THE MONTREAL CONVENTION OF 1999:

PROBLEMS AND PROSPECTS

by

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ABSTRACT

After international transportation by air became a reality, the need to fashion out an appropriate global regime to govern the new relationships created by this development led to the signing of the Warsaw Convention in 1929. As time went on, the need to adjust this original Convention to contemporary technological and legal realities necessitated the enactment of several other instruments that were not new Conventions in themselves, but were merely welded to the original 1929 Convention. With the absence of consolidation, the undesirable result was total confusion created by the concurrent operation of the multiple regimes of the Warsaw System. The overwhelming need to modernise and consolidate all instruments of the Warsaw system into a single uniform text culminated in the signing of the Montreal Convention on 28 May 1999.

This thesis attempts to x-ray the Montreal Convention in the light of its potentials to alleviate the numerous problems of the Warsaw system, including the prospects of its ratification. In the same vein, the inherent deficiencies and imperfections of this new instrument, which might militate against its ratification, have been overtly highlighted for reference. This treatise also analysed the need for developing and African nations to ratify the new convention notwithstanding that their interests were given minimal considerations. The conclusion is a call to all nations, particularly the US, to ratify this new convention without further procrastination, in order to enable it come into force without further delay, lest it become just another relic in the kitty of the very Warsaw System that it sought to replace.

RÉSUMÉ

Après que le transport international par voie aérienne soit devenu une réalité, le besoin de mettre sur pieds une règlementation appropriée pouvant régir ces nouvelles activités conduisit les parties intéressées à l'adoption et à la signature de la Convention de Varsovie en 1929. Avec l'évolution, la nécessité d'adapter cette convention au dévelopement technologique et aux réalités juridiques contemporaines amena les hautes parties contractantes à adopter d'autres instruments qui n'étaient pas de nouvelles conventions mais plutôt des adaptations de celle de 1929. Mais avec l'absence d'unification de ces différents instruments, il se produisit des effets indésirables qui débouchèrent sur une confusion du fait de la concurrence créée par l'application des multiples régimes du système Varsovien. Le besoin ultime de moderniser et de codifier tous les instruments du système Varsovien amena à la signature de la Convention de Montréal le 28 Mai 1999.

Cette thèse tente de passer la Convention de Montréal aux rayons-x à la lumière de sa capacité de surmonter les problèmes créés par le système Varsovien ainsi que l'étude de sa ratification éventuelle. Dans le même ordre d'idées, les déficiences et les imperfections inhérentes de cet instrument, lesquelles ont milité contre sa ratification, sont mises en évidence pour référence. Cette thèse analyse aussi le besoin pour les pays en voie de dévelopement et les pays Africains de ratifier cette convention malgré le fait que leurs intérêts n'ont bénéficié que d'un traitement minimun (secondaire). En conclusion, un appel sera lancé en direction de toutes les nations, particulirièrement des Etas-Unis d'Amérique, de ratifier cette nouvelle convention sans tergiversation afin de permettre son entrée en vigueur sans délai. Sinon, elle deviendrait encore un autre rélique dans l'ensemble du fameux système de Varsovie qu'elle cherche à remplacer.

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Introduction

The efforts of the delegates who assembled in Warsaw some 70 years ago to fashion out some basic rules that addressed uniformity in the system of carriage by air and airline liability are worthy of a great tribute. Their foresight and ability to arrive at such basic rules as regards a system of liability, uniform set of documentation and limitation of liability except in cases of wilful misconduct on the part of the carrier, were lofty achievements appropriate for their times. The resultant Convention together with its successive instruments has so far served the airline industry and consumers incredibly well.

> From the time Handley-Page H.P. 42 "Hannibals" carried 24 passengers in four hours from London to Paris, till today, when nearly 400 passengers spend 12 hours together on a flight from Auckland to Los Angeles. The durability of the Convention over the seven decades in which aircraft and air travel have developed beyond the wildest imagination of the early aviation pioneers is a glowing testimony to the expertise of its draftsmen.[1]

What makes this even more surprising is that the Convention was drawn at a time when air transport was still in its infancy and many of the major advances in technology, procedures and processes that have transformed air travel could not have been foreseen. "From pressurised cabins to electronic ticketing and automated baggage handling, the scope of change has stretched the adaptability of the early regime to the limit."[2] True to fact, the passage of time has demonstrated the inappropriateness and inability of the present regime to cope with the needs of modern aviation industry and consumers. "The needs of contemporary society faced with changing circumstances and changing values and in a world in which travel by air had in the context of globalisation reduced the world to a global village."[3]

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[1] A.G. Mercer, "The 1999 Montreal Convention – A New Convention for a New Millennium" (2000) 2 Aviation Quarterly at 86.
[2] R. Gardiner, "The Warsaw Convention at Three Score Years and Ten" (1999) 24 Air & Sp. L. at 114.
[3] K.O. Rattray, "The New Montreal Convention for the Unification of Certain Rules for International Carriage by Air – Modernisation of the Warsaw System: The Search for Consensus" (2000) 2 Aviation Quarterly at 59.

Several efforts have been made since 1929, when the original Warsaw Convention[4] was signed, to address successive changing circumstances. The International Civil Aviation Organisation (ICAO) has been actively involved in advancing this process of modernisation since 1947.[5] Amongst all others, ICAO happens to be the most appropriate forum for such changes because it is the umbrella global organisation responsible for international civil aviation and "global problems require global solutions."[6] In furtherance of this objective, the council of ICAO decided to establish a Special Group on the Modernisation and Consolidation of the Warsaw System (SGMW) on 26 November 1997.[7] After thoroughly considering the Report of the SGMW, the ICAO Council, against all pessimism, boldly decided to convene a Diplomatic Conference from 11-29 May 1999 for the adoption of a draft Convention for the Unification of Certain Rules for International Carriage by Air.[8] The main objective of the Conference was to be the modernisation and consolidation of the instruments of the Warsaw System.[9] Successive changes in world outlook of states within the private international aviation community brought with them unending demands for the adoption of new instruments into the System. A major cause for concern here was the absence of unanimity of ratification by all states, for the supplementary instruments, as there was for the original 1929 Convention. The obvious implication was chaos, because the instruments they ratified could only bind a States.

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[4] See *Warsaw Convention*, *infra* note 9.

[5] See V. Poonoosamy "The Montreal Convention 1999 – A Question of Balance" (2000) 2 Aviation Quarterly at 79.

[6] *Ibid.*

[7] See ICAO, C-DEC 152/8 (November 1997).

[8] See ICAO, C-DEC 154/7 (November1997).

[9] The following eight instruments make up the Warsaw System: *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 12 October 1929, ICAO Doc. 7838 [hereinafter *Warsaw Convention*]; *Protocol to Amend the Warsaw Convention*, 28 September 1955, ICAO Doc. 7632 [hereinafter *The Hague Protocol*]; *Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, 18 September 1961, ICAO Doc. 8181 [hereinafter *Guadalajara Convention*]; *Protocol to Amend the Warsaw Convention, as Amended by The Hague Protocol*, 8 March 1971, ICAO Doc. 8932 [hereinafter *Guatemala City Protocol*]; *Additional Protocol No. 1 to Amend the Warsaw Convention*, 25 September 1975, ICAO Doc. 9145 [hereinafter *Additional Protocol No. 1*]; *Additional Protocol No. 2 to Amend the Warsaw Convention, as Amended by The Hague Protocol*, signed at Montreal on 25 September 1975, ICAO Doc. 9146 [hereinafter *Additional Protocol No.2*]; *Additional Protocol No. 3 to Amend the Warsaw Convention, as Amended by The Hague Protocol and the Guatemala City Protocol*, 25 September 1975, ICAO Doc. 9147 [hereinafter *Additional Protocol No. 3*]; *Montreal Protocol No. 4 to Amend the Warsaw Convention, as Amended by The Hague Protocol*, 25 September 1975, ICAO Doc. 9148 [hereinafter *Montreal Protocol No. 4*].

The result was much disunity within a supposed unified system. As a result, there arose a strong need for the creation of a new distinct convention (rather than another amending instrument) which will consolidate the existing complex system. The Conference was therefore expected to be a landmark in the history of international law making and of the unification of private international air law, heralding the dawn of a new era where the regulatory framework is adjusted to the realities of modern aviation industry.[10]

That Diplomatic Conference on Air Law was convened at ICAO Headquarters in Montreal, pursuant to the procedure for the Adoption of International Conventions,[11] on 10 May 1999. At the end of three weeks of consultations, debates, discussions, drafting and redrafting, a Convention for the Unification of Certain Rules for International Carriage by Air[12] was adopted by consensus and signed by representatives of 52 nations on 28 May 1999.[13] According to ICAO's News Release, "[t]here were 525 participants from 121 ICAO States, one non-member and 11 International organisations."[14] The countries that signed, and those that chose to adhere, must formally ratify the Convention under their national procedures before the new Convention will be binding on their airlines. After 30 such ratification, the new instrument will come into effect in those countries that ratify or accede to it later.[15] The Convention will be known as the Montreal Convention.[16]

Insofar as it succeeded in adopting a new Convention, against all speculations to the contrary, albeit by consensus (without a vote), the Diplomatic Conference was a huge success. It would however be unrealistic "to interpret this consensus as unanimity of the

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[10] See Milde, *infra* note 17 at 158.
[11] See ICAO, *Procedure for the Adoption of International Conventions*, Res. A31-15, ICAO Doc. 9730 (1999), app. B.
[12] See *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, ICAO Doc. 9740 [hereinafter *Montreal Convention*].
[13] See G.N. Tompkins, "The Montreal Convention of 1999: This is the Answer" (1999) 3 Aviation Quarterly at 114.
[14] H. Caplan, "Novelty in the New Convention" (1999) 4 Aviation Quarterly at 193. The Final Act, however, shows 118 States.
[15] See *Montreal Convention*, *supra* note 12, art. 53(6).
[16] See *ibid.*

international community – deep divisions in basic concepts remain, in particular between the developed and developing countries, as they existed during the preparatory stages preceding the conference",[17] amongst many other problems, which this treatise will attempt a discourse. The Montreal Convention is essentially a composite of the Warsaw Convention, several Protocols, the Supplementary Convention and the IATA Inter-carrier Agreements.[18] Unlike the Protocols and Supplementary Convention, the Inter-carrier Agreements could not amend the Warsaw Convention because they were not acts of States. They were rather developed by airlines under the auspices of the International Air Transport Association (IATA) as permitted under Article 22 of the Warsaw Convention.[19]

Being new and single, the draft Convention is worthy and attractive, since by implication it can be safely presumed to have modernised the old hybrid order, having consolidated it into a single text. It has dealt decisively with the colossal issue of liability with respect to passengers, baggage and cargo and their corresponding quantum of compensations.[20] There is no need any longer to break the limits of liability at all cost by proving wilful misconduct or faulty documentation through dubious manipulations of the law.[21] The new Convention has provided for the fifth jurisdiction, which was ordinarily available under the general principles of private international law,[22] in addition to modernised documentation and a requirement of compulsory

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[17] M. Milde "The Warsaw System of Liability in International Carriage by Air: History, Merits and flaws...and the New 'non-Warsaw' Convention of 28 May 1999" (1999) XXIV Ann. Air & Sp. L. 155 at 157.

[18] See T.J. Whalen "The New Warsaw Convention: The Montreal Convention" (2000) 25 Air & Sp. L. at 12. A series of unilateral actions were undertaken to break the deadlock existing amongst States. At its Annual General Meeting in Kuala Lumpur on 30 October 1995, IATA adopted the Inter-carrier Agreement on Passenger Liability, followed by other instruments. For the text of the Inter-carrier Agreement and other instruments, see (1997) XX Ann. Air & Sp. L. 293-298. In a similar vein, the European Community adopted EU, *Council Regulation (EC) 2027/97*, O.J. Legislation (1997) L/285 [hereinafter *Council Regulation 2027/97*], which came into force on 18 October 1998, thereby creating a new a separate liability regime for its EC Carriers on both domestic and international flights. See generally J. Mauritz, "Current Legal Developments: The ICAO International Conference on Air Law, Montreal, May 1999" (1999) 24 Air & Sp. L. 153 - 157.

[19] Special contracts by which the carrier and passenger may agree to a higher limit of liability. See *Warsaw Convention*, *supra* note 9.

[20] See *Montreal Convention*, *supra* note 12, c. 3.

[21] See *ibid.*, art. 3.

[22] See L. Weber & A. Jakob "Draft Convention Seeks to Consolidate and Modernise the Elements of the Warsaw System" (1997) 52 ICAO J. 5 at 7.

insurance for carriers among others. The main format and structure of the Warsaw Convention was maintained in the new instrument, so that the aviation industry could continue to benefit from years of established judicial precedents in the interpretation of the Warsaw Convention and as a way of ensuring continuity.[23] In the words of Harold Caplan, "I was fully convinced[24] that it was premature to attempt a complete New Convention, but having seen the final edition, I salute the delegates. Innovation is at a merciful minimum; as much as possible of the current system has been preserved;[25] and 96.37 per cent is understandable."[26] The President of the ICAO Council, Dr. Assad Kotaite, evaluated the outcome of the Conference: "We have succeeded in modernising a seventy-year old system of international instruments of private international law into one legal instrument that will provide, for years to come, an adequate level of compensation for those involved in international air accidents."[27] Notwithstanding the foregoing, the true success of the conference, as per Dr. Michael Milde, will be measured by the speed and breath of its ratification and application.

Unfortunately the efforts of the new Convention in alleviating the ills of the Warsaw System were inconclusive. The new instrument retained certain undesirable provisions of the old order, completely omitted to address some pressing issues and is overtly ambiguous in some of its provisions. The multiplier effect of these anomalies could spell disaster for its universal acceptability and ratification, lending further credence to the view that there was no need for an entirely new Convention in the first place, but rather "[a] new protocol,[28] amending the Warsaw Convention in certain limited respects, is all that is required."[29] On the other hand, there is a potent assertion that the Conference only come to reap where it did not sow. That nothing was really novel

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[23] See *ibid.* at 5.
[24] H. Caplan "Modernisation of the Warsaw System: A Protocol or a New Convention?" [1996-1997] Aviation Quarterly 132-138 [hereinafter *Protocol or new Convention*].
[25] For example, the whole of 1961 Guadalajara Supplementary Convention, and the substance of 1975 Montreal Protocol No. 4 are included with minimal adjustments.
[26] Caplan, *supra* note 14.
[27] See ICAO, Press Release PIO 06/99 (29 May 1999).
[28] An entirely new convention was reckoned by some commentators to be too disruptive and ambitious, contrary to a protocol, which simply attempts to amend certain rules.
[29] G.N. Tompkins, "The Future for the Warsaw Convention Liability System" (1999) 4 Aviation Quarterly 38 at 42 [hereinafter *Future for Warsaw*].

about the new convention, because the greater portion of the aviation world had more or less already embraced all the principles embodied therein. The Conference therefore only served as a forum for States to take note of the contemporary acceptable trends in the industry and to express their political will by endorsing these trends in a new international legal instrument.[30] If the index of new innovations in the new Convention is taken to be those features that have no formal precursors, then apart from the introduction of compulsory insurance, the innovations of the new Convention are concerned more with detail than with substance.[31] It retained the concept of accident and a vestige of wilful misconduct, preferred the concept of bodily injury, omitted arbitration with respect to passenger disputes and is ambiguous in its provisions for advance payments and the complex fifth jurisdiction. Moreover, the financial implications, from liability to insurance may impede developing countries from venturing into the industry. As a matter of fact, several opportunities for modernisation have been missed – thereby providing material for future consideration.[32]

Suffice it to say that these shortcomings provide fertile ground for advocating changes to this new Convention, which is not even in force yet. Yielding to such early demands would mean plunging back into the hybrid trap of the old system or confronting the near impossible task of convening another Diplomatic Conference. This is not to say that the Montreal Convention will be permanent. A change will eventually come in due course. There is dire need to spread the gospel of compromise among the nations of the world because the ultimate test of the new Convention lies in its rapid ratification by states, the majority being in the developing world.

Against this background, this thesis attempts to evaluate the Montreal Convention of 1999, with a view to highlighting its prospects and problems, including its acceptability in developing nations. Compared to the Warsaw Convention, there has not been much academic work done on this subject, since the Convention itself is not yet in force. Hence, this treatise is partly an effort to provide some academic insight into the new

[30] See Milde, *supra* note 17 at 158.
[31] See Caplan, *supra* note 14 at 205.
[32] See *ibid.*

Convention. It will not pretend to be conclusive on all issues and will be updated as new developments arise after Convention enters into force.

Chapter One

An Overview of the Warsaw System

1.1 Short History

The evolution of the Warsaw system can be traced to 1929 and tied to the adoption in that year at Warsaw, of the Warsaw Convention,[33] the first-ever Convention creating a uniform body of rules governing the liability of airlines in international air transportation. The main purpose of this Convention was to provide for uniformity and certainty in the application of the law to the rights and obligations of users and providers of international air transport, which was at this time an infant industry.

With the passage of time and advancements in industry and technology, the rules of the original 1929 Convention were rendered obsolete. As such, there was need to update the Convention. Thus, in 1955 a Protocol was adopted at The Hague to amend the Warsaw Convention.[34] Time was also to take its toll on The Hague Protocol, which amended the Warsaw Convention, when in 1961, owing to industry advancement; a supplementary Convention was concluded at Guadalajara[35] that extended the Convention rules to substituted carriers and code-shared flights.

As standards of living around the world improved, the convention limits of liability became more and more unrealistic. As such, fresh demands for increments among others, led to the conclusion in Guatemala City of a Protocol in 1971,[36] creating an unbreakable limit of liability but providing for a Supplementary Compensation Plan funded by passenger contributions. Then in 1975, four Protocols were concluded at Montreal. Additional Protocols Nos. 1, 2, and 3[37] provided for liability limits in terms

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[33] See *Warsaw Convention, supra* note 9.
[34] See *Hague Protocol, supra* note 9.
[35] See *Guadalajara Convention, supra* note 9.
[36] See *Guatemala City Protocol, supra* note 9.
[37] See *Additional Protocol No. 1, supra* note 9; *Additional Protocol No. 2, supra* note 9; *Additional Protocol No. 3, supra* note 9.

of SDRs,[38] as opposed to gold, and incorporated the provisions on the Guatemala City Protocol, while Montreal Protocol No. 4[39] modernised the cargo provisions of the Warsaw Convention.

Besides the protocols and supplementary conventions, there are several Inter-carrier Agreements developed by airlines to raise the limits of liability or waive the defences provided for in the Warsaw Convention. These Agreements could not amend the Convention (which required action of states), but were legitimated by Article 22 of the Warsaw Convention, which permitted the carrier to agree to higher limits of liability through "special contracts" with the passenger.

The Montreal Agreement of 1966[40] raised the limit of liability to US $ 75,000 if the transportation involved a point in the United States and the carriers also waived their "all necessary measures defence" under Article 20(1). In the same vein the 1995-1996 IATA Inter-carrier Agreements[41] waived all limits of liability but retained the right to invoke the "all necessary measures defence" of Article 20 for that portion of a claim in excess of 100,000 SDRs. This meant that the carrier was strictly liable for provable damages up to 100,000 SDRs for bodily injury and wrongful death and was presumptively liable to an unlimited amount. Ancillary to the Inter-carrier Agreements are the unilateral initiatives of Italy in July 1988[42] and Japanese air carriers in November 1992.[43] In a similar vein, the European Community adopted a Council

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[38] Special Drawing Rights (SDRs) are a fixed sum based on the *basket* of the values of five currencies, as defined by the International Monetary Fund.

[39] See *Montreal Protocol No. 4*, *supra* note 9.

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

[41] An official copy of the IATA Inter-carrier Agreement may be obtained from IATA. For the text of the Agreement, see (1996) XXI:I Ann. Air & Sp. L. 293 [hereinafter *IIA*].

[42] Italy by law adopted the 100,000 SDRs limit of liability for a passenger's death and injury for all Italian carriers and all other carriers operating into, from or via Italy, see *infra* note 128.

[43] With the approval of their government, all Japanese air carriers adopted a new tariff provision whereby a two-tier system of liability became applicable. They would accept strict liability up to 100,000 SDRs without any defence. Beyond that amount, they would accept liability based on presumed fault with a reversed burden of proof.

Regulation that came into force on 18 October 1998, which created a new a separate liability regime for EC Carriers on both domestic and international flights.[44]

All the foregoing instruments together form what has become known as the Warsaw System. The base line of the System being the Warsaw Convention, on which the other successive Protocols, Supplementary Conventions and Agreements have attempted to update, modify supplement and amend. An effective evaluation of the Montreal Convention of 1999 is only possible after a thorough examination of all the provisions of the Warsaw System, which it seeks to modernise and consolidate.

1.2 The Warsaw Convention of 1929

The Warsaw Convention[45] is the patriarch of the Warsaw System. It was concluded over seventy years ago in Warsaw, Poland, at a time where transportation by air was a novelty. This new means of transportation brought with it fresh legal issues like differing limits of liabilities and legal basis for such limits in different countries, conflicts of law issues, among others. The Warsaw Convention therefore basically sought to provide for certainty and uniformity in the application of law, as per the obligations and rights of the users and providers of international air transport, thereby ensuring that the same law would be applicable no matter where a liability cause arose, or an action was brought. The Warsaw Convention is still the most ratified instrument of the Warsaw System and is currently in force in 140 states.[46] The basic provisions of the Warsaw Convention relevant to the purpose of our study are elucidated hereunder.

1.2.1 Applicability

Article 1(1) states that the Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It also applies to gratuitous carriage by aircraft performed by an air transport undertaking. Article 1(2) defines international

[44] See EU, *Council Regulation 2027/97*, *supra* note 18.
[45] See *Warsaw Convention*, *supra* note 9.
[46] See ICAO, C-WP/10853 (20 May 1998).

transportation,[47] while Article 1(3) incorporates carriage by several successive carriers if the parties have regarded it as a single operation. We can therefore safely conclude that the Convention applies only when the transportation is international as defined by Article 1(2), and to "persons", baggage or goods carried for reward. Gratuitous carriage is covered only when performed by an air transport company. Other gratuitous carriage is not included. The reason why an exception has been made for an air transport company is that free tickets are usually issued with the intention of obtaining something in return, *e.g.*, for propaganda purposes.[48] By virtue of Article 1(2), unforeseen events like emergency landings do not affect the applicability of the Convention. In *Grein* v. *Imperial Airways*, an "agreed stopping place" was strictly interpreted as a place where "according to the contract" the aircraft will stop in course of performing the contract of carriage.[49]

Why was the word "persons" preferred to "passengers" in the draft and who is a passenger by the way? Are the captain and crew of an air transport company covered by the Convention in this context? According to the Convention, a passenger is a person who is carried by virtue of a contract of carriage and the international character of the contract is determined by the intention of the parties as expressed in that contract.

1.2.1.1 Exceptions

Article 2 expressly excludes carriage performed by a state unless it falls within the conditions laid down in Article 1. It is however possible to make a reservation excluding this type of carriage, though only the US has made use of this option. The Convention does not apply to carriage performed under the terms of any international

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[47] Carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High 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.

[48] See I.H. Diederiks-Verschoor, *An Introduction to Air Law* (Boston: Kluwer and Taxation Publishers, 1991).

[49] *Grein* v. *Imperial Airways*, [1936] USAvR, 211, Court of Appeal (England), 13 July 1936; Avi, Vol.1. 622 [hereinafter *Imperial Airways*].

postal convention[50] and carriage performed by way of experimental trial by air navigation undertakings, with a view to the establishment of regular air services.[51] More so, carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business is excluded.[52]

1.2.1.2 Unanswered Questions

As explicit as the Convention tried to be, some questions were still left unanswered, as follows:

1. Who precisely is a passenger? There has been no express definition in the Convention as to who a passenger really is. To compound maters further, the word "persons" was substituted for "passengers" in the draft. This lacuna has led to diverse opinions as to who a passenger is. Some authorities have thus extended the meaning to cover the captains and crew of air transport companies whom they assert are not only bound by the terms of their contract of employment, but also by the terms of the contract of carriage.

2. What is an aircraft? The Convention did not give a definition as to what an aircraft is. We can only but resort to the definition offered in the Annexes to the Chicago Convention:[53] "[a]ny machine that can derive support in the atmosphere from the reactions of the air...." This definition encompassed gliders, balloons and even hovercrafts. ICAO later had to add the words "other than the reaction against the earth's surface" to this definition in order to expressly exclude carriage by hovercrafts.

3. What type of aircraft is the Convention applicable to? The Convention itself provides no clue and if we are left again to rely on the Annexes to the Chicago Convention then

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[50] See *Warsaw Convention*, *supra* note 9, art. 2(2).
[51] See *ibid.*, art. 34.
[52] See *Vanderburg* v. *French Sardine Company and Souby,* [1953] USAvR 423. (CaSC).
[53] See *Convention on International Civil Aviation*, 7 December 1944., ICAO Doc. 7300/6 [hereinafter *Chicago Convention*].

again gliders and balloons may safely still be deemed to come within the contemplation of the Convention.

1.2.2 Documents of Carriage

The content, legal significance and format of the Warsaw Convention's documents of carriage (Passengers ticket, baggage check, and air waybill) are essentially followed by airlines to this day.[54]

1.2.2.1 The Passenger Ticket

The Convention stipulates that the carrier must issue a ticket to the passenger.[55] In a situation where no ticket is issued, or the issued ticket is lost or contains inaccuracies, the Convention is still applicable, thus sustaining the subsisting contract of carriage. However, non-issuance of a ticket to a passenger will subject the air carrier to unlimited liability. The ticket issued has to contain the following details:

1. The place and date of issue.
2. The place of departure and of destination
3. The agreed stopping places, which could be altered at the instance of the carrier in case of necessity but which cannot deprive the carriage of its international character.
4. The name and address of the carrier or carriers
5. A statement that the carriage is subject to the rules relating to liability established by the Convention.

[54] See Milde, *supra* note 17 at 159.
[55] See *Warsaw Convention*, *supra* note 9, art. 3(1).

1.2.2.2 Baggage Check

The Convention requires the air carrier to issue a baggage check for the transportation of baggage, except those items that the passenger takes charge himself.[56] The baggage check must contain the same details earlier mentioned for the passenger's ticket and must be in duplicate. It must also contain a reference to the packages; the amount of value declared in a case where the passenger has made such a declaration and a statement to the effect that the package shall be delivered to the bearer of the check. Loss, absence or irregularity of the baggage check does not invalidate the contract and the applicability of the Convention. The carrier will however be exposed to unlimited liability if where there are inaccuracies in filling out the baggage check and where he accepts baggage without issuing a baggage check. In certain situations, the air carrier can refuse the transportation of baggage and can even request the passenger to permit the search of his person or baggage to determine the acceptability of such for carriage.[57] The passenger is expected to collect the baggage as soon as it is available for collection at places of destination or stopover.[58]

1.2.2.3 Air Waybill

Article 6 of the Warsaw Convention requires that the air waybill be made out in triplicate, each having the status of original. The first copy containing the phrase "for the carrier" must be signed by the consignor of the goods. The second copy with the phrase "for the consignee" must be signed by the carrier and the consignor and it must accompany the goods. The third copy is signed by the carrier and delivered to the consignor after the receipt of the goods. By virtue of Article 8(f),[59] the Warsaw Convention allows for the introduction of negotiable instrument, though not strictly speaking a negotiable air waybill. It is a duty incumbent on the consignor to ensure the

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[56] See *ibid.*, art. 4.
[57] See *Amtsgericht Frankfurt-Main*, [1961] ZLW 205, where a passenger was required to pay the entire cost involved in an emergency landing to remove an unacceptable item from the aircraft.
[58] See generally IATA, *General Conditions of Carriage*, *infra* note 76, art. IX(9)(a).

accuracy of statements and other information he inserts in the air waybill. Hence, he is liable for all damage suffered by the carrier or any other person by reason thereof,[60] except of course where the fault is on the part of the carrier.

Time was to take its toll on the formalities of these documents of carriage. It turned out that the formalities later turned into obstacles against the emergent use of electronic data processing. Moreover, the sanctioning of non-compliance with the formalities of the documents provided a forum for unjust litigation.

1.2.3 Regime of Liability

Liability entails a legal obligation to compensate for damage caused by action or inaction, intentional or negligent, or simply caused by an act without intention or negligence. This should be distinguished from the doctrine of criminal responsibility in Criminal Law. It may arise out of a contract, *lex contractu*, or may be imposed by law in form of a quasi contract or delict, even where there is no contract. The Warsaw Convention's system of liability is based on contract and represents the main concern of the drafters. The general rule in contract is duty of care. The breadth of liability stretches from death of and injury to passenger,[61] destruction, loss or damage to cargo,[62] to damage caused by delay in the carriage by air of passengers, baggage and cargo.[63] It is worthy to mention at this point that the liability rules of the Convention apply only in the realm of transportation. The rules are not for instance stretched to cover aircraft manufacturers or air traffic controllers. The duration of the carrier's liability is however not clearly stated in the Convention. Nevertheless, it is generally accepted that the carrier's liability begins when the passenger puts himself in the hands of an employee of the carrier and ends when the passenger enters the arrival hall at the point of destination. The same will apply to baggage and cargo

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[59] *Warsaw Convention*, *supra* note 9, allows for the name and address of the consignee to be left open. The right to take delivery of the goods, which derives from the agreement and is mentioned in the air waybill, may therefore be assigned to the bearer of the document.
[60] See *ibid.*, art. 10. See also *ibid.*, art. 16.
[61] See *ibid.*, art. 17.
[62] See *ibid.*, art. 18.

1.2.3.1 The Carrier

By virtue of the contract of carriage, the carrier is under an obligation to transport with out delay or damage. "The carrier shall be liable for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by the passenger, if the accident which caused the damage so sustained, took place on board the aircraft or in the course of any of the operations of embarking or disembarking".[64] Unfortunately, the term "accident" was not defined by the convention and has been subjected to various interpretations,[65] but there must be a linkage between the accident and the damage. Controversy equally rages over the exclusion of mental injury (standing alone) and not arising directly form bodily injury.[66] The legal basis of liability of the carrier is fault liability or negligence, with reversed burden of proof.[67] A point to note here is that the fault here is already presumed. Hence, to avoid liability, the carrier must prove that it or its agents have taken all necessary measures[68] to avoid the damage or that it was impossible to avoid it.[69] This arrangement reflected a quid pro quo in the sense that the authors of the Convention had chosen to place the burden of proof on the carrier's shoulders in return for the passenger losing the benefit of unlimited liability of the carrier. The idea of limiting liability on its part is at variance with the fundamental principle of the law of liability and natural justice known as *restitutio in integrum* of the *status quo ante*.[70]

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[63] See *ibid.*, art. 19.
[64] See *ibid.*, art. 17.
[65] In *DeMarines* v. *KLM Royal Ducth Airlines,* [1977] USDC. Avi, Vol. 14 at 18,212, "accident" was defined as an unexpected and sudden event that takes place without foresight. See also *Warshaw* v. *TWA* [1977] USDC. Avi, Vol. 14 at 18,297, where an event was held not to be an accident if it arose exclusively from the passenger's state of health.
[66] See *Husserl* v. *Swissair*, [1976] USDC, Avi. Vol. 13 at 17,603.
[67] See *Warsaw Convention*, *supra* note 9, art. 20. The traditional legal principle of *actori incumbit probatio,* which puts the onus of proof on the claimant, was reversed by this provision.
[68] The various acts that may be regarded as constituting *all necessary measures* are left to the discretion of the judge.
[69] See *supra* note 67.
[70] Restoring the injured fully to the position he was in before the damage occurred. In most circumstances restoration has often been quantified in monetary terms. "As far as possible as money can satisfy."

The carrier is not liable with respect to goods and baggage only, if he proves that the damage was caused by negligent pilotage or negligence in the handling of the aircraft, or navigation, and that in all other respects, he and his agents have taken all necessary measures to avoid the damage.[71] If he proves that the damage was caused by or contributed to by the negligence of the injured person, the carrier may be wholly or partly exonerated from liability.[72] A passenger, who ignored the "fasten seat belts" sign and wishing to say farewell to her to her family, did not notice that the stairs leading to the aircraft had been removed. She fell out of the aircraft and injured her leg. Here the carrier was not held liable.[73]

The fact that the aeroplane and air transportation was still a novelty in 1929 should be taken into consideration when passing judgement on all these arrangements. Moreover, consumer protection was not yet firmly established and the Convention's innovative reversal of the burden of proof was a positive step towards better protection of claimants who, in view of the technical complexities of aviation would find it difficult to marshal necessary evidence. The problem arises when the cause of the accident is unknown and the carrier is therefore not in a position to prove that he had taken all necessary measures. There is no consensus as to the liability or otherwise of the carrier in such situations.

1.2.3.2 Limits of Liability

For death, wounding or other bodily injury of passengers, the liability limit of the carrier fixed by the Convention, as per Article 22(1) is 125,000 francs. That of checked baggage and goods is 250 francs per kilogram, unless the consignor had made a special declaration of value at the time the consignment was handed over to the carrier and had paid a supplementary sum as required. In this 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

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[71] See *supra* note 67.
[72] See *Warsaw Convention*, *supra* note 9, art. 21.
[73] See *Chuter* v. *KLM Royal Ducth Airlines & Allied Aviation Services International Corporation,* [1955] USAvR 250.

actual value to the consignor on delivery.[74] As regards objects which the passenger takes charge himself, the liability of the carrier shall be limited to 5000 francs per passenger.[75] No limit separate specific limit was set for delay. Article 19 provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage and goods. Jurisprudence subsequently evolved, such that the respective passenger and cargo limitations would apply in cases of delay.[76]

The liability of the carrier will be unlimited under two circumstances:

1. If the damage is caused by wilful misconduct, or such default on his part as in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct.[77]

2. If the carrier fails to issue a passengers ticket[78] or baggage check, or if they do not contain the requirements of Article 4(4). Another instance is a situation where no air waybill has been made out, or it does not contain all the requirements of Article 8 (Article 9).

The convention defines the Franc currency as referring to the French franc consisting of 65 ½ milligrams of gold, at a standard of fineness of nine hundred thousandths.[79]

1.2.3.3 Claims

Article 29 of the Convention stipulates that claims for damages are to be lodged within two years counting from the date of the arrival of the aircraft at its destination, or from the date on which it ought to have arrived, or from the date on which the transportation

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[74] See *Warsaw Convention*, *supra* note 9, art. 22(2). See also *Data Card et al* v. *Air Express International et al.*, [1984] QBD (CC) 9AL 187.
[75] See *Warsaw Convention*, *ibid.*, art. 22(3).
[76] A set of conditions was adopted at the 1970 Honolulu Conference of IATA that is merely recommended practices. See "IATA General Conditions" [1971] ZLW 214-232.
[77] *Warsaw Convention*, *supra* note 9, art. 25.
[78] *Ibid.*, art. 3(2).
[79] See *ibid.*, art. 22(4).

stopped. The method of calculating the period of limitation was however left to the law of the court handling the claim. In the case of damage to luggage or goods, the person entitled to delivery must report to the carrier after discovery of the damage within three days in case of luggage and seven days in case of goods. In the case of delay, the complaint must be made within fourteen days.[80] The persons who were entitled to lodge claims for compensation were unfortunately not specified in the Convention. This was left to the determination of national laws.[81] It is worth mentioning here that the Convention does not create in itself a cause of action. In civil law countries this does not pose a problem since causes of action would evidently be found either in contract or in tort. In common law countries however, the existence or non-existence of a cause of action is paramount especially in cases of wrongful death. These difficulties have however been eliminated by legislation implementing the Warsaw Convention in some of those countries. However, a landmark decision, the US Court of Appeals did establish that the Warsaw Convention does create a cause of action for wrongful death and for damage to baggage rather than only establishing conditions for causes of action.[82]

1.2.3.4 Jurisdiction

The Convention minimised the complex possible conflicts of jurisdictions by determining four jurisdictions before which, at the option of the claimant, an action may be brought[83] as follows:

1. The court having jurisdiction at the place where the carrier is ordinarily resident (court of domicile)

2. The court having jurisdiction at the place where the carrier has his principal place of business.

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[80] See *ibid.*, art. 26(2).
[81] See *ibid.*, art. 24.
[82] See *Benjamins* v. *BEA et al,* [1978] USAvR 86.
[83] See *Warsaw Convention*, *supra* note 9, art. 28.

3. The court having jurisdiction at the place where the carrier maintains an establishment through which the contract has been made.

4. The court having jurisdiction at the place of destination.

From the foregoing, the possibility of a claimant influencing the legal procedure by his choice of a forum abounds. As a rule therefore, a choice of forum should be dictated as much as possible by practical considerations. Nonetheless, the forum so chosen must be located in the territory of a state party to the Convention.[84]

1.3 Other Instruments of the Warsaw System

As earlier enumerated, seven other instruments combine with the Warsaw Convention to make up the Warsaw System.[85] This is without prejudice to the contribution of unilateral non-state initiatives, legitimised by Article 22 of the Warsaw Convention to the system.[86] We will examine each of them briefly, paying particular attention to the additions or subtractions that they brought to bear on the Warsaw Convention of 1929 and the system as a whole.

1.3.1 The Hague Protocol

The rapid growth of transportation by air between 1929 and 1955 brought to light some practical and legal inadequacies of the Warsaw Convention, necessitating some adjustments. A Diplomatic Conference was thus convened at The Hague in 1955 to adopt a protocol to amend the Convention. The Hague Protocol of 28 September 1955 succeeded in introducing the following amendments:

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[84] See *ibid.*
[85] See *supra* note 9.
[86] See *supra* notes 40-44.

1. States were allowed to make reservations as regards applicability of the Convention only in respect of carriage by military aircraft.[87] The Warsaw Convention allowed this reservation for all categories of state aircraft.

2. Where a ticket does not include the notice that the carriage is subject to the rules relating to liability as established by the Warsaw Convention the carrier will nonetheless still be exposed to unlimited liability.[88]

3. It allowed for baggage checks to be combined with or incorporated in the passenger tickets. However, a reference to the possibility of liability limitations being applicable still remained mandatory. Carriers remained obliged to mention the places of departure, destination and agreed stopping places.[89]

4. The most outstanding amendment, however, was doubling the limit of liability with respect to the death, wounding or other physical injury of the passenger from 125,000 francs to 250,000 francs.[90] The Hague Protocol further provided that the conversion from gold into national currencies shall in case of judicial proceedings be made according to the gold value of such currencies at the date of the judgement.[91]

5. The Hague Protocol deleted the provision of the 1929 Convention releasing the carrier from liability in the transportation of goods and baggage, if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or navigation.[92] A second paragraph was added to Article 23 thus "paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from inherent defects, quality or vice of the cargo carried."[93]

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[87] *Hague Protocol*, *supra* note 9, art. XXVI.
[88] *Ibid.*, art. III.
[89] *Ibid.*, art. IV.
[90] *Ibid.*, art. XI.
[91] *Ibid.*
[92] *Ibid.*, art. X.
[93] *Ibid.*, art. XII.

6. A new paragraph (Paragraph 3) was added to Article 15, stating that "nothing in this Convention prevents the issuing of a negotiable air waybill."[94]

7. The period for bringing claims in accordance with Article 26[95] was extended to fourteen days in the case of goods and seven days in the case of luggage. That for damages resulting from delay was extended to twenty-one days.

8. The Hague Protocol took a giant stride in modifying the provisions of Article 25 of the Warsaw Convention. The obvious conflicting interpretations of the English and authentic French text of wilful misconduct and dol were resolved. It replaced Article 25 with a new Article stating that the limits laid down in the Warsaw Convention will 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...."[96] The new provision thus encompassed the ingredients of dol, wilful misconduct, and even omission, as grounds for unlimited liability. Another novel provision was the explicit entrenchment in The Hague Protocol was that the servants or agents of the carrier can also invoke the liability limits of Article 22 of the Warsaw Convention if they acted within the scope of their employment.[97]

9. Article 8 of the Warsaw Convention was replaced by a completely new provision, omitting the requirements that perpetuate the translation impasse between the French and English text as per what an air waybill should contain.[98]

The Hague Protocol is in force for 121 states.[99] It is worth mentioning that *ab initio* the US did not ratify this protocol. However, by its ratification of Montreal Protocol No. 4 in 1999, [100] the US has tacitly ratified The Hague Protocol by implication.

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[94] *Ibid.*, art. IX.
[95] *Ibid.*, art. XV; *contra* note 80.
[96] *Ibid.*, art. XIII. See also B. Cheng, "Wilful Misconduct: From Warsaw to The Hague and from Brussels to Paris" (1977) II Ann. Air & Sp. L. 55-102.
[97] *Hague Protocol*, *supra* note 9, art. XIV.
[98] *Ibid.*, art. VI.

1.3.2 The Guadalajara Convention

The drafters of the Warsaw Convention did not take cognisance of the issue of charter flights, since it played an insignificant part in international air traffic at that time. No definition of the term "carrier" was equally adopted because it was considered undesirable to hamper the development of aviation by so doing. With the increase in charter arrangements especially after the Second World War, it became imminent to formulate specific rules to regulate these emergent arrangements in a supplementary Convention rather than an amending Protocol. This was so because the matters it was called to deal with were entirely new and unavailable in the 1929 Convention. ICAO's efforts in this regard resulted in the Guadalajara Convention of 18 September 1961.[101]

This Convention drew a line between the carrier who concludes the agreement and the carrier who actually carries it out wholly or in part, each with its own obligations of liability. It did not however provide an explicit definition of the term carrier but was able to make the following clarifications.

1. A contracting carrier means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor.[102]

2. The actual carrier means the person other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated above, but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention.[103] Such authority is presumed in the absence of proof of the contrary.

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[99] See ICAO, C-WP/100853 (25 May 1998).
[100] See *Montreal Protocol No. 4*, *supra* note 9.
[101] See *Guadalajara Convention*, *Supra* note 9.
[102] *Ibid.*, art. I(b).
[103] *Ibid.*, art. I(c).

3. The actual carrier is not liable to the same extent as the contracting carrier. For instance, the actual carrier cannot be held liable for an unlimited sum;[104] his liability is restricted to the limits provided for in Article 22 of the Warsaw Convention. Notwithstanding, the acts and omissions of the contracting carrier and those of his servants and agents can result in liability for the actual carrier.[105]

4. Legal actions may be brought against either the contracting carrier or the actual carrier or both of them together. If one of the carriers is facing legal action, he has a right to bring the other into the suit.

The Guadalajara Convention entered into force in 1964 after ratification by five states and is in force for 77 states.

1.3.3 The Guatemala City Protocol

The next component of the Warsaw System to be considered here is the Protocol signed by 21 nations including the US on 8 March 1971 at Guatemala City.[106] The Protocol was primarily targeting the overall modification and modernisation of the Warsaw Convention as amended by The Hague Protocol.[107] Notwithstanding that this Protocol may never enter into force, it still deserves some consideration because its provisions were very lofty as per modernisation of the System as follows:

1. It changed the basis of liability of the carrier form fault to risk, thus making the carrier liable even in situations where he has no fault or blame, like in claims for injury or death arising out of sabotage or hijacking.[108] The proviso here however was that liability cannot exceed the sum of 1,500,000 francs (about US $100,000),[109] with regards to passengers and baggage, even where the damage resulted from an act or

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[104] Unless agreed to by him in a special contract.
[105] *Ibid.*, art. III(2).
[106] See *Guatemala City Protocol*, *supra* note 9.
[107] See *ibid.*, art. 1.
[108] Unlawful interference with aircraft by persons on board.
[109] *Guatemala City Protocol*, *supra* note 9, art. VIII.

omission of the carrier, his servants, employees or agents, done with intent to cause damage, or recklessly with knowledge that damage would probably result. The Protocol further made this unbreakable limit of liability subject to periodic review.

2. The Protocol significantly modernised and simplified the documents of carriage and enabled their replacement with electronic data processing methods.[110]

3. Article XIV of the Protocol allows states to establish supplementary compensation schemes within their territories, as long as the costs involved are not charged to the carrier

4. A worthy innovation was the provision of an additional jurisdiction, whereby a claimant could bring a suit in the state of his domicile or permanent residence, if the carrier has a place of business in that state and is subject to the jurisdiction of that state.[111]

This Protocol has only been ratified by eleven states out of the 30 needed to bring it into force. Moreover, the additional condition that the scheduled air traffic of five ratifying states, on aggregate and expressed in passenger-kilometres should represent 40% of the 1970 total of international scheduled air traffic of ICAO Member States has not equally been met. Ironically, even the US, in whose interest this Protocol was drafted, did not ratify it.[112] As such, this instrument is now a historic relic of an honest effort of the international community that will never come into force. However, many valuable provisions of this Protocol have been reproduced verbatim in the Montreal Convention of 1999, which is the main subject of this treatise.

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[110] *Ibid.*, art. II, allows for any other means that would preserve the record of information of the documents of carriage to be substituted for the delivery of such document.
[111] *Ibid.*, art. XII.

1.3.4 The Four Additional Protocols of 1975

A Diplomatic Conference held in Montreal adopted four (Montreal) Protocols to amend the Warsaw Convention in September 1975.[113] With the establishment of the International Monetary Fund (IMF) in 1944, gold was gradually losing grounds as the basis of the world monetary system. There was already an official market price for gold expressed in US dollars and the price of gold was susceptible to fluctuation in the free market. After 1969, gold was demonetised, finally loosing its character as a stable yardstick of values. Consequently, all monetary sums provided for in the Warsaw Convention as amended by The Hague Protocol and as amended by the Guatemala City Protocol, which were expressed in French franc consisting of 65½ milligrams of gold, at the standard fineness of nine hundred thousandths,[114] ceased to be feasible. The IMF then introduced the Special Drawing Rights (SDR), which were a fixed sum based on the basket of values of five currencies.[115] The SDR then replaced gold as a yardstick of values in international transactions with its value determined daily by averaging the basket of leading five currencies.[116]

1.3.4.1 Additional Protocol No. 1

This protocol deletes the provision of Article 22 of the Warsaw Convention, insofar as it allowed for gold to be a standard of measure for payments. The Protocol allows payments made within the liability established by the Warsaw Convention to be calculated only in terms of SDRs as determined by the IMF.[117]

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[112] *Ibid.*, art. XX. This provision makes it statistically impossible to bring the Protocol into force without ratification by the US.
[113] See *supra* note 9.
[114] See *Montreal Protocol No. 4*, *supra* note 79.
[115] See *supra* note 38. The SDR basket includes the currencies of the US, Germany, Japan, France and the United Kingdom, representing the largest exports of goods and services. The current equivalent of one SDR as determined by the IMF is about US $1.37.
[116] See *ibid.*

1.3.4.2 Additional Protocol No. 2

Additional Protocol No. 2 replaces the limits set out in The Hague Protocol by limits expressed in SDRs. The limit of liability of the carrier for each passenger was fixed at 16,600 SDRs except in cases of special contracts where the passenger and the carrier may agree to higher limit.[118]

1.3.4.3 Additional Protocol No. 3

This protocol deals in like manner (as Protocol No. 1 and No. 2) with sums of liability limits provided for in the Guatemala City Protocol.

1.3.4.4 Protocol No. 4

The purpose of Montreal Protocol No. 4[119] was the amendment of the Warsaw Convention as amended by The Hague Protocol with regards to liability for baggage and cargo. It introduced for the first time since The Hague Protocol, changes in liability rules relating to goods and also introduced the application of SDRs. It simplified the requirements of the air waybills, making it possible to replace it with methods of electronic data processing.[120] The legal basis for liability of the carrier in transportation of goods was changed from fault to risk liability.[121] The carrier however has four grounds in which he can exonerate himself.[122]

Additional Protocols Nos. 1 and 2 are in force in thirty countries,[123] while Additional Protocol No. 3 is not yet in force (and may never be). Montreal Protocol No. 4 came into force on 14 June 1998 for a small group of states,[124] including the US.[125]

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[117] See *Additional Protocol No. 1*, *supra* note 9, art. II.
[118] See *Additional Protocol No. 2*, *supra* note 9, art. II.
[119] See *Montreal Protocol No. 4*, *supra* note 9.
[120] See *ibid.*, art. III.
[121] See *ibid.*, art. IV.
[122] See *ibid.*
[123] See ICAO, C-WP/10853 (15 February 1996).
[124] See *ibid.* at 11. At the moment there are 51 parties to this instrument.

1.3.5 Unilateral Initiatives

The major bone of contention and area of dissatisfaction in the Warsaw System through the years has always been in the regime and quantum of liability. The issue of liability has threatened the very existence of universal regime for private international air transport. The failure to reach broad based consensus by states is responsible for the slow pace of modernisation of the System, which in turn has caused a lot of dissatisfaction and frustrations to the air carriers and governments alike.

A series of unilateral initiative had been undertaken over time to bridge the gaps deadlocked in international law making by states. This has often come by way of unilateral private agreements by airlines to increase their limits of liability or waive their defences as provided for in the Warsaw Convention. It is important to mention here that these agreements could not amend the Convention (which required action of states), but were legitimated by Article 22 of the Warsaw Convention, which permitted the carrier to agree to higher limits of liability by special contracts with the passenger.[126] The Convention remains the fundamental international legal framework among the parties and can be amended only in accordance with the international law of treaties.[127] From the late 1980s onwards, many airlines, especially in the developed countries unilaterally increased their limits of liability to 100,000 SDRs for a passenger's death or injury. In 1988, Italy adopted this limit by law[128] for all Italian carriers and those operating from, via or into her territory.

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[125] By so doing, the US by implication has accepted the Warsaw Convention as amended by the Hague Protocol of 1955, an action they could have taken some forty-five years ago.

[126] Note that Article 32 of the Convention declares null and void any special agreements or clauses purporting to infringe the rules laid down by the Convention.

[127] See *Vienna Convention on the Law of Treaties,* 1155 U.N.T.S. 331 1969, arts. 39-41 [hereinafter *Vienna Convention*].

[128] See *Limite di Risarcimento nei Transporti Internzionali di Persone,* Law No. 274 1988 *Gazetta Ufficiale della Repubblica Italiana,* No. 168 1988, *supra* note 42.

The notable unilateral initiatives to be considered here include: The Montreal Agreement of 1966,[129] the Japanese Initiative of 1992,[130] the 1995-1996 IATA Inter-carrier Agreements[131] and the European Union Council Regulation of 1997.

1.3.5.1 The Montreal Agreement of 1966

It is necessary to begin by stressing here that this Agreement is not an instrument of international law (which would require the action of states). This was rather a package offered to the US by airlines within IATA, after the US threatened to denounce the Warsaw Convention on 15 November 1965.[132] The crux of the US threat was that the Convention's limit of liability of 125,000 francs was too low and unrealistic compared with what is paid in her domestic air transportation.[133] When it became glaring that ICAO's efforts in tackling the crisis were too slow and were too late, the air carriers seized the initiative to save the situation. The Montreal Agreement is applicable to all international carriage to, from or via US territory. The carriers accepted strict liability up to US $75,000, waiving their defence in Article 20, yet still agreeing to be bound by the wilful misconduct provision of Article 25. This development set the ball rolling to the eventual reversal from fault liability to risk liability.

On 4 May 1966, the US Government formally requested the Polish Government to cancel its notification of denunciation. This Agreement in addition to being contrary to the norms of the international law of treaties further eroded the unity of private international air law. Nevertheless, it was a great success where action of states through ICAO failed.

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[129] See *Montreal Ageement*, *supra* note 40.
[130] See *supra* note 43. For the text of the Japanese initiative, see P. Martin, "Japanese Airlines – Looking Forward Rather Than Back" (1992) 11:22 Lloyd's Aviation L. 2 [hereinafter *Japanese Initiative of 1992*].
[131] See *IIA*, *supra* note 41; *MIA*, *supra* note 41.
[132] It was concluded between the IATA airlines and the US Civil Aeronautics Board Agreement on the text was reached on 4 May 1966 and the agreement was accepted by the US authorities on 13 May 1966 and became effective on 16 May 1966.

1.3.5.2 The Japanese Initiative of 1992

With the approval of their government, all Japanese air carriers adopted a new tariff provision in November 1992. This involved a two-tier system of liability, where they would accept strict liability without any defence up to the sum of 100,000 SDRs, but beyond that limit they would accept unlimited liability based on presumed fault with reversed burden of proof.[134] This decision was informed by the fact that there is no limitation of liability in domestic air carriage in Japan. It also signalled to the aviation world that the industry was ripe enough for the removal of the limitation subsidy. This initiative was the pacesetter for subsequent successive agreements.

1.3.5.3 The 1995-1996 IATA Inter-carrier Agreements

IATA was to follow the pace set by the Japanese at its annual general meeting in Kuala Lumpur on 31 October 1995. It adopted the IATA Inter-carrier Agreement (IIA) on passenger Liability[135] and other instruments.[136] In 1996 another Inter-carrier Agreement on measures to implement the IATA Inter-carrier Agreement (MIA) was adopted. The purpose of these instruments was to ensure the adoption and implementation of the Japanese initiative. Under the agreement, carriers waived the limitation of liability for recoverable compensatory damages in Article 22(1) of the Warsaw Convention as to claims for death, wounding or other bodily injury of a passenger, within the meaning of Article 17. The carriers were also to accept strict liability up to 100,000 SDRs. A total of 122 airlines signed the agreement and 89 actually implemented it immediately. This figure can be claimed to account for more than ninety percent of international air transportation of passengers.[137] The Agreement came into force on 14 February 1997 and has become a yardstick of what is presently acceptable to the industry, insurers and

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[133] Within the US, an unlimited liability regime is prevalent.
[134] With the *all necessary measures* defence under Article 20(1) of the Warsaw Convention.
[135] See *IIA*, *supra* note 41.
[136] See *ibid.* Other instruments included the Measures to Implement the IATA Inter-carrier Agreement (MIA). See *MIA*, *supra* note 41 at 298.
[137] See ICAO, DCW Doc. No. 45, para. 2.2.

the travelling public. The Montreal Convention of 1999 was left with no option than to recognise this yardstick.

1.3.5.4 European Union Council Regulation of 1997

Another direct result of the Japanese initiative was a multilateral, regional legislative step taken by the European Union (EU) in adopting as law applicable to its members a Council Regulation on Air Carrier Liability[138] on 17 October 1998. This EU Regulation adopts and applies the Japanese initiative to both domestic and international carriage for all community carriers. The crux of the Regulation is strict liability up to 100,000 SDRs and a waiver of limit of liability for death or injury to passengers. The EU preferred to regulate this issue by law[139] rather than leaving it to the contractual freedom of carriers of the 15 member countries that make up the community.[140]

1.4 Gross inadequacies in the System - The need for change

This general overview of the present system has exposed many fundamental inadequacies that need considerable reform. Granted that the only constant in time is change, the system is not entirely to blame for this age-old continuous desire to adapt it to realities of the time, which started with the adoption of The Hague Protocol in 1955. Nevertheless, every attempt to update the Convention had amounted to a de facto disunification of a supposed unified system of Private International Air Law.[141] Sending strong signals that there is a need to halt the trend and find a permanent solution.

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[138] See *Council Regulation 2027/97*, *supra* note 18.

[139] This latest benchmark is acceptable to the aviation industry, as evidenced in the Japanese initiative and IATA Inter-carrier Agreements.

[140] See F. Ortino & R.E. Jurgens, "The IATA Agreements and the European Regulation: The Latest Attempts in Pursuit of a Fair and Uniform Liability Regime for International Air Transportation" (1999) 64 J. Air L. & Comm. at 406.

1.4.1 Inadequacies of the System

The result of the system as we have it is a multiplicity of instruments[142] with no transparent consolidated text. As a result, different limits of liabilities apply to different passengers travelling on the same aircraft to different destinations. Coupled with the absence of unanimity of ratification by all countries for each successive instrument, different standards operate concurrently.

The idea of limitation of liability, which was a subsidy to the infant industry in 1929, is no longer relevant today, when there is available insurance for the matured aviation industry to purchase as part of a risk management strategy.[143] Being an imperfect compromise of the civil and common law concepts, some terms of the Warsaw System have caused considerable difficulties in interpretation and application, resulting in different jurisprudence for different countries.[144] While the original Convention of 1929 is authentic only in the French language, some amendments are authentic also in English and Spanish. Notwithstanding, the French text prevails in case of conflicts – an outdated and unrealistic vestige of a past era when French was the universal diplomatic language.[145] There is also a need to have a single impartial depository of instruments, in harmony with modern treaty practice. Different texts of the System are deposited with different depositories.

The Warsaw System is outdated and not responsive to modern realities in its formalistic requirements for documents of carriage. This has been a costly obstacle to the wider use of modern electronic data processing.[146]

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[141] See Milde, *supra* note 17 at 167.
[142] *Ibid.* Supplementary Convention, Protocol, Protocol-to-Protocol, Protocol-to-Protocol-to-Protocol etc.
[143] See *ibid.*
[144] *Ibid.* The concepts of *accident*, *bodily injury* and *wilful misconduct*, for example, have been subjected to different judicial interpretations.
[145] See *ibid.*

1.4.2 Need for change

The Warsaw Convention had long ago foreseen that there would be need for changes. Article 41 of the Convention entitled any party not earlier than two years after the coming into force of the Convention "to call for the assembling of a new international Conference in order to consider any improvements which may be made in this Convention."

The complicated situation arising from the inadequacies of the System especially from the multitude of instruments present a strong case for change. This caused the Montreal Diplomatic Conference of 1975 to adopt a resolution requesting the ICAO legal committee to prepare a consolidated text covering the whole area of the Warsaw System. The aim was to create a measure of uniformity between the Warsaw Convention and its amendments.[147] Some have argued that a consolidated text would not clear up the situation, let alone solve the problems. At best it will only confuse matters further by adding another legal instrument to the existing series; therefore, the status quo should be maintained.[148] With collective special contracts as precedent for change without altering the fundamental treaty, what need is there for a new Convention they ask? Notwithstanding, a new consolidated text would be the only sure way of realising the aims of the original Warsaw Convention of uniformity and simplicity in the regime of international carriage. In addition, modernisation of the regime in line with contemporary realities will be guaranteed. This writer feels justified joining in the submission that it is better to establish a new regime which would inculcate pressure towards conformity; like a requirement that states denounce all previous instruments or versions and become bound only by the new one.[149] This can only be achieved by the expression of will of states under the auspices of ICAO which is the global organisation responsible for international civil aviation and more so

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[146] See *ibid.*

[147] See ICAO, *Minutes and Documents of the International Conference on Air Law held in Montreal 1975*, ICAO Docs. 9154-LC/174-1 & 174-2 (1975).

[148] See R.H. Mankiewicz, "From Warsaw to Montreal with Certain Intermediate Stops. Marginal Notes on the Warsaw System" XV Air L. 239-260.

[149] See Gardiner, *supra* note 2 at 120.

because global problems require global solutions.[150] As per Michael Milde, "[t]he current challenge for states will be to expedite studies in the framework of the ICAO Legal Committee and to prepare a new Convention unifying the rules relating to international carriage by air".[151]

[150] See Poonoosamy, *supra* note 5.
[151] M. Milde, "Warsaw Requiem or Unfinished Symphony" [1996-1997] Aviation Quarterly 37-51 [hereinafter *Unfinished Symphony*].

Chapter Two

The Montreal Convention of 1999

In Chapter One, we traversed the various efforts since 1929, which were made to adjust the Warsaw Convention to successive changing circumstances: From The Hague Protocol in 1955, through the Montreal Protocols of 1975, to the second IATA Agreement between Carriers in 1995. A sum total of the efforts through the years highlighted the need for the establishment of uniformity by means of a universal new instrument, which will accommodate all interest within the context of modernisation and consolidation, if the system was to be salvaged from further fragmentation. The end product of all this, is the Montreal Convention of 1999. This new Instrument is essentially based on the Warsaw and Hague regimes, but it has incorporated some provisions of the Guadalajara Convention, Additional Protocol No. 3, Montreal Protocol No. 4 and the Guatemala City Protocol of 1971.

The Montreal Convention acknowledges *ab initio* the significant contribution of the Warsaw Convention and related instruments to the harmonisation of Private International Air Law; the need to modernise and consolidate the Warsaw Convention and its related instruments; and, significantly, "the importance of ensuring protection of interests of consumers in international carriage by air, including the need for equitable compensation based on the principle of restitution."[152] It also records "that collective state action for further harmonisation and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an equitable balance of interests."[153]

[152] *Montreal Convention*, *supra* note 12. The preamble.
[153] *Ibid.*

2.1 Historical Background

Apart from adopting the four Additional Protocols, the Montreal Diplomatic Conference of 1975 adopted a resolution, requesting the ICAO legal committee to prepare a consolidated text covering the whole area of the Warsaw System.[154] The aim of the consolidated text was modernisation, consolidation and creation of a measure of uniformity between the original Convention and the successive instruments.

Instead of initiating action in this direction, ICAO only concentrated on urging contracting States to ratify Additional Protocol No. 3 and No. 4 "and in hypocritically unanimous resolutions, continued 'flogging a dead horse' until 1995 when the industry's initiative started a new momentum and overtook the inertia of States."[155] Stampeded into action by the Japanese initiative and IATA Inter-carrier Agreements, the ICAO Council in a hurry to catch up with industry, on 15 November 1995 initiated the process that led to the 1999 Convention.[156] The Assembly of ICAO decided that the modernisation of the Warsaw System should be given a high level of priority on the work programme of the Legal Committee. The work programme of the Legal Committee was thus amended, and a new item entitled "The Modernisation of the Warsaw System and review of the ratification of international air law instruments" was inserted. This was done barely two weeks after the adoption of the IIA in Kuala Lumpur.[157] The ICAO standard procedure for preparation of draft Conventions was hurriedly by-passed[158] for the first time and no reason was given for this departure from the legal rules. Instead, a body labelled the Secretariat Study Group[159] was established by the Council of ICAO to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernisation process. This body, composed of officials of the Legal Bureau and experts selected by the President of the Council, met in two brief sessions in 1996 and presented a report to the Council. A Rapporteur

[154] See Minutes of Conference *supra* note 147
[155] Milde, *supra* note 17 at 168.
[156] See *ibid.*
[157] *Ibid.* Surprisingly, the records do not contain any reference to the IATA initiative.
[158] ICAO Doc. 7669-139/3, attachment A. Procedure for the Preparation of Draft Conventions.

was thereafter appointed whose report was presented directly to the Council in early 1997 instead of being presented through the sub-committee of the Legal Committee. Thereafter the 30th session of the Legal Committee was convened to meet in Montreal from 28 April to 9 May 1997.[160] The Draft Convention thus did not have the opportunity of being extensively examined by a wider representative forum of the sub-committee, all in a bid to save time. The price of this seemingly efficient method was - reduced transparency of deliberations and less opportunity for states to express their opinions.[161]

As speculated, the 30th session of the Legal Committee that was to follow turned out to be a colossal disappointment both in attendance, deliberations and creativity. Attended by only sixty-one states, the debates were chaotic and under a disoriented Chair.[162] Mutual suspicion filled the air and most delegates were not too familiar with the problem enough to express any opinion on the new draft prepared behind closed doors.[163] The most critical provisions of the draft presented to the committee included the two-tier liability system along the lines of the IATA Passenger Liability Agreement, moreover, the Committee prepared three vastly divergent variants as to the second tier of liability with regards to the required burden of proof and even introduced a third tier.[164] These alternatives were however kept in square brackets for the Diplomatic Conference to decide – a sure prescription for failure of the Conference where two-thirds majority is required for the adoption of a Convention.[165] Another contentious issue was the introduction of the 5th jurisdiction – the place of domicile or permanent residence of the passenger, which was strongly canvassed by the US.

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[159] Milde, *supra* note 17 at 168. A body neither provided for, nor foreseen in the rules, which did not reflect the proper linguistic spectrum and geographical distribution in composition.
[160] See *ibid.* This again was yet another negation of the applicable rules of procedure.
[161] See Milde, *supra* note 17 at 169.
[162] See ICAO, Res. A7-5, Doc. 7669 – LC/139/5 (1997), para. 3. The Legal Committee is to be composed of legal experts from all contracting states. Sixty-one participants were less than one-third of ICAO contracting States.
[163] See Milde, *supra* note 17 at 169.
[164] See *ibid.*
[165] See *ibid.*

Notwithstanding the lack of consensus on some basic issues, the Committee considered its draft to be final and ready for presentation to a Diplomatic Conference. The ICAO Council in its wisdom refrained from convening a Diplomatic Conference on the basis of the draft but rather circulated the draft to States for comments.[166] The Secretariat Study Group was to be convened for two more sessions before another body, whose members were appointed by the president of the council, called "The Special Group on Modernisation and Consolidation of the Warsaw System" (SGMW) was formed.[167] From 14-18 April 1998 the SGMW succeeded in preparing a solid and convincing draft Convention which was presented to the Diplomatic Conference as the "text approved by the 30th session of the ICAO Legal Committee, Montreal, 28 April-9 May 1997 and refined by the Special Group on the Modernisation and Consolidation of the 'Warsaw System', Montreal, 14-18 April 1998."[168]

The truth of the matter however is that the SGMW merely, though substantially, solidified the text along the principles of the IATA Inter-carrier Agreement of 1995 and the European Union Council Regulation 2027/97 of 1997. While removing the alternatives in square brackets with respect to liability left open by the Legal Committee, it accepted the 5th jurisdiction. The text that emerged from the deliberations of the SGMW formed the basis for consideration by the Diplomatic Conference that met in Montreal from 10 to 28 May 1999 and which eventually adopted the Montreal Convention.

2.2 The Montreal Conference: Tactics and Strategies

The core issue at the Conference was the achievement of consensus, if the end product was to be globally acceptable as an equitable balance between the interests of passengers, the consumers, the carriers and the public. Without consensus, global acceptability and satisfaction could not be guaranteed. The strategy for achieving such

[166] See *ibid.*; State Letter LE4/51-97/65 (27 June 1997).
[167] See Milde, *ibid.* at 170. This body was not provided for in the rules.
[168] See ibid.; ICAO, DCW Doc. 3 (April 1998).

consensus was to encourage the widest participation of states and regional interest groups possible in deliberation and co-ordination positions.

As expected, the conference was plagued with deep divisions especially between the developed and developing nations. Most developed nations with strong airlines, including all members of the European Civil Aviation Conference (ECAC) fully supported the draft.[169] In this group, only France initially objected to the case presented by the US in favour of the 5th jurisdiction.

On the other side of the divide, the developing nations, including the massive superficially influential group of fifty-three African states, spear-headed by India, opposed the provision of the draft as to liability without monetary limit in the 2nd tier, asserting and rightly so that presumed fault with reversed burden of proof is "tantamount to strict liability",[170] and averring "such a regime would be against the interest of air carriers, especially the small and middle sized" and "would make the very survival of the carriers questionable."[171] Developing nations in general asserted that "the main beneficiaries of the unlimited liability regime would be the passengers of the developed countries" meanwhile all carriers will face higher insurance premiums.[172] The fifty-three African contracting States therefore advocated a three-tier system as follows:

(a) Strict liability up to 100,000 SDRs in the 1st tier;

(b) Presumption of fault with reversed burden of proof up to 500,000SDRs in the 2nd tier.

(c) Proven fault for claims exceeding 500,000 SDRs in the 3rd tier.

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[169] See ICAO, DCW Doc. 8 (May 1999), which was an overt extension of their support for *Council Regulation 2027/97*, *supra* note 18.
[170] See ICAO, DCW Doc. 18 (May 1999).
[171] *Ibid.*

The African contracting states unanimously opposed the introduction of the 5th jurisdiction.[173]

The sixteen member states of the Arab Civil Aviation Commission supported the African position, with a requirement that the 3rd tier be set at 400,000 SDRs instead of 500,000 SDRs.[174] Vietnam on its part proposed that all claims above 100,000 SDRs should require the claimant to prove negligence on the part of the carrier.[175] Incidentally, all twenty-one member States of the Latin American Civil Aviation Conference expressed their general support for the draft.[176]

The only reasonable deduction from the above situation was that the conference was bound to fail in its bid to achieve the majority vote required for the approval of the draft Convention.[177] It was also apparent that strict adherence to the established procedures (prior to the Conference) might not have equally marshalled the required consensus. The rifts created by the issues of unlimited liability with presumed fault and the 5th jurisdiction between the developed and developing nations was a colossal barrier to any meaningful consensus of any kind.

The first strategy for achieving consensus was to focus on the main issues in a general debate where alternative proposals were grouped together, and providing the opportunity for the views of the widest cross-section of the international community and interest groups to be heard. This in turn facilitated greater appreciation of the differences in opinion and the possibilities of reconciling those differences. Then after identifying the main contentious issues to be resolved, a forum where they will be more intensively examined will be created.

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[172] *Ibid.*
[173] See ICAO, DCW Doc. 22 (May 1999).
[174] See ICAO, DCW Doc. 29 (May 1999).
[175] See ICAO, DCW Doc. 24 (May 1999).
[176] See ICAO, DCW Doc. 14 (May 1999).
[177] For approval, a two-thirds majority vote of representatives present and voting is required.

The US would not accept any instrument that did not incorporate the 5th jurisdiction, and the experience of the 1971 Guatemala City Protocol was to prove that no progress could be made in the unification Private International Air Law without the participation of the US. This is due to its vast share in international air transport and being a major point of destination for numerous carriers. Other developed nations were unwilling to accept any instrument that did not incorporate the provisions of the IATA Inter-carrier Agreement or the EC Regulation 2027/97. Ironically, the developing nations on the opposing side were in the voting numerical majority.

In an attempt to reconcile these differences, the President[178] of the Conference established a Review Committee. This move equally met its Waterloo due to disagreements in its composition. The President then resorted to informal consultative strategies, which led to his creation of the Friends of the Chairman Group[179] on 17 May 1999, at the 8th meeting of the Commission of the whole, a week after the opening of the Conference. The president proposed at the end of the general discussion, that a cluster of contentious issues should be referred to the new working group for intensive examination.

This was a more balanced body composed of twenty-seven delegates with a good spread both geographically and in levels of negotiating skills. In theory, other delegates were allowed participation in this Group, but in practice, the room allocated for the Group's deliberations could allow wider participation except for those who wished to attend standing. The Group did not keep minutes of its deliberations and its modus of building consensus were shrouded with mystery and suspicion.[180] The fact that the very meeting where these consensus were built were exclusive while the remaining delegates idled away their time in the dark, was a minus. Many at times these excluded delegates

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[178] See Milde, *supra* note 17 at 172. The President of the Conference was a renowned international lawyer, Dr Kenneth Rattray, the Attorney General of Jamaica and the President of the ICAO Diplomatic Conference of 1991.

[179] *Ibid.* Friends of the Chairman Group was an informal advisory body that was not provided for in the rules of procedure, but which had been well tested by the President when he acted as Rapporteur during the UN Conference on the Law of the Sea. He had drawn much assistance in consensus building from a similar body, Friends of the Rapporteur.

never knew even when the next meetings of the Commission of the Whole were to be held.

At the 13th meeting of the Commission of the Whole, on 25 May 1999, barely three days to the proposed end of the Conference, the President of the Conference suddenly presented the Consensus Package[181] to the delegates. There was a standing ovation in the conference room. This was to be immediately followed by congratulatory messages from the President of the Conference and the President of the ICAO Council then the meeting was adjourned with no further ado. The impression created here and as evidenced in the records, was that of a unanimous approval of the consensus package[182] but the truth of the matter is that many delegates left the left the meeting rather puzzled and confused. Equity had just been sacrificed at the altar of consensus. Their frustrations were further highlighted by the robust and animated debates during the remaining meetings of the commission of the whole.[183] They had obviously been arm-twisted, brutalised and defeated by the so-called consensus quagmire.

In hindsight, if "the end justifies the means" then this will neutralise all antagonism as per the ways and means reaching the international agreement that produced the Montreal Convention of 1999. The Convention has not only succeeded in modernising archaic requirements, but has consolidated the various instruments of the Warsaw System into a single text, authentic in six languages,[184] thus creating the much desired unity in Private International Air Law. On the other hand, rules and procedures are supposed to be adhered to if legality is to be enhanced. The gross deviations from established rules and procedures, without the courtesy of explanations as it were, confer *stricto sensu* on the new Convention the status of a neo-legal document - a product of arm-twisting, bullying and deceit, under the guise of consensus.

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[180] The chairman had decided that periodic summary reports on the progress of the group would be presented to the commission of the whole, but by way of preliminary conclusions only.
[181] See Milde, *supra* note 17 at 172; ICAO, DCW Doc. 50 (May 1999).
[182] *Ibid.* See also (1999) 12 ICAO J. 1.
[183] See *ibid.*

As the president of the Conference in his congratulatory speech rightly conceded, "[i]n developing this new Montreal Convention, we were able to reach a delicate balance..." Delicate indeed is the balance, and it is only hoped that the Convention will soon come into force to be tested in practical application. This can be inferred from the unanimous resolution adopted by the Conference, as evidenced by the signature by all delegates of the Final Act.[185]

2.3 The Montreal Convention – Basic features

The new Convention consists of 57 Articles, is preceded by a preamble and divided into seven Chapters. As a prelude to analysing the problems and prospects of the Montreal Convention, we are going to outline the basic distinctive features of the Convention under the following headings:

1. Regime of Liability.
2. Jurisdiction.
3. Documentation.
4. Insurance.
5. Carriage by air performed by a person other than the contracting carrier.
6. Relationship with other Warsaw System instruments.
7. Final clauses.

2.3.1 Regime of Liability

The new regime of liability is entrenched in Chapter III of the Convention, laying down the liability of the carrier and the extent of compensation for damage. Article 21 provides for a two-tier system of liability for death or bodily injury, it also consolidated the provisions of Montreal Protocol No. 4 as to liability for cargo, baggage and delay.

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[184] English, French, Chinese, Arabic, Russian and Spanish. The true test of the equality in language precision will come when the Convention enters into force, since the texts were prepared in a hurry.
[185] See ICAO, DCW Doc. 58 (28 May 1999), res. 1 [hereinafter *Final Act*].

(a) For damages for death or bodily injury not exceeding 100,000 SDR a regime of strict liability applies on the basis that the carrier will not be able to exclude or limit its liability.[186]

(b) For damages in respect of baggage, the carrier will be able to escape liability if the carrier proofs that: -

(i) such damage to a checked baggage was due to inherent defect, quality or vice of the baggage;[187] or

(ii) such damage to unchecked baggage was not due to its fault or that of its servants or agents.[188]

(c) It will still be necessary under the new Convention for the claimant to establish the causation between the death or bodily injury and the extent to which the accident caused such death or bodily injury as well as the quantum of loss suffered. Hence the carrier stands exonerated in whole or in part from its liability to the extent that it proves the damage was caused or contributed to by the negligence or other wrongful act of the person claiming compensation or the person from whom such rights are derived.[189]

(d) In the case of aircraft accidents resulting in death or injury of passengers, the Convention provides that the carrier shall, if required by its national law make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet immediate economic needs of such persons. Such payments would not constitute recognition of liability and would be offset against any amounts subsequently paid as damages by the carrier.[190]

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[186] *Montreal Convention*, *supra* note 12, art. 17, granted that the accident causing damage took place on board the aircraft or in the course of embarking or disembarking.
[187] *Ibid.*
[188] *Ibid.*
[189] *Montreal Convention*, *supra* note 12, art. 20, exoneration clause.
[190] *Ibid.*, art. 28, advance payments provisions.

(e) In the case of Liability for baggage, cargo and delay the new convention consolidated the provisions of Montreal Protocol No. 4:

(i) The liability in respect of destruction, loss, damage or delay in respect of cargo has been fixed at 17 SDR per kilogram unless the consignor had made a special declaration of interest and paid a supplementary sum.[191]

(ii) The liability for damage caused by delay in the carriage of passengers was placed at 4,150 SDRs.[192]

(iii) For destruction, loss, damage or delay to baggage, the liability was fixed at 1,000 SDR per passenger unless the passenger had made a special declaration of interest and paid the supplementary sum.[193]

All the above limits of liability would however not apply if recklessness or wilful misconduct on the part of the carrier, its servants or agents (acting within the scope of their employment) were established.[194]

(f) Article 24 of the Convention provides for a periodic review of the limits of liability taking into account the inflationary trends and to ensure that the limits remained relevant to contemporary conditions.[195]

2.3.2 Jurisdiction

The Convention created an additional "fifth" jurisdiction to the four retained from the Warsaw Convention:[196]

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[191] *Ibid.*, art. 22(3).
[192] *Ibid.*, art. 22(1).
[193] *Ibid.*, art. 22(2).
[194] *Ibid.*, art. 22(5).
[195] This is without prejudice to Article 25, which permits a carrier to stipulate a higher (but never a lower) limit of liability than those provided for in the Convention.
[196] See *Montreal Convention*, *supra* note 12, art. 33(1), c*ontra Warsaw Convention*, *supra* note 9, art. 28(1).

(a) The Court of the domicile of the carrier
(b) The Court of the principal place of business of the carrier
(c) The Court where the carrier has a place of business through which the contract was made
(d) The Court at the place of destination.

Now, action could be brought for the recovery of damages in the Court of the passenger's home country if the air carrier has a commercial presence in that country.[197] To forestall forum shopping, the fifth jurisdiction has been restricted to:

(a) the principal and permanent residence of the passenger;

(b) to or from which the carrier operates services for the carriage of passengers by air either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement; and

(c) such principal and permanent residence being a place in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

2.3.3 Documentation

(a) With respect to passengers, the Convention provides that the document of carriage to be delivered to a passenger could either be in a standard form indicating places of destination and departure and at least one stopping place within the territory of another state, or in substitution thereof, any other means which preserves the above information; in which case the carrier would be required to offer to deliver to the passenger a written statement of the information so preserved.[198]

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[197] See *Montreal Convention*, *ibid.*, art. 33, fifth jurisdiction provisions.
[198] *Ibid.*, art. 3(1) & (2).

(b) The carrier is still required to deliver to the passenger a baggage identification tag for each piece of checked baggage; and the passenger would also be given a written notice to the effect that where the Convention is applicable, it governs and may limit liability.[199]

(c) As for cargo, Article 5 of the Convention has simplified and standardised the contents of the air waybill. More so, the delivery of the air waybill can be substituted by any other means, which preserves the record of the carriage. But the carrier, if so requested by the consignor, must deliver to the consignor a receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.[200]

(d) However, the consignor may be required, if necessary to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo.[201]

(e) Most significantly, the Convention provides that non-compliance with the provisions relating to documentation will not affect the existence or validity of the contract of carriage in respect of passengers, baggage (and cargo), and the provisions of the Convention including those relating to limitation of liability will, notwithstanding such non-compliance, apply.[202]

2.3.4 Insurance

Article 50 of the Convention requires all carriers to maintain adequate insurance covering their liability under the Convention. To this end, a state party may request a carrier operating services into her territory to furnish evidence of such insurance adequate to cover its liability under the Convention.

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[199] *Ibid.*, art. 3(3) & (4).
[200] *Ibid.*, art. 4.
[201] *Ibid.*, art. 16.
[202] *Ibid.*, art. 3(5).

2.3.5 Carriage by air performed by a person other than the contracting carrier

The Convention consolidated the provisions of the Guadalajara Convention as regards carriage by air performed by a person who is not a party to the contract of carriage. Articles 39-48 in Chapter Five of the Convention provide:

(a) that if the actual carrier performs the whole or part of the carriage, both the contracting carrier and the actual carrier would be subject to the rules of the Convention, the contracting carrier for the whole of the carriage, while the actual carrier solely for the carriage which it performs;[203]

(b) the acts and omissions of the actual carrier, its servants and agents acting within the scope of their employment, shall be deemed to be those of the contracting carrier in relation to the carriage performed by the actual carrier;[204] and the acts and omissions of the contracting carrier, its servants or agents acting within the scope of their employment, shall in relation to the carriage performed by the actual carrier also be deemed to be those of the actual carrier, subject to the limits of liability specified in the Convention. So, however, that any special agreement under which the contracting carrier assumed obligations not imposed by the convention or any waiver of rights or defences conferred by the Convention or any special declaration of interest under which the contracting carrier assumed obligations for delivery of baggage or cargo shall not affect the actual carrier unless agreed to by it;[205]

(c) that in relation to carriage performed by the actual carrier, its servants or agents or those of the contracting carrier acting within the scope of their employment are entitled to avail themselves of the conditions and limits of liability applicable to the carrier whose agents or servants they are;[206]

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[203] *Ibid.*, art. 40, respective liability.
[204] *Ibid.*, art. 41, mutual liability.
[205] *Ibid.*, art. 41(2).
[206] *Ibid.*, art. 43.

(d) that in relation to carriage performed by the actual carrier, the aggregate amounts recoverable from that carrier and the contracting carrier and their servants or agents acting within the scope of their employment shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier; but none of those persons shall be liable for a sum in excess of the limit applicable to that person;[207]

(e) that in relation to carriage performed by the actual carrier, an action for damages may be brought at the option of the plaintiff against that carrier or the contracting carrier or against both together or separately, but if action is brought against only one of the carriers, that carrier shall have a right to require the other carrier to be joined in the proceedings;[208]

(f) that any contractual provision tending to relieve the contracting carrier or the actual carrier from liability under Chapter Five of the Convention or to fix a lower limit than that which is applicable, shall be null and void but the nullity does not involve the nullity of the whole contract which remains subject to the provisions of that Chapter;[209]

(g) that the mutual relations of the contracting and actual carrier, including the rights of recourse and indemnification (but excluding the right of one carrier to require the other carrier to be joined in the proceedings), are not affected by the provisions of Chapter Five.[210]

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[207] *Ibid.*, art. 44, aggregate damages.
[208] *Ibid.*, art. 45, address of claims.
[209] *Ibid.*, art. 47.
[210] *Ibid.*, art. 48.

2.3.6 Relationship with other Warsaw System Instruments

Article 55 of the Convention establishes the relationship of the new Convention with the instruments of the Warsaw System, to the effect that the Montreal Convention shall prevail over any other rules that apply to international carriage by air:

1. Between States Parties to this Convention by virtue of those States commonly being Party to:

(a) The Warsaw Convention.
(b) The Hague Protocol.
(c) The Guadalajara Convention.
(d) The Guatemala City Protocol.
(e) Additional Protocols Nos. 1, 2 & 3 and Montreal Protocol No. 4.

2. Within the territory of a single State Party to this Convention by virtue of that state being Party to one or more of the instruments referred to in sub-paragraphs (a)-(e) above.

2.3.7 Final Clauses

The final clauses of the Montreal Convention addressed many novel issues in its bid to achieve the highest degree of universality and acceptability as follows:

1. It provided that the Convention shall be open for ratification and signature by Regional Economic Integration Organisations. Such organisations, which had competence in matters covered by the Convention, and which were authorised to do so, could become party to the Convention in respect of matters within their competence.[211]

[211] *Ibid.*, art. 53, paras. 2-4. Therefore, the European Union could become party to the Convention.

2. For States that have two or more territorial units with different systems of law, the Convention could be made to apply to all of its territorial units or only to one or more of them.[212]

3. The Convention permits a States Party to make very limited reservations as to the application of the Convention.[213] A State could make a declaration that the Convention would not apply:

(a) to international carriage performed and operated directly by the State for non-commercial purposes in respect of its functions and duties as a sovereign State; or

(b) to carriage for its military authorities on aircraft registered or leased by that state, the whole capacity of which has been reserved by or on behalf of such authorities.

In a bid to accommodate the interests of all stakeholders in international carriage by air, the new Convention introduced new modernising and in some instances, radically reforming principles. Notwithstanding, the Montreal Convention displays a good deal of the general form and content of the Warsaw and Hague instruments. This was a deliberate act of the drafters to ensure that the benefit of over 60 years of judicial interpretation of key provisions was not lost to overzealous reforms.

[212] *Ibid.*, art. 56, paras. 1-3.
[213] *Ibid.*, art. 57.

Chapter Three

Prospects of the Montreal Convention

From the previous Chapters, we have been able to establish that the trend of events, which led to the adoption of Montreal Convention, was triggered by a general dissatisfaction with the Warsaw System, starting with the Warsaw Convention of 1929. As a result, any meaningful evaluation of the prospects of the new convention can only be achieved by dividing the innovations in the various segments of the Montreal Convention, amongst the various units of dissatisfaction in the former order. We will then be in a better position to assess the degrees of satisfaction that has been created, from the acceptable levels of repairs that have been brought to bear on the Warsaw System. This will in turn provide an index of the overall acceptability of the new Convention, creating an insight to the prospects of its timely ratification. In this Chapter, we will progress with a step by step appraisal of the various novel issues entrenched in the Montreal Convention with a view to determining how they have positively advanced the cause of Private International Air Law to the satisfaction of all stake holders.

3.1 Liability of the Carrier

The issue of liability and compensation has always been the junction of disagreement and dissatisfaction in Private International Air Law. Starting with the Warsaw Convention of 1929, this is basically where demands for new regulations have always emanated. Chapter III of the Montreal Convention[214] establishes a new regime of liability for the carrier and sets the extent of compensation for damages.

3.1.1 Liability to the passenger

Article 17(1) of the Montreal Convention stipulates that the carrier is liable for the damage sustained in case of death or bodily injury of the passenger if the accident that caused the damage occurred on board or during embarkation or disembarkation.

Much to the appreciation of the airlines, and for avoidance of any doubts, the wording of this Article ensures that only compensatory damage is recoverable. Punitive, exemplary and other non-compensatory damages are expressly excluded.[215] The preamble of the Convention also re-echoes this position of "...ensuring protection of interest of consumers in international carriage and the need for equitable compensation based on the principle of restitution".[216] This has provided a double assurance to carriers against the fear of defending claims in those jurisdictions noted for giving generous awards for such non-compensatory damages.

In this new provision, the adjective bodily has been added to injury, foreclosing permanently the possibility of the fluid notion of mental injury that is not accompanied by bodily injury[217] from being sneaked into the Convention through the back door of overzealous interpretation. As acceptable as the concept of stand-alone mental injury may seem in principle, it is virtually impossible to construct a provision that will sift bonafide from the malafide claims that will be brought under it, in practice. The inclusion of stand-alone mental injury, which could even arise from mere fear of flying or other normal occurrences[218] incidental to flight like clear air turbulence, would have opened a floodgate to wanton abuse. As a matter of fact, recent US jury awards for fear caused by turbulence would support this wisdom in excluding stand-alone mental injury. Therefore mental injury under the new regime is compensated only when it

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[214] *Ibid.*, arts. 17-37.
[215] *Ibid.*, art. 29, expressly excludes punitive, exemplary or non-compensatory damages in any action brought under the Convention.
[216] *Supra* Preamble, note 152.
[217] Thus, mental injury standing alone as a claim (not accompanied by bodily injury) is not covered in the new regime.
[218] Examples include diversions due to bad weather, hard landings due to poor visibility and other *acts of God.*

accompanies bodily injury. This has laid to rest the long controversy on the interpretation of the French expression *lesion corporelle*[219] in the Warsaw System, which is susceptible to being interpreted as both bodily injury and personal injury. This exclusion was extremely gratifying to the air carrier fraternity, a great prospect for acceptability of the new Convention.

The new liability provision also conforms to the rule of thumb, that the tort-feasor takes his victim as he finds him.[220] The fact that the passenger had a thin skull or his body was like an eggshell is immaterial to liability. Nevertheless the occurrence of an accident from where liability can be traced is still necessary. By retaining the term accident, the Montreal Convention has ensured the continued application of the long-standing Warsaw System judicial precedents relative to this critical term.

The Convention provides for a two-tier system of liability, which is in essence the regime in the IATA Inter-carrier Agreements of 1995[221] and basically a regime of unlimited liability. Article 21(1) provides in the first tier for strict liability with no defences available to the carrier up to the first 100,000 SDRs of claim, for damages arising from death or bodily injury. In the second tier, Article 21(2) provides for unlimited liability of the carrier for claims in excess of 100,000 SDRs unless he proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents;[222] or

(b) such damage was due solely to the negligence or other wrongful act or omission of a third party.[223]

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[219] The Warsaw Convention was authentic only in the French language. Therefore, in cases of disputes as to interpretation, the original French text was to be consulted.
[220] Eggshell - thin skull principle.
[221] See *IIA*, *supra* note 41; *MIA*, *supra* note 41. See also *Japanese Initiative of 1992*, *supra* note 130; *Council Regulation 2027/97*, *supra* note 18.
[222] Exoneration clause, *supra* note 189.

To say that the Warsaw quantum of liability were grossly inadequate is an understatement. More so, the perpetuation of a limit to liability was a great obstruction to the advancement of Private International Air Law, a contravention of the equitable remedy of *restitutio in integrum*.[224] The Montreal Convention reckoned that the airline industry was now matured. Technological advancements in the industry had enhanced greater safety and certainty of operations and affordable insurance was readily available to cover any risk. Accordingly, the infant subsidy of limitation of liability was removed. This removal of a limit to liability represents the most outstanding contribution of the Montreal Convention to Private International Law.

The carrier is strictly liable in the first tier up to 100,000 SDRs, but it may avoid liability beyond that figure if the facts in sub-paragraphs (a) and (b)[225] above are proved. This is just another novel element of the new convention. "It will be interesting to see how jurisprudence will develop on the basis of this provision..."[226]

By adjusting the new liability regime to be at par with the IATA regime, the new Convention has confirmed that it is in tune with contemporary trends and standards acceptable to industry. Notwithstanding the foregoing, Article 25 contains a provision enabling a carrier to stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in the Convention or to no limits whatsoever. This is a pro-consumer provision because there is no equivalent empowering a carrier to stipulate lower limits than those provided for in the Convention.

This new regime has removed the onerous all necessary measures defence of Warsaw-Hague Article 20 and replaced it with the simpler test of absence of negligence or other wrongful act or omission on the part of the carrier, its servants or agents, thereby presenting a lesser hurdle to carriers that may contemplate defending their liability beyond the first tier. Absence of negligence on the part of the carrier would appear to

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[223] *Ibid.*
[224] This term refers to restoration to the original position, a remedy administered by courts of equity, placing parties in the position they occupied before entering into a transaction.
[225] See *supra* note 189 and accompanying text.

be a less demanding test than one that requires the carrier positively to prove it took all necessary measures or that it was impossible to take those measures.[227]

Article 22(6) of the Convention contains a settlement inducement clause in relation the limits of liability for damages arising out of death or bodily injury of passengers, thus enabling the claimant to recover under the law of the forum or court in which the case is tried,[228] the court costs and other expenses of litigation including interests, the proviso however being only if the amount awarded by the court exceeds the sum that the carrier has offered in writing to the plaintiff within a defined period of time.[229]

3.1.2 Liability for Baggage

The Montreal Convention retained the provision of the much applauded Additional Protocol No. 3[230] by fixing the limit of liability for destruction, loss, damage or delay in respect of checked baggage, at 1,000 SDRs per passenger,[231] unless the passenger had made a special declaration of interest and paid the supplementary sum.[232] The Convention prescribes a special declaration of interest in delivery at destination, a *de novo* contract where the carrier, offers a higher limits of liability in exchange for supplementary payments.

Liability however will only arise upon the condition that the event that caused the damage took place on board the aircraft or during the period, which the baggage was in the custody of the carrier. In the case of unchecked baggage, (articles which the passenger takes along and retains on board by himself) the carrier's liability arises only if damage resulted from its fault or that of its servants or agents.[233] An example is the

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[226] See Milde, *supra* note 17 at 180, para 3.
[227] See Mercer, *supra* note 1 at 92.
[228] *Lex Fori.*
[229] Six months from the date of occurrence causing the damage, or before the commencement of action, if that is later.
[230] See *Additional Protocol No. 3*, *supra* note 9.
[231] *Ibid.*, art. II, calculated on the assumed average checked baggage weight of 20 kilogrammes per passenger.
[232] See *Montreal Convention*, *supra* note 12, art. 22(2).
[233] See *ibid.*, art. 17(2).

case of a sophisticated laptop computer falling from an overhead locker in the cabin while a passenger is trying to open the locker. Here the carrier cannot be liable because there is no fault on its part.

The new limit represents a generous increment from the limit set by Article 22 of the Warsaw Convention, even though it did not cater for the high value baggage or for replacement of things like expensive jewellery that may have been included in checked baggage. However, the carrier is not liable in the event of loss of or damage to any baggage, if the damage resulted from some inherent defect, quality or vice of the baggage.[234] On the other hand, if it is proved that the damage was a result of wilful misconduct on the part of the carrier, the limit of 1000 SDRs will not apply.[235]

3.1.3 Liability for Cargo

In line with Montreal Protocol No. 4,[236] the liability in respect of destruction, loss or damage or delay in respect of cargo was fixed at 17 SDR per kilogram,[237] as long as the event that caused the damage took place during the carriage by air.[238] This limit cannot be broken unless the consignor had made a special declaration of interest and paid a supplementary sum.[239] This ceiling is seemingly absolute and may not be broken by the proof of wilful misconduct. The carrier will be not be liable if it proves that the damage resulted from the inherent defect, quality or vice of the cargo; or from defective packaging performed by a person other than the carrier, its agent or servant; or from an act of war; or from an act of public authority connected with the entry, exit or transit of cargo.[240]

In the wisdom of the Convention it was inappropriate to attempt improvement of any consumer protection in this area since cargo arrangements are generally contracted

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[234] See *ibid.*
[235] See *Montreal Convention*, *supra* note 12, art. 22(5).
[236] See *Montreal Protocol No. 4*, *supra* note 39.
[237] See *ibid.*, art. VII; *contra Montreal Convention*, *supra* note 12, art. 22(3).
[238] See *ibid.*, art. IV. The entire period during which the cargo is in the charge of the carrier.
[239] See *Montreal Convention*, *supra* note 12, art. 22(3).

between commercial enterprises. Hence, the consignor would invariably be in an equal bargaining position with the carrier and probably be equally sophisticated in the way of doing business and therefore would in any event take out adequate insurance to protect its business. Apart from the Montreal Protocol No. 4, the new Convention is the only instrument of unified air law imposing strict liability in carriage of cargo. As such the new Convention merely consolidated the provision of Montreal Protocol No. 4.

3.1.4 Liability for Delay

The Montreal Convention consolidated the provisions of Additional Protocol No. 3,[241] by entrenching a very generous provision for liability for damage caused by delay in the carriage of passengers, placing it at 4,150 SDRs[242] limit per person. This limit would however not apply if wilful misconduct was established on the part of the carrier.[243] On the other hand the carrier may avoid liability for delay if it proves that it took all reasonable measures to avoid the damage or that it was impossible to take such measures.[244]

This is not a lump sum payable under all circumstances, but represents the maximum limit possible subject to the degree of proof by the claimant of actual loss suffered. The Convention reckoned that it was not feasible to hold the carrier strictly liable for any and every delay because this might jeopardise and compromise flight safety precautions. Therefore, liability for delay is based on fault with a reversed burden of proof.

3.1.5 Review of Limits

The Montreal Convention foresaw that the present limits of liability could become inadequate with the passage of time, due to economic factors like changes in standard

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[240] See *ibid.*, art. 18(2).
[241] See *Montreal Protocol No. 4*, *supra* note 9.
[242] See *Montreal Convention*, *supra* note 12, art. 22(1).
[243] See Wilful Misconduct, *supra* note 235.

of living and inflation. To ensure that these limits remained relevant, the Convention installed an innovative mechanism for their periodic review and increases. The review mandated by the Convention is to be conducted by the depository of the Convention, which in this case is the ICAO. Whichever way one looks at it, these provisions are in essence innovative and unique.

3.1.5.1 Five-year reviews

All limits are to be reviewed at five-year intervals by reference to an inflation factor corresponding to the accumulative rate of inflation since the previous revision, or in the first instance since the date of entry into force of the Convention. The first review would take place at the end of the fifth year following the date of entry into force of the Convention. If the Convention does not enter into force, within five years of the date it is first opened for signature, within the first year of its entry into force.[245] The measure of the rate of inflation is to be the weighted average of the annual rates of increases or decreases in the consumer price indices of the states whose currencies comprise the SDR.

3.1.5.2 Automatic increases

A repeat occurrence of the failure to achieve a review of the liability limits for over 25 years was unpardonable. To this end, the new Convention made sure that an automatic review facility was in place. To this end, if the review concludes that the inflation factor exceeds 10 per cent, the depository shall notify States parties of a revision of the limits, and such revision shall become effective six months after such notification. However, if within three months after such notification, a majority of States parties register their disapproval, such revision shall not become effective. The depository will then have to refer the matter to a meeting of States parties for determination.[246] Presumably a

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[244] See *Montreal Convention*, *supra* note 12, art. 19.
[245] See *ibid.*, art. 24(1).
[246] See *ibid.*, art. 24(2).

Diplomatic Conference, since no other forum within ICAO or otherwise would have the legal competence to take such a decision.

3.1.5.3 Review by States

Although mandated at five-yearly intervals, periodic reviews may also take place at any time when one-third of the States parties express their desire for a review, and upon condition that the inflation factor has exceeded 30 per cent since the previous revision. In this situation, the depository must initiate the revision notification process that we treated in the preceding paragraph.[247]

3.1.6 Exoneration

In the true spirit of equity, the new regime provides for strict liability, but not absolute liability. Therefore, it will still be necessary under the new Convention, for the claimant to establish the causation between the death or bodily injury and the extent to which the accident caused such death or bodily injury, as well as the quantum of loss suffered. Hence, the carrier stands exonerated in whole or in part from its liability to the extent that it proves the damage was caused or contributed to by the negligence or other wrongful act of the person claiming compensation or the person from whom such rights are derived.[248] The carrier in respect of all claims may apply this defence of contributory negligence, including claims in the first tier of 100,000 SDRs for passenger injury or death.[249]

This provision debunks the claim that up to the first 100,000 SDRs, the carrier is placed in a position of an insurer of all risks without any defence. For claims not exceeding 100,000 SDRs, the system of strict liability would serve to protect up to 80 per cent of all passengers so that there would be a degree of certainty in respect of the quantum of claims and greater predictability in the quantum of insurance required. This will bring

[247] See *ibid.*, art. 24(3).
[248] See Exoneration clause, *supra* note 189. In cases of contributory negligence.
[249] See *ibid.*

about an early settlement of claims without need for expensive litigation and therefore serve to advance the interest of the travelling public. Also the carrier would be able to exclude liability in excess of 100,000 SDRs by establishing that the accident was not caused by its negligence or other wrongful act or omission, or was caused solely by the negligence or other wrongful act or omission of a third party.

The burden of proof rests on the carrier and the doctrine of *res ipsa loquitur*[250] in certain jurisdictions would facilitate speedy recovery by the passenger. But the counterbalancing feature of the new regime is the exclusion of exemplary, punitive and other non-compensatory damages by Article 29 of the Convention. This Article further provides that in the carriage of passengers, baggage or 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 such limits of liability as are set out in the Convention. This is without prejudice to the question of who the person(s) with the right to bring the suit are and what their respective rights are. Moreover, the right of recourse against third parties is expressly preserved by Article 37 of the new Convention.

3.1.7 · Advance Payments

In the case of aircraft accidents resulting in death or injury of passengers, the Convention obliges the carrier, if required by its national law to make advance payments without delay to a natural person or persons who are entitled to claim compensation.[251] Resolution No. 2 in the Conference final Act also urges carriers to make such advance payments[252] and encourages States to take appropriate measures under national law to promote such action. The quantum of payments has been left to the national law permitting advance payments to prescribe.

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[250] Meaning, *the thing speaks for itself.* The maxim applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant; that a reasonable jury could find without further evidence that it was so caused.

[251] See Advance Payments, *supra* note 190.

[252] Milde, *supra* note 17 at 182, based on the immediate economic needs of families of victims, or survivors of accidents.

This is more of a humanitarian provision to enable such people meet immediate economic needs that usually arise after such occurrences, instead of allowing them to wait for the for the outcome of lengthy litigation. A case that prominently comes to mind is that of the shooting down of Korean Airlines KAL 007 in 1983, where it took 14 years before the Appeals Court in the US could render a decision on the matter in September 1997. Advance payments would not constitute recognition of liability and would be offset against any amounts subsequently paid as damages by the carrier.[253] The consequences of airline accidents and the immediate hardship it works in the aftermath, on victims and survivors might have prompted the inclusion of this provision.

In providing for advance payments, the new Convention also took into account the recent experience of Swiss Air, resulting from the crash of flight 111 in September 1998.[254] It also recognised the European Union Council Regulation providing for advance payments of not less than 15,000 SDRs per passenger in the event of death, illustrating a growing practice recognised by airlines of the need to provide for immediate financial support in the case of death or injury to passenger.

3.2 The Fifth Jurisdiction

The avoidance of conflicts of jurisdiction where suits may be brought is paramount to the unification and advancement of Private International Law. Under the Warsaw System rules, which have been retained by the Montreal Convention, a lawsuit can only be instituted at the option of the plaintiff in the territory of a State party to the Convention[255] as follows:

(a) The Court of the domicile of the carrier.
(b) The Court of the principal place of business of the carrier.

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[253] See Advance Payments, *supra* note 190.
[254] See *infra* note 259.
[255] See Fifth jurisdiction, *supra* note 196.

(c) The Court where the carrier has a place of business through which the contract was made.

(d) The Court at the place of destination.

The existing four jurisdictions are strictly speaking inequitable, because none of them allows action in respect of passenger injury or death to be brought in the jurisdiction where the passenger had his or her domicile or permanent residence. In all fairness, if jurisdiction has been given to the court of the domicile of the carrier, it is simply fair and equitable that it should equally be given to the court of the domicile of the passenger. After all, equality is equity.

To right this wrong, the new Convention created a fifth jurisdiction whereby, in respect of damage resulting from the death or injury[256] of a passenger, an action may be brought in the territory of a State party in which at the time of the accident the passenger had his or her permanent place of residence, and to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement, and in which the carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.[257]

The fact that the inclusion of the fifth jurisdiction was an absolute, non-negotiable requirement of the US should not make one loose sight of the fact that, even in the absence of a Convention, the right to this jurisdiction was available to the claimant under the general principles of Private International Law. Moreover, this reform will not benefit US nationals only. The Guatemala City Protocol had long recognised the desirability and equity of this jurisdiction.[258] The continuos denial of this right to claimants, by Article 28 of the Warsaw Convention worked enough hardship on the

[256] It will be interesting to watch the development of jurisprudence as per the interpretation of injury here.
[257] See *Montreal Convention*, *supra* note 12, art. 33(2).
[258] See *Guatemala City Protocol*, *supra* note 9, art. XII.

advancement of Private International Air Law.[259] As a matter of fact, most legal systems allow claimants to bring action at the place of their principal or permanent residence, as long as the defendant has some form of commercial presence in the same place.

Sceptics of this additional jurisdiction were primarily concerned with the fact that it will encourage forum shopping,[260] a suggestion that the notion of forum non convenience should be woven into the provision. There was also the fear of predatory awards while defending claims in award generous jurisdictions, especially in the US, with her liberal system of discovery and jury system. In response, the Montreal Convention circumscribed the conditions, under which this jurisdiction would be available,[261] by restricting it to:

(a) the principal and permanent residence of the passenger;

(b) to or from which the carrier operates services for the carriage of passengers by air either on its own aircraft or on another carrier's aircraft pursuant to a commercial agreement; and

(c) such principal and permanent residence being a place in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

For avoidance of doubt, the Convention expressly provides that the principal and permanent residence means the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger shall not be a determining

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[259] Some next of kin of French victims of the Swissair accident of 1 September 1998 (on a flight from New York to Zurich) were prevented from filing suits in France on the premise of this Article, because the tickets of their deceased were bought in Switzerland.

[260] *Montreal Convention*, *supra* note 12, art. 33(4). Providing that questions of procedure will be governed by the law of the court seized of the case, in this instance the law of the court of the forum chosen by the claimant.

[261] See *ibid.*, art. 33(1) & (2).

factor[262] in this aspect. Equally, actual commercial presence as opposed to a mere agency arrangement[263] was a mandatory requirement if the 5th Jurisdiction was to apply. A commercial agreement was defined as an agreement made between carriers relating to the provision or marketing of their joint services for carriage by air.[264] Therefore the qualification of a code sharing arrangement will depend on whether it relates to the provision or marketing of joint services for carriage by air. In addition, the carrier must conduct its business from premises leased or owned by it or by such other carrier with which it has the commercial agreement.

The absence of any express provisions in respect of forum shopping notwithstanding, especially in jurisdictions where the principle of forum non convenience applies, it is still a prerogative of the courts to dismiss law suits on this ground in all circumstances of the case, if it would not be a convenient forum for the matter to be determined there. Especially in cases where the vital connecting events relating to the circumstances of the accident are all disconnected from the principal and permanent resident of the claimant.

Therefore, if a US permanent resident flies from New York to Paris on a US carrier on its own code and then flies from Paris to Abidjan on a Cote d'Ivoire carrier with which the US carrier has a code share arrangement. If an accident occurs in the Paris-Abidjan sector, the Cote d'Ivoire carrier will not be subject to the fifth jurisdiction in the US. However if the Cote d'Ivoire carrier had its code on the US carrier on the New York-Paris sector (even if not the carrier on the US resident's ticket) then it will be subject to jurisdiction in the US.[265]

The involvement of the US resident satisfies the first requirement. The third requirement is met when the Cote d'Ivoire carrier conducts business or has an office in

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[262] See *ibid.*, art. 33(3)(b).
[263] *Ibid.*, art. 33(3)(a) distinguishes between a sales agency agreement and a mere inter-line agreement.
[264] See *ibid.*
[265] A summary of a hypothetical example, given by the US delegation in response to a direct enquiry by the Cote d'Ivoire delegation during the 9th meeting of the Montreal Diplomatic Conference Commission of the whole.

the US. The second element is satisfied if the carrier operates into the US (either directly or contractually in a commercial code share). Then the carrier will be subject to the fifth jurisdiction in the US.

From the foregoing, the new provision has cumulatively established a rather demanding hurdle for claimants wishing to bring suits for passenger injury or death to negotiate. The greatest exposure of a foreign carrier to suits in a particular jurisdiction will be on its (own operated or code share) services to and from that particular jurisdiction and not in the carriage of permanent residents of that jurisdiction between two foreign points. At the very worst, Article 29 of the Convention will protect the carrier against non-compensatory damages.

3.3 Documentation

No advancement or modernisation of Private International Air would be worthwhile without acknowledging and accommodating the significant technological developments in the aviation sector, in which information relating to contracts of carriage can now be stored and shared electronically. Chapter II of the Montreal Convention represents an important modernisation in this realm and a significant departure from the formalistic documentary requirements of the Warsaw system.

3.3.1 Passengers Ticket and Baggage

With respect to passengers, the Convention provides that the document of carriage to be delivered to a passenger could either be in a standard form indicating places of destination and departure and at least one stopping place within the territory of another state, or in substitution thereof, any other means that preserves the above information. If such other means is used, the carrier must offer to deliver to the passenger a written statement of the information so preserved.[266] The Warsaw System prescription that a baggage check should be delivered with the passenger ticket has been expunged but the

[266] See Passenger documentation, *supra* note 198.

requirement that "the passenger shall be given written notice to the effect that where this Convention is applicable, it governs and may limit the liability of carriers..."[267] was retained. The carrier is however still required to deliver to the passenger a baggage identification tag for each piece of checked baggage.[268]

These developments have been applauded by airlines as a gateway into the long awaited electronic ticketing and other data processing age. The huge sums spent on printing documents and the man-hours wasted on manual paper work will be saved. The lengthy book-like, passenger tickets that are being rolled out from printing shops around the world everyday will become history, while electronic tickets and other innovations like swipe-cards will allow for the expeditious recording and processing of travel information for the mutual benefit of the carrier and the consumers.

3.3.2 The Air Waybill

Article 5 of the new Convention has simplified and standardised the contents of the air waybill or cargo receipt. The mandatory information to be contained in an air waybill include, the place of departure and destination, the agreed stopping place if departure and destination are within the territory of the same State, and an indication of the weight of the cargo.

As with the passenger ticket, the delivery of the air waybill can be substituted by any other means, which preserves the record of the carriage. But the carrier, if so requested by the consignor, must deliver to the consignor a receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means.[269]

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[267] See Baggage documentation, *supra* note 199.
[268] See *ibid.*
[269] See Cargo air waybill, *supra* note 200.

3.3.3 Nature of Cargo

The simplification sought by the new Convention has been achieved by the exclusion of the requirement that, an indication of the nature of the cargo be made obligatory in the air waybill. In the wisdom of the Convention, in so far as dangerous goods were concerned, there were express regulations prescribed by ICAO standards[270] and in so far as liability was concerned, the carrier would not be liable for damage to cargo resulting from inherent defects, quality or vice of that cargo.[271] Therefore the air waybill was not required to indicate the nature of the cargo concerned.

Notwithstanding, the new Convention had to counterbalance the seeming advantage, which industrialised countries appeared to be having from the overall package. This was to ensure the unreserved acceptability of the new instrument to all stakeholders. As a result, Article 6 provides that "the consignor may be require if necessary, to meet the formalities of customs, police and similar public authorities, to deliver a document indicating the nature of the cargo.[272] This provision does not however create for the carrier any duty, obligation or liability.

3.3.4 Non-compliance

The strict rules of sanctions for non-adherence with rudiments of documentation were not inherited from the Warsaw system. With regards to passengers and baggage, Article 3(5) of the new Convention provides that non-compliance with the provisions relating to documentation (including the requirement of notice) shall not affect the existence or validity of the contract of carriage, which shall, nonetheless be subject to the rules of the Convention including those relating to limitation of liability. Thus a carrier's liability is not exacerbated if it fails to deliver a ticket, a written statement or prescribed notice. Article 9 contains the same provision in respect of cargo. The absence of

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[270] See Annex 18 to the Chicago Convention, which provides express regulations for transportation of dangerous goods.
[271] See *supra* note 240.
[272] See *Montreal Convention*, *supra* note 12, art. 6.

sanctions for non-compliance is a positive way forward from the provisions of the Warsaw System where non-compliance with the rudiments of documentation, especially ticketing defects provided a fertile ground for wanton litigation, wherein claimants always often broke the limits of liability through questionable decisions.

The concession in this new Convention is very logical in view of the new unbreakable limits for cargo loss, damage or delay. On the other hand, the removal of limits of liability in cases of passenger's death or bodily injury has rendered unnecessary the need for such sanction and resorts to breaking the limits of liability by all means of the past era. On the average, the new rules of documentation represent a major advancement in the achievement of modernisation, consolidation and uniformity, while recognising contemporary technological developments, but ensuring that the rules of application of the Convention, in particular that of liability cannot be avoided on the basis of wrong documentation.

3.4 Insurance

Another significant innovation of the new Convention is an obligation requiring carriers to maintain adequate insurance covering their liability under the Convention.[273] There have been instances in the past where carriers have operated internationally without adequate insurance cover. The capabilities and capacity of such carriers in liability to compensate claimants for damages, in cases of accidents can be very unpredictable. An obligation as to compulsory adequate insurance is more or less a guarantee or an assurance that the carrier is capable and will meet his liability.

All States Parties to the Convention are obliged to require their carriers to maintain adequate insurance covering their liability under the Convention. As a corollary, a State party has the right to require a foreign carrier operating into its territory to furnish evidence that it maintains such adequate insurance. This provision provides increased

[273] See *ibid.*, art. 50.

consumer protection and gives greater integrity to the regime established by the Convention.

3.5 Carriage by air performed by a person other than the contracting carrier

To further its objective of modernisation and consolidation, the new Convention modified and incorporated the provisions of the 1961 Guadalajara Convention as regards carriage by air performed by a person who is not a party to the contract of carriage, to reflect rudiments of code-share arrangements. The consolidation of these provisions in a single instrument is a positive advancement for Private International Air Law. Articles 39-48 of Chapter V of the Convention provide as follows:

(a) If the actual carrier performs the whole or part of the carriage, both the contracting carrier and the actual carrier would be subject to the rules of the Convention, the contracting carrier for the whole of the carriage, while the actual carrier solely for the carriage which it performs;[274]

(b) The acts and omissions of the actual carrier, its servants and agents acting within the scope of their employment, shall be deemed to be those of the contracting carrier in relation to the carriage performed by the actual carrier;[275]

(c) The acts and omissions of the contracting carrier, its servants or agents acting within the scope of their employment, shall in relation to the carriage performed by the actual carrier, also be deemed to be those of the actual carrier, subject to the limits of liability specified in the Convention.

(d) However, that any special agreement[276] under which the contracting carrier assumed obligations not imposed by the convention or any waiver of rights or

[274] Respective liability, *supra* note 203.
[275] Mutual liability, *supra* note 204.

defences conferred by the Convention or any special declaration of interest under which the contracting carrier assumed obligations for delivery of baggage or cargo shall not affect the actual carrier unless agreed to by it.[277]

(e) In relation to carriage performed by the actual carrier, its servants or agents or those of the contracting carrier acting within the scope of their employment are entitled to avail themselves of the conditions and limits of liability applicable to the carrier whose agents or servants they are;[278]

(f) In relation to carriage performed by the actual carrier, the aggregate amounts recoverable from that carrier and the contracting carrier and their servants or agents acting within the scope of their employment shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier; but none of those persons shall be liable for a sum in excess of the limit applicable to that person;[279]

(g) In relation to carriage performed by the actual carrier, an action for damages may be brought at the option of the plaintiff against that carrier or the contracting carrier or against both together or separately, but if action is brought against only one of the carriers, that carrier shall have a right to require the other carrier to be joined in the proceedings;[280]

(h) Any contractual provision tending to relieve the contracting carrier or the actual carrier from liability under Chapter V of the Convention or to fix a lower limit than that which is applicable, shall be null and void but the nullity does not involve the

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[276] *Montreal Convention*, *supra* note 12, art. 25, grants a carrier the right to stipulate higher limits of liability than those provided for in the Convention. See also *ibid.*, art. 27, which grants freedom to contract.
[277] Mutual liability, *supra* note 204. A significant modification.
[278] Servants and Agents, *supra* note 206.
[279] Aggregate damages, *supra* note 207.
[280] Address of claims, *supra* note 208.

nullity of the whole contract which remains subject to the provisions of that Chapter;[281]

(i) The provisions of Chapter V do not affect the mutual relations of the contracting and actual carrier (apart from the right of one carrier to require the other carrier to be joined in the proceedings), including the rights of recourse and indemnification.[282]

The new convention being in tune with the growing practices in the industry had provided these regulations to facilitate code-sharing arrangements. These rules will govern the relationships between the contracting carrier and the actual carrier, and by extension, between the actual carrier and the passenger, in view of the fact that some actual carriers may not have any direct contractual or other relationship with the passenger or consumer.

3.6 Relationship with other Warsaw System Instruments

The Montreal Convention in its determination to modernise and consolidate the rules of Private International Air Law foresaw that allowing States, which ratified the new Convention to remain parties to the other instruments (which it intended to consolidate and replace), would be counter-productive and a contradiction in terms. To eliminate fragmentation in the emergent Private International Air law regime once and for all, the Montreal Convention instituted a relationship with the instruments of the Warsaw System. The rule being that the new Convention shall prevail over any other rule of international carriage by air between States Parties to the new Convention, that are also party to other Warsaw instruments.[283]Article 55 of the Montreal Convention establishes its relationship with the instruments of the Warsaw System, to the effect that the Montreal Convention shall prevail over any other rules that apply to international carriage by air, as follows:

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[281] Invalidity of contractual provisions, *supra* note 209.
[282] Mutual relations of carriers, *supra* note 210.
[283] See *Montreal Convention*, *supra* note 12, art. 55.

1. Between States Parties to the Montreal Convention by virtue of those States commonly being Party to:

(a) The Warsaw Convention.
(b) The Hague Protocol.
(c) The Guadalajara Convention.
(d) The Guatemala City Protocol.
(e) Additional Protocols Nos. 1, 2, & 3 and Montreal Protocol No. 4.

2. Within the territory of any single State Party to this Convention by virtue of that State being Party to one or more of the instruments referred to in sub-paragraphs (a)-(e) above.

In the old order, States could be party to as many separate and successive instruments as they desired. This largely accounted for the excessive fragmentation, which is one of the issues that the new Convention has come to address. The provision of Article 55 has decisively and conclusively addressed the problem, ensuring perpetual unity of law - a positive way forward from the old order.

3.7 Final Clauses

As part of the overall balancing formula, the final clauses of the Montreal Convention addressed many novel issues, in its bid to achieve the highest degree of universality and acceptability. We will proceed here to examine some of them.

3.7.1 Signature by Regional Economic Integration Organisations

In direct response to the yearnings of the European Union and in recognition of the emerging trends of integrated regional political-economic blocs, most of which have distinct international legal personalities, the new Convention in Article 53(2), provided that the Convention shall be open for ratification and signature by Regional Economic

Integration Organisations. For its purpose, the Convention defined a "Regional Economic Integration Organisation" as "any organisations constituted by sovereign States of a given region, which has competence in respect of certain matters governed by this Convention, and has been duly authorised to sign and to ratify or accede to this convention". Such organisations could become party to the Convention in respect of matters within their competence but not as a State Party.[284]

As a result of this development, an organisation like the European Union, to whom authority in respect of aviation matters has been vested by all members, can become party to the Convention. The European Union though not a party to the Warsaw system, in 1997 adopted as law to be applicable to its member States from 17 October 1998, a Council Regulation on Air Carrier Liability.[285] This regulation, which adopted the principles of the Japanese initiative became applicable to both domestic and international flights and in no small measure helped to advance the revision of the Warsaw System in Europe. In the wisdom of the Convention, the inclusion of this type of organisations would greatly enhance the unity and durability of the Convention including its ability to keep pace with future development in this area. A precedent on this matter was set at the United Nations Convention on the Law of the Sea in 1982.

3.7.2 States with diverse systems of law

The Montreal Convention recognised that there were states like Canada and China with different territorial units where different systems of law may apply in relation to matters dealt with in the Convention.[286] Article 56 enables such States to extend the ratification of the Convention to all its territorial units or only to one or more of them.[287] The Convention understands different systems of law to encompass different social and economic systems and it is very likely that China for example will ratify the Convention with respect to Hong Kong and Macao first, as a test run, before accepting

[284] Therefore, the Economic Community of West African States (ECOWAS) could become party to the Convention if vested with such powers.
[285] See *Council Regulation 2027/97*, *supra* note 18.
[286] A typical example is Hong Kong and Macao in China.

it for the entire territory of mainland China. It will also be interesting to observe the reaction of other states like Canada in respect of the province of Quebec and Britain in this regard.

3.7.3 Reservations

To preserve the sanctity of the provisions of the Convention as an integral whole, the new Convention has ensured that reservations are permitted except in very limited areas. The Convention thus permits a State Party to make very limited reservations as to its application.[288] A State could make a declaration that the Convention would not apply only in the following situations:

(a) To international carriage performed and operated directly by the State for non-commercial purposes in respect of its functions and duties as a sovereign State; or

(b) Carriage for its military authorities on aircraft registered or leased by that state, the whole capacity of which has been reserved by or on behalf of such authorities.

3.7.4 Language

Unlike the Warsaw Convention that was authentic only in the French Language,[289] the Montreal Convention is equally authentic in six languages: Arabic, Chinese, English, French, Russian and Spanish.[290] This ensures wider understanding and prospects of broader acceptability. French is no longer the controlling diplomatic language.

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[287] See *Montreal Convention*, *supra* note 12, art. 56(1)-(3).
[288] See *ibid.*, art. 57.
[289] See *supra* note 219.
[290] See *supra* note 184.

Conclusion

If the main objective of the Montreal Convention was the modernisation and consolidation of the instruments of the Warsaw System, then it has to be acknowledged that this issue has been properly addressed. The new consolidated text has realised the aims of the original Warsaw Convention, of uniformity and simplicity in the regime of international carriage. In addition, modernisation of the regime in line with contemporary realities has equally been achieved. The necessity to establish a new regime, which would inculcate pressure towards conformity, like a requirement that states denounce all previous instruments or versions and become bound only by the new one, has been fulfilled by the provisions of Article 55 of the Montreal Convention. Hence, the possibilities of fragmentation of instruments have permanently been foreclosed in the emerging regime.

The new Convention of 1999 has tacitly preserved the structure and maintained the format and familiar wordings of the Warsaw Convention of 1929, while at the same time responding to the needs of all stakeholders in contemporary international carriage by air, by injecting new modernising and innovative principles. This it has done to ensure that civil aviation continues to benefit from over 60 years of established judicial precedents in the interpretation and application of the provisions of the Warsaw Convention.

It has also incorporated in one text other instruments of the Warsaw System like the Guadalajara Convention, Montreal Protocol No. 4., including features of the Guatemala City Protocol and Montreal Additional Protocol No. 3. This act of consolidation has greatly strengthened the potentials of continuity of modern airline acceptable practices like code-sharing, electronic documentation and regime of liability, while eliminating the multiplicity of instruments, which plagued the Warsaw system. In addition, the interests of all stakeholders in international carriage by air like insurers; shippers, air carriers, passengers and governments have been improved by the new Convention.

The guarantee of global application of such changes as above could only be achieved by the expression of will of States, under the auspices of ICAO. This is the global organisation responsible for international civil aviation and global problems require global solutions. Other unilateral initiatives could modify but not amend any of the substantive provisions of the Warsaw Convention, which in themselves were imperative.[291] The Convention could only be amended in accordance with the International Law of Treaties[292] and ICAO was the only forum in which new modernisation or consolidation of Private International Air Law could be accomplished. The new instrument is in essence a separate and distinct new Convention and not an amendment to the Warsaw System by a further protocol.

The participation of the US in the creation of this Convention and the concessions that have been made to her interests has greatly enhanced the prospects of the new Convention. History has shown that the participation of the US is vital to the success of any new instrument of international carriage by air. The Convention incorporates the air carrier liability regime approved by the US Department of Transport and it has introduced the Fifth jurisdiction, which was a non-negotiable demand of the US. In addition, the new regime has paved way for the introduction of electronic documentation and processing.

This writer believes that the Montreal Convention has lived up to the expectation of key interest groups in the US and as such is politically acceptable and satisfactory. This should provide the springboard for its timely approval and ratification. Once the US ratifies this Convention, its coming into force will be almost automatic because every other state that intends to continue operating into the US will follow suit. Just as the US effectively determined the content and acceptance of the key provisions of the new Convention, "so will it influence, if not control, acceptance of the Convention and its entry into force."[293] Having endorsed the Montreal Convention in principle pending the

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[291] *Warsaw Convention*, *supra* note 9, art. 32 expressly declares null and void any special agreements or clauses purporting to infringe the rules laid down by the Convention.
[292] See *Vienna Convention*, *supra* note 127.
[293] Mercer, *supra* note 1 at 106.

outcome of domestic political scrutiny, the ball is now in the court of the US, for he who sought equity to do equity. After the US ratifies the Convention, she is bound to give notice to the world of her denunciation of other instruments of the Warsaw System that she was hitherto party to. Other states will then hurry to accept the new Convention because their relationship with the US from then on will be based on the Montreal Convention.

In conclusion, if the true integrity of the Convention is to be measured by the speed and breadth of its ratification and application since 1999, then for now the prospects of the Montreal Convention are very low. The prospects were more encouraging in 1999, when 52 States from all geographical regions signed the Convention on the first day it was opened for signature.[294] This gave rise to the general initial optimism that the new Convention would come into force without the characteristic delay and procrastination that have impeded earlier governmental attempts to reform Private International Air Law. But from then till now (3 years after), only 14 States have actually ratified the new instrument. The hopes of those experts who believed that the Convention would come into force as early as the end of 2000 has been dashed. Therefore, the appeal made in Resolution 1 for collective action, by urging States to ratify the Convention as soon as possible is an appeal, which in the opinion of this writer should be concentrated on the US, the panacea for ultimate ratification.

[294] Representing 66% of all passengers carried on total scheduled flights.

Chapter Four

A Catalogue of Problems

Having carefully evaluated the lofty prospects of the Montreal Convention in the previous Chapter, we will we proceed to closely examine and see if the new Convention has actually justified its creation as the panacea for all ills of the Warsaw System, as held by the proponents of the Convention. What is really novel about the Convention? Was a new convention even necessary in the first place? What are the inherent defects in the Convention and are the defects repairable? Do we then need another amending instrument or another Convention? This Chapter will attempt to answer these questions and others.

4.1 Necessity of a Convention

The mere fact that the Warsaw System was grossly inadequate and needed major adjustments does not justify the necessity of a new Convention. It has been severally held that the desired changes could have been met by measures taken within the system. From practical experience, major changes of great importance in Private International Air Law have been made without a treaty. An example is the Montreal Agreement of 1966. This Agreement is not an instrument of international law (which would require the action of states). This was rather a package under the special contract[295] provision, offered to the US by airlines within IATA, after the US threatened to denounce the Warsaw Convention on 15 November 1965.[296] Yet it brought about an increase in limits of compensation and set the ball rolling to the eventual reversal from fault liability to risk liability, as we have it now in Private International Air Law.

There is a line of thought that encouraging airlines to adopt uniform special contracts that were aimed at rectifying the various inadequacies was a better way of proceeding

[295] See *Warsaw Convention*, supra note 9, art. 22(1).
[296] See *Montreal Agreement, supra* note 40.

within the System. It is strongly argued that the availability of the special contract option as a precedent for change without altering the fundamental treaty negates the necessity for a brand new Convention.

In the alternative, some writers have opined that a simple amending protocol was all that was necessary to introduce the desired changes into the system,[297] as there was no pressing need for such a new ambitious and unnecessarily revolutionary multilateral treaty like the Montreal Convention. In their thinking, the large number of States involved will make it very difficult to achieve agreement and the new Convention will create just another regime for air carriers and lawyers to contend with, thus complicating rather than simplifying the system. Experience with previous ICAO amending instruments had shown that the prospects of entry into force of any new instrument were slim. States were better at concluding such multilateral treaties than at ratifying them and bringing them into force, and this was bound to be the fate of the new effort to modernise and consolidate the whole system into a single text.

Other authorities have contended that a consolidated text on its part would not clear up the situation, let alone solve the problems. At best it will only confuse matters further by adding another legal instrument to the existing series; therefore the status quo should be maintained.[298] The experience of the past, where States like the US held tight to only the original Warsaw Convention for years, despite the existence of new instruments, should be a warning signal that it is just a matter of time for this new instrument to become just another relic in the kitty of the Warsaw System.

4.2 Genuine Innovation

If genuine innovation is to be defined as those features of the new Convention that have no formal precursors either in the Warsaw System or the unilateral initiatives,[299] then one can comfortably conclude that the Montreal Convention has added nothing

[297] See "Future for Warsaw", *supra* note 29 at 42.
[298] Mankiewicz, *supra* note 148.
[299] See Caplan, *supra* note 14 at 196.

substantial to the existing status quo. ICAO has just succeeded in piecing together things that have already been in place and as such does not deserve any credit for the new initiatives that led to the so called modernisation of the Warsaw System. The most important provisions of the Montreal Convention have been drawn from already existing instruments.

The most outstanding provision of the new Convention is the passenger liability regime as contained in Article 17. This was wholly a reproduction of the regime of the IATA Inter-carrier Agreements and its implementation won't be novel to those airlines that have already adopted IIA and implemented the MIA. On another hand, the limits of liability for delay to passengers and for destruction, loss, damage or delay to checked and unchecked baggage was all copied from the Guatemala City Protocol. More so, the toothless ticket requirements to which have been added a streamlined notice about the possible applicability of the Convention and its effects were reproduced from The Hague Protocol. Even the controversial Fifth Jurisdiction was developed from a fairly simpler concept in the Guatemala City Protocol.

Apart from the loose-ended provision for compulsory insurance, the other peripheral issues, the major provisions of the Montreal Convention are concerned more with details than with substance.[300] Existing agreements and instruments have already covered the matters of greatest importance to air carriers and passengers and no act of consolidation can qualify ICAO to reap where it did not sow.

4.3 The Preamble

The preamble to a Convention may not have the force of law yet it reveals a lot about the design and purpose of the instrument and comes in handy when interpreting the instrument.[301] Judging from its preamble, the Montreal Convention is already biased when it expressly states as one of the factors underpinning the Convention:

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[300] See *ibid.* at 205.
[301] See Whalen, *supra* note 18 at 14.

"Recognising the importance of ensuring protection of the interest of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution...."[302] It is therefore more of a Convention for passengers and consumers than for airlines. Perhaps this is why consumers and passengers are not required to prove fault before liability attaches to the carrier, and no attempt has been made to define what type or measure of damages will constitute restitution.[303]

This Convention is bound to be warmly embraced by passengers and consumers while the air carriers and their insurers are bound to view it with much suspicion. The consensus package of the new Convention was drafted by a group of delegates called "Friends of the Chairman".[304] Unfortunately, the airlines had few friends present there.[305] By and large, with some notable exceptions, these Government representatives had little familiarity with or experience with the Convention or knowledge about litigation experience in cases brought under the Convention.[306] This is because even in the domestic airline regime of the US where the interest of consumers paramount in legislation and law generally, it has never been thought unfair, or adverse to consumer interest to require them to prove fault before liability is attached to the carrier.

4.4 Scope

The implication of Article 1(1) of the Montreal Convention is a seeming suggestion that the scope of the new instrument has been extended beyond the traditional parameter of commercial transportation by air.[307] On the contrary the instruments of the Warsaw System have always been rigidly associated with international transportation on a commercial airline.[308] According to the above Article, the Montreal Convention applies to international transportation performed by aircraft for reward and to gratuitous carriage by aircraft performed by an air transport undertaking. The meaning of

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[302] *Montreal Convention*, *supra* note 12, preamble, para. 3.
[303] This has been left to national law to decide.
[304] See *supra* note 179.
[305] See Whalen, *supra* note 18 at 15.
[306] See *ibid.*
[307] See *ibid.*

undertaking has not been explained any further in the Convention, leaving one with the discretion of extending the Convention beyond the traditional grounds of commercial air transportation. As a result, it can be safely presumed that gratuitous air transport undertakings of private companies that are not airlines have been contemplated by the new Convention.[309] An example in this respect would be the air transport undertaking of a company like Microsoft Corporation which flies customers free of charge all around the world or a media organisation like Cable News Network (CNN) that flies both its staff and news makers free of charge.

The two organisations above may not be in the air transportation business, but they are involved in gratuitous carriage performed under an air transport undertaking of some sort. In the absence of further clarifications, the Montreal Convention rules can safely be extended to cover the air transport operations of these companies. In an extreme situation, the vagueness of the air transport undertaking clause can extend the presumptive fault and unlimited liability regime of the new Convention to cover a gratuitous trip with a friend in a private aircraft.[310] Therefore, Article 1(1) of the Montreal Convention should be viewed with caution and it needs to be closely studied by general aviation and business aircraft interests and their insurers.[311]

By not expressly defining the vital term carrier or such other persons contemplated by the Convention, the Montreal Convention has reinforced the vagueness of its scope and created a permanent confusion as to who the Convention really applies to. As long as this term remains undefined the presumptive fault regime of the new Convention and its unlimited liability consequences will perpetually haunt and those other non-airline entities, which are so juxtaposed with airlines, as to be deemed carriers or agents of carriers.[312] The multiplier effect will be an increase in the cost of insurance premium for this innocent group.

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[308] The Warsaw System language for gratuitous carriage was *enterprise.*
[309] See Whalen, *supra* note 18 at 15.*Supra* note 305.
[310] See *ibid.*
[311] See Whalen, *supra* note 18.

As a result of this lacuna, which was inherited from the Warsaw Convention, courts in jurisdictions like the US will continue to hold baggage handlers, freight forwarders and even travel agencies as coming within the contemplation of the Convention as carriers. When in actual fact these entities may just be performing some functions of the carrier by contract or as agents. In *Royal Ins.* v. *Amerford Air Cargo*,[313] the term carrier was extended to cover freight forwarder and in *Kabbani* v. *International Total Services*"[314] the Warsaw Convention was applied to govern claims against companies that performed security services for a carrier at various airports.

Some writers have opined that under the present System, a courtesy-relationship without a contract of carriage by a person who is not a carrier would be outside the Warsaw Convention. This position may no longer hold under the Montreal Convention, where the term carrier is not defined coupled with the use of the word undertaking.[315]

4.5 Regime of Liability

The regime of liability entrenched in the new Convention is plagued with a myriad of problems. Unfortunately, the regime does not present any innovation in substance because all its provisions were hurriedly copied from existing instruments. The regime incorporates in substance, the liability provisions of the 1995 IATA Inter-carrier Agreements (the IIA and the MIA) relating to liability for passengers injury and death, (Articles 17 and 21). The provisions of the Guadalajara Convention and Montreal Protocol No. 4 have also been incorporated to govern liability with respect to cargo (Chapter V Articles 4-15). Lastly, the regime governing liability for delay for passengers and that of destruction, loss, damage or delay to checked or unchecked baggage was copied from Montreal Protocol No. 3. Here we will proceed to examine the significant problems in these provisions.

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[312] See generally *ibid.*
[313] [1987] 679 SDNY 654 F. Supp.
[314] See [1992] 1033 DDC 805 F. Supp.
[315] See Whalen, *supra* note 18 at 16.

4.5.1 Passenger Liability

The new liability regime with respect to passengers, set out in Chapter III of the Montreal Convention[316] is basically the regime of the IATA Inter-carrier Agreements, presenting no innovations whatsoever. Rather, it is a step backward from its precursor in the text of the Guatemala City Protocol which provided for personal injury, a wider term than bodily injury which the new Convention has entrenched. This is a deliberate unfair effort to deny claims for mental trauma and other mental injuries permanently. The fact that these types of injuries actually persist will continue to haunt the Montreal Convention like a ghost, bringing enough pressure to bear on the regime. As per the vague interpretative statement[317] attached to the Convention, it is to be hoped that jurisprudence will evolve under national law, to interpret the term bodily injury to include mental injury. With the same flexibility (and lack of unity) as we have under the present system, jurisprudence will eventually recognise that stand-alone mental traumas may be as debilitating as a physical trauma.[318] This will definitely plunge Private International Air Law into another disunity crisis.

The new regime has preferred the vague concept of accident to the wider more definable concept of event, which was used in the Guatemala City Protocol. The term accident can be extended to cover quite a number of issues, including a passenger's air rage, which really has nothing to do with the carrier's responsibility. It may therefore be safely assumed that as long as it occurs within the parameters set in Article 17, an accident need not be related to typical aviation risks before it triggers the carrier's liability. The sum total of the new liability regime may well be that the air carrier is deemed to be an insurer of all risks on board and in the course of any of the operations of embarking or disembarking, notwithstanding that such risks are not related to the carriage and are beyond its control.[319]

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[316] See *Montreal Convention*, *supra* note 12, art. 17(1).
[317] A rather misleading attachment to the convention to give an appearance that stand-alone mental injury was recoverable via jurisprudence under national law, despite the plain language of the Convention.
[318] See Milde, *supra* note 17 at 178.

Article 21 holds the carrier strictly liable up to 100,000 SDRs in provable damages (but without proof of fault) for personal injury and death, and presumptively liable thereafter to an unlimited amount unless:

(a) the carrier can prove that the damage was not due to its negligence, or

(b) it was due solely to the negligence of a third party.

These two statements are tautological, as they seem to propose the same conditions. A carrier who proves that it was not negligent will invariably have proved that someone else was solely responsible for the accident. Nevertheless, this provision is unrealistic, because in actual litigation, with the operation of the doctrine of *res ipsa loquitur*, it would be a colossal task for the air carrier to prove that it did nothing wrong at all. As such, even the slightest negligence would then result in unlimited liability.

In upholding a limit of liability[320] of up to 100,000 SDRs without any proof of fault in the first tier, the new regime negates the cardinal rule of Natural Justice *audi alteram partem*.[321] The reasons advanced to support this anomaly as satisfactory as they may seem, cannot justify the limit in the in the first tier, which is rather too high considering that fault is merely presumed and not proven. In addition, shifting the onus of proof away from the claimant in the second tier runs contrary to the cardinal common law rule in the Law of Evidence, where the onus of proof should be on the claimant, to prove beyond reasonable doubt.

One cannot but agree with those who are dissatisfied with the Montreal Convention because the liability in the first tier is too high and the burden of proof in the second tier ought to be on the claimant. If the Diplomatic Conference had chosen to be more original in innovations, they would have reckoned that there was a way out of these

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[319] See generally *ibid.*

[320] The new regime of liability for passenger injury and death is actually unlimited. Reconciling this with Article 25, can the carrier stipulate a limit higher than unlimited?

[321] Meaning, hear *the other side* before you allocate liability

fundamental legal deviations. The thought of Mr. G.A. Mercer here provides a possible alternative: "It is highly likely that had the IATA agreements merely adopted a greatly increased limit rather than open-ended liability in the context of presumed fault, a change to the orthodox position of the burden being on the claimant would have been achievable...."[322]

Having recognised arbitration as desirable alternative in dispute resolution in Article 34,[323] the new Convention chose not to require arbitration in for passenger claims. This alternative would have reduced the number of litigation and the costs of litigation for carriers and consumers alike.

4.5.2 Liability for Delay

Article 22(1) of the Montreal Convention reduced the limit of claim for delay per passenger from US $ 8,300 to 4,150 SDRs (about US $ 5,640). Notwithstanding that there is no substantive change, this provision is capable of inviting class action against carriers who delay a flight for even for safety reasons, if those delays were preventable.[324] It would not serve the public interest if a delay caused by an airline captain who wants equipment checked for safety reasons prior to a flight results in liability for the carrier. Although delays caused by mechanical checks were preventable, exposing carriers to liability therefrom might jeopardise and compromise future diligent flight safety precautions.

On the other hand, Article 22(5) places an unnecessary cumbersome burden on the claimant in order to break the limit of 4,150 SDRs. The passenger is required to prove that the delay causing damage resulted from the act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result. The chances that a carrier's conduct will ever meet

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[322] See Mercer, *supra* note 1 at 91.
[323] It expressly permits the insertion of arbitration clauses in cargo air waybills and recognises the enforceability of such provisions.
[324] See Whalen, *supra* note 18 at 18.

all the parameters above so as to enable a *bonafide* claimant or his class to break the limit of liability of 4,150 SDRs is very remote. This might provide yet another fertile ground for litigation and dubious interpretations, all in an effort to break the limit of liability per passenger for delay.

4.5.3 Liability for Baggage

Article 22(2) of the Montreal Convention limits the liability for destruction, loss, damage or delay baggage to 1000 SDRs unless a special declaration of interest in delivery at destination has been made and any supplementary charge paid. Most passengers might assume that they would have a special interest in delivery at destination regardless of whether a declaration is made. But the declaration has to be made when checked baggage is handed to the carrier. Therefore it is by no means certain whether the declaration can increase the overall limit of 1000 SDRs, or whether it is restricted to checked baggage, particularly as the regime of liability is not the same for checked and unchecked baggage.[325]

In the case of unchecked baggage, (articles which the passenger takes along and retains on board by himself) the carrier's liability arises only if damage resulted from its fault or that of its servants or agents.[326] In this context, damage seems to mean legal damage rather than physical damage. "A wise traveller therefore will always have his baggage comprehensively insured on all-risks basis at a value of personal choice- thereby leaving the all-risks insurer to traverse the labyrinth of carrier liability in the event of loss."[327] Article 3(3) incorporates an unnecessary provision requiring a carrier to deliver a baggage identification tag for each piece of checked baggage, but there is no penalty if the carrier fails to do so. Hence, there is no rationale for including the provision at all.

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[325] See Caplan, *supra* note 14 at 203.
[326] By implication, Article 22(2) contemplates only checked baggage. In relation to unchecked baggage, the carrier is only liable for fault presumably to be proved by the passenger under Article 17(2).
[327] Caplan, *supra* note 325.

A vestige of wilful misconduct inherited from the Warsaw System is retained in Article 22(5) of the new Convention. It provides for the breaking of the limits of liability for destruction, loss, damage or delay to baggage by proof of wilful misconduct "if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with the knowledge that damage that damage would probably result." This is a hangover of the Warsaw System that might become sport for claimants and may lead to unnecessary costly litigation.

4.5.4 Liability for Cargo

Incorporating in substance the provisions of Montreal Protocol No. 4, Article 22(3) pegs an unbreakable limit of liability for cargo at 17 SDRs per kilogram unless a special declaration has been made and supplementary fees paid, at the time when the package was handed over to the carrier. Article 18 provides for liability for cargo in the event of destruction, loss or damage sustained taking place during the period of carriage by air. It further defines the period of carriage by air as the period when the cargo is in the charge of the carrier. This construction in essence extends the carrier's liability to the customs warehouse and other off-airport points where the carrier does not have any control over the cargo. Nevertheless, the cargo is technically still deemed to be under the carrier's control according to this Article. The abnormality of this provision is reinforced by the fact that it is not clear whether the defences of Article 18[328] and the contributory negligence defences of Article 20 with respect to cargo were meant to be exclusive.

The necessity of the provisions of Article 6 with respect to cargo baffles intelligent imagination, since it creates for the carrier no duty, no obligation or liability. It is also stated no where in the Convention the stage at which the consignor may be required to deliver such document indicating the nature of the cargo to meet customs, police or other public authority requirements. Rather, there is an otherwise inexplicable resolution No. 3 stressing the importance of compliance with ICAO Annex 18 on the

[328] See *Montreal Convention*, *supra* note 12, art. 18(2).

carriage of dangerous goods. Article 6 is a surprising provision because Article 16 already contains a broader requirement for the consignor to meet the requirements of customs and other public authorities.

In respect of passenger, baggage and cargo liability, Article 22(6) empowers the court to award to the claimant in accordance to the *lex fori*, the court cost and other expenses of litigation including interests. This will happen if the amount of damages awarded exceeds any written offer of settlement made within six months of the accident or before litigation commenced. This provision is like a trap and is subject to gross abuse as the plaintiff attorney will often impress on the claimants that it is in their interest to wait fir six months, expecting an offer from the carrier, before instituting proceedings. The carrier sensing this move will be forced to make an offer of settlement without discovery, but relying solely on the plaintiff attorney's submissions. To avoid paying additional costs under Article 22, the offers for settlement are likely to be uninformed and non-compensatory if not punitive.[329]

4.5.5 Advance Payments

In cases of aircraft accidents resulting in death and or injury to passengers, Article 28 of the Montreal Convention provides that, carriers if required by national law, must "make advance payments without delay to a natural person or persons who are entitled to claim compensation" in order to meet their immediate economic needs. Such payments do not constitute recognition of liability and may be off set against final claims. The convention neither specified the amount to be paid as advance payment nor the category of persons entitled to receive this amount. This has been left to national law to decide and there is no limit to what a sovereign State might require its carriers to do.[330] Examples include the US Aviation Disaster Family Assistance Act of 1966 and the US Foreign Air Carrier Family Support Act of 1997. Since national law drives the

[329] See Whalen, *supra* note 18 at 19.
[330] See *ibid.* at 20

provision of advance payments, one then wonders why the drafters bothered to include this provision in an international Convention in the first place.[331]

Resolution 2 of the final Act urges carriers to make advance payments without reference to national law and encourages States to enact national law to promote such action. All these were entirely unnecessary because carriers did not need national or international law to make such payments. The truth of the matter being that advance payments have always been part of the catastrophe plans evolved by carriers and their insurers over the past four decades. Carriers without admission of liability have always given emergency financial assistance, which is just one aspect of post-catastrophe response, though such payments may be brought into final accounting.

It is worthy to note that Article 28 uses a novel term "aircraft accidents" which it does not go further to define. If we are to reconcile this new term with the "accident" wording of Article 17(1), which encompassed accidents on board or during embarkation or disembarkation, we will be at a loss as to whether the scope of Article 28 will fit in properly into Article 17. The question is bound to arise whether advance payments will be invoked if a passenger is involved in an accident during disembarkation or from a luggage falling from the over head locker on board because these are strictly speaking not aircraft accidents. The apparent confusion inherent in this provision is bound to result in different interpretations, which will fan the embers of disunity in the system.

4.5.6 Basis of Claims

The new liability regime does not allow for the recovery of "punitive, exemplary or any other non-compensatory damages."[332] The stage has here been set for a battle as to what constitutes non-compensatory damages. The courts may have to resort to the preamble and the general principles of restitution while attempting to solve this puzzle. Article 29

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[331] See *ibid.*
[332] *Montreal Convention*, *supra* note 12, art. 29.

of the new Convention stipulates that "in the carriage of passengers, baggage and 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 such limits of liability as are 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 their respective rights are." The combined effect of this provision is an infringement on the exclusiveness of the Montreal Convention.

This is bound to cause a lot of confusion since it constitutes an express recognition of causes of action in relation to international carriage. Therefore, claims can be instituted in tort and otherwise. Claimants could also argue that action could rightly be brought under the Convention or national law.[333] Moreover, even if there is no occurrence of an accident during international transportation, a claim under national law arising from the transportation will be viable, though still subject to Convention limits of liability.

4.6 Jurisdiction

Under the Warsaw System rules, which have been retained by the Montreal Convention, a lawsuit can only be entertained in four jurisdictions, at the option of the plaintiff in the territory of a State party to the Convention. The Montreal Convention in its work of modernisation has added a fifth jurisdiction to the existing list and coincidentally, though unconsciously added a sixth, seventh and unlimited jurisdictions.

4.6.1 The Fifth Jurisdiction

Article 33(2) provided for a new forum where suits may be brought at the option of the claimant in case of death or injury of a passenger. This is the place where the passenger had his principal or permanent place of residence at the time of the accident - subject to certain qualifications.[334] Championed by the US, this jurisdiction was developed from a

[333] See Whalen, *supra* note 18 at 20.
[334] See *Montreal Convention*, *supra* note 12, art. 33(2) & (3).

fairly simple concept in the Guatemala City Protocol,[335] to the complex provision that will provide ample employment for generations of lawyers if it ever comes into force.[336] Such a place must also be a place to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft or another carrier's aircraft pursuant to a commercial agreement "and"[337] in which the carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.[338]

The undue complications evident from the above conditions will undoubtedly provide a fertile ground for endless litigation and may work great hardship on claimants. Grounds for invocation of the fifth jurisdiction are restricted to claims for death or injury only. Claimants may therefore have to invoke another jurisdiction for baggage or other claims irrespective of the fact that both causes of action arose from the same accident. This restriction imposed by Article 33(2) is by and large illogical. Prudent reasoning will also deduce that the drafters of the conditions for the fifth jurisdiction in Article 33(2) may have actually meant or when they inserted and,[339] which would have reduced the degree of complications by half. For instance, under the provision, an airline which has an off-line office in the US, but does not operate into the US itself or through a code-share agreement may not qualify to defend claims in the US under the fifth jurisdiction.[340]

Granted that the arrangement must be by agreement and the business must be commercial, providing joint services for profit and not gratuitous. The situation is not clear whether a code share arrangement alone can constitute a commercial agreement within the meaning of Article 33 because not all code sharing agreements will meet the additional condition of qualifying as a joint service. The condition is that the commercial agreement must relate to the provision of joint services for carriage of

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[335] See *Guatemala City Protocol*, *supra* note 36, art. XII.
[336] See Caplan, *supra* note 14 at 203.
[337] The drafters might have meant "or", which would be construed as "alternatively".
[338] See *Montreal Convention*, *supra* note 12, art. 33(2) & (3).
[339] See Whalen, *supra* note 18 at 21.
[340] See *ibid.*

passengers by air. It is also not clear whether the commercial agreement had to exist at the time of the accident; nor whether the commercial partner providing the aircraft has to be the same as the one owning or leasing the premises or whether the aircraft may be leased in the first place. This and many more questions during the Conference provoked the delegate of the US to offer the following illustration in answer to entreaties by the delegation of Cote d'Ivoire:

If a US permanent resident flies from New York to Paris on a US carrier on its own code and then flies from Paris to Abidjan on a Cote d'Ivoire carrier with which the US carrier has a code share arrangement. If an accident occurs in the Paris-Abidjan sector, the Cote d'Ivoire carrier will not be subject to the fifth jurisdiction in the US. However, if the Cote d'Ivoire carrier had its code on the US carrier on the New York-Paris sector (even if not the carrier on the US resident's ticket) then it will be subject to jurisdiction in the US.[341]

(a) The involvement of the US resident satisfies the first requirement.

(b) The second element is satisfied if the carrier operates into the US (either directly or contractually in a commercial code share)
(c) The third requirement is met when the Cote d'Ivoire carrier conducts business or has an office in the US.

The practical difficulty here lies in the exact interpretation of the criteria (b) and (c), in relation to the exact nature of the agreement between, *e.g.*, a US carrier and an African carrier. In this example of the US and Cote d'Ivoire carrier given by the US delegate,[342] the Paris-Abidjan ticket was construed as a separate agreement. In practice this would seem to be an extreme exception to the more realistic scenario where a passenger buys just one ticket for the entire journey and in essence gets one contract. Had this been the

[341] A hypothetical example given by the US delegation in response to a direct enquiry by the Cote d'Ivoire delegation during the 9th meeting of the Montreal Diplomatic Conference Commission of the Whole.
[342] See *ibid.*

supposition in the US delegate's illustration, the Cote d'Ivoire carrier would have qualified for US fifth jurisdiction claims *ab initio*. All aspects of Article 33(2) would have been met on the premise that its code sharing agreement with the US carrier qualifies as a commercial agreement for the provision of joint services for carriage of passengers by air. The crucial determining factor seems to lie in the scope of the phrase commercial agreement, which would force court to scrutinise the nature of the agreement between carriers at hand. Since many airlines have rooms in the headquarters of the Boeing Aeroplane Company in Seattle, US, for the purpose of overseeing the manufacture of the aircraft which they are purchasing, it may well be that jurisdiction will be founded on that basis in Seattle. This is so because the carrier need not conduct the actual business of carriage of passengers by air in an aircraft alone, but also in premises, which may be leased or owned by the carrier or its code share partner. These may be premises from where contracts or reservations are made or even an offshore office responsible for supervising manufacture or maintenance of aircraft. It could turn out that the fifth jurisdiction would apply more frequently than the cumulative criteria of Article 33(2) initially seemed to suggest and it will definitely open a floodgate for fifth jurisdiction forum shopping.

This fifth Jurisdiction provision would lead to increase in insurance rates for carriers, who may in turn pass the burden on to the passengers by way of increased rates. The dilemma of the matter being that passengers and carriers from certain jurisdictions would in effect be subsidising claims for passengers residing in award generous jurisdictions.[343] These increments could drive the airlines of developing economies into extinction. All these complications would have been avoided if Article 33 simply assimilated the fifth jurisdiction version provided by the Guatemala City Protocol[344] with minimal adjustments if any.

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[343] See ICAO, DCW DOC No. 28 (May 1999). The Union of Airline Insurers had warned that a fifth Jurisdiction could significantly drive up the exposures of air carriers, which would lead to an increase in insurance charges, which would be difficult (if not strangulating) for airlines of the developing world.

4.6.2 Sixth, Seventh and unlimited jurisdictions

In the illustration offered by the US delegate in the preceding paragraphs; if the Cote d'Ivoire carrier having fulfilled the three conditions, had another code share agreement with a German carrier who operates into Australia and has an office there, in respect of the accident on the Abidjan limb of the flight, the Cote d'Ivoire carrier will be subject to a sixth jurisdiction in Germany and the seventh jurisdiction in Australia. Article 46 of the Convention, which expressly provides that the carrier contemplated for all purposes in the jurisdiction provisions is not restricted to the actual carrier alone but includes the contracting carrier, provides for these additional jurisdictions by implication.[345]

Accordingly, if the contract of carriage on the US/Cote d'Ivoire carrier is made with Korean airlines, not only would Korean airlines have liability, but clearly it could be sued in Korea and also in any of the jurisdictions where it or any of its code share partners has an office that makes reservations, sell tickets or supervises manufacture and maintenance of aircraft. In light of the modern trend of airline alliances, the new convention has by the prescriptions of this Article, succeeded in providing for unlimited jurisdiction. No matter the explanations that the US will continue to offer, there will still be more questions than answers.

4.7 Documentation

With regards to passengers, Article 3(2) of the new Convention allows for other means which preserves the details of a passenger's journey to be substituted for the delivery of a ticket. Yet, as a duplication of action the Article further provides obliges the carrier to offer to deliver a written statement of the information is has so preserved to the passenger. Article 3(4) retains the obnoxious Warsaw System requirement of a written

[344] See *Guatemala City Protocol, supra* note 335. The place of domicile or the permanent residence of the passenger, if the carrier has an establishment there

notice to be given to the passenger, that where the Convention is applicable it governs and may limit the carrier's liabilities for all claims. This is a contradiction in terms with respect to passenger liability, because the limits have already been eliminated by the new liability regime. Carriers are also obliged to provide a separate baggage identification tag (not incorporated into the ticket) for each piece of checked baggage,[346] which is by and large an uneconomical innovation. Ironically, the new Convention does not prescribe any sanctions for non-compliance with the above stipulations. One then wonders why the provisions were embodied in a Convention that is meant to have the force of law.

With respect to cargo, Articles 4-16 incorporate verbatim the modernised documentation provisions of Montreal Protocol No. 4 allowing for the use of electronic waybills. But none of the drafting irregularities of Montreal Protocol No. 4 were addressed.[347] "Any other means, which preserves the record of the carriage performed" may be substituted for an air waybill. The necessity of the provisions of Article 6 to the effect that the consignor may be required to deliver a document indicating the nature of the cargo to meet customs, police or other public authority requirements baffles intelligent imagination. It is stated nowhere in the Convention the stage at which this is to be done and it creates for the carrier no duty, obligation or liability. Article 9 in turn prescribes no sanctions for non-compliance, by expressly providing that non-compliance with the documentary provisions with relating to cargo will not affect the existence or validity of a contract of carriage nor the application of the rules of the Convention. Here again, one is left to wonder why the provisions were embodied in a rule of law.

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[345] When you marry Article 46 with Article 33, it is not clear whether the latter applies to the actual carrier in a code sharing arrangement, since the former seems to suggest that the latter applies to a contracting carrier.

[346] See *Montreal Convention*, *supra* note 12, art. 3(3).

[347] Article 12 of the Montreal Convention, when read with Article 13, as to when the right of the consignor to call back cargo ceases.

4.8 Insurance

In Article 50, the Montreal Convention makes it mandatory for carriers to maintain adequate insurance covering their liability. The Article also empowers any State Party to require carriers operating into its territory to furnish evidence that it maintains such adequate insurance. The Convention stopped thus far without clearing the air as to what will constitute adequate insurance. At least a general guideline would have sufficed, in terms of the required minimal coverage per accident. As a result, States will apply diverse standards while complying with this provision, which will definitely result in conflicts and gross disunity in the system.

The United Kingdom Civil Aviation Authority (CAA) for example has considered this problem thoroughly, focusing on the real world situation where liability insurance is purchased with a combined single limit (CSL).[348] Notwithstanding, the CAA has realised that the main factor governing CSL limits is not the carrier's exposure to its own passengers and cargo claims but the risk of collision with another aircraft. Therefore, the CAA has prescribed a standard where the minimum CSL limit takes into consideration the most expensive third-party aircraft load likely to be encountered in a collision. The truth of the matter however is that this thoroughly researched standard prescribed by the CAA falls well below the current levels of cover in force for major airlines in the international insurance market.[349]

On the authority of Article 21(2) of the new Convention a carrier's liability with respect to the passengers is unlimited. This will brew fresh difficulties in compliance with Article 50 because the air carrier will practically be looking for an insurer that will give it unlimited coverage at a price that can better be imagined. Such insurers may not be easy to come by and the cost of such coverage would be colossal. The financial implications of complying with the insurance provisions in the new regime will

[348] Covering passengers, cargo and third-party liabilities.
[349] See Caplan, *supra* note 14 at 200.

definitely strangulate many air carriers especially in the developing economies, if at all such insurers will ever be found in the developing world.

On the other hand, the wording of Article 50 is a tacit instruction to governments to pass laws that will oblige insurers to underwrite policies of indemnity for unlimited sums. It seems clearly inappropriate in a Convention regulating the relationship between carriers and passengers for reference to be made to the carrier's insurance obligation vis-à-vis the State.[350] The question thus arises if a State will be liable where it wrongly confirms a carrier's insurance as adequate or if it fails to make enquires into the adequacy of such insurance altogether. The need for this provision will continue to be difficult understand notwithstanding that it can be justified by extreme situations involving injury or death, where carriers could operate international flights without adequate insurance.

Regardless whether the initiative is rooted in the proposition that limits of any kind are anti-consumer and against public policy, this is a bold pro-consumer stroke.[351] There is no denying the fact that consumers will certainly benefit if insurance companies were forced by law to issue policies without limits, but the practicability of such a policy is suspect. The Article at best does no more than obliging States to do that which most of them have in one way or the other already done, so it is perhaps of little significance and relevance. In a word, this provision and the policy it embraces, is absurd.[352]

4.9 Right of Recourse against Third Parties

In one single sentence Article 37 of the new convention provides that "[n]othing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." The import of this provision is slippery and at the worst an illusion, because in some

[350] S. Gates, "The Montreal Convention of 1999: A Report on the Conference and on what the Convention means for Air Carriers and their Insurers" (1999) 4 Aviation Quarterly at 191.
[351] See Whalen, *supra* note 18 at 26.
[352] See *ibid.*

countries, unless there is an adjudication of joint liability with a third party, the carrier will thereafter not be able to obtain contribution from a negligent third party.[353] Actions for indemnity against the third party are however less cumbersome in cases where the carrier was not negligent at all and the third party was wholly responsible.[354] Some authorities have held that Article 33 allows contribution from a third party, irrespective of national law prescribing the contrary. If this was the intention, it should have been clearly expressed in a more straightforward language.[355]

Granted that the Convention intended to enable carriers to obtain reimbursement from a negligent third party for its share of the Convention liability - to the extent that the third party was negligent or at fault. A straightforward language would achieved this result easily, so why the ambiguous provision? Because this is not a Convention for the airlines, the carrier may have to pay everything, notwithstanding that a third party was guiltier of negligence than the carrier.[356]

4.10 Carriage by Persons other than the Contracting Carrier

While consolidating the essential elements of the Guadalajara Convention to reflect the modern trend of code-share arrangements and airline alliances, Articles 39-48 of the Montreal Convention leaves much to be desired. In event that only one of the carriers is sued (either the contracting or actual carrier), Article 45 stipulates that the carrier sued has the right to request that the other carrier to be joined in the suit. "The procedure and effect of this being determined by the court seized of the case." The claimant does not have the right to join the other carrier if, for example, jurisdiction cannot be obtained under Article 33. What is yet unclear is what will happen if the law of court of the forum cannot obtain jurisdiction against the other carrier whom the carrier sued by the claimant wants to join the in the proceedings, because procedure and effects does not encompass jurisdiction. The better construction of Article 45 would have given the

[353] In some states in the US, for example. See Whalen, *supra* note 18 at 24.
[354] A near impossible scenario.
[355] See Whalen, *supra* note 353.
[356] See *ibid.*

right of joinder to all parties not withstanding jurisdictional impediments under Article 33.[357]

The drafters of this provision did not reconcile Article 33 with Article 46 properly to fashion out a better working relationship. It is confusing in the light of Article 46 whether Article 33 applies to an actual carrier in a code share arrangement because Article 46 seems to regard it as applicable to a contracting carrier.[358] This uncertainty stems from the fact that Article 46, as drawn from the Guadalajara Convention, was specifically intended to cover a code-share/substitute carriage relationship. Thus in a rough attempt by the new regime to cover code-share relationships in the fifth jurisdiction provision of Article 33, the drafters may have caused this uncertainty, which may be of grave practical importance to the claimant, especially where the contracting carrier is not financially responsible.[359]

There are two other unnecessary provisions worthy of mention at this point in time. The first is the aggregation of damages provision of Article 44. It stipulates that a claimant cannot recover from the contracting carrier or the actual carrier (including their servants or agents acting within the scope of their employment) an amount higher than the highest amount that could be awarded against either the contracting carrier or the actual carrier under the convention. For all intents and purposes, the import of this provision makes very little sense in light of the fact that the liability regime of the new Convention is unlimited. The drafters should have reckoned that no amount is higher than unlimited.[360]

Read with Article 30, the liability of servants and agents acting within the scope of their employment is undesirable because carriers will always want their pilots and other employees to act within the scope of their employment. A more sound provision in the interest of airlines would have been one that grants immunity from liability to servants

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[357] See *ibid.*
[358] See *supra* note 345.
[359] See Whalen, *supra* note 18 at 25.
[360] See *ibid.* at 24.

and agents as long as they are acting within the scope of their employment and not on a frolic of their own.

The second unnecessary provision is the invalidity of contractual provisions clause of Article 47, which bars any contractual provision that relieves either, the actual or contracting carrier from liability or prescribes a lower limit of liability than that provided for in the Convention. This provision is unnecessary or at best a tautology, in the light of Article 26 which has hitherto covered invalidity of contractual provisions.

4.11 Relationship with other Warsaw System Instruments

The Montreal Convention is to come into force on the 60th day following the deposit of the thirtieth instrument of ratification, acceptance, approval or accession with ICAO.[361] The variety of ways in which States could become parties to the convention could present fresh problems. There is no good reason for departing from the Warsaw practice of just ratification and accession.[362] Provision has also been made for Regional Economic Integration Organisations to become a party to the Convention,[363] but the power of such organisations, like the Economic Community of West African States to ratify the Convention is by no means clear.

The coming into force of the Montreal Convention will not alter the existing Warsaw instruments, but its provisions shall prevail between States who are parties to the new Convention.[364] This means that there will be no immediate need for such States to withdraw from being parties to the Warsaw instruments. It is therefore envisaged that there will be a transition period where the Montreal Convention will co-exist with the other six Warsaw instruments until the number of parties to the new instrument begins to equal or exceed those to the other six. The big question is what will happen if the after ratifying the new Convention, an aviation super power State like the US decides to

[361] See *Montreal Convention*, *supra* note 12, art. 53(6).
[362] See *Warsaw Convention*, *supra* note 33, arts. 37 & 38.
[363] See *Montreal Convention*, *supra* note 12, art. 53(2).
[364] See *ibid.*, art. 55(1).

withdraw from the Warsaw System entirely. The US would have by this action immediately created a fault-based regime for some carriers from States that have not yet ratified the new Convention, if those carriers wished to continue operating into the US. At the risk of being left without any Warsaw relationship with the US, some States will be coerced to ratify the Montreal Convention against their wish.[365]

Another question readily comes to mind is: which Convention (if any) will prevail during the supposed transition period, between two States involved in international carriage, where one has ratified the Montreal Convention but the other is still adhering to the Warsaw System instruments. Article 55 of the new Convention stipulates that both states must be parties to the new convention before the new rules can prevail. This reasonably foreseeable situation has not been adequately catered for in the new convention. One is inclined to think though, that the Warsaw rules should apply where it has not been completely denounced by the party adhering to the new Convention, at least because it is common to both parties. Even this sound line of reasoning has not been anywhere reproduced in the Convention.

A more comfortable scenario will be in cases where the origin and destination of the international carriage are within the territory of the same State Party to the Montreal Convention (with an agreed stopping place in another State). Without any qualms the Montreal Convention will apply if action is instituted in that State. Then again, in light of the fifth, sixth and other jurisdictions, the Montreal Convention may not apply if action for claims is commenced in another jurisdiction that is not Party to the Montreal Convention. The jurisdiction provisions of Article 33 of the Montreal Convention and Article 28 of the Warsaw Convention would thus be likely impacted by a dual Warsaw/Montreal Convention regime.[366] The concurrent existence of the Warsaw System instruments and the Montreal Convention will cause problems of uniformity. Unfailingly, this will fan the embers of disunity in the system especially during the transition period.

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[365] See Whalen, *supra* note 18 at 26.
[366] See *ibid.*

4.12 Matters not addressed

Diplomatic Conference that produced the new instrument unfortunately did not take advantage of that moment of history to address certain crucial matters, which will be examined hereunder. Perhaps the foregoing and the list following here under will prove useful to the next Conference that will assemble to consider the first amendments to the new instrument.

4.12.1 Definitions and Scope

Many crucial words and phrases have been left undefined in the Convention. The public is still at bay as to the definition of an aircraft and whether a commercial international flight in an airship, a balloon or glider comes within the contemplation of the convention. Crucial words like the carrier, the passenger, the shipper etc need to be separated and expressly defined. The Convention has not expressly outlined the claims and persons contemplated in its application. Much of the travelling public will be inclined to believe that the Convention is not applicable to claims by third parties like manufacturers, against airlines for contribution or indemnity. As far they are concerned, the convention applies only to claims against carriers by passengers, shippers and consignees or those claiming under them. Some believe that the carrier's liability in international carriage applies to all claims and claimants against the carrier, where the damages claimed are directly or derivatively damages for injury or death of passenger in an accident. If the Convention intended to apply only to passengers, consignees and shippers it should have expressly stated so. The Drafters of the Montreal Convention failed to address this and other disputed issues.

4.12.2 Social Insurance Agency claims

Another issue not addressed is the place of Social Insurance Payments by government agencies for disabilities arising out of air accidents. The Convention did not clarify whether these agencies can proceed against the liable airline for recovery of such social

benefits paid to victims and families of accident victims remains. Unlike the IATA Inter-carrier agreements, which gave each subscribing airline the right to stipulate that, the waiver of the Convention limits for passenger death or injury does not extend to governmental social insurance agencies, the Montreal Convention does not contain any such reservation. Therefore, social security agencies should be able to claim full reimbursement from carriers. This goes well beyond the protection of consumers and creates a bonanza for insurers and social agencies that were hitherto content in honouring their contracts without any thought of reimbursement.

4.12.3 Arbitration for passenger claims

Having recognised arbitration as desirable method of dispute resolution in Article 34,[367] which expressly permits the insertion of arbitration clauses in cargo air waybills and recognises the enforceability of such provisions, the new Convention missed the opportunity of providing for arbitration in cases of passenger claims. This would have reduced the number of litigation and the costs of litigation for carriers.

Conclusion

To say that the Montreal Convention is plagued with a myriad of problems is an understatement. This predicament was forecasted long before the Diplomatic Conference assembled in Montreal in 1999. A persuasive argument is that maintaining the status quo would have been a better alternative than to attempting such an overzealous revolutionary venture, not with the experiences of recent history in formulation new Private international air law instruments at heart. What else could one expect from a consensus package produced by such hasty undemocratic horse-trading between all delegates and the friends of the chairman group, who were cajoled into agreeing to a text, which in the time available, could not be subject to detailed consideration, by them let alone the Committee of the whole? These problems will continue to militate against all prospects of the Montreal Convention including early

[367] See *Montreal Convention*, *supra* note 12.

ratification. How they will be addressed presents fresh questions, between limited amendments of a Convention that is not yet in force and new Convention incorporating those amendments.

The protagonists of this Convention had predicted that it should come into force by 2000. How this ambition can be realised is now a satire in light of only the twelve ratifications that it had by the end of 2001. As in the past, many States will probably wait for the US ratification before making a decision. But even this much-anticipated ratification by the US may never come to pass. History will recall that this is not the first instrument that all demands of the US have been met and yet it did not ratify such instruments until they were overtaken by time. One is inclined to think that the US is more comfortable with combined special contracts between its department of transport and airlines than with international instruments.

Chapter Five

The Montreal Convention in the Eyes of Developing and African Nations

5.1 Background

For a Convention that was fashioned under the overwhelming influence of the developed aviation nations of the world, there is a need to x-ray the Montreal Convention in the eyes of the developing nations of the world, especially the African nations, in order to provide a complete picture. This Chapter is devoted to fulfilling that purpose. Notwithstanding that Africa as a whole for example accounts for no more than 2% of total air transport gross output,[368] the rules of equality as provided for by the Vienna Convention on the Law of Treaties ought to have been respected during the Montreal Diplomatic Conference. But this was not to be, mainly because of the fear among the developed nations that the developing world would have used their numerical majority to sway decisions in its favour. "[i]t became apparent that the two-thirds majority vote of the representatives present and voting required for the approval of any draft Convention was elusive."[369] This was undesirable and as such was fraudulently circumvented by the Friends of the President[370] tactics.

The success of this tactics was guaranteed because it was easier for the aviation powers to cajole the few developing nations who were co-opted into the Friends of the President group into compliance. As should be expected, the end product is an instrument that reflects neither the effective participation nor any input from the developing world. Most pitifully, the developing nations were further arm-twisted to sign the instrument, thus giving the impression of their apparent satisfaction with the so-called consensus package wherein nothing was conceded to them. Whether the

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[368] See E.A. Jones, "Joint Ventures and Global Alliances: The Essentials" (2000) 3 Aviation & Allied Business at 10.
[369] Milde, *supra* note 17 at 171.

outcome of the consensus package was a balanced international instrument or there would have been no other means of achieving such, the truth of the matter however is that the consensus was a fraud particularly on the developing nations.

Without prejudice, the aviation industry in a number developing nations on their part, are plagued with a myriad of problems. Ranging from finance and skilled labour to infrastructure and management etc, some of these problems can still be traced to external political economics and some are self-inflicted. The synergy of all the aforementioned will enable one to view the Montreal Convention of 1999 in the eyes of the developing aviation world. In this regard, after examining some of the problems faced by the developing nations in general and African nations in particular, this Chapter will proceed to consider the major areas of dissatisfaction, which the developing countries have against the Montreal Convention. The concluding part of the Chapter will attempt to answer questions such as: Can the developing nations afford to do without the Montreal Convention? What is the way out, if there is any? Is there a consolatory meeting point between the two extremes?

5.2 Problems of Developing Nations

Having realised their international political influence due to their numerical strength, the developing nations have always worked within the present system to protect their existence in international air transportation, thereby strengthening the equalising principles of the Chicago Convention. All the same some problems that have confronted the aviation industry in the developing world are actuated externally, while some are internal.

5.2.1 External Influences

Developing nations exploited their political influence on the international scene to seek more international legal protection for their aviation industry and a less discriminatory

[370] See Friends of the Chairman Group, *supra* note 179.

access to the market. They were also successful in gaining a more equitable repartition of aviation resources and adequate aid from the international community to compensate for their economic weakness, for as long as was necessary to compete on an equal footing with the large airlines of the developed world.[371] These developments ran counter to the modern trends in international political economics, where economic might was right, leaving room for no further considerations such as numerical democracy nor international solidarity interests.

Before the Montreal Diplomatic Conference, the impact of developing nations was very potent in the Special Air Transport Conferences of ICAO in moderating the influences that threatened existing structures. For instance, the considerable support obtained by recommendations in favour of the continuation of multilateral tariff co-ordination was due to the convincing arguments of speakers from developing countries. As Jacques Naveau observed:

> In theory, the latent revolution in the international regulatory system, not unlike the system itself, was a world-wide phenomenon. If all nations of the world were declared capable and entitled to participate in aviation activities, the weakest among them would logically be most interested in maintaining this system of law because they would be most severely hit by its disappearance.[372]

The first problem that confronted the developing world and a great one indeed was that this trend did not go down well with the developing world, which would rather have a more competitive environment and a wide leverage of flexibility. Flowing from earlier limited attempts of external manipulation,[373] the trend favouring the developing world was to be decisively stopped by treaty. This has been achieved in the Draft Convention of 1999, and with it the feeling and the obligation of global solidarity has apparently been extinguished. It is very disappointing that the governments of the industrialised world would rather not concede and compromise the fact that developing countries have peculiar problems that should have been reflected it in the new Convention.

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[371] See Naveau, *infra* note 372.

[372] J. Naveau, *International Air Transport in a Changing World* (Boston: Brylant/Martinus Nijhoff Publishers, 1989) at 165.

5.2.2 Internal Problems

All developing countries are plagued with similar internal problems, their disparity in sizes and wealth notwithstanding. They all are basically primary producers with the resultant unfavourable terms of trade. Therefore, necessary finance for industrial investment is scarce. This leaves them with no other option than to seek international assistance with its attendant price tag of a perpetual debt trap and economic distortions. There is also an acute shortage of skilled professionals and managerial manpower, coupled with the fact that the social and technological infrastructures are inadequate for civil aviation to thrive. Developing nations depend on the industrialised nations for expert advice, spare parts, financial and expert assistance and technological infrastructure. Thin traffic, poor financial returns, obsolete fleets, poor airport facilities, economic recession, inadequate route network and narrow market penetration have compounded the situation for the developing countries and yet they have to compete and keep pace with the large airlines of industrialised countries with their vast resources. It can be deduced from all of the above that their scope of operation and latitude of competition is severely restricted. For the sake of international equity and fair play, the developed aviation powers ought to take all these problems into consideration when dealing with aviation matters affecting the developing world. Suffice it to say that the reverse was the case in the Montreal Convention of 1999.

In addition, the concept of State-owned national carriers is commonplace in the developing world. As a matter of fact a national carrier is one of the symbols of independence, national image and prestige. The economic concept of deregulation is yet to get a foothold in these countries. Public ownership and control of national airlines is considered normal in view of the fact that they serve both social and economic purposes. Therefore the fate of the national airline cannot be left to market forces. "The legal status of the national airline is therefore usually protective and weighed down with constrains and obligations for the carrier who is obliged to operate

[373] Like unfavourable financial and leasing arrangements, including barriers to transfers of technology, etc.

services or offer fares for social reasons."[374] The reality of the times however is that any airline established with the objectives of commercially profitability and gratuitous provision social services cannot perform up to optimum satisfaction in either of the two areas. Granted that political and economic reasons may necessitate the establishment of national carriers,[375] there is still need to draw a line between these two motives, especially when such an airline is supposed to operate and compete in the international market place. On the other hand, the developed aviation nations ought to take cognisance of this peculiar circumstance in their interaction with the developing nations, at least for the sake of global solidarity. This was not to be in the Montreal Diplomatic Conference that produced the Draft Convention of 1999.

5.3 Peculiar Problems faced by African Nations

Suffice it to say that there is no developed aviation nation in Africa. As such all the problems militating against the aviation industry of developing nations in general, manifest in various degrees in Africa. In addition, a particular problem faced by African aviation as a block, is the inability of fully implementing the Yamoussoukro Declaration.[376] This in part can be attributed to the inequitable treatment of African aviation by the industrial powers, a situation that should have been remedied in the Montreal Convention. This is not to say that African aviation does not have its own inert impediments. The Yamoussoukro Declaration provided for the liberal exchange of traffic rights among African nations including collective and individual commitments to achieve full integration of their airlines within eight years. Other matters included the establishment of an unbiased African computer reservation system and the phasing out of obsolete aircraft, particularly as it had to do with compliance with noise regulations and safety oversights.

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[374] Naveau, *supra* note 372 at 170.
[375] For example, a land-locked country surrounded by hostile neighbours.

5.3.1 Implementing the Yamoussoukro Declaration

Implementing the declaration had brought to light the indispensable linkages of economic and legal issues. The primary consideration and concern facing civil aviation in Africa is incontrovertibly the economic factor. However, the legal infrastructure that is needed to place economic issues in their right order follows inevitably, making it essential that the two areas of interest are addressed together.[377] Liberalisation must be backed by the establishment of a regulatory economic body to ensure fair competition and consumer protection.[378] The Montreal Convention of 1999 should have incorporated even by implication the much-needed legal provisions to aid the full implementation of this declaration. Just as it incorporated advance payments to satisfy the yearnings of European nations. The full realisation of the Yamoussoukro Declaration would provide a panacea for most of the ills of African aviation.

5.3.2 Merger trends

The liberalisation of air transport in Europe and America has resulted in global airline alliances and mergers as a survival strategy. The emerging trend of mergers, both regionally[379] and among airlines in the developed world, has adversely impacted on the present commercial viability and the future of African airlines. It has become increasingly impossible for African nations to cope with these trends in order to remain competitive. At the moment no African airline carrier is a full member of any global alliance.[380] The fact that the Montreal Convention has boosted this trend without qualifications is inimical to the interest of African airlines. An inter regional merger like that between KLM Royal Dutch Airlines and North West Airlines presents a colossal obstacle to the development and continued existence of any African airlines

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[376] A declaration on a "New African Air Transport Policy", signed on 7 October 1988 by African civil aviation ministers in Yamoussoukro, Cote d' Ivoire. In anticipation of the effects of deregulation and liberalisation in the US and Europe on African airlines, among others.

[377] See R. Abeyratne, "Global Issues Confronting African Civil Aviation" (1999) 1 Aviation Quarterly at 5.

[378] See N. Fadugba, "Implementing Air Transport Liberalisation in West and Central Africa" (2001) 4 African Aviation at 8.

[379] For example, the unification of European aviation.

plying their routes. On the other hand, because of economic constrains, African airlines are not able to afford the need glamour and in-flight luxuries needed to counter the effects of these regional mergers and strong alliances.

5.3.3 Open skies agreements

Notwithstanding that an open skies policy will result in a more vibrant market place where market forces will determine prices, routes and scheduling, African nations are very suspicious of these phenomenon, partly because of their lack of capacity to compete favourably with the developed nations and the absence of a level playing ground. The danger is that the ideal open skies policy is not predicated on reciprocity before unlimited access to traffic rights are granted to airlines. As a result, consumers have all the leverage to choose to fly the most efficient and most competitive airline among the lot available. "While the open skies policy sounds economically expedient, its implementation would undoubtedly phase out smaller carriers, which are now offering competition in air transport and a lager spectrum of air transport to the consumer."[381] The 32nd Assembly of the African Airlines Association (AFRAA) held in November 2000 had as top on its agenda to address issues relating to air transport liberalisation especially with respect to open skies and the increasing penetration of the African airline industry by foreign carriers. Granted that eventually African nations will open up to liberalisation and open skies agreements with the developed aviation powers, there will still be need to strike a balance between the expected gains of open skies and its predatory fall outs which warrants the present protectionism and apprehension. It would not have been out place for the Montreal Convention of 1999 to take the striking of this balance into consideration.

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[380] See Jones, *supra* note 368 at 11.
[381] Abeyratne, *supra* note 377 at 12.

5.3.4 Financial constrains

Inadequate finances have been a colossal problem facing the African aviation industry. The political and economic instability of the region, coupled with the poor credit records has severely eroded credibility with potential foreign financiers and investors. The result is that African airlines have been put in very unfavourable positions when negotiating for funds and other acquisitions. If the home environment is not attractive to potential investors, it does put a dent on the access to finance.[382] The Montreal Convention was indifferent to global financial disparities in general and the financial inadequacies of African airlines in particular. It rather sought to arbitrarily equate the financial strengths and standards of living of all nations.

5.4 Major Lapses

Many instances abound in the Convention where the interest of developing nations were either not taken into consideration at all or their overt propositions were rebuffed by the aviation powers. These instances will remain as sources of discontent and sore points in the new instrument until they are remedied. We will proceed to consider the major ones here.

5.4.1 The Unlimited Liability Regime

Cautious of the fact that they would be at the receiving end of an unlimited liability regime owing to their peculiar economic and other situations, which we have hitherto examined, a group of 53 African States proposed a three-tier system of liability to the Diplomatic Conference where:

(a) the carrier would be liable in the first tier for claims up to 100,000 SDRs on the basis of strict liability;

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[382] See V. Poonoosamy, "Making it Happen" (2001) 1 Aviation & Allied Business at 18 [hereinafter *Making it*].

(b) for claims exceeding that amount and up to a second layer of 500,000 SDRs the liability of the carrier would be based on the principle of presumptive liability, that is, that the carrier would have the defence of non-negligence; and

(c) for claims in excess of the third layer of 500,000 SDRs the liability of the carrier would be based on fault without a numerical limit of liability, the burden of proof for which would rest on the passenger.

The contention of the African group was that having accepted the protection of the consumer, it was necessary not to ignore the interest of the carrier. As such, for any rule to be balanced an acceptable, it must emanate from a trade-off between the interests of various stakeholders:

(a) the interest of consumers for reasonable and fair compensation,

(b) the interest of the State in ensuring equitable protection for its citizens,

(c) the interest of the airlines to contain their liability expenses and insurance premium at reasonable levels,

(d) the collective interest of all stake holders to ensure uniform rules that reduce conflict and simplify claim settlement.

Member States of the Arab Civil Aviation Commission made a similar proposal for three tiers of liability and the Indian delegation proposed a limit of strict liability to 100,000 SDRs, requiring the equivalent of wilful misconduct for claims above that limit. There was a general consensus among developing nations that the liability regime should distinguish between different thresholds of claims and their attendant presumptions and onus of proof.

The delegation of India was stoutly against unlimited liability in the second tier. They asserted as it were, that presumed fault with reversed burden of proof is tantamount to strict liability and such a regime would work much hardship on small and middle size air carriers enough to drive them out of business.[383]

The fundamental question posed by these proposals was that of reconciling the interests of small and large carriers or more specifically the interests of developed and developing countries.[384] These proposals were not acceptable to the major aviation powers, especially the US and Japan, which put much undue pressure on the Diplomatic Conference against these proposals. Even a proposed compromise increase of the second tier limit to 800,000 SDRs was still rejected by the US and Japan. The issue was consequently reconciled in favour of the position acceptable to the large carriers and the developed countries.[385] This was done not minding the potent economic considerations relevant to the continued participation of developing countries and their smaller airlines in international air transport.

5.4.2 Insurance

Having established a regime of unlimited liability, the new Convention went further to entrench a provision for an obligation requiring all carriers to maintain adequate insurance covering their unlimited liability under Convention.[386] The question then arises as to where an African airline will find an insurance company who is capable of providing cover for her unlimited liability. Even when one is found, the question of how much it will cost to purchase such insurance remains. Developing countries might not be able to afford such cover, because the insurance cost will take into consideration their fleet of poorly maintained obsolete aircraft and bad safety record. And even where they can afford it, overall operational cost would be driven so high that the business

[383] See ICAO, DCW Doc. 18 (19 May 1999).
[384] See Rattray, *supra* note 3 at 72.
[385] See *Montreal Convention*, *supra* note 12, art. 21 provides for unlimited liability in the second tier.
[386] See generally *ibid.*, art. 50.

might not be feasible. The Montreal Convention of 1999 did not consider the implications of this insurance provision on developing nations.

5.4.3 Fifth Jurisdiction

This provision was largely resisted by developing nations[387] because it was relatively very unclear and was perceived to be subject to abuse, by way of fifth forum shopping. It is equally feared that the fifth jurisdiction would lead to increase in insurance rates.[388] Ironically, the reality of the insurance scenario is that passengers and carriers from developing countries would in effect be subsidising claims for passengers residing in jurisdiction of the developed nations with their generous levels of compensation. The Union of Airline Insurers had warned and confirmed that a fifth jurisdiction could significantly drive up the exposures of carriers, leading to an increase in insurance charges, which would be difficult especially for airlines of the developing world. Another irony here is that unlike its predecessor in the 1971 Guatemala City Protocol, the fifth jurisdiction in the new Convention only applies to actions resulting from death or injury of a passenger.[389] It was incumbent on the Diplomatic Conference to clear up the confusion generated by this provision, if just to allay the fears of developing nations. Rather the provision was entrenched without any adjustments.

5.5 Can the developing nations afford to do without the Montreal Convention?

Granted that this convention was forced down their throats and they are dissatisfied in many areas, as we have seen, it needs to be examined if developing nations can actually afford to ignore the convention. Of course, they can choose to ratify or not to ratify the convention. The limit of either choice however will be determined by their capacity to cope with consequences of such choice. The irony of the matter is that strictly speaking, both choices will lead to the same result. There however abound several options that

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[387] African States, Arab States, Vietnam and India favoured the option clause, whereby they could opt out of the provision.
[388] See ICAO, DCW Doc. No. 28 (May 1999) at 4 – 5.
[389] See *Guatemala City Protocol*, *supra* note 12, art. 33.

can be explored to mitigate the hardships which ratifying the Convention will bring to bear on developing nations. The potentials of these factors will serve to make the option to ratify a better choice.

5.5.1 A choice not to ratify the Convention

This is the most reasonable choice in all sincerity. Developing nations should naturally exercise the option of not ratifying a Convention that has not taken their interest into any meaningful consideration. The obvious implication of exercising this choice is however far reaching. To make it clear, they can only exercise this option if the want to go out of the business of international transportation by air. The first reason is that other nations who would have ratified the Convention will gang up against them and ostracise them by various ways and means, like the denial of landing rights to the airlines of developing countries in their airports. Even in the absence of a gang up, a choice not to ratify will make airlines of developing countries less attractive even to their own international domestic consumers. This disincentive will be principally actuated the lack of the contemporary competitive adequate insurance cover on their flights in addition to the awareness that the liability of the carrier to passengers is limited. In the presence of airlines whose countries have ratified the Convention, no passenger will want to fly on the airlines of developing countries that have chosen not to ratify the Convention. In the final analysis, developing nations have no choice but to ratify the Convention. If not for economic reasons, which is most unlikely, at least to enable them sustain one of their symbols of independence and sovereignty.

5.5.2 A choice to ratify the Convention

The only sincere option available to developing nations if they want to remain in the carrier business is a choice to ratify the Convention. The immediate advantageous implication of this choice will be the elimination of all the adverse consequences of non-ratification enumerated above. Nevertheless, a choice of ratification comes with its own price tag. The major adverse consequence of a choice to ratify being that the

airlines of developing countries would have come under an unlimited liability regime. A chain reaction down the line will be the requirement that their airlines maintain adequate insurance to cover their unlimited liability. As mentioned earlier in this Chapter, the comparative cost of such insurance for the airlines of developing countries will be enormous, leading to very high operating costs. At the end of the day, these airlines will still not be able to compete favourably and profitably in the international market with their counterparts from the developed world. Eventually, they will still have to go out of business, just as would have been the case if the chose not to ratify the Convention.

5.5.3 Mitigating Factors on choice of ratification

The adverse consequences of ratifying the Montreal Convention has led to the highlighting and analysis of several factors in the developing world, which if properly exploited would counterbalance the supposed adverse consequences of ratifying the Convention. This makes the choice of ratification more persuasive than non-ratification. We will proceed to consider some of the factors here.

5.5.3.1 Labour Cost

As aforesaid, several factors in the developing world can be exploited to counterbalance the effects of ratification, making their airlines more competitive and profitable. A major factor that comes to mind is the price of labour in developing countries. The cost of domestic labour, both skilled and unskilled, is comparatively lower. The salary of a cabin crew in an American Airlines flight for example might be more that the salary of an airline captain in Sri Lanka. The problem comes when the airlines of the developing nations engage the services of expatriate air and ground crew from developed nations. As more and more indigenous skilled professionals get turned out into the aviation market of developing nations, the need to engage expatriates will reduce and greater advantage can be taken of this factor.

5.5.3.2 Co-operation

The similar circumstances which the developing countries would have been exposed to by virtue of ratifying the Convention should stimulate their instincts for self preservation, driving them to rely more and more on co-operation rather than competition with each other.[390] Airlines physically operating on any route should have the prime objective of avoiding unfair competition through planned provision of capacity to match the available traffic. "The countries need first of all to co-operate with each other on regional basis and to seek solutions together to their common problems.... The common use of traffic rights by a group of states would strengthen their negotiating hand in bilateral discussions with third countries."[391]

The Yamoussoukro Declaration for example is anchored upon the fundamental postulate of co-operation in air transport brought about by the integration of African airlines.[392] Since its Declaration in 1988, there has been a significant co-operation among airlines of the South African Development Company (SADC), so much so that they are now contemplating operating under a common logo. Co-operation can also be effected in areas like cross posting of staff between their airlines and pooling of resources. This will lead to mutually beneficial transfer of technology and ideas that can internalise the effects of ratification of the Montreal Convention. It is rather disheartening to note that rather than patronise the cheaper world class maintenance facilities located in Africa, many African airlines prefer to ferry their aircraft as far as North America for minor maintenance checks at exorbitant cost. Ironically however some European carriers are taking advantage of the low manpower cost in Africa by sending their equipment to African installations for checks.[393] Co-operation with the industrialised countries is however not to be neglected but adequately exploited. Bilateral agreements with the industrialised countries could for example be made to

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[390] A regional co-operation between developing nations and their carriers is a *sin qua non*.
[391] Naveau, *supra* note 372 at 168.
[392] See Abeyratne, *supra* note 377 at 4.
[393] See M. Abhulimen, "Looking Inside Africa for Aircraft Maintenance Solutions" (2001) 1 Aviation & Allied Business at 12.

include such terms like trading off say traffic rights for staff training courses and the likes.

5.5.3.3 Privatisation

At the moment, the majority of airlines in developing countries are government owned and operated and national identification with airlines as symbols of independence is still strong. The airlines as a result, have so far been serving both commercial and social purposes. The result being that they neither do well both ways. Notwithstanding the compelling reasons for this situation, if their airlines are to remain competitive in the present deregulated dispensation, there is a great need for them shake off the grip of governments, shed their national symbol image, privatise and become self reliant. A corollary of privatisation is the attraction of investors, public and private, foreign and domestic to invest in their aviation industry. The availability of large capital for investment will provide a panacea for all financial ills. Investors will also ensure prudent and efficient management of all resources with a view to profit. The result will be the rebirth of more competitive airlines in the developing countries.

Airlines in South Africa are adopting this posture of operating completely devoid of state interference and subsidisation.[394] There is no gain saying that South African Airways is helping to crave a new vision for African airlines with its growing partnership ventures with other strategic operators, which has given it an impressive global distribution and competitive edge.[395] If the privatisation option is adopted, it is capable of remarkably counterbalancing the adverse consequences of ratifying the Montreal Convention. The process of privatisation has in recent times had brushes with nationalistic feelings in some instances. The planned privatisation of Nigerian Airways for example has been stalemated primarily because of the concern in Nigeria that, care should be taken not to allow a foreign airline to acquire the country's lucrative

[394] M. Abhulimen, "Aviation in South Africa: Solid Foundation for Future Growth" (2000) 3 Aviation & Allied Business at 14 [hereinafter "Foundation for Future Growth"].
[395] See *ibid.*

international routes for next to nothing.[396] Vijay Poonoosamy, the MD of Air Mauritius has however cautioned that privatisation should be seen as a means to an end and not the end itself. He observed that there were many countries in the world, which own airlines that were well managed and competitive. Hence, government ownership is not really the problem.[397] In his opinion the important thing is ensuring that an airline is well managed.

5.5.3.4 Management

Prudent management of all available resources of airlines in developing countries is *sin qua non* for success in offsetting the adverse consequences of their ratification of the Montreal Convention. This should encompass rationalisation of staff, equipment, materials and methods for efficiency, avoidance of wastage, optimum utilisation of scarce resources and imbibing a maintenance culture. Incidentally, the standards of airline management in some developing countries are currently high. Notwithstanding, there is need for managers to be constantly trained and retrained on such issues as market access and benefits that could be derived through their strategic position. Prudent management will also mean the continued updating of management profiles and adjustments to changing global circumstances in the aviation industry. Aviation management in developing countries should not to be swept away by the tide of the current trends of liberalisation, but should be careful with arrangements like the prevailing open skies arrangements. The good training and continuous education of staff is a springboard to effective and efficient management.

5.6 Preferential Measures for Developing Nations suggested by ICAO

ICAO in its wisdom and foresight has already visualised the probable threats of annihilation that airlines of developing nations will be exposed to in a Montreal Convention regime. Apart from the peculiar economic and other situations in

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[396] N. Fadugba, "Nigeria Airways: Privatisation Stalemate" (2001) 3 African Aviation at 18 [hereinafter "Privatisation Stalemate"].
[397] See "Making it ", *supra* note 382.

developing countries, which we have examined in the previous section of this Chapter, the potential of these threats has been amplified by be emerging trends of airline mergers, country mergers and regional mergers. The unavoidable truth is that the international carriage by air will soon be controlled very few groups of carriers providing global service through a network of commercial and trade agreements. As Ruwantissa Abeyratne rightly observed "Regional carriers will predominate, easing out niche carriers and small national carriers whose economics are inadequate to compare their cost with the lower cost and joint ventures of larger carriers."[398] As a result, ICAO has proffered the under-listed suggestions of preferential treatments,[399] for consideration and adoption by member states when dealing with the mega trends of commercial aviation and market access[400] as follows:

(a) The asymmetric liberalisation of market access in a bilateral air transport relationship to give an air carrier of a developing country: more cities to serve; fifth freedom traffic rights on sectors which are otherwise not normally granted; flexibility to operate unilateral services on a given route for a certain period of time; and the right to serve greater capacity for an agreed period of time;

(b) more flexibility for air carriers of developing countries (than their counterparts in developed countries) in changing capacity between routes in a bilateral agreement situation; code-sharing of markets of interests to them; and changing gauge (aircraft types) without restrictions;

(c) the allowance of trial period for carriers of developing countries to operate on liberal air service agreements for an agreed time;

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[398] See Abeyratne, *supra* note 377 at 11.
[399] See ICAO, *Study on Preferential Measures for Developing Countries*, ICAO Doc. AT-WP/1789 (22 August 1996) A-7-A-9.
[400] See Abeyratne, *supra* note 398.

(d) gradual introduction by developing countries (in order to ensure participation by their carriers) to more liberal market access agreements for longer periods of time than developed countries' air carriers;

(e) use of liberalised arrangements at a quick pace by developing countries' carriers;

(f) waiver of nationality requirement for ownership of carriers of developing countries on a subjective basis;

(g) allowance for carriers of developing countries to use more modern aircraft through the use of liberal leasing agreements;

(h) preferential treatment with regards to slot allocations at airports;

(i) more liberal forms for carriers of developing countries in arrangements for ground handling at airports, conversion of currency at their foreign offices and employment of foreign personnel with specialised skills.

The desirability that such higher levels of competitiveness as envisaged by the Montreal Convention of 1999 prevail in international carriage by air cannot be dispensed with. As a result, these proposed preferential measures are targeted at supplementing and complimenting the disadvantaged position of developing countries, giving them the needed booster that will ensure their continued existence and participation in the market. ICAO has done its part, though it could have done better by treaty arrangement. The ball is now in the court of States, especially the industrialised aviation powers to implement these recommendations in good faith. This will be just another major determinant of how developing nations will view the Convention, which they have no choice but to ratify. In a world where the interest global solidarity and international equity has been relegated to the background, should much be expected?

CONCLUSION

The present combination of Convention, amending protocol, supplementary Convention and collective special contracts is not a good vehicle for realising the aims of the fore fathers of the Warsaw Convention. Experience has this far shown that it only leads to confusion, fuelled by the difficulties presented by multiplicity of regimes. Legal contradictions have always arisen where different instruments apply to the same carriage because States choose which aspects of the multiple regimes would apply to them.

Establishing a new regime embodied in a consolidated modernised text, and mounting pressure towards global conformity, such as provided for in Article 55 of the Montreal Convention is a laudable initiative. The need for such text with a strong force of law, taking cognisance of contemporary technological developments, as well as ensuring that the rules relating to the application of the Convention cannot be circumvented by defective documentation or otherwise has been fulfilled in the Montreal Convention of 1999. Thus, such practices as in the case where the Italian constitutional court displaced the Warsaw convention in 1985, holding that the Convention limits were exceptionally low have been permanently precluded in the new regime.

Special collective contracts among States, which have been touted as an easier vehicle for the modernisation and consolidation of the present System, do not change the rules of the Convention. The absence of compulsion, sanctions and the force of law render such special contracts merely a vehicle for multiplicity of regimes and disunity. Any unilateral action by a state or group to change the Convention would be null and void. Changes to the Convention can only be effected by an act of all States and the only forum available for now is ICAO. By virtue of the Montreal Convention, the elimination of liability limits for example, will become law by treaty as opposed to an agreement between airlines and passengers through filed tariffs or changes in the airline condition of carriage.

The Montreal Convention has created a two-tier regime of unlimited liability for death and injury to passengers, codified the long debated fifth jurisdiction, increased the limit of liability for destruction, loss, damage or delay to baggage and maintained the present liability limit with respect to cargo. It has equally provided for the speedy and adequate compensation for passengers while eliminating wasteful and time consuming litigation. The modernised documentary requirements will ensure faster, easier and cheaper processing of passengers and cargo. To a great extent, the deficiencies in the present system that a consolidated and modernised instrument was sought after to rectify have been addressed and positively resolved in the Montreal Convention of 1999.

The interest of all stakeholders[401] have also been enhanced and improved. The instrument represents a fine balance of the complex and varied requirements of consumers, victims, airlines (especially smaller ones) and the overall public interest.[402] Therefore, it is in the interest of all stakeholders in international transportation by air that this Convention receives their full support and that of their Governments, to enable it come into force as soon as possible. Hopefully, this noble cause actuated by the Japanese airlines, through the IATA initiatives and the ICAO Council, to representatives of 118 State Parties and eleven special international organisations, will not stumble and fall before the finish line, as happened with prior governmental efforts to modernise the Warsaw System.[403]

Judging from previous attempts to modernise the Warsaw system, the participation of the US will be crucial to the timely ratification and coming into force of the Montreal Convention. Having conceded so much to the interest of the US during the diplomatic Conference, it is hoped that the new instrument has found favour in the eyes of powerful interest groups in the US to make it politically acceptable and thereby paving way for its ratification. "Just as the United States effectively determined the content and acceptance of key provisions of the new Convention, so it will influence, if not control

[401] Includes passengers, shippers, air carriers, insurers and governments.
[402] See Mercer, *supra* note 2 at 106.
[403] See Tompkins, *supra* note 13 at 117.

acceptance of the Convention and its entry into force."[404] On her ratification of the Convention, the US will quicken ratification by other countries by creating a bandwagon effect. The bandwagon effect will be actuated when the US serves them notice of her denunciation of the Warsaw System instruments to which she is party. The implication of this will be that the countries will hurry to ratify the Montreal Convention because this will be the only basis of their continued relationship with the US.

Granted as it were, that the Montreal Convention has its own imperfections and apparent biases one should not loose sight of the fact it did not however set out *ab initio* to unify every rule nor did it pledge to satisfy all stakeholders. As one delegate at the Diplomatic Conference remarked, "[m]any will not be able fully to appreciate the odds against which we were operating and the various, and often conflicting, interests and objectives of stakeholders, not only between regions but also within regions and even within a single State."[405] It is not possible to solve the problems of the world in one conference, yet the Diplomatic Conference needed to start from somewhere, a worthy beginning, and a foundation on which future adjustments can be made. IATA who had expressed pessimism about the ability of the diplomatic to achieve any meaningful result was astonished by the draft Convention and issued a congratulatory statement to ICAO and the delegates for the significant achievement.

Therefore, no State, region or group got everything it requested from the Convention which was a product of compromise in many areas. It is now left to ICAO to appeal for this same type of broad compromise among Governments and all stakeholders, because "the true integrity of the Convention will now depend upon its ratification and the speed with which this is done by a substantial number of States."[406] Such appeal while emphasising the urgent necessity for consolidating and modernising the present Warsaw System must acknowledge the biases of the Montreal Convention against the

[404] See Whalen, *supra* note 18 at 26.
[405] See Poonoosamy, *supra* note 5 at 79.
[406] See Rattray, *supra* note 3 at 78.

interests of developing countries and in truth promise speedy adjustments as soon as the convention comes into force.

The draft Convention, which has so far been signed by 71 States and one Regional Economic Integration Organisation, is to come into force after ratification by 30 States. History has however proved the optimists that the Convention will be brought into force without delay wrong. Some experts had predicted that the Convention would come into force as early as 2000. The irony of the fact is that up till the end of 2001 only 12 States ratified the new instrument. This is not encouraging at all. Developing nations may have woken up from the confusion created by the standing ovation and acclamations, which drowned their dissent and subdued their reservations about the draft Convention (into acquiescence) during the diplomatic conference. But can the same be said of developed aviation nations like the US, which got all they wanted and even more?

All States, the US in particular should ratify this Convention in time, before prolonged procrastination transforms it into just another relic of the Warsaw System. Granted that the equity of all the concession made to the US interest by the Diplomatic Conference imputes on her an intention to fulfil this obligation, this treatise is also a call, particularly on the US, to promptly ratify the Montreal Convention and initiate the much needed bandwagon effect. We have since 1929, as Alice and the Cheshire cat would have said, "... walked long enough that we are bound to get somewhere."[407]

[407] Poonoosamy, *supra* note 5 at 85.

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