention and the Hague Protocol. In Newell v Canadian Pacific Airlines Ltd.,[217] one of plaintiff's dogs died and the other suffered serious injury while being transported in a cargo compartment of defendant's aircraft. The cause of the disaster was carbon dioxide poisoning. Both dogs had been placed in a compartment together with a quantity of vaccine packed in dry-ice, in breach of defendant's contract to carry the dogs safely. The court held the carrier quilty of misconduct and plaintiff recovered damages above the limits. As had been pointed out earlier,

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[215](1976) USAVR 102.

[216]See Manufacturers Hanover v Alitalia, 14 Avi. 17, 710 where claimant recovered full value.

[217](1976) 74 DLR (3rd) 574.

when Montreal Protocol No. 4 comes into force, cases like Newell will no longer be good law, since a carrier's liability will not be excluded on the ground of wilful misconduct respecting the transportation of goods. According to the new Article 25 as amended by Montreal, 'wilful misconduct' provision is only applicable to passengers and baggage.[218]

The courts have had occasions to determine whether goods were damaged or lost where some of the contents of a consignment or baggage were lost. So far, they are split on where to draw the line of difference.

In Bernard Schwimmer v Air France,[219] plaintiff brought an action to recover for damage to four cases and for loss of seven cases of an eleven-case shipment of house-hold goods and furniture. Shapiro J. ruled:

> "Defendants argue that the loss of a portion of a shipment constitutes damage . . . . I cannot agree. Damage is damage and loss is loss."

In the English case of Fothergill v Monarch Airlines Ltd.,[220] the question also arose whether the loss of some contents of a baggage amounted to damage or not for the purposes of notice as required in Article 26(2). Lords Brown and

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[218] Articles IX and X, Montreal Protocol No. 4.

[219] 14 Avi. 17, 466.

[220] (1980) I.Q.B. 23.

Geofrey Lane held a view similar to that of Shapiro J. above. They ruled:

> ". . . the word 'damage' in the English text of Article 26(2) of the Warsaw Convention as amended by Hague in 1955, and given effect to by the carriage of Goods Act 1961, meant physical injury to the baggage, and did not include partial loss of the contents."

But Lord Denning M.R. in the same court ruled differently:

> "Although the word 'damage' in Article 26(2) is ambiguous, the travaux préparatoires, the judicial decisions, the text writers and section 2 (1)of the Act of 1979 which is declaratory, lead to the conclusion that damage includes partial loss."

Lord Denning's conclusion was upheld when the case went on appeal to the House of Lords.

Mankiewiez appears to have come up with a compromise answer. He explains that partial destruction or loss stricto sensu, means that one or several items shipped under one single air waybill have been lost or destroyed. In that case, no complaint is required. However, destruction or loss of

some or all of the contents of a single package or piece of baggage must be considered as damage to the cargo or baggage and, thus, requires the filing of a written complaint within the time limit prescribed in the Warsaw Convention. Where, for example, the whole or part of the contents of a suitcase is lost, the suitcase itself is not lost. It is damaged even thouth it may look undamaged.[221] This explanation can be very helpful.

3.5.3. Delay

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods. This provision has been seriously criticized for being too wide. It is inappropriate in relation to such a matter as carriage by air that a carrier should be liable without any qualification for damage occuring through delay. Safety should not be sacrificed for speed, though air transport sells speed.[222] The International Union of Aviation Insurers has been quoted as warning that it would be unwise to have the question of possibly very heavy liability of an airline for delay enter into the calculations of a captain in deciding whether to start or complete any particular air

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[221] Mankiewicz: The Liability Regime of International Air Carrier, op.cit. p. 180 et.seq.

[222] Hadjis Dimitrois: Liability Limitations in the Carriage of Passengers & Goods by Air (LL.M. Thesis McGill) p. 68.

journey.[223]

Be that as it may, the provision remains the way it was drafted in 1929 - unaffected by any of the amending protocols, as far as carriage of cargo is concerned. It has been pointed out that the carrier is protected if he proves that he took all necessary measures to avoid delay; in other words, the liability for delay is fault, not strict liability. While this assertion is right, the practice of some courts, and the unreliability of the defence of 'all necessary measures' make the realities of the assertion unimpressive to the carrier.

The approach of the courts to the question of delay is of tremendous importance. Three points have to be determined. First, in the circumstances of a particular case has there been delay? Second, if there has been delay, is any damage occasioned by it? Third, if the answer to the second question is positive, how is the compensable damage to be determined?

It has been observed that judgements have generally tended to apply Article 19 strictly, and to hold the carrier liable for any delay unless he discharges the burden of proof imposed by Articles 20 and 21. More specifically, he must prove that in spite of the utmost deligence he was

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[223]Ibid, p. 69.

unable to arrange for the timely carriage of the passengers or goods on another aircraft or by another carrier.[224]

It must be said that such judgements were generally influenced by the no longer tenable view that all airlines clients choose carriage by air because of its speed. This view may be correct to a very high degree in the transportation of passengers. For the carriage of goods, speed is not in every case the underlying reason for the choice of air carriage, as the first chapter of this thesis illustrated. Unless there is conclusive evidence to support the fact that carriage by air was chosen in a given case because of its speed, it will be unfair to the carrier for the court to presume it to be so. Such a hasty and unsupported conclusion will adversely affect the court's objectivity in determining whether in the circumstances there had been a delay or not, and if there had been, whether there has been damage or not.

Lazarus J's ruling in Goldsamt v Slick Airways[225] is significant:

> "Whether, in all the circumstances, this delay constituted a breach of contract or a negligent failure on the part of the defendant to perform a duty arising from the relationship

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[224] Mankiewicz: The Liability Regime of International Air Carrier, op.cit. p. 189.

[225] (1954) USAVR 179.

South African Airways.[199] In that case, plaintiff's consignment of platinum was stolen by the carrier's servant in the course of his employment. The carrier sought to avail himself of the Warsaw limits of liability but it was held:

> "If this loss was caused by the wilful misconduct of a servant or agent of the carrier acting within the scope of his employment, then the carrier can no longer rely on that limit of liability. He is liable for the full value of the cargo."

Legal writers, like the courts, appear to be unimpressed by the Convention's provisions on the particulars in an air waybill. Beaumont writes: Article 8 provides that the consignment note shall contain seventeen specified particulars, only ten of which, however, are obligatory under Article 9. Some of these, namely, those relating to the cargo, can obviously be supplied only by the consignor, the others, relating to the carriage itself, can only be supplied by the carrier. Yet the obligation to complete the whole of the consignment note is upon the consignor though the carrier is subjected to the unlimited liability without defence if any ten obligatory particulars is omitted. This makes the strict

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[199](1979) 1 Lloyds L.R. p. 19.

"between the parties is a question
of fact."

Needless to state that in a court of law, questions of fact have to be proved, not presumed. Delay cannot be an exception to that rule.

The case of Biachi v United Airlines[226] is important in two respects. The claimant gave evidence to prove that he chose carriage by air because of its speed. The case also highlights the Convention's inadequacy regarding the compensation for damage caused by delay.

In that case, plaintiff desired a promisory note to be delivered from Seattle, U.S.A., to Mazatlan, Mexico, by the next day. An agent of the defendant airlines assured plaintiff it could so be done. Relying on this assurance, plaintiff delivered an envelope with the note therein for shipment. He again stressed the need for speedy delivery. He was again assured the deadline would be met. The weight of the consignment was recorded as one pound, and valued at one dollar. Defendant delayed delivery by three days. Plaintiff claimed he suffered damage of $10,000 as a result of the delay, from sale of a home due to a devaluation of the peso. He prayed the court to allow him to recover that amount of money from the carrier. The defendant argued that he was protected by the Warsaw limits of liability. But plaintiff

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[226] 15 Avi. 17, 426.

protested that the unfulfilled assurances amounted to a material deviation from the terms of the contract, a sufficient reason to vitiate the contract of carriage under the common law. The trial court upheld the plaintiff's arguement. But on appeal, Swanson J. ruled:

> "We find the trial court erred in inferring a common law theory could control in a situation within the Warsaw Convention."

Plaintiff was then awarded $9.07.

One cannot agree completely with this dictum. A common law theory, admittedly cannot operate to vitiate a Warsaw Convention contract or condition of such a contract. But there is nothing in the Convention preventing a common law theory from operating to fill a gap in the Convention's contract such as the damages to be awarded for tardy delivery not resulting in direct physical damage to the consignment. The determination of such indirect damages is entirely left to the subjective assessment of the courts. To determine the recoverable damage for Biachi as a result of the damage he suffered through the delay on the basis of the weight of the consignment, as it was done by the Appeal Court, is to say the least, unrealistic.

In Vassalo and Claire v TransCanada Al,[227] a case involving delayed delivery of dresses and costumes from Italy to Toronto, Canada, McRuen, C.J. agreed with the plaintiff's contention that "damages are to be determined under the well established principles in actions based on breach of contract." The well established principles determining damages are expounded in the old case of Hadley et Al v Baxendale.[228] The C.J. went on to expatiate:

> "If items of damage were to be recoverable from an air carrier, it would be necessary to have quite clear evidence that before the contract was entered into, the circumstances which would have arisen from any breach were communicated to the carrier, and he had agreed either expressly or impliedly to accept responsibility for the special damages arising upon those circumstances."

And in determining the recoverable damage in Panalpina International Transport v Densil (supra), Fay J.declared:

> "The claim here is for a large sum of money reflecting a fall in the value

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[227](1968) DLR (2nd) 383.

[228](1854) 9 Exchequer 341.

> "of the goods because they missed the christmas market. Under the second rule in Hadley v Baxendale, this is clearly an item of damage which is too remote in the ordinary course of events and can only be claimed if it was reasonably within the contemplation of the parties because the party to be charged had been given that information which enabled him to appreciate that this kind of damage would flow . . . . I hold that the defendants (claimants) are over that hurdle."[229]

Gellert v United Airlines Express Inc.[230] is also worth mentioning. Ski-equipment were shipped to the United States for the San Francisco Ski-show. The consignment was valued at $1,500.00. It was delayed and the plaintiff claimed $43,000 for lost orders consequent upon the delay. The court awarded only the declared value - $1,500. Evidence was not produced to show that the carrier was made aware of such possible consequential damages before he accepted to transport the goods.

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[229] See also the decision in Bendersky v Trans-World Airlines, 10 Avi. 18, 123.

[230] 12 Avi. 17, 763.

The point must be made that like the declared weight, the declared value of the consignment is not a relevant criterion for determining consequential damage occasioned by delayed delivery of goods. The dicta in Vassalo and Panalpina cases quoted above, form the only rational bases, in the absence of express enactment, for the determination of such damages.

The International Air Transport Association (IATA) General Conditions of Carriage provide, inter alia, that 'times shown in the ticket timetables or else where are not guaranteed and do not form part of the condition of carriage', and that when circumstances so require, the carrier may without notice delay any flight.[231]

Some decided cases have endorsed this provision. In Sofimex v TWA,[232] a French court ruled that a carrier could only be liable for delay in cases only where the delay was caused by his wilful misconduct. A case decided by the Provincial Court of Montreal in 1979, Westmount Moving and Warehousing v Continental Air Freight,[233] gives an implied approval to the clause. Mr. Emile Colas then states:

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[231]Article 5 IATA Contractual Conditions.

[232]RFDA (1958), p. 86.

[233]Cited by Emile Colas,(1981) Annuals of Air and Space Law, p. 17 et. seq.

> "Ainsi, pour que s'exerce un droit en reparation pour l'expediteur, il est necessaire que ce dernier ait fait preuve de diligence: tout d'abord, en decrivant précisement au transporteur le contenu des colis et en avertissant ce dernier du contenu et donc de la necessité du transport dans un delai raisonable, et des dommages qui pourraient résulter s'il y a avait un retard."

In both Iran Air v Cie General de Geophysique[234] and McMurray v Capital International Airways,[235] the courts held that stipulations of the IATA kind amount to relieving wholly or partly the carrier's liability for delay and are protanto void under Article 23 of the Warsaw Convention. The decisions in these two cases are not unreasonable. The IATA provision is too wide and presumptuous to be acceptable today. The court in McMurray rightly stated:

> "Transportation by airplane is no longer in its infancy. Hit and

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[234] RFDA (1975), p. 60.

[235] 15 Avi. 18, 087.

> "miss practices of a nascent industry may be tolerable as a temporary expedient. It is high time, however, that airlines began to assume the obligations of responsible businessmen."

The concept of delay in transportation by air should not be allowed to be a subject of extremities on the parts of the carrier and the claimant. The claimant cannot be allowed to press his rights in a case of delay to its logical but unrealistic conclusion. The carrier should not be allowed either to be slothful and abdicate his responsibility of meeting the reasonable expectations of his clients.

3.6. Time Limits

3.6.1. General Provisions

A claimant may lose his right to recover if he does not make a complaint or institute an action timeously. The Warsaw Convention stipulates that in the case of goods, the person entitled to delivery must complain to the carrier after the discovery of damage at the latest, within three days from the date of the receipt of baggage, seven days for goods, and fourteen days for delay of goods - from the day the goods

were placed at the disposal of the consignee.[236] The Hague Protocol extends the period of complaint to seven days in the case of baggage, fourteen days in the case of goods, and twenty-one days in the case of delay.[237] The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which the transportation stopped.[238]

3.6.2. Complaint

A complaint is a pre-requisite for a claim in the case of damage to goods, according to the provision of Article 26(2). The raison d'être of the requirement of complaint was enunciated by Lord Wilberforce in Fothergill v Monarch Airlines.[239]

> "The purpose of Article 26 . . . . Appears to me to be reasonably clear. It is: 1) to enable the airline to check the nature of the 'damage'; 2) to enable it to make enquiries how and when it occured; 3) to

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[236]Article 26(2), Warsaw Convention.

[237]Article XV, Hague Protocol.

[238]Article 29, Warsaw Convention.

239(1980) 3 WLR 209.

> "enable it to assess its possible liability, to make provisions in its accounts and if necessary, to claim on its insurers; 4) to enable it to ensure that relevant documents (for example, the baggage checks, or passenger ticket or the air waybill) are retained until the issue of liability is disposed of."

The courts will not admit a complaint in futoro, that is, a complaint given in advance of the discovery of the damage. Thus, in Brentwood Fabrics Corp. v KLM,[240] plaintiff, in a mistaken belief that an entire shipment of goods was lost, submitted a written claim for damages for non-delivery. The consignment was subsequently delivered and the plaintiff brought an action for damage to the goods instead, claiming that his earlier written claim served as a complaint for the purposes of his action on damages to the goods. Kassal J. objecting the plaintiff's claim stated:

> ". . . in the case of 'damage' i.e., physical damage to the goods, the written complaint must be made after - not before - the actual discovery of such damage. Thus, any claim for

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[240] 13 Avi. 17, 426.

> "physical damage made upon the supposition that such damage might occur and prior to the actual discovery thereof would not meet the requirements of the Article in question."

Brentwood should have submitted another complaint after the discovery of the damage to the goods. Its failure to do so was fatal to its claim.

It is not enough that the damage to the goods was officially established in the presence of an employee of the carrier; the claimant must still submit a written complaint within the period specified in the Convention. In Lady Marlene Brassiere Corp. v Irish International Airlines,[241] a consignment of plaintiff's brassiere was shipped from London to New York. It was damaged on arrival at their destination. In an action for recovery, plaintiff claimed that the carrier had notice of the claim since the document of transportation contained a notation by the carrier's employee stating: "3 cartons retaped, apparent good order Treasy", and this was done within the seven days period. The court held:

> "It is apparent from the wording of the aforesaid notation, and the court so finds, that there is not-

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[241] 13 Avi. 17, 428.

> "hing contained therein to put defendant on notice that plaintiff had a complaint or claim against defendant. In view thereof, plaintiff did not comply with Article 26 of the Warsaw Convention in that it failed to give defendant written notice within seven days. . . ."

The period of filing a claim cannot be modified, not even by an agent of the carrier. In Gene Pirilla v Eastern Airlines*, the claimant filed a complaint nine days after a damaged baggage was recieved, following an oral advice of the carriers agent. The complaint was rejected as belated and the claim failed. This decision is unfortunate. It is more so, as the advice on which the plaintiff relied does not tend to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Warsaw Convention. It is, nonetheless, a correct decision in that a carrier's agent is not competent to vary the terms or conditions in the contract of carriage by air. The agent's advise was, therefore, of no effect.

The Convention is silent on the requirement of a written notice in respect of cases of destruction or loss of goods. The point has been argued and decided in a number

*(1980) 15 Avi. 18, 070.

of cases.

In Patrick Dalton v Delta Airlines,[242] five grey-hound racing dogs were shipped from Ireland to Miami, U.S.A. The dogs were found dead on arrival at Miami. Plaintiff asked for $60,000 in compensatory and exemplary damages for the income and profits he would have received had the dogs arrived in good condition, and for their value at the time of the loss. Defendant contended that the action was governed by Article 26 of the Warsaw Convention and that since the plaintiff had not given a timely written notice within seven days as required by clause (2), his action could not succeed. The court held that where destruction of goods occurs on an international flight, the claimant need not give notice as provided in Article 26(2). Brown C.J. declared:

> "Recognizing, as we must, that live dogs are goods, when dead they are no longer just damaged goods. They are not at all the thing shipped. No one better than the carrier knows this fact. Notice is not needed since notice would serve no useful purpose to the carrier . . . . The facts of this case demonstrate the wisdom of

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[242] 14 Avi. 18, 425.

"the 'no notice needed for destroyed goods' rule."

On a reflection on the purpose of Article 26(2) as enunciated by Lord Wilberforce in Fothergill (supra), a complaint in a case of destruction or loss of goods which the carrier knows is, at best, a surplusage. There may be some cases, however, (e.g. goods in containers) where the carrier may have no means of knowing that the goods are destroyed. In such cases, the 'no notice needed for destroyed goods' rule cannot justifiably apply. It is, therefore, submitted that whether a complaint is needed or not for destroyed goods will depend on whether the circumstances of a particular case point conclusively to the probability that the carrier knows or ought to know of the destruction. Since a claimant does not offend any law by giving a written notice, he is better advised to give a written notice wherever possible in order not to take unnecessary risks of having an otherwise good claim defeated.

In the case of loss of goods, the concensus seems to be that the requirements of Article 26(2) do not apply. But carriers have in their tariffs purported to fill the gap left in the Convention by stipulating their own time limits within which complaints or notice ofclaim must be made, otherwise, the claimant loses his right to recover. Unfor-

tunately, the courts are split on the validity of such stipulations.

In the Malaysian case of Brathens South American & F.E. Air Transport v The Borneo Co. Ltd.,[243] a consignment of watches was shipped from Geneva to Singapore. The watches never arrived at their destination. In an action to recover the value of the cargo, the carrier resisted the claim on the ground that no complaint or claim in writing had been made within the one hundred and twenty days time limit provided in the general conditions of carriage on the air waybill. Plaintiff contested that the time limit provision offended Section 23 of the Warsaw Convention and was, therefore, null and void. Rose C.J. ruled:

> ". . . the imposition of a time limit of 120 days within which notice of non-delivery must be given does tend to relieve the carrier of the liability laid down in the Convention."

Plaintiff recovered.

The American District Court of New York gave a decision in line with the Malaysian decision. That was in the case of Peggy Denziger v Compagnie Nationale Air France.[244] where

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[243](1961) UL c 131.

[244]14 Avi. 18, 280.

Haigh J. said:

> "It cannot be seriously asserted that the provision in the tariffs is consistent with the terms of Article 23 which invalidate a tariff relieving a carrier of liability. That is precisely what the tariff provides once adequate notice and pre-requisites are shown. Thus, the provision in the tariff is invalid."

There are, however, decisions which are not in agreement with the above dicta. In Butlers Shoe Co. v Pan American Airlines,[245] women's boots were shipped from Rio de Janeiro to New York. The goods were lost. The carrier resisted the claim for recovery arguing that the claim was not made within the 120 days provided in its tariff. The plaintiff argued that the tariff offended Article 23. In his judgement, Gibson J. said:

> "The Pan Am tariff regulation does not attempt to limit the amount of damages recoverable for loss or impose a standard of liability

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[245] 13 Avi. 17, 833.

> "higher than contained in the Convention and, therefore, does not conflict with Article 23. Tariff regulations on matters not covered by the Convention are authorized by Article 33 of the Convention."

In the case of Falmolare Inc. v Seaboard & others,[246] the court followed the decision in Butlers Shoe Co. It was held that the 120 days limit for the presentation of claims for lost cargo was in order. Plaintiff's claim was dismissed since it did not comply with that provision in the defendant's tariff.

Mankiewiez has submitted that:

> ". . . as the clause in question (120 days) does not directly 'relieve the carrier of liability' it is not necessarily 'aprehended' by Article 23 . . . . Nevertheless, the clause is null and void under Article 24(1) and 32 becuase it is inconsistent with the liability system established by the Convention, which in these cases gives the plaintiff the right to sue without

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[246] 15 Avi. 17, 287.

"prior notification of the carrier, the only bar to recovery being the expiration of the time limit set in Article 29 for bringing suit."[247]

This author holds the above submission with the greatest respect, and it is, therefore, with the greatest respect that he finds it difficult to appreciate how 'the clause' Offends Articles 24(1) and 32 of the Warsaw Convention. It is generally accepted that no treaty can provide for every fact in the field it sets out to regulate. Cognizant of this fact, it appears, the Warsaw Convention provided in Article 33 that nothing in the Convention shall prevent the carrier from, inter alia, making regulations which do not comflict with the provisions of the Convention.

Article 24(1) provides that in the cases covered by Articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention. The Convention does not set out any condition or limit in respect of notice of claim for loss or destruction of goods. On the contrary, the authorization for a carrier to make certain supplementary regulations is a condition of the Convention. Regarding Article 24(1), therefore, can the clause not rather be said to be in conformity

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[247] Mankiewicz: The Liability of International Air Carrier, op.cit. p. 184 et. seq.

with it as it derives its validity from Article 33? If Article 33 cannot be used as a basis to make a regulation to fill a 'serious gap' like this one, in the Convention, then can that Article not be said to be a redundant appendage which should be scrapped off?

Article 32 provides that any clause contained in the contract and all special agreements entered into before the damage occured by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied or by altering the rules as to jurisdictiion, shall be null and void. One would think that Article 32 is more relevant to the choice of law and jurisdiction, issues which 'the clause' has nothing to do with. If, however, one must give that Article a more generous coverage, still one cannot see any inconsistency with 'the clause'. It has been held that the Convention has not made any rules on notice of claim in respect of loss and destruction of goods. Max Litvine was quoted in Patrick Dalton v Delta Airlines (supra) as stating in his book, 'Droit Aérien Notions de Droit Belge et de Droit International', at page 250, that "Article 26 represents a serious gap as it indeed deals only with cases of damage and delay." What rules, then, is 'the clause' offending since there is only a 'serious gap'?

What is good for the goose is good for the gander.

Carriage of goods by air is no longer in its infancy and air carriers have been urged to assume the obligations of responsible businessmen. Speed is a big advantage of air transport cherished by both the shipper and the carrier. The maturity of the air transport industry has generated a fantastic increase in the volume of the freight handled by the carriers and the operations to ensure satisfactory shipment of the goods have become more sophisticated. The carriers need speedy transaction of their business in order not to cause a bottle-neck in the industry. Shippers have also to assume the obligations of responsible businessmen in their dealings with the carriers. Moreso, as Article 13(3) of the Warsaw Convention urges claimants to expedite claims against the carrier. One hundred and twenty days is not an unreasonable period for a vigilant shipper keen on protecting his interests, to make a claim for his lost goods, rather than sit back (in the absence of fraud on the part of the carrier) and burden the carrier afterwards with stale claims. Even Equity will not sanction such sit-and-wait attitude.

3.6.3. Suits

As stated earlier, Article 29 of Warsaw Convention provides for a period of two years within which an action

for damages must be brought. The method of calculating the period of limitation is left to the law of the court to which the case is submitted for determination. The period of two years may not be interrupted or suspended. The Article cannot be interpreted as opening the door to replacement of limitation by prescription. National courts have jurisdiction to define, according to their own laws, the exact moment when the period of limitation begins to take effect and the manner in which the concept of the two year period for bringing an action must be interpreted.[248]

In All Transport Inc. v Seaboard World Airways,[249] machinery was shipped from England to New York. It arrived at New York on October 14, 1970, but it was finally turned over to the plaintiff on November 16, 1970. Between October 14th and November 16th, the cargo was in the charge of the carrier. Plaintiff brought an action to recover for damage to the cargo on November 2, 1972. Defendant contended that the action was time barred. The court held that the time limit started to run from November 16th, when the cargo was actually delivered to the plaintiff, not from October 14th, when the aircraft touched down at New York City. Sherman

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[248] Matte: Treatise On Air Aeronautical Law op.cit. p. 429.

[249] 12 Avi. 18, 063

J. explained:

> "It is clear that the arrival of the aircraft at its destination refers to personal injury actions. It is only with respect to the carrying of goods that the measuring events, namely, 'date of arrival at the destination' and when 'the transportation stopped' have a different meaning."

He then went on a rule, citing Article 18(2) which defines the period of transportation by air for the purposes of carriage of goods, that the transportation of the machinery did not come to an end on Octoner 14th, since the goods were still in the control of the carrier. The goods arrived at their destination and the transportation ended on November 16th, the day the machinery was delivered to the consignee.

A case arises occasionally which cannot be appropriately pigeon-holed into any of the three categories in Article 29(1). In that case, Article 29(2) will be called into play to determine when the two-year period starts to run. Thus, in Bernard Schwimmer v Air France,[250] cited earlier, it was held:

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[250] 14 Avi. 17, 466.

> "The categories set forth in subdivision (1) of Article 29 are not germane since there are no facts presented which will fit this case into one of the three categories. However, subdivision (2) does provide that the law of the forum shall determine the calculation of the period of limitation."

The judge found that the law of the forum provided that the period of limitation shall be computed from the time the cause of action accrued to the time the action is interposed. The court went back to the Warsaw Convention to find out when the cause of action accrued and held further:

> "The answer is to be found in sub-division (3) of Article 13 of the Warsaw Convention . . . ."

Finally, the decision in Tova Khan et al v Transworld[251] is worth mentioning. That case concerns an action for recovery in respect of injuries suffered by some infant passengers in defendant's aircraft hijacked by some Palestinians from Frankfurt, Germany, and flown to a desert in Jordan. The accident occured on September 12, 1970, but the action was brought on December 15, 1972. The court held

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[251](1981) 16 Avi. 18, 041.

that the two year time limitation for filing action is a condition precedent to suit and not a statute of limitation that is subject to the infancy tolling provisions of the New York statutes;and that the claim was absolutely barred as it was not brought within two years of accrual.

Article 29 - and Servants and Agents:

As far as the claimant's agents or servants are concerned, case law establishes that if the goods are delivered to the consignee's agent, the time limit will start to run from the date the agent received the goods, and not from the date the consignee actually received them. In Ernesto Hepp v United Airlines,[252] plaintiff shipped their personal property by defendant aircraft from Chile to the United States. The consignments were delivered on arrival at their destination to a storage company, pursuant to plaintiffs' instructions, on October 27, 1970, and December 9, 1970 respectively. The plaintiffs arrived in the United States and took delivery of the consignment in April 1972. They discovered that the consignments had been damaged in the course of transportation on May 18, 1972, and brought an

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[252] 13 Avi. 17, 987.

action for recovery on July 27, 1973. Smith J. delivering judgement said:

> "A bailee may discharge his obligations by delivering of the property concerned to the bailor, someone claiming under him, or someone authorised to accept the property on behalf of the bailor. Defendants therefore, fulfilled their obligations under the contract with the plaintiffs upon delivery to (the storage company). Since this delivery occured more than two years the suit is barred."

Does Article 29 cover the carrier's agents and servants? The question is highly debateable as it is ineluctably tied up to the general question of whether the Warsaw Convention covers the carrier's agents and servants as well. The conclusions of text writers and in judicial decisions are conflicting.

Professor Matte, for example, states that since the Convention only governs the carriers' liability, Article 29 is not applicable to direct actions against the agents and other persons who are not 'carriers in the sense of the Convention. Their liability is governed by national laws.[253]

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[253]Matte: Treatise On Air - Aeronautical Law op.cit.p.429.

Professor Drion on the other hand, postulates that a sound interpretation based on the spirit of Article 24 and not conflicting with its letter, leads to the conclusion that any action brought against the carrier's enterprise as such, or against members of it who can be considered part of the enterprise are to be brought subject to the limits of Article 22.[254]

Court decisions are also divided. In Pierre v Eastern Airlines Inc.[255] Meaney J ruled that the Warsaw Convention at the time of the accident (1953) applied to the carrier only. Various efforts had been made to amend the terms of the Convention to include the servants and agents of the carrier in the provision of liability, but to no avail. Not until 1955 was the limitation so extended in Article 25A of the Convention. Manson J. was more categorical in Magarette Straton v Trans Canada Airlines when he declared, oblivious of even Article 25A, that the Act extends to carriers only and that there is nothing in the Act that even remotely suggests that the word 'carrier' is to be interpreted as including employees of the carrier.

But Elizabeth Wanderer v Sabena [257] was decided

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[254]Drion: Limitations of Liability In International Air Law, p. 158.

[255](1957) USAVR 434 at 435.

[256](1961) USAVR 246 at 250.

[257]4 Avi. 17, 733.

differently. In that case plaintiffs sued to recover for personal injuries suffered during transportation in defendant's aircraft. Defendant argued that the action was time barred, both against it, and its agent, PanAm. The plaintiff responded that PanAm, as an agent, was not covered. It was held that the Convention, where applicable, applies not only to the carrier but to the agencies employed to perform the carriage as well. It was also the view of Edelstein J. in Chutter v KLM[258] that the conditions and limitations of the Warsaw Convention inure to the benefit of the agents through whom the airline fulfills a part of its obligations under the contract of transportation.

The amended Article 25A has given tremendous force to the arguement in favour of the agents and servants being covered by the Convention. There is also a movement in decided cases in favour of this position, as exemplified in the later case of Reed v Wiser.[259] Accordingly, it is safe to conclude now that Article 29 applies to both the carrier and his agents or servants.

3.7. The Gold Clause in the Warsaw Convention.

Article 22 of the Warsaw Convention provides that the

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[258] 4 Avi. 17, 733.

[259] 14 Avi. 17, 841.

carriers liability for each passenger shall be limited to the sum of 125,000 francs; for checked baggage and goods, 250 francs per kilogram; and for objects of which the passenger takes charge himself, 5,000 francs per passenger. Then it states:

> "The sums mentioned above shall be deemed to refer to the French franc consisting of 65-½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

Article XI of Hague Protocol amending Article 22 of Warsaw raised the passenger's limit to 250,000 francs, but maintained the limits in the cases of registered baggage, goods and objects in the charge of the passenger himself, as well as the unit of account as provided in Warsaw. It however, adds that:

> "Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement."

The fluctuation of currencies especially after the

First World War was a decisive factor in the search for a more universally acceptable unit of account which would provide a stable and firm economic guarantee of just and equitable awards for damages under international conventions, no matter in which country the action is brought. The drafters of the Warsaw Convention were attracted by gold because of its stability and tendency to reflect real values better than currency. Dealings in gold then were regulated by an inter-governmental official rate. Commercial transactions in gold were either proscribed or strictly limited. It was in truth, not a commodity available to private investors and there was no free market, as such, for gold.

It would have been absurd for a claimant to be compensated by taking delivery of gold. The French franc based on gold parity was the currency commonly used to express the limit in international conventions.[260] However, two different gold parities of the franc were used: the franc used until 1928 had a different parity from the franc used in subsequent conventions such as the Warsaw. The first is commonly referred to as the Germinal franc with a gold parity of $^{10}/_{31}$ of a gram of gold of millesimal fineness nine hundred. The second gold unit, called Franc Poincaré, used in the Warsaw Convention, had a gold parity of 65.5 milli-

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[260] For example, Article 5 of the Postal Convention of 1874.

grams of gold of millesimal fineness nine hundred.[261] The gold parity of the monetary unit remained the most important factor.

From the late 1960s, however, many governments began to evolve a bifurcated approach to dealings in gold. While maintaining the official price for inter-governmental transactions, a gold commodity market was permitted to develop in parallel. Increasingly, the market price outpaced the official price. In 1973, for example, while the official price was $42.22 U.S., the market price was $200.00 U.S. In 1978, through the instrumentalities of the Jamaica Accords, the official price structure was abolished by the International Monetary Fund (IMF) and replaced by the Special Drawing Right (SDR), a weighted unit of account reflecting a spread of some 16 major World Currencies. The Montreal Protocols of 1975 use the Special Drawing Right, while the Multimodal Transport Convention of 1980 uses 'Unit of account'.

Today, the question of the true construction of Article 22 of Warsaw Convention in its present form has become controversial. Quite apart from the formal abolition of the official price structure in 1978, the recent dramatic and

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[261] For a general discussion on this point, see Tobolewski: Monetary Limitations of Liability in International Private Air Law. DCL Thesis, McGill, 1981, p. 11 et seq.

unpredictable progress of gold price as regularly highlighted in the financial press underscores the inherent uncertainties that arise from using as a unit of account a commodity that is a byword for speculation.[262] In the United States, for example, an ounce of gold was worth approximately $20, in 1929. Today, the market value stands at over $300. The Civil Aeronautics Board, however, still allows airlines to calculate their limitations on the one time official rate of $42.22 an ounce, even though the United States has abandoned the official market price of gold, as far back as 1978. The board justifies its action on the basis of its obligation 'to observe to the extent possible the requirements of the Warsaw Convention'.[263]

The court in the case of Boehringer Mannheim Diagnostic Inc. v PanAm[264] was not impressed by CAB's official rate. It ruled:

> ". . . allowing defendant to limit its liability under the Convention based on the now abolished 'official' gold price

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[262] Neil McGilchrist: 'What is a Poincaré gold franc worth?' ♣ Lloyds Maritime and Commercial Law Quarterly, February 1982, p. 164.

[263] Bureau of Comoliance and Consumer Protection, Civil Aeronautics Board, Memorandum on Warsaw Convention Liability Limits, May 20, 1981, p. 6.

[264] (1981)16 Avi. 18, 177, at p. 181.

> "of $42.22 an ounce would perpetuate a legal fiction of the purest kind. There is no justification in the language or history of the Warsaw Convention to justify such a holding."

It then held that defendant's liability be converted to U.S. dollars with reference to the current free market price of gold.

But the decision handed down in the case of Re Crash Disaster[265] was different. In that case, plaintiff argued that the limits be tied to the fair market value of gold because, inter alia, previous modifications in the interpretation of the damage limitations demonstrate that the United States never thought the limitations were immutable, but rather, had to respond to inflation which now can only be insured by the use of the fair market price. The court held:

> "The signatories of the treaties (sic) looked to gold to avoid fluctuations, since gold had a constant value . . . . This constancy and stability upon which the parties to the Convention relied, cannot be achieved if the fair market

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[265](1982) 16 Avi. 18, 249, at p. 256.

> "value of gold is used for the calculations. The plaintiff's suggestion that the fair market value of gold be the basis for the Conversion must be rejected."

Mr. Peter Martin[266] is of the view that there is no, or no wholly, satisfactory solution to be found by the courts anywhere; the middle can only be cleared up by effective international legislation. The use of the former official price of gold accords with a resolution of the ICAO's legal Committee in October 1974, but it is logically indefensible in the light of later events. The use of the market price is unsatisfactory as it fluctuates too much and would not do justice as between plaintiffs and defendants. He favours the SDR: 'it makes sense, it can be justified by sound arguements and it fills the gap'. He then urges practitioners to promote its use in cases of doubt and the courts should be encouraged by arguement to find that it is the logical successor of the Convention franc until the Montreal Protocols are in force or superseded by a new Convention.

The use of the SDR is sound, but to urge the courts to use it when the Montreal Protocols have not gone into force

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[266] Peter Martin: 'The Price of Gold and the Warsaw Convention', Air Law Vol. 6, No. 4, 1981, p. 246.

is a little off the mark. When that suggestion was made in Franklin Mint Corp. v Trans World[267] Whitman Knapp D.J. epigrammatically dismissed it:

> "Were we writing on a clean slate we would find the arguement in favour of the . . . (SDR) most persuasive."

The suggestion for a new international legislation is not quite attractive either. A new international legislation amounts to losing many more years in order to draft and adopt it, and probably adding to the swelling number of unratified international legislations. The Air transport industry does not benefit in any way from archives of unratified Conventions. Governments should rather be urged to ratify the Montreal Protocols so that the courts can judiciously use the SDR without being bound to apply the Warsaw Convention's gold clause.

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[267](1981) 16 Avi. 18, 024.

CHAPTER 4

DANGEROUS GOODS

> "The basic principle of 'Safety First' is as vital in the carriage of air freight as it is in other phases of air transport. Therefore, it is essential that all persons shipping or accepting air freight consignments are fully familiar with the detailed provisions setforth in the IATA Restricted Articles Regulations. . . ."[268]

4.1. Generalities

More than half of the cargo carried by all modes of transport in the world is dangerous cargo - explosive, corrosive, flamable, toxic and even radio active in nature.[269] These dangerous goods,[270] are essentially for a wide variety of global industrial, commercial, medical and research requirements and processes. Becuase of the advantages of air

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[268] AD. Groenewege, Traffic Services Director, International Air Transport Association (IATA) - Forward to the Restricted Articles Regulations, 23rd. Edition.

[269] The Convention On ICAO - the first 35 years op.cit. p. 35.

[270] They are called Restricted Articles by IATA.

transport, a great deal of this cargo is carried by aircraft. These goods can pose a frightening threat to the safety of passengers, other consignments and the aircraft itself. Dr. Magdelénat has given a number of accidents and incidents which have been caused so far by dangerous air cargo. One such accidents involved a Pan American cargo plane at Boston Airport in 1973.[271]

Animals, both domitae naturae and ferae naturae, are regular air freight. Some of them have been destroyed by dangerous consignments in the same aircraft.[272] Some have caused considerable disorder or fright in the aircraft or in the airport. One can recall an incident involving an Air Canada freighter at London in 1970.[273] When a station attendant opened a belly door of the freighter, he found a pair of green eyes belonging to a tiger staring at him. The freighter which arrived from Frankfurt was carrying five young tigers. One of the tigers had escaped and it took an official from the London Zoo to tranquilize the animal before it could be put back in the cage.

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[271]Le transport par air des matieres dangereuses et la Nouvelle Annex 18, 1981 Annales de Droit Aérien et Spatial Vol. 6, p. 45 et. seq.

[272]e.g. Newell v Canadian Pacific, 74 DLR (3rd) 574.

[273]Air Canada: Between Ourselves/Horizons March 1970,p.15.

Governments and International Organizations had to initiate regulations to prevent accidents caused by dangerous goods. The concern has been chiefly directed to the carriage of dangerous substances.

4.2. National Regulations

The United States, through the Department of Transportation has announced Rules and Regulations governing the carriage of dangerous goods in the United States.[274] Britain, France, and Canada have also promulgated some enactments to regulate the same subject.

4.3. International Regulations

4.3.1. IATA Restricted Articles Regulations

The IATA has proved to be the international organization which has shown the most concern for, and made the biggest contribution to the regulation of the transportation of dangerous goods. The Association established a Restricted Articles Board in 1950. The Board was charged with the responsibility of drawing up the Restricted Articles Regu-

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[274] U.S. Fed. Register/Vol. 45, No. 101, 1980 (may 22) amended by U.S. Fed. Register/Vol. 45, No. 219, November 1980.

lations, Regulations which have matured to the 23rd edition as at December 1980. Many governments have recognized the IATA Regulations which are applicable to carriage to, from or through their territories.[275] The Regulations are applicable to Member Airlines in scheduled, un-scheduled and interline operations. It appears that a member airline is bound to observe the regulations whether it is engaged in international or domestic transportation. What is more, shippers (not distinguished between international and domestic) are obligated when offering Restricted Articles to any Member Airline, to comply with the IATA Regulations in their entirety.[276]

4.3.2. ICAO Annex 18 and Technical Instructions

The United Nations Committee of Experts on the Transportation of Dangerous Goods by all modes of transportation published a number of recommendations in 1977.[277] These recommendations, as well as the Regulations for the Safe Transport of Radioactive materials of the International Atomic Energy Agency were the sources from which the International

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[275]See Section 1(4) of Restricted Articles Regulations 23rd Edition, p. 6, for the countries that have recognized the Regulations.

[276]Section 1(3) Ibid.

[277]See UN Doc. ST/SG/AC/10/1

Civil Aviation Air Navigation Commission drew the materials for the new annex. On June 26, 1981, the ICAO Council adopted the new annex entitled: 'The Safe Transportation of Dangerous Goods by Air.8 The annex is in two parts. The first part, the annex itself, contains the basic regulatory framework, the second part is the Technical Instructions which provide the detailed provisions needed for controlling and expediting the movement of dangerous goods by air and between other modes of transport. The Technical Instructions are, however, contained in a different document.[278]

States were required to file in any notification of disapproval before October 26, 1981. They are required to file in notifications of differences and compliance before June 1, 1983. The new annex will become effective on the 1st of January, 1983, except for any part concerning which a majority of contracting states has registered disapproval before October 26, 1981.[279]

The Technical Instructions contain myriad mandatory and relatively dynamic detailed instructions. States are urged to take the necessary measures to achieve compliance with the provisions contained in the Technical Instructions.[280]

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[278]ICAO Doc. 9284 - AN/905.

[279]See ICAO Secretary General Circular No.AN/11/27-81/9.

[280]Paragraph 2.2.1. of Annex 18.

It would be premature and misleading to state that the Technical Instructions are binding. The effect of paragraph 2. 2.1. of Annex 18 is to make the Technical Instructions binding in nature. The binding effect of the Instructions is dependent upon states not filing differences in respect of specification 2.2.1. States are competent to file differences within the time stipulated if they are unable to accept the binding nature of the Technical Instructions. They are also competent to report any variations from the detailed provisions of the Instructions.[281]

The Instructions cover some 3,000 commodities which fall into nine categories. Categories one to three inclusive consist of explosives with mass detonating risks and those which represent a principal fire hazard, compressed gases including dissolved or liquified gases, and flamable liquids such as gasoline and kerosine. Category four consists of flamable solids; category five, oxidizing substances; category six, poisonous or infectious substances; category seven, radioactive materials; category eight, corrosive substances; and category nine, miscellaneous.

Some goods are forbidden to be carried under any circumstances.[282] These include explosives which ignite or decompose when subjected to a temperature of 75 degrees Centigrade

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[281]Paragraph 2.5. Ibid.

[282]Paragraph 4.3. Annex 18.

for 48 hours; explosives containing mixtures of chlorates and phosphorus; solid explosives which are classified as moderately sensitive to mechanical shock; any substance which is likely to produce a dangerous evolution of heat or gas under the conditions normally encountered in air transportation; and organic proxides having, as tested, explosive properties and which are packed in such a way that the classification procedure would require the use of an explosives label as a subsidiary risk label.

The ICAO cognizant of the fact that new products are being manufactured almost daily, made the amendment and updating of the Technical Instructions a yearly affair to cover the state-of-the-art in the manufacture of dangerous goods. The eighteen to twenty-four months amendment procedure which is normally required for regulating ICAO documents is not compatible with the requirements of the Technical Instructions which is an operational document and needs to be updated and published in a relatively short period.

One would wonder whether it is really necessary to have two sets of regulations governing the same subject matter - the IATA Restricted Articles Regulations and the ICAO Technical Instructions. The fact that the two organizations have developed rules on the same subject demonstrates the

seriousness of carriage of dangerous goods by air. Another positive point is the fact that there is no gap left in the field of application, as each takes over from where the other seems to fall short, thereby not only running in the same channel but also providing a desirable link.

The IATA Regulations bind member airlines only, the ICAO Instructions bind states which have powerful enforcement machineries to compel compliance by both shippers and airlines. The ICAO Instructions are designed for International transportation. As for domestic transportation, they are not binding. The ICAO only recommends that in the interest of safety and of minimizing interruptions to the international transport of dangerous goods, contracting states should also take the necessary measures to achieve compliance with the annex and the Technical Instructions for domestic civil aircraft.[283] But that is only a recommendation and ICAO recommendations command very little compliance as contrasted with ICAO standards. However, the IATA Regulations are to be complied with by member airlines whether they are engaged in international or domestic transportation. It is hoped that for the few domestic carriers who are not competent

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[283]Paragraph 2.3., Annex 18.

to be members of IATA, states will ensure that the ICAO Instructions bind them or they can incorporate the IATA Regulations into their national laws to enable them to bind such carriers.

What happens in the case of a conflict in the provisions of the IATA Regulations and the ICAO Instructions? The IATA did rightly conceive a possibility of such differences arising when it stated:

> "The IATA Restricted Articles Regulations will be compatible with the UN Recommendations on the Transport of Dangerous Goods to the greatest extent possible, as well as with the ICAO documents when the final content of these are known. However, IATA will not necessarily follow the same format or precise wording of the UN/ICAO material but will format the IATA Regulations in the most efficient and practicable manner possible."[284]

The IATA Regulations are de jure subservient to the ICAO Technical Instructions and where there is any conflict, the latter will prevail. But the matter cannot be resolved so casually. The carriage of dangerous goods is more a

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[284] IATA Transmittal No. 43 of 1st September, 1980, paragraph 7.

question of safety than of law. ICAO is just a new comer into this field and is comparatively farther from the realities. The IATA on the other hand, has had a very long experience in the regulation of the conditions of carriage of dangerous goods. Moreover, it is its members who carry these dangerous goods, so it is closer to the realities. If any conflict arises, therefore, one would expect the conflicting provisions to be judged by which one is more capable of making the carriage safe. One, however, hopes that many such conflicts do not arise, if they do, then it may not be an unreasonable idea for both organizations to get together and compile one single set of Regulations - ICAO/IATA Regulations on Carriage of Dangerous Goods by Air.

4.4. Liability for Dangerous Air Cargo

Dr. Magdelénat suggests that as regards radioactive materials, any future revision of the Warsaw Convention should include a 'nuclear clause' or protocol whereby the air carrier is not held liable for the fault in packaging by the freight forwarder.[285] Well and good, if and when that is done; but until then, the carrier is not without some recourses.

The carrier is not obliged to carry radioactive

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[285] See his article on Carriage of Dangerous Goods in the 1981 Annals of Air and Space Law, cited supra.

materials. The Warsaw Convention empowers a carrier to refuse to enter into any contract of transportation if he so wishes.[286] The new Annex 18 states that the transport of dangerous goods by air shall be forbidden except as established in the annex and the detailed specifications and procedures provided in the Technical Instructions.[287] The annex even goes further to say that it is the responsibility of the carrier not to accept forbidden goods except subject to some qualifications.[288] If a carrier goes ahead to accept radioactive cargo, he takes the usual risks of a businessman.

If he was not aware of the hazardous nature of the cargo, then Article 10 of the Warsaw Convention will come into play. The shipper will be liable for any damage arising therefrom by reason of the irregularity or incompleteness or incorrectness of the information he had furnished the carrier. If the carrier suffers any damage, the shipper must indemnify him.

As for the fault in packaging by the freight forwarder, the IATA Regulations vest the responsibility of packaging on the shipper and not on the carrier's freight forwarder,

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[286]Article 33, Warsaw Convention.

[287]Annex 18, paragraphs 4.1. and 4.2.

[288]Ibid, paragraph 8.1.

agent or consolidator. The Specimen shipper's certificate for Radioactive materials,[289] which must be signed by the shipper only contains the following provision: The shipper certifies

> "that the contents of this consignment are fully and accurately described, and are classified, packed, marked, labelled and in proper condition for carriage by air . . . . I acknowledge that I may be liable for damages . . . and I further agree that any air carrier involved in the shipment of this consignment may rely upon this certification."

If there is any fault in packaging by the shipper or his freight forwarder, he will be liable, and not the carrier.[290]

What can an aircraft commander do about dangerous goods which are likely to cause damage? This question will naturally lead one to a discussion of the absence of and need for a single treaty regulating the powers of the aircraft commander. However, this paper is not an appropriate medium for such a discussion.

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[289]Restricted Articles Regulations 23rd Edition, p. 29.

[290]Ibid, Part 2A, Sec 9.1(a).

Nevertheless, it must be stated that the aircraft commander has no express authority to jettison goods even where the goods pose a danger to safety. Startlingly, the draft convention on the Legal status of the Aircraft Commander as revised at Paris by the Legal ad hoc Committee in February 1947 (the draft was never adopted) only provided that the aircraft commander has the right, for good reason, to disembark any member of the crew, or passengers at an intermediate stop[291] but could not provide that for good reason, the commander can jettison goods. On the contrary, the Tokyo Convention 1963, prohibits the dropping of anything from the aircraft except under conditions prescribed by the appropriate authority.[292]

The Tokyo Convention provision is designed to protect third parties on the surface, but it is oblivious of the safety of the aircraft itself or the passengers and the goods in it. Courts, however, will be willing to hold an aircraft commander justified to jettison goods if it is reasonable in the circumstance to do so. It should be recalled that in United International Stables Ltd. v Pacific Western Airlines Ltd.[293] where a horse was destroyed on the orders of the

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[291]Draft Convention on Legal Status of Aircraft Commander, Article 2(c).

[292]Annex 2, 3.1.4., Tokyo Convention 1963.

[293](1969) 5 DLR (3rd) 67.

aircraft commander, the propriety of the action was never questioned.

Annex 18 made specific provisions on competence to deal with dangerous goods which pose a threat. Where any package of dangerous goods loaded on an aircraft appears to be damaged or leaking, the operator shall remove such package from the aircraft or arrange for its removal by an appropriate authority or organization, and thereafter, shall ensure that the remainder of the consignment is in proper condition for transport by air and that no other package is contaminated.[294] The operator shall provide the pilot in command before depatrure with written information as specified in the Technical Instructions.[295] The operator shall provide such information in his operations manual as will enable the flight crew to carry out its responsibilities with regard to the transport of dangerous goods and shall provide instructions as to the action to be taken in the event of emergencies arising involving any dangerous goods.[296]

Conclusion

The existing relevant Warsaw provisions, and any add-

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[294]Annex 18, paragraph 8.3.3.

[295]Ibid, paragraph 9.1.

[296]Ibid, paragraph 9.2.

itions thereto, do not and will not provide an ultimate solution to liability arising from the transportation of dangerous goods. Those provisions are designed to compensate for or exenorate some parties from the damage already caused by such goods. A genuine and ultimate solution lies in preventing the damage from occuring at all, which is why the IATA Restricted Articles Regulations and the ICAO Technical Instructions must be taken very seriously by both the carriers and the shippers.

In a catastrophic situation such as one likely to be caused by dangerous air freight, no amount of compensation can be enough - it will either be inadequate or over generous when all the parties involved are considered. Professor J.M. Brown can be appropriately and extensively quoted:

> "In any major disaster situation there is an extremely high probability that any tortfeasor will be financially incapable of providing compensation at the level adjudged necessary . . . . Even in those few cases where a major corporate tortfeasor theoretically might have the asset potential to satisfy (such) judgements . . . it is probable that these firms would be so

"economically crippled . . . they might not be able to continue functioning . . . . Ultimate determinations of liability will be preceded by years of litigation with the delay itself imposing serious collateral costs, upon both tortfeasor and victim."[297]

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[297]Probing the Law and Beyond, a quest for public protection from hazardous product catastrophies:George Washington University Law Review, Vol. 38, No. 3, March 1970, pp. 435-436.

CHAPTER 5

THE MULTIMODAL TRANSPORT CONVENTION

5.1. Containerization

Multimodal transport is essentially containerized transport of goods by combined modes of sea, surface and air. Containerization of goods is very profitable to both shippers and carriers and facilitates the export of goods. It is in the area of sea transport that containerization is most popular. When in 1979, the first bulk shipment of Australian apples in a 20ft. Act Refregerator container arrived in the United Kingdom, Mr. Hinschellwood, boss of the shipping company, declared: 'The move into containers had paid off. Our ships lend themselves to all kinds of cargo - steel, earth movers, heavy vehicles, yachts, and the like."[298]

For air transport, the move into containers began with piston-engined and turbo-prop aircraft when carriers used pallets and nets to unitize air shipments. The introduction of larger aircraft, particularly the jets, brought an increase in the cost of loading freight significantly to warrant greater unitization of air shipments. The wide-body aircraft provided even more impetus to expand the development of the container program to reduce congestion in the loading area

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[298] Freight News Weekly, September 19, 1980, p. 14.

and to reduce turn-around time.[299]

Containerization, though highly desirable, remains quite unsuited for air transport. Thus, the air mode is the weakest link in multimodal transport. The use of containers does not only bring the air carrier benefits, but presents him with lots of problems and constraints limiting their use. These range from acquisition costs, the backhaul problem, tare weight penalties, lack of standardization and interchangeability to the problematic size of the containers.

The strongest pessimism about the role of the air mode in intermodal transportation was expressed by the chairman of British European Airways, Sir Anthony Milward, in an article titled: 'Development and Future of Air Cargo';[300] Intermodal capability is limited by the strength of the container itself. The basic design criteria is critical because of limitations in the weight of the carrying element. What is suitable for air carriage is usually unsuited for sea carriage - or by land transport. The reverse situation also applies because although the purpose of the container is to contain and protect the goods, the stresses imposed by the different modes of transport vary considerably. It seems unlikely that, for example, there would be a requirement for onward carriage by sea from Britain for containers shipped by air

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[299]Taneja: The US Air Freight Industry, op.cit.p.185

[300]Aeronautics Journal of the Royal Aeronautical Society, Vol. 72, No. 695, November 1968, p. 962 et. seq.

across the Atlantic. The answer is for airlines to design their own light weight containers, for it is unrealistic to envisage an intermodal capability for air designed containers.

Small shippers are also apprehensive. The big size of containers for intermodal units is only attractive to freight forwarders, but may be hurtful to small shippers who cannot take advantage of container rates. Drawing from the experience of the railway which is reluctant to accept less-than-a-carload shipments, the small shippers fear that as carriers move towards containerization, their own needs will be severely ignored. Waiting to consolidate a number of small shipments in a container load may destroy the inherent advantage of air freight, as air freight shipments have traditionally tended to be small in size and weight. Paradoxically, some shippers complain that the airlines do not consider the needs of very large shippers with the requirements for very big containers.

The United Nations Conference on Trade and Development (UNCTAD) was not concerned with the pessimism and complaints stated above. It was very concerned with 'stimulating the development of smooth economic and efficient multimodal transport services adequate to the requirements of world trade'. It desired to ensure 'the orderly development of inter-

national multimodal transport in the interest of all countries'. Accordingly, it conceived and gave birth to a convention christianed 'The Multimodal Transport Convention'.

5.2. The Convention

The Multimodal Transport Convention, the end product of two sessions of the United Nations Conference on Trade and Development (UNCTAD) [301] was adopted on May 24, 1980 and opened to signature at the United Nation's headquarters, New York, from September 1, 1980 to August 31, 1981. The Convention enters into force twelve months after the governments of thirty states have either signed it not subject to ratification, acceptance or approval, or have deposited instruments of ratification, acceptance or approval or accession with the depository. For a state which ratifies, accepts, approves or accedes to the Convention after the requirements for entry into force enumerated above have been met, the Convention comes into force for that state, twelve months after the deposit by such state of the appropriate instrument.[302] So far, the Convention has not met the requirements for coming into force.

Unlike the other Conventions and Protocols treated so

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[301] For background information on the Convention, see Fitzgerald F. Gerald - 'The United Nations Convention on the Multimodal Transport of Goods'. 1980 Annals of Air and Space Law, Vol. V, p. 51 et.seq.

[302] Article 36 of the Convention.

far, which neatly fall under either Public or Private International Law, the Multimodal Convention seems to be both. It contains provisions on contract and the liability regime of the parties to such contract; but it also contains some public law provisions such as those on customs matters.[303]

A significant creation of the Convention is the Multimodal Transport Operator.[304] He is the hub of multimodal transportation. He contracts with the consignor as a principal, not as an agent like a freight forwarder does, undertakes complete responsibility for the transportation of the consignment from a point in one country to a point in another country. He acts independently of the consignor and arranges for the transportation by the various modes of carriage. There is no contractual privity between the consignor and the respective carriers. The Multimodal Transport operator can act in a dual capacity of principal and carrier.

5.3. The Air Segment of the Carriage

The two most important organizations with air transport, the International Civil Aviation Organization and the International Air Transport Association have been strongly opposed

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[303] See, for example, Article 32 of the Convention.

[304] Article 1(2) of the Convention.

to the Convention as it concerns the air segment. The former is concerned about the impact of the Convention on civil aviation, the latter vehemently wished to have the air mode excluded completely from the Convention. Even the framers of the Warsaw Convention, in an apparent anticipation of the Multimodal Transport Convention, provided in Article 31(1) that in the case of combined carriage, the air segment is governed by the Warsaw provisions.

Surrounded by these, among other not-very-friendly forces, the drafters of the Multimodal Transport Convention included some compromising but curious provisions. To appease air carriers who have extensive air-truck movements that provide door-to-door service to customers, pick-up and delivery operations are excluded from the multimodal transport contract.[305] This is a concession the air carriers could not get from the Warsaw Convention.[306] When a multimodal transport contract has been concluded which, according to its Article 2, shall be governed by the Convention, its provisions shall be mandatorily applicable to that contract. But the consignor has the right to choose between multimodal and segmented transport.[307] On IATA's soft spot, the negoti-

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[305] Article 1(1), Multimodal Transport Convention.

[306] Article 18(3) Warsaw Convention.

[307] Article 3, Multimodal Transport Convention.

able document of carriage, the Convention stipulates that when the goods are taken in charge by the multimodal transport operator, he shall issue a multimodal transport document which at the option of the consignor shall be in either negotiable or non-negotiable form.[308] Here, IATA is enraged but powerless as the decision to issue a negotiable document rests solely with the consignor, not the carrier.

Multimodal Transport Convention vis-a-vis Warsaw Convention

When the Multimodal Transport Convention comes into force, it will be de jure inter pares with the Warsaw Convention. Both of them being independent international conventions duly ratified by the contracting states, the Warsaw Convention will have no legal claim to superiority. De facto, however, the Multimodal Convention has, of its own making, rendered itself subordinate to Warsaw. It stipulates that it will not affect, or be incompatible with the application of any international convention or national law relating to the regulation and control of transport operations.[309] This provision is a basis for Warsaw provisions such as its Article 18(3) to prevail over contrary stipulations in the multimodal in respect of Pick-up and delivery service. Article 31 of Warsaw can also rely on that provision

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[308]Article 5, See also Article 6.

[309]Article 4.

to apply even where the consignor has exercised his right in Article 3 of Multimodal to opt for the contractual conditions under the Multimodal Convention instead of a segmented transport.

Interestingly, while the Warsaw Convention framers made sure that the Convention applies of its own force to certain kinds of transportation the framers of the Multimodal Convention left its application at the pleasure of the consignor. A consignor could, therefore, choose multimodal transport contract, but an air carrier engaged by the multimodal transport operator could refuse to be bound by the multimodal contract, and fall back to the Warsaw contract.

The multimodal transport document is as cumbersome as the unamended Warsaw consignment note. Fifteen particulars are required to be inserted, but unlike in the case of Warsaw, the non-inclusion of any of the recommended particulars in the document shall not affect the legal character of the document provided that it meets the requirements set out in paragraph 4 of Article 1.[310] However, when the multimodal transport operator, with intent to defraud, gives in the multimodal transport document false information concerning the goods or omits any information required to be included under paragraphs 1(a) or (b) of Article 8, or under Article 9, he

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[310]Article 8

shall be liable without the benefit of the limitation of liability provided in the Convention for any loss, damage, or expenses incurred by a third party, including a consignee, who acted in reliance on the description of the goods in the document.[311] In order to recover for unlimited liability on the ground of mistatements or omissions, the claimant must prove two facts: that the mistatement or omission was intentional and designed to defraud, and that it was relied on.

The multimodal transport operator is liable for the acts and omissions of his servants or agents when any such servant or agent is acting within the scope of his employment or of any other person whose services he makes use of for the performance of the contract, as if such acts or omissions were his own.[312] If an action is brought against the servant or agent, he shall be entitled to avail himself of the defences and limits of liability which the multimodal transport operator is entitled to invoke.[313] There is no need for a debate like the kind whether the Warsaw Convention covers servants and agents of the carrier, in the case of multimodal transportation.

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[311]Article 11, Multimodal Convention.

[312]Article 15, Ibid.

[313]Article 20(2), Ibid.

Unlike the Warsaw Convention, the Multimodal Transport Convention is clear on the issue of delay. The liability of the multimodal transport operator shall be limited to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the multimodal transport contract.[314] For ordinary damage to and loss of goods, the liability is assessed in terms of 'Units of Account' which is the Special Drawing Right designed by the International Monetary Fund.[315] Liability cannot exceed 920 units of account per package or other shipping unit or 2.75 units of account per kilogramme.[316]

Multimodal Transport Convention is also explicit on the issue of notice in respect of loss or destruction of goods. If notification in writing stating the nature and main particulars of the claim has not been given within six months after the day when they were delivered or where the goods have not been delivered, on the day after the last day on which the goods should have been delivered, the action shall be time barred.[317] This requirement for notification is for

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[314] Article 18(4), Multimodal Convention.

[315] Article 31

[316] Article 18(1)

[317] Article 25

any action relating to the contract - damage, loss, etc.

Arbitral or judicial proceedings must be instituted within two years. The limitation periods of two years for suit and six months for notification are not as rigid as Warsaw limitation periods. They can be said to be prescriptions rather than limitations, stricto sensu.[318] Thus, it is stipulated:

> "The person against whom a claim is made may at any time during the limitation period extend the period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations."[319]

One would like, however, to believe that this provision applies to the period of six months for notification of claim, and not the two years for bringing action. But the provision is so liberally worded and so positioned that there is no strong basis for this belief.

5.4. What are the chances for the Multimodal Convention?

One appreciates UNCTAD's desire to develop world trade.

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[318]The French translation of the Article rightly uses 'prescription'.

[319]Article 25 (3).

International Multimodal transport is a lofty ideal. It is a means of facilitating the orderly expansion of world trade. But no matter how optimistic one might like to be about the success of the Multimodal Transport Convention, one cannot realistically, but conclude that the Convention is far from being the panacea for improving world trade. The fault is not in the concept of such a convention, it is in the field the convention is fated to regulate and the fastidious forces operating in that field.

The IATA finds the Convention's liberal provisions such as the negotiable document revolting to its conservative stance on the negotiability of the air waybill. The ICAO and the International Chamber of Commerce both look at the Convention with the kind of suspicion one looks at a cat in a cupboard, unsure to what direction it will spring. Then there are the various camps of governments with diametrically opposed expectations. Thus, the developing states, the marketing states, etc., have all to be appeased by the Convention. The subject matter for regulation - multimodal transportation - is a special problem. Its basis is containerization, but interchangeability of containers among the various modes of transport is so far technically in the realm of make-believe.

In the light of the above factors, one can appreciate

the background and worth of the Convention's provisions. The framers made a good job of ensuring that the Convention stands up on paper, but can it stand the test in practice? It does not seem like it will be workable. The Convention concedes too much to too many at the same time so that the concessions instead of producing a functional compromise, will produce a fatal contradiction which in turn will spell its demise. Look at Article 4(1), for example,

> "This Convention shall not affect, or be incompatible with the application of any international convention or national law relating to the regulation and control of transport operations."

How can any human convention be compatible with, or not cross the path of any regulation of the myriads of national laws and provisions of other international conventions, existing or yet to exist, in the field it governs and still in itself be worth a pinch of salt?

One can, therefore, not resist the urge to ask: is the Multimodal Transport Convention really necessary afterall? Perhaps the answer can only be known when the Convention shall have come into force. The Convention can lay claim to one credit at least. For once, the law has taken a step ahead of technology, in the area of intermodal transport. Technology has the challenge to catch up. If technology can

make machines that fly, why can it not make containers that are interchangeable among the various modes of transport?

CHAPTER 6

CONCLUSION

This thesis has been a kind of long journey by air from the early days of the air freight industry to the present, changing from piston-engined aircraft to turbo-prop, and then to the jet and wide-body aircraft. There were stop-overs at reasons for and kind of air freight, global air freight trends, cargo routes and aircraft, national and international laws regulating the industry, and dangerous goods. The destination was the Multimodal Transport Convention.

Here then is the point to look back and take stock. Was the survey of these developments worthwhile? Yes. While the law has a negative reputation of lagging behind times and changes, it has been the singular challenge to its apostles, the legal academics, like its priests, the judges, to catch up with the changes and in turn, hasten up the 'snail'. This is why this kind of investigation is necessary.

Why was a good part of a legal paper devoted to economic matters? Transportation of goods by air is primarily the interplay of economic interests and activities. These interests and activities generate the need for laws, and laws in turn affect economic developments. The law on

air freight could not appropriately be treated in isolation. Real world problems have an irritating habit of not matching neatly against traditionally defined subjects.[320] Thus, Roscoe Pound says that the science of the law today has given over its exclusiveness and seeks what may be called team play with the other social sciences.[321] O. Khan - Freund said that it is the duty of the Scholar to search for the socialforces that make the law, while professor W. Friedman warns that it would be inexcusable for a lawyer to ignore contemporary trends in economics. Law is an instrument of utility. For it to have utility in the air freight industry, it must be aware of and attune to the economic trends in the industry.

Many areas of law bear the stamp of economic reasoning. Few legal opinions, to be sure, contain explicit references to economic concepts, but the true grounds of a decision are often concealed rather than illuminated by the characteristic rhetoric of judicial opinions. Indeed, legal education consists primarily of learning to dig beneath the rhetorical surface to find those true grounds.[322] Thus one can understand why the United States courts are very resentful of the

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[320] J. M. Oliver: Law and Economics, p. 13.

[321] Roscoe Pound: Jurisprudence, 1959, Vol. 1, p.349.

[322] Richard A. Posner: Economic Analysis of Law, p. 6.

Warsaw outmoded monetary limits in the case of passengers in particular, in a society where it costs so much to breed a human being and where medical and maintenance costs have increased manifold since 1929. Thus, too, we may understand after going through this thesis, why a judge may rightly rule that late delivery of goods, in a certain case, does not amount to delay, for the claimant in that case may have chosen air freight for a reason other than the speed of air transport, and in the light of that particular reason, late delivery cannot be of any consequence.

Like in any other industry, fairness in economic dealings in the air freight industry is not self-executing. The inclination for any of the parties in the contract of carriage to forego an economic advantage simply in order to act fairly is very slight unless the flouting of the norms of fair play is strongly disapproved by a positive rule of law.

The rules of the law on international carriage of goods by air are fundamentally ~~posited~~ in international conventions, and to a lesser extent, in national legislations. Although a significant part of this thesis is trenched in case law, it will be a mistake to get away with the idea that the Law Reports are the repository of the law on international air freight. It is, therefore, absolutely essential that the provisions of the international conventions be relevant to

and current with the practical needs of the industry.

One can, therefore, understand, for example, the IATA's objection to some provisions of the Multimodal Transport Convention, especially the negotiable document of carriage. As it has been stated.

> "It is obvious that those who continously participate in the market intercourse . . . have a far greater rational knowledge of the market and interest situation than the legislators . . . whose interest is only ideal.[323]

It is also against this background that one can safely place much faith and confidence on that Association's Restricted Articles Regulations.

The Warsaw Convention is archaic and risks losing its utility. The solution, however, does not lie in scrapping, but in renovating it so that while its old relics which can no longer achieve the purpose for which they were designed are amended, those 'oldies' which are still 'goodies' are retained. It is disheartening that of all the Protocols amending the Warsaw Convention, only the Hague Protocol of 1955 is in force and even that does not apply in some jurisdictions like the United States. But even more disheartening

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[323]Max Weber: Law in Economy and Society, p. 38.

is the fact that the United States which has been in the forefront in focusing attention to the obsolete provisions of the Warsaw, has not ratified even one of the amending protocols, protocols which are largely the products of her own initiative. How seriously can the United States expect to be taken today in the field of orderly international civil aviation?

It is high time governments realized that economic developments in the air freight industry have far out-paced the law. Should the gap continue to get wider, there will be severe undesirable effects on the growth of the industry. It takes governments many years to realize the need for an international convention, or the need to amend an existing one, it takes them many more years to draft and adopt the provisions, it then takes an awfully long, time, sometimes indefinite, period to give the convention or protocol the required ratifications to come into force.

The IATA, in its Annual General Meeting in 1976, urged governments to ratify the Montreal Additional Protocols No. 3 and No. 4. The Association again in its 1981 Annual General Meeting reiterated their strong support for the ratification of these instruments, and urged states to take all necessary measures to ensure ratification.[324] The task of

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[324]World Airline Co-operation Review, October - December 1981, Vol. 16, No. 4, p. 7.

governments is not only to regulate air transport - they have other and sometimes more important 'fish to fry'. But if and when they do make these legislations, they should give ears to the appeals of their representatives in the industry and ratify the treaties.

It was said above that the Law Reports are not the repository of the law on international carriage by air. That was not intended to mean that case law is of little significance to the air freight industry. Far from it! As long as some areas of international transportation by air remain unprovided for by any express rules of law, and as long as the inconvenient provisions of existing legislations cannot be rectified easily and speedily, the courts remain the last recourse for reform.

G. W. Paton said that 'it is a most unpleasant task for a judge to give a decision that he knows to be unjust because the weight of the authority is compelling'.[325] When a bold, imaginative, enterprising and knowledgeable judge is confronted with such an awkward case he finds a way out. Thus, in ruling, for example, that a person, other than the consignor or consignee, with the necessary interest in the goods is competent to bring an action against the carrier for damage to the goods, a judge can re-echo the words of

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[325] Paton: Jurisprudence, p. 61.

Scrutton L.J. in Gardiner v Heading:[326]

> "I think it is the law. I am sure it is justice. It is probably the law for that reason."

A reckless and unjudicious use of this recourse, however, can be counter productive and the industry will be hurt.

The final note: Sir Anthony Milward, addressing the Royal Aeronautical Society in 1968, said that 'there is nothing new in the carriage of goods by air - there is, however, a new approach towards the exploitation of an international market which has scarcely been touched'. Does this statement still hold good today? At the time it was made the Boeing 747 all-cargo plane had not been introduced and the Montreal Protocols had not been adopted. The new Annex 18 and the Technical Instructions on the Carriage of Dangerous Goods and the Multimodal Transport Convention had not been conceived. It is not disputed that there has been a new approach towards the exploitation of the air freight market. But do all the developments which have taken place in the industry so far amount to only a 'new approach toward the exploitation of an international market'? This author is inclined to answer nay.

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[326](1928) 2 K. B. 284 at 290.

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