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Canada

Liability in International Air Transport

(An Icelandic Perspective)

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Abstract

At present there are several instruments that regulate air carrier's liability in international transportation. These international treaties are collectively known as the Warsaw System. Unfortunately, not all States are parties to the same instruments. Therefore, in the past (and present), conflicts of interest have arisen with the result that passengers go forum shopping in the hope of getting the highest possible compensation. There are other "flaws" in the System, for example, the air carrier's liability is limited and the limits are too low. States have tried to solve these problems through various amendments to the System with different results. All these amendments have at least one thing in common and that is the preservation of the System as whole but otherwise they are quite different.

In this thesis, four possibilities will be introduced for amendment of the System. These possibilities are as follows: ratification of the Guatemala City Protocol through the Montreal Protocol No. 3, an international treaty instrument, meant to update and amend the whole Warsaw System; the Italian solution, a national "remedy" taken without international consultations; the Japanese action, Japanese air carriers have waived entirely the Warsaw System's limits of liability; and finally, a recommendation to the EC Commission on a regional remedy in the form of a multilateral agreement where carriers raise the liability limits but otherwise the Warsaw provisions apply.

Each possibility will be thoroughly examined in order to determine whether it is the best solution to the present crisis that the System is facing. At the end of this thesis one solution will be recommended for Iceland and other States to update the System. Other solutions are available but will not be discussed since they are not considered desirable for the aim of unification of air carrier's liability in international air carriage. What must be kept in mind when the four possibilities are being examined is that the aim of this thesis is to find a solution that unifies the air carrier liability regime and sometimes, in order to reach a uniform solution, a compromise must be reached.

Résumé

Il existe actuellement plusieurs moyens permettant de régir la responsabilité des transporteurs aériens à l'échelle internationale. L'ensemble des traités internationaux qui les régissent sont connus sous le nom de "Warsaw System". Malheureusement, les Etats n'ont pas tous ratifié ces ententes, ce qui a donné lieu, tant dans le passé qu'à l'heure actuelle, à des conflits d'intérêts avec comme conséquence que les passagers choisissent de porter leur action devant la cour susceptible de leur apporter les plus importantes compensations possibles. Il existe bien d'autres inconvénients à ce système: par exemple, la responsabilité des transporteurs aériens est limitée et ces limites ne sont pas assez élevées. Les pays ont essayé de résoudre ces problèmes par de nombreux amendements au système, ce qui donne différents résultats. En dépit du fait que ces amendements soient tous différents, ils ont un seul point en commun: la préservation du système dans son ensemble.

Dans la présente thèse, quatre possibilités seront présentées comme amendements au système. Ces possibilités sont les suivantes: la ratification du "Guatemala City Protocol" par le "Montreal Protocol" numéro 3,; un instrument de traité international visant à mettre à jour et à amender le "Warsaw System" en entier; la solution italienne, un "remède" national administré sans aucune consultation internationale; l'action japonaise, les transporteurs aériens japonais ont totalment éliminé les limites de responsabilité du "Warsaw System" et, enfin, une recommandation à la Commission de la Communauté Européenne sur une mesure régionale prenant la forme d'une entente multilatérale obligeant les transporteurs aériens à augmenter la limite de responsabilité tout en appliquant les dispositions du "Warsaw System" là ou elles s'appliquent.

Chaque option sera étudiée afin de déterminer si celle-ci représente la meilleure solution à la présente crise que vit le système actuel. A la fin de cette thèse, une solution sera proposée pour l'Islande et d'autres pays afin de mettre à jour le système. D'autres remèdes existent, mais ils ne seront pas proposés parce qu'ils ne représentent pas des solutions idéales et ne sont pas envisageables dans un effort d'unification des responsabilités des transporteurs aériens dans l'industrie internationale du transport aérien. Il ne faut pas oublier tout en examinant ces quatre possibilités, que le but de cette thèse est d'identifier une solution qui unifierait le régime de responsabilité des transporteurs aériens et que pour atteindre cet objectif un compromis est à envisager.

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Liability in International Air Transport
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This thesis is dedicated to my grandfather, Högni Helgason

Introduction

I. Objectives of thesis

Iceland has been a Party to the Warsaw Convention of 1929[1] from the 19th of November 1948[2]. It is not a Party to all the subsequent Warsaw instruments that have entered into force nor a Party to those instruments that have not yet entered into force. The situation is therefore not satisfactory. Iceland is a Party to the Warsaw Convention of 1929 and that Convention as amended at The Hague in 1955[3]. Iceland especially needs to ratify the Guadalajara Convention[4] but first and foremost it needs to update The Hague Protocol's liability limit that rules today in international carriage by air where an Icelandic carrier is the contracting carrier. As other aviation nations, Iceland has signed many international instruments regarding international carriage by air. Such instruments have been both in the field of public law, such as the Chicago Conference

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[1] *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12th October 1929, for the text of the Convention see ICAO Doc. 601;49 Stat. 3000; TS 876. The Convention entered into force on 13 February 1933. [Hereinafter the Convention will be referred to as the Warsaw Convention or the Convention].

[2] This date is based on information received from the depository State, Poland. The letter of adherence was received on 21st of August 1948 and took effect on the 19th of November 1948.

[3] *The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12th October 1929, done at the Hague on 28th September 1955, see ICAO Doc. 7632. [Hereinafter the Protocol will be referred to as The Hague Protocol or as the WH, meaning the Warsaw Convention of 1929 as amended at The Hague, 1955].

[4] *Convention supplementary to the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara on 18th September 1961, see ICAO Doc. 8181. [Hereinafter the Convention will be referred to as the Guadalajara Convention].

of 1944[5] and its Annexes[6] and in the field of private law such as the Warsaw Convention. Iceland is also a member of International organizations such as the United Nations Organization and some of its specialized agencies including the International Civil Aviation Organization (ICAO)[7]. It is also a party to regional organizations such as the European Civil Aviation Conference (ECAC)[8] and the European Free Trade Association (EFTA)[9] and will be a Member of the European Economic Area (EEA)[10]. When all this is taken into account it is clear that Iceland cannot take unilateral action when it finally decides to update the Warsaw System[11]. Its action must be in

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[5]The Conference on International Civil Aviation came into force on 4th April 1947 in accordance with Article 91 (b) thereof. Iceland was one of the Signatories to the International Civil Aviation Conference that took place at Chicago, Illinois, November 1st to December 7th, 1944. Iceland deposited its instrument of ratification on 21st of March 1947. The Chicago Convention of 1944 established the International Civil Aviation Organization (ICAO). The Chicago Convention is ICAO's constitution and the Organization derives its power therefrom. Iceland has a seat on the ICAO Council (elected on the 29th September 1992) and will hold that position until October 1995 when a new Council will be elected.

[6]The Annexes to the Chicago Convention are regulatory and not mandatory. States must accept them (by not filing a "difference" under Article 38 of the Convention) in order to be bound legally on an international level.

[7]See *supra* note 2.

[8]*ECAC Constitution and Rules of Procedure*, ECAC Doc. 20, 2d ed., March 1991. ECAC was created in Strasbourg, 1954 in a conference Convened by ICAO. ECAC has currently 31 Member States. The EC States are 12, the EFTA states are 7 and the remaining States include 9 former socialist States from Eastern Europe (Bulgaria, Croatia, Czech Republic, Hungary, Lithuania, Poland, Romania, Slovakia and Slovenia). It is expected that other Eastern European States will join ECAC in the near future.

[9]EFTA "Year Book of International Organizations" (1992/1993), Vol. I, ed. Union of International Associations, at 485-486. The EFTA was established on the 20th of November 1959 at Stockholm. It came into being on the 3rd of May 1960. Member States are currently seven: Austria, Finland, Iceland, Liechtenstein, Norway, Sweden and Switzerland.

[10]The EEA agreement was formally signed in April 1992. It is a general economic association agreement between the European Community (EC) and EFTA. The agreement envisages the creation of a trade area for the free flow of goods, capital, persons and services including air transport services. The agreement was expected to come into force in early 1993 but has been delayed because Switzerland refused to join the EEA. Norway and Sweden have signed a more limited but specific air transport agreement with the EC which is meant to be in force until the EEA agreement formally comes into force.

[11]Hereinafter the Warsaw Convention of 1929, the Convention as amended at The Hague as supplemented at Guadalajara, as amended at Guatemala City and as amended at Montreal (Montreal Protocols Nos. 1, 2, 3 and 4) will be referred to as the Warsaw System or simply the System.

accordance with what the major part of the world will do otherwise the golden rule of **"unification"** will be broken. When contemplating what actions Iceland can take, this thesis will go about it by searching for what all States can or should do. Therefore the thesis will focus on what can be done to bring unification of law into the field of international carriage by air instead of focusing on just one State.

Questions such as, *should the Warsaw System be amended once more?, should it be abandoned? or is there an instrument already in existence that can fulfill the needs of the public?*, will be answered. These questions and many more will surface in the following chapters and will be dealt with as they arise. In order to have unification in international law governing carriage by air, harmonious action is needed. Such actions have been taken throughout the years with considerable success and can be accomplished once more as long as one State takes the plunge and others follow. What is needed is a unified compromise between the different objectives that States have regarding this subject. The old ICAO saying should be remembered when this problem is tackled: "the best may be the enemy of good"[12] and sometimes sacrifices and compromises must be made in order to create harmony.

[12]M. Milde, "ICAO Work on the Modernization of the Warsaw System" (1989) XIV Air Law, 193 at 206. [Hereinafter M. Milde will be referred to as Milde].

II. Outline of thesis

In Chapter one, all the Warsaw instruments will be introduced and the history behind the drafting of each instrument touched upon in general terms. At the end of the Chapter it will also be explained why there is such disunification when there are nine instruments that have been drafted in order to unify this field of international law.

In Chapter two, the Guatemala City Protocol will be highlighted and the criticism regarding its provisions brought forward and counter-arguments given as appropriate. The future of the Protocol, in the United States, will be discussed at the end of this Chapter.

In Chapter three, unilateral actions that have taken place in recent years will be mentioned and an evaluation will be given as to how effective or disruptive they are for the Warsaw System as whole. The Japanese solution will be the primary focus but the Italian action will also be briefly mentioned. At the end of this Chapter, a Report submitted to the EC Commission will be discussed and the recommendation it puts forward.

In the final Chapter, Chapter four, a conclusion will be reached, based on the arguments given in the last two chapters, regarding the future of the System for Iceland and other States.

Chapter 1 The Warsaw System

1.1. Foreword

Traveling through airspace in an aircraft is a fairly young industry where technology has advanced greatly in a relatively short time. The law governing the liability regime of this method of traveling has not been able to keep up with the pace because of several factors, such as politics, economy and shortage of time, to mention a few reasons. The revolution in the airline industry has gone from hot air balloons to wide body aircraft. The future of the industry is going towards global airlines with ultra long haul wide body aircraft, highly sophisticated computer reservation systems (CRSs') where no passenger ticket is required and communication, navigation and surveillance via satellites. Technological achievements have sped ahead without restriction while the legal side has been trying to catch up without success. Although this is a fact, there has been a fundamental effort to close the gap between the technology and lack of law in this field. This effort is collectively known as the Warsaw System and it all started with the Paris Convention of 1925.

The Warsaw System itself is a group of instruments meant to establish and unify the scope of liability of air carriers in international flights toward passengers and cargo owners. It lays down the rules regarding the eligible fora, highlights what kind of damage the carrier is liable for, establishes who can be sued, unifies the regime and limits of liability and regulates the documents of carriage. In short, the Warsaw System

is a collection of international treaties which govern some essential elements of the uniform law of international carriage by air.

The Warsaw System is primarily defined by the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw in 1929[13]. This Convention is commonly known as the Warsaw Convention. The Warsaw Convention was amended in 1955 by the adoption of The Hague Protocol[14] and again in 1971 by the adoption of the Guatemala City Protocol[15]. In 1975 the Convention was again amended by four protocols adopted at Montreal, the so-called Montreal Additional Protocols Nos. 1[16], 2[17], 3[18] and Montreal Protocol No. 4[19]. In 1961 the Convention was supplemented by the adoption of the Guadalajara Convention[20] and in 1966 an Inter Carrier Agreement was signed in Montreal[21]. This has been included as

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[13]See *supra* note 1.

[14]See *supra* note 3.

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

[16]*Montreal Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th of October 1929*, signed at Montreal on 25th September 1975 see ICAO Doc. 9145. [Hereinafter the Protocol will be referred to as the MP1].

[17]*Montreal Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol done at the Hague on 28th September 1955*, signed at Montreal on 25th September 1975, see ICAO Doc. 9146. [Hereinafter the Protocol will be referred to as the MP2].

[18]*Montreal Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol done at the Hague on 28th September 1955 and at Guatemala City on 8th March 1971*, signed at Montreal on 25th September 1975, see ICAO Doc. 9147. [Hereinafter the Protocol will be referred to as MP3].

[19]*Protocol to Amend the Convention of the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th of October 1929 as Amended by the Protocol done at the Hague on 28th of September 1955*, signed at Montreal on 25th September 1975, see ICAO Doc. 9148. [Hereinafter the Protocol will be referred to as the Montreal Protocol No. 4 or MP4].

[20]See *supra* note 4.

[21]*Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, 13th May 1966, CAB No. 18900, approved by order E-23680 (docket 17325). [Hereinafter the Agreement will be referred to as the MIA].

an instrument of the System although it is a private agreement whereby the major air carriers who signed it agreed to modify their conditions of carriage for the benefit of air passengers whose contract of carriage includes a place in the United States as a point of origin, a point of destination or an agreed stopping place.

The Warsaw System is widely accepted in many countries and covers most of the cases of international carriage by air of passengers and cargo. That reason alone demands that the System should be effective and fair in its dealings with claimants and it should prevent time consuming court cases where the claimant might have to wait for years before he receives compensation for his loss. Although the original Warsaw Convention was very well drafted, it is not perfect. For one, it was a compromise between civil and common law countries which in itself creates difficulties in interpretation of the rules and, for another, technology was not very advanced at the time of the drafting. Therefore the Convention was silent on certain important aspects which, later on, the adopted protocols were meant to rectify. The Warsaw Convention was conceived with the main purpose of eliminating conflicts of laws by providing a uniform liability regime for air carriers. The first chapter of the Convention handles the scope of that regime which other instruments in the System have, during the years, supplemented with modifications.

In the next sub-chapters, the System and its history will be introduced along with what each and every instrument contributed to the rules governing this specific field of aviation.

1.2. The Warsaw Convention

The history behind the drafting of the Convention started with a letter from Premier Poincaré addressed to the diplomatic representatives accredited to the French Government in Paris[22], dated 17 August 1923. In this letter, the French Government proposed the convening of a diplomatic conference in November of the same year for the purposes of concluding a convention relating to liability in international carriage by air. This was done without any preliminary work or international studies or previous preparatory consultations. Invitations were sent to governments which in return proved to be reluctant to act on such short notice, especially without the knowledge of the solutions proposed, and thus the convening of the Conference was formally deferred on two occasions Finally, between 27th of October and 6th of November 1925 the first conference (Conférence Internationale de Droit Privé Aérien) met in Paris and studied a draft convention[23]. It seems that most of the participants in the Conference were diplomats accredited to the French Government and there was not sufficient professional expertise for the negotiation and adoption of a highly technical legal text which had been the main purpose[24]. The Paris Convention of 1925 was not totally useless if only for the expression of will of its participants to create a body of technical legal experts who would study the draft convention prior to its submission to a diplomatic conference with a view to its approval. Therefore, the Paris Conference of 1925 laid the foundation for the creation of the Comité International Technique

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[22]D. Goedhuis, *National Airlegislations and the Warsaw Convention* (The Hague: M. Nijhoff, 1937) at 14.
[23]*Conférence Internationale de Droit Privé Aérien*, 27 octobre-6 novembre, 1925, Paris (1926).
[24]For further information see Milde *supra* note 12 at 193.

d'Experts Juridiques Aériens, generally known as CITEJA[25]. The creation of CITEJA took place in May 1926. The composition of CITEJA was a gathering of experts on air law who where nominated by the States invited to attend the Paris Conference of 1925. In 1927 and 1928, CITEJA studied the proposed draft convention and developed it into the present package of unification of law rather than a straightforward instrument dealing with the liabilities in international carriage[26]. The CITEJA draft was presented to the second Conférence Internationale de Droit Privé Aérien invited to meet at Warsaw and the text was approved in a period of time which, by today's standards, seems incredible - the Conference met for nine days between 4th and 12th October 1929[27].

The 1929 Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air is a convention that unified an important sector of private air law. Its greatest achievement was to eliminate some conflicts of law and the conflicts of jurisdiction.

The Convention entered into force on 13 February 1933 upon ratification by five States[28].

The Conference at Warsaw did not follow the original French proposal which was to deal exclusively with the problem of liability; the conference adopted a comprehensive unification of many aspects of the contract of carriage with the aim of preventing conflicts of laws and conflicts of jurisdiction in the field of the contract of carriage.

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[25]CITEJA was the dominant force in international air law for 20 years but after World War II a new body was created that eventually took over the functions of CITEJA. This body was ICAO, see *supra* note 5.

[26]Avant-projet du CITEJA, see Vol. II. Conférence Internationale de Droit Privé Aérien, 4-12 octobre 1929, Varsovie 1930, at 157-176.

[27]See *supra* note 1.

[28]Article 37 of the Warsaw Convention. On February 13th 1933, the Convention came into force for six States: Brazil, France, Poland, Romania, Spain and former Yugoslavia.

Mainly it unified:

a) the definition of "international carriage" which determines the scope of applicability of the convention[29];
b) the rules concerning the liability of the carrier and its limitations[30]: the liability is based on fault of the carrier[31], the fault of the carrier is presumed[32], the burden of proof is reversed[33] and the amount of the liability is limited[34] unless there are defects in documentation or the claimant can prove willful misconduct[35];
c) the rules concerning the documents of carriage[36]; and
d) the rules concerning jurisdiction[37].

In the Convention there is a provision on successive carriage[38] and there is also a specific provision on combined carriage performed partly by air and partly by any other mode of transportation[39]. The provisions of the Convention are of imperative nature and the parties cannot infringe the rules thereof, because such contracts shall be null and void[40].

"The package of solutions embodied in the Warsaw Convention must be considered to be far-sighted and creative and drafted with profound legal vision"[41]. Though that is so,

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[29]Article 1(2).
[30]Articles 17, 20, 22 and 25.
[31]Article 20. The liability in the Warsaw Convention is fault liability with a reversed burden of proof, the so-called "assumed fault liability". That means that the defendant must prove that he/she did not act negligently nor with intent to cause damage.
[32]Article 17.
[33]Article 20.
[34]Article 22.
[35]Article 25.
[36]Articles 3 to 16.
[37]Article 28.
[38]Article 30.
[39]Article 31.
[40]Article 32.
[41]Milde, *supra* note 12 at 195.

and the basic principles of the Convention have survived successfully from 1929 to this day, several of its provisions required adjustment and fine-tuning and not the last among them was the amount of the limit. As of late 1993, 124 States had ratified the Convention, amongst them Iceland and more are expected to become members.[42]

The Convention has now been in force for 60 years as of February 1993 and during that period several instruments have been ratified that amend, clarify and supplement the original Convention. Several instruments have been signed but are not yet in force or appear to have been abandoned. In the following pages these instruments will be introduced along with the changes they brought about.

In the years 1948-1951, ICAO's Legal Committee[43] studied the possibility of revising the Convention and in 1952 a Special Sub-Committee of the Legal Committee and its Rapporteur, Major K. M. Beaumont, prepared a new draft convention which would have replaced the Convention if it had been approved[44]. This draft convention was rejected by the Legal Committee at its Ninth Session in 1953 and at the same time the Committee decided that the Convention should not be replaced but amended[45]. The work done by the Legal Committee at the Ninth Session was presented to the International Conference on Air Law which was convened by the Council of ICAO and

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[42]This figure is based on information given to ICAO, received from the depositary State, Poland, 15th November 1993.

[43]Legal Committee, Second Session, Geneva, 28th May - 18th June 1948 (ICAO Doc. 6014-LC/III); Legal Committee, Third Session, Lisbon, 24th September - 1st October 1948 (ICAO Doc. 6024-LC/121); Legal Committee, Fourth Session, Montreal, 7th - 18th June 1949 (ICAO Doc. 6027-LC/124); Legal Committee, Fifth Session, Taormina-Rome 5th - 21st January 1950 (ICAO Doc. 6029-LC/126) at 231-232; Legal Committee, Seventh Session, Mexico City, 2nd - 23rd January 1951 (ICAO Doc. 7157-LC/130).

[44]Report by Major K.M. Beaumont, Reporter, ICAO Doc. 7229-LC/133, Annex I at 191-216.

[45]Legal Committee, Ninth Session, Rio de Janeiro, 25th August - 12th September 1953 (ICAO Doc. 7450-LC/136; Resolution concerning the revision of the Warsaw Convention at xv).

met at The Hague from 6th to 28th September 1955[46]. The Hague Conference adopted a Protocol for the amendment of the Warsaw Convention[47]. It was agreed that, between the parties to the Protocol, the 1929 Warsaw Convention and the Protocol "are to be read and interpreted together as one single instrument to be known as the Warsaw Convention as Amended at The Hague, 1955."[48] This in fact was not only an amendment to the Convention but a creation of a new and separate legal instrument that is only binding between parties thereto. Therefore, States that are only parties to the unamended Warsaw Convention are not affected by this instrument unless they ratify it[49].

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[46]International Conference on Private Air Law, The Hague, September 1955, ICAO Doc. 7686-LC/140 (Vol. I - Minutes, Vol. II - Documents).
[47]See *supra* note 3.
[48]Article XIX of WH.
[49]This means that if one State is a Party to the Warsaw Convention of 1929 and another State is a party to The Hague Protocol of 1955, neither State has an instrument in common and therefore no mutual international ground for litigation. In other words the Warsaw System is ineffective in such cases.

1.3. The Hague Protocol

For the entry into force of The Hague Protocol, 30 ratifications were needed[50] and on 1 August 1963 that task was accomplished. The Hague Protocol (WH) has been ratified by 110 states[51] and among them is Iceland. The main elements introduced by the WH to the Convention where:

a) it doubled the passenger liability limit to 250,000 gold francs[52];
b) it modernized the rules relating to the documents of carriage by redrafting and simplifying them[53];
c) the concept of "willful misconduct" (Article 25 Warsaw Convention) was clarified[54]; and,
d) a new provision, Article 25A was introduced, stipulating that rules regarding the limits of liability now also apply to a servant or an agent of the carrier acting within the scope of his employment[55].

Although WH clarified and closed a lot of loopholes in the Convention, still there were provisions that proved unsatisfactory or too ambiguous for States. In August - September 1961, on the grounds of the work done by ICAO's Legal Committee[56], the Council of ICAO convened a Diplomatic Conference at Guadalajara, Mexico[57]. This Conference adopted, on 18th of September 1961, a Convention supplementary to the

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[50]Article XXII, paragraph 1 of WH.
[51]See *supra* note 42.
[52]Article XI of the WH.
[53]Articles III to IX of the WH.
[54]Article XIII of the WH.
[55]Article XIV of the WH.
[56]Legal Committee, Eleventh Session, Tokyo, 12 - 25 September 1957, ICAO Doc. 7921-LC/143 (Vol. I - Minutes, Vol. II - Documents).
[57]International Conference on Private Air Law, Guadalajara, August - September 1961, ICAO Doc. 8301-LC/149 (Vol. I - Minutes, Vol. II - Documents).

original Convention or that Convention as amended at The Hague[58].

[58]The text of the Guadalajara Convention is found in ICAO Doc. 8181.

1.4. The Guadalajara Convention

The Guadalajara Convention needed five ratifications for its entry into force[59]. On 1st of May 1964 it entered into force. In 1993 the Supplementary Convention had been ratified by 67 States[60]. Iceland did not sign this instrument nor has it deposited its instrument of adherence[61]. The sole and exclusive purpose of the Guadalajara Convention was to extend the application of the Warsaw System to include the "actual carrier[62]" in addition to the "contracting carrier[63]" in cases where these two functions are split between different parties. In the provisions of the Convention or WH only the contracting carrier is mentioned. There is a silence towards carriers that do not have a direct contractual link with passengers or cargo owners and therefore Guadalajara was convened to remedy this flaw in the System.

Although the liability limits established in the Convention were doubled in 1955 (WH), there was considerable opposition towards those limits and lawyers started using every accessible avenue to set them aside, especially by alleging "willful misconduct" under

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[59]Article XIII, paragraph 1 of the Guadalajara Supplementary Convention.

[60]This figure is based on information given to ICAO, received from the depositary State, Mexico, 15th November 1993.

[61]The other major Scandinavian States (Denmark, Norway and Sweden) are Parties to this Supplementary Convention. Iceland should follow their example as it has so often in the past because otherwise an important aspect of international carriage by air is left unregulated, that is, the charter flights.

[62]Guadalajara Supplementary Convention (1961) Article 1c).

"Article 1c) "Actual carrier" means a person, other than the contracting carrier, who by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.""

[63]Guadalajara Supplementary Convention (1961) Article 1b).

"Article 1b) "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;""

the framework of Article 25 or using technical shortcomings in the ticket in order to break the limits[64]. Before work could be undertaken to remedy this dissatisfaction, the United States of America[65] announced their intention to denounce the Warsaw Convention. The Council of ICAO decided to arrange for international consultations on the matter and convened a Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and The Hague Protocol[66]. But before this meeting took place the United States proceeded with its denunciation by sending a Diplomatic Note to the depository (received 15 November 1965 by the Government of Poland). The denunciation was to take effect six months later. On 14 May 1966, only two days before the denunciation was to take effect, the United States withdrew its notice. The reason for this withdrawal was a private agreement reached between the United States and air carriers[67] that were members of the International Air Transport Association (IATA)[68]. This agreement was drafted in Montreal and is known as the Montreal Inter-Carrier Agreement (MIA)[69]. The MIA is not an international agreement but a private arrangement and as such is not a formal revision of the Warsaw System. However, it affects the System because it governs a significant segment of international carriage of passengers by air in a region with the heaviest passenger traffic and is therefore usually mentioned as an indirect instrument to the Warsaw system. Because of its

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[64]This statement applies especially to the jurisprudence in the United States of America, which has proven in the past as being a very litigious nation.

[65]Hereinafter the United States of America will be referred to as the United States.

[66]ICAO Doc 8584-LC/154-1 and 2.

[67]These carriers were members of the so-called "Malta group", a grouping of senior civil servants from the aviation administrations of western European States- see M. Milde, "'Warsaw' System and Limits of Liability - Yet another Crossroad?" (1993) XVIII:I Annals of Air and Space Law 201 at 226.

[68]IATA came into being in December 1944. One of the reasons for the establishment of IATA was that the Chicago Conference of 1944 could not agree on the commercial side for international air carriage. For further information see Shawcross & Beaumont, "Air Law" I:II Chapter 5 at (27).

[69]See *supra* note 21.

reach and significance, the MIA is often, in spite of its private character, regarded as part of the Warsaw system[70].

[70]For further information see Milde, *supra* note 67 at 209-212.

1.5. The Montreal Inter-Carrier Agreement (MIA) and the "New Zealand Package"

The MIA covers all traffic to, from and via the United States. It differs from the treaty instruments in that it is a private agreement between airlines to include certain conditions in their contracts of carriage as a special contract under Article 22(1) of the Warsaw Convention or of the WH. Icelandair (Flugleiòir)[71] is a party to the MIA as well as other international air carriers that fly to, from or via the United States. The conditions of the MIA are as follows:

a) carriers accept contractually "strict liability"[72];
b) carriers are to apply a limit of US $ 75,000 in cases of death, wounding or other bodily injury to passengers[73] (if legal fees are excluded the amount is 58,000 US$); and,
c) a new type of notice is required to warn passengers of the liability limit, printed in a distinct legible print.

The MIA is, as has been said before, not an instrument of the System and therefore not considered a permanent solution to the then low liability limit. Since the liability limit was still very much considered too low, particularly in the United States, ICAO kept the matter open. In 1967, ICAO established a Panel of Experts on the Limits for Passengers in International Transport by Air[74]. The Panel met in two sessions in 1967,

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[71]Icelandair is a Member of IATA. It is the only international air carrier in Iceland. It is not State owned nor is it subsidized by the government.
[72]"Strict liability" is liability where proof of fault is not required. The claimant must establish a) that an accident occurred, b) that damage occurred and c) that there is a direct causation between the accident and the damage.
[73]This is in accordance to Article 22 (1) of the Convention.
[74]ICAO Doc. 8839-LC/158-1: LC/SC Warsaw WD/1 at 115.

January[75] and July[76] and explored various solutions for the proper adjustment of the limits. During the meetings of the Panel, the limit of liability was, for the first time, not discussed in isolation but as a package possibly connected with the system of liability. Also, for the first time, the concepts of strict and absolute liability were explored and their value for the elimination of costly litigation was assessed. In essence, the Panel came up with two solutions, one based on the WH with a high limit (fault liability) possibly exceeding the MIA limit (S$75,000) and the cost; the other solution was based on the principle of strict liability with a limit equivalent to that of the MIA. The Panel also explored the possibility of a choice of limits by the passenger, determined either at the time of purchase of the ticket or at the time when the claim is made. The choice would have been based upon the two above mentioned solutions; fault liability (very high limits) or strict liability (high unbreakable limits).

In October 1967, the sixteenth Session of the Legal Committee established a Sub-Committee of the Legal Committee to address the subject "Revision of the Warsaw Convention as amended by the Hague Protocol"[77]. The Sub-committee held two sessions, the first one from 18th - 29th September 1968 and the second one from 2nd - 19th September 1969[78]. The Sub-Committee did not only address the question on the amount of the limit but also the rule of liability, defenses available to the carrier, the ticket, the notice requirement, willful misconduct and questions of jurisdiction. The views of the international community on liability further crystallized during these sessions, for example, the United States and IATA formulated controversial proposals that were specific and far-reaching. The outcome of these two sessions was the seventeenth Session of the ICAO Legal Committee, held in 1970, from 9th February to

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[75]ICAO Doc. 8839-LC/158-2 at 73-82.
[76]See *supra* note 75 at 123-133.
[77]Paris, October 1967, ICAO Doc. 8787-LC/156-1 and 2.
[78]ICAO Doc. 8839-LC/158-1 at 1 and 81.

11th March. The highlight of the discussions that took place during that time was the so-called "New Zealand Package"[79]. The provisions of the "Package" contained the following:

> "1. absolute liability of the air carrier for death or injury subject only to the defense of contributory negligence; even the defense of armed conflict was to be expressly eliminated;
> 2. liability to be limited to US$100,000;
> 3. the limit to be unbreakable in all circumstances; that, in practice, means that the limit could not be exceeded even in the case of an intentional act or in the case of gross negligence or in the cases of absence or deficiency in the ticket or the notice;
> 4. there would be an automatic increase of the limit of liability in the order of 2.5 % per year;
> 5. a settlement inducement clause would be inserted to enable the courts to award costs in addition to the damages unless the carrier has made an offer of settlement in an amount at least equal to the compensation eventually awarded within the applicable limit; and,
> 6. a further forum would be added to those in Article 28, namely, the court of the domicile or of the permanent residence of the victim if the carrier has a public establishment in the same Contracting State."[80]

The Legal Committee, during its seventeenth Session, drafted texts of certain articles for the purpose of revising the Warsaw Convention as amended at the Hague and based the proposals mostly on the "New Zealand Package"[81]. The proposals were

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[79]Proposal of the New Zealand delegation presented on 18 February 1970. ICAO Doc. 8878-LC/162, Minutes and Documents relating to the question of the revision of the Warsaw Convention of 1929 as amended by The Hague Protocol of 1955 and other matters.
[80]See *supra* note 79.
[81]For further information see Milde, *supra* note 12 at 200-202 and Milde, *supra* note 67 at 211-213.

submitted to the Council of ICAO for action and the result was an International Conference on Air Law, convened at Guatemala City from 9th February to 8th March 1971[82]. This Conference adopted a protocol, the so-called Guatemala City Protocol for the Amendment of the Warsaw Convention as Amended at The Hague, 1955[83]. The Guatemala City Protocol is a separate and distinct instrument to be read and interpreted together as one single instrument to be known as the Warsaw Convention as Amended at The Hague, 1955, and at Guatemala City, 1971[84].

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[82]ICAO Doc. 9040-LC/167-1 and 2.
[83]See *supra* note 15.
[84]ICAO Doc. 9040-LC/167-1 at 326, paragraph 106.

1.6. The Guatemala City Protocol

The Guatemala City Protocol has so far only been ratified by 11 states[85] and is not in force since 30 ratifications are needed[86]. Iceland is not among these 11 States[87]. It is almost certain that the Guatemala City Protocol will never become a binding treaty in its own right because Article XX, paragraph 1, stipulates that:

> *"This Protocol shall enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification on the condition, however, that the total international scheduled air traffic, expressed in passenger-kilometers, according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five States which have ratified this Protocol, represents at least 40 % of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organization in that year. If, at the time of deposit of the thirtieth instrument of ratification, this condition has not been fulfilled, the Protocol shall not come into force until the ninetieth day after this condition shall have been satisfied. This Protocol shall come into force for each State ratifying after the deposit of the last instrument of ratification necessary for entry into force of this Protocol on the ninetieth day after the deposit of its instrument of ratification."*

This means that the entry into force of the Guatemala City Protocol is conditional upon ratification by the United States since they represented at least 24% of the international

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[85]This figure is based on information given by the depositary, ICAO, 15th November 1993.
[86]See Article XX of the GP.
[87]These States are: Colombia, Costa Rica, Cyprus, Dominican Republic, Greece, Italy, Mauritania, Netherlands, Niger, Seychelles and Togo. The three major Scandinavian States, Denmark, Norway and Sweden, signed this instrument but have not ratified it.

scheduled air traffic in 1970. Therefore ratification by the United States is required in every case to meet the condition of Article XX[88]. This condition was agreed on because the Conference felt that the primary purpose of the Protocol was to accommodate the needs of the United States and therefore made its entry into force contingent on the participation of the United States. It has become known that the United States will never ratify the Protocol on its own. However all amendments suggested by this Protocol have become a consolidated text to be known as "The Warsaw Convention as Amended at the Hague, 1955, at Guatemala City, 1971, and by the Additional Montreal Protocol No. 3, 1975"[89]. This means that if States ratify Montreal Additional Protocol No. 3, they automatically become a party to the Guatemala City Protocol. The Guatemala City Protocol and thereby also Montreal Additional Protocol No. 3, have introduced fundamental changes to the WH rules. The characteristics of these changes are the following[90]:

> a) the documents of carriage (both for passengers and checked baggage) have been considerably simplified and the new provisions offer the possibility to issue an "individual or collective" document of carriage or substitute such document by "any other means which would preserve the record" therefore permitting the introduction of electronic data processing for the issuance of a passenger ticket or baggage check[91];
>
> b) there is no sanction attached to non-compliance with the above mentioned provisions which simply means that the liability limit can no longer be broken on the ground of unsatisfactory documentation as has been very popular in the past;
>
> c) the Hague passenger limits are raised to 1,500,000 Gold

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[88]See Milde, *supra* note 12 at 203 and Milde, *supra* note 67 at 214.
[89]See Article VII of the Montreal Additional Protocol No. 3 (1975) and *supra* note 18.
[90]The Guatemala City Protocol will be discussed further in Chapter two.
[91]Articles II and III of the GP.

Francs. The limit can not be broken even in cases of willful misconduct. (The Montreal Additional Protocol No. 3 converts this limit to 100,000 SDR[92]);

d) the system of liability is changed from "assumed fault liability"[93] to "strict liability"[94];

d) the limit is unbreakable and can not be exceeded even in cases of acts or omissions done with intent to cause damage or recklessly and with knowledge that damage would probably result[95];

e) one jurisdiction is added to the already existing ones (passenger's domicile as a possible forum)[96];

f) Article 35A is introduced, enabling States to establish and operate, within their territories, a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury of passengers;

g) carriers are permitted to disregard the notice requirement set forth in the Warsaw Convention[97]; and,

h) there is also a provision that provides for two revisions of the liability limit in the Protocols, five and ten years after the treaty has entered into force[98] (by a maximum of 12,500 SDR on each occasion).

The Guatemala City Protocol only deals with the liability in respect of passengers, baggage and delay. It left intact the matter of cargo which was further studied by the sessions of the Legal Sub-Committee and by the Legal Committee[99]. The results of

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[92]SDR: Special Drawing Right, it is a unit of currency created by the International Monetary Fund. 1 SDR is based on 16 different currencies but the fundamental currencies are the following; French Franc; Deutsch Mark; Pound Sterling; US. Dollar and Japanese Yen.
[93]See *supra* note 31.
[94]See *supra* note 72.
[95]Article IX (amends Article 24, para 1) of the GP.
[96]Article XII of the GP.
[97]Articles 3 and 4 of the Warsaw Convention.
[98]Article XIV GP inserts Article 42.
[99]ICAO Doc. 9131-LC/173-1 and 2.

those deliberations were presented to an International Conference on Air Law which met at Montreal from 3rd to 25th of September 1975[100]. The Protocol which was adopted by that Conference is known as Protocol No. 4 to Amend the Warsaw Convention of 1929 as Amended by The Hague Protocol, 1955[101].

[100]ICAO Doc. 9151-LC/171-1 and 2.
[101]See *Supra* note 19.

1.7. Montreal Protocol No. 4

The Montreal Protocol No. 4 (MP4) has been ratified by 21 States[102] and it deals exclusively with air freight liability. Iceland has not ratified this instrument nor the other three Montreal Protocols that will be mentioned next. For the entry into force of Montreal Protocol No. 4, any 30 ratifications are needed[103]; there is no condition implying the requirement of ratification by the United States.

The Montreal Protocol No. 4 is a new implementation to be read and interpreted together, as one single instrument, with the Warsaw Convention as amended at The Hague in 1955[104]. The main characteristics of this instrument are as follows:

> a) the Convention as amended does not apply to the carriage of postal items; the carrier is only liable to the relevant postal administration and such liability will be governed by the rules applicable to the relationship between the carriers and the postal administrations, not by the Convention[105];
>
> b) the documentation regarding cargo has been simplified in the sense that the traditional air waybill can be substituted by "any other means which would preserve a record of the carriage to be performed" therefore permitting the use of electronic or computer data processing. This has to be done "with the consent of the consignor". "If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other

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[102]See *supra* note 42.
[103]Article XVIII of the MP4.
[104]Article XV of the MP4.
[105]Article II of the MP4.

means"[106];

c) the Protocol introduces "strict liability"[107] in international carriage of cargo by air. This means that the carrier is liable irrespective of fault. "However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following;

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

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

c) an act of war or an armed conflict;

d) an act of public authority carried out in connection with the entry, exit or transit of the cargo."[108]; and,

d) the liability limit is expressed in the SDRs of the International Monetary Fund but has not been increased from the Warsaw Convention[109].

Already in October, 1974 the 21st Session of the ICAO Legal Committee adopted a resolution that stipulated that the conversion of the sums in gold francs into national currencies "should not be made on the basis of the price of gold on the free market for that metal"[110].

The 1975 Diplomatic Conference realized that the "gold clause" contained in the instruments of the Warsaw system had lost its practical meaning because, since 1968, the free market of gold had been established and by subsequent amendments of the Bretton-Woods Agreements the gold was in fact demonetized. Therefore the 1975 Conference introduced the SDRs of the International Monetary Fund as the yardstick of

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[106]Article III of the MP4, [Emphasis added].
[107]See *supra* note 72.
[108]Article IV of the MP4.
[109]Article VII, paragraph 2 b) of the MP4.
[110]ICAO Doc. 9122-LC/172, Part II, Appendix B.

values to replace the gold clause. The Conference also adopted, without any preparatory work, the Additional Montreal Protocols Nos. 1[111], 2[112] and 3[113].

[111]ICAO Doc. 9145.
[112]ICAO Doc. 9146.
[113]ICAO Doc. 9147.

1.8. Montreal Additional Protocols Nos. 1, 2 and 3

The Montreal Additional Protocol No. 3 has already been mentioned in relation to the Guatemala City Protocol but the other two still remain. None of these Protocols are in force but only 30 ratifications are needed for each[114]; there is no condition implying the need for ratification by the United States. The Protocols have been open for signature since 1975 and during that time the Montreal Protocol No. 1 and the Montreal Protocol No. 2 have been ratified by 25 States[115]. The Montreal Protocol No. 3 has been ratified by 19 States[116]. The sole purpose of these Protocols is to substitute SDRs[117] for gold francs in the Warsaw Convention of 1929 or that Convention as amended at The Hague in 1955 or that Convention as amended by the Guatemala City Protocol of 1971.

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[114]Article VII MP1, Article VII MP2 and Article VIII MP3.
[115]See *supra* note 42.
[116]See *supra* note 42.
[117]See *supra* note 92.

1.9. Conclusion

All these attempts at unification of law have created a very complex and chaotic system that still needs to be unified. The Warsaw Convention of 1929 has been amended by a Protocol (The Hague Protocol), thereafter amended by a Protocol (Guatemala City Protocol) to Protocol (MP4) and eventually amended by a Protocol to Protocol to Protocol (MP1, MP2 and MP3). This creates confusion and disunification which is not what the Warsaw System is meant to do. There are States that are only Parties to the Warsaw Convention (the United States), other States that are only Parties to The Hague Protocol (Singapore) but most European States are Parties to both instruments (for example all the EC States and all the Scandinavian States, including Iceland). The Guadalajara Supplementary Convention has only been ratified by 67 States and Iceland is not included in that number, nor is the United States. Also a single text with all these amendments is not readily available and has not been made authentic in all ICAO languages. Although, after the 1975 Conference, ICAO undertook to study the consolidation of the System and did attempt to prepare a single authentic text, that work was abandoned when it became apparent that this might actually slow down the flow of ratification of the Warsaw instruments that are not yet in force[118].

While the study of the Warsaw System has been on the General Work Programme of the ICAO's Legal Committee since 1976, it will not be studied unless the Montreal Protocols of 1975 will enter into force[119]. The Legal Committee has urged all Contracting States to ratify the Montreal Protocols Nos. 1-4[120]. Similarly, the 26th

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[118]See Milde, *supra* note 12 at p. 206.

[119]ICAO Doc. 9397-LC/185, p. 4-9, Decision 4/3 of the 25 Session of the Legal Committee.

[120]ICAO Doc. 9394-LC/184 and Doc 9397-LC/185, the 24th and 25th Session of The Legal Committee.

Session of the ICAO Assembly in 1986 adopted unanimously a Resolution A26-2 urging States to ratify all air law conventions prepared under the auspices of the Organization. The 28th Session of ICAO's Legal Committee approved, in their current work progamme in 1992, the promotion of the ratification of the Montreal Protocols[121].

In Chapter 2 the Guatemala City Protocol will be studied and the validity of its provisions regarding ratification of that instrument.

[121]ICAO Doc. 9588-LC/188.

Chapter 2 The Rationales for Ratifying or Tearing up the Montreal Additional Protocol No. 3, alias Guatemala City Protocol

2.1. Foreword

As has been mentioned before, the Guatemala City Protocol was adopted by the Conference convened by ICAO from 9th February to 8th March, 1971[122]. After four weeks of extensive deliberations and drafting, the Protocol was approved by a vote of 36 against 6, with 5 abstentions. "The vote was not a roll call and only personal memory confirms that the negative votes came from the USSR, Byelorussian SSR, Ukrainian SSR, Czechoslovakia, Poland and Yugoslavia."[123] Their main cause for opposition was not a dissatisfaction with the Protocol but was based on purely political considerations. The "no" vote was to draw attention to their dissatisfaction with the fact that the (then) German Democratic Republic was not invited to attend the Conference and also the depositary function for the new instrument was given to ICAO rather than to Poland (the depositary of the 1929 Convention and The Hague Protocol). On the other hand, the abstentions came from the African and Asian developing countries who found the new limit of liability extremely high. The Latin American delegations supported the new instrument.

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[122]See *supra* note 15.
[123]Milde, *supra* note 67 at 213-214.

The Guatemala City Protocol (GP) is the result of a compromise between the United States of America and the "rest of the world". This was done, at the initiative of the delegations of France, Germany and the United Kingdom, through a proposal containing the stipulation that the Protocol would not enter into force without ratification by the United States[124].

The Protocol introduces only amendments with respect to the carriage of passengers and their baggage. Carriage of cargo is subject to the WH provisions. The reason why cargo carriage was not amended lies in the fact that the Legal Committee and the Conference dealt only with what was perceived as a priority issue and left the problems of cargo for later study[125].

It has been mentioned before that the GP has so far only been ratified by 11 States and is not in force since 30 ratifications are needed[126], that the Protocol will never become a binding treaty in its own right since its entry into force relies on ratification by the United States and that all amendments suggested by the Protocol have, however, become a consolidated text to be known as "The Warsaw Convention as Amended at the Hague, 1955, at Guatemala City, 1971, and by the Additional Montreal Protocol No. 3 (MP3), 1975"[127]. The MP3 does not need to be ratified by the United States for its entry into force and what is so noteworthy is that by ratifying Montreal Protocol No. 3, the Guatemala City Protocol is ratified in its amended form (without it ever entering into force)[128].

In order to evaluate the strength or weakness of the Guatemala City Protocol, its

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[124]Article XX of the Protocol.

[125]Provisions regarding cargo carriage were adopted in 1975 as the Montreal Protocol No. 4, see *supra* note 19.

[126]See *supra* notes 85 and 86.

[127]See *supra* note 18.

[128]For further information on the Guatemala City Protocol see *supra* note 15 and Milde, *supra* note 12.

provisions must be discussed, the validity of the criticism that has been brought forward against each provision must be evaluated and the instrument as whole must be discussed. The Montreal Additional Protocol No. 3 does not change the provisions of the Guatemala City Protocol nor the Warsaw System in any way, except that it provides for the substitution of SDR[129] for gold francs and brings into effect the Guatemala City Protocol's provisions[130]. Therefore, from here on, only the Guatemala City Protocol will be discussed.

In a speech given on behalf of Bin Cheng at the International Conference on Air Transport and Space Application in a New World, held at Tokyo, 2-5 June 1993, he had this to say about the Guatemala City Protocol:

> "any attempt to bring its alter ego into force in the form of MAP3[131], will not only be a retrograde step, but will also completely mess up the Warsaw System as such. In fact, even in its reincarnation as MAP3, the Guatemala City Protocol has been completely overtaken by events. A number of passengers traveling under the Warsaw or Warsaw-Hague Conventions today come also under the 1966 Montreal Inter-Carrier Agreement and special contracts entered into by carriers from the Malta Group countries[132]. These passengers already enjoy, therefore, the régime of absolute liability and a limit of 100,000 SDR. If MAP3 were to

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[129]Article 22 of the Convention as amended by Article II of the MP3.
[130]Article V of the MP3.
[131]"Alter ego" refers to the Guatemala City Protocol and "MAP3" is an abbreviation for the Montreal Additional Protocol No. 3. [Footnote added].
[132]See N.R. McGilchrist, "Special Contracts and the Malta Agreement", Lloyd's Maritime and Commercial Law Quarterly (1977), at 366. Also, (1976) I Air Law at 285; M. de Juglart, *Traité de droit aérien*, 2nd ed. (Paris: Librarie generale de droit et de jurisprudence, 1989), 2835.

> replace the existing régime, they would gain nothing apart from a fifth jurisdiction, but they would lose the possibility of obtaining full compensation in case of faulty documentation and in the event of willful misconduct on the part of the carrier or his servants and agents.
>
> Yet this is the régime which most governments and their airlines, both individually and collectively in their respective international groupings, ICAO and IATA, repeatedly and emphatically argue as the most desirable step to take in order to bring the Warsaw System out of the present crisis."[133]

Cheng says that the shortcomings of the Montreal Protocol No. 3 which in fact are then the shortcomings of the Guatemala City Protocol, fall roughly into six categories. According to Cheng these categories are:

> a) The MP3 can be a source of much misunderstanding and confusion;
>
> b) the MP3 shows signs of great haste in its drafting and adoption leading to technical defects which render parts of the resultant treaty inoperative;
>
> c) the MP3 is overtly carrier-oriented;
>
> d) the MP3's supplementary compensation scheme is a non-starter;
>
> e) the MP3 has been largely overtaken by events; and,

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[133]Bin Cheng, "The Warsaw System: Mess Up, Tear Up, or Shore Up?" (Paper presented on 3rd June 1993, to the International Conference on Air Transport and Space Application In a New World, Tokyo, 2-5 June, 1993) at 20 [unpublished]. The author was not present at Tokyo and the paper was partly read on his behalf by Professor David Yang, Soochow University, Taipei. [Hereinafter Bin Cheng will be referred to as Cheng]

f) the MP3's aim, to harmonize the limit of the carrier's liability for passenger death and injury, is no longer realistic[134].

These are harsh words against the Protocols. The question is, is Cheng right or could it be that the Protocols have something to introduce to the aviation nations, something that might bring the System out of the crisis and into a calm atmosphere of harmony?

Cheng's view is not supported unanimously throughout the academic world of aviation nor by governments. An example of the opposite outlook on the Protocols is that of Milde who was also at the Tokyo Conference and had this to say about the Guatemala City Protocol:

> "While the critics of the Guatemala City Protocol concentrate on the questions of the limit of liability, it is often overlooked that the Protocol represents an honest effort to modernize the Convention, to remove the obstacles to a speedy settlement of claims, reduce litigation and simplify the formalities."[135]

Milde further says:

> "It would, *inter alia*, be unwise not to note that ICAO- a UN specialized agency with 180 Member States - continues to urge international action to expedite the entry into force of Montreal Protocols 3 and 4 unless we wish to put ourselves above the collective wisdom and political will of the

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[134]Cheng, "What is wrong with the 1975 Montreal Additional Protocol No. 3?" (1989) XIV Air Law 220 at 222.
[135]Milde *supra* note 67 at 214.

ICAO Member States.

This is not to say that the Guatemala City Protocol and Montreal Protocol No. 3 are perfect legal instruments; at the time of their adoption they represented the best compromise solution the international community could reach. Each compromise by necessity contains flaws and imperfections but they are of the nature the States "can live with". There was no possibility of agreeing on an amount of the limit of liability and the approved sum of 100,000 SDR (in today's terms about $ 140,360) was by far too high for some States and insufficient for the United States. Article 35A enabling a domestic supplementary scheme should have assisted the States requiring a higher limit or no limit at all to be part of the unified legal framework - however it has taken already too long to elaborate such a scheme in one single State."[136]

What to do, what to do? Two opposite views have been given towards the Protocols and now comes the difficult task of deciding whether it is rational to ratify Guatemala City Protocol through Montreal Protocol No. 3 or to find another solution for the existing problem, because the situation today is not tolerable and something fundamental must be done to eliminate the disunification that exists.

After examination of Cheng's first argument, it must be rejected. He says that the MP3 can be the source of much misunderstanding and confusion. He further explains that if the Montreal Protocols come into force there will be no less than eight treaties and one instrument[137] in the Warsaw System. The combinations between them will be endless

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[136]Milde, *supra* note 67 at 232-233.
[137]The MIA.

and serious confusion will arise[138]. The fact is that if the Montreal Protocols are ratified by most States, the confusion will cease to exist because then the Warsaw Convention, WH, GP and the Montreal Protocols will all be in force for those States and unification will be brought about. It does not matter whether the Protocols or a new instrument are being brought into force as long as there is unanimous ratification. For example, if a complete new instrument were to be drafted and it was brought into force by 30 ratifications and not foreseeable that it would be ratified by the rest of the Warsaw States[139], the confusion would still be there and the crisis not eliminated. What is anticipated though, regarding the Montreal Protocols, is that when the United States has ratified them the other Warsaw States will follow[140].

In the next sub-chapters those provisions of the GP will be examined that have been subject to criticism and Cheng's arguments will be discussed where relevant.

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[138]See Cheng, *supra* note 134 at 222-223.

[139]The States that are a party to one or more instruments of the Warsaw System.

[140]The probability of the United States ratifying the Montreal Protocols will be discussed later o.: in this Chapter. See 2.2.8. The Supplemental Compensation Plan and 3.2. Conclusion.

2.2. The Protocol itself

In order to evaluate the desirability of ratifying or tearing up the Guatemala City Protocol, it is necessary to scrutinize each and every provision of the Protocol, especially those that have been the subject of disagreement and exposed to severe criticism.

2.2.1. Article I, The Scope of the Guatemala City Protocol

Article I is explanatory in the sense that it stipulates that the Protocol is meant to modify the Warsaw Convention as amended at The Hague (WH) and at the same time explains that WH will be called the Convention. This Article has not been exposed to criticism since it does not alter nor change the original Convention directly. The Article stipulates:

> **"Article I**
>
> The Convention which the provisions of the present Chapter modify is the Warsaw Convention as amended at The Hague in 1955."

2.2.2. Articles II and III, Documents of Carriage

The next two articles, Articles II and III are provisions relating to the documents of carriage. They will be explained together since their terms are quite similar. These Articles have been exposed to severe criticism and will therefore, be thoroughly examined. Their provisions are as follows:

"Article II

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

"Article 3

1. In respect of the carriage of passengers an individual or collective document of carriage shall be delivered containing:

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

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability."

Article III

Article 4 of the Convention shall be deleted and replaced by the following:-

"Article 4

1. In respect of the carriage of checked baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a document of carriage which complies with the provisions of Article 3, paragraph 1, shall contain:

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

b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.

2. Any other means which would preserve a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the baggage check referred to in that paragraph.

3. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.""

Articles 3 and 4, as amended by Articles II and III, simplify considerably the documents of carriage for passengers and the baggage check in the sense that:

1. the Articles offer the possibility to issue an "individual or collective" document of carriage and they enable substitution of such document by "any other means which would preserve the record" therefore permitting the use of electronic data processing or computer data processing for a formal ticket or baggage check;

2. no "sanction" is attached to non-compliance with these provisions according to Article 3, paragraph 3 and Article 4 paragraph 3, a status that has been assimilated to the documentation used in other means of mass transport. This means that no longer can the document of carriage possibly be used as a method to exceed the liability limit by pointing out that *no* document has been issued or that the issued document does not fulfill the requirements set forth in the Convention; and,

3. what is also very important, the Articles do not contain a notice requirement. The original Convention requires that the documents of carriage have a notice saying that the carriage is subject to the rules laid down in the Warsaw Convention and this

notice must explicitly make clear that the rules limiting the carrier's liability apply[141]. In other words, the notice has to stipulate that the carriage is international carriage and that the carriage is subject to the Convention's limits of liability. The importance of this is tremendous. No longer is it possible to exceed the liability limit by pointing out that the passenger was not aware that the carriage was international carriage that is subject to the Convention with a limited liability because the ticket lacked the proper notice.

The question that arises is whether this amendment to the Convention is fair or not towards the passenger.

There are some who are convinced that these two articles impair the Convention while others believe they can only be seen as a necessary move that should be embraced. The criticism itself relates to the facts that no longer is there a sanction for not issuing a document of carriage, nor is there a notice requirement. The concern is that no longer will passengers know that they are subject to a liability limit and therefore will not take necessary steps to insure themselves against financial loss in case of accidents that

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[141]Article 3 of the Convention. The Article stipulates:
"Article 3
1. For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
a) the place and date of issue;
b) the place of departure and of destination;
c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
d) the name and address of the carrier or carriers;
e) a statement that the transportation is subject to the rules relating to liability established by this convention.
2. The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability." [Emphasis added].

could possibly exceed the limit set forth in the Guatemala City Protocol. Cheng is extremely opposed to the amended Articles 3 and 4. The following six points have been raised against the amended Articles:

> "1. Over the years, courts in the United States, the 1966 Montreal Agreement, and even the 1955 Hague Protocol have all laid great stress on the need for passengers to be given clear and legible notice of possible limitations of the carrier's liability before they began their flight. Yet, the Guatemala City Protocol, alias MAP3, has done a complete U-turn and blithely deleted the statement and notice required under respectively the Warsaw and Warsaw-Hague Conventions that the carriage is, or at least may be, subject to the rules relating to liability established by the Convention -- even when the limit under the Guatemala City Protocol is now unbreakable.
>
> 2. Contrary to the Warsaw and Warsaw-Hague Conventions and one would add sound commercial practice and sheer common sense, the Guatemala City Protocol no longer requires a passenger ticket or a baggage check to be delivered. The amended Articles 3(2) and 4(2) provide respectively that "[a]ny other means which would preserve a record of the information ... [on the passenger ticket/baggage check] may be substituted for the delivery" of the ticket and baggage check (emphasis added).
>
> 3. If a comparison is made with Article 5 of the Convention as amended by MP4 on the carriage of cargo where the non-delivery of an air waybill is subject to "the consent of the consignor" it will be seen that under the Guatemala City Protocol, the passenger is not given an

equivalent right to prevent the carrier from not delivering him a ticket or a baggage check for his checked baggage.

4. The same comparison will show that whilst the consignor under MP4 is entitled to demand from the carrier a meaningful "receipt... permitting identification... and access to the information contained in the record preserved by such other means", the Guatemala City Protocol denies the passenger a similar right regarding his ticket and baggage check.

5. Under MP4 the cargo carrier is forbidden to refuse carriage simply because of the "impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage. It would appear a contrario that, under the Guatemala City Protocol, alias MAP3, where no such provision exists, a carrier of passengers is allowed to refuse to carry his passengers and their baggage on those grounds.

6. Unlike the Warsaw and Warsaw-Hague Conventions which enforce their mandatory rules of documents of carriage with the penalty of absolute and unlimited or at least unlimited liability on the carrier who violates them, the Guatemala City Protocol removes all sanctions for non-compliance with the rules on passenger tickets and baggage checks with the result that, insofar as the Protocol is concerned, the carrier can happily ignore such rules. There are suggestions that individual States may decide to impose administrative or even penal sanctions. But, inasmuch as the passenger's right of recovery is strictly limited to those prescribed within the Convention, this means that the passenger is

denied all redress for such non-compliance."[142]

Points 1 and 2.

These two points contain the no-notice requirement and the no-delivery of a document of carriage. In the past and present, two very popular methods have been used to exceed the liability limits. One of them is to establish that no document of carriage was issued prior to the carriage and the second, relates to the breach of the "effective notice requirement"[143], in other words that the issued ticket did not have an effective notice informing the passenger that the carriage he was about to undertake is subject to the Convention and that the rules limiting the carrier's liability apply. The legal importance of the document and the notice seems in the first instance to be of utmost importance, that they are absolutely necessary because it is documented proof that a passenger has entered into a contract of carriage with the carrier and has been warned that his right to full indemnities, when damage occurs, has "possibly" been contained; "possibly" because often the damage does not exceed the limit.

What is though controversial regarding the notice is that often it is not effective because of the following:

a) the language in the ticket is not understandable to the passenger;

b) the passenger is blind and can not therefore "read" the notice (unless it is in Braille); and,

c) the passenger is illiterate or dyslexic etc.

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[142]See Cheng, *supra* note 133 at 13-15. [The quotation is given in extenso because the source is not yet published].

[143]See *supra* note 141.

therefore the "effective notice requirement" is not as important as one might think. The argument could also be reversed in the sense that as long as the notice is understood by the majority of passengers, it is admissible. What is more persuasive against the documentation of the carriage and the notice requirement is that the future seems to be going towards electronic data processing where all transactions go through a computer without documents being issued. So in order to give way to progress there has to be some leeway for the carrier to disregard the documentation and therefore the notice. It can also be mentioned that today, travel agents often offer passengers insurance coverage, both for baggage and personal injuries, and when Guatemala City Protocol comes into effect through Montreal Protocol No. 3, it is foreseeable that this will become a standard procedure[144].

Points 3 and 4.

These two points contain a comparison between the MP4 and the GP. The fact is that there cannot be a comparison between the revised Article 5 of the MP4 (Article III) and Articles 3 and 4 as amended by the GP (Articles II and III), because these articles do not embrace the same issue.

The revised Article 5 stipulates:

"Article III

Section III - Documentation relating to cargo

Article 5

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

[144]This is not an argument to justify the deletion of articles 3 and 4 of the Convention but to show that passengers are being offered insurance before they participate in international flights. Often passengers do not realize how and to what extent airlines are liable for damage that could occur during their flight even though there is a notice in the ticket.

delivered.
2. Any other means which would preserve a record of the carriage to be performed may, with the consent of the consignor, be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.
3. The impossibility of using, at points of transit and destination, the other means which would preserve the record of the carriage referred to in paragraph 2 of this Article does not entitle the carrier to refuse to accept the cargo for carriage."[145]

It has been said before that documentation of carriage is moving towards electronic data processing. Therefore it cannot be decided by the passenger whether a document is issued or not, since this would seriously affect the operation of the electronic data system and possibly weaken it in such a way as to make it ineffective. When the revised Article 5 is read together with the revised Article 11 of the MP4, the purpose of Article 5 becomes clear.

Article 11 of the Convention as revised by the MP4 stipulates;

"Article 11

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.
2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo."[146]

[145]Emphasis added.
[146]Emphasis added.

The amended Article 5 of the Convention has a special purpose. Cargo cannot be defined as baggage nor as a passenger; it is commercial goods which can be of great value and the value differs from one shipment to another. For example, two identical boxes are shipped that are of similar weight and dimension. One of the boxes contains diamonds the other zircons. It is obvious that one of the boxes is of much greater value than the other. If both boxes got lost and no air waybill was issued and no receipt delivered, then it would be next to impossible for the consignor to prove what each box contained. The air waybill or the receipt are the only evidence of the value of the cargo, at least between the carrier and consignor, so in order to ensure that the consignor has documented proof, Article III makes it a condition. When a person buys an airline ticket he or she cannot be considered a commercial commodity that needs to be valued beforehand in the unlikely event of possible damage. Regarding baggage, it usually contains personal items such as clothing and necessary travel items. Most airlines today have regulations regarding how much baggage a person can carry on board an airplane. It is relatively easy to measure the loss in cases of damage. On the other hand, in order to be able to claim compensation for loss of or damage to cargo, there has to be identification of such cargo and proof of the quantity and value of it otherwise the consignor will never get the true value of his cargo. This would not be the case in passenger transport.

Point 5.

Cheng's fifth point, that a carrier can refuse to carry a passenger because he cannot preserve the record of carriage, is a rather doubtful statement. The carrier has the choice between issuing a document of carriage or not: that is, the GP is promoting undocumented carriage, so to refuse carriage on the ground that no document can be issued, is controversial to say the least. There is also the matter of how to interpret this

provision. Although the MP4 expressly stipulates that the carrier cannot refuse to accept the cargo for carriage, it does not mean that the silence in the GP can be interpreted to mean the opposite thing. When a legal provision is being interpreted it has to be done carefully and with caution. A contrario interpretation should only be done in very special circumstances. It is very hard to believe that the drafters of GP and MP3 meant for the carrier to be able to refuse carriage on the above mentioned ground. In any case, the right of the carrier to refuse to enter into contract of carriage is dealt with in the general provision of Article 33 - a further proof that Cheng's argument can not be upheld.

Point 6.

This point is related to points 1 and 2 and has to do with the fact that no longer is there a sanction for not delivering a document of carriage nor is there a notice requirement for the liability limit in the issued document. The purpose of the Warsaw Convention and the System as whole is to speed up the process of paying compensation and to prevent litigation. The hard core of the matter is that if a claimant goes before a court to claim compensation, often he has to wait for years before he receives any compensation at all[147]. It does not seem right that the document of carriage and the notice should be used as a tool to exceed the liability limit when the circumstances are "right"[148], such as the ticket was not delivered or not delivered in time[149] or the warning

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[147]There is a lot of truth in the old saying: "justice delayed is justice denied". The Korean Air Lines 007 litigation has been going on for years now, see G.N. Tompkins "Korean Air Lines 007 Disaster litigation - damage awards rendered in ten passenger cases" (1993) 12:14 Aviation Law 1.

[148]This applies especially in the United States, as one author put it "like the moth is drawn to the light so is a litigant drawn to the United States".

[149]Several Court Cases have dealt with this problem, such as: *Mertens* v. *Flying Tiger Lines, Inc.* 341 F. 2d 851 (2nd Cir. 1965), cert. denied 382 U.S. 816 (1965). "The delivery of a ticket to a military courier after he had boarded a plane and after the material he was accompanying had been loaded and, at the time of delivery, the aircraft was parked on the ramp almost ready to

was illegible[150] or not elaborate enough etc. That was never the intention of the drafters of the Convention and it seems that the United States Supreme Court has finally recognized this, because in the Chan case[151] they changed their former rulings in the Mertens, Warren and Lisi judgments, on the effects of the lack of documentation of carriage[152]. No longer can the limit be broken simply because the document of carriage lacked certain formalities.

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take off was not adequate delivery as required by Article 3(2) of the Warsaw Convention. Therefore, the Convention's limitation of liability was inapplicable to an action arising out of the flight. The military courier did not have a reasonable opportunity to take any measures to protect himself against the limitation when he would have had to disobey a military order to disembark to obtain flight insurance and the statement concerning the limitation was printed in such as manner as to be both unnoticeable and unreadable, especially in an aircraft about to take off." [Emphasis added]; *Warren* v. *Flying Tiger Lines, Inc.* 352 F. 2d 494 (9th Cir. 1965). "An air carrier's delivery of air transportation tickets to servicemen at the foot of the boarding ramp to an international military charter flight, which did not afford the servicemen a reasonable opportunity to even read the tickets, much less obtain additional flight insurance, was not sufficient delivery of the tickets within the terms of the Warsaw Convention and the Convention's liability limitation could not be imposed by the air carrier in an action which arose out of the flight. The inadequate delivery of tickets was not altered by the fact that the servicemen failed to obtain flight insurance at subsequent stops." [Emphasis added].

[150]*Lisi* v. *Alitalia- Linee Aeree Italine, S.p.A.* 253 F.Supp. 237 (D.C.N.Y.), aff'd, 370 F. 2nd 508 (2nd Cir. 1966) aff'd by equally divided court, 390 U.S. 455 (1968). "The delivery of an air travel ticket which contained the printed notice of the applicability of the Warsaw Convention's exculpatory provisions in such small type that it was both unnoticeable and unreadable among the other conditions of contract and which failed to emphasize the provisions in any way so that their presence was concealed failed to give the passenger the required notice that the liability limitation provisions of the Convention were applicable to the flight." [Emphasis added]. In a more resent case the U.S. Supreme Court changed its course and gave an opposite judgment: *Chan et. al.* v. *Korean Air Lines, Ltd.* ,Supreme Court of the United States, No. 87-1055, April 18, 1989. For prior decision, see 21 Avi. 18,223. "International air carriers do not lose the benefit of the limitation on damages for passenger injury or death provided by the Warsaw Convention if they fail to provide notice of that limitation in the 10-point type size required by the Montreal Agreement. Neither the Warsaw Convention nor the Montreal Agreement prescribes that the sanction for failure to provide the required form of notice is the elimination of the damages limitation. The only sanction provided in Article 3 of the Warsaw Convention subjects a carrier to unlimited liability if it accepts a passenger without a passenger ticket having been delivered. Non delivery of a ticket cannot be equated with the delivery of a ticket in a form that fails to provide adequate notice of the Warsaw limitation. A delivered document does not fail to qualify as a passenger ticket, and does not cause forfeiture of the damages limitation, merely because it contains a defective notice. The use of 8-point type instead of 10-point type for the liability limitation notice is not so great a shortcoming as to prevent a document from being considered a ticket." [Emphasis added].

[151]See *Chan et al* v. *Korean Air Lines, supra* note 150.

After careful consideration it has to be concluded that Articles 3 and 4, as amended by Articles II and III of GP, are not so unfavorable towards the passenger so as to prevent States from ratifying the Protocol through the MP3.

2.2.3. Articles IV and V, The Liability Regime

These two Articles have not caused any disagreement, simply because they are very much in favor of the passenger and consignor. They will be explained jointly since their conditions are quite similar. Article IV deals with liability toward passengers while Article V deals with liability towards cargo. Article V will not be explained specifically only Article IV, since its liability regime does not differ from the one in Article IV.

Article IV deletes Article 17 of the Convention and changes the liability regime from "presumed fault liability" to "strict liability". The Article stipulates:

> **"Article IV**
>
> Article 17 of the Convention shall be deleted and replaced by the following:-
>
> "Article 17
>
> 1. The carrier is liable for damage sustained in case of death or personal injury of a passenger upon condition only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

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[152]See *supra* notes 149 and 150.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage.

3. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and objects carried by the passenger.""

Article V

In Article 18 of the Convention -
paragraphs 1 and 2 shall be deleted and replaced by the following:-

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the cargo is in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever."

Article 17 as amended by Article IV introduces the concept of strict liability[153] regardless of fault for damage sustained in cases of death or personal[154] injury, destruction, loss of or damage to baggage, upon condition only that the event[155] which caused the death or injury, destruction, loss of or damage to the baggage, took place on board the

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[153]In Article 17 of the Convention the liability was based on fault with a reversed burden of proof. See *supra* note 72.

[154]Article 17 of the Convention referred to "blessure ou toute lesion corporelle" (wounding or any other bodily injury) which caused interpretation difficulties and disunity with respect to "mental distress" and other similar claims not accompanied by physical trauma. Personal injury comprises both physical injury and mental distress.

[155]Article 17 of the Convention referred to "l'accident" which is much narrower than the term "event". The term "event" can mean several things e.g., mishap, happening, outcome etc. while the term "accident" is not as broad in interpretation.

aircraft or in the course of any of the operations of embarking or disembarking.

"The introduction of strict liability in mass transport is a bold development in the unification of private law which represents a remarkable progress in the interests of the passengers. At the same time, it represents a considerable burden for the air carriers who have to assume strict liability for *events* which may be completely beyond their control (e.g., acts of third persons, aviation terrorism the real target of which is not the carrier but the State of the flag, etc.). The introduction of strict liability was believed to be conductive to fast settlement of claims and avoidance of litigation and definitely in the interest of the traveling public."[156]

The above statement explains correctly, that strict liability is a heavy burden for the carrier. Contrary to what some might think strict liability is not absolute liability and the difference lies in the fact that under strict liability in certain circumstances the carrier can defend himself while under absolute liability no defenses are allowed. In the revised Convention, only two defenses are permitted, i.e. the state of health of the passenger and contributory negligence. The revised Article 17 stipulates; "However, the carrier is not liable, if the death or injury resulted solely from the state of health of the passenger"[157]. Similarly, if the carrier proves[158] that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall[159] be wholly or partly exonerated from his

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[156]Milde, *supra* note 67 at 215-216.
[157]Emphasis added.
[158]Reversed burden of proof, the burden of proof lies with the carrier.
[159]Article 21 of the Convention was only permissive and gave the right to the Court, under its lex

liability[160]. These defenses are extended toward third parties claiming compensation for the death or injury of a passenger if the passenger himself can not claim compensation.

There is no doubt whatsoever that these two Articles favor the passenger and can only be considered good headway in the amendment of the System.

2.2.4. Articles VI and VII, Exoneration of the Carrier

Article VII has already been mentioned in relation to the revised Article 17. Article VI amends Article 20 and deals with delay. Montreal Protocol No. 4, Article V, amends again Article 20. These two Articles have not been criticized and are self explanatory. Therefore, their provisions will only be mentioned but not explored. Articles V and VI stipulate:

Article V

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

"Article 20

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

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fori, to exonerate the carrier wholly or partly from his liability.
[160]Article 21 of the Convention as amended by Article VII of the GP.

Here, the carrier must, in order to exonerate himself, prove that he, his servants or agents took all necessary measures to avoid the damage that was caused by the delay or prove, that it was impossible for them to take such measures. The burden of proof lies with the carrier and that is in favor of the passenger/consignor.

Article VII

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

"Article 21

> If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, the carrier shall be wholly or partly exonerated for his liability to such person to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of the death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger."[161]

This Article has already been mentioned in relation to Article IV (Article 17 as amended) of the Protocol and needs no further explanation. The expression "shall" indicates a mandatory nature of this provision while the Warsaw Convention and the WH contained only a permissive provision. That means that the court must wholly or partly exonerate the carrier if the carrier proves that the damage was caused or contributed by a negligent or other wrongful act of the passenger or the person claiming compensation.

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[161]Emphasis added.

2.2.5. Articles VIII, IX, and XI, The Liability Limits

The following Articles are probably the most criticized of all the provisions in the Protocol. The criticism relates to several facts:

a) there is a limit on the air carrier's liability (Article VIII);

b) the limit is considered too low (Article VIII);

c) Article VIII supposedly eliminates the possibility of a special contract between the passenger and the carrier; and,

d) the limit is unbreakable (Article IX), even in cases of willful misconduct (Article X).

Article 22 as amended by Article VIII, stipulates:

Article VIII

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

"Article 22

1. a) In the carriage of persons the liability of the carrier is limited to the sum of one million five hundred thousand francs for the aggregate of the claims, however founded, in respect of damage suffered as a result of the death or personal injury of each passenger. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed one million five hundred thousand francs.

b) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to sixty-two thousand five hundred francs.

c) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to fifteen thousand francs for each passenger.

2. a) In the carriage of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination

and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination.

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

3. a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including lawyers' fees, shall, in actions to which this Convention applies, have the power to award, in their discretion, to the claimant the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable.

b) The costs of the action including lawyers' fees shall be awarded in accordance with subparagraph a) only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be extended until the time of commencement of the action if that is later.

c) The costs of the action including lawyers' fees shall not be taken into account in applying the limits under this Article.

4. The sums mentioned in francs in this Article and Article 42 shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgment."

The dissatisfaction with this provision relates to the following:

"The new limit of the carrier's liability for passenger death and injury which, at the then official price of gold, stood at US$100,000 was already deemed low by some countries, the United States, for instance,

having suggested US$300,000.

Since neither the Protocol or its alter ego the MP3, which changed the limit to 100,000 SDR, at the time equivalent to approximately US$100,000, has yet to come into force, the limit first set in 1971 has by now already been heavily eroded by inflation. In addition, in many countries, there have been meanwhile significant or even dramatic increases--in real terms--in per capita GNP, with the result that the Guatemala City Protocol and MAP3 limits are worth much less today than in 1971 or 1975."[162]

The amended Article 22 alters the Convention in several ways.

Firstly, it sets a separate and distinct limit of liability for damage caused by delay[163]. The limit is 62,500 francs (4,150 SDR). The GP bases liability on a rebuttable presumption of fault of the carrier with a reversed burden of proof. The carrier can exonerate himself if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or it was impossible for them to take such measures[164].

It is not unfair toward the passenger to have separate and distinct limits between delayed transport and actual damage caused by an event. This amendment can only be considered a point in the right direction and enhances the probabilities of ratifications by States.

Secondly, in cases of destruction, loss, damage or delay of baggage, the liability is

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[162]Cheng, *supra* note 133 at 15-16.

[163]In the original Convention a passenger who was delayed could claim the full limit of 125,000 francs and exceed it if he proved deficiencies in the ticket or notice or willful misconduct. See Article 19 of the Convention and Article VI of the GP.

[164]See Article VI of the GP.

limited to 15,000 francs (1,000 SDR). This is an increase in the compensation from the Convention but it is still way too low. The items in a typical suitcase are usually worth a lot more. Business people who fly frequently usually have expensive suits or dresses that would not be covered under this limit.

Thirdly, the liability limit for personal injury or death is set at 1,500,000 francs (100,000 SDR). This is the thorn in the Protocol and the question arises, why agree on a limit? Why not have unlimited liability?

Today the 100,000 SDR limit is valued at approximately $ 140,360 (179,980 CAD). At the time of the drafting of the GP there was no possibility to agree on a limit that every State could be satisfied with. Some States thought that 100,000 SDR was excessively high while others deemed it too low. 100,000 SDR was agreed on as a compromise between these two groups of States. The compromise was based on the belief that 100,000 SDR would cover at least 80% of the typical claims in the United States and would vastly exceed the real economic needs in most other States. It was also believed that the new Article 35A, the provision on the domestic supplementary scheme, would be sufficient to safeguard the special needs of the United States[165]. This explains why the limit is at 100,000 SDR but it is difficult to fathom why States are still promoting liability limits in international air carriage when there are no limits in other types of commercial activities[166]. No valid reason can be found that justifies liability limits at all. Nevertheless, it seems that States are not willing to let go of the limit, at least not at this point in time[167].

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[165]See Milde, *supra* note 67 at 216.

[166]In other modes of transport, such as maritime, rail and road, there are limits, but they can be broken if intent or gross negligence is proven.

[167]After the drafting of the original Convention several justifications surfaced as to why the air carrier's liability was limited. Not one of those so-called justifications applied then and they certainly do not apply today, see H. Drion, *Limitations of Liabilities in International Air Law* (The

There can be several reasons as to why States do not throw the limit overboard and support unlimited liability. For example:

1. often airlines are automatically supported by their governments:
    a) they are state owned or heavily subsidized; or,
    b) many governments make it a matter of policy to support their airlines; or
2. indifference and passivity leads governments to leave the matter entirely to the department concerned which in turn leaves it to the national airlines.[168]

These are explanations as to why States promote liability limits but cannot be considered a valid justification for the limit itself. It is clear that in some States this liability limit is too low such as the United States. That is why Article 35A was adopted, to offer additional protection to those that would not be fully compensated under the GP limit. As yet, nothing has come out of the plans offered in Article 35A but the Article has been seriously considered in the United States Senate. The supplementary compensation plan has twice been on the agenda in the Senate but has not yet been approved. The EC Commission is looking for a solution regarding the future of the System in the EC area and a supplemental compensation plan has been mentioned[169] These States realize that the limit is way too low as it is, at least for them and possibly other industrialized States. It cannot be argued that the liability limit is to low for some

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Hague: Nijhoff, 1954) at 12 and following.

[168]For further information on this subject see Cheng, "Sixty Years of the Warsaw Convention: Airline Liability at the Crossroads", (1989) 38 Zeitschrift für Luft- und Weltraumrecht 319 at 321-

[169]See Chapter 3 regarding the future of the Warsaw System in the EC.

States and, unless Article 35A can be brought into use, the Protocol will be ineffective for quite a number of States.

There is more criticism towards this provision. According to Cheng the GP has eliminated the possibility for passengers and carriers to enter into a special contract with a higher limit. He says:

> "Symptomatic of the pro-carrier and almost anti-passenger bias of the Guatemala City Protocol, it has deleted.....the last sentence in Article 22 (1) of the Warsaw-Hague Convention, which provides for the possibility of the carrier and the passenger by special contract agreeing to a higher limit of liability than that laid down in the treaty. This is of course a desperate attempt to preserve at all cost the universal uniformity of the limit and the so-called "integrity" of the treaty. It may be worth noting from this point of view that MP4 in respect of cargo is quite happy to allow the consignor to retain the right under the Warsaw-Hague Convention to make a special declaration of interest in delivery of his cargo and obtain a higher limit from the carrier, paying if required a supplementary sum. Yet the Guatemala City Protocol and through it MAP3 want to deprive the passenger of the equivalent facility provided for by the Warsaw and Warsaw-Hague Conventions for his person and his baggage. The saving grace is that it is perhaps doubtful whether the Protocol, in this what might be regarded as a never-mind-the-passenger Freudian slip, has actually succeeded in preventing special contracts raising the limit of passenger liability from being validly concluded; for it may well be maintained that any such contracts concluded by a carrier with his passengers would fall within the category of "regulations which

do not conflict with the provisions of this convention", permitted under Article 33."[170]

It is noted that Cheng is not altogether sure whether special contracts are "allowed" or not under the GP. Article 33 of the Convention stipulates:

"Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention "

A special contract, between the passenger and the carrier, raising the limits of liability or agreeing on unlimited liability do not go against Article 33. However, one of the golden rules in law is the freedom to enter into a contract, provided that the contract itself does not contravene any law, public order or codes of ethics. If the GP is believed to have eliminated the possibility of entering into a special contract, the Protocol itself must be considered a breach of one of the fundamental rules of law. However this "rule of thumb" is well known and does not need to be promoted. The original Convention did not need to stipulate that a special contract was allowed; what was necessary was to mention that any contract lowering the limits was to be considered null and void[171]. There is no need to expressly state that "Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability"[172]. There is still freedom to enter into a special contract as long as it is not meant to lower the limit, then such contract would go against the provisions of the

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[170]Cheng, *supra* note 133 at 18.
[171]See Article 23 of the Convention.
[172]See Article 22(1) of the WH.

Convention and Article 33.

There is an innovation introduced in Article 22 paragraph 3(a) and (b). The Article authorizes the courts of the Contracting Parties, in actions to which the Convention applies and in their discretion, to award to the claimant the whole or part of the costs of the action, including lawyers' fees which the court considers reasonable[173]. The Convention (both Warsaw and Hague) was silent on this matter. The costs and fees are to be awarded *only if* the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount *and* the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit[174]. The costs of the action, including lawyers' fees are not to be taken into account in applying the limits under Article 22[175]. This provision was believed to encourage fast settlement of claims since under the revised Convention there would be no other grounds for litigation except for the determination of the amount of compensation within the applicable limit. A fast settlement is always more beneficial for the claimant rather than waiting for several years to get "full compensation", even with moderate limits of liability. Under the current system it may take 5-7 years from the time of the accident before a final court award is made and compensation is available to the claimant[176].

Unfortunately, not only does the GP promote a limit on the carrier's liability, it also makes the limit unbreakable, even in cases of willful misconduct. Article IX that

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[173]Article 22(3)(a) of the revised Convention.
[174]Article 22(3)(b) of the revised Convention.
[175]Article 22(3)(c) of the revised Convention.
[176]See Milde, *supra* note 67 at 217 and *supra* note 147.

amends Article 24 of the Convention stipulates:

Article IX

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

"Article 24

1. In the carriage of cargo, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

2. In the carriage of passengers and baggage any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."[177]

Article 24 as amended by the GP, stipulates that under no circumstances can the liability limit be broken. In the original Convention there were two ways to brake the limit, one was related to the documentation of the carriage[178] the other was to prove willful misconduct. The GP deletes Article 25 which dealt with willful misconduct. This means that if a passenger dies or suffers injury and/or his baggage is destroyed or damaged, the liability limit cannot be broken, even if the act was intentional.

It is very understandable that these provisions have been criticized severely. Cheng does not mince words when he attacks them:

> "doubtless the worst feature of the Guatemala City Protocol from the passenger's point of view is the absolute unbreakability of the limit of the

[177]Emphasis added.

[178]See *supra* notes 149 and 150.

> carrier's liability, a limit that was, in the eyes of a number of countries, from the very beginning inadequate and is by now heavily eroded and woefully obsolete. The infrangibility of this already much debated limit is achieved by the deletion of Article 25 of the Warsaw-Hague Convention insofar as passengers and their baggage are concerned, as well as all other provisions, such as Articles 3(2) and 4(2), which would have deprived the carrier of the right to invoke Article 22 of the Convention which limits the carrier's liability in the carriage of passengers and baggage. The deletion of Article 25 in particular means that even where the death or injury of a passenger, or the damage to or loss of his baggage, has been caused intentionally -- "done with intent to cause damage" to quote the Hague Protocol -- by the carrier, or his servants or agents, the carrier nevertheless benefits from the treaty's limitation of his liability to respectively 100,000 SDR and 1,000 SDR. If such a régime were to be found in a contract, instead of a treaty, many a system of law and conflict of laws, especially in civil law countries, would declare it to be contrary to public policy, violative of ordre public, or contra bonos mores --in short null and void."[179]

This provision is a serious defect in the GP. What was the aim of the drafters, when they put in this ill-conceived stipulation? Apparently there is a good historical reason for this idea:

> "in the atmosphere of the negotiations between 1966 to 1971 many

[179]Cheng, *supra* note 133 at 17-18.

> delegations expressed their dismay at the ease with which the Warsaw/Hague limits could be broken before the U.S. courts and there was nearly an obsession with making the future high limits absolutely infrangible. The idea itself was not bad when talking about preventing excessive claims based on minor clerical defect in the documents of carriage"[180].

The idea of preventing excessive claims in certain circumstances is not a bad one but to delete Article 25 of the Convention, that deals with willful misconduct, is very unfortunate, to say the least. In many States this provision in the protocol is unconstitutional and against the law, and that in itself will prevent States from ratifying. In order to disregard this flaw in the GP, States must ratify it with a reservation, stipulating that Articles IX and X are not in force for them, and in the States where the limit is considered too low, set up a supplemental compensation plan in order to compensate fully, those who seek indemnities.

The next Article, Article XI amends Article 25A and is directly linked to Articles VIII (Article 22 as amended), IX (Article 24 as amended) and X (Article 25 as amended). The Article Stipulates:

Article XI

In Article 25 A of the Convention -
paragraphs 1 and 3 shall be deleted and replaced by the following:

> "1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he proves that he acted within the scope of his

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[180]Milde, *supra* note 67 at 233-234.

employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under this Convention."

Paragraph 1 stipulates that Article VIII (Article 22 as amended), the limitation of the air carrier's liability also applies to his servants and agents and that Articles IX (Article 24 as amended) and X (Article 25 as amended) also apply. This simply means that a claimant cannot bring suit against such servants or agents, in the hope of getting higher compensation. There is nothing unfair in this provision towards the passenger, the Article is simply extending the scope of applicability of the Convention towards servants and agents of the carrier.

2.2.6. Article XII, Introduction of a New Jurisdiction

Article XII, introduces one additional jurisdiction for claimants, and by doing so, enhances their options. This Article has not been criticized. The Article stipulates:

Article XII

In Article 28 of the Convention -
the present paragraph 2 shall be renumbered as paragraph 3 and a new paragraph 2 shall be inserted as follows:

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

According to this Article the claimant can claim damages in a court that has jurisdiction over the place where the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same Contracting Party. This Article favors the passenger and will not prevent States from ratifying.

2.2.7. Article XIII, The Right of Recourse Against a Third Person

Article XIII is a new provision. It creates Article 30A that stipulates:

Article XIII

After Article 30 of the Convention, the following Article shall be inserted:-

"Article 30 A

Nothing 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."

This is self explanatory. According to this provision the Convention does not prevent the carrier, his servants or agents from claiming indemnities from a third person, such as aircraft manufacturers, air traffic control agencies, airport operators, etc.

2.2.8. Article XIV, The Supplemental Compensation Plan

As has been mentioned before, the GP offers States the choice to create a supplementary compensation plan. As of yet, no State has implemented such a scheme, but there have been some serious considerations towards this possibility, especially in relation to whether the Montreal Protocols should be ratified or not[181]. Article XIV deals with this matter and stipulates the following:

Article XIV

After Article 35 of the Convention, the following Article shall be inserted:-

"Article 35 A

No provision contained in this Convention shall prevent a State from establishing and operating within its territory a system to supplement the compensation payable to claimants under the Convention in respect of death, or personal injury, of passengers. Such a system shall fulfill the following conditions:

a) it shall not in any circumstances impose upon the carrier, his servants or agents, any liability in addition to that provided under this Convention;

b) it shall not impose upon the carrier any financial or administrative burden other than collecting in that State contributions from passengers if required so to do;

c) it shall not give rise to any discrimination between carriers with regard to the passengers concerned and the benefits available to the said passengers under the system shall be extended to them regardless of the carrier whose services they have used;

d) if a passenger has contributed to the system, any person suffering damage as a consequence of death or personal injury of such passenger shall be entitled to the benefits of the system."

This Article has not gotten away without criticism, although the criticism is more pointed towards the Protocol itself as a defective instrument that Article 35A is meant to remedy

[181]The United States is seriously considering this possibility and the EC has looked into this matter.

rather than toward the provision itself. The following embraces this criticism:

> "as if intended as a panacea to cure all the possible shortcomings of the Guatemala City Protocol, Article 35A of the Protocol introduces what at the time might have seemed an attractive idea, the possibility for individual contracting States to establish supplemental compensation schemes. The experience of the United States Administration is seeking to formulate a satisfactory plan demonstrates tremendous difficulties in implementing the idea -- a wholly impractical one. Furthermore, while at the time, it might have been thought that the only country that would wish to set up such a supplemental compensation scheme would be the United States, today if one were really to bring into force the Guatemala City Protocol as incorporated in MAP3, because of the extremely low limit it has set to the carrier's liability, many States would have to devise such plans. In that connection, it has to be remembered that these supplemental plans do not form an integral part of the Warsaw System. Consequently, a separate regime, probably complex and costly, will have to be evolved in order to coordinate and implement them on the international level, in the absence of which there can be endless disputes and litigation."[182]

The above statement has at least two factors that have to be examined.

Firstly, the practicability of such a scheme. The United States has tried on two

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[182]Cheng, *supra* note 133 at 19-20.

occasions to implement a supplemental plan on the basis of Article 35A without success but indications recently seem to suggest that such a plan might finally receive Senate approval.

The first United States Supplemental Plan[183]

The first supplemental plan (SP1) was approved by the CAB[184] on 20th July 1977 through Order 77-7-85. The SP1, which represents a first attempt to implement the concept of supplemental compensation systems under Art. 35A, differs from the currently pursued proposal in several important respects. Firstly, it offered only a layer - U.S. $ 200.000 - of compensations in excess of the treaty limit. This was deemed insufficient. Secondly, it had an agreed level of surcharge, U.S. $ 2.00, and a named Contractor before it was submitted, together with the ratification proposal to the Senate. Thirdly, it had the characteristics of a mutual insurance fund, operated and managed by a Contractor on behalf of the traveling public. For various reasons, none of these characteristics have reappeared in the 1990 version.

The Second United States Supplemental Plan[185]

The second plan (SP2) forms a part of the currently pursued attempt to secure Senate advice and consent to ratify the MP3 thereby ratifying the GP. The main difference between the SP2 and the SP1 is that the SP2 offers unlimited compensation to the individual passenger. The SP2 is still incomplete and will, according to plans, not be

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[183]Agreement to establish a Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention, as Amended by the Protocols at Hague, 1955, at Guatemala City, 1975 and by Additional Protocol No. 3 of Montreal, 1975, combined with an Agreement to implement the Plan between Certain Certified U.S. and Foreign Air Carriers and the Prudential Insurance Company of America.

[184]CAB is an abbreviation for the Civil Aeronautic Board as it then existed.

[185]Agreement to establish a United States Supplemental Compensation Plan Pursuant to Article 35A of the Warsaw Convention, as Amended - October 1990.

finalized, notably in respect of a named Contractor and agreed surcharge, until after the Senate has approved the proposal. The Contractor must be a corporation or association of a United States nationality or, if foreign, with a permanent establishment in the United States, and must arrange for the requisite insurance capacity of no less than $500 million per aircraft and accident from specified sources of adequate financial strength. Negotiations to determine the Contractor and surcharge will be conducted by ATA-IATA who will request the necessary anti-trust immunity for these negotiations as soon as the Senate's approval has been obtained. The finalized SP2 package is subject to approval by the Department of Transport (DOT) before the Administration can complete adherence formalities by submitting the instrument of ratification.

The last comprehensive proposal to establish and operate a system in the United States to supplement the compensation was tabled in Bill S.2945 in the Senate on 2nd July 1992[186]. The Bill was referred to the Committee on Commerce, Science and Transportation. No decision was taken thereon prior to the presidential elections in 1992. However, a report, submitted by the National Commission to Ensure a Strong Competitive Airline Industry[187] to the President of the U.S., has advised the President

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[186]S.2945, 102d. Congress (2d Session) A Bill to amend the Federal Aviation Act of 1958 to establish and operate a system in the United States to supplement the compensation payable to claimants under the Convention for the Unification of Certain Rules Relating to International Carriage by Air in respect of death or personal injury of passengers. (Text may be found in IATA Legal Information Bulletin No. 66, January 1993, Appendix B-1, at 1-27).

[187]The Commission was created on 7th April 1993, by Public Law 103-13. The Commission's mandate was to investigate, study and make policy recommendations about the financial health and future competitiveness of the U.S. airline and aerospace industries. The Commission's membership consists of 15 voting and 11 non-voting members. Five voting members were appointed by the President, five by the Senate leadership and five by the House leadership. It is bipartisan, with members appointed from "among individuals who are experts in aviation economics, finance, international trade and related disciplines and who can represent airlines, passengers, shippers, airline employees, aircraft manufacturers, general aviation and the financial community." The chairman of the Commission is a voting member appointed by the President, in consultation with the Speaker of the House of Representatives and the majority leader of the Senate. See The National Commission To Ensure A Strong Competitive Airline Industry, A Report to the President and Congress, "Change, Challenge and Competition", submitted in August 1993, 1 at 2.

to ratify the MP3 and MP4. The report says:

> "The Commission believes Montreal Protocols 3 and 4 and a supplemental compensation plan should be ratified by the Senate. The Montreal Protocol 4 also would establish a modern, strict liability system for air cargo and streamline the cargo documentation requirements. We believe it would be preferable to include protection for both airlines and aircraft manufacturers in a supplemental compensation plan.
>
> *We recommend:*
>
> **The U.S. amend the Warsaw Convention by ratifying Montreal Protocols 3 and 4 and approve a supplemental compensation plan."**[188]

It seems logical to draw the conclusion from the above that the next step taken by the U.S. will be to ratify the MP3 and the MP4 and establish a supplemental compensation plan. It is true that it has taken a long time for the U.S. to come up with an adequate supplemental plan. The reason for this delay is political, not because such a plan is "impractical". As for other States that would need to establish such a plan, they can use Bill S2945 as a guideline and have the plan optional instead of mandatory. That way States can prevent such plans from being unconstitutional or against the law because in some States, insurance plans that are mandatory, could be a breach of their national legislation.

Secondly, the other factor that needs to be examined is whether such a plan would be

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[188]See *supra* note 187 at 23-24.

complex and costly.

According to Bill S 2945 the surcharge for insurance will be $ 5 per passenger[189]. That amount is not excessively high and regarding the complexity of such a plan the U.S. has already drafted plans that could be used as a guideline for other States when they draft their own.

2.2.9. Article XV, Revision of the Liability Limit

Article XV introduces a new provision into the Warsaw System. This Article offers a revision of the liability limit set forth in the Protocol. It provides for a rise in the limit, five and ten years after the entry into force of the said Protocol. The new Article stipulates:

Article XV

After Article 41 of the Convention the following Article shall be inserted:-

"Article 42

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

2. At each of the Conferences mentioned in paragraph 1 of this Article the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall not be increased by an amount exceeding one hundred and eighty-seven thousand five hundred francs.

3. Subject to paragraph 2 of this Article, unless before the thirty-first December of the fifth and tenth years after the date of entry into

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[189]See *supra* note 186 Appendix B-1, Sec. 1704 (c) at 13.

force of the Protocol referred to in paragraph 1 of this Article the aforesaid Conferences decide otherwise by a two-thirds majority vote of the Parties present and voting, the limit of liability in Article 22, paragraph 1 a) in force at the respective dates of these Conferences shall on those dates be increased by one hundred and eighty-seven thousand five hundred francs.

4. The applicable limit shall be that which, in accordance with the preceding paragraphs, is in effect on the date of the event which caused the death or personal injury of the passenger."

Like most of the GP's provisions this one has not escaped criticism. The argument relates to the following.

"The combined effects of inflation and increased prosperity on this 1971/1975 limit have been further aggravated by another factor. Under Article 42 of the Guatemala City Protocol, during the fifth and tenth years respectively after the date of entry into force of the Protocol conferences are to be convened for the purpose of reviewing and, if necessary, increase the limit set in the Protocol. But since the Guatemala City Protocol has not yet come into force, these conferences have so far-- more than 20 years after the conclusion of the Protocol-- not been able to take place, causing, therefore, the limit to be so much more out of date.

In what can only be described as another provision to protect the carriers irrespective of circumstances, Article 42(2) of the Guatemala City Protocol sets down an absolute maximum, namely, one-eighth, by which each of the two review conferences mentioned above may increase the limit set in the Protocol. In other words, even if the Protocol were to come into force today, the limit of 100,000 SDR may only be increased at these review conferences by a maximum of 25% in ten years' time,

> even if all the Contracting Parties were then in favor of a higher increase, unless of course they were to conclude another protocol to amend the Article 42(2).
>
> In fact, if ever Article 42(2) were brought into force through MAP, it is questionable whether such periodic conferences and increases envisaged in its paragraphs 2 and 3 would be able to take place, inasmuch MAP has dispensed with the need for the Guatemala City Protocol to be brought into force. Consequently, there would be no date of "entry into force of the [Guatemala City] Protocol", from which the five or ten year period could be calculated."[190]

It is true that the increase of the limit, that is offered in Article 42, is not sufficient for some States. For them, it is too low to adequately amend the original limit and inflation has also had an influence. For other States this increase would go a long way to update the limit to today's standards and generously cover most, if not all compensation claims. It has already been said that the GP will never enter into force "on its own". On the other hand, it can and will in all probability, enter into force through the MP3. The emphasis here is on "enter into force". The doubt that Cheng expresses, regarding whether this Article can be put to use, is unfounded. It is incorrect to interpret the GP and the MP3 provisions, on the entry into force of the Protocols, as Cheng implies. It is clear that when the MP3 has been ratified by 30 States, it will enter into force on the ninetieth day after the deposit of the thirtieth instrument of ratification[191]. The GP, as amended, will enter into force on that same day and therefore, Article 42 applies. The two conferences mentioned in the Article,

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[190]Cheng, *supra* note 133 at 16-17.
[191]Article VIII of the MP3.

offered five and ten years after the entry into force of the GP, can be convened without a doubt. What is more, the conferences convened under Article 42 (or Article 41 of original Convention) would be sovereign diplomatic conferences, that have the capability, both in fact and in law, to adopt new limits of liability, different from the provisions of Article 42[192].

[192]Article 41 of the Warsaw Convention:

"Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference."

2.3. Conclusion

After the analysis of the provisions of the Guatemala City Protocol comes the difficult task of deciding whether States should be encouraged to ratify it or not. There are certainly some provisions in the Protocol that could have been drafted differently or left unamended, such as Articles VIII (Article 22 as amended), IX (Article 24 as amended) and X (Article 25 as amended). The other remaining Articles cannot be considered unfair, both regarding the passenger/consignor and the carrier. Those provisions are worthy of ratification and should not be a hindrance for States. The problem is the three above mentioned Articles. The question is, are their provisions of such nature as to prevent States from ratifying, or is it possible to ratify the Protocol with respect to, e.g., the consequences of willful misconduct? Article 22 as amended, that deals with the liability limits, is one of the most disputed Articles in the Protocol. What States can do, is to bring Article 35A into force, and establish a supplemental compensation plan, a plan that is preferably not mandatory[193]. That way, the dissatisfaction with the liability limit can be prevented. Unfortunately, the passenger would be the one to pay, not the carrier, but the coverage should be kept minimal, such as the United States having decided on a $ 5 surcharge per passenger, if their latest supplemental plan comes into force[194]. Articles 24 and 25 as amended, have to be disregarded, in order to be fair towards the passenger and in some instances, in order to comply with national legislation and the concept of "public order". States could do that by making a

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[193]The U.S. Supplemental Plan is mandatory, see *supra* note 166, Appendix B-1, Sec. 1704 (a) at 12. It should be decided by the passenger whether or not he takes extra insurance. If the plan is mandatory, those passengers that are fully covered by the limit, would be paying for those passengers that are not covered by the limit.

[194]See *supra* note 186.

reservation in their letter of ratification, stipulating that the "original" Articles 24 and 25 apply in international carriage by air, concerning their territories. The United States seems to be about to ratify the MP3 and MP4[195]. Such a step, taken by the biggest aviation nation in the world, will without a doubt change the course of the Montreal Protocols. It is not far fetched to predict that other aviation nations will follow with their ratifications, because the only block in the past stopping the GP from entering into force was the passiveness of the United States. It cannot be disregarded that the EC States are seriously considering updating the System[196]. A recent Report, "Study on the Possibility of Community Action to Harmonize Limits of Passenger Liability and Increase the Amounts of Compensation for International Accident Victims in Air Transport"[197], recommends that the EC States adopt an inter-carrier agreement that is almost identical to the MIA[198]. The Report does not recommend the ratification of the MP3 with a supplemental compensation plan. It does though, recommend that an agreed limit should be adopted along with an optional supplemental compensation plan[199]. The changes that are foreseeable in the United States regarding the MP3 and the MP4 might have a bearing on what the EC States will eventually agree on regarding the System. What the EC States have already done is to raise their liability limits to 100,000 SDR[200]. Ratifying the MP3 would not change their liability limits. What would

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[195]The Bill has been delayed in the Senate because aircraft manufacturers want to be covered in the supplemental compensation plan. That request will delay the approval since certain amendments need to be made to the Bill in order to extend the liability regime that the original Bill offers. Hopefully the plan will be approved in the year 1994.

[196]The EC and the EFTA (Iceland is a member of EFTA) work closely together. For example they are working together on creating the EEA, see *supra* note 10. What the EC does regarding the System will be seriously considered by other European States, especially the EFTA States. It is not unlikely that these two organizations will try for a unified action. See also *infra* note 234.

[197]A report submitted to the Commission of the European Communities pursuant to Contract No. C1, B91, B2-7040, SIN 001556 by Sven T. Brise, Consultant, dated 15th September 1991; Vol. 1 and 2 (Appendices). [Hereinafter this report will be referred to as the Report].

[198]See *supra* note 21.

[199]See *supra* note 197 Vol. 1, Section 2.4 "Recommendations regarding Community Action".

[200]See *supra* note 197 Vol. 2, Appendix 1 "Liability Limits in EC Countries".

change for example, is the liability regime, the documentation of carriage and they could establish a supplemental compensation plan under Article 35A. The possibility of not ratifying the Protocol still exists but then another solution must be found otherwise the "crisis" will continue. In any case, if the United States ratifies the MP3 and the MP4 and denounces (as planned) the original Convention, other States (including the EC) will have little choice but to follow the United States example.

In the next Chapter two recent unilateral actions will be introduced that were taken in order to "update" the Warsaw System and the EC Report will be explored further.

Chapter 3 Existing Possibilities for Updating the Warsaw System

3.1. Foreword

In this Chapter two unilateral actions will be highlighted that were recently taken in order to remedy the instruments in force of the Warsaw System. One of these actions is the so-called "Italian solution", the other has been called the "Japanese solution". At the end of the Chapter the Report submitted to the Commission of the EC will be further discussed[201].

[201]See Brise, *supra* note 197.

3.2. The Italian Action

On 2nd May 1985, the Italian Constitutional Court declared that Article 22(1) of the Convention and the Convention as amended at the Hague, contravened the basic principles of the Italian Constitution[202]. The Court made a specific reference to the fundamental liberties granted to Italian citizens under Article 2 of the Italian Constitution[203]. The Article reads as follows:

> **"Article 2**
> The republic recognizes and guarantees the inviolable rights of man, both as an individual and as a member of the social groups in which his personality finds expression, and imposes the performance of unalterable duties of a political, economic and social nature."

Before the Court reached its final decision it made a detailed review of the history and philosophy of the Warsaw Convention, the MIA, the GP and the MP3, instruments of the Warsaw System which Italy has ratified. In its final decision, the Court referred to

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[202]*Coccia Ugo et al.* v. *THY*, decision No 132/1985, the Constitutional Court, Palazzo della Consulta, 2nd May 1985. See G. Guerreri, "The Warsaw system Italian style: convention without limits" X Air Law (1985) 294. A translation of the decision is to be found at 297. The plaintiff's daughter was killed on an Istanbul - Antalya flight. The ticket provided for transportation Between Rome - Istanbul - Antalya and return. Turkey was not a party to the Warsaw Convention. Nevertheless the Convention applied to the contract of carriage since the places of origin and destination were located in the same Contracting Party with a intermediate stop in a non-Contracting Party (Article 1 of the Convention). The Turkish Airlines defended themselves by asserting the limitations of the Convention as specified in Article 22. The plaintiffs alleged that the limitations were unconstitutional as they discriminated air travelers from the users of other means of transport and also offended the principle of equal protection making no reference to the different socio-economic conditions of individuals. The Tribunal of Rome had to refer the matter of constitutionality to the Constitutional Court which has jurisdiction over questions relating to the legitimacy of substantial and formal law. The Constitutional Court ruled that the Warsaw/Hague provisions relating to the present limits were inadequate in that they failed to offer proper protection in their present figures. [Hereinafter G. Guerreri will be referred to as Guerreri].

[203]For further information see Guerreri, ibid. A translation of this Article is to be found at 294.

the substantial growth of air traffic, the high level of safety reached so far and the decreasing insurance costs due to the diminished risks of air travel. That led the Court to consider that an acceptable balance had to be re-established between the interests of air carriers whose 'sphere of economic enterprise' should not be unduly compressed, and those of the injured or deceased passengers which should be protected through a system of both reliable and adequate damage compensation. "Furthermore, the Court held that the expectation for full compensation in respect of damage affecting the supreme asset of life could not be impaired in such a way as to deprive the claimant of a 'proper' compensation"[204].

Consistent with these principles, the Court found that the basic rules of the Warsaw Convention were not only incompatible with Article 2 of the Constitution, but also observed that the passing years and inflation had left the original limits outdated and therefore not justifiable. "The Warsaw/The Hague provisions relating to the present limits (and not those relating to the limitation of liability) were considered inadequate in that they failed to offer - in their present figures - proper protection to the damaged party."[205] For these reasons, the Constitutional Court declared "the constitutional illegitimacy of Article 1 of Law No. 841 of 19th May 1932 and of Article 2 of Law No. 1832 of 3rd December 1962, in the part in which they give execution to Article 22(1) of the Warsaw Convention of 12 October 1929, as amended by Article XI of The Hague Protocol of 28th September 1955."[206]

The Court did not mean that the principle of limitation of liability was a breach of their constitution. What the Court considered a breach was the low limit in existence and that was what the Italian authorities decided to amend.

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[204]Guerreri, *supra* note 201 at 295.
[205]Guerreri, *supra* note 201 at 295.
[206]Guerreri, *supra* note 201 at 305.

The aftermath of this Court ruling came in 1988[207]. The Italian Government submitted to the Parliament a bill with three basic aims:

> "a) to provide a remedy capable of reinstating some acceptable liability limits;
>
> b) to conform to the Constitutional Court decision which required compensation to be certain and adequate"[208]; - (that task was accomplished by forcing carriers to accept 100,000 SDR as a minimum liability limit) and,
>
> "c) to implement a law fixing limits in anticipation of the entry into force of Montreal Protocol No. 3 in an attempt to minimize international criticism against limits established in such a unilateral manner."[209] - this task was not accomplished because the Italian solution is tied to the old Warsaw instruments, the original Convention and the WH.

The above mentioned bill was approved as Law No. 274[210]. The provisions of the bill can be summarized as follows:

1. Italian authorities impose upon their national carriers, wherever they fly, and other carriers that fly to, from or via Italian territory, a higher liability limit than the WH limit. To be more precise, every carrier that flies to, from or via Italian territory must

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[207]Law No. 274 of 7th July 1988 on the "Limit of Liability in International Air Carriage of Persons", Gazzetta Ufficiale della Repubblica Italiana, Roma, No. 168, 19th July 1988. See Guerreri, "Law No. 274 of 7 July 1988: a remarkable piece of Italian patchwork" (1989) XIV Air Law 176.
[208]Guerreri, *supra* note 206 at 177.
[209]Guerreri, *supra* note 206 at 177.
[210]See Guerreri *supra* note 206 at 180-182 where a translation of Law No. 274 is to be found.

agree to raise their liability limits, in cases of death or injury of a passenger, to at least 100,000 SDR[211].

2. The carriers must have passenger liability insurance and no aircraft is permitted to fly without evidence of such insurance coverage[212].

In the first instance this action seems not unlike the MIA agreement. However, it differs quite profoundly in several ways. Firstly, this decision, taken by the Italian authorities, was not done through consultations with the carriers affected. No agreement was signed, the decision is being imposed upon every carrier that wants to fly to, from or via Italian territory and carriers must comply with it in order to be granted "the freedoms of flying"[213] to, from or via Italian territory. Secondly, the increased limit is imposed by law and is a condition for the operating permit of the carrier[214]. Thirdly, there is a distinct hint of "extraterritorial" application of Italian law to foreign carriers forcing them to go beyond the treaty obligations under the Warsaw/Hague instruments. Fourthly, and finally this limit is, as the Japanese solution[215], attached to the old instruments of 1929

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[211]Article 2 of Law 174, see Guerreri, *supra* note 206 at 181.
[212]Article 3 of Law 174, see Guerreri, *supra* note 206 at 181.
[213]The freedoms of flying have been put into 7 categories. They are as follows:
a) **freedom 1**: the right of transit over a foreign state without landing;
b) **freedom 2**: right of non-traffic stop in a foreign state (a right for refueling etc.), but not for setting down or picking up load;
c) **freedom 3**: right to set down traffic from state A at state B (state A is the state of registry);
d) **freedom 4**: right to pick up traffic from state B for state A;
e) **freedom 5**: right to carry traffic between two or more foreign states, e.g. between state B, C and state D; for example:
i) carrier of nationality A has the right to carry passengers, cargo and mail to/from nation B to/from nation C on the route A-B-C;
ii) carrier of nationality A has the right to carry passengers, cargo and mail to/from nation C to/from nation B on the route A-C-B;
iii) the same as above except the route is C-B-A;
f) **freedom 6**: the right to carry load between two foreign states without being able to set down or pick up traffic in the state of registry; and,
g) **freedom 7**: right to carry traffic within territory of a foreign state (cabotage).
[214]See Guerreri, *supra* note 206 at 181, Article 2.
[215]The Japanese solution will be discussed in sub-chapter 3.3.

and 1955 (the MIA is only attached to the 1929 Convention). The old instruments are insufficient and obsolete and tying this solution to them will not help in bringing about unification in the international regulation of passenger liability in air transport. The Italian solution eases a domestic problem, but it forces its national law on foreign carriers and might be a breach of the treaty obligations that Italy is subject to, namely the Warsaw System. The Italian action does not solve the international problem, it rather adds to it, therefore, Iceland and other States contemplating updating the System must find another solution.[216]

[216]For further information see Milde, *supra* note 67 at 227-228.

3.3. The Japanese Solution

In 1992, the Japanese airlines took steps to waive entirely the Warsaw Convention and the Hague Protocol limitations of liability on passengers' death, wounding or other bodily injury provided for in Article 22 of the WH, towards passengers carried on the aircraft of the airlines of Japan. Prior to this action, in June 1991, the Japanese Transport Policy Council submitted a report which stated the following:

> "Although the level of compensation for passengers in case of international air carriage is an important factor in view of high quality air carriage service, the limits of liability for passenger's damages in the Conditions of Carriage are not necessarily sufficient in comparison with the damages actually paid. Thus, it is important to reexamine the limits taking into consideration the world trends."[217]

The Minister of Transport in Japan approved the amendments set forth by the Japanese carriers and they came into effect on November 20, 1992.

The mechanism for this waiver has been present in Article 22 of the Convention since it was adopted over 60 years ago. Article 22(1) of the Convention stipulates:

> **"Article 22**
>
> 1. In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand

[217]K. Hayashida, "Waiver of Warsaw Convention and Hague Protocol Limits of Liability on Injury or Death of Passenger by Japanese Carriers"(1993) 42 Zeitschrift für Luft- und Weltraumrect 144 at 144-145.

> francs (16 600 Special Drawing Rights). Where, in accordance with the law of the court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousands francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."[218]

The airlines of Japan took matters into their own hands by utilizing the existing provisions of the Convention. With their action, they solved the problems caused by the disparity between domestic and international damage awards[219], but only for the passengers of the airlines of Japan[220] and only concerning death, wounding or other bodily injury sustained in an aircraft accident.

The action of the Japanese airlines has the effect of bringing about a contractual abandonment by all Japanese airlines of the limitation of liability in respect of any claims arising out of the death, wounding or other bodily injury of a passenger in cases in which such Japanese airlines are Convention carriers (international carriers that are subject to the WH provisions in their carriage). The text of the new conditions of

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[218]Emphasis added.

[219]All Japanese airlines had unilaterally accepted a limit of 100,000 SDR (then approximately 17,000,000 Yen. At today's high Yen it is about 13,000,000) before the waiver. What is more, since 1st April 1982 there has been unlimited liability in domestic accidents (before, the limits were 23,000,000 Yen). See K. Hayashida, "Jurisdiction and Applicable Law in Aviation Cases in Japan" (Paper presented on 4 June 1993 to the International Conference on Air Transport and Space Application in a New World, Tokyo 2nd to 5th June 1993) 1 at 12-13 [unpublished].

[220]In Japan, the standard and cost of living is very high. Therefore, the settlement claims are very high and the occurrence of litigation is minimal. "According to the implicit cultural and ethical code of the Japanese society a victim must be duly compensated for the damage and the responsible party should not be shielded by an arbitrary limit of liability and adversarial confrontational situations must be avoided." See Milde, *supra* note 67 at 229 and S. Okabe, "Aviation Personal Injury Claim Settlement Practice in Japan" (Paper presented in June 1993 to the International Conference on Air Transport and Space Application in a New World, Tokyo 2nd to 5th June 1993) at 2 and 13 [unpublished]. According to this paper the compensation in cases of death (loss of income and pain and suffering) is close to 1,000,000$ for a married person with dependent children. The lowest compensation shown in the paper was 387,100$ for a single person with no dependents. For statistics from the United States, see G. N. Tompkins ed., "Korean Air Lines 007 Disaster Litigation - damage awards rendered in ten passenger cases" (1993) 12:14 Aviation Law 1. It is interesting to note that the KAL 007 litigation has taken over more than ten years and is still not completed.

carriage, adopted by each of the Japanese carriers are similar. Set out below is the full text of paragraph 16(C)(4) of the revised conditions of All Nippon Airways:

> "(4) (a) ANA agrees in accordance with Article 22(1) of the Convention that as to all international carriage hereunder as defined in the Convention:
>
> (i) ANA shall not apply the applicable limit of liability based on Article 22(1) of the Convention in defense of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention. Except as provided in paragraph (ii) below, ANA does not waive any defense to such claims as is available under Article 20(1) of the Convention or any other applicable law.
>
> (ii) ANA shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention, avail itself of any defense under Article 20(1) of the Convention up to the sum of 100,000 SDR exclusive of the costs of the action including lawyers' fees which the court finds reasonable.
>
> (b) Nothing herein shall be deemed to affect the rights of ANA with regard to any claim brought by, on behalf of, or in respect of any person who has willfully caused damage which resulted in death, wounding or other bodily injury of a passenger.
>
> (c) The sum mentioned in terms of SDR in this Article shall be deemed to refer to the Special Drawing Rights as defined by the International Monetary Fund. Conversion of the sum into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Rights at the date of conclusion of an oral argument, or, in case of not judicial proceedings, according to the value of such currencies in terms of the Special Drawing Rights at the date when the damages to be paid is agreed."

This means in practical terms, that:

1. Japanese airlines will not plead limitation of liability in defense of any claim arising out of the death, wounding or other bodily injury of a passenger. In respect to claims with a value under 100,000 SDR, the Article 20(1)[221] defense of the Convention will be waived, whereas for claims in excess of 100,000 SDR, the Article 20(1) defense will be retained in respect of the portion of claim in excess of 100,000 SDR.

2. In cases of successive carriage, according to Article 30 of the WH[222], the provisions above will apply in those instances where the Japanese airline is the carrier who performed the carriage during which the accident occurred. That means that the Japanese airline does not assume liability for the whole carriage when it involves various successive carriers.

3. When the Japanese airline is the actual or contracting carrier in accordance with the Guadalajara Convention, the provisions above apply. On the other hand, when the Japanese airline is the contracting carrier and a non-Japanese airline is the actual carrier, the non-Japanese airline is not bound, contractually or otherwise, to fully indemnify the Japanese airline against the payment by that airline of the damages envisaged by the amended condition. An agreement would be needed between those two airlines for the above mentioned situation. This would not apply where Article 25 of

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[221]Article 20 of the original Convention:
"1. The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

[222]Article 30 of the WH:
"1. In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1. each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.
2. In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey."

the WH[223] could be invoked[224].

This action, taken by the Japanese air carriers has been criticized. The criticism is twofold. The first reproach relates to the fact that there seems to be an omission in this solution that should have been amended. What is being referred to is the situation when an aircraft is destroyed or severely damaged by a terrorist act. Some firmly believe that a good trial lawyer could relive a Japanese carrier from all liability by establishing that neither negligence or intent of the carrier or his servants or agents was the cause of the damage. This could very well be the case because according to the conditions of carriage, paragraph 16 (C)(4) (a) (i) and (ii), the Japanese carrier does not waive any defense to such claims as is available under Article 20(1) of the Convention or any other applicable law[225].

The other reproach relates to the usefulness of this action for the maintenance of uniformity in the regulation of passenger liability in international air carriage. The question that arises is, whether this action has a bearing on other international passengers that do not fly with Japanese airlines? and, whether this will help the System towards an international unified liability regime?

> "This unilateral Japanese solution is deemed to be only a temporary measure to narrow the difference between the financial needs of the

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[223]Article 25 of the WH:
"The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

[224]For further information, see P. Martin, "Japanese Airlines - Looking Forward Rather Than Back" (1992) Vol. 11:22 Lloyd's Aviation Law at 2-5. [Hereinafter P. Martin will be referred to as Martin].

[225]See ANA's conditions of carriage paragraph 16(C)(4)(a)(i).

> passengers and the current chaotic liability situation; the Japanese airlines are looking for a justifiable *global system* which would better serve the public. The Japanese solution cannot be viewed as a *panacea* - it is of limited applicability for the Japanese air carriers; there is no indication that the Japanese Government intends to impose the same conditions on all carriers operating to, from or via Japanese territory (as the Italian solution does)."[226]

The imperfections of the Japanese solution are as follows:

1. The Japanese solution is only available to passengers traveling with Japanese carriers. This "system" does not benefit anyone that does not travel with a Japanese carrier. Not even Japanese citizens or Japanese residents that travel with non-Japanese carriers, are covered.

2. Furthermore, the solution does not apply in cases of successive carriage, unless the accident occurs during the portion of the carriage performed by the Japanese airline (see point 2 above).

3. The solution is only meant to remedy the compensation paid, in cases of death, wounding or other bodily injury and leaves the cargo and baggage limit unchanged.

4. Claims in excess of 100,000 SDR enable the carrier to invoke the defenses available under Article 20(1) of the Convention and the WH or any other applicable law.

Therefore, the practical impact of this solution is limited and does not help to enhance uniformity in international transport by air. What seems to be the real weakness of this solution is:

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[226]Milde, *supra* note 67 at 230.

> "the fact that its bold and innovative attitude to the scope of compensation of the victims is attached to the old instruments of 1929 and 1955 and no progress has been achieved to enhance the international unification of law by expediting the entry into force of the Montreal Protocols 3 and 4 which would modernize the unified law."[227]

The view has been expressed that this action of the Japanese air carriers might be a strong weapon in the fierce competition that exist between international air carriers[228]. It is rather unbelievable that a carrier would advertise that their airline would pay higher compensation than the next airline in cases of death or injury to a passenger. Such advertisements would probably have a negative effect not to mention that they would be in very poor taste. On the other hand, what might happen is that claimants could be tempted to go forum shopping when they realize that the Japanese courts award higher indemnities than other States, and that will create a problem. The situation at present is that litigants try to sue in the United States because for a long time the highest compensation paid has been there. The Japanese solution cannot be considered a "role model" for other carriers because it does not bring them towards a unified liability regime that can be shared by other international carriers. The Japanese carriers waited a long time for the United States to ratify MP3 (and bring the GP into force) but eventually gave up hope and took matters into their own hands. The Japanese carriers thought that other international carriers would follow in their footsteps but at present, more than one year after their waiver came into effect, not one carrier has adopted this solution. When the United States ratifies the MP3 there is going to be a problem because in all likelihood they will at the same time denounce the Warsaw Convention.

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[227]Milde, *supra* note 67 at 231.
[228]See Martin, *supra* note 222 at 3.

If that happens there is not going to be an instrument in force that could apply between Japan and the United States (this also applies to other States that will not have ratified the MP3). This courageous act of the Japanese carriers might eventually create more problems than solutions, at least on the international level and to prevent this from happening, it is not unlikely that the Japanese authorities will ratify the MP3 when the United States finally takes the plunge.

It should also be mentioned that the Japanese Research Institute submitted a Report prior to the action taken by the Japanese carriers which contains the adopted solution. This Report describes the waiver of the limit as a ""*temporary response to the problems related to an appropriate liability for international air carriers*". It acknowledges *"this method definitely falls behind a treaty as a proper way to settle the issue of international air carrier liability"* and calls for *"further efforts toward establishing a new liability scheme of international air carriers, including such matters as modernisation of transport documents, additional basis of jurisdiction and so forth.""*[229]

[229]A. Mercher, "Unlimited liability to passengers: 'The Japanese Initiative' and its consequences or 'whither the Warsaw system?' (1993) 12:20 Lloyd's Aviation Law 2 at 6.

3.4. The EC Report[230]

The focus of this thesis has been on what States can do in order to update the Warsaw System and at the same time bring about unification. The main aim though has been to find a solution for Iceland as a sovereign State that seriously needs to update the System. Therefore, it is necessary to look into what the other European States are thinking, regarding the System, especially the EC States, because there is a close working relationship between the EC and the EFTA[231]. What one organization will do could have a bearing on what the other might do.

It should be mentioned that all States in Europe are parties to the WH and some are parties to other instruments of the Warsaw System as well. As yet, no action has taken place towards unifying the liability limits in international carriage by air in this area but the EC has been looking for a possible solution for the Community itself.

The aim among the EC States is a single market without national frontiers and liberalization[232]. Therefore, in order for carriers to operate on an equal basis, disparities in the means of remedies for passengers, in cases of death or personal injury, must be eliminated. The Report submitted to the Commission of the EC says that the adopted remedy must "require undifferentiated treatment of all victims regardless of former qualification in aviation terminology whether the air service involved is, or used to be considered as, national or domestic; whether it operates in conventional third, fourth, fifth freedom or cabotage; even whether the carrier involved

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[230]See Brise, *supra* note 197.

[231]See *supra* notes 10 and 196.

[232]For further information on the aims of the EC see the *Treaty Establishing the European Economic Community*, opened for signature at Rome on 25 March 1957, entered into force on 1st January 1958, 298 UNTS 11.

is Community registered or not, provided he flies to, from or within the Community on a commercial basis.

The removal of essential disparities among operators linked to national regulations appears therefore, in this perspective, to be the dominant legal constraint per se."[233]

There is reason to believe that the EFTA States would seriously consider the action taken by the EC since there is a strong relationship progressing between those two organizations and which will affect air transport matters[234]. It is in the interest of the EFTA States to take the same or similar measures as the EC States if they want their carriers to operate as equals among the EC Community carriers. This of course, is based on the assumption that the Community will implement the best possible solution available to this problem with harmony in mind rather than a regional solution. What the rest of Europe will do is also open to speculation, but if it is taken into account that EC and EFTA States are in the majority in the European Civil Aviation Conference (ECAC), it is not too far fetched to believe that the other twelve remaining States in ECAC will seriously consider the action taken by the EC and eventually adopt a similar solution regarding the liability limits[235]. There is also the need to consider the agreements between the EC and former Czechoslovakia (now Czech Republic and

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[233]Brise, *supra* note 197 Vol. 1, Section 6.2 "Basic Assumption: EC Constraints in Law and Policy", according to the Preface, the author of this part is Professor Jacques Naveau not S. Brise.

[234]See *The Single European Act*, Done at Luxembourg on 17th February 1986 and at the Hague on 28th February 1986 (1987) 2 C.M.L.R. 741. The SEA amends the Treaty of Rome. It stipulates that the EC States shall, by the end of 1992, create an internal market without frontiers for the free movement of goods, capital persons and services, including air transport services (that task is yet to be completed). The EC has already started to bring down frontiers between the EC area and other European States, see *supra* notes 10 and 196.

[235]ECAC, see *supra* note 8. As an example of how closely the ECAC follows the EC actions and takes them into serious considerations, it can be mentioned that under the influence of the EC Commission Consultation Paper entitled "Passenger Liability in Aircraft Accidents, Warsaw Convention and Internal Market Requirements", the ECAC's Economic Committee gave priority to the study of the Warsaw Convention and the contract of carriage. See P.P.C. Haanappel, "Recent European Air Transport Developments: 1992-93" (1993) XVIII:I Annals of Air and Space Law 133 at 138.

Slovakia), Hungary and Poland. These Central European States would try to follow the Community since they seem very keen on having a place in the common market. This is though all speculative and would not happen overnight, but given time, harmonization of liability limits in Europe might happen sooner rather than later.

The aforementioned Report contemplates what options are available for the EC in updating the System. The Report says:

> "The Report supports the view already expressed by the U.S. Administration (Secretary of Transportation in letter to the President of the Senate, 24 June 1988)[236], in that the Warsaw Convention is "unpredictable, unfair, costly and confusing." The Report maintains that the assessment is valid also for the Convention as amended by the Hague Protocol, to which all EC Member States have adhered.
>
> The Report also supports the U.S. Administration's observation that global uniformity is desirable to increase predictability, speed and cost effectiveness in compensating air crash victims. The Report is equally supportive of the Administration's conclusion that the treaty defined liability limit, even at the suggested Montreal Protocol level, is unacceptable unless supplemented by additional passenger insurance.
>
> The Report does not support the Administration's view that the proposed Montreal Protocol 3, combined with a Supplemental Compensation Plan as now drafted in the U.S.A., would offer an optimal - or even viable - interim solution for preserving the Warsaw System."[237]

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[236]This letter was addressed to the Bush Administration [footnote added].
[237]Brise, *supra* note 197 Vol. 1, "Executive Summary".

The Report continues and comes to the conclusion that it:

> "doubts that the MP3 will ever be accepted by "high compensation countries" such as the U.S.A. and Japan."[238]

The Report also says that since the GP/MP3 rules where drafted over two decades ago, the "new" passenger limit introduced there has already lost some 80% of its original purchase value. Even if the revision clause is invoked the limit will still be insufficient to cover the actual damage and passengers would have to find other ways to be fully compensated[239]. The Report further explains that the possibility exists to ratify GP/MP3 and on the basis of Article 35A of the consolidated text of WH GP/MP3 for governments to implement a Supplementary Insurance Plan that:

> "would offer passengers on a mandatory basis and in connection with each purchase of an international air ticket a hybrid between personal accident insurance (since it will be passenger - paid and cover loss in excess of an "unbreakable" limit where, by definition, no airline liability would exist any longer) and liability insurance (since the insurance benefits -if any- will be determined in accordance with tort law)"[240].

The Report explains further that such Supplementary Plans (S-plan) face many obstacles since some States do not have the legal authority to impose such a system

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[238]Brise *supra* note 197 Vol. 1, Section 2.3 "Conclusions regarding Directions of Future Developments".
[239]See Brise *supra* note 194 Vol. 1, Section 2.2 "Post Hague Protocol Developments".
[240]Brise *supra* note 197 Vol. 1, Section 5.3 "The "safety valve" concept in the GP/MP3 revision - (Art. 35A of the consolidated text)".

on the passenger (this applies especially in the EC)[241].

The Report rejects consideration of the possibility of ratifying the MP3 because:

> "At the time of writing, considering the updated information on U.S. developments as described in Section 7.2, and interesting as it may still be to consider the Montreal/Guatemala hypothesis in the long term perspective, the chances for it to materialize in the immediate future are remote if not nonexistent; therefore it would be of no practical interest to the Community to pursue the exercise on that assumption."[242]

Finally the Report concludes that:

> "the G(P)\MP3 amendments would now worsen rather than improve the overall cost-effectiveness of the Warsaw System. Ongoing monetary inflation would continue to shift an ever-growing proportion of the insurance cost burden to be carried directly by passengers. The slowness of international legislative process in attempts to revise the limits, lends another worrying dimension to the observation that inflation destroys the balance of the System."

Although the Report does not want to contemplate ratifying MP3 it refuses the possibility of denouncing the System as a whole and says that the most urgent task is to find a workable compromise regarding limits and:

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[241]See Brise, *supra* note 235.
[242]Brise, *supra* note 197 Vol. 1, Section 6.3 "International Legal Context".

"As matters stand, the alternative which the Report believes would offer the best and most readily available interim solution would be a continued reliance on the treaty instruments which already exist and are globally accepted. That treaty framework should be combined with an extended Montreal Intercarrier Agreement which is also, in principle, already in place and accepted by a vast majority of the world's international air carriers. To satisfy demands for protection beyond the limit of a revised Intercarrier Agreement, a system for offering passengers optional supplemental insurance cover should be developed, as envisaged already by the WH rules."[243]

The Report even draws up such an agreement and the text is as follows:

"Recommendations regarding Community Action

It is recommended that the Council takes appropriate action, on its own authority or through Directive to Member States, to ensure that carrier permits to operate air services to, from or via an agreed stopping place in the territory of one or several Member States, be issued on the following conditions: (The text below is essentially copied from CAB 18900 - see Appendix 4)

1. Each carrier shall, effective (date) include the following in its conditions of carriage, including tariffs embodying conditions of carriage filed by it with any Government: "The carrier shall avail itself of the limitation of the Warsaw Convention signed on 12 October 1929, or provided in the said Convention as amended by the Hague Protocol, signed on 28 September 1955. However, in accordance with Article 22 (1) of said treaty instruments, the Carrier agrees that, as to all international transportation by the Carrier as defined in the said treaty instruments which, according to the Contract of carriage, includes a point in one of the Member States of the European Community as a point of

[243]Brise, *supra* note 197 Vol. 1, Section 2.3 "Conclusions regarding Direction of Future Developments".

origin, point of destination or agreed stopping place

> (1) the limit of liability for each passenger for death, wounding or other bodily injury shall be the sum of ...(say ECU 250,000)..., exclusive of legal fees and costs;
> (2) the Carrier shall not, with respect to any claim arising out of the death, wounding or other bodily injury of a passenger, avail itself of any defense under Article 20 (1) of said treaty instruments;
> (3) the Carrier shall make available to each passenger buying his or her international transportation in a Member State of the European Community, an option to buy insurance to cover cost in excess of the limit of..... up to a level of no less than... (say ECU 1,000,000).

Nothing herein shall be deemed to affect the rights and liabilities of the Carrier with regard to any claim brought by, on behalf of, or in respect of any person who has wilfully caused damage which resulted in death, wounding or other bodily injury of a passenger.

2. Each Carrier shall, at the time of delivery of the ticket, furnish to each passenger whose transportation is governed by the Warsaw Convention, or the Hague Protocol and by any special contract in accordance with Article 20 (1) of said treaty instruments, the following notice which shall be printed in type at least as large as 10 point modern type and in ink contrasting with the stock in (1) each ticket, (2) a piece of paper either placed in the ticket envelope with the ticket or attached to the ticket; or (3) on the ticket envelope:

ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY

> Note: No detailed text is submitted, but the following general comments are offered:

If the pattern set by the MIA and corresponding U.S. regulatory approval, CAB Order No. 18900, is followed, any revised or additional Intercarrier Agreement that may result from future EC action will also require a review of currently used Notice formats. For the purpose of this Study it is obviously the Notice regarding passenger limits that is of primary importance, although the need to revise the Notice relating to baggage limits must no doubt also be addressed, to reflect legal and regulatory developments.

It deserves bearing in mind, in this context, that it would become necessary to amend current formats anyway, if the MP3 entered into effect, and irrespective of which form the additional regulatory measures might take. It must, however, also be noted that this conclusion rests on the assumption that airlines will not interpret the deletion of the notice requirement which is proposed through the MP3 amendments as a freedom to drop altogether notices attached to the ticket document. Airlines' intentions in this respect should be explored, particularly against the background of the ignored "special contract" stipulations in the Warsaw\Hague texts which failed to underpin the rules with any penalty for non-compliance.

As regards the shape of a revised Notice format, it should be noted that modern computer technology makes it perfectly feasible to give, at insignificant additional cost and administrative effort, each individual passenger precise information regarding the treaty limit that applies to his journey for the destination registered in his ticket. It is equally easy to add information on the applicable Intercarrier Agreement, if any, whose limit exceeds the otherwise applicable treaty limit, and also to register the passenger's individual choice regarding optional insurance offers. Similar information could be simultaneously given in respect of baggage limits.

Today's CRS technology has eliminated hand-written ticket documents and reduced enormously the administrative workload involved. The video terminals and printers which are required to produce the suggested Notice format exist. Recent research has established that the concept is technically and economically feasible.

The exact wording and shape of any new Notice format must obviously be determined in consultation with the airline industry. It falls outside the scope of this Study to do more than confirm that the computer and systems technology exists to distribute and administer notices and optional insurance products as outlined above, at a cost which would be determined to an insignificant degree by fixed costs and therefore largely by the level of recurring commission charges levied by intermediaries."[244]

The Report has made some hasty decisions regarding the MP3. It refuses to explore the possibility of ratifying the MP3 because:

a) the United States does not seem to be about to ratify it; and,

b) the author of the Report believes that the United States and Japan cannot accept the provisions in the Protocol.

The Report is against the low limit in the Protocol (but so are most other industrialized States) and believes that implementation of a supplementary insurance plan will be very difficult, especially in the EC, although it promotes an "optional supplemental insurance plan". The fact is that in all probability the United States is about to ratify the MP3 and the MP4. It is unfortunate that the Report did not explore the possibility of

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[244]Brise, *supra* note 197 Vol. 1, Section 2.4 "Recommendations regarding Community Action".

ratifying the MP3 because if they proceed with the MIA type arrangement, more confusion will arise. The Report promotes global uniformity. Quite frankly their suggestion, regarding the future of the System, does not enhance the possibilities of a global uniform liability regime. If the United States denounces the original Convention, as planned, there will not be a mutual liability regime between the EC area and the United States. Thus, at present, seven EC States have ratified the MP3[245] and when the Protocol enters into force these States will be bound by the provisions of the Protocol and have a mutual treaty regime with the United States. That situation will create utter chaos for the passengers of those EC States since two instruments would be in force, the MIA type agreement and the MP3. If the EC Commission acts upon the recommendation promoted in the Report it is obvious that the EC States that have already ratified the MP3 are in a tight spot. They will have to denounce the MP3 to create uniformity in the EC area. At the same time they would create disunity regarding the System toward the other Warsaw carriers that have or will ratify the MP3.

It has to be believed that the drafters of the Report acted in haste when rejecting to even consider the ratification of the MP3 simply because it was thought that the United States was not about to ratify. Even if the United States did not want to ratify the MP3, most of its provisions are attractive and at least worth considering as a possible regime, if not worth ratifying. What will happen now in the EC is unknown but hopefully the matter will be brought up again and considered with a more open mind toward the MP3.

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[245]Denmark, Greece, Italy, Netherlands, Portugal, Spain and United Kingdom see *supra* note 42.

Chapter 4 Conclusions

4.1. Introduction

In the last two Chapters, three "solutions" have been introduced, their defects, if any, have been highlighted and their good points emphasized. These solutions are as follows:

1. The ratification of the Montreal Protocol No. 3 thereby bringing into force the amended Guatemala City Protocol and in addition, the adoption of a supplemental insurance plan under national law or by groups of States (for example the EC);
2. The Italian solution: national legislation makes higher limits a precondition for airlines to obtain operating permits;
3. The Japanese solution: air carriers waive entirely the liability limit in their contracts of carriage and still maintain the provisions of the System; and,
4. The EC Report's suggestion that airlines could revise and perhaps generalize the MIA to increase (or remove) the limits.

Are there any other solutions available or is one of the above mentioned the answer to the crisis that the Warsaw System is facing?

When the System is being discussed, often one other possibility is mentioned as a remedy along with the other four. That action is the most extreme and concerns the

denunciation of the System and at the same time the development of a totally new single instrument. This possibility will not be explored in detail because:

a) The Warsaw Convention has been ratified by 124 States and is widely known and used;

b) It is difficult to create a new system that would be followed by as many States as the Warsaw System;

c) Both the Japanese Report and the EC Report came to the conclusion that the System should be preserved and there are many others that agree with that observation;

d) It would take too many years for a new system to become effective and in the meantime disunification would rule; and,

e) Very few international treaties are "perfect"; they are, most of the time, based on a compromise between two or more different views, and when that is taken into account the Warsaw System has done well. It has in a way bridged the gap between common and civil law States, between the developed and the developing States and has as an international liability system, served well.

One conference has been convened in order to draw up a new treaty that would replace the instruments of the System without denouncing it completely. This is the so-called Alvor-Draft Convention[246]. The suggestions brought up there were quite unrealistic (for example: one treaty that embraced everyone who could possibly be

[246]For further information on the Alvor Draft Convention see Cheng, "Fifty Years of the Warsaw Convention: Where Do We Go from Here?" (1979) 28 Zeitschrift für Luft- und Weltraumrecht 373; Cheng, "An Integrated System of Absolute, Unlimited and Secured Liability for Passenger Injury and Death in International Carriage by Air" Lloyd's of London Press, *International Aviation Law Seminar, Tobago, 1981* (1981) 208; and Cheng, *supra* note 168.

liable for damage in air carriage, such as the carrier, aircraft manufacturer, air traffic controller (ATC), airport operators e.t.c.). Such a treaty would never be accepted by States because, for one, States would not want to bind themselves internationally without fault being established (in many States the ATC and airports are run by the government).

4.2. Suggestion to Iceland and other States Regarding the Future of the System

We are at crossroads and have to choose which path to take. Should the EC Report's recommendation be adopted in the hope that the EC will adopt it too, or should the MP3 be adopted? The Italian and the Japanese solutions are being rejected because they are only meant to solve a domestic problem; they are temporary solutions and do not enhance the possibility of unification in international air carriage (not to mention that the Italian solution could be a breach of a treaty obligation). Therefore, Iceland has only two options to choose from: the ratification of the MP3 or to wait for the EC to take the plunge and act upon the EC Report's recommendation. The Report's recommendation has to be rejected simply because it is not sensible to adopt such an agreement when it is almost certain that the MP3 is about to be ratified by the United States.

Therefore, it is strongly recommended that Iceland and other States ratify the MP3 and thereby bring into force the amended GP for the following reasons:

1. the amended Protocol introduces "strict liability";
2. the carrier is liable in cases of "events" instead of accidents, which is much narrower in interpretation;
3. the documents of carriage have been considerably simplified;
4. the liability limits are raised to 100,000 SDR regarding death or injury to a passenger, which is way higher than the Hague limits (16,600 SDR);
5. States can adopt supplemental insurance plans under Article 35A of the GP and

thereby compensate those who's claims exceed the limits; and,

6. one additional jurisdiction is introduced.

It has been said that the Protocol is defective and perhaps those defects could prevent States from ratifying. The defects are that there is a limit on the air carrier's liability, the limits are too low and the limits are unbreakable. The last two defects can be amended by a) setting up a supplemental insurance plan and b) ratifying the Protocol with a reservation towards Articles 24 and 25 as amended[247].

The above reasons are sufficient enough for States to ratify the MP3. What is equally important if not the most important reason for ratifying, is that the United States are about to ratify the MP3 and the MP4. That act in itself calls for a counter reaction because the United States has said that it will denounce the original Convention when it ratifies those two Protocols. In order for States to have a mutual liability regime in international air carriage, they simply must ratify the Protocols in order to have a mutual liability regime with the United States.

If the United States were not about to ratify it might have been better for Iceland to follow the future EC action (whatever that might be). On the other hand, Iceland is in desperate need to raise the limits of liability where its carrier is concerned[248] because at present the Hague provisions[249] are in force and they are not sufficient to cover compensation claims in cases of damage. If Iceland meant to wait for the EC to

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[247]See Chapter 2 Section 2.3. "Conclusion".

[248]At present only one international air carrier has an operating permit in Iceland, namely Icelandair (Flugleiðir).

[249]Article 22 of the WH. In cases of death or injury of a passenger the liability limit is 250,000 gold francs (16,600 SDR). Cargo and registered baggage is restricted to 250 gold francs (17 SDR) per kilogramme in cases of destruction, loss or delay.

proceed it would be better for it to ratify the MP3 because the Scandinavian States, Denmark, Norway and Sweden have already ratified the MP3, several EC States have ratified the MP3 and the two European States, Hungary and Ireland have also ratified the MP3. Therefore, in order to have a mutual liability regime and to help in the process of unification of liability rules in air carriage, Iceland should ratify the MP3 without waiting for the ratification of the United States or the EC.

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