SHORT TITLE

THE WARSAW CONVENTION,
EVOLUTION OF THE CARGO PROVISIONS

THE EVOLUTION OF THE PROVISIONS OF THE WARSAW CONVENTION RELATING TO THE CARRIAGE OF CARGO

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment of the requirements for the degree of Master of Laws.

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Montreal

August 1976

SUMMARY

The thesis reviews the provisions relating to the international carriage of cargo by air set in the Warsaw Convention of 1929, the Hague Protocol of 1955 and the Montreal Protocol No.4 of 1975.

Various points of view expressed in the doctrine and jurisprudence on interpretation and critics of the provisions of the Warsaw Convention of 1929 are presented in the first part of the thesis. The amendments to the Convention are examined so as to show whether the critical remarks and various proposals were taken into consideration in the subsequent acts, and to what extent. Problems arising from the interpretation of new provisions are discussed.

The examination of the evolution of the provisions relating to the carriage of cargo by air led to the conclusion that only a few, widely criticised provisions were amended and corrected. A new approach to the working methods of International Conferences of Air Law and the necessity of drafting a new Convention relating to carriage of cargo are suggested.

Résumé

La thèse passe en revue les clauses relatives au transport du fret aérien établies par la Convention de Varsovie de 1929, le Prôtocole de La Haye de 1955 et Protocole de Montréal No.4 de 1975.

La première partie de la thèse présente les différents points de vue exprimés par la doctrine des clauses de la Convention de Varsovie de 1929; elle examine également la juridiction de ses interprétations et de ses critiques. Elle examine ensuite les amendements à la Convention de façon à établir jusqu'à quel point les diverses propositions et remarques critiques furent prises en considération. La thèse discute finalement des problèmes découlant de l'interprétation de nouvelles clauses.

Après avoir étudié l'évolution des clauses relatives au transport du fret aérien, elle conclut que seules quelques clauses, très critiquées, furent remaniées et corrigées. Elle propose une nouvelle conception des méthodes de travail des conférences de droit aérien international et suggère la nécessité d'établir une nouvelle Convention relative au fret aérien.

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ACKNOWLEDGMENTS

In presenting this thesis I take the opportunity to express my sincere thanks for the guidance and assistance given to me by Professor Martin A. Bradley.

I owe a deep debt of gratitude to Miss Lala Jurasz for her unfailing support and encouragement.

I also wish to thank Mrs. Marillyn Curran for her editing advice given to me.

Finally, I would like to thank my Mother as well as many other persons who encouraged me and who made completion of this thesis possible.

I state that this thesis was prepared by myself in my private capacity. The opinions expressed are solely my own and should not be attributed to any activity connected with my employment in the Ministry of Transport of Poland.

Aleksander Tobolewski

ABBREVIATIONS

All E.R.	All England Law Reports
Avi	Aviation Law Reports
CIM	Convention Internationale concernant le transport des marchandises par chemins de fer
CITEJA	Comité International Technique d'Experts Juridiques Aériens
DLR	Dominion Law Reports
IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
JALC	Journal of Air Law and Commerce
RFDA	Revue Française de Droit Aérien
RGA	Revue Générale de l'Air
RJILA	Revue Juridique Internationale de la Locomotion Aérien
U.S.Av.R.	United States Aviation Reports

I N T R O D U C T I O N

The history of aviation is not very long when we compare it with the history of other means of transport. Although many endeavours had been made to fly, the first recorded flight by a heavier than air, powered machine took place only on December 17, 1903 in North Carolina. A peculiar, frail structure of metal, wood and fabric flew a distance of $^1/_6$ mile in just 3 minutes. The only passenger was the pilot.

In a very few years, the fast development of technology made possible the carriage of passengers and even cargo. The first recorded carriage of cargo by air took place in 1910.[1] The consignment - a 60 pound bolt of silk was transported from Dayton to Columbus, i.e. approximately 65 miles. The role to be played by aviation had not been realized yet. Soon however war advanced the development of aviation techniques to the point where the transportation of loads and passengers became possible.

After the War, international cooperation played a greater role and soon aviation was used to transport of passengers on international routes. The first recorded

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1. A.D. Groenewege and R. Heitmeyer: Air Fright Key to Greater Profit, England 1964 p. 18.

international carriage of cargo by air took place between London and Paris in 1919.[2] Carriage of passengers, mail and cargo by air began to grow and play an important role in international transportation.

The Second World War accelerated the development of technology and especially aviation. When the War was over, thousands of military aircraft stood without operating and hundreds of them were sold to civil aviation. When, in 1950, the economical conditions of the World became normal, the boom in air transportation started, also in the transportation of cargo. The average annual growth was very high.

The introduction of wide body jets in the sixties - with cargo compartments big enough to hold a whole aircraft of the thirties, accelerate the development of the transportation of cargo. Hundreds of passengers and several tons of cargo could be carried thousands of miles without stops by one aircraft. The expansion of international trade and cooperation has created a demand for carriage of cargo by air.

In 1974, 19230 million tonno/km of cargo and 11340 million tonno/km of international air cargo were transported.[3] The average annual rate of growth in the

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2. ibidem p.16

3. Annual Report to the Council - 1974, ICAO Doc 9127 3 Tab I-I and I-5; also ICAO Bulletin 1975 May at p.9 Tab.3

international carriage of cargo by air in the 1965-1974 decade was 18.1% and for 1969-1968 was as high as 33.9%.[4] Even in 1974 when the annual increase over 1973 was below the ten-year average, the rate of growth in tonno/km of international carriage of freight was 13.7%.[5] Therefore, it seems that the growth in carriage of cargo by air is a stable process / which nonetheless may depend on the overall world economic situation/ and allows the prediction of further growth in the volume of cargo carried.[6]

In every phase of man`s actvity some mistakes and problems exist. With the carriage of cargo by air some damage, loss or delay of consignment take place. It is a normal situation and for many years to come such cases will occur.

In 1973, some 37 of the largest air carriers concluded 12.5 millions of contracts for the carriage of cargo by air and in the same period they recorded 55408 claims on it. The percentage of claims for a particular airline in comparison with concluded con-

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4. ICAO Doc 9127 at Tab. 4, I-3; ICAO Bulletin 1975 May at p.17 Tab.3.
5. Ibidem.
6. See especially Articles by: A.Hoften:Air Cargo`s Big Lift;P.Smith:New Opportunities for Air Freight; W.Goodman:Flying the Freighters - published in the Flight International 6 February 1975 p.208 and seq. They predicted i.a. that during next ten years the air cargo market will increase in size - in terms of tonno/ miles by a factor of 2-3. In this series of articles

tracts was 0.02% to 3.21% and averaged 0.4439% - one claim for 225 concluded contracts.[7]

The statistics which show us the growth of cargo carried show also the percentage of claims. However, almost 99% of the claims are settled between the involved parties without the necessity of going to court or of involving legal proceedings. Some of them, nonetheless, are resolved by courts or arbitrators.

Today, the carriers rights and duties as well as other rules concerning international carriage by air are set out in the Warsaw Convention which was signed in 1929 and amended several times since then by various acts.

Air law is a relatively new branch of law and many of its principles have not been clearly indentified. The other principles, which were established too soon, are no longer congruent with present day international practice. Some are being revised and others need to be revised so as not to bar the rapid development of air cargo carriage.

Cont. apart from economical predictions there are very good explaination of technical capabilities of modern aircraft used for the carriage of cargo.

7. IATA Support Materials for the Air Carriers Lawyers Conference - June 1974.

OBJECTIVE AND OUTLINE OF THE THESIS

In 1929, a fundamental act, governing private air law was established: The Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw on 12 October 1929 - referred to as the Warsaw Convention 1929. It laid down some basic rules which govern the transport of passengers, baggage and cargo by air. This act has been subsequently amended and supplemented by various acts, such as:

1. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, Done at The Hague on 28 September 1955 - referred to as the Hague Protocol;

2. Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at Guadalajara on 18 September 1961 - referred to as the Guadalajara Convention;

3. Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Guatemala City on 8 March 1971 -

referred to as the Guatemala Protocol;

4. Three Additional Protocols adopted during the Diplomatic Conference in Montreal in 1975 - referred to as the Additional Protocols;

5. Montreal Protocol No.4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, Signed at Montreal on 25 September 1975 - referred to as the Montreal Protocol No.4.

In the international practice, all the above mentioned acts are frequently called as "Warsaw System" or simply Warsaw Convention. Therefore, in this thesis the"Warsaw Convention" will be deemed as referred to the "Warsaw System".

The objective of this thesis is to examine and notice the development of rules and regulations governing the international carriage of cargo by air, set out originally in the Warsaw Convention 1929 and in the Hague Protocol and Montreal Protocol No.4.

Since the main changes concerning the cargo rules in those acts are those related to cargo documentation and liability of carriers, they will be the object of special consideration while some other changes will only be mentioned in passing.

The Warsaw Convention 1929 is the most widely accepted international private law convention. As such having been examined in international doctrine to the greatest possible extent. Therefore, opinions expressed by various authors will be recalled, especially to check whether or not these opinions were taken into consideration when the draft of the amendments to the Convention were made.

No effort has been made in this thesis to prepare a complete study of all the implications of the Warsaw Convention 1929 and its subsequent amendments with regard to international practice or to discuss relations between the Warsaw Convention and Conditions of Contract used in international practice. The existing Conditions of Contract used by IATA carriers were not taken into consideration.

The choice, for extensive elaboration, of some parts of the Warsaw Convention and the mere mention of others has been made on the discretion of the author and does not necessarily reflect their relative importance to international practice. In the opinion of the author the chosen points are worthy of discussion and examination as they may require further amendments. This discussion might also reveal some principles which were or still are of key importance either in theory or practice.

The exclusive purpose of this thesis is to examine only cargo rules and regulations, however, as the Warsaw Convention also regulates carriage of passengers and baggage, some common rules will be examined as long as they have an impact on the subject of carriage of cargo by air. So as to give general background for discussion, some comments of a general nature will also be included.

C H A P T E R I

WARSAW CONVENTION 1929

1. History

The necessity of unifying rules relating to international aviation was clear even before the first successful flight took place. The first serious works had been performed during the Paris Conference in 1919 which adopted a Convention relating to the Regulation of Aerial Navigation. The Conference established the Commission Internationale de Navigation Aérien which had, in its scope of reference, i.a. the task of working out some general outlines of private international air law. But real progress in the field of private air law was only achieved after the First International Conference of Private Air Law, which was held in 1925 in Paris.[8]

The Conference established Comité International Technique d'Experts Juridiques Aérien /referred to as the CITEJA/. The CITEJA held several meetings and sessions which resulted in i.a. the drafting of the text of pro-

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8. Minutes see I Conférence International de Droit Privé Aérien, Paris 1926

posed convention relating to international air transport.[9]

The proposed text of the Convention was discussed during the Conference held in Warsaw from October 4th - 12th 1929. As a result of this Conference, the French text of the Convention / Convention pour l'unification de certaines règles relatives au transport aérien international/ was signed. The text was deposited with the Government of Poland. The Convention came into force in 1933, after the deposition of the instrument of ratification by France, Latvia, Spain, Brazil, Jugoslavia and Romania.

The Convention contains provisions concerning:

a/ scope and definition of the Convention;

b/ transportation documents /passenger ticket, baggage check and air waybill[10]/;

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9. The preparatory works to the Convention and the role of CITEJA in them are discussed broadly by V.Lakhtime: Quelques remarques sur le texte de l'avant projet de la convention sur la responsabilité du transporteur dans les transports internationaux par aéronefs et sur la lettre de transport aérien, élaboré par la C.I.T.E.J.A., Revue Juridique Internationale de la Locomotion Aérien 1927 at p. 385 and seq.; G.Ripert: La responsabilité du transporteur aérien d'apres le projet de la Conférence Internationale de Paris de 1926,RJILA 1926 p.1 and seq.;H.Colannier: Éléments createurs du droit aérien, Paris 1929; CITEJA Compte rendue de la III Session.

10. The translation of term "lettre de transport aérien" as "air waybill" is more often used than English translation "air consignment note".

c/ liability of the carrier;

d/ combined transportation;

e/ general and final provisions.

2. General

The Convention applies to all international carriage of persons, baggage and cargo performed by aircraft for reward and to gratuitous carriage by aircraft, performed by an air transport undertaking,/Article 1 paragraph 1/.

For the purposes of the Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the places of depature and of destination, whether or not there is a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of Another Power, even though that Power is not a party to this Convention. Carriage without such an agreed stopping place between territories

subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international /Article 1 paragraph 2/.

A carriage to be performed by several succesive air carriers is deemed, for the purpose of the Convention to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty mandate or authority of the same High Contracting Party /Article 1 paragraph 3/.[11]

In respect to the carriage of cargo, the Convention established the rules concerning document of transport i.e. the air waybill, as well as uniform

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11. The examination of these provisions is outside scope of reference of this thesis. However, many problems with the interpretation and implementation of those terms arise in practice. See e.g. Shawcross and Beaumont: Air Law, London 1966 p.403 and seq.; The Warsaw Convention does not contain a definition of the carrier. It may cause certain difficulties, see e.g. Jonker and Schaad v Nordisk Transport Company, /1961/U.S.Av.R. 230; Some of these problems were resolved by the Guadalajara Convention.

rules governing the rights and liability of carriers vis a vis consignors and consignees.

A general description of the liability of the carrier established by the Convention is as follows:

a/ The carrier is prima facie liable for loss of, damage to and delay of cargo;

b/ The carrier may avoid liability if he can prove at least one of various specific defenses;

c/ The amount of the carrier's liability is limited to a specified sum unless the plaintiff can prove circumstances / also enumerated in the Convention/ which deprive the carrier of the right to invoke "the provisions of the Convention which exclude or limit his liability".

A broader examination of some of the interesting aspects of this regulation will be found later.

In the Convention the rules concerning documents of carriage are found in the second Chapter entitled "Documents of Carriage". Nonetheless the principle of existence and of use of them are at various points linked with the provisions concerning liability of the carrier and rights and duties of the consignor and consignee.

A more extensive elaboration of the problems can therefore be done either by grouping the problems on the basis of their substantive link or by examining them from the begining as they appear in the text of the Convention. Since the objective of this thesis is to show the development and historical improvement of the rules and text of the Convention the latter method seems to be the proper one. For the benefit of the reader the text of particular Articles is quoted at the beginning of every subparagraph.

3. Cargo Documentation

After the Paris Conference of 1925 CITEJA worked on two separate draft Conventions. The draft Convention on the carriers liability and a separate draft Convention on the air waybill. The CITEJA was under the influence of the just signed Brussels Bills of Lading Convention of 1924 and it seemed logical to prepare a separate convention on the air waybill. However, during its second session those two drafts were unified into one proposition. A clear example of the draft rules on the cargo documentation existed in the Brussels Convention and CIM Convention.[12]

The first draft was submitted on March 30, 1927 by the CITEJA.[13] However, the final draft, and, in consequence the text submitted to the Warsaw Conference in 1929 differed very greatly from the pattern used in the Brussel and CIM Conventions for the cargo documentation. The main difference was that although other Conventions contained the forms of the documents for carriage, the Warsaw Convention 1929 contained only

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12. Convention Internationale concernant le transport des marchandises par chemins de fer - 1880.

13. II Conference Internationale de Droit Privé Aérien, 4-12 Octobre 1929, Warszawa 1930 p. 159; G.N. Calkins Jr.: The Cause of Action under the Warsaw Convention, JALC 1959 p. 217; V.Lakhtime: op.cit. p. 385.

several prescriptions and sanctions without setting the form of the air waybill. The drafters followed the pattern of other Conventions in some articles[14] but in others departed from the established principles in those Conventions. Consequently the Warsaw Convention 1929 did not follow either of known documents of carriage when adopting the rules concerning the air waybill. Thus a completely new kind of document, with its own rules, was established. It is rather difficult to understand why the drafters did not accepted the solutions of the bill of lading or the waybill existing in the CIM and Brussel Conventions to the greater extent.

The bill of lading for example serves mainly as:

a/ an instrument of proof, proving the contract of carriage;

b/ a document proving the circumstances of shipment;

c/ a document allowing the legal circulation of cargo during transportation /sale, pledge etc./

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14. Article 10 of the Warsaw Convention 1929 is almost identical word for word with the Article 7/1/ of the Convention Internationale relative aux transport internationaux des marchandises par chemins de fer - CIM; M.Lemoine: Traité de droit aérien, Paris 1947 No.590.

The air waybill serves various purposes to be examined later, but this specific, yet unclear, regulation raises many difficulties in defining the legal character of this document. Therefore its usefulness in comparison with the bill of lading is much narrower.

The articles concerning the carriage of cargo by air are set out in Chapter II -"Transportation Documents" Section III under the title "Air Waybill" - /Article 5 - 16 inclusive/. The title of the Section does not reflect the content of it. Section I -"Passenger Ticket" and Section II "Baggage Check" contain articles which exclusively deal with these documents / passenger ticket - Article 3, baggage check - Article 4/. In Section III however, were included articles which are not directly related to the "Air Waybill", but rather regulate the process of the carriage, set the rights and duties of the parties of the contract / e.g. Article 12,13,14,15 and 16/. Even if they indirectly refer to the air waybill they carry much more important principles. Therefore the title which suggests that the section contains only provisions related to the document of carriage may be misleading.

Article 5

/1/ Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.

/2/ The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.[15]

Article 5/1/ gives the carrier the right to request the consignor to make out and hand over to him an air waybill and the right of the consignor to request the carrier to accept this document. This implies that an air waybill is not obligatory document and upon consent of the carrier and the consignor may not be issued. However, when issued, a consignor is a party issuing it. He may choose its form, subject to certain constrains as to the content and number of copies. It is easy to forsee that such practice is not acceptable to any airline. Thousands of different forms of air waybills would

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15. The translation of the Warsaw Convention 1929 quoted in this thesis appears in the Schedule to the United Kingdom Carriage by Air Act 1932; 22 and 23 Geo 5, Ch.36. The terms which are outdated are changed during the examination for the modern ones. E.g. "goods" - "cargo", "air consignment note" - "air waybill" etc.

paralyze the activity of any company.[16]

According to Article 33 a carrier may make regulation which are not in conflict with the provisions of the Warsaw Convention or even may refuse to enter into a contract. It was therefore easy to deduce that the air carriers will make their provisions as to uniform document of carriage. But the next point to criticize is that there was no standard form of this document drafted to be used by all carriers. The standard form is useful and in many cases necessary to efficient successive carriage.[17]

This problem either was overlooked by the drafters or they forsaw that such a uniform document would be prepared and accepted by somebody else. As a matter of fact it was done by the International Air Traffic Association as early as in 1931 in Antwerp and IATA continues to pre-

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16. See H.Drion: Limitation of Liabilities in International Air Law, The Haque 1954 para 67 at p. 75 and seq. in which he deals with the problem of issuing the air waybill by the consignor. He stated i.a.:"It is belived that the drafters of the Convention did not fully realize the consequences of the air waybill being issued by the consignor".

17. It may be interesting to point out that other Conventions - e.g. Convention relative au contrat de transport internationale de marchandises par route - CMR or quoted above CIM - established in their contents the standard form of the documents of carriage. In the Warsaw Convention 1929 this practice was not followed.

pare standard documents of transport in international practice.[18]

As it has been pointed out by various authors and by the drafters of the Warsaw Convention 1929, the consignor is a person who is in possession of almost all the particulars neccessary to conclude a contract of carriage and to fill out the air waybill.[19] Although these arguments are sound, they should not determine the person issuing the air waybill to be consignor. This solution may be contrasted with the provisions of the CMR and CIM Conventions mentioned above where both the consignor and the carrier issue waybills.

From the wording of the French text "...demander à l'établissement...lettre de transport aérien" it may be understood that the air waybill exists as a unilateral document / as is the case with the bill of lading/. However, the air waybill can not be treated as a unilateral document, as it has to be accepted by the other party to the contract. Thus it is a kind of mutual agreement between the carrier and the consignor to use this document in form prepared and issued by the consignor.

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18. See on this subject: IATA Bulletin 1948,No.6 p. 30 and No.12 of 1950 at p. 86; also Bin Cheng: The Law of International Air Transport, London 1962 at 246-252; P.Chauveau: Droit aérien,Paris 1951 at p. 130;R.Rodière Manuel des transports terrestres et aérien,Paris 1969 at p. 123;Shawcross and Beaumont: op.cit. p.75

19. D.Goedhuis: National Air Legislation and the Warsaw

A document of carriage in the contract of carriage is not necessary, as the contract of carriage is concluded solo consensus.[20] However, it is useful and the transportation of cargo requires some form of documentation for practical purposes. The exception to the rule, that the contract can be concluded in any form by parties, should be explicitly imposed by law. The Warsaw Convention 1929 does not contain an obligation to issue an air waybill unless it is requested by one of the parties to the contract. Therefore, a contract of carriage is valid even without this document. This principle - well known in most European systems of law, has been repeated in Article 5 /2/.

The Warsaw Convention 1929 provides that the absence and, in some cases the irregularity of the air waybill, restricts air carriers from availing themselves of the provisions of the Warsaw Convention 1929 which exclude or limits their liability /this shall be examined later/. The contract may be concluded in oral form, or in a written form without issuing the document of carriage

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Cont. Convention, The Hague 1937 at p. 168; W.Guldimann: Internationales Lufttransportrecht, Zurich 1965 at p. 49; M.Lemoine: op.cit. p. 409.

20. "Le contract de transport...est purement consensuel.." M.Litvine: Droit aérien, Bruxelles 1970 at p. 235.

prescribed by the Warsaw Convention 1929. In those cases the carrier loses the benefit of limited liability. Therefore the air waybill became a document which is necessary to give effect to some other provisions of the Warsaw Convention 1929. This legal form is called form ad eventum.

Article 6

/1/ The air consignment note shall be made out by the consignor in three original parts and handed over with the goods.

/2/ The first part shall be marked "for the carrier" and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

/3/ The carrier shall sign on acceptance of the goods.

/4/ The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

/5/ If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 6/1/ repeats the principle that the air waybill is issued by the consignor, who should make out this document in three original parts and hand it over to the carrier with the cargo. The legal value of all these three parts should be the same. In case of a discrepancy between them, all acts based on a particular part shall be valid and it is up to the courts to settle which part is to be deprived of its validity.

In international practice, the air waybill is issued in three prescribed original parts and many copies.[21] The copies have limited legal value. In Sté Mat Transport v Air France[22] the Cour d'Appel de Paris 1re Ch, in his judgement of June 7,1966, stated that:

> "Le fait que sur l'exemplaire No.12 de la L.T.A. lenombre des deux colis expédiés ait été porté par erreur comme n'étant qu'un seul ne peut constituer une irrégularité au sens del'article 9 de la C.V., privant le transporteur du bénéfice de la limitation, alors que d'une part cette erreur est imputable à l'expéditeur lui-même et que, d'autre part, cette erreur a été rectifiée parun agent du transporteur sur tous les autres exemplaires de la L.T.A. notamment sur les trois originaux seuls exigés par l'article 6 de la C.V."

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21. IATA Resolution 600j Section B Manual of Traffic Resolutions Cargo Vol. I issue 3, I October 1975 provides that an air waybill may be issued in maximum 14 copies.

22. Sté Mat Transport v. Cie Air France;/1966/ RFDA at p. 337.

In international practice, copies of air waybills are used for various purposes. They serve as:

a/ documents of proof, proving the payment of charges due;

b/ customs and tax declaration;

c/ documents necessary for other official and accountant purposes.

The standard IATA air waybill includes in its set, a so called yellow copy, which is used as proof of the delivery of the cargo to the consignee.

In some cases the existence of a copy of the air waybill may affect the legal position of the parties to the contract of carriage. In Cooper's Finer Foods Inc., v. Pan American World Airways and First National Bank of Miami,[23] the consignor collected money for an unshipped consignment. Pursuant to a letter of credit, the consignor was authorised to receive payment upon production of i.a. " copy of an air waybill". This copy was not taken by the airline when they returned the shipment to the consignor. The consignor received undeserved payment upon presentation of a copy of the air waybill. The Florida Court of Appeals held that the airline

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23. /1965/ 9 Avi 17776.

which did not take all the copies of the air waybill was liable for undeserved payment which could not have been obtained if a copy of the air waybill had been taken.

A properly signed document may be used against the person who signed it. An air waybill, issued in three original parts should be signed by both, carrier and consignor only on its original marked "for the consignee". The consignee, who can not be deemed under some system of laws as a party to the contract, but only as a party for whose benefit the contract has been concluded /the contract for the benefit of third party/ may use his part of the air waybill to enforce his rights against both the carrier and the consignor. Carrier and consignor do not sign the parts of air waybill which remains in their possessionbut sign parts destined for the counterparts to the contract. In practice, however, the air waybills have a carboned reverse of all parts, and the whole set is signed by the carrier and the consignor once on the face.[24]

In this respect some problems may arise under those national laws which do not recognise the carbon copied signature, which would appear on subsequent parts of an air waybill.

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24. See e.g. M.Litvine: Droit aérien at p. 235.

It is not understood why only a consignor's signature may be printed or stamped while a carrier's may only be stamped. In modern practice both consignor's and carrier's signatuere could be replaced by a stamp or print.

Article 6/5/ provides that the carrier can make out an air waybill upon the request of the consignor. He is however, deemed to do so, subject to proof to the contrary, on behalf of the consignor. In predominant practice, the air waybill is made out by the carriers acting as agents of the consignors.[25] Therefore, some kind of contract for making out an air waybill has to be concluded by the consignor and the carrier. A very interesting point of view has been expressed on this subject by H.Drion.[26] According to him, a consignor who delivers the cargo to a carrier without the accompanying air waybill should probably be deemed to have implicitly requested the carrier to establish the air waybill on his behalf. Therefore, the contract to make out the air waybill would be concluded per facta concludentia. The Warsaw Convention 1929 does not contain any more provisions on this subject, so the relations between the consignor

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25. H.Drion: Limitation...at p. 313.
26. Ibidem p.307.

and the carrier regarding the establishment of air waybills,which are incidental to the contract of carriage of cargo by air,shall be subject to national laws.

In examining Article 6 some general problems arise. For example, when is the air waybill made out? What is the minimum of contents of the air waybill to be deemed as made out? What would happen if an air waybill were not issued in three original parts or was not signed? These problems are very closely related to the problem of sanctions for not making out the air waybill or omitting particulars in it - and will be examined later.

Article 7

The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

Articles 7 gives the carrier the right to request the consignor to make out separate air waybills whenever there is more than one package. It is justified because the capacity of an aircraft is limited and very often the consignment has to be carried in two or more parts. Also in Article 6/2/ it is provided that one original of the air waybill should accompany the cargo. That would be impossible if the cargo was to be transported in two or more aircraft.

Article 8

The air consignment note shall contain the following particulars:-

/a/ the place and date of its execution;
/b/ the place of depature and of destination;
/c/ the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
/d/ the name and address of the consignor;
/e/ the name and address of the first carrier;
/f/ the name and address of the consignee, if the case so require;
/g/ the nature of the goods;
/h/ the number of the packages, the method of packing and the particular marks or numbers upon them;
/i/ the weight, the quantity and the volume or dimensions of the goods;
/j/ the apparent condition of the goods and of the packing;
/k/ the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
/l/ if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
/m/ the amount of the value declared in accordance with Article 22 /2/;
/n/ the number of parts of the air consignment note;

/o/ the documents handed to the carrier to accompany the air consignment note;

/p/ the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;

/q/ a statement that the carriage is subject to the rules relating to liability established by this Convention.

Before examining the requirements, listed in /a/ to /q/, it should be recalled that the making out of an air waybill is necessary to give effect to those provisions of the Warsaw Convention 1929 which limits or excludes the liability of the carrier /this problem will be examined at the later stage/. Moreover, the making out of an air waybill which does not contain some particulars has the same effect as if the air waybill had not been made out - namely unlimited liability of the carrier. In the course of the examination, those particulars for which ommision in the air waybill results in unlimited liability shall be called "obligatory".

ad./a/ These are "obligatory" particulars.

Inclusion of these particulars may be useful in determining the law under which the contract was concluded.[27]

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27. See e.g. M.Lemoine:op.cit. p.409

It has to be pointed out that although in the majority of cases the place and date of the execution of the air waybill is the same place and date as the conclusion of the contract of carriage, in some cases they are not the same. The contract of carriage can be concluded without an air waybill having been made out. The date and place of the conclusion of a "consensual" contract may be different from the date and place of the execution of the air waybill.

ad./b/ These "obligatory" particulars serve for the following purposes:

- to allow determination of whether or not the carriage is international within the meaning of Article 1 /2/ of the Convention;
- can be used to determine the remuneration for the carriage.

ad./c/ Insertion on the air waybill of the agreed stopping place /"obligatory"/ is necessary to determine, in some cases, whether the carriage is international as defined in the Warsaw Convention.

The second reason to insert the agreed stopping place is to show the consignor that the carriage shall be performed on a specific route with an entry into

the territory of a foreign country. This maybe essential to the consignor in case the country has the regulations concerning entry or transit of some merchandises.[28]

With respect to insertion in the air waybill of this particular some problems arose.
In Kraus v KLM[29] instead of specifing the "agreed stopping place"in the space provided for that purpose, the following was inserted:

> "See lists of scheduled stopping places in the time table of the carriers concerned which lists... are made part hereof".

The New York Supreme Court stated that this was sufficient compliance with the provision of Article 8 /c/.

In American Smelting and Refining Co.,et al.,v Philippine Airlines,Inc., of Manila,[30] the New York Supreme Court held that omission in the air waybill of the "agreed stopping place" does not preclude the

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28. R.Coquoz:Le droit privé international aérien,Paris 1938 p.112; M.Litvine: Droit aérien at p. 236. As an example the carriage of narcotics or drugs may be brought up. In the case the consignment contains such articles it may be stopped and condemned by the appropriate authorities.

29. /1949/ U.S.Av.R. 306.

30. /1954/ U.S.Av.R. 221;/1954/ 4 Avi 17413; Affirmed Judgement by New York Court of Appeals /1956/ U.S.Av.R. 387.

carrier from invoking the provisions of Warsaw Convention 1929 which limits his liability, since the international character of the carriage was clear / from USA to Hong Kong/ and a stop for refueling was necessary as the distance of the flight is approximately 8.500 miles. This decision was also invoked by the Court of Appeal of England with full agreement.[31]

This interpretation of Article 8 /c/ in connection with Article 9 is virtually against the letter of the Convention. Although this liberal interpretation is accepted by various authors some others disagree.[32]

The problem which is connected with other provisions of the Warsaw Convention 1929 is twofold. On the one hand liberal interpretation is justified for the carriers, as the omission of this particular usually has no relevance to the damage and the carrier should not be penalized for an act which had no causal relationship with the damage. On the other hand, the decision issued

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31. In Corocraft,Ltd., and Another v Pan American Airways, Inc., /1969/ I All E.R. 82

32. A.L.Holman: Warsaw Convention - Limited Liability - AWB Requirements - JALC 1970 at 771-787; R.H. Mankiewicz: Conflicting Interpretations of the Warsaw Air Transport Treaty,American Journal of Comparative Law 1970 at 177-188,and The Judicial Diversification of Uniform Private Law Conventions, The International and Comparative Law Quarterly,1972, p.718,-757; N.Mateesco-Matte:Traite de droit aerien-aeronautique, Paris 1964 p. 396.

by the American Court disunified the system and accepted a precedent which is without any doubt against the Convention.

It is suggested that as far as the law is in force it should be observed. The Court should not interpret the Convention contra legem. Such interpretation is not accepted in any of the systems of law.

ad./d/ The name of the consignor and his address /"obligatory"/ allows the determination one of the party to the contract of carriage who has the right of action against the carrier.

In Les Tanneires de Lutèce v Air France et al,[33] Tribunal de Commerce de la Seine in his judgment of February 23,1965, stated i.a.:

> En vertu des dispositions de la Convention de Varsovie, seules les parties au contrat de transport, soit l'expéditeur et le destinataire, dont les noms figurent sur la lettre de transport aérien, ont qualité pour agir en responsabilité contre le transporteur aérien en case de retard ou avaries du fret transporté par air."

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33. Les Tanneires de Lutèce v Air France, Hirch, The World Marine Insurance, Air Liban, /1966/ RFDA at p.105

ad./e/ Inserting of the name and address of the first carrier /"obligatory"/ allows the determination of the second party to the contract of carriage.[34]

The consignor should bring an action only against the first carrier or to the carrier who performed the carriage during which the damage, loss or delay took place - if the carriage was performed by more than one carrier.[35]

ad./f/ These particulars[36] serve primarily to show:

- a person entitled to delivery of cargo;
- a person to whom the carrier should give notice after the cargo has arrived - Article 13 /2/;[37]

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34. It has to be pointed out that some difficulties may arise in case the first carrier mentioned on the air waybill is not the carrier who in fact performed the carriage. In these States which are parties to the Guadalajara Convention the provisions of the latter will apply. See on this subject e.g. M.Litvine: Droit aerien at p. 236 and seq. Examination of this problem falls outside the scope of this thesis.

35. H.Drion: Limitation... paragraph 266; The difficulty of defining who is a carrier under the Warsaw Convention faced the Court in Jonker and Schaad v Nordisk Transport Company -/1961/ U.S.Av.R. 230.

36. These are "obligatory" particulars in those cases when the air waybill is not negotiable.

37. K.J.Keith: Treaties and Legislation /Based on Corocraft Ltd.,v Pan American Airways Inc., The International and Comparative Law Quarterly, 1970 at p. 133.

- a person having a right of action against the respective carriers - Article 30 /3/.

In this respect Cour d'Appel de Paris 5^{e}Ch in his judgement of June 27,1969 in Sprinks et al. v Air France[38] stated i.a.:

> Le droit d'agir contre le transporteur aérien n'appartient, conformément aux disposition de la Convention de Varsovie, qu'à l'expéditeur ou au destinataire dont les noms sont mentionnés sur la lettre de transport aérien.

The drafters of the Convention anticipated the possibility of negotiation of the air waybill and this is the reason for the words "if the case so requires".[39]

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38. Sprinks et Cie, Sté Loevenbruck v Air France, Sté Egetra: IATA Air Carrier s Liability Reports 347; See also El Al Israel Airlines Ltd., v Oram Electrical Industries Ltd., Tashqir Express Ltd., IATA Air Carrier s Liability Reports 468.

39. CITEJA Compte rendue de la 3^{e} Session, May 1928 at 102. Here it should be mentioned that the possibility of the negotiation of the air waybill under the rules of the Warsaw Convention 1929 has been questioned. In the opinion of the author there is nothing serious in the Convention what would really prevent issuance of a negotiable air waybill. Nonetheless many sound arguments have been put forward against the negotiation of the air waybill. This problem is purely theorethical because in international practice the negotiable air waybill is not used. On the question of the negotiability of the air waybill see e.g.: C.Barry: The Carriage of Goods by Air, Business Law Review 1954 p.12-21; K.M.Beaumont: Negotiability of the Air Waybill, The Journal of Business Law 1957 p. 130-135; H.Drion: Rapport sur l'introduction d'une lettre de transport aerien négociable, Revista Brasileira de Direito Aeronautico 1952 p. 109-122; J.Gazdik: International Review, JALC 1955 p.221-231; F. Legrez: Négociabilité

ad./g/ This /"obligatory"/ particular could help in determining the value of the cargo, to eliminate those cargoes dangerous to carriage by air and to determine the remuneration for the carriage if the special commodity rates are applicable.

ad./h/ The French text of this subparagraph / being the only original/ states: "le nombre, le mode d'emballage, les marques particulières ou les numéros des colis" and as Drion argues, it is not clear whether it is sufficient to have only one of these particulars mentioned, or whether the only choise is between the last two mentioned particulars.[40] He prefers the latter solution, which seems to be correct. These particulars help in the identification of the consignment. They are also useful in the case of damage or partial loss of the cargo or package - if the package having any commercial value.

ad./i/ These /"obligatory"/ particulars allow determination whether the carriage of the cargo by air on a particular aircraft is possible /dimension, weight, etc./. They are also useful in determining the limit of liability.

Cont. de la lettre de transport aérien, RFDA 1949 p.353-366; M.Smirnov: Da li treba ici na prenosivost vozdusnog tovarnog lista? Medunarodni Transport 1957 No.10 p. 306.

40. H.Drion: Limitation... paragraph 268 at p.310.

The original French text of Article 8 /i/: "le poids, la quantité, le volume ou les dimensions de la marchandise" is not very clear. Should only one or three out of four particulars be inserted in the air waybill?[41]

In Corocraft,Ltd., and Another v Pan American World Airways, Inc.,[42] the Court stated i.a.:

> "sender should give the weight whenever it is appropriate /as it usually is/. He will not give the volume or dimensions, except when it is necessary or useful so to do..."

In conclusion the Court stated that insertion in the air waybill of only one particular is sufficient unless the others are necessary or useful.[43]

ad./j/ These particulars allow elimination of disputes or litigation in case where the cargo was accepted for carriage either badly packed or in apparently bad condition. It is presumed that the cargo was accepted for transportation in apparently good order and condition - Article 11 /2/.

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41. See e.g. M.Litvine: Précis élémentaire de droit aérien, Bruxelles 1953 Nos 371-372; H.Drion: Limitation..No.269.
42. /1969/ I All E.R. 82.
43. On this subject see: K.J.Keith: op.cit. p. 127 and seq. R.H.Mankiewicz: Conflicting interpretation of the Warsaw Air Transport Treaty, op.cit. p.177 and seq., The Judicial Diversification of Private Uniform Law Conventions op.cit. p.735 and seq., with cases quoted in footnote 57 and bibliography quoted in footnote 59 thereon.

ad./k/ The freight is usually agreed upon before the commencement of the carriage. In most cases, the carriers have approved tariffs and the amount of freight comes only from the application of the appropriate rate per kilogram or pound. Nonetheless it is possible to pay C.O.D. or agree upon a specific price for the transportation.

ad./l/ These particulars are useful for both the carrier who is to collect the payment and the consignee who is informed of the value of the cargo and expenses incurred. He can, therefore refuse to accept the cargo if the amount to be collected is not related to the value of the cargo plus cost of shipment etc. These particulars can not serve as the declaration of value provided in Article 22 /2/.

ad./m/ Inclusion of the declared value for cargo in the air waybill facilitates the proof that in the concluded contract for carriage the limitation of liability has been contractually raised.

The insertion in the air waybill of a declaration of value nor the payment of a supplementary sum is necessary to establish the fact that such an agreement has been concluded. It is submited that the proof of such a declaration may be conducted in other ways and does not pre-

clude the consignor from having the limit raised, but simply facilitates the proof. [44] However, one must bear in mind that whether such a declaration is inserted or not, the proof to the contrary may be easily dismissed. The air waybill is a written contract and e.g. parole evidence contrary to it may not be sufficient to vary its terms.[45]

ad./n/ It is not clear for what purpose the insertion of the number of parts of the air waybill could serve. In accordance with Article 6 /1/ the air waybill is issued in three original parts. The number of copies does not have any legal impact on the contract of carriage. Nonetheless, it probably may have limited usefulness in those situations where the copies are used for purposes other than carriage. In those cases it may facilitate the settlement of disputes.

ad./o/ In accordance with Article 16 /1/, the consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi or police before the cargo

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44. See e.g. Dover Farm Inc., and Berstein v. American Airlines Inc., /1970/11 Avi 17693 - where this problem was discussed with respect to national carriage but it may also be applicable to the Warsaw Convention 1929.

45. See e.g. Land and C.Mayers Company,Inc., v KLM /1952/

is delivered to the consignee. He can also attach various documents necessary to the consignee related to the contract of carriage or to the consignment. The enumeration of the documents that are handed to the carrier could facilitate settlement of the disputes concerning these obligations.[46]

ad./p/ These particulars facilitate the determination of a delay in the carriage.[47] They may also be required when the consignor asks that the cargo be sent by a specific route.

ad./q/ This is an "obligatory" statement.

The purpose of this statement is to advise a consignor who is not familiar with rules of the Warsaw Convention 1929, that in a case where the transport is

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Cont. 3 Avi 17929; Bruce Glen, Inc., v Emery Air Freight Corporation /1965/ 9 Avi 18000.

46. The Supreme Court of Poland in its judgement of Feb.18, 1970 - I CR 566/70 examined a situation where the carrier did not deliver to the consignee the documents which were attached to the air waybill. See comments of J. Rajski in Orzecznictwo Sądów Polskich i Komisji Arbitrażowych 1972 p.187 and seq.

47. All air waybills issued by the members of IATA have printed, in the conditions of contract on the reverse side of the air waybill, the condition:/5/ "It is agreed that no time is fixed for the completion of the carriage..." and/12/" No agent, servant or representative of the Carrier has authority to alter, modify or waive any provision of this contract". This shall be examined later.

international, the liability of the carrier may be limited. Because the term "international carriage" has a specific meaning, it is, at first sight, not always easy to define and therefore the drafting of such a"warning notice" require special attention.

The text of this notice should be universal so as to avoid the necessity of holding two stocks of air way-bills. For some carriage, even when the cargo crosses borders, the Warsaw Convention 1929 rules do not apply. In those cases the notice is superfluous and in some cases may be even against the interest of the carriers. On the other hand the text should clearly stated that the rules relating to liability, as established by the Convention, may apply for international carriage.

In Westminster Bank Limited v Imperial Airways Ltd.,[48] the Court stated that the statement:

> The General Conditions of Carriage of Goods are applicable to both internal and international carriage. These General Conditions are based upon the Convention of Warsaw of October 12,1929, in so far as concerns the special meaning of the said Convention.

does not satisfy the requirements of Article 8 /q/ of the Convention.

In The Flying Tiger Line Inc., v The United States[49] the Court stated:

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48. /1936/ 2 All E.R. 890; /1936/ U.S.Av.R. 39.
49. /1959/ 6 Avi 17291.

> The statement called for by item /q/ is given great importance by the provision of Article 9 that if the carrier accepts goods without an agreement from the shipper that liability is limited, he is not entitled to the provisions of the Convention limiting liability. We think a shipper is entitled, under the Convention, to have his attention called, in understandable language, to this important waiver of what would, at least in this country, be his rights in the absence of the waiver. He may refuse to ship, if the carrier insist upon the waiver, or the carrier may refuse to carry if the shipper refuses to waive.

The other formula was examined by the Courts in Seth v British Overseas Airways Corporation[50] and in Samuel Montagu and Co.,Ltd., v Swiss Air Transport Co. Ltd.,[51] Both Courts held that the statement:

> The carriage is subject to the rules relating to liability of the Warsaw Convention unless such carriage is not international as defined by the Convention.

constituted sufficient compliance with the Warsaw Convention rules. McNair, however, is of the opinion that the Convention requires a positive unqualified notice.[52]

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50. /1964/ 8 Avi 18183, The case concerns a statement in the "baggage check". However the requirements are the same for the "baggage check" and air waybill in respect to the notice.
51. /1966/ 1 All E.R.814.
52. A.McNair: The Law of the Air, London 1964 at p. 177.

Although, The Court, in the above mentioned The Flying Tiger case stated that:

> "...shipper is entitled...to have his attention called in understandable language..."

the opinion that the notice may be only in English prevails in doctrine and jurisprudence.[53]

Article 9

> If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Article 8 /a/ to /i/ inclusive and /q/, the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

With the interpretation of this Article some explaination are necessary.

The first problem to be shortly discussed concerns the air waybill " having been made out". As it was stated before, for the purposes of the Convention, the air waybill is made out when it contains all information prescribed by Article 8 /a/ to /i/ and /q/. The legal reason for "making out" the air waybill is to give effect to the provisions limiting the liability of the carrier.

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53. See H.Drion: Limitation....at paragraph 240; X and Y v Olympic Airways IATA Air Carrier s Liability Reports 475.

Thus in case only one obligatory particular is missing, the ratio legis of the existence of the air waybill is no longer valid and has the same effect as it would had not been issued.

The air waybill is made out even if it is not signed, though the evidentiary value of it is lower. It is clear that the Convention makes a difference between making out and signing this document.[54]

From the interpretation of the text of Article 9 it is clear that, in a case where an obligatory particular of the air waybill has been omitted, the liability of the carrier becomes almost absolute. He can not invoke those provisions which exclude his liability / Article 20, 21/ or those limiting his liability / Article 22/.[55]

No sanction vis a vis the carrier is connected with the irregularity of the particulars.[56]

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54. See H.Drion: Limitation...at p. 308; P.Chauveau: op.cit. No.233; M.Litvine: Precis...at 257,258; and United International Stables Ltd., v Pacific Western Air-Lines Ltd. / 1969/ 5 DLR /3d/ 67.

55. On this subject see: P.Chauveau: op.cit. at p. 132; J.Rajski: Odpowiedzialność cywilna przewoźnika lotniczego w prawie międzynarodowym i krajowym, Warszawa 1968 p.108; Shawcross and Beaumont: op.cit. at p. 441 and 464.

56. H.Drion: Limitation...at p. 311; Koffka - Bodenstein - Koffka: Luftverkergesetz und Warschauer Abkommen, Berlin 1937 at p. 293.

Finally, some remarks are necessary with respect to the severe sanction for non issuance or omittance of particulars in the air waybill. It was pointed out that the sanction which results in almost absolute liability of the carrier is not justfied and has no relation at all to the seriousness of the fault committed. The rationale of such a regulation is doubtful. Moreover, such a regulation is questioned especially if it is taken into consideration that the consignor makes out an air waybill and he should be "penalised" for any omission in this document. According to the Warsaw Convention 1929 it is the carrier who loses his benefits. The overlooking of one of the necessary particulars is very easy and has no relation to the liability of the carrier, unless the omission of this specific particular causes damage.[57]

Article 10

/1/ The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

/2/ The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompletenessof the said particulars and statements.

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57. The critics of this regulation: K.M.Beaumont: Some Anomalies Requiring Amendment in the Warsaw Convention of 1929, JALC 1947 p.30-36;J.Rajski: op.cit.p.108 and seq.

Concerning this Article, some discussion took place in the doctrine. The main issue was that the carrier, who is held deprived of his right to invoke the limits and other defences of the Convention, because of the incompleteness of the air waybill, has a right of recourse, for the resulting increase of his liability, against the consignor whose duty it was to make out an air waybill in accordance with Article 8.[58]

Such an interpretation leads to an absurd result. It was argued that Article 10 makes consignors responsible for those damages which the carrier suffered due to lack of or incorrectness of the individual statement while Article 9 envisages the total absence of one or more particulars. Also that the increased liability of the carrier is a different kind of "damage" than that regulated by Article 10. It has to be pointed out, however, that at least in theory, some doubts are possible.[59]

Article 11

/1/ The air consignment note is prima facie evidence of the receipt of the goods and of the conditions of carriage.

/2/ The statements in the air consignment note relating to the weight, dimensions and packing

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58. For broader comments on this subject see e.g.: R.Coquoz: op.cit. p. 144; D.Goedhuis: National... at p. 129; H.Drion: Limitation... at p. 312; M.Litvine: Precis ...No. 263
59. See A.J.Miller: International Carriage of Cargo by Air McGill thesis 1972 at p.29 and seq.

of the goods, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and conditions of the goods do not constitute evidence against the carrier except as so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

With respect to paragraph 1 some doubts can be submitted:

- can an air waybill be prima facie evidence when it is not signed?[60]
- what is the evidentiary value of incomplete air waybill?
- is the air waybill prima facie evidence of the conditions of transportation inserted in it only, or also of those to which it refers? / e.g. by inserting in the content reference to the conditions of transportation avaiable in the office of the carrier but not printed in air waybill/.

In Article 11 /2/ the evidentiary value of the particulars inserted in the air waybill have been established.

The statements relating to weight, dimensions, packing of the cargo and number of packages are prima facie

60. See for example remarks of W.Guldimann: op.cit. at p. 64.

evidence of the facts stated. Those statements are apparent for the carrier when he accepts the shipment. Other statements, relating to the quantity, volume and conditions of the cargo should be checked before they can produce evidence against the carrier.

The evidentiary value of other statements which are inserted in the air waybill is not regulated by the Convention. Therefore their evidentiary value should be assessed on the basis of national law. The opposite view was expressed by O.Riese at the Hague Conference.[61] According to him all statements have evidentiary value. This point of view probably comes from the concept of "private documents" known in some systems of law. According to this concept, all written documents establish the presumption that their statements come from a person signing them and are therefore prima facie evidence vis a vis those persons.

Article 12

/1/ Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them

61. ICAO DOC 7686 LC 140 Vol. I at p. 151.

to be delivered at the place of destination or in the course of journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such way as to prejudice the carrier or the consignors and he must repay any expenses occasioned by the exercise of this right.

/2/ If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

/3/ If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, 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 consignment note.

/4/ The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or he cannot be communicated with, the consignor resumes his right of disposition.

In Article 12, the right to dispose of the cargo has been granted only to the consignor. Any other person, even if in possession of the consignors part of air waybill is not entitled to exercise this right.

The consignor may be deprived of this right in case he cannot produce the part of the air waybill delivered to him - if the carrier so desires. The decision to fulfil or disregard the disposition of the consignor remains at the discretion of the carrier. According to Article 12 /3/, he may obey the orders of the consignor without requiring the production of the consignor's copy of the air waybill.

The right to dispose of the cargo is granted to the consignor upon a number of conditions:

a/ that he carry out all his obligations under the contract of carriage;

b/ that the exercise of his right will not prejudice the carrier or other consignors;

c/ that the consignor repay any expenses occasioned by the exercise of those rights.

If all the above mentioned conditions are fulfilled the consignor has the right to withdraw the cargo at the airport of departure or destination, to stop it in the course of the journey on any landing, to call for delivery to a person other than the consignee named in the air waybill or to request the return of the cargo to the airport of departure. His right to dispose of the cargo remains until the consignee rights begin in accordance with Article 13. The consignor resumes his rights if the

consignee declines to accept the air waybill or the cargo or the consignee cannot be communicated with.

In connection with the consignor's rights of disposing of the cargo and Article 13, some uncertainty arises as to when these rights cease. The contract of carriage of cargo by air by its nature takes place at the airport of departure and ends at the airport of destination. Any transportation from the airport of destination to the place of destination other than the airport must not be deemed as exercised within the contract of carriage of cargo by air.[62] Therefore, the place of destination /Article 13/, in most cases, is the airport of destination /Article 12 /1/ /. Consequently, there may exist a contradiction between the right - on one hand, of the consignor to withdraw the cargo from the airport of destination and - on the other hand, the right of the consignor to require the carrier to hand over to him the air waybill and to deliver the cargo to him on the arrival of the cargo at the place of destination. The complex relationship between the rights of the consignor of the carrier and the consignee in this respect makes it rather difficult to avoid confliction of their rights at one point or another.

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62. Except those situation where the carriage is performed e.g. by helicopter to the place of destination which is not an airport.

Article 13

/1/ Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

/2/ Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

/3/ If the carrier admits the loss of 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 is entitled to put into force against the carrier the rights which flow from the contract of carriage.

What is not clear with respect to Article 13 /1/, is that the consignee is entitled to request the carrier to hand over to him the air waybill upon compliance with the conditions of transportation set out in this document. How is the consignee to know the conditions of transportation set out in a document not in his possession? The problem is in the wording of this paragraph and, to this author, it is clear that the consignee may require the delivery of the cargo and the handing over the air waybill separately. Moreover, he has the right to request

the air waybill so as to decide if he wants to accept the cargo. According to Article 12 /4/, the wording is: ".... if the consignee declines t o a c c e p t a i r w a y b i l l o r t h e c a r g o ". He may therefore accept the air waybill but not the cargo.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Article 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

In international doctrine two kinds of legal concept of contract of carriage of cargo are known. The first, accepts the idea that the consignee, at a certain stage, becomes a party to the contract. The second treats it as a contract for the benefit of the third party /consignee/, who never becomes a party to the contract, but only receives "benefits" from the contract. It does not imply that he has no rights or obligation flowing from the contract, but that they are of a secondary nature. Article 13 /3/ and 14, probably to avoid various interpretations and unnecessary misunderstanding set the rights and relations which can be otherwise difficult to enforce. As an example, uncertainty could be invoked in a situation where the cargo did not arrive. The time when the con-

signée would become a party to the contract would be difficult to define. Article 13 /3/ resolves this problem.

Article 15

/1/ Articles 12,13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

/2/ The provisions of Articles 12,13 and 14 can only be varied by express provision in the air consignment note.

Article 15 /2/ provides that the provisions of Articles 12,13 and 14 can only be varied by express provision in the air waybill, which implies that the parties are left free to deviate from the said provisions. Although the consignee is not a party to the contract /in one system and in the other becomes party only after it has been already concluded/ it is apparently justfied that he, having rights and duties in the contract, is also entitled to make changes to the said provisions / e.g. to Article 13 /2/ /.

Article 16

/1/ The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet formalities of

customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agent.

/2/ The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

It is obviously right to place on the consignor the burden of furnishing information and of supplying the necessary documents to meet various formalities which in consequence permit the performance of contract. The consignor should bear the responsability of the unsufficiency of supplied documents. However in modern practice very often the carrier is better informed regarding what kind of documents are necessary for the proper performance of international carriage.

4. Liablility of the Carrier

At the time Warsaw Convention 1929 was drafted no uniform regime of liability of air carrier existed in international practice. On the other hand many national laws provided various liability rules. In some cases they were more favourable to the carriers and in others to the passengers, consignors and consignees. The drafters of the Convention tried to unify the laws so as not to impose too much of a burden on either side of the contract of carriage.

The air industry, being in its infancy, required some protection. On the other hand, users of air transportation were generally in a worse position than the carriers, so their position had to be improved too. As a balanced / in the understanding of the drafters of the Convention/ compromise of the interests of both sides, a set of rules was adopted.

In the interest of the carriers, a limitation of the liability of an air carrier to a fixed maximum amount expressed in the Convention was established. As justification for the limitation of liability the

following was given:

a/ it provides necessary protection to a financially weak industry;

b/ catastrophical risks should not be borne by the aviation alone;

c/ it was necessary that the carriers or operators be able to insure their risk / in case of unlimited liability an insurance companies would not be prepared to undertake insurance/;

d/ it leads to avoidance of litigation.

In the interest of users, a principle of presumption of liability of air carrier and the impossibility of contracting out the carrier's liability or establishing lower than prescribed by the Convention limit of liability have been established.

In some cases the carrier is granted the possibility of escaping the liability completely and in others he is not protected by the limit.

The compromised rules established by the Convention led to various interpretation by courts. Controversy in the doctrine was expressed by those who felt that the interests of air carriers and of users was unbalanced. The ambiguous language of some provisions did not encourage a unified interpretation.

For the purpose of this thesis only some problems with respect to carriage of cargo need to be examined.

Article 18

/1/ The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurence which caused the damage so sustained took place during the carriage by air.

/2/ The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

/3/ The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

With respect to this Article, three problems will be discussed. First to be discussed concerns the concept of cargo being "in charge of the carrier".

The points of view are split into two concepts:

a/ that cargo is in charge of the carrier from the moment of delivery to him, until the moment of putting them at the disposal of the consignee / or consignor in case of the cargo being returned/ - recently favoured by Oberlandesgericht of Frankfurt /RFDA 1976 p.281/

b/ that it is in the charge of the carrier when in his custody.[63]

The leading case favouring the first interpretation is the Caisse Parisienne de Réescompte v Compagnie Air France et Compagnie Air Liban.[64] Tribunal Civile de la Seine 1re Ch in its judgement of January 14,1955, held that the air carrier was responsible for the gold which was stolen from the Customs Authorities magazine and expressed the point of view that the period of liability of the carrier continues until the cargo is delivered to the consignee.

The second interpretation was favoured by the Cour d'Appel de Bruxelles in Favre v. Belgian State and Sabena[65] who stated that the carrier's responsability ceases at the moment the cargo is placed legally under someone else's control.[66]

The problem is very important to international practice, because the consignments are handled by various

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63. This problem was broadly discussed by H.Drion: Limitation...p.83 and seq.

64. /1955/ RFDA p.439.

65. /1950/ U.S.Av.R. 392.

66. See also U/67/1963,/1966/ Zeitschrift für Luftrecht und Weltraumrechtsfragen at 63; Justin Entreprises, Inc., v. Lufthansa Airlines /1967/ 10 Avi 17506.

authorities before they are given to the consignee. Moreover, as it was pointed out, it is very difficult to establish the exact moment when the cargo is handed over to the consignee.[67]

In practice various public authorities / e.g. customs or police/ are completely independent and unrelated to the air carriers, and in an overwhelming majority of cases the carriers cannot take sufficient measure to avoid damages.[68]

The second problem relates to the situation where the cargo, delivered to the airport and taken by the carrier under his custody, is thereafter taken by the carrier outside the airport and e.g. stored somewhere else.

According to Article 18 /2/, the Warsaw Convention 1929 liability rules would not apply if the damage occured outside the airport. In those cases local law would apply / it may favour the carrier/. However, the consignor giving the cargo in the airport should be assured that the Warsaw Convention 1929 applies. In the above mentioned situation consignor cannot rely on the

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67. Compare e.g. E.Georgiades in the comments to the KLM v. Zahra A.Kachour in RFDA 1970 at p. 228.

68. This fact has been pointed out in the above qouted Faivre case.

Warsaw Convention 1929 liability rules.[69]

The third problem is related to the fact that the period of transportation by air is not extended to any transportation by land, by sea or by river. If such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage will be presumed as a result of an event which took place during the transportation by air. Therefore, it is either to the carrier, the consignor or the consignee to prove that the event took place other than during the period of transportation by air. In fact it would be very difficult for the consignor or the consignee to prove that the damage took place other than during the carriage by air. On the other hand, the carrier is in a better position as he is able to "choose" the law. If the Warsaw Convention 1929 is more favourable to him, he may require the consignor or the consignee to prove that the damage occured during transshipment, or otherwise the presumption will stand. In a case where the other / for example, municipal/ laws are more favourable to the carrier, he can easily prove /if it is the case/ that the damage

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69. The situation where the cargo is taken into custody not in the airport is not discussed because it seems to be clear that the Warsaw Convention applies only to air transportation. See e.g. O.Riese, J.Lacour: Précis de droit aerien, Paris 1951 p. 267 and seq.

took place during transshipment or delivery outside the airport. Therefore, in theory, he is in a better position. It is, however, presumed that such cases /if any/ would be very rare.[70].

Article 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

Article 19 provides that the carrier shall be liable for damage occasioned by delay in the transportation by air i.a. of the cargo. It is clear that such a vague formula could cause problems of interpretation, especially if we take into consideration that no other provision require a time to be fixed for the completion of carriage. Although the Rapporteur of the Convention de Vos stated that the establishment of a more specific term was not possible and should be left up to the courts, it was clear that the delay should be reasonable.[71]

The damage may be recovered from the carrier if it occured by "delay in the transportation by air".

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70. See on this matter G.R.Sullivan: The Codification of Air Carrier Liability by International Convention, JALC 1936 p.25 and seq.

71. See II Conference Internationale de Droit Privé Aérien at p. 16.

Three interpretation of this formula have been presented:[72]

a/ that it refers to a delay occurring only whilst the cargo is airborne;[73]

However, it should be pointed out that adoption of such a narrow interpretation in overwhelming majority of cases would exclude the liability of the carrier.

b/ that it means the delay occured within the period described in Article 18 /2/;[74]

It was submitted that in case Article 19 did not give the definition of the delay, the term "in the transportation by air" should be taken from the definition of Article 18 /2/. It was also argued that damage occasioned by the delay is not different from other kind of damage, so in both cases the time within which the carrier is liable should be the same. This interpre-

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72. Shawcross and Beaumont: op.cit. p. 431.

73. In international doctrine this point of view was firstly presented by D. Goedhuis: La Convention de Varsovie du 12 Octobre 1929, La Haye 1933 p.166 and 171, and repeated in National Air Legislation and the Warsaw Convention at p. 207; see also J. van Houtte: La responsabilite civile dans les transports aerien interieurs et internationaux, Paris 1940 at p. 85.

74. R.Coquoz:op.cit. at p. 130-131; M.Lemoine: Traite... No. 843; M.Litvine: Precis...at p.164; N. Mateesco Matte: op.cit. p. 408; Schleicher, Reymann, Abraham: Das Recht der Luftfahrt, Köln 1960 p.348; Shawcross and Beaumont: op. cit. p.431; A.McNair:op.cit. p.183.

tation was favoured by the Cour d'Appel de Paris 5e Ch in its judgement of March 14,1960 in Transport Mondiaux v Air France et Sté Lufthansa[75] The Court stated i.a.:

> Considérant qu'il ressort des articles 18 et 19 de la convention de Varsovie, l'article 19 se référant implicitement et rationnellement à l'article 18 quant à la définition du transport aérien, que le transporteur est responsable du dommage survenu en cas de destruction, perte avarie ou retard concernant des marchandises, lorsque le dommage s'est produit pendant le transport aérien, lequel comprend la période pendant laquelle les marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrisage en dehors d'un aérodrome;

A similar interpretation was presented in Bart v British West Indian Airways, Ltd.,[76]

c/ that it refers to delay in the entire carriage, arising if the cargo did not arrive at its destination by the stipulated time.[77]

Although it is not within the scope of this thesis to deal with IATA Conditions of Contract, with regard to one provision of them, some comments are nece-

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75. /1969/ RFDA p. 317.
76. /1967/ I.Lloyds List Law Reports 239.
77. See H.Drion: Limitation...p.83 and seq.; O.Riese, O.Lacour: op.cit. at p. 320-321.

ssary. The carriers associated in IATA include into their conditions of contract the stipulation that:" No time is fixed for the completion of carriage." This stipulation seems to be contrary to Article 23 of the Warsaw Convention 1929. Therefore the delay should be established by appropriate courts, and left to be determined by national laws. It has, however, to be mentioned that on the validity of this clause many different decisions were issued and many different opinions submitted.[78]

Article 20

/1/ The carrier is not liable if he proves that he and his agents have taken all necessary measure to avoid the damage or that it was impossible for him or them to take such measures.

/2/ In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agent have taken all necessary measures to avoid the damage.

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78. See e.g.: N.V.Heerfur t.v.v.d., Vellen-En Pelterijenhandel v KLM, IATA Air Carrier s Liability Reports 127; Robert Houdin v Panair do Brasil, /1964/ U.S.Av.R. 307; Societe des Transports Clasquin v Societe Socotra et autres, /1950/ RGA 1131; Cie Iran Air v Cie Generale de Géophisique /1975/ RFDA p.61; Cie Generale de Géophisiques v Cie Iran Air, /1975/ RFDA p.64. In the last two cases the courts dealt with the liablity for delay and i.a. the validity of the above mentioned

Article 20, which provides the possibility of exclusion of the liability of the air carrier probably is the most elaborated one in the doctrine and jurisprudence. It is obvious that almost all has been said on this subject, though not all the controversy has been cleared up. The most often two subject are discussed:

a/ the term " all necessary measures ";

b/ the nature of burden of proof required from the carrier.

If we were to literally accept the meaning of the term "all necessary measures", it is clear that /except in the case of vis major/, the damage would not have occurred. Therefore, to explain the meaning and the nature of the liability, it is necessary to check the preparatory works and the minutes of the Conference. From the background of preparatory works for the Convention and I Conference of Private Air Law[79] and CITEJA, it is clear that the carrier should not be liable if he took "all reasonable measures". During the meeting however, this "reasonable" was replaced by "necessary" and it is not clear enough from the minutes whether or not it was

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Cont.condition. The comments on these cases by E.Georgiades, on page 67 therein, provide a clear summary of previous decisions and sum up the points of view expressed in the doctrine.

79. See I Conference... Paris 1926 , and the statement of Pittard at p. 55-56.

the intent of the drafters to drastically change the system of liability based on fault to almost absolute. Consequently, it was possible either to interpret this term strictly or more liberally. The consequences are differences of opinions and judgement.

The liberal interpretation of the term "necessary measures" is interpreted in fact as "reasonable measures" so the carrier should prove that he took normally taken measures to avoid the damage. In the case of an unknown cause of damage he has to prove that he acted in a reasonable manner.[80]

Those who accept a strict interpretation claim that the carrier has to prove that all necessary measures, which are directly related to the damage, have been taken. An unknown cause of damage is interpreted to the benefit of the claimant.[81]

Both lines of interpretation of Article 20 /1/ are represented in jurisprudence.[82]

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80. See the opinion of: P.Chauveau: op.cit. p.178; M.Lemoine Traite... No.819.

81. This interpretation is favorized by e.g. O.Riese, J.Lacour: op.cit. at p. 273 and seq.; D.Goedhuis: National.. at p. 235 and seq.; F. Hjalsted: The Air Carrier s Liability in Cases of Unknown Cause of Damage in International Air Law, JALC 1969 at p. 14; N.Mateesco Matte: op.cit. p.411-413; An even stricter interpretation is proposed by M. Pourcelet: Transport aérien international et responsabilité, Montreal 1964 p.56 and J.Rajski: op.cit. p.53 and seq.

82. See e.g. Palleroni v. S.A. di Navigazione Aeria, /1939/

A provisional conclusion is that interpretation of this Article can vary from the view that the liability imposed is based on fault to the view of almost absolute liability.[83]

The system of liability is slightly modified with respect to cargo by Article 20 /2/. The carrier is not liable if he proves that the damage was occasioned by an error in pilotage, in the handling of the aircraft or in navigation, and that in all other respects the carrier and his agent have taken all necessary measures to avoid the damage. This concept, adopted from the Maritime Law, was soon criticised. Mainly because it was not justified in modern air carriage.[84]

Cont. RGA p. 390; Grein v. Imperial Airways Ltd., /1936/ U.S.Av.R. 211; Chisholm v British European Airways, /1963/ Lloyds List Law Reports 626; Grey v American Airlines Inc., /1955/ U.S.Av.R. 626.

83. See e.g. G.Cas: A la recherche d'une notion de faut dans la Convention de Varsovie, RGA 1962 at p. 343. He stated that the Convention provides "présomption de responsabilité" instead of présomption de faute. Similar points of view represent M.Pourcelet: op.cit. p. 56 and J.Rajski: op.cit. p. 75 and seq.

84. It seems that there was no real support for this provision in the doctrine. The critics see: D.Goedhuis: La Convention de Varsovie... at p. 187; P.Chauveau: op.cit. p. 183; R.Rodiere: Droit des transports, Paris 1955 Vol. II at p. 530.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

In most systems of law, this provision is superfluous. However, during the Conference the delegate from Britain submitted that, under common law, contributory negligence is a complete defence and that the implementation of such a provision may be useful.[85] It was, however, left to national laws of lex fori to determine the necessary elements and consequences of contributory negligence. What is to be observed, this provision is not applicable to carriage of cargo by air.

Article 22

/1/ Intentionally omitted.

/2/ In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor in delivery.

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85. See II Conference... at p. 192.

/3/ Intentionally omitted.

/4/ The sum mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 miligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.

On the problems arising from the interpretation of this Article extensive discussion in doctrine and jurisprudence took place.[86] For the purpose of this thesis some of them will be briefly summed up:

a/ the sum of the liability could be calculated either on a basis of net or gross weight of the consignment / the latter solution is preferred as the net weight of the consignment may be difficult to establish/;[87]

b/ the limit of liability may be calculated on the basis of real weight or on weight which was used to calculate the freight due;[88]

The first solution seems to be the proper one because the limit of liability is based on weight and not on the freight due.[89]

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86. The rationale for limitation of liability of the carrier was broadly discussed by H. Drion: Limitation.. in paragraph 3 "Rationale of Limitation of Liabilities"

87. E.g. J.Rajski: op.cit. p.73

88. See N.Mateesco Matte: op.cit. footnote 136, who is in favour of the second choice. His point of view is based on the Amstelhoeden fabriek N.V. v Pan American Airways,Inc., IATA Air Carrier s Liability Reports 14.

89. See H.Drion: Limitation...No.149; J.Rajski: op.cit.p.73

c/ the limit in case of partial loss may be calculated on the base of:

- the weight of the entire consignment;
- the weight of the package or part of the consignment lost;
- the weight of the lost or damaged item.[90]

The second method seems to be the most reasonable, although it may be questioned in those cases where mixed goods of various values are shipped in one shipment.

d/ the necessity of paying the supplementary sum when the declaration of value is made by the consignor.

H.Drion[91] and P.Chauveau[92] expressed the view that such an ad valorem charge is necessary. The same view was expressed by the Court in L.and C. Mayers v KLM [93]

> In addition to the declaration of value for transportation there must be payment of the increased rate.

It seems that the literal interpretation of Article 22 /2/ and especially the words"if the case so requires" gives the carrier the right to accept such a declaration from the consignor without requiring

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90. For an extensive study on this subject see H.Drion: Limitation...p. 166 and seq.
91. H.Drion: Limitation... p.318.
92. P.Chauveau: op.cit. p.190.
93. supra note 45

any supplementary charge.[94]

e/ the meaning of the term "the actual interest to the consignor at delivery;"

This was submitted - that the determination of the amount of liability with respect to the above mentioned "actual interest at the delivery" should be left to national laws and court.[95]

f/ the sum mentioned as 250 francs refers to so called Poincaré francs based on gold. The implementation of the "gold value clause" /Article 22 /4// was intended to provide a stable monetary unit and an equal conversion for national currencies of sums due.

Article 23

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which laid down this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

It seems that no special attention need be given to this provision which is selfexplanatory. Some doubts could arise however, on the problem of damage caused by the

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94. See on this subject also Westminster Bank Ltd. v Imperial Airways Ltd. /1936/ 2 All E.R. 890; Kraus v KLM /1949/ U.S.Av.R.306.

95. See e.g. D.Goedhuis: National... p. 216.

loss or damage resulting from inherent defect, quality or vice of the cargo carried. Could the consignor and carrier conclude an agreement that the latter is not liable for such damage? The formal interpretation of the Convention says no.

Article 24

/1/ In the cases covered by Articles 18 and 19 any action, however founded, can only be brought subject to the conditions and limits set out in this Convention.

/2/ Intentionally omitted.

The purpose of Article 24 was to prevent a plaintiff from avoiding the defences and limits of the Convention by not founding his claims on the contract of carriage e.g. by suing in tort.[96]

Article 25

/1/ The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liablity, 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 seised of the case is considered to be equivalent to wilful misconduct.

/2/ Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

96. H.Drion: Limitation... p. 71.

Article 25 deprives the carrier of the right to avail himself of the provisions which exclude or limit his liability if the damage is caused by his wilful misconduct / in French "dol"/ or such default on his part as, in accordance with the law of the court is considered to be equivalent to wilful misconduct /dol/.

This provision is of substantial importance in the whole system constructed by the Warsaw Convention 1929 and as such, was broadly discussed. The preliminary draft[97] did not contain the exception to the limited liability. However, it was clear to the drafters, that some intentional illicit acts of the carrier which result in damage should be penalised by unlimited liability.[98] It was rather difficult to find the proper formula and to find a compromise on the degree of an illicit act, which would cause unlimited liability. Moreover, under some systems of law, the well established principles of liability did not provide for liability involving some kinds of acts, which under the other, would cause unlimited liability.

The adopted concept of wilful misconduct /dol/ was not free from ambiguity and it was clear that the whole game of interpretation would appear in the definition

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97. Elaborated by the Paris Conference 1925.

98. For an extensive discussion on this subject with the history of this Article see H.Drion: Limitation... p. 197 and seq.

of this concept. The examination of this provision would require a more complete study and would probably show that the definition could be interpreted either strictly subjective or purely objective and would depend mostly on the background of education and accepted concepts in national law of the interpretor. For those reasons, although it is understood that the problem is important, it will not be examined. The problem was broadly discussed in the doctrine and various cases could be found.[99]

It is not the intention of this thesis to discuss the rights of action and all those procedural possibilities which defend the carrier or settle the lex fori. Therefore, subsequent articles will not be examined although it is possible that in some cases the scope of application of the other Warsaw Convention regulation may depend upon the fullfilment of the requirements provided in further articles.

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99. See especially: H.Drion: Limitation...p.197 and seq.; P.Chauveau: op.cit. p. 191; J.Rajski: op.cit. p.84 and seq.; M.Lemoine: op.cit. No. 832; M.Litvine: Precis...p.198 and seq.; N.Mateesco Matte: op.cit. p. 425 and seq.; R.Rodiere: Droit...Vol. II p. 611 and seq.; and decisions: Eve Boutique Imports Inc. v Seaboard World Airlines Inc. /1968/ 10 Avi 17703; Rashap et al. v American Airlines Inc. /1955/ U.S. Av.R. 593; the interpretation of the term "dol" was also submitted in Broche Hennesy v. Compagnie Air France /1952/ RFDA p. 199 and seq. Compagnie Air France v Nordisk Transport /1953/ RFDA p. 165.

C H A P T E R I I

THE HAGUE PROTOCOL 1955

1. General

The first works on the revision of the Warsaw Convention 1929 began as soon as in 1935.[100] Until the Second World War the works were conducted under the auspices of CITEJA. After the War the Legal Committee of the International Civil Aviation Organization undertook the duties of CITEJA. As a result of many meetings and discussions[101] the Diplomatic Conference was held in the Hague and on 28 September 1955 the "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929" was signed.

The Protocol came into force on 1 August 1963.

As was pointed out in an earlier part of this thesis on the interpretation of several provisions of the Warsaw Convention 1929, many different points of

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100. J.Rajski: op.cit. p. 15; R.Coquoz: op.cit. p.64; ICAO DOC 7686 LC/140 Vol. I. p. XV. According to Shawcross and Beaumont: op.cit. p. 43 these works began in 1938. This point of view has no support neither in doctrine nor in documents.

101. Report on works see e.g. IATA Bulletin 1954 No.20 p. 54 and seq.; ICAO DOC 7686 LC/140 p. XV and seq.

view were expressed and various court decisions issued. At the time of drafting changes and during the Diplomatic Conference some of them were taken into consideration while other were passed by without even mentioning. Some problems were broadly discussed, but no decisions were taken. What is odd in the whole course of deliberation is the lack of endeavours to improve the text, even in those parts which were broadly criticised. Real progress was achieved only on those points which were not acceptable to modern practice and aviation. Various points of view expressed in the doctrine were passed by and sometimes there occurs the impression that the delegates attending the meetings were not familiar with all the criticisms.[102]

For various reasons, not all signatory States to the Warsaw Convention 1929 ratified the Hague Protocol. Amongst others, the United States of America did not sign the Protocol until June 28, 1956, and up to this date have not ratified it.[103]

The Final Clauses of the Hague Protocol did not

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102. The minutes and working documents published in ICAO DOC 7686 LC/140 Vol. I and II.

103. On this subject see A.Lowenfeld, A.Mendelsohn: The United States and the Warsaw Convention, Harvard Law Review 1967, p. 511 and seq.; L.Kreindler: The Denuntiation of the Warsaw Convention, JALC 1965 p. 291 and seq.; R.H.Mankiewicz: Pourquoi les Etas - Unis d'Amérique n'ont pas ratifié le Protocol de la Haye, RGA 1967 p. 349 and seq.

resolved properly the problems of conflict resulting from the existence of the Warsaw Convention 1929 and the Hague Protocol rules. The uniformity of international air law could have been saved if all the States who had been party to the Warsaw Convention 1929 had also become party to the Hague Protocol.

As a practical result of the existence of the Warsaw Convention 1929 rules and the rules of the Warsaw Convention as amended by the Hague Protocol, some disadvantages of the old Warsaw rules still remains. For those States that do not ratify the Hague Protocol, the Warsaw Convention 1929 still remains in force. As it was pointed out, for uniform practice the form of air waybill should be the same for all carriers. Therefore a uniform document should fulfill the requirements of the Hague Protocol and for the carriages governed by the unchanged Warsaw Convention 1929 the air waybill should fullfil their requirements. In practice however, keeping two stocks of air waybills and in every case determining which set of rules are applicable is not possible, so only one document, fullfiling both Warsaw 1929 and the Hague requirements is used. No simplification of this document has been achieved in practice.

The Hague Protocol amended i.a. provisions of Article 1 and 2, concerning the scope and definitions of the Convention.

In accordance with Article 34 of the Warsaw Convention 1929, the provisions of the whole Convention do not apply if the carriage by air is performed by way of experimental trial by air navigation entreprises when establishing new regular lines or performed in extraordinary circumstances outside the normal scope of an air carrier's business. This provision has been changed so as to read:

> The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business. /Article XVI /.

The term "extraordinary circumstances" was not defined and left for application and interpretation of the courts. Therefore the application of the Convention was extended.

2. Cargo Documentation

With respect to documentation relating to carriage of cargo by air, the following amendments to the Warsaw Convention 1929 were adopted: x

Article V

In Article 6 of the Convention-
paragraph 3 shall be deleted and replaced by the following:-

"3. The carrier shall sign prior to the loading of the cargo on board the aircraft."

Article V of the Hague Protocol changed the rule that the carriers should sign the air waybill upon acceptance of the cargo. This change, in the opinion of the Conference, was necessary to enable the making out of the air waybill at a place and time other than when the cargo is accepted.[104] Under the Warsaw Convention 1929, if the air waybill was not made out at the time of acceptance the cargo, the carrier could lose the right to invoke rules limiting his liability.

From the Minutes of the Conference it seems to be clear that, in the opinion of delegates, the signature on the air waybill was condition sine qua non of the making out of the air waybill. Also the moment of signing

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104. See ICAO DOC 7686 LC/140 Vol. I p. 137 and seq.

x - Text of Articles taken from ICAO DOC 7632.

the air waybill was taken as the moment of conclusion of the contract of carriage.

The remarks which are presented in this thesis during the examination of Article 5 /2/ and 9 of the Warsaw Convention 1929 were not taken into consideration at the Hague Conference.

Article VI

Article 8 of the Convention shall be deleted and replaced by the following:-

" The air waybill shall contain:
a/ an indication of the places of departure and destination;
b/ 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;
c/ a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss or damage to cargo."

Some observations should be mentioned on the history of these changes. The Draft Protocol in Article VI provided that "the air waybill shall contain particulars which show that the carriage is international in

the sense of Article 1[105] and a statement that the carriage is subject to the rules relating to liability established by the Convention.[106] To this Article, the US Delegation proposed changes, to insert in the new Article the particulars set out in Article 8 /a/ to /d/, /g/ to /j/,/m/ and /q/ of the Warsaw Convention 1929, with some minor modifications.[107] This proposition was finally rejected by vote 20 to 14.[108]

The particulars /a/ and /b/ of the new Article 8 show that the carriage is international or non-international in the sense of the Warsaw Convention. The notice to the consignor /c/ has changed particular/q/ of Article 8, which was discussed under the Warsaw Convention 1929.

The decision as to the form of this document, at least in theory, was left up to the parties of the contract of carriage. The problem mentioned under discussion of Article 9 of the Warsaw Convention 1929, as to when the air waybill may be considered as made out was not resolved. Moreover, some new problems arose. Article 8 does not contain the requirement to

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105. In the final text of the Hague Protocol this phrase was replaced by specific enumeration without recalling Article 1.
106. ICAO DOC 7686 LC/140 Vol. II p. 78.
107. ICAO DOC 7686 LC/140 Vol. II p. 245.
108. ICAO DOC 7686 LC/140 Vol. I p.145.

insert specific particulars, therefore the probative force of the air waybill may be questioned, as for example in connection with Article 11 /2/ which establishes prima facie evidence of the statements inserted in the air waybill. If an air waybill were not to contain at least minimum content to produce some kind of legal usefulness / e.g. evidentiary value/ it would be useless for the purpose of the carriage.

Because an air waybill is necessary to give effect to the provisions which limit the liability of the carrier, any document performs this role as long as the sole statement /c/ is inserted! At least in theory a piece of paper with a warning notice to the consignor may perform the role of the air waybill - even if no parties to the contract or contract itself can be identified from this "document".

Implementation of these changes to Article 8 should be followed by amending some other Articles. For example the text of Article 11 /2/ should read: "If inserted, the statement in the air waybill relating to the weight, dimensions... shall be prima facie evidence..."

Article VII

Article 9 of the Convention shall be deleted and replaced by the following:-

"If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph c/, the carrier shall not be entitled to avail himself of the provisions of Article 22 paragraph 2".

The sanction for not making out the air waybill and for lack of the "warning notice" has not been very broadly discussed during the Conference and its retention was rather obvious for the delegates.

The drafters of the Hague Protocol gave consideration to the wording of Article 9 of the Warsaw Convention 1929, which refers to the carrier's inability to invoke those provisions which exclude or limit his liability. The new provision refers only to the carrier's inability to invoke those provisions which limit his liability.

Article VIII

In Article 10 of the Convention- paragraph 2 shall be deleted and replaced by the following:-

"2. The consignor shall indemnify the carrier against all damage suffered by him, 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 by the consignor."

Paragraph 2 of Article 10 has been redrafted so as to avoid uncertainty on the problem of the scope of liability of the consignor. Under the existing rules he could be held liable to the third parties, to whom, under the national law, he might not be liable. Therefore the scope of his liability under the new text is narrower and clearer than under the old provision.

Article IX

To Article 15 of the Convention -
the following paragraph shall be added:-
"3. Nothing in this Convention prevents the issue of a negotiable air waybill."

The problem of the negotiability of the air waybill was discussed at length by the Conference.[109] The pro and cons were presented. The Conference finally accepted an addition to Article 15.

This addition did not resolve the problem of negotiability and does not provide any clarification to the objections submitted against the negotiable air waybill. In practice nothing has changed and the negotiable air waybill is not used.

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109. ICAO DOC 7686 LC/140 Vol. I p. 151 and seq.

3. Liability of the Carrier

Article X

Paragraph 2 of Article 20 of the Convention shall be deleted.

There was no discussion during the Conference on the deletion of paragraph 2 of Article 20 of the Warsaw Convention 1929.

The concept of negligent pilotage, adopted from Maritime Law does not fit with the carriage by air, never had substantial support and during the years was inoperative.

Article XI

Article 22 of the Convention shall be deleted and replaced by the following:-

Article 22

/1/ Intentionally omitted.

/2/ a/ In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or consignor's interest in delivery at destination.

b/ In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of any object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

/3/ Intentionally omitted.

/4/ Intentionally omitted.

/5/ Intentionally omitted.

Article XI with respect to cargo, added a new provision that in the case of loss, damage or delay of part of the cargo, or any object contained therein, the weight to be taken into consideration is only the total weight of the package or packages concerned. The difficulty in calculating the limit in case of partial loss or damage was resolved.[110]

A new element has been added to this concept. If the loss, damage or delay of a part of the cargo affects the value of all shipment, the weight to be taken into consideration is the total weight of the shipment coverd by one air waybill. This covers the cases of loss of the

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110. See ICAO DOC 7686 LC/140 Vol. I p.251 and seq.

components or parts which may affect the value of the rest of the shipment.

Article XII,

In Article 23 of the Convention, the existing provision shall be renumbered as paragraph 1 and another paragraph shall be added as follows:-

"2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo concerned."

The introduction of this provision was broadly discussed during the Conference and preparatory works.[111] The introduction of it however, was strongly criticised by H.Drion.[112] He stated i.a.:

> The new provision was introduced in view of the extra risks involved in carrying cargo such as perishables or livestock. Whenever transportation of certain goods, because of their quality, inherent defects or vice, requires special care from the carrier in order that the goods may safely arrive at their destination, Article 23 does not forbid the carrier from contracting away his liability for failing to provide the special care required. It could be said that the special nature of the goods

111. The discussion see ICAO DOC 7686 LC/140 Vol. I p.157 and seq.

112. H. Drion: Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo, JALC 1961/1962 p. 329 and seq.

is again emphasized, although the word "special" was intentionally removed from the text. Actually, there must be some deviation from what is normal as to goods carried by air. If not, the door is opened to any exemption clause for the carriage of any goods, since the quality or nature of the goods is always an essential elemement in determining the kind of damages which the goods may suffer. If a shipment has been handled roughly and arrives in pieces, it is because of the breakable nature of shipment. Had it been a shipment of gold, there would be no damage. The quality or inherent defect can only be said to have contributed to the damage, if normal cargo, not requiring special care, would not have suffered damage.

It seems that the above mentioned criticism is fully justified.

Article XIII

In Article 25 of the Convention- paragraph 1 and 2 shall be deleted and replaced by the following:-

"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

The Conference discussed the problem of unlimited liability in close relation to the amount of limit of liability of a carrier. Although it seems that the new provision unified the concept of unlimited liability of a carrier and more clearly established that the act of an agent or a servant of a carrier may result in unlimited liability, the scope of this provision is narrower than the respective provision of the Warsaw Convention 1929. It was submitted that an act done recklessly and with the knowledge that damage would probably result is almost impossible to prove.[113]

The improvement in the text was achieved by clearly stating that in all those cases the carrier shall not be able to invoke provisions which limit his liability, while all other defences remain in force.

4. Conclusions

From the minutes of the Hague Protocol, we may draw the conclusion that almost all problems which arose under the Warsaw Convention 1929 were discussed and some changes were at least proposed.

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113. See especially M.Pourcelet: op.cit. p. 115; W. Coullet: La responsabilite illimitee du transporteur aérien, Faute lourde et Faut inexcusable, RGA 1960 p. 315 and seq.

The most difficult problems concerned the liability of the carrier vis a vis the passengers and was the longest discussed. It was justified - the value of human life and limb is much higher than the value of property - if the two can ever be compared. Nonetheless, it seems that the central problem i.e. raising of the limit of liability was the only one properly elaborated.[114]

Not too much attention was paid to the other problems before the Conference and no clear concept of the changes were proposed, either by the Secretariat of ICAO or by the States. Therefore, on many points the discussion was difficult, because even the good changes to the text were not adopted due to lack of time to think them over when submitted during the Conference.

The changes to the Warsaw Convention 1929 with respect to the air waybill have significant value. In principle the air waybill was simplified and urgently needed changes were done. Nonetheless the drafters of the Hague Protocol did not go any further and did not correct mistakes of the Warsaw Convention 1929 text, though the objections were well known. This approach was probably adopted with the aim of enabling wide acceptance of the Protocol by the States. In the opinion of the Conference

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114. These are also the conclusions of J.Rajski: op.cit. p. 113.

and of the drafters[115] the amendments to the Warsaw Convention 1929 should not extend beyond those shown " to be of real practical or legal need". In consequence, the changes were, on various points, insufficient.
On the other hand, on some points where various different opinions were expressed, and the reaching of a compromise rather time consuming and burdensome, the Conference reached the decision to retain status quo.

115. ICAO DOC 7686 LC/140 Vol.I p. XV

C H A P T E R I I I

THE MONTREAL PROTOCOL NO. 4

1. General

The works on the changes of the Warsaw Convention 1929 and the Hague Protocol /referred to as the Warsaw-Hague/ were divided into two subjects. One, relating to the carriage of passengers and baggage / which resulted in drafting of the Guatemala Protocol in 1971/ and two, realting to the carriage of cargo.

The first substantial discussion on the changes of the provisions relating to carriage of cargo by air took place during the Session of a "Subcommittee on the revision of the Warsaw Convention 1929 as amended by the Hague Protocol 1955 /cargo, mail, authomatic insurance/", established by XIX Session of the ICAO Legal Committee.[116]

The Subcommittee held their meetings from 20 September to 4 October 1972 and its report was submitted to the XXI Session of the ICAO Legal Committee.[117]

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116. The Report see ICAO DOC 9131 LC/173-2 p.109 and seq. The previous works held in 1968,1969 have no direct impact on the eventually drafted amendments.

117. At the time of wrieting this thesis only Documents of this Session were published in ICAO DOC 9131 LC/173-2, and were issued as a document to International Conference on Air Law the draft Minutes of this Session. Therefore, although used in preparing this thesis no reference can be made to the Minutes.

The ICAO Legal Committee prepared the Draft Articles on Documentation and Liability with respect to cargo. They were approved and submitted as proposals to be discussed during the International Conference on Air Law.[118]

The International Conference on Air Law was held in Montreal on 3 - 25 September 1975 and drafted:

- Additional Protocol to the Warsaw Convention 1929 / Additional Protocol No. 1/;
- Additional Protocol to the Hague Protocol / Additional Protocol No.2/;
- Addtional Protocol to the Guatemala City Protocol / Additional Protocol No. 3/;
- Montreal Protocol No. 4 [119] to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955. It deals mainly with the carriage of cargo by air.

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118. See ICAO DOC 9122-LC/172 Vol. II p. 51-53.

119. The number in the title of this Protocol seems to be superfluous. It should be called just Montreal Protocol. The other 3 Additional Protocols drafted at the same time are titled Additional Protocols and are numerated, but regulate other subjects.

2. Cargo Documentation

Unlike other Protocols and Convention which amended or supplemented the Warsaw Convention 1929, the Montreal Protocol No. 4, in its Article III, replaced the whole of Section III of Chapter II of the Warsaw-Hague.

Article III

In Chapter II of the Convention - Section III /Articles 5 to 16/ shall be deleted and replaced by the following:-

" Section III. - Documentation relating to cargo,...

/ The objection to the title of Section III of the Warsaw Convention 1929 was presented during the examination of this Convention. The new title still does not reflect the fact that this Section refers not only to documentation but also to the rights and duties of the carrier, the consignor and the consignee /Article 12-15//.

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which 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.

3. The impossibility of using, at the points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage.

/ The modern technology used nowadays in the air industry in many cases allows the automatisation of certain processes. The broad utilization of computers and electronic devices makes possible the elimination of expensive and time consuming manual labor in the handling and processing of cargo. It is possible to exclude paper documentation from use in the carriage by air. In practice however, for every contract of carriage of cargo by air, governed by the Warsaw Convention 1929 or the Hague Protocol, there should be issued an air waybill. Non compliance with the respective provisions of the Warsaw Convention 1929 or Warsaw-Hague may result in unlimited liability of the air carrier. In this situation it is obvious that the advantages of automation are lowered because of the severe sanction for non - compliance with the Warsaw Convention provisions.

The Conference faced this problem and some changes in that respect were necessary. In the present state of air transportation however, not all air carriers and airports possess electronic devices, which would allow for the complete exclusion of all paper documents from air transportation. They are still required to record the contract of carriage in written form. The adopted solutions in respect to air cargo documentation reflect the compromise which is necessary to this transitient period - when both paper and electronic devices are used for the recording of contracts of carriage.

The principle that in the carriage of cargo by air an air waybill is used remains unchanged. But the legal value of this document has changed. It is no longer document which is necessary to give effect to other rules of the Warsaw Convention. The main purpose of using it is to preserve a record of the carriage.

Any other means which preserve a record of the carriage may, with the consent of the consignor, be substituted for the air waybill. The provision of Article 5 /2/ has two main advantages.
Firstly, it enables the consignor to choose the way the contract is to be recorded. In case he requires a paper

document, he may not agree to the use of "other means of preserving records" and in these cases the air waybill is to be delivered Article 5 /1/.

Secondly, it enables the carrier to use electronic devices for the transport of cargo, in those cases where the consignor does not object - or is even interested in using those electronic devices. It is forseen for example that the big forwarding companies may use the same system of electronic data recording and any paper document may not be necessary at all. The consignors who do not possess their own computer may ask the carrier to deliver a new document "receipt for the cargo" permitting the identification of the consignment and access to the information contained in the record preserved by such other means / i.e. computer/. In this respect the solution adopted seems to balance the interest of carriers and consignors and consignees.

For the protection of consignors and consignees the provisions of Article 5 /3/ have been adopted. The electronic data processing facilities may not be avaiable in certain airports of departures, transshipment and destination. The carrier nonetheless may not refuse to

accept the cargo for carriage.[120]/

Article 6

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

/ The concept of the air waybill and the function it serves has been changed. So some of the criticism of the air waybill, presented in this thesis, is no longer valid. It has to be pointed out that at the present time it is difficult to forsee how the organisation of carriage of cargo by air will look under the rules of the Montreal

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120. As a consequence of this provision, Article 33 has been changed to read:" Except as provided in paragraph 3 of Article 5, nothing in this Convention shall prevent the carrier from refusing to enter into any contract of carriage or making regulations which do not conflict with the provisions of this Convention." It is necessary to draw attention to the inconsistency of these two Articles. When in Article 5 /3/ the carrier is not entitled to "refuse to accept the cargo for carriage" in Article 33 he cannot refuse to

Protocol No. 4.

During the Conference some ideas to support the new concepts were expressed. But it is not known if they will be practical.

The principle that the consignor is to make out the air waybill has been retained. Criticism of this regulation may not be valid any longer. It was pointed out that the air waybill may serve in the future only as a document used in relations between consignor and consignee. If this was the case, the form of this document would no longer be important. However it has to be taken into consideration that for many years the practice of the carrier being the party forming and, in some cases, making out the air waybill will remain. The idea that the air waybill will be used solely in relations between consignor and consignee justified the deletion of the requirement that one of the original parts of the air waybill has to accompany the cargo.

Lack of certainty as to the future practice provides an opportunity to draw attention to the possible implication of losing or rerouting a cargo not accompanied by a written document. Especially in those cases

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Cont. "enter into any contract of carriage". In the opinion of the author "the entering into contract of carriage is different from." accepting the cargo".

where a substitution of carriers possessing and not possessing electronic devises could be necessary. The other problem may arise with the succesive carriage. The first carrier using the electronics may face difficulty with the transhipment the cargo to the carrier who is not in possession of those devices.

So far the air waybill performs various functions. Containing several particulars, it is useful and is often used as a guideline to perform the carriage. The informative function /e.g. concerning special care, storage, etc./ of the particulars inserted in the air waybill are significant. But to perform this function, this document has to accompany the cargo.[121] If it does not, it loses this function.

Under the rules of Montreal Protocol No. 4 it is not clear who will keep the part of the air waybill destined for the consignee.

The signature of the carrier and that of the consignor may be printed or stamped. The problem discussed with respect of Article 6 /4/ of the Warsaw Convention 1929 was resolved properly so as to give the same rights to the carrier and the consignee. However, the possibility of substitution of other means which would allow identification of the parties /e.g. perforation/, instead of the signature, should be considered in the future./

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121. See e.g. A.Schweickhardt: Lettre de transport aérien ou connaissement aérien? RFDA 1951 at p. 21.

Article 7

Where there is more than one package:

a/ the carrier of cargo has the right to require the consignor to make out separate air waybills;

b/ the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 5 are used.

/ The introduction of the new document relating to cargo required some changes in other provisions of the Warsaw-Hague. The reasons for requiring separate documents where there is more than one package, explained during examination of Article 7 of the Warsaw Convention 1929, are still valid./

Article 8

The air waybill and the receipt for the cargo shall contain:

a/ an indication of the places of departure and destination;

b/ 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

c/ an indication of the weight of the consignment.

/The requirements /a/ and /b/ are already known and remain unchanged. They indicate that the carriage is international in the meaning of Article 1 of the Convention It is difficult to understand why they are enumerated in the Protocol, if there is no "warning notice" to the consignor that the Warsaw Convention may apply.

As the air waybill is a document which preserves a record of the carriage, an indication of the place of departure and destination is the condition sine qua non of performance of the carriage. Moreover, many other particulars should be inserted in its content. The ratio legis of enumerating in the text of the Convention the indication /a/ and /b/ is, in this author's opinion, linked with the notice to the consignor provided in Article 8 /c/ of Warsaw-Hague and Article 8 /q/ of the Warsaw Convention 1929, which informs the consignor that the Warsaw Convention limits the liability of the carrier. The consignor may relatively easy determine on the basis of all these particulars whether or not the Warsaw Convention applies and take, for example extra insurance. If the notice to the consignor is omitted /as is the case/, the particulars mentioned in /a/ and /b/ are unnecessary, at least to be enumerated in the Convention.

The requirement to insert in the text of the document of carriage the notice provided in Article 8 /c/ Warsaw-Hague was deleted. It was observed that in the process of carriage of cargo by air mainly proffesionals are involved, so informing them of the law applicable is superfluous.

The indication of the weight of the consignment may serve as a basis to determine the amount of liability of the air carrier. It is not, however, clear why this requirement is enumerated in the text of the Protocol. /

Article 9

> Non-compliance with the provisions of Article 5 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, none the less be subject to the rules of this Convention including those relating to limitation of liability.

/ The widely criticised link between compliance with the rules relating to the cargo documentation and the limitation of liability of air carrier, is deleted. Of course the phrase "including those relating to limitation of liability" is superfluous. The drafters of the Montreal Protocol No. 4 / as well as those who drafted the Guatemala Protocol 1971, regarding passengers and baggage/, took into consideration that any doubts in the interpretation should be avoided. Such doubts could arise due to the old habits of the courts, which could interpret the text of the new Protocol under the influence of previous texts of the Warsaw Convention./

Article 10

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5.

2. The consignor shall indemnify the carrier against all damage suffered by him, 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 by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by other means referred to in paragraph 2 of Article 5.

/In the first paragraph, the principle was established that the consignor is responsible for the correctness of the particulars and statements relating to the cargo:

a/ inserted by him or on his behalf in the air waybill;

b/ furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo;

c/ for insertion in the record preserved by the other means referred to in Article 5.

Points /a/ and /b/ are obvious and all remarks done in respect to appropriate provisions of the Warsaw-Hague can be quoted per analogiam. Point/c/ causes some difficult. In practice the consignor may not see or even understand what has been put in the record of the computer or other electronic device. If by any chance the air carrier's clerk makes a mistake, the consignor will have no possibility of proving that he furnished correct information.

Serious doubts may cause interpretation of paragraph 3 of Article 10. It is clear that the carrier who delivers the receipt for cargo should indemnify the consignor against damages suffered by him in connection with the irregularity of this document. But for which particulars the carrier is liable? For those which come from him e.g. date, number of flight, freight due etc., or for those furnished properly by the consignor but incorrectly inserted in the receipt for cargo or computer? The addition of the phrase "Subject to the provisions of paragraph 1 and 2 of this Article" suggest the first solution. The ratio legis however, seems to be with the second possibility./

Article 11

1. The air waybill or the receipt for the cargo is prima facie evidence of the conclusion of the contract, of the acceptance of the cargo and of conditions of contract mentioned therein.

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those related to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do 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 cargo.

/ In Article 11 /1/, the evidentiary value of the air waybill and the receipt for cargo has been established. These documents are prima facie evidence: -

- of the conclusion of the contract;

The question however, arises: do these documents produce the evidence apart from the content in itself? The provisions of the Protocol regulate only non important parts of the content of this document - non important for establishing the evidence of the conclusion of the contract. The answer to this question must be negative. At least these particulars which are necessary to identify the parties and the consignment must be inserted / an indication of the places of departure and of destina-

tion are provided to be inserted by Article 8 /a//.

- of the acceptance of the cargo;

The change in wording is only the matter of the translation though the original French text remains unchanged.

- of the conditions of carriage mentioned therein.

The problem of evidentiary value of the air waybill with respect to the conditions of carriage discussed under Article 11 of the Warsaw Convention 1929 was resolved. Now it is clear that these documents do not produce the evidentiary value of the carriers conditions of carriage unless they are inserted in those documents.

With respect to Article 11 /2/, the evidentiary value of the statements relating to the quantity, volume and conditions of the cargo is provided only in respect to the air waybill. It does not seem to be justified.

The problem of the evidentiary value of the other means, which preserve a record was not resolved. As it is pointed out above, the electronic data recording /i.e. computers - in most cases/ can completely eliminate paper documentation from the process of transportation. In some cases no paper documentation may be used in the contract of carriage of cargo. Up to this date, however,

the evidentiary value of the computers record has not been established either in international or national laws. The necessity of the establishment in the Convention of the evidentiary value of the record flown from "the other means" / in practice computers/ was pointed out during the Conference.[122] Nonetheless, no decision in this respect was taken.

The problem discussed in respect to Article VI of the Hague Protocol in relation to the evidentiary value of the statements which may not appear in the air waybill are still valid - also in respect to the receipt for the cargo. /

Article 12

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must repay any expenses occasioned by the exercise of this right.

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122. See ICAO DOC 9131 LC/173 the statements of delegates from Canada and Poland.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, 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 or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

/The right to dispose of the cargo was not generally changed. The necessary changes relate to the fact that in the new situations the receipt for the cargo, the air waybill or the electronic data recording with no paper document may be used.

The situation is a little more complicated in respect to the right to dispose of the cargo when no document was issued. In this case, according to the Warsaw Convention 1929, only the consignor can dispose of

the cargo. Therefore, no protection is provided for the person who may be lawfully entitled to the cargo / as it is provided in case a paper document is used/.

The contradiction between the rights of consignor and consignee which were dealt with in respect to Warsaw Convention 1929 remain. The first phrase " except when the consignor exercised his right under Article 12", which substituted "Except in the circumstances set out in the preceding Article" /in the Warsaw Convention 1929/ clarified a little uncertainty. /

Article 13

1. Except when the consignor has exercised his right under Article 12, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

/ The serious problem, at least in theory, can cause the depriving the consignee the right to require

the carrier to deliver to him a copy of the air waybill or receipt for the cargo, or any other legible copy of the document in which the conditions of contract and some basic data concerning the concluded contract were inserted. Article 13 provides that the consignee has the right to require the carrier to deliver the cargo to him o n payment of the charges due and o n complying with the conditions of contract. It is obvious that before the consignee accepts the cargo, he may be interested to know what obligation the contract of carriage may impose upon him. Moreover, how he can accept the consignment when he is not informed what it contains. He is under no obligation to accept the consignment, unless he is informed of all facts mentioned above. Such information, up to now, are inserted in copy of the air waybill destined for him. It seems useful and in many cases necessary to give the consignee the opportunity to possess a kind of document which / at present, an air waybill/, may serve as customs, or tax declaration, record of conditions of contract, evidence of payment charges due etc./

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Article 12 and 13, each in his own name, whether he is acting in

his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage.

/ This Article is repeated without any changes from Article 14 Warsaw-Hague. /

Article 15

1. Articles 12,13 and 14 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo.

/ Without long discussion the Conference deleted the provision of the Hague Protocol providing the possibility of issuing the negotiable air waybill.

A view was expressed, that there is no commercial need for a negotiable air waybill at present time. Also some delegations underlined that paragraph 3 of Article 15 Warsaw-Hague is not sufficient for providing the negotiability of the air waybill./

Article 16

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo

can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servant or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents."

There were only editorial amendments concerning the possiblility of using other methods which preserve a record. The information and documents should be furnished but not necessarily attached to the air waybill.

3. Liability of the Carrier

The Guatemala City Protocol of 1971 implemented some important provisions concerning liability rules vis a vis passengers and baggage. The Montreal Conference had to take those changes into consideration in drafting new rules of liability of the carrier in the carriage of cargo to harmonise some of them with the Guatemala Protocol. It was necessary to provide clear and consistent system of the Warsaw Convention and to enable the States to accept both Protocols. Therefore, those rules which deal with the carriage of passengers and baggage will not be examined, although some of them have been inserted in the text of the Montreal Protocol No. 4.

Article IV

Article 18 of the Convention shall be deleted and replaced by the following:-

"Article 18

1. Intentionally omitted.

2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurence which caused the damage so sustained took place during the carriage by air.

3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the

cargo resulted solely from one or more of the following:

a/ inherent defect, quality or vice of that cargo;

b/ defective packing of that cargo performed by a person other than the carrier or his servant or agents;

c/ an act of war or an armed conflict;

d/ an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the 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.

5. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

The liability of carrier for damages sustained in the event of the destruction or loss of or damage to the cargo is based on the new concept. It was claimed during the Conference that the system of liability adopted, is a system of strict liabilty. It does not seem to be the case, and more properly this system should be described

as based on strict liability with enumerated defences. However, for the sake of clarity, this system will be called - strict liability system.[123]

The problems discussed with respect to Article 18 of the Warsaw Convention 1929, relating to the concept of the cargo being "in the charge of the carrier"; to the problem relating to the situation where the cargo, delivered to the airport is thereafter taken outside the airport, remains unchanged and no improvement in this respect was done.

With respect to Article 18 /5/, describing the period of the carriage by air which does not extend to other carriages some observation - which relates also to Article 24 /2/ should be done.

Article 24 /2/ states:

> "In the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention..."

Therefore the carriage which takes place in the performance of a contract of carriage by air, ouside an airport

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123. It should be borne in mind that the system adopted by the Montreal Protocol No. 4 differs from clear concept of strict liability. It provides exemptions which are not common to other acts which adopt strict system of liability.

/by land, sea or river/ will be governed by the conditions and limits of liability set out by the Montreal Protocol No. 4 in every case. It always is necessary to conclude the contract of carriage. Therefore it is not clear whether Article 24 /2/ does not extend the scope of applicability of the Convention for the carriages which are adjacent to the carriage of cargo by air. In every case it is submitted that Article 18 /5/ is without meaning. Even if it is proved that the damage took place outside the carriage by air but in the performance of a contract of carriage of cargo / it seems to be the case in all situation /, the limit of liability and other provisions will apply, because any action has to be brought subject to the conditions and limits of the liability of the Convention / Article 24 /2//.

With respect to Article 18 /3/ some observation regarding the defences avaiable to the carrier should be done.

The text of Article 18 /3//a/ -inherent defect, quality or vice of that cargo; - seems to be better formulated than the text appearing in the Hague Protocol /Article 23 /2//. It is clear that the inherent defect, quality or vice must be of that cargo to which damage occured[124] and may not be interpreted as the result of quality or

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124. As an example the carriage of various cargoes aboard the same aircraft can be invoke. If the onion or garlic would be carried together with other food it may happen that the smell may be absorbed by those article and disqualify them from sale.

vice of other cargoes.
The remarks of Drion presented in the Chapter II concerning this defence remain valid.

With respect to Article 18 /3/ /b/ - it is submitted that the Russian term " НЕПРАВИЛЬНОЙ" does not correspond with the other texts and may be interpreted as inadequate rather than defective.

This is one of the defence which may lead to litigation in the future. What does the "defective packing" mean? Does it comprise inadequate packing too, or not? How is it to be proved that at the time of delivery to the carrier, the cargo was not defectively packed. The term "defective packing" is rather broad and very difficult to define. It may happen that the "defective packing" may be used in normal conditions but when stored under extraordinary conditions, the defect may result in damage. Therefore, should the consignor expect such "extraordinary conditions" and to what extent?

With respect to Article 18 /3/ /c/ it should be mentioned that this defence was broadly discussed during the Conference. Many delegations pointed out that this defence clearly favours the carrier who performs the contract. It is extremely difficult for the consignor to follow the situation in the part of the world that he sends his cargo to. Moreover, the carrier in most cases is

not obliged to send the cargo by the specific route. In various cases it may harm the consignor who was not even informed that the cargo is to be sent by specific "dangerrous" route. It should be up to the carrier who operates and is clearly informed of the situation in the points of destination or transit to bear these risks or refuse to enter into contract.

It has to be pointed out, that the definitions of "acts of war" and "armed conflict" are difficult to define, very broad and as a result their interpretation may be incentive to litigation. Moreover, there is no doubt that there will be no uniformity in interpretation of those terms by the courts. Therefore, uniformity in this point should not be expected.

With respect to Article 18 /3/ /d/ - it seems that this defence is partly justified as a carrier may not intervene in acts of public authorities. Therefore, if he can prove that the damage, loss of or the destruction resulted from such act, the carrier should be exempt from the liability. However, a practical observation may be done on this subject. The carriers for the time being represent the interest of the consignors and consignees if any public authority carries any act with respect to the cargo. The carriers are aware, that the ambigious text of the Warsaw Convention may be interpreted against them, if the damage took place /also in those cases a public authority caused the damage/.

The carriers are therefore wholly interested in avoiding any damage and takes all possible care. Under the Montreal Protocol No. 4 regulation, they have no incentive to take care of the cargo if in hands of any public authority. It is submitted, that it often may happen that a carrier will not be interested in protecting the interest of the consignors and consignees in the above mentioned situation.

Article V

Article 20 of the Convention shall be deleted and replaced by the following:-

"Article 20

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or thet it was impossible for them to take such measures."

The liability of the carrier for the damage occasioned by delay in the carriage of cargo, is based on presumed fault of the carrier.

This seems to be the curiosity of the Montreal Protocol No. 4. There is no adequate explaination why such a controversial formula has been adopted by the Conference. The broad discussion which was conducted on the term "necessary measures" in international doctrine, seemed to justify the changing or redrafting of this provision.

It is not sufficient to state that this was necessary to harmonise provisions of the Montreal Protocol No.4 with the provisions of the Guatemala Protocol.

Article VI

Article 21 of the Convention shall be deleted and replaced by the following:-

"Article 21

1. Intentionally omitted.

2. In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent such negligence or wrongful act or omission caused or contributed to the damage."

The principle of contributory negligence on the part of the claimant was established as exemption of carrier's liability.[125]

In establishing one more provision which exempts the carrier from his liability, the Conference did not follow the concept of strict liability. Also the wording of this Article may be in the future an incentive to litigation. The terms "negligence", "other wrongful act

125. See on this subject R.H.Mankiewicz: Résumé des travaux du Comité juridique de l'OACI,RFDA 1975 p.93.

or omission"are so broad that there would be many possibilities to deprive the claimant from compensation. As there is no uniform interpretation of these terms in doctrine it may be an incentive to litigation.

Article VII

In Article 22 of the Convention -

a/ in paragraph 2a/ the words "and of cargo" shall be deleted.

b/ after paragraph 2a/ the following paragraph shall be inserted:-

"b/ In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the consignor's actual interest in delivery at destination."

c/ paragraph 2b/ shall be designated as paragraph 2c/.

d/ after paragraph 5 the following paragraph shall be inserted:-

"6. The sum mentioned in terms of Special Drawing Right in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national

currency, in terms of the Special Drawing Right, of a High Contracting Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions.The value of a national currency, in terms of the Special Drawing Right, of a High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by the High Contracting Party.

Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 2b/ of Article 22 may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned."

The Montreal Protocol No.4 implemented the new unit of expression of the limit of liability - Special Drawing Right. It was obvious that the gold clause in which the limit of liability has been expressed is no

longer useful due to international process of depreciation of the gold. Therefore, the Conference adopted the Special Drawing Right as a monetary unit for expression of the limit of liability of the carrier. For those States which are not members of the IMF the Protocol retained a "gold clause".

Nonetheless, the solution adopted, seems to be unsatisfactory for various reasons, e.g.:

a/ two different limits are provided, because the 17 SDR does not fully correspond to 250 gold units;

b/ SDR have no stable value but vary from day to day, so the compensation received by the claimant will depend on the daily out of court settlement;

c/ the declaration of value shall be complicated and not certain, because the conversion of SDR's will depend on the exchange rate of SDR's both in the country of departure and destination.

d/ the monetary situation of the world does not quarantee that the SDR will be in use in next years.

During the preparatory works, IATA proposed to freeze the exchange value of the Poincaré franc on the value it had at the date of the signature of the Guatemala Protocol, for the purpose of stabilising the value of gold monetary unit. This proposal was not put forward during the Conference.

The comments on the SDR as the unit for expression the limit of liability is premature. The other possible solutions were not discussed during the Conference and it seems that the adopted solution may not be the best one.

Article VIII

Article 24 of the Convention shall be deleted and replaced by the following:-

1. Intentionally omitted.

2. In the carriage of cargo, any damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceed whatever the circumstances which gave rise to the liability."

The Montreal Conference adopted the principle of the unbreakability of the limit of liability of the carrier; the most controversial and probably the most difficult to accept by various States.

It is submitted that at least in some systems of law, the provision of Article 24 /2/ is null and void and may not be invoked whatever the circumstance. The broadly accepted principle that the liability can not be limited in case of intentional unlawful act of the person

liable is quoted in various national laws as the fundamental principle of law. The bodies which would consider the possibility of adoption of the Montreal Protocol No.4 may not break this principle in case of carriage of cargo by air. Especially when it is difficult to find ratio legis for such solution. The strict liability system and the high limit of liability would be one of the points in favour of unbreakability of the limit whatever the cause. It is, however, submitted that the adopted system of liability is not so strict for the carrier. It provides many exemptions, the limit is not very high so the only rationale for the unbreakability of the limit is lost.

This principle, although consistent with the Guatemala Protocol, does not seem to be justified in respect to carriage of cargo.

4. Conclusions

The Montreal Protocol No.4 was adopted 20 years after the Hague Protocol amended and changed the Warsaw Convention 1929 provisions relating to the carriage of cargo by air. It is obvious that some provisions are not elaborated enough. As the new concepts were introduced to the provisions governing the cargo documentation

it is difficult to assess their validity. They break off in some respects with the existing practice and, although provide new solutions to the practice, no clear assesment of them is possible yet. It is the first time after the Warsaw Convention 1929, when the rules are ahead of the practice. If we take this into consideration many criticisms should be directed to the text. In various points it is ambigious and not clear. Some concepts are not clearly defined and only guessing to their application in international practice is possible. The text of many controversial provisions of Warsaw-Hague was not improved.

It seems that the relations between the carriers and consignors/consignees rights, duties and priviliges are completely unbalanced in favour to air carriers:

a/ the limit of liability of carriers was not raised;

b/ the limit is unbreakable, even in cases of unlawful intentional acts of the carrier he is protected by the limit of liability;

c/ carriers can escape all responsability for damage, loss or destruction of the cargo in many situations;

d/ so called "strict system of liability" was not implemented with respect to delay.

The above mentioned situation is hardly justified

in international practice.[126]

126. The other problems arising from the final clauses of the Protocol, as well as the fact that the Conference dealt with the problems which were not included in the Agenda of the Conference sent to the States /Additional Protocols, SDR clauses/ when the Conference was called - what is not in conformity with international practice, are not discussed. Some of them were criticised already by R.H.Mankiewicz: A galaxy of unified laws will replace the uniform regime created in 1929 in Warsaw or The death - blow to the uniform regime of liability in international carriage by air, Air Law No.3 1976, p. 157-160.

C H A P T E R I V

APPROACH TO THE CONSOLIDATION OF THE WARSAW CONVENTION

1. General

The International Conference on Air Law which adopted i.a. the Montreal Protocol No. 4, recognized the fact that the Warsaw Convention 1929 and subsequent amendments to it form a complicated system for international practice. Following its deliberations the Conference adopted the text of the Resolution incorporated in the Final Act of the Conference:

> "The International Conference on Air Law,
>
> Whereas
>
> 1. the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929, The Hague Protocol /1955/, the Guadalajara Convention /1961/, the Guatemala City Protocol /1971/ and the Montreal Protocols /1975/ form a complicated system;
> 2. the Legal Committee of the International Civil Aviation Organization has not excluded from the basic work of the present Conference the possibility of conducting further studies, with a view to combining the above-mentioned instruments into

a single Convention;

Resolves

1. that, in accordance with the established procedure, the necessary measures be taken for the Legal Committee to study and prepare a draft consolidated text which would make no change in substance to existing instruments pertaining to the Warsaw Convention or that Convention as amended or supplemented, except in so far as such change is necessary to maintain consistency within the consolidated text;

2. that the said draft be examined at a Diplomatic Conference to be convened by the Council of the International Civil Aviation Organization in accordance with the established procedure as soon as possible."

The Chairman of the Legal Committee established the Subcommittee to:"Study of the Consolidation of the Instruments of 'Warsaw System' into a Single Convention." which held their meeting from May 17 to June 1,1975 in Montreal.

2. Report of the ICAO Legal Subcommittee on Study of the Consolidation of the Instruments of 'Warsaw System' into a Single Convention.

The consolidated text of the Warsaw Convention prepared by the Legal Subcommittee contains provisions relating to the scope and definition of the Convention

in Chapter I. Chapter II deals with the carriage of passengers and baggage. Chapter III contains provisions relating to the carriage of cargo. Special provisions relating to succesive and combined carriage are set out in Chapter IV. Chapter V contains special provisions relating to carriage by air performed by a person other than the contracting carrier. Chapter VI sets out general provisions. The final clauses are established in Chapter VII.

With respect to the carriage of cargo only one substantial improvement in the text took place. Part I of Chapter III - "Carriage of Cargo" which contains all provisions of Article III of the Montreal Protocol No.4 /with editorial changes/ is entitled:"Documentation and other provisions relating to the carriage of cargo." Therefore it is no longer misleading and gives clear information that in this part not only provisions concerning the documentation relating to the carriage of cargo are included. This change was suggested in this thesis in respect to the previous texts of the Warsaw Convention.

The other changes or amendments are only of editorial nature as no substantial amendments were either

proposed or discussed. Nevertheless, some observations regarding the existing regulation in respect to carriage of cargo were recorded:

a/ concerning the notice of applicability of the Convention with its limit of liability /Article 8 /c/ of The Hague Protocol/. Two delegations expressed their preference to the inclusion of such notice to the contents of the air waybill and to the receipt for the cargo / Article 8 of the Montreal Protocol No.4, in the Consolidated Draft appears as Article 17/;

b/ with reference to Article 13 of the Montreal Protocol No. 4 / Article 22 in the Consolidated Draft/ it was observed that the consignee may not know the conditions of carriage and therefore some form of a document which would state the conditions of the particular carriage should be issued;

c/ two delegations suggested that for the time being the provisions relating to the expression of the limit of liability in terms of the Special Drawing Right should not be included, but further discussed.

Some other changes not of a great importance were proposed and included.

The draft of the consolidated text of the Warsaw Convention, adopted by the Subcommittee shall be further discussed during the Session of the ICAO Legal Committee. At this stage only one important principle of the whole consolidated text should be discussed.

The consolidated text includes both, provisions relating to the carriage of passengers and baggage and relating to the carriage of cargo. The Final Clauses provide to States the possibility to make reservations to the effect, that they will not be bound either by the provisions of the Chapter relating to the carriage of passengers and baggage or the Chapter relating to the carriage of cargo.

It is clear therefore, that the Subcommittee recognized the substantial difference between the character of carriage of cargo and passengers and baggage.

The following provision was included:

Article 58

1. Only the following reservations may be made to this Convention:

a/ any State may declare at the time of ratification of this Convention or accession thereto that it shall not be bound by Chapter II of this Convention;

b/ any State may declare at the time of ratification of this Convention or accession thereto that it shall not be bound by Chapter III of this Convention;...."

This solution is highly artificial and should be strongly criticised. There is no sound reason why the rules concerning carriage of cargo and carriage of passengers and baggage may not be separated, and two separate conventions drafted. This seems to be the clearest and most acceptable solution. Moreover, in the future the amendments to the separate conventions may be easy conducted and implemented.

The conception proposed by the Subcommittee, providing the reservations, in the future will cause more troubles and has more disadvantages than advantages. The only advantage of the consolidated text is, that the common provisions appear only once and are the same for both carriages. Nonetheless there is no difficulty in drafting two separate conventions with the provisions of general nature common for both conventions.

C H A P T E R V

CONCLUSIONS

At the time of drafting the Warsaw Convention 1929, problems relating to the carriage of cargo by air were of rather minor importance, as the volume of international carriage of cargo by air was virtually small at that time. Moreover, the concept of liability rules which should govern the carriage of cargo as well as the documents of carriage was not clear, for this new mode of transportation.

When the drafters devoted their time to the elaboration of the provisions of the Convention, which combined rules regulating the carriage of passengers and rules regulating carriage of cargo, they preferred to spend more time on the more important subject which, without doubt, concerned the problems of carriage of passengers. This approach was wholly justified in 1929. Since then, however, as it has been pointed out, the development of carriage of cargo by air opened up new prospects for the carriage of cargo. The problems became more divided between those relating to the carriage of passengers and those relating to the carriage of cargo.

In international doctrine and jurisprudence the approaches to those problems are different. The situation of the parties to the contract of the carriage of cargo is different from the situation of the parties in the contract of carriage of passengers and some problems do not appear in both of these branches of transportation by air. The approach, however, to the problems related to cargo is very often influenced by the decisions and approaches related to the carriage of passengers. Even in this thesis, the Court decisions relating to the carriage of passengers were invoked to justify the solutions implemented or defended in the carriage of cargo. The nature of the carriage of cargo and passengers is different enough to be dealt with separately and so the first conclusion of this thesis is:

1. An entirely new Convention, dealing only with the carriage of cargo by air, should be drafted.

International trade and cooperation justify and require the further unification of the international legal regime of carriage of cargo by air. This is, however, a complex and difficult task because the new rules should be better adapted to the social and economic needs of a modern aviation industry and the economic needs of the world.

Nonetheless, it seems appropriate in all those provisions which open the way to application of national laws, to review the approach and draft such rules in the Convention which would also arrest the process of "disunification" of the Convention by different, above mentioned interpretations and decisions.

This leads to the second conclusion:

2. The present state of the carriage of cargo by air requires a broadly accepted, unified legal regime which would exclude different interpretation of the same provisions.

Unification is closely linked with the simplification and modernisation of the relevant provisions to avoid unnecessary litigation. The balance between the interests of carriers on one side, and, the consignors and consignees on the other, should be corrected. Presently, in the Montreal Protocol No.4, the interests of the carriers are much more protected than those of the consignors and consignees. This may bar those countries which do not possess strong airlines from adhereing to the Montreal Protocol No.4. The existence in the Montreal Protocol No.4 of the provisions which are contrary to the well established, fundamental

principle of law of many States may also be an obstacle of broad acceptance of this act.

Therefore, the third conclusion is submitted:

3. The proposed solutions in the new Convention should be simple and acceptable to all interested States.

From the presented examination of the provisions of the Warsaw Convention 1929, The Hague Protocol 1955, Montreal Protocol No.4 and Consolidated Draft of the "Warsaw System", it is observable that the introduction of new concepts and solutions is very difficult and with time elapsing, the differences of approaches of various countries become bigger and bigger. The reaching of compromise is more and more difficult, and, as it is shown in practice, due to lack of time no compromise is reached during the Conferences. In many cases, broadly criticised provisions remain unchanged due to the lack of better solution.

ICAO, which during the last 29 years played an important role in the preparation of international acts and Conventions, is not able to take a close look at every subject in international air law. It is submitted that it may be useful to nominate the rappourter before the work on a particular subject starts. His role would be

to conduct all preparatory works, Subcommittees and Sessions, which are related to a special problem. It is observed that the points of view of the international doctrine are not known to many of the participants of the Conferences and in many cases are not taken into consideration or even discussed. Correct observations are not included, new concepts are not implemented during the Conferences, which base its works on drafts which are sometimes not elaborated enough.

In connection with the above, the following conclusion is presented:

4. To the International Conference on Air Law / and this may be probably applicable to all Conferences and not only to those relating to private air law/, ICAO should submit a brief report on the main problems to be discussed during the Conference, including:

   a/ the present state of law;

   b/ the points of view expressed by the international doctrine on the most important subjects;

   c/ the leading cases;

   d/ the main directions in which the rules governing the subject to be discussed are being developed;

   e/ possible solutions and drafts.

The co-existence of different international legal regimes of carriage of cargo by air do not help to promote the carriage of cargo by air and may pose a serious obstacle in its further development. The situation in air law where three different acts governing the same subject exist and compete amongst themselves is, in practice unacceptable. It is suggested that serious studies are required to find possible solutions to change this unsatisfactory situation.

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