Air Carrier Liability – Unfinished Unification of Private International Air Law

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Abstract

On 31 November 2003 the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air entered into force. Its purpose was to consolidate and modernize the Warsaw system and to reunify the provisions of several international instruments of private international air law under one legal instrument. The Montreal Convention consolidates the positive elements of the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and Additional Protocol Numbers 3 and 4. It also simplifies and modernizes the requirements of documentation relating to the carriage by air of passengers, baggage and cargo. Most importantly, the Montreal Convention modernizes of the liability regime for death and injury to passengers by adopting the passenger liability regime in the IATA Inter-carrier Agreement. It also modernizes the liability regime for damage to baggage and cargo and the delay. In spite of the foregoing, the Montreal Convention fails to advance the unification of private international air law any further than the Warsaw Convention.

This thesis analyzes the provisions of liability regimes under the Warsaw System and the 1999 Montreal Convention. Chapter one studies the liability regime established under the original Warsaw Convention and the subsequent attempts by states, air carriers and other interested entities to update it. Chapter two analyzes the new regime of unlimited liability established by the 1999 Montreal Convention. Chapter three examines the liability of the air carrier for damage caused by terrorist activities. In an effort to demonstrate the innovative elements of the new Convention and to encourage states to ratify it, chapter four surveys the main benefits that have accrued to the Kingdom of Saudi Arabia and its national air carrier upon ratification of the 1999 Montreal Convention.

Résumé

Le 31 novembre 2003 entrait en vigueur la *Convention pour l'unification de certaines règles relatives au transport aérien international (*Convention de Montréal), avec pour objet la consolidation et la modernisation du système de Varsovie, et l'unification en un texte unique de nombreux instruments de droit aérien international privé. La Convention de Montréal reproduit les éléments innovateurs de la Convention de Varsovie, du Protocole de La Haye, de la Convention de Guadalajara, du Protocole de Guatemala City et des Protocoles additionnels 3 et 4. De plus, elle simplifie et modernise les exigences documentaires relatives au transport de passagers, de bagages et de fret. Plus important encore, la Convention de Montréal modernise le régime de responsabilité pour la mort et les blessures des passagers, par l'incorporation du régime de responsabilité mis en place par l'Accord inter-transporteurs de l'IATA. Est aussi modernisé le régime de responsabilité concernant les dommages et les retards subis par les bagages et le fret. Quoique la Convention de Montréal représente une amélioration substantielle par rapport au système de Varsovie, elle n'en incarne pas moins plusieurs « occasions manquées » en ce que des notions telles que celles d'accident et blessure corporelle, et d'autres, demeurent indéfinies comme auparavant. En dépit des avancées qu'elle représente, la Convention de Montréal n'a pas permis de porter l'unification du droit aérien international privé plus loin que ne l'avait fait la Convention de Varsovie.

Ce mémoire analyse les dispositions du système de Varsovie, de même que celles de la Convention de Montréal, au regard du régime de responsabilité. Le premier chapitre s'attarde au régime de responsabilité adopté par la Convention de Varsovie originelle et les tentatives subséquentes de mises à jour entreprises par les États et les transporteurs

aériens. Le deuxième chapitre passe en revue le régime de responsabilité illimitée mis de l'avant par la Convention de Montréal de 1999. Le troisième chapitre expose les nombreux bénéfices qu'entraînent la nouvelle convention pour le Royaume d'Arabie Saoudite et son transporteur national. Enfin le quatrième chapitre examine la responsabilité du transporteur aérien découlant d'un acte terroriste.

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Introduction

The Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 (the Warsaw Convention)[1] was designed to avoid costly and long litigation, to protect the rights of passengers and consignors, and to limit the liability of the air carrier in the event that death, bodily injury or damage to baggage and goods occurred following an accident or event during air transport.[2] Moreover, "[t]he language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without references to the rules of their own domestic law."[3]

However, this aim of establishing a uniform international code was not completely achieved as planned since the Warsaw Convention contains gaps. In particular, the language of article 17 and the use therein of terms such as "accident," "bodily injury" and "in the course of any of the operations of embarking or disembarking" have created several controversies in litigation under the Convention and have as such been interpreted without any uniformity in many jurisdictions. In addition, the limits of air carrier liability established under article 22(1) were over the years considered to be unreasonable and unrealistic.

Notwithstanding the foregoing, the Warsaw Convention has by and large performed the difficult function of unifying disparate systems of private international law. The task of unifying the different legal systems of several nations within one legal

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[1] *Convention for the Unification of Certain Rules Relating to the International Carriage by Air*, 12 October 1929, 137 L.N.T.S 11, (entered into force 13th February 1933) [Warsaw Convention]; The text of the original Warsaw Convention was drawn up in the French language only.

[2] Malcolm A. Clarke, *Contracts of Carriage by Air* (London: Interactive Sciences, 2002) at 3.

[3] *Sidhu v. BA* , [1997] 2 Lloyd's Rep. 76 at 87.

instrument was by no means an easy one in view of their varied cultural, linguistic, and economic backgrounds. The Warsaw Convention of 1929 not only secured the satisfaction of various participating states to join its club, but to date, it has to a large extent been successful in retaining the loyalty of its member states. With the exception the United States of America which threatened to denounce the Convention in a 1933 note to the depository Polish government, none of the member states has ever denounced the Convention,[4] The US notice of intention to denounce the Convention was subsequently withdrawn and so the US is still a party to the Convention.[5]

In essence, the Warsaw Convention provides a cause of action for damages against an air carrier in the event that death, wounding or any other bodily injury is suffered by a passenger as a result of an accident occurring on board the aircraft or in the course of any of the operations of embarking or disembarking.[6] The Convention also provides a cause of action for the recovery of damages sustained in the event of destruction or loss of, or damage to any registered luggage or goods, if the occurrence that caused the damage took place during the carriage by air,[7] and also for the recovery of damages occasioned by delay to the passengers, their luggage or goods in the carriage by air.[8] The cause of action provided under the Convention is independent and as such, its validity is not founded upon any system of national law. So long as there is a contract of carriage which satisfies the conditions of the Convention,[9] an action can be brought in the

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[4] See Appendix 1 at 100 below.
[5] Further discussion on this issue will be found at "The Montreal Agreement 1966", 42-43 below.
[6] Warsaw Convention, *supra* note 1 Art. 17.
[7] *Ibid.* Art. 18.
[8] *Ibid.* Art. 19.
[9] Namely that it was international, with the place of departure and the place of destination situated within the territories of two contracting parties or within the territory of one contracting party with an agreed stopping place within a territory subject to another power whether or not that power is subject to the Convention: See Warsaw Convention, *supra* note 1 Art. 1.

national courts of any of the jurisdictions specified in the Convention.[10] The liability of the carrier for each passenger, registered luggage and goods is limited.[11]

The two major achievements of the Warsaw Convention are that:

- To some extent, it has established uniformity of liability across nations.
- It has also established limits on monetary damages exigible from air carriers, thus fostering the growth of, and protecting, the infant commercial aviation industry from the time of the conclusion of the Convention.

Over the years, developments in the field of aviation and the global economy as well as the need to modify the air carrier liability regime and liability limits established under the Warsaw Convention brought to the fore the necessity of amending the Convention to reflect changed circumstances. The Warsaw Convention has thus undergone several amendments in its lifetime. These amendments, effected by the Hague Protocol of 1955,[12] the Guadalajara Convention of 1961,[13] the Guatemala City Protocol of 1971,[14] and the four Montreal Additional Protocols of 1975,[15] have concentrated mainly on five issues:

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[10] Warsaw Convention, *supra* note 1. Art. 28.
[11] *Ibid.* Art. 22.
[12] *Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw on 12th October 1929, 28 September 1955, ICAO Doc. 7632, (entered into force on 1st August 1963) [Hague Protocol].
[13] *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, ICAO Doc. 8181, (entered into force on 1st May, 1964) [Guadalajara Convention].
[14] *Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929, as amended by the Hague Protocol of 1955*, signed at Guatemala City on 8th March, 1971, ICAO Doc. 8932, (not yet in force) [Guatemala City Protocol].
[15] *Additional Protocol No.1 to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929*, Signed at Montreal on 25th September 1975, ICAO Doc. 9145, (entered into force 15th February 1996) [Montreal Additional Protocol No. 1]; *Additional Protocol No.2 to Amend the Convention for 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 Montreal on 25th September 1975, ICAO Doc. 9146, (entered into force 15th February 1996) [Montreal Additional Protocol No. 2]; *Additional Protocol No.3 to*

- The modernization of the requirement of documents of carriage;
- The enhancement of the limits of the liability of the air carrier;
- The adoption of the principle of strict liability;
- The introduction of a modern and reliable yardstick to express the limits of liability in place of the Poincare Franc; and finally,
- The improvement of the range of jurisdictions within which actions may be brought against air carriers to recover damages.

As the commercial aviation industry matured over the years, commercial airlines in a rather unprecedented and unexpected move considered the limits of the liability established by the Warsaw Convention to be too low, unrealistic and restrictive due to global economic changes and technological advancement. The excuse of protection for the infant commercial aviation industry, upon which the limitation of air carrier liability in the Warsaw Convention was theoretically based, no longer remained valid. Thus, airlines privately concluded agreements between themselves in which they established different legal regimes and enhanced limits of carrier liability. Those pertaining under the Warsaw Convention were dispensed with.[16] These actions were taken in order to present more advantages and protection to their consumers.

Amend the Convention for 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, and at Guatemala City on 8th March 1971, Signed at Montreal on 25th September 1975, ICAO Doc. 9147, (not yet in force) [Montreal Additional Protocol No. 3]; *Montreal Protocol No.4 to Amend the Convention for 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 Montreal on 25 September 1975, ICAO Doc. 9148, (entered into force 14th June 1998) [Montreal Additional Protocol No. 4]

[16] *Montreal Inter-carrier Agreement* signed at Montreal May 13th 1966, CAB 18900, approved by Order E-23680, (docket 17325)[the Montreal Agreement]: Montreal Agreement was a private inter-airline agreement between the US government and the air carriers whose flights operate to, from, or with a stopping place in US. This Agreement was not a formal amendment to the Warsaw System; *Japanese Airlines Conditions of Carriage* (1992) 11 Lloyds Aviation Law 22 [Japanese initiative]; 1995 IATA Inter-

The Warsaw System consisting of the Warsaw Convention and all its amendments to date has been described as a dis-unification of private law due to the sheer multiplicity of the amendments and the fact that there is no unanimity of membership across the spectrum of treaties that make up the system. This fact, coupled with the extreme insistence by the United States of America for change, culminated in the adoption in 1999 of a new Convention on the subject. On 28th May 1999 when it was opened for signature, fifty-two states[17] initially signed the Montreal Convention for the Unification of Certain Rules Relating to International Carriage by Air[18] , following an international conference held in Montreal under the auspices of ICAO.

In several respects, this new Convention is a great improvement over the Warsaw system. However, certain basic concepts have remained unchanged in the new Convention. In particular, the concepts of "accident" and "bodily injury" remained undefined in the Convention and as such provided fertile ground for further litigation and irreconcilable interpretations across jurisdictions. In this regard, the Montreal Convention 1999 takes the unification of private international air law no further than the Warsaw System and the resulting legal regime can thus be appropriately described as an unfinished unification of private international air law.

The purpose of this thesis is to undertake a comparative study of the liability regimes established under the Warsaw System, their merits and shortcomings, as well as those established under the Montreal Convention 1999. The major focus will be placed on the

[17] See Appendix 2 at 106 below.
[18] *Convention for the Unification of Certain Rules for International Carriage by Air*, 28 May 1999, ICAO Doc. 9740 (entered into force 4 November, 2003) [The Montreal Convention].

discussion of the concepts of "accident" and "bodily injury" in respect of which it will be submitted that the new Convention does not contribute to their development but rather represents an unfinished unification of law with many missed opportunities.

Chapter One: The Warsaw System

I- Introduction:

1. Historical Background of the Warsaw Convention of 1929

Before the Warsaw Convention of 1929, there was no uniform legal system to regulate the private international law aspects of civil aviation.[19] The initial preparations to conclude the Warsaw Convention started in 1923, when a number of aeronautical organizations expressed their intention to have uniform legal rules to regulate international air transportation and to protect airlines against the risk of claims for compensation.[20]

In June 1923, the French Government submitted to its National Assembly a Bill regarding the liability of the air carrier and suggested that an international agreement be concluded.[21] The Warsaw Convention was the result of two international conferences that were held following this initiative by the French Government. The first international conference of private international air law was held in Paris in 1925. The objective of the participating countries was to set international rules and limits, which could establish a fair balance between the providers and users of air transport services.[22] The delegates approved a draft convention on the liability of carriers in international air transport, and adopted a resolution establishing a committee of experts, to be later known as the Committee International Technique d'Experts Juridique Aerienne (CITEJA), to continue working on the draft convention.

In its work, the CITEJA recognized the fact that the commercial air transport industry was in an early stage of development, and therefore, there was the need to create

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[19] De Forest Billyou, *Air Law* (New York: Ad Press, 1963) at 127.
[20] *Ibid.*
[21] *Ibid.*
[22] Harold Caplan, "A second supplement for the Warsaw Convention: an historic opportunity" (1999) 2 Av. Q., 70 at 71.

a uniform legal regime to protect not only the carriers, but also the governments behind them from, potentially damaging compensation awards.[23]

The second international conference on private international air law was held in Warsaw, Poland from the 4th to 12th October 1929. During this conference, CITEJA submitted a draft Convention for the Unification of Certain Rules relating to International Carriage by Air. The Convention was opened for signature on the 12th of October 1929 and entered into force on 13 February 1933.[24]

2. The Scope of the Warsaw Convention

The Warsaw Convention of 1929 applies only to international carriage by air of passengers, baggage and goods in return for remuneration or hire, as well as to gratuitous transportation by aircraft performed by an air transportation enterprise.[25] International transportation means transportation in which the place of departure and place of destination are situated within the territories of two high contracting parties or within the territory of one contracting party if there is an agreed stopping place within the territory of another country, whether a contracting party or not.[26]

For example, in the case of a round-trip ticket, the Convention applies if the country of departure and destination is a party to the Convention and if there is an agreed stopping place in any other state regardless of whether or not the other state is a party to the Convention. Neither the flag of the air carrier nor the citizenship of the passenger is relevant in deciding whether or not the Convention applies. Thus a passenger traveling

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[23] Paul Stephen Dempsey, "Pennies from Heavens: Breaking Through the Liability Ceiling of Warsaw" (1997) XXII part I Ann. Air & Sp. L. 267 at 286.
[24] Warsaw Convention, *supra* note 1.
[25] *Ibid.* Art. 1.
[26] *Ibid.* Art. 1(2).

between Riyadh-Saudi Arabia and Frankfurt-Germany is covered no matter what carrier he flies on and regardless of the nationality of the passenger. The only determining factor is the place of departure and destination of the passenger as shown on the ticket or the contract of carriage.[27]

The ticket or the contract of carriage determines whether the Convention applies even when a specific leg in the journey is entirely within the same country. Thus, a passenger holding a ticket from Riyadh to Jeddah, both in Saudi Arabia and then to Geneva-Switzerland on the same carrier will be covered by the Convention even if the accident occurred during the domestic leg of the flight (i.e. between Riyadh and Jeddah).

II. The Legal Regime of Liability under Warsaw Convention of 1929

Chapter III[28] of the Warsaw Convention establishes a liability regime that regulates the recovery of compensation following an accident or occurrence during air transportation in which life, limb or property is lost or damaged. This liability regime is based upon the following principles:

- the basis of the air carrier's liability is fault liability;
- the fault of the carrier is presumed; the burden of proof is reversed and cast upon the air carrier;
- the carrier has the right to exonerate itself from, and/or reduce its liability by relying on certain defenses; and
- As a trade off for the presumption of fault and the burden of proof falling to the carrier, the liability of the air carrier is limited.

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[27] *Ibid.*
[28] *Ibid.* Arts. 17-30.

These principles were agreed upon at the Paris international conference on private international air law in 1925.[29] As will be shortly noted, these principles, which provide shape for the liability regime under Warsaw Convention do not distinguish between the liability of the carrier for the carriage of passengers, baggage, and goods.[30] Thus, in all three forms of carriage by air, the liability of the air carrier is based on fault and the fault of the carrier is presumed, with a reversed burden of proof cast on the carrier. In this regard, the Warsaw Convention is closer to Civil law than it is to Common law because the latter distinguishes between liability of the common carrier of passengers which is based on fault liability, and the liability of the common carrier of goods which is based on strict liability.[31]

The Warsaw Convention regulates the liability of the carrier in the carriage of passengers under article 17, baggage and goods under article 18, and for delay under article 19. It is however, important to read the foregoing provisions together with other articles in the Convention in order to appreciate and implement the meaning intended by the drafters.[32]

1. Air Carrier Liability for Death, Wounding or Bodily Injury of the Passenger

Article 17 of the Convention provides as follows:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other *bodily injury* suffered by a passenger if the *accident* which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of *embarking or disembarking*.[33]

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[29] Georgette Miller, *Liability in International Air Transport* (The Netherlands: Kluwer, 1977) at 63.
[30] *Ibid.* at 64.
[31] *Ibid.* at 52.
[32] *Ibid.* at 65.
[33] Warsaw Convention, *supra* note 1 Art. 17 [emphasis added].

The carrier would only be liable if the claim for damages for death, wounding or any other bodily injury suffered by a passenger is brought within the narrow parameters of article 17. The Convention however fails to define such terms as 'bodily injury', 'accident', 'embarking' and 'disembarking' and, as will be seen later in this study, this has opened a floodgate to litigation and created dis-unification of law.

A. Elements of Liability under Article 17 of the Warsaw Convention:

The following elements must be proved in order to sustain a claim against the carrier under article 17:

- Damage
- Sustained in the event of death, wounding of a passenger or any other bodily injury
- Suffered by a Passenger
- Caused by an accident which;
- Took place on board the aircraft or in the course of any of the operations of embarking or disembarking,

(a). Damage sustained

The issue that arises is what kinds of damages are recoverable under the Warsaw Convention? Article 17 provides the answer in the words "damage sustained". This is the actual damage sustained. Punitive damages are thus not recoverable under the Convention. The concept of compensation inherent in the Convention is that of

restitution; the idea being an attempt to restore the passenger to the state in which he was prior to the accident in so far it is possible to do so in monetary terms.[34]

In the United States, courts permit recovery for monetary losses only.[35] While in U.K., the English Court in *Preston v. Hunting Air Transport* held that recoverable damages could not be restricted to financial loss only but also the loss which the infant plaintiffs sustained by reason of the fact that they had lost their mother's care at an age when they most needed it.[36]

(b). Death, Wounding or Bodily Injury

Article 17 requires a plaintiff to prove that he suffered "... death or wounding ... or any other bodily injury..." Even though the convention did not provide definitions for any of these terms, the first two words "death or wounding" do not present any problems of interpretation. The problem however lies with the interpretation of the phrase "bodily injury" and the point of controversy has been whether or not in addition to externally visible injuries, bodily injury includes those changes in the human body that are not accompanied by external manifestations such as mental injury, emotional stress and post traumatic stress disorders. The following sections explore this issue by surveying the negotiating history of the Warsaw Convention and jurisprudence.

0- The Negotiating History of the Warsaw Convention:

The early negotiations indicate that during the drafting of article 17, there was no effort to include a definition of the term "bodily injury" in the Warsaw Convention.[37]

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[34] Michael Milde, Lecture given to the LL.M in Air & Space Law class of 2003-2004 [Milde, Lecture].
[35] *Zicherman v. Korean Airlines,* 516 U.S. 217 (1996).
[36] *Preston v. Hunting Air Transport,* [1956] 1 Q.B.D. All E.R. 443. Para. G.
[37] W. Muller, "*et al.*", eds., *Warsaw Convention* (The Hague: Kluwer Law International, 2002), Art.17 at 4.

The first time a definition of "bodily injury" was discussed was in Madrid, during the drafting of the Hague Protocol in 1951, when the legal committee of ICAO proposed that a definition of the term "bodily injury" needed to be incorporated into the Warsaw Convention.[38] There is, however, no indication as to whether or not the delegates intended "bodily injury" to cover mental injury.[39] In any event, this proposal was not accepted. Thus, the negotiating history of the Warsaw Convention provides no clues as to the meaning intended by the drafters when they employed the term "bodily injury" in article 17. Resort may therefore be had to article 31(1) of the 1969 Vienna Convention on the Law of Treaties which provides that:

> A treaty shall be interpreted in good faith in accordance with ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[40]

In *Burnett v. T.W.A*, a U.S court held that in the official French text of the Warsaw Convention, the term used for "bodily injury" was "lesion corporelle" which does not include mental anguish suffered unless it was caused by some physical injury. [41] This interpretation is in conformity with French legal terminology, which distinguishes between injury to the body and damage to other objects of legal protection, including mental injury. [42]

One of the major objects of the Warsaw Convention was to achieve uniformity in certain rules relating to international carriage by air. In order that this object may be realized, the words used therein must be interpreted to reflect the intention of the drafters.

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[38] *Ibid.*
[39] Report of the Subcommittee on the Revision of the Warsaw Convention, ICAO Legal Committee. Minutes and Documents of the 8th Sess. (1952) 19 Air L. & Comm. 70-79.
[40] *Vienna Convention on the Law of Treaties*, 23rd May 1969, 1155 U.N.T.S. 331 (entered into force 27th January 1980) Art. 31(1).
[41] *Burnett v. TWA*, 368 F. Supp. 1152 (D.C.N.M.1973). at 1156-1158.
[42] W. Muller, *supra* note 37, Art.17 at 7.

A review of the decisions made by the courts of different countries regarding article 17 however paints a different picture.

0- Jurisprudence:

Decisions made by the courts of the United States indicate the emergence of two trends in the interpretation of 'bodily injury' as used in article 17. On the one hand, courts have held that the air carrier is not liable for mental injury unless it flows from, or is accompanied by, physical injury. In *Rosman v. Trans World Airlines Inc.*,[43] the court of appeals of New York held that the ordinary meaning of the term "bodily injury" did not include mental injury. The court added that passengers suffering pure mental injuries could not recover against the airline unless they could prove that such damages were caused by some physical injury to the body.[44]

Also in *Eastern Airlines v. Floyd*,[45] the U.S. Supreme Court said that "[n]either the Warsaw Convention itself nor any of the applicable legal sources demonstrates that the relevant article 17 phrase "lesion corporelle" should be translated other than as 'bodily injury', a narrow meaning excluding purely mental injuries."[46] The court accordingly held that article 17 allowed recovery only for death or physical injury. The trend that appears from these cases is that the meaning of "bodily injury" in article 17 has been narrowed down to exclude recovery for mental injuries unless they were associated with physical injury. The degree of association between the injury to the body and the

[43] *Rosman v. Trans World Airlines Inc*, 1974 U.S. Av. R. 1 (N. Ct. App. June 13th , 1974). at 13
[44] *Ibid.* at 15
[45] *Eastern Airlines v. Floyd,* 499 U.S. 530 (1991)
[46] *Ibid.* at 552.

mental injury, if compensation is to be awarded for the latter, is still the subject of debate.[47]

British decisions regarding the term "bodily injury" appear to be more consistent with the previously mentioned case. In *Sidhu v. British Airways*[48] , the British Court of Appeals held on a claim for damages for pure mental injury that "[t]he Convention was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available."[49] The Court's interpretation of bodily injury thus excluded pure mental injury and the air carrier was accordingly exonerated from liability for pure mental injury.[50]

In the recent case of *Morris v. KLM*,[51] where the claimant had suffered clinical depression brought on as a result of a sexual assault on board an aircraft, the British Court of Appeal once again held that the claim fell outside article 17. Lord Phillips of Worth Matravers MR said that "[t]his appeal had to be approached on the premise that mental illness and physical injury are distinguishable and that the claimant had accepted that she suffered no physical injury."[52] The court added "[w]hen those who drafted the Warsaw Convention used the phrase 'lesion corporelle/bodily injury' they intended that

[47] Malcolm A. Clarke, *supra* note 2 at 83.
[48] *Sidhu v. British Airways*, *supra* note 3.
[49] *Ibid.* at 87.
[50] W. Muller, *supra* note 37, Art.17 at 7.
[51] *Morris v. KLM* [2001] 3 All. E.R.126.
[52] *Ibid.* at 136 Para. 40.

phrase to have its natural meaning-physical injury. They did not intend that it would extend to a different type of harm, mental injury."[53]

On the other hand, some courts have widely interpreted 'bodily injury' to allow recovery for purely mental injury. In *Husserl v. Swiss Air*,[54] the court held that "[t]here is no evidence the drafters intended to preclude recovery for any particular type of injury".[55] The court added that"[m]ental and psychosomatic injuries are colorably within the ambit and are, therefore, comprehended by article 17".[56]

(c). A passenger:

A passenger under the Warsaw Convention is a person who uses the air transportation services provided by an air carrier gratuitously or for reward.[57] However, not every person on board an aircraft is considered a passenger. To be a passenger and be subject to the Warsaw Convention, a person must have concluded a contract of a carriage with the carrier.[58] In practice, a formal contract is not always signed between the passenger and the air carrier but a ticket is considered acceptable evidence of the contract of carriage.[59] The air carrier must submit a ticket to a passenger to avail itself of the limited liability provisions of the Convention.[60] As will be seen, the idea of linking the liability provisions to the issuance of documents of carriage under the Warsaw Convention has been a sore point and there is an attempt to deal with it in the new Convention.

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[53] *Ibid.* at 149 para. 102.
[54] *Husserl v. Swiss Air,* 388 F. Supp. 1238 (D.C.N.Y. 1975).
[55] *Ibid.* at 1250.
[56] *Ibid.*
[57] I.H.pH. Diederiks-Verschoor, *An introduction to Air Law*, 7th ed (The Hague: Kluwer Law International, 2001) at 47.
[58] Warsaw Convention, *supra* note 1 Art. 1(2).
[59] Milde, Lecture, *supra* note 34.
[60] Warsaw Convention, *supra* note 1 Art. 3.

Airline cockpit crew and flight attendants who are working on a flight or just traveling to pick up another flight, a practice known as dead-heading, are not considered passengers since they do not have contracts of carriage by air, but employment contracts, with the airline.[61] However, airline employees traveling with reduced rate or free tickets are considered to be passengers for purposes of the Warsaw Convention because they have concluded contracts of carriage by air with the airline.

(d) Accident:

The Warsaw Convention does not provide a definition for the term "accident" as used in article 17. As a result, there have been several different interpretations of the term across nations, a situation that has deprived the Convention of its acclaimed objective of unifying disparate systems of private air law. Blacks law dictionary defines an accident as "an unintentional and un-foreseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated."[62]

The 1944 Convention on International Civil Aviation[63] (Chicago Convention), on the other hand defines an "accident" as "an *occurrence* with the operation of an aircraft."[64] However, this definition cannot be applied to "accident" under article 17 of the Warsaw Convention because the Warsaw Convention clearly distinguishes between "accident" and "occurrence" in articles 17 and 18. Article 17 imposes liability on the carrier for death, wounding or bodily injury sustained by passengers in an "accident" whereas liability for damage or destruction of baggage as a result of an "occurrence" is

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[61] Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook*, (The Hague: Kluwer Law International, 2000) at 74.
[62] *Black's Law Dictionary*. 8th ed. s.v. " Accident" at15.
[63] *Convention on International Civil Aviation*, 7th December 1944, 15 U.N.T.S. 295, T.I.A.S. No. 1591, ICAO Doc. 7300/8. (entered into force on 4 April, 1947) [Chicago Convention].
[64] *Ibid.* Annex 13 [emphasis added].

dealt with in article 18.[65] In keeping with general rules of interpretation, it is submitted that the drafters of the Warsaw Convention intended to establish different meanings by using the term "accident" in article 17 and "occurrence" in article 18.

The term "occurrence" is wider than "accident" for purposes of recovery of damages. Since one of the purposes of the Warsaw Convention was to protect the infant aviation industry from risk exorbitant awards of damages, a definition of "accident", which equates it to the much broader term "occurrence" as the Chicago Convention does, would defeat the purpose of the Convention. For example, if the death of a passenger results solely from the state of the passenger's own health, it would fall under the scope of "occurrence" but not under "accident".[66]

The absence of a definition of the term accident has in turn spawned a number of controversies such as: what type of accident does the term refer to; who was responsible for the accident; whether it includes acts of aggression by passengers against other passengers, third party acts, or acts of agents of the air carrier.[67] Some of these questions have been determined by national courts one way or the other while others remain unanswered. Therefore, "[a] clear answer can not be derived from the convention and must be sought in national law."[68] The decisions of American courts over the years have been very instructive in this regard.[69]

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[65] Tory A. Weigand, "Accident, Exclusivity, and Passenger Disturbances under the Warsaw Convention" (2001) 16 Am. U. Int'l L. Rev. 891.
[66] *Ibid.*
[67] Harold J Sherman, *The Social Impact of the Warsaw Convention* (New York: Exposition Press,1952) at 57.
[68] Malcolm A. Clarke, *supra* note 2 at 82.
[69] Georgette Miller, *supra* note 29 at 109.

In *Air France v. Saks*,[70] the United States Supreme Court made the following essential points regarding the scope of the term accident as used in article 17 of the Warsaw Convention "[l]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. This definition should be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."[71] After making a finding of fact that the routine depressurization of the aircraft was normal, usual and expected, the Court stated: "[w]hen the injury indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply."[72] The carrier escaped liability in this case because it was held that the condition of the passenger's sinuses, her own internal conditions, predisposed her to damage from the routine, normal and usual operation of the aircraft.

On the basis of the reasoning in this decision, it is submitted that air carriers would escape liability for Deep Vein Thrombosis (DVT) claims, otherwise known as economy class syndrome claims, which could be brought against them under article 17 of the Warsaw Convention. This however remains to be adjudged.[73]

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[70] *Air France v. Saks* 470 U.S. 392 (1985): Saks was a passenger flying on an Air France flight landing in Los Angeles. As the aircraft was undergoing routine depressurization, she suffered some hearing loss problems. She brought action against the airline for permanent deafness allegedly caused by negligent maintenance and operation of aircraft's pressurization system.

[71] *Ibid.* at 405.

[72] *Ibid.* at 406.

[73] In the USA, several DVT cases have been consolidated and are pending before the Northern District of California. See Andrew J. Harakas "Warsaw Convention: Recent Cases Affecting Air Carrier Liability" (presented at the Worldwide Conference on Current Challenges in International Aviation, held in Montreal on 24-26 September 2004) at 12-13.

The Saks principle was followed in the case of *Sethy v. Malev-Hungarian Airlines*.[74] A passenger was injured when he slipped and fell over a piece of luggage that was in the aisle of the plane while he was boarding. The court held that "there is nothing unexpected or unusual about the presence of a bag in or near the aisle during the boarding process."[75]

In the recent case of *Olympic Airways v. Husain*[76] however, the Supreme Court of the United States affirmed the judgment of the court of appeals for the Ninth Circuit which held that "[t]he flight attendant's refusal to reseat Dr. Hanson was clearly external to Dr. Hanson, and it was unexpected and unusual in light of industry, Olympic policy, and the simple nature of Dr. Hanson's requested accommodation."[77] So the failure to reseat an asthmatic patient farther away from the smoking section of the aircraft constituted an accident within the meaning of article 17 of the Warsaw Convention.

In the case of *Wallace v. Korean Airlines*,[78] a sexual assault on a female passenger by another passenger on board an aircraft was held to be an accident under article 17 of the Warsaw Convention. However, in *Stone v. Continental Airlines Incorporated*,[79] where a passenger was assaulted by another passenger on the plane the court dismissed the plaintiff' claim reasoning that "[p]laintiff's misfortune was not an accident derived

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[74] *Sethy v. Malev- Hungarian Airlines*, 2000 U.S. Dist. Lexis 12606. < http://www.lexis.com>
[75] *Ibid.* at Para. 13-14
[76] *Olympic Airways v. Husain,* 116 F. Supp. 1121 (ND Cal, 2000), Affirmed: *Olympic Airways v. Husain*, 540 U.S. 644 (2004).
[77] *Ibid.* at 649.
[78] *Wallace v. Korean Airlines,* 214 F. 3d 293 (2d Cir.2000): A sleeping passenger on a flight from Korea to Los Angeles awoke to find that a passenger next to her had unzipped her clothes, placed his hand inside her garments and fondled her
[79] *Stone v. Continental Airlines,* 905 F. Supp. 823. (D. Hawaii.1995)

from air travel. The court therefore finds plaintiff's claim to be outside the scope of the Warsaw Convention".[80]

The last two cases illustrate the absurdity and inconsistency that has resulted from the absence of a definition of the term 'accident' in the Warsaw Convention. They also point out clearly the fact that due to the Warsaw Convention's lack of a definition of the term 'accident', there has been dis-unification rather than unification of private international air law.

(e). Embarking or Disembarking:

The Convention does not define the terms "on board" and "during the operations of embarking or disembarking" used in article 17 to indicate when the carrier would be liable for death, wounding or bodily injury suffered by a passenger. The peculiar problem presented by the foregoing is how to determine the scope of the operations of embarking and disembarking. As usual, attempts at defining the scope of these terms have provided the basis for litigation over the years.

In *Day v. TWA*,[81] passengers who were attacked by terrorists after surrendering their tickets, passing through passport control, waiting in an area exclusively reserved for persons about to depart on international flights and undergoing weapons searches by airline agents prior to boarding, sought damages from the carrier under article 17 of the Warsaw Convention. The court held that the Warsaw Convention should be interpreted flexibly to conform to the procedures and risks inherent in present-day aviation.[82] In holding that the passengers could recover under article 17, the court established a three-

[80] *Ibid.* at 827.
[81] *Day v. TWA*, 528 F.2d 31 (2d Cir, 1976).
[82] *Ibid.* at 38.

pronged test (the Day test) to determine whether or not an accident took place "in the course of the operations of embarking or disembarking"[83]:

1- Location of the accident;

2- Activity in which the passenger was engaged at time of the accident; and,

3- The airline's control over the passenger at the time of the accident (restriction of movement of the passenger).

These three factors have been subsequently described as "inextricably intertwined."[84] As such, they should be given equal attention in determined the scope of the operations of embarking or disembarking.

In *Schmidkunz v. SAS*,[85] the court found that a passenger, who was 500 yards away from the aircraft in a common passenger area of the terminal, who had not yet received her boarding pass and was not under the airline's control, was not in the course of the operation of embarking. Similarly, in *Martinez Hernandez v. Air France*,[86] a passenger was at the immigration control when terrorists attacked. The court applied the Day test and refused to hold the air carrier liable because the airline was not in charge of the passenger, and the process of disembarkation had been completed. Article 17 of the Warsaw Convention, therefore, was not applicable.

The French courts have adopted a different approach to the construction of the phrase "in the course of any of the operations of embarking or disembarking", albeit with the same results. Under this approach, embarking begins when the contract of carriage by

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[83] *Ibid.* at 33.
[84] Malcolm A. Clarke, *supra* note 2 at 101.
[85] *Schmidkunz v. SAS*, 628 F.2d 1205 (D.C. Cal 1980).
[86] *Martinez Hernandez v. Air France*, 545 F.2d 279 (1st Cir.1976).

air begins. In *Bibabcea c. Air France*,[87] a passenger who had gone through customs fell while she was waiting for her flight in the international departure lounge. The court refused to hold the air carrier liable for damages under article 17. In the opinion of the court, the passenger had not yet commenced operations of embarking as the fall took place before the call of passengers. Since the passenger was not under the control of the carrier, the contract of carriage by air was held not to have commenced.

2. Air Carrier Liability for Damage to, Destruction or Loss of, Luggage and Goods

As regards registered luggage or goods, the Warsaw Convention provides that the carrier is liable for damage sustained in the event of their destruction or loss if the occurrence that caused the damage took place during the carriage by air.[88] Carriage by air comprises the period during which the luggage or goods are in charge of the carrier, but excludes any transshipment by land, sea or river performed outside air carriage, except where the said transshipment was done for purposes of loading or delivery.[89] Objects that remain in the charge of a passenger during the flight are not considered as registered baggage; therefore, they are not governed under this article.

As noted earlier, the terms "accident" used in article 17 and "occurrence" used in article 18 were chosen intentionally.[90] The occurrence that causes destruction, damage or loss of baggage or goods does not have to be an accident. Any event that causes material damage to luggage and goods triggers the liability of the air carrier.[91] Thus, for example, if an expected occurrence, such as turbulence during a flight, causes damage to, destruction or loss of, luggage and goods, the carrier would be liable under the Warsaw

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[87] *Bibabcea c. Air France,* 1960 RFDA 725 (Trib. com. Marseille, 27th May 1960).
[88] Warsaw Convention, *supra* note 1 Art. 18(1).
[89] *Ibid.* arts. 18(2) & (3).
[90] Jeffery C. Long, "The Warsaw Convention Liability Scheme" (2004) 69 J. Air L. & Com. 65 at 74.
[91] W. Muller, *supra* note 37 at 16.

Convention. The carrier's obligation with respect to registered luggage and goods ends when the said luggage and goods have been delivered to the passenger or consignee in good condition. Failure to deliver luggage or goods for whatever reason makes the carrier liable unless it is able to avail itself of any of the defenses provided under the Convention.[92]

In *Alltransport Inc. v. Seaboard World Airlines*[93], the New York State Supreme Court held the air carrier liable for damage that occurred while the goods in question were in the charge of Customs. The court held that "[i]t is clear that paragraph (1) of article 29 does not start to run until the shipped goods are no longer 'in charge of the carrier' in the airport even though they have previously arrived there under the shipping contract."[94]

3. Air Carrier Liability for Delay to Passengers, Luggage or Goods

Article 19 of the Warsaw Convention provides that:

> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.[95]

As can be seen, the liability of the air carrier under this article involves his obligation to carry passengers, baggage and goods to the agreed destination within the agreed time limits. Even though the Warsaw Convention does not define the term "delay", the period of delay goes beyond the scope of article 17 which is restricted by the operations of embarking and disembarking when the flight is postponed or cancelled.[96]

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[92] Further discussion of this issue will be found at "Air Carrier Defenses" , P.32 below.
[93] *All transport Inc. v. Seaboard World Airlines,* 349 N.Y.S.2d 277 (N.Y. Civ.Ct.1973).
[94] *Ibid.* at 280 Paras. 5-6.
[95] Warsaw Convention, *supra* note 1 Art. 19.
[96] Georgette Miller, *supra* note 29 at 159.

In 1931, the International Air Transport Association (IATA) issued General Conditions regulating the carriage of Passengers, Baggage and Goods.[97] These conditions were considered as incorporated into the contract of the carriage.[98] In respect of the rule relating to delay, article 19 requires the carrier to use his best efforts to carry the passenger, his luggage and goods with reasonable dispatch. [99] Therefore, the fault of the carrier is not presumed but must be proved.

Even though these IATA regulations do not formally amend article 19, they could be struck down under article 23 of the Warsaw Convention which provides that any provisions tending to relieve the air carrier of liability or to fix a lower limit than that established by the Warsaw Convention shall be null and void.[100] In *Ets. Peronny c. Ste. Ethiopian Airlines*,[101] some goods were being shipped from Egypt to Paris and they arrived damaged because of delay. The air waybill had a clause stating that no time was fixed for the transportation of the goods. Nevertheless, the court held the air carrier liable for delay on the ground that the clause tended to relieve the carrier of liability and, as such, was invalid as it violated the provisions of article 23 of the Warsaw Convention.

In *Greller v. Lufthansa*,[102] the court denied the liability of the air carrier for delayed delivery of goods, because the said delay was occasioned by a mistake in the telephone number provided by the consignor.

In case of successive carriage, the claim for damages for delay could be brought against only the carrier who performed the carriage during which the delay occurred.[103]

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[97] Christopher N. Shawcross "*et al.*", *Shawcross and Beaumont on Air Law*, 2nd ed. Vol. 1 (London: Butterworth, 1951) at 373.
[98] *Ibid.* at 374.
[99] IATA, General Conditions (Passengers) (1970) ZLW 214-232.
[100] Warsaw Convention, *supra* note 1 Art. 23.
[101] *Ets. Peronny c. Ste. Ethiopian Airlines,* 1975 RFDA 395 (C.A. Paris, 30 May 1975).
[102] *Greller v. Lufthansa*, 18 Avi. 17, 555 N.Y. Civil Court.

In respect of baggage or cargo however, the passenger or consignor may bring an action against the first Carrier, and the passenger or consignee who is entitled to delivery has a right of action against the first or last carrier respectively.[104] In *Saiyed v. Transmediterranean Airways*, [105] the claim was brought against the last carrier, North Central, for damage caused by delay made by a previous air carrier Northwest Orient. Nevertheless, the court held the sued carrier liable.

Article 26 of the Warsaw Convention imposes a time limit of 14 days after the baggage or goods have been placed at the disposal of the passenger or consignee within which a complaint relating to delay must be lodged with the air carrier.[106]

4. Limits of Air Carrier Liability

As noted above, the Warsaw Convention established a trade off between the air carrier and passengers/consignors, by limiting the liability of the carrier in return for the carrier's presumed fault and a reversed burden of proof. The concept of limited liability had been previously used in maritime law under the Hague Rules of 1924,[107] which limited the liability of the carrier and the ship to 100 pounds sterling per package or unit unless the value of the goods had previously been declared.[108]

Article 22 of the Warsaw Convention contains the provisions that limit the liability of the carrier. In the carriage of passengers, the carrier's liability for each passenger was limited to 125,000 francs and this could be paid in bulk or in the form of

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[103] Warsaw convention, *supra* note 1 Art. 30(2).
[104] *Ibid.* Art. 30(3).
[105] *Saiyed v. Transmediterranean Airways*, 509 F. Supp. 1167 (D.C. Mich. 1981).
[106] Warsaw convention, *supra* note 1 Art. 26.
[107] *The Hague Rules: International Convention for the Unification of Certain Rules of Law relating to Bills of Lading*, 25th August 1924, 120 L.N.T.S. 155, (entered into force in 1931) Art. 5.
[108] Michael Milde, "Liability in International Carriage by Air: the New Montreal Convention" (1999) IV Unif. L. Rev. 835 at 838 [Milde, Liability].

periodic payments. However, the parties to the contract of carriage could agree by special contract on a higher limit of liability.[109]

In the carriage of registered luggage and goods, the liability of the carrier was limited to the sum of 250 francs per kilogram, unless the consignor had made a special declaration of the value of the goods and paid a supplementary sum at the time of handing over the goods to the carrier.[110] In that event, the liability of the carrier was limited to the declared sum unless he could prove that the sum was greater than the actual value of the goods to the consignor at the time of delivery.[111]

With respect to objects of which the passenger takes charge himself, the liability of the carrier was limited to 5000 francs per passenger.[112]

In the case of liability for delay, the Warsaw Convention did not establish specific amounts as it did for the liability for passengers, goods and cargo. The Convention leaves this matter to be determined in accordance with the law of the Court seised of the case, subject to the condition that the weight of the goods may be used as a yardstick to measure the amount to which the carrier's liability is limited.[113]

The sums indicated in article 22 were indexed to the French Franc, consisting of 65½ milligrams of gold of millesimal fineness 900, otherwise known as the Poincare Franc, and could be converted into any national currency in round figures.[114] Even though these limits were stated in the Convention, they did not apply automatically in every case.[115] Claimants were required to prove the exact amount of their damages and

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[109] Warsaw Convention, *supra* note 1 art 22(1).
[110] *Ibid.* Art. 22(2).
[111] *Ibid.*
[112] *Ibid.* Art. 22(3).
[113] *Ibid.* Art. 22(2).
[114] *Ibid.* Art. 22(4).
[115] Milde, Liability, *supra* note 108 at 838.

were entitled to receive only the amount that they could prove up to a maximum of the prescribed limits.[116] A claimant could however recover damages exceeding the said limits, thereby exposing the carrier to unlimited liability, in the event that the death, injury or damage was caused by the wilful misconduct or such other default of the carrier.[117]

5-Breaking the Limits of Liability

Even though one of the major objectives of the Warsaw Convention was to protect the infant commercial air transportation industry from bankruptcy arising from potentially exorbitant awards of damages, there are still some situations where the air carrier cannot avail itself of the provisions of the Convention that limit or exclude its liability. These situations are as follows:

1- Where the death, injury or damage was caused by the carrier's wilful misconduct or such default on his part as, in accordance to the law of the court seised of the case, is considered to be equivalent to wilful misconduct.[118]

2- Where the plaintiff did not receive a passenger ticket.[119]

3- Where a baggage check issued by the air carrier does not contain all the particulars listed in article 4(3) of the Convention.[120]

As usual, the Warsaw Convention provides no definition for the term 'wilful misconduct', but rather leaves it to be determined in accordance with the law of the Court seised of the case. It is submitted that this aspect of the Convention defeats its stated

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[116] *The case of Korean Airlines disaster*, 664 F. Supp. 1463 (DC Dist Ct.1985); Milde, Lecture, *supra* note 34.
[117] Warsaw Convention, *supra* note 1 Art. 25(1).
[118] *Ibid.*
[119] *Ibid.* Art. 3(2).
[120] *Ibid.* Art. 4(4).

purpose of unifying certain rules relating to international carriage by air, or perhaps, this is one of the areas where the drafters did not intend unification of the law. The basis of this assertion lies in the fact that states have different standards regarding what constitutes wilful misconduct. Thus for the same accident, a claimant in one country may well be able to break the limits of liability due to a lower standard of wilful misconduct whereas another claimant in another country may not be able to do so because the concept of wilful misconduct might be foreign to the law of his country.

Another difficulty with this provision is that the authentic French text of the Convention uses the term "*dol*", which implies fault or negligence. In contrast, wilful misconduct requires that a person must be aware of his behavior and the potential damage that may result there from.[121] In addition, wilful misconduct implies that the act in question was intentional or so grossly negligent as to equate it to an intentional act.[122] Thus, the scope of wilful misconduct appears to be wider than that of *dol*.

In any event, the burden of proving wilful misconduct rests on the plaintiff. The injured party must prove that the damage was caused by an act or omission of the carrier, his servants or agents, done recklessly or with the intent to cause damage, and with the knowledge, that damage would probably result. If the damage was caused by an act or omission of the carrier's employees or agents, the carrier would only be held vicariously liable if there is proof that they were acting within the scope of their employment or agency.[123]

Two tests have been applied to determine whether the carrier's behavior amounts to wilful misconduct. The first test is the "objective test" in which the court looks to what

[121] I.H.pH. Diederiks-Verschoor, *supra* note 57 at 86.
[122] Milde, Lecture, *supra* note 34.
[123] Lawrence B. Goldhirsch, *supra* note 61 at 151.

a reasonable person, under the same circumstances as the carrier, would have done.[124] Under the second test, the "subjective test", the court looks at the actual state of mind accompanying the person's behavior at the time of the alleged misconduct.[125]

The objective test has been applied in the courts of the United States, whereas the subjective test has been applied in British, Italian and Belgian courts.[126] In the case of *In Re Air Crash Near Cali, Colombia on December 20, 1995*,[127] the court held the carrier liable for wilful misconduct because pilots continued to descend in mountains. Also in *Butler v. Aeromexico*,[128] the court held the carrier liable for wilful misconduct because the crew had turned off the radar, which could have detected bad weather and forestalled the accident.

Courts in Britain have held thefts by the carrier's employees or agents as constituting wilful misconduct,[129] whereas the same act has not been considered as wilful misconduct by American courts.[130] It was held in *Compania de Aviacion Faucett S.A. v. Mulford*[131] a case involving delay that, the carrier was guilty of wilful misconduct under article 25 of the Warsaw Convention in recklessly informing passengers that their luggage was on board when, in fact, it was not on board.

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[124] *Ibid.* at 154.
[125] *Ibid.*
[126] W. Muller, *supra* note 37 Art.25. at 18.
[127] *Re Air Crash Near Cali, Colombia on December 20*, 1995, 959 F. Supp. 1529; See also Lawrence B. Goldhirsch, *supra* note 61 at 158.
[128] *Butler v. Aeromexico,* 774 F.2d 429 (11th Cir. 1985).
[129] *Rustenberg Platinum Mines v. South African Airways,* 1 Lloyds L. Rep. 19 (C.A. England, 1979): The court said if carrier's servants steal goods or allow others to do so, the servant is guilty of wilful misconduct within the scope of his employment. (*Ibid.* At 24).
[130] *Rymanowski v. Pan Am*, 416 N.Y. S.2d 1018 (N.Y.C.A. 1980): The court said that to claim " The carrier had attempted to cover- up collusion between its agents and customs officers that resulted in conversion luggage was in sufficient to establish liability by reason of "wilful misconduct" in absence of evidence". (*Ibid.* At 1018)
[131] *Compania de Aviacion Faucett S.A. v. Mulford*, 1980 U.S. Av. R. 1939 (D.C. App. Fla.1980).

6. The Basis of Air Carrier Liability under the Warsaw Convention

The contract of carriage by air involves two duties on the part of the carrier: the duty to carry the passenger to the agreed destination; and the duty to conduct the carriage safely.[132] The air carrier is thus obliged to carry the passenger, baggage and cargo without damage and without delay to the agreed destination. Failure to perform these obligations in a safe manner triggers the carrier's liability if it causes any damage to the passenger or the consignor of goods, the liability of the carrier under the Warsaw Convention is fault-based, with a reversed burden of proof. This means that a claimant does not have to establish that a carrier has been negligent in order to sustain a claim for damages under the Convention. The reversed burden of proof is considered the main future of the regime of liability under the Warsaw Convention.[133]

It was realized by the drafters of the convention that it would be extremely difficult and unfair for a claimant to be required to prove the fault of an air carrier since the entire operation of the aircraft is under the control of the carrier.[134] The Warsaw Convention therefore presumes the fault of the air carrier and places the carrier under the burden of proving that it was not at fault. The carrier discharges this burden by showing that the accident or occurrence was not the result of its fault. In return, the liability of the air carrier is limited. In order to discharge the reversed burden of proof, the Warsaw Convention provides a number of defenses that the carrier may avail itself of.

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[132] Milde, Lecture, *supra* note 34.
[133] Peter Martin *"et al."*, eds., *Shawcross and Beaumont, Air Law*, 4th ed. (London: Butterworth, 1977).
[134] Michael Milde, "The Warsaw System of Liability in International Carriage by Air: History, Merits and Flaws ... and the New "non-Warsaw" Convention of 28th May 1999" (1999) XXIV Ann. Air & Sp. L. 155 at 167 [Milde, The Warsaw System].

7. Air Carrier Defenses

The Warsaw Convention recognizes that certain accidents would inevitably happen irrespective of the fault or otherwise of the air carrier.[135] In such situations, it would be unfair to saddle the air carrier with liability. Accordingly, the Convention provides defenses in articles 20 and 21 that a carrier may employ to exclude or avoid liability.

Article 20, also known as the "all necessary measures" defense, provides as follows:

> The carrier is not 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.[136]

It is submitted that if the carrier does not know what the cause of the accident is, he cannot claim 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.

In *Manufactures Hanover Trust Co. v. Alitalia,*[137] the court defined the term "all necessary measures" as "all reasonable measures", including regular and proper maintenance schedule for aircraft, the airworthiness of the aircraft, proper certification of the flight crew, or warnings to passengers about the expected dangers. In *Fleming v. Delta,*[138] the air carrier failed to warn passengers about the possibility of bad weather during the flight. In an action for damages for injury suffered by a passenger, the court held that the air carrier had not taken all necessary measures to avoid the damage and, as such, was liable for damage suffered by the injured passenger.

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[135] For example "bird strike", "wind shear", "a closed airport because of bad weather".
[136] Warsaw Convention, *supra* note 1 Art. 20(1).
[137] *Manufactures Hanover Trust Co. v. Alitalia,* 429 F. Supp. 964 at 967 (D.C.N.Y.1977).
[138] *Fleming v. Delta*, 12 Avi 18, 122 US District Court, SDNY.

In the case of *Chutter v. KLM*,[139] a passenger who ignored the "fasten seat-belt" sign and insisted on saying farewell to her family failed to notice that the stairs leading to the aircraft had already been removed. She fell out of the aircraft and injured her leg. The air carrier escaped liability for the injury suffered by the passenger because it was found to have taken all necessary measures to avoid the injury. The passenger was also found to have been contributory negligent.

As regards the carriage of goods and luggage, article 20(2) states as follows:

> In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by *negligent pilotage or negligence* in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.[140]

The carrier may rely on proof of negligence in the pilotage, navigation or handling of the aircraft as a defense to liability. The carrier would have to prove in addition that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

The other defense that a carrier can rely on to partially or wholly exonerate himself from liability is contained in article 21 of the Warsaw Convention. It reads as follows:

> If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.[141]

Contributory negligence generally means, "...a plaintiff's own negligence played a part in causing the plaintiff's injury and that is significant enough to bar the plaintiff

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[139] *Chutter v. KLM*, 132 F. Supp. 611 (D.C.N.Y.1955).
[140] Warsaw Convention, *supra* note 1 Art. 20(2) [emphasis added].
[141] *Ibid.* Art. 21.

from recovering damages."[142] According to the text of this article, the injured party must have contributed to the damage. In other words the air carrier cannot rely on the damage caused or contributed to by a third party to reduce or exonerate his liability. In *Kraegel v. Lufthansa*,[143] where a passenger stumbled over a clearly visible bump inside an air bridge, the court held that the passenger had been contributory negligent.

Some commentators have criticized the defenses provided in the Warsaw Convention, in particular the 'all necessary measures' defense on the ground that they negatively affect the carrier's duty of safe transportation, since article 20 allows the carrier to limit or exonerate himself from the liability by proving that it was impossible to him to prevent that damage. [144] However, it would appear that the defenses provided in the Warsaw Convention were included upon realization of the fact that "[n]o system of law can attempt to compensate persons for all losses in whatever circumstances."[145]

As can be seen from the foregoing discussion, the liability regime established under the Warsaw Convention has a narrow scope and appears to be extremely protective of air carriers. It is frequently said in justification that this was necessary to protect the infant aviation industry and the governments that owned most of the airlines at that time from potentially disastrous awards of damages in the days when the technology used in civil aviation was very rudimentary. A contrary viewpoint asserts that the Warsaw Convention takes into account the need to safeguard the interests of passengers and consignors of goods by assuring them of some form of limited compensation without having to discharge the onerous burden of proving the negligence of the carrier. Over the

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[142] Black's Law Dictionary, *supra* note 62. s.v. " Negligence" at 1062.
[143] *Kraegel v. Lufthansa*, Lloyds Aviation Law, March 1st, 1988 (D.C.N.Y.1987); See also W. Muller, *supra* note 37, Art. 21 at 7.
[144] Harold J Sherman, *supra* note 67 at 44-45.
[145] *Sidhu v. BA*, *supra* note 3 at 87.

years, it was realized that the Warsaw Convention was not catering effectively to the needs of the industry. There have thus been several amendments to the Convention to keep it up to date with developments in the global economy.

III. Amendments to the Warsaw Convention

Since its conclusion in 1929, several amendments[146] have been made to update the Warsaw Convention. The discussion of this part will, however, be limited to those amendments that deal with the issue of liability.

1- The Hague Protocol, 1955[147]

Some twenty-two years after coming into force and governing the relationship between air carriers and users of the international air transportation services provided by these carriers, the Warsaw Convention experienced its first amendment, effected by the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, known as the Hague Protocol of 28th of September 1955. This Protocol introduced very important amendments aimed at solving the legal and economic issues observed during application of the provisions of the Warsaw Convention. However, the Hague Protocol did not change the basis of the air carrier' liability under the Warsaw Convention.[148]

(A).The Limits of Liability in the Hague Protocol:

The liability limits established under article 22 of the Warsaw Convention were considered inadequate and unrealistic in view of the improving economic circumstances

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[146] Hague Protocol 1951, *supra* note 12; Guadalajara Convention 1961, *supra* note 13; Guatemala City Protocol 1971, *supra* note 14; the Montreal Four Protocols 1975, *supra* note 15.
[147] Hague Protocol, *supra* note 12.
[148] Georgette Miller, *supra* note 29 at 68.

of the parties to the Convention.[149] Thus, article XI of the Hague Protocol replaced the previous article 22 of the Warsaw Convention and doubled the limit of liability of carriers for death, wounding or other bodily injury of each passenger from 125,000 Poincare francs to 250,000 Poincare francs.[150]

As regards the limits of liability for registered luggage and goods, the same rates specified in the Warsaw Convention were retained, since the passenger or consignor could declare a higher value for the luggage or goods and secure adequate compensation from the carrier in the event of damage, loss or destruction. A new provision was however introduced in relation to loss, damage or delay of part of registered baggage or cargo. In that event, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited is the total weight of the package or packages concerned.[151] These limits were made applicable to air carrier's servants and agents.[152]

In addition, the Hague Protocol provides that the Court seised of the case may, in accordance with its own law, award court costs and other expenses of litigation to the plaintiff. This could however be done provided that the damages awarded do not exceed the sum which the carrier has offered to the claimants in writing within a period of six months from the date of the occurrence causing the damage.[153]

(B).Wilful Misconduct

One of the significant amendments introduced by the Hague Protocol was the elimination of the term "wilful misconduct" which, as has been seen, engendered a dis-

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[149] Marek Zylicz, *International Air Transport Law* (Dordrecht: Martinus Nijhoff, 1992) at 91.
[150] Hague Protocol, *supra* note 12 Art. XI.
[151] *Ibid.* Art. IX 2 (b).
[152] *Ibid.* Art. XIV (25A).
[153] *Ibid.* Art. XI (4).

unification of private international air law.[154] In its place, article XIII of the Hague Protocol provided a new article 25 as follows:

> The limits of liability specified in article 22 shall not apply if it is proved that 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 an act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.[155]

With this comprehensive provision, the tendency to have differing standards for wilful misconduct from country to country had been eliminated.

2- The Guatemala City Protocol, 1971[156]

In spite of the important changes introduced by the Montreal Agreement of 1966, it also brought about an unfair situation in the rules regulating international carriage by air. Although the Agreement was not a formal amendment of the Warsaw system, it in fact established a different liability regime for flights to, from or through the United States. In an attempt to level the playing field by having a uniform regime applicable to all international flights, a new protocol to the Warsaw Convention, as amended by the Hague Protocol, was adopted in Guatemala City in 1971.

The Guatemala City Protocol followed along the lines of the Montreal Agreement of 1966. It established a regime of strict liability of the carrier in the case of death, wounding or other bodily injury of passengers and also the destruction, loss or damage of

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[154] See "Breaking the limits of liability" at 28 above.
[155] Hague Protocol, *supra* note 12 Art. XIII.
[156] Guatemala City Protocol, *supra* note 14.

baggage, "checked or unchecked".[157] Article IV (1) of the Protocol, intended as a replacement for article 17 of the Warsaw Convention, states

> The carrier is liable for damage sustained in case of death or *personal injury* of a passenger upon condition only that the *event* that 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.[158]

Compared to article 17 of the Warsaw Convention, it may be noted that the following phrase "if the *accident* which caused damage so sustained" had been replaced by the phrase "upon condition only that the *event* which caused the death or injury". More significantly, the term "*bodily injury*" used in article 17 was replaced by the words "*personal injury*". The common element contained in the new terms used in the Guatemala City Protocol is that they cover a wider scope than the terms originally used in the Warsaw Convention.[159] Personal injury for instance would include mental injury whereas bodily injury would not.[160] Article IV (2) extends the legal regime of strict liability to cover the transportation of baggage.

(A).The Limits of Liability in the Guatemala City Protocol:

The drafters of this protocol recognized the need to deal with the ever insufficient and unrealistic compensation available to passengers under the Warsaw Convention as amended. Therefore, the Protocol attempted to increase the limits of liability to levels that reflected the changes in the global economy at the time. First, the limit of liability was

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[157] Milde, Lecture, *supra* note 34.
[158] Guatemala City Protocol, *supra* note 14 Art. IV(1) [emphasis added].
[159] Michael Milde, "Warsaw requiem or unfinished symphony? (From Warsaw to The Hague, Guatemala, Montreal, Kuala Lumpur and to ....?) (1996) Av. Q. 37 at 40.
[160] See "Bodily injury" page 12 above.

increased to 1,500,000 francs in the case of death or injury of a passenger.[161] This limit could not be exceeded under any circumstances. Secondly, the Protocol for the first time stated a specific amount of 62,000 francs per passenger in the case of delay in carriage of passengers.[162] As regards destruction, loss, damage or delay to baggage, the Protocol increased the limit of liability to 15,000 francs per passenger.[163] The limits of liability for cargo remained as stated in the original Warsaw Convention; 250 francs per kilogram.[164]

Unfortunately, this Protocol is not yet in force, because it has not been ratified by those five states whose airlines represent at least 40 % of the total scheduled international air traffic.[165] In particular, the principle of unbreakable limits of liability adopted in the Protocol prevented the United States from ratifying the Protocol.

3-The Four Montreal Additional Protocols of 1975[166]

The Guatemala City Protocol introduced the concept of SDRs instead of the gold indexed Poincare franc as the monetary unit for limiting the liability of the carrier. This action was necessitated by the instability in the U.S dollar-indexed price of gold.[167] However, since the Guatemala City Protocol had not yet entered into force an interim measure in the form of four Additional Protocols was adopted in Montreal in 1975 to deal with the situation. Montreal Additional Protocol Nos.1, 2, and 3 adopted SDRs as a yardstick in place of the gold clauses in the Warsaw Convention as amended by the

[161] Guatemala City Protocol, *supra* note at 14 Art. VIII(1)(a).
[162] *Ibid.* Art. 1(b).
[163] *Ibid.* Art. 1(c).
[164] *Ibid.* Art. 2(a).
[165] *Ibid.* Art. XX.
[166] The four Montreal Additional Protocols of 1975, *supra* note 15.
[167] Tory A. Weigand, *supra* note 65 at 906.

Hague Protocol.[168] Since both the ICAO and IATA considered that a parallel regime should be adopted with respect to the liability of the carrier for cargo due to growth in international business, the Montreal Additional Protocol No. 4 restated the rules relating to the carriage of cargo by air.[169]

Montreal Additional Protocol No. 1 provided a passenger liability limit of 8,300 SDRs, a registered baggage limit of 17 SDRs per kilogram, and a 332 SDR limit per passenger for objects of which the passenger takes charge himself.[170] Montreal Additional Protocol No. 2 doubled the passenger liability limit to 16,600 SDRs and retained all the other limits established by Protocol No. 1.[171] Montreal Additional Protocol No. 3 raised the limits to the level of those contained in the Guatemala City Protocol, namely 100,000 SDRs per passenger for passenger liability, 4150 SDRs per passenger for delay, 1000 SDRs per passenger for loss, damage, destruction or delay to baggage, and 17 SDRs per kilogram for cargo.[172]

Montreal Additional Protocols No. 1, 2, and 4 have secured the required number of ratifications and have since entered into force. However, Montreal Additional Protocol No. 3 has not entered into force yet probably for the same reasons as the Guatemala City Protocol.[173] The gold currency unit may be retained by states which are not members of the International Monetary Fund and whose law does not permit the use of SDRs[174]

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[168] SDRs value is determined on a daily basis by averaging a basket of leading currencies (The Euro, Japanese Yen, Pond Sterling and U.S. Dollar):See the official website of International Monetary Fund, <http://www.imf.org/external/np/exr/facts/sdr.HTM> (date accessed: 21 January 2005).
[169] Doo Hwan, Kim, "The System of the Warsaw Convention Liability in International Carriage by Air" (1997) 1: 2 Boletim da Faculdade de Direito 55 at 63.
[170] Montreal Additional Protocol No. 1, *supra* note 15, Art. II.
[171] Montreal Additional Protocol No. 2, *supra* note 15, Art. II.
[172] Montreal Additional Protocol No. 3, *supra* note 15, Art. II.
[173] See " Guatemala City Protocol" at 39 above.
[174] Montreal Additional Protocol No. 1, *supra* note 15 Art. II.

It has been argued by some authors that the purpose of Montreal Additional Protocol No. 4 was to extend the regime of strict liability to cover the carriage of cargo by air.[175] It is submitted that this assertion is not borne out by the provisions of the Protocol. Even though the carrier is liable for damage sustained in the event of destruction or loss of, or damage to any registered baggage or cargo upon the sole condition that the occurrence which caused the damage so sustained took place during the carriage by air,[176] the drafters of the Protocol reserved some defenses for the carrier by which he could avoid or be exonerated from liability.[177] These defenses are: firstly, an inherent defect, quality or vice of the cargo; secondly, defective packaging of the cargo performed by a person other than the carrier or his employees or agents; thirdly, an act of war or an armed conflict: and finally, an act of a public authority carried out in connection with the entry, exit or transit of the cargo. These defenses afford the carrier an easy opportunity to escape liability even though the goods may have been in his charge at the time of the damage. This does not accord with a regime of strict liability.

IV. Private Agreements Concluded by Airlines & IATA:

Over the years, airlines felt that the liability regime established under the Warsaw System was not conducive to business. Thus, on a number of occasions, groups of airlines took decisions to set their own regime of liability to meet their obligations to their clients aside from the Warsaw system. The significantly high levels of

[175] Milde, Liability, *supra* note 108 at 840.
[176] Montreal Additional Protocol No. 4, *supra* note 15 Art. IV.
[177] *Ibid.* Art. IV(3).

technology and safety associated with modern day commercial aviation influenced these decisions.[178]

1. The Montreal Agreement, 1966[179]

In the United States, it was believed that the justifications for the limitation of the liability of international air carriers under the Warsaw Convention were groundless[180] as most US airlines were flying for several years with no limit on their liability towards their passengers, and that did not affect their operations in any negative way.[181]

As a result, the United States expressed its rejection of the changes made under the Hague Protocol 1955 by sending a notice of denunciation to the Polish government.[182] The reason for this action was mainly that the government of the US felt that the Warsaw Convention's limits of liability, as enhanced by the Hague Protocol, were ridiculously low and unrealistic.[183] Therefore, in order to retain the government of the United States as a member of the Warsaw Convention and to prevent any denunciation of the agreement, airlines under the umbrella of IATA entered into negotiations with the US government and adopted the Montreal Agreement of 1966.[184]

The Montreal Agreement is thus, a private agreement between airlines and the government of the United States. It applies to any carriage by air to, from or via the territory of the United States. Even though this agreement is not a *de jure* amendment of

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[178] Lorne S. Clark, "The 1996 IATA Inter-carrier Agreement on Measures to Implement the New Passenger Liability Regime" (1996) 45: 4 Z.W. 353 at 553.
[179] The Montreal Agreement, *supra* note 16.
[180] Harold J. Sherman, *supra* note 67 at 126.
[181] *Ibid.*
[182] Peter Martin *et al.*, *supra* note *133,* at 346-47.
[183] U.S. Association of the Bar of the City of New York, Report on the Warsaw Convention as Amended by The Hague Protocol, Maurice Ravage, Committee on Aeronautics (Washington, DC, 1959) at 2-3, ICAO Doc. 17095.
[184] The Montreal Agreement, *supra* note 16.

the Warsaw Convention under international law,[185] it constitutes a *de facto* amendment of the Warsaw Convention and the Hague Protocol so far as the parties thereto are concerned.[186] This is reflected in the expression "Warsaw System" which includes the Montreal Agreement 1966.[187]

The Montreal Agreement 1966 altered the basic legal regime of air carrier liability as provided under the Warsaw Convention.[188] The Agreement introduced two important changes. It increased the limits of liability of the carriers who were party to it and introduced a regime of strict liability. The limit of air carriers liability for death, wounding or bodily injury was set at US$75,000 per person, including costs of litigation and expenses; or US$ 58,000 excluding costs of litigation and expenses, if the award of such costs and expenses was made separately according to the law of the court seised of the case.[189]

More significantly, the parties to the Montreal Agreement undertook not to avail themselves of the "all necessary measures of defenses"[190] provided under article 20(1) of the Warsaw Convention with respect to any claim arising out of the death, wounding or other bodily injury of a passenger.[191] In essence, the parties to this Agreement established a regime of strict liability regarding claims made under article 17 of the Warsaw Convention.

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[185] Milde, Liability, *supra* note 108 at 838.
[186] P. Martin, "Fifty Years of the Warsaw Convention: A Practical Man's Guide" (1979) 4 Ann. Air & Sp. L. 233.
[187] Georgette Miller, *supra* note 29 at 1.
[188] *Ibid.* at 68.
[189] Montreal Agreement, *supra* note 16 Art. 1.
[190] See "Air carrier defenses" at 32 above.
[191] The Montreal Agreement, *supra* note16 Art. 2.

2- Japanese Initiative of 1992:[192]

In 1992, all Japanese airlines adopted a new legal regime and a new amount of compensation in respect to the international carriage of passengers. They amended their conditions of carriage to waive the limitation of liability for passenger injury or death caused by an accident within the meaning and scope of article 17 of the Warsaw Convention. The new regime comprised of a two-tier system of liability:

- Strict liability up to the sum of 100,000 SDR.
- Beyond 100,000 SDR, carriers reserve the right to assert the "all necessary measures" defense under article 20(1) of the Warsaw Convention.

The Japanese initiative was a remarkable improvement to the liability regime of air carriers in the international transportation of passengers. It adopted a regime of strict liability and removed the ceiling on the liability of the carrier

3- The IATA Inter-Carrier Agreement on Passenger Liability, 1995

Over a period of more than thirty years, the Warsaw Convention did not see any amendments. IATA was thus of the opinion that the Warsaw system was out of date and the limits of liability established thereunder did not reflect contemporary community standards.[193] In response to this issue, airlines once again came together as they did with the Montreal Agreement of 1966, and adopted an inter-carrier agreement applicable not only for the carriage to, from or via United States but internationally applicable to all members of this agreement. IATA Inter-carrier Agreement[194] (IIA) was approved and

[192] Japanese initiative, *supra* note 16.
[193] Lorne S. Clark, *supra* note 178 at 559.
[194] IIA, *supra* note 16.

adopted unanimously by a resolution of the 51st Annual General Meeting of IATA in Kuala Lumpur, Malaysia on October 31, 1995.[195]

By this agreement, the airlines agreed to waive the limitation of liability in respect of claims under article 17 of the Warsaw Convention for death or bodily injury of passengers as provided in article 22 of the Warsaw Convention.[196] The regime introduced by the IIA imposed strict liability upon carriers for claims not exceeding 100,000 SDR and for amounts claimed in excess of 100,000 SDR, the agreement reserved all defenses available under the Warsaw Convention to the carriers. With respect to third parties, the carrier also reserved all rights of recourse against any other person, including without limitation, rights of contribution and indemnity.

To implement the principles of the Inter-carrier Agreement, airlines under the auspices of IATA, concluded Measures to Implement the IATA Inter-carrier Agreement (MIA). The MIA retains the option of domestic law for the calculation of damages. This is intended to allow American passengers the benefit from United States levels of damages wherever they fly with a member airline.[197]

The regime adopted in the IIA removes the limitation of liability and brings to an end "willful misconduct" litigation aimed at breaking the limits.[198] The main objective of IATA in adopting this agreement was to remove some of the major drawbacks resulting from the Warsaw Convention.[199]

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[195] Doo Hwan Kim, *supra* note 169 at 70.
[196] The IATA Inter-carrier Agreement 1995 (IIA) came into force on 14th February 1997.
[197] Harold Caplan, "Full Compensation for the Iternational Pssenger IATA AGM Tkes the Frst Seps", Airclaims Ltd – Blue Print. November 2nd 1995, 4 at 4.
[198] Doo Hwan Kim, *supra* note 169 at 71.
[199] Lorne S. Clark, *supra* note 178 at 559.

V. Conclusion

In this chapter, an attempt has been made to outline the features of the Warsaw System of air carrier liability. It has been found that the basis of a carrier's liability for death, wounding or any bodily injury to passengers as well as for damage, loss of or destruction of baggage and cargo is presumed fault liability with a reversed burden of proof placed on the carrier. It has also been found that the liability of the carrier in respect of each of the foregoing heads of damage is limited, and that the limits have lost their relevance as a result of advancements in technology and improvements in the global economy. In order to keep the system up to date, there have been several amendments to the Warsaw Convention over the years. The effect of these amendments is the creation of a multiplicity of instruments without uniformity of membership across board, thereby resulting in a minefield of different rules governing air carrier liability in international air transportation.

Chapter Two: The Montreal Convention of 1999

I. Introduction

Chapter one discussed the regime of air carrier liability established by the Warsaw System. It was found that two major features of the Warsaw System, namely the limits of liability and the requirement of documents of carriage as a trigger to the liability provisions, had become too restrictive and inappropriate, due to advancements in technology and global economic conditions. [200] As a result, it became apparent that there was an urgent need for modernization and consolidation of the Warsaw System.

While the limits set by the Warsaw Convention (as amended by Hague Protocol) were supposed to be applied in the states parties, in practice different limits were applied in accordance with the private inter-carrier agreements.[201] It was also found that although there had been several attempts through amendments and protocols to update the Warsaw System over the years, they were insufficient and had indeed resulted in a multiplicity of liability regimes, depending upon the origin and destination of each passenger. For instance, as regards the liability regime and the limit of compensation in the case of death or bodily injury to passengers traveling on the same aircraft, those traveling to or from a state which was a party to the original Warsaw Convention could only claim a maximum of 125,000 francs (16600 SDR). However, those traveling to, from or via the United States could claim a maximum of $75,000 by virtue of the Montreal Agreement of 1966

It was thus important and beneficial to both providers and users of international air transport services that some action should be taken to remedy the situation. The

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[200] Anthony G. Mercer "The Montreal Convention - A New Convention for A New Millennium" (2000) 2 Av. Q. 86 at 87.
[201] Malcolm A. Clarke, *supra* note 2 at 14.

modernization and consolidation of the Warsaw System was long overdue especially since its underlying rationale, namely the protection of air carriers from excessive awards of damages, had ceased to be relevant over the years. It was against this background that the Montreal Convention[202] was concluded in 1999. It was intended as an appropriate instrument for the 21st century, shifting the focus from protection of the air carrier to the protection of the consumer.

This chapter examines the provisions of the Montreal Convention 1999, in particularly articles 17 and 22, in order to find out whether the Convention eliminates the controversial issues created in the wake of the Warsaw Convention, and also to see how far it carries forward the objective of unification of private international air law.

1. The preparation of the Montreal Convention of 1999

The idea of modernizing and updating the Warsaw System was initially brought up during the 1975 ICAO Diplomatic Conference held in Montreal when the ICAO legal committee was requested to prepare a consolidated text covering the whole subject area of the Warsaw System.[203] However, the actual process of modernization and updating the system started in 1995 when the ICAO Council decided to establish a Secretariat Study Group [study group] and to entrust it with the task of assisting the Legal Bureau in "developing a mechanism within the framework of ICAO to accelerate the modernization of the Warsaw System."[204]

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[202] Montreal Convention, *supra* note 18.

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

[204] See ICAO Council Decision of 15 November 1995. ICAO Doc. C-DEC 146/3; See also L. Weber and A. Jakob "The ICAO Draft Convention on the Modernization of the Warsaw System to be Considered by a Diplomatic Conference in 1999" (1998) XXIII Ann. Air & Sp. L. 231 at 232 [Weber, The ICAO draft].

Two alternatives were open to the study group. One was the conclusion of yet another protocol to be added to the Warsaw Convention and its amendments and the other was the conclusion of an entirely new Convention to replace the Warsaw System. Each alternative had its merits and flaws, but to bring to an end the dis-unification of law that had resulted from the multiplicity of instruments, i.e. the Warsaw System, it was considered extremely necessary to conclude a new convention to substitute the Warsaw System.[205] In its report to the Legal Bureau, the study group stated its preference for the concept of a new convention instead of the preparation of another protocol.[206]

On 15 November 1995 the 31st Session the Assembly of ICAO decided that the modernization of the Warsaw system should be given a high level of priority on the work programme of the Legal Committee.[207] Consequently, the work programme of the legal committee was amended, and a new item entitled "the Modernization of the Warsaw System and review of the ratification of international air law instruments" was inserted.[208] The Legal Bureau then presented its report to the Council during its 147th Session in order to advise the Council of the appropriate steps necessary to modernize the Warsaw System.[209]

The study group commenced its work at the beginning of 1996 and concluded in June 1996.[210] By consensus, the study group agreed that action within ICAO was

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[205] Milde, The Warsaw System, *supra* note 134, at 167.
[206] L. Weber and A. Jakob "The Modernization of the Warsaw System: the Montreal Convention of 1999" (1999) XXIV Ann. Air & Sp. L. 333 at 336. [L. Weber and A. Jakob, The modernization of the Warsaw].
[207] Milde, The Warsaw System, *supra* note 134, at 168.
[208] *Ibid.*
[209] *Report of the Secretariat study Group on Modernization of the Warsaw Convention System*, ICAO Doc. C-WP/ 10381 (5th March 1996) at Appendix A.
[210] L. Weber and A. Jakob, The Modernization of the Warsaw, *supra* note 206 at 335.

required to modernize the regime of liability established by the Warsaw System.[211] There was however a division in the study group as to the manner in which this was to be carried out. Nevertheless, the majority of states expressed support for the concept of a new convention.[212] By June 1996, the Study Group, with the assistance of the ICAO Legal Bureau, submitted a first draft text of a new convention which was later presented to the ICAO council in October 1996.[213] "The draft was significantly prepared to revise, modernize and consolidate the Warsaw Convention by means of a self-standing convention with the object of achieving simplicity, flexibility and compatibility with modern technology".[214] The draft convention consolidated the positive aspects of the Warsaw System.[215] It also adopted the liability regime for passengers in the IATA Inter-carrier Agreement (IIA).[216] The adoption of the positive aspects of the Warsaw system and the IATA Inter-carrier Agreement was intentionally done so that aviation could continue to benefit from 70 years of established judicial precedents in interpreting provisions of the Warsaw system.[217]

However, within the study group, opponents of the idea of an entirely new convention argued that another protocol would be sufficient to address the required amendments to the Warsaw System.[218] Other critical comments about the draft were that: (i) it did not provide for liability for mental injury standing alone; (ii) it did not require advanced payment; and (iii) it prescribed a "fifth jurisdiction" – the territory in which a

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[211] Vijay Poonoosamy, "The Montreal Convention 1999- a question of balance" (2000) 2 Av. Q. 79 at 80. [Vijay, a question of balance].
[212] L. Weber and A. Jakob, The Modernization of the Warsaw, *supra* note 206 at 335.
[213] *Ibid.*
[214] Vijay, a question of balance, *supra* note 211 at 80.
[215] *Ibid.*
[216] Anthony G. Mercer, *supra* note 200 at 89.
[217] Weber, the ICAO draft, *supra* note 204 at 5.
[218] Anthony G. Mercer, *supra* note 200 at 89.

passenger had his permanent and principal residence in which proceedings against the carrier for damages for the passenger's death or injury could be brought.[219]

Since "the Study Group did not represent the balance international expertise in the field",[220] a Rapporteur was appointed in September 1996 to carry out a study on the subject of the "Modernization and Consolidation of the Warsaw System".[221]

At its 30th Session held in Montreal in 1997, the ICAO Legal Committee considered the report of the Rapporteur together with the draft text of the study group.[222] During the discussion, concern was expressed about some innovative elements of the draft text. First, some delegates did not at all support certain aspects of the two-tiered liability regime introduced by the draft text,[223] and secondly, the question as to who should bear the burden of proof for claims exceeding the first tier was raised.[224] Another troubling issue was the inclusion of the "fifth jurisdiction", which was considered as a fundamental issue by the United States delegation.[225] This was because fifth jurisdiction ensured that American passengers could drag air carriers before the courts of the United States where awards of damages have been traditionally known to be very high.

On 9th May 1997 the Legal Committee approved the text of the draft convention for the unification of certain rules for international carriage by air.[226] However, the issues upon which controversy remained, namely: the proposed two-tiered liability regime for

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[219] *Ibid.*
[220] Milde, Liability, *supra* note 108 at 845.
[221] Vijay, a question of balance, *supra* note 211 at 80.
[222] L. Weber and A. Jakob, The Modernization of the Warsaw, *supra* note 206 at 336.
[223] The two-tier liability regime for recoverable compensatory damage is applicable in case of injury or death of passengers. The first tier comprises of strict liability up to 100,000 SDR. The second tier provides for liability of the air carrier in excess of 100,000 SDR on the basis of fault liability.
[224] L. Weber and A. Jakob, The Modernization of the Warsaw, *supra* note 206 at 336.
[225] Milde, The Warsaw System, *supra* note 134, at 169.
[226] ICAO, *The Report of The 30th Session of the ICAO Legal Committee*, ICAO Doc 9693-LC/ 190, Attachment D.

passengers; the limit of liability in case of death or bodily injury suffered by a passenger; fifth jurisdiction; arbitration; the escalator clause; and liability insurance were left in square brackets for determination by the Diplomatic Conference.[227] Subsequently, the Council decided that more studies should be undertaken in respect of the issues in square brackets.

The Council thus established a Special Group on the Modernization and Consolidation of the Warsaw System (SGMW) for the purpose.[228] The SGMW reviewed and revised the draft text in the light of the comments which had been received from different states on the subject. The final text was delivered to the Diplomatic Conference by SGMW after the principles of the IATA Inter-carrier Agreement of 1995, the 1997 EC Council Regulation No. 2027/97,[229] and the fifth jurisdiction had been incorporated therein.[230]

The Council of ICAO approved the report of SGMW and decided to convene a Diplomatic Conference from 11th to 29th May 1999 for the adoption of the draft convention for the unification of certain rules for international carriage by air as approved by the Legal Committee and the SGMW[231]

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[227] Weber, The ICAO draft, *supra* note 204 at 232.
[228] *Ibid.*
[229] EC, Council Regulation No.2027/97 of 9th October 1997 on air carrier liability in the event of accidents, [1997] O.J. L.285/1 (entered into force on 17th October 1998). The EC Council Regulation applied the principle of strict liability up to 100,000 SDR.
[230] Milde, The Warsaw System, *supra* note 134, at 170.
[231] *Ibid.*

2. The 1999 Diplomatic Conference

The Montreal Conference was convened for the adoption of the draft convention because this was the only way to establish a high degree of uniformity of private international air law for the benefit of international aviation.[232]

Participants at the conference were divided in two main blocks.[233] One block, consisting mainly of developed countries with stronger airlines including all the members of the European Civil Aviation Conference (ECAC),[234] was in favor of the draft convention. France initially objected to the adoption of the fifth jurisdiction, but it eventually withdrew its objection[235] upon strong insistence from the United States that the fifth jurisdiction be included.[236] This group also had the support of 21 member states of the Latin American Civil Aviation Conference (LACAC).[237]

The other block, on the other hand, consisted mainly of developing countries.[238] This group objected to the adoption of the draft convention. Participants in this group were of the view that a regime of unlimited air carrier liability in the second tier was not in the interest of air carriers, especially those from developing countries, since it would

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[232] The Hon. K.O. Rattray, O.J., Q.C "The New Montreal Convention for The Unification of Certain Rules for International Carriage by Air- Modernization of the Warsaw System: The Search for Consensus, (2000) 2 Aviation Quarterly 59 at 66.

[233] Milde, The Warsaw System, *supra* note 134, at 170.

[234] ICAO, *ECAC'S Comments on the Draft Convention* (Presented by 37 Contracting States, members of the European Civil Aviation Conference), ICAO DCW Doc No. 8 (30th May 1999).

[235] ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air* (Presented by France), ICAO DCW Doc. No. 36 (19th May 1999).

[236] ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air, Article 27— Fifth Jurisdiction* (Presented by the United States of America),ICAO DCW Doc. 12 (4th May 1999).

[237] ICAO, *Comments from the Latin American Civil Aviation Commission (LA CAL) on the Draft Convention* (Presented by the Latin American Civil Aviation Commission), ICAO DCW Doc. No. 14.(6th May,1999)

[238] ICAO, *Liability of the Carrier and Extent of Compensation for Damage-Death and Injury of Passengers* (Presented by India), ICAO DCW Doc. No. 18 (11th May 1999).

expose them to the risk of high compensation awards.[239] They also argued against the adoption of the fifth jurisdiction.[240]

With regard to the limits of liability, several proposals were made during the 1999 diplomatic conference. Notably, a proposal was made by a group of 53 African states for a three–tier system according to which the carrier would be liable for claims up to 100,000 SDR on the basis of strict liability. For claims exceeding the first tier, the carrier would be liable on the basis of the principle of presumptive liability up to 500,000 SDR. For claims exceeding the second tier, the liability of the air carrier would be unlimited and based on proof of fault.[241] A similar three-tiered proposal was made by the member states of the Arab Civil Aviation Commission. However, the limit of liability for each tier was pegged at 100,000 SDR, 250,000-400,000 SDR and over 400,000 SDR respectively.[242]

In view of the conflicting viewpoints, it appeared that no consensus would be achieved at the conference. However, the president of the Conference cleared these obstacles by establishing a "Friends of the Chairman Group" (FCG) and entrusting the draft convention to the group for further review.[243] The task of this group was to evaluate the viability of various proposals made at the conference with a view to identifying

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[239] ICAO, *Comments on Article 20: Compensation in Case of Death or Injury of Passengers*(Presented by 53 African Contracting States), ICAO DCW Doc. No. 21 (12th May 1999).
[240] ICAO, *Comments on Article 21A: Limit of liability, presented by 53 African Contracting states*, DCW Doc. No. 22.(12th May,1999).
[241] ICAO, *Comments on Article 20: Compensation in Case of Death or Injury of Passengers* (Presented by 53 African Contracting States), ICAO DCW Doc. No. 21(12th May 1999).
[242] ICAO, *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, Comments on Articles 20 and 27 (Submitted by Member States of the Arab Civil Aviation Commission) ICAO DCW Doc. 29 (14th May 1999).
[243] L. Weber and A. Jakob, The modernization of the Warsaw, *supra* note 206 at 339: The Friend of Chairman Group consisted of twenty-seven delegations. Its membership was spread geographically across participating states and in accordance with the negotiating skills of delegates.

solutions.[244] In its work, the FCG focused attention on deeply controversial provisions such as: article 16 (scope of compensable damage); article 19 (exoneration); article 20 (liability regime); article 21 (limits of liability); article 22 (advance payments); and article 27 (fifth jurisdiction).[245]

Eventually, the president of the Conference announced a "consensus package" consisting of the text approved by FCG to the delegates at the13th meeting.[246] On 28th May 1999, the Diplomatic Conference unanimously adopted a new instrument intended to bring uniformity to certain rules on international carriage by air,[247] and to entirely replace the Warsaw System.

The Montreal Convention establishes a modern system of air carrier liability that accommodates developments in the global economy and advancements in technology in the aviation industry on one hand, and also provides a fair level of protection for the consumers of international air transport services on the other hand.

In its preamble, the Montreal Convention of 1999 recalls the significant contribution made by the Warsaw System to the development of private international law.[248] Also included in the preamble are three notable principles: (1) the need to modernize and consolidate the Warsaw System; (2) the protection of the interest of consumers; and (3) the desirability of orderly development of international air transport operations.[249] The Montreal Convention contains several features for the benefit of international carriage by air. These features include, but are not limited to, the following:

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[244] *Ibid.*
[245] *Ibid.* at 341.
[246] ICAO, *Consensus Package*, DCW Doc. 50 (25th May, 1999).
[247] Milde, The Warsaw System, *supra* note 134, at 171.
[248] Anthony G. Mercer, *supra* note 200 at 89.
[249] The Montreal Convention, *supra* note 18 preamble.

1- Uniformity of the Warsaw System through a single instrument.

2- Use of positive elements of the Warsaw convention, the Hague protocol, the Guadalajara convention, the Guatemala City Protocol and Additional Protocols 3 and 4.

3- Simplification and modernization of the documentation relating to the carriage of passengers, baggage and cargo.

4- Modernization of the liability regime for death and injury to passengers by adopting the passenger regime in the IATA Inter-carrier Agreement.

5- Modernization of the liability regime for damage to baggage and cargo and for delay.

6- Advance payments. In case of aircraft accidents resulting in death or injury of passengers, the air carrier shall, if required by its national law make an advance payment without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such person/s.

7- Adoption of the fifth jurisdiction. A plaintiff could bring an action for recovery of damages, resulting from the death or injury of a passenger, before a court where he has the principal and permanent residence of him and to or from which the carrier operates services for the carriage of passengers.

8- Requirement of the air carriers to submit proof of adequate insurance covering their liability as stated by this convention. [250]

The discussion in the remainder of this chapter will be confined to the elements concerning the issue of air carrier liability.

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[250] Milde, The Warsaw System, *supra* note 134, at 171.

II. The Air Carrier Liability Regime under the Montreal Convention of 1999:

Chapter III of the Montreal Convention establishes a new liability regime together with a new framework for determining eligible compensation for damages. The provisions of this chapter reflect the application of the principle of "consumer protection" as stated in the preamble. The new air carrier liability regime also signals a movement from the concept of fault liability to one of strict liability, and as well, seeks to address the impact of changes in the global economy and the cost of living on the limits of compensation.

1. Liability for passengers

With respect to air carrier liability towards passengers, the Montreal Convention provides:

> The air carrier is liable for damages sustained in case of death or bodily injury of a passenger upon condition only that the accident 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.[251]

In essence, this is a repetition of article 17 of the Warsaw Convention the only change being a condition that the accident causing such death or injury takes place on board the aircraft or in the course of embarking or disembarking. In the opinion of one eminent commentator, "[t]his basic provision on liability of the carrier does not represent any innovation."[252]

The most significant change brought about by the Montreal Convention is the elimination of the "all necessary measures" defense, which was available to the air carrier under article 20(1) of the Warsaw Convention for heads of damages. Under the Montreal

[251] The Montreal Convention, *supra* note 18 Art. 17.
[252] Milde, Liability, *supra* note 108 at 853.

Convention, the defence is only available for claims for damages due to delay.[253] Thus, with the exception of claims based on delay, the basis of liability under articles 17 and 18 of the Montreal Convention is strict liability.

The scope of air carrier liability however remained as it was under the Warsaw Convention except for a minor change. The term "wounding" was deleted from the new article 17. This deletion probably took place, because the term "any bodily injury" actually encompasses the meaning of wounding. The rest of the text remains as it was in the Warsaw Convention. Aside from the foregoing, the elements that one has to prove to sustain a claim under the new article 17 are almost the same as those required under article17 of the Warsaw Convention. The retention of the old article 17, it has been said, enhances consistency in the air carrier-consumer relationship and keeps the benefit of positive provisions of the Warsaw System.[254]

While this author greatly applauds this trend, it is submitted that the seeds of controversy and litigation could have been completely eliminated if the Montreal Convention had taken the opportunity to define some of the controversial terms that have been the cause of several lawsuits under the Warsaw Convention; terms such as "bodily injury" and "accident". The Montreal convention could have cleared this situation as it had done with punitive damages. The term "damage sustained" as used in the Montreal Convention is much clearer than as used in the Warsaw Convention because it ensures that only compensatory damages are recoverable.[255] Moreover, in order to prevent doubt, bring certainty and codify the principles of several important judicial decisions, the

[253] Malcolm A. Clarke, *supra* note 2 at 4.
[254] Weber, The ICAO draft, *supra* note 204 at 5.
[255] The Montreal Convention, *supra* note 18 preamble; Milde, The Warsaw System, *supra* note 134 at 177.

Montreal Convention expressly states that "punitive, exemplary or non-compensatory damages shall not be recoverable."[256]

The Montreal Convention could have achieved better unification of private international air law as it set out to do if it had filled in the gaps and omitted the ambiguous terms of the Warsaw Convention since the states parties to this convention have different legal systems with different rules of interpretations that may prevent them from accepting judicial precedents from other states. For example, the Courts in Saudi Arabia apply Islamic Law. Therefore, lawyers cannot support their arguments, in respect to the issues arising out of this Convention, with the judicial precedent from U.S. Courts.

The situation would have been different if the Montreal Convention had incorporated definitions for those terms because the government of Saudi Arabia would have ratified the Convention and the Saudi court would be obliged to apply its provisions as part of the law of Saudi Arabia. For instance, the U.S. Supreme Court has held that the accident that causes the passenger's injury must be abnormal, unexpected and unusual.[257] But this definition can neither be used as a judicial precedent nor persuasive authority before the Saudi Arabian courts. The same can be said regarding judicial definitions of the term "bodily injury".

In addition to the foregoing, the term "accident" needs more clarification.[258] It may be necessary for instance to set a condition that for an event to be described as an accident for the purposes of article 17, that event must be related to a typical aviation risk.[259] Such a condition is important because some events may occur while a passenger

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[256] Anthony G. Mercer, *supra* note 200 at 94.
[257] *Air France v. Saks*, *supra* note 70 at 405.
[258] Milde, The Warsaw System, *supra* note 134 at 178.
[259] *Ibid.*

is in the charge of the air carrier which may not necessarily be accidents; for instance a physical fight between passengers on a flight. The term accident is a general term and could be subject to widely varying interpretations according to the legal system of the Court seised of the case, thus leading to dis-unification instead of unification of private international air law.

A problem inherent in the current situation in which courts are at liberty to decide what constitutes an accident on a case by case basis is that courts tend to widen or narrow the definition over time. [260] For instance, in U.S the judicial definitions of the term "accident" over the years have reflected very wide variations. [261] First, U.S courts took a narrow view of the term "accident" by distinguishing between the accident which caused the passenger's injury and the accident which is the passenger's injury. [262] Consequently, the courts accept the accident which caused the passenger's injury and deny the accident which is the passenger's injury. Secondly, the courts gave wider meaning to the term by stating that the accident must be an event within the carrier's capacity to control.[263] As a third variation, the courts have held carriers liable for damages caused by incidents occurring in airport terminals, before departure or after arrival provided that passengers are under the carrier's control.[264] In recent times,[265] an accident could be almost be anything happening to passengers including the human interactions.[266]

As one author put it, the most negative implication of not providing a precise definition for "accident" is that "[a]ccident may include any number of unexpected and

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[260] Malcolm A. Clarke, *supra* note 2 at 81.
[261] *Ibid.*
[262] *Air France v. Saks*, *supra* note 70 at 398.
[263] *Day v. TWA*, *supra* note 81 at 33.
[264] *Rabinowitz v. SAS*, 741 F Supp. 441(SD NY,1990) at 446- 447.
[265] Malcolm A. Clarke, *supra* note 2 at 93.
[266] *Wallace v. Korean Airlines*, *supra* note 78.

abnormal events and some of them bear no relation to aviation risks and could occur any where."[267]

(A) The term "Bodily injury":

As noted, there have been complex situations under the Warsaw System in which Courts had to determine the extent to which damages for mental injury were recoverable, and whether "mental injury" could be compensable without being accompanied by "bodily injury". According to a decision of the United States Supreme Court in respect of air carrier liability under Warsaw Convention, "mental injury" is not recoverable unless it is accompanied by bodily injury.[268] Also in *Sidhu v. British Airways Plc*,[269] the English House of Lords held that psychological injury was not recoverable under the Warsaw Convention.

Against this backdrop there was a movement during the Diplomatic Conference, supported by delegates representing Sweden, Norway, Colombia and others, which proposed the adoption of the term "personal injury" in place of the term "bodily injury" as had been proposed in the Guatemala City Protocol.[270] Proponents of this movement were of the opinion that the term personal injury would allow a plaintiff to claim compensation for "mental injury" without necessarily proving that it was accompanied by bodily injury, as the term "personal injury" had a wider meaning than the term "bodily injury".[271] Moreover, several Francophone states suggested that the existing French expression "lesion corporelle" could be interpreted as allowing recovery for mental injury

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[267] Milde, Liability, *supra* note 108 at 853.
[268] *Rosman v. Trans World Airlines*, *supra* note 43.
[269] *Sidhu v. B A*, *supra* note 3 at 87.
[270] The Hon, *supra* note 232 at 177; See also ICAO, *Comments on the draft text approved by the 30 session of the ICAO legal committee amended by the special group on the modernization and consolidation of the Warsaw, (Presented by Norway and Sweden)* DCW Doc No. 10 (4th May,1999)
[271] Milde, The Warsaw System, *supra* note 134 at 177.

standing alone without being accompanied by bodily injury.[272] "They argued that there may be considerable cases of mental injury attributable to an accident resulting in the impairment of health for which fair and equitable compensation should be ruled".[273]

The opponents of this movement resented the probable consequences if the term "personal injury" was adopted since it could allow recovery for the mental injury.[274] They claimed that "mental injury could arise simply from fear occasioned by air travel and that difficult questions of proof or disproof of the real causation in a regime of strict liability could open the door to limitless abuse."[275]

In the present author's view, it is fair and balanced between the air carriers and consumers that the article 17 retained the term "bodily injury" and did not extend it to cover mental injury. There is no doubt that changes in the global economy, accompanied by technological advancements in aviation require major changes in the relationship between providers and users of international services so as to provide more protection for the users. Air transport services have become an essential utility that must be maintained and support for the benefit of consumers. However, there is also the need to recognize and understand the difficulties air carriers are facing in these times. International carriers are facing critical financial situations due to increased costs of operation, including fuel, maintenance, insurance, other services required for aviation and harsh competition.

All these obstacles tend to drive air carriers into bankruptcy. If we add the cost of insurance premiums based on the expected amounts of compensation payable in the worst case scenario, air carriers will be hindered from continuing to provide improved air

[272] Anthony G. Mercer, *supra* note 200 at 93.
[273] The Hon, *supra* note 232 at 69.
[274] *Ibid.*
[275] *Ibid.*

transport services to meet today's expectations. Thus, the Convention takes into account the interests of the airlines in both developed and developing countries in retaining the term "bodily injury" and not extending it to cover mental injury. A definition of the term in the Convention would not have been out of place.

(B). Limit of liability in respect of passengers:

The Montreal Convention raised the limit of passenger liability to an up-to-date level and at the same time kept the advantage of the Warsaw Convention by retaining the reversed burden of proof placed upon the carrier. The new regime establishes a two-tiered liability regime:[276]

I – With respect to damages for death or bodily injury of a passenger not exceeding 100,000 SDR, a regime of strict liability applies on the basis that the carrier will not be able to exclude or limit its liability under any circumstances.[277] Air carrier liability under this tier is subject to a strict liability regime;

II- For damages in respect of death or bodily injury of a passenger exceeding 100,000 SDR, the liability of the carrier is unlimited unless he can prove that the damage was neither the result of his negligence or wrongful act nor that of his servants or agents; or that such damage was solely due to the negligence or wrongful act of a third party.[278]

2- Liability for Baggage:

The regime of liability under the Montreal Convention in respect of baggage, distinguishes between checked and unchecked baggage. For checked baggage, the air carrier is strictly liable for damage sustained in the event of destruction, loss or damage

[276] The Montreal Convention, *supra* note 18 Art. 21.
[277] *Ibid.* Art. 21(1).
[278] *Ibid.* Art. 21(2).

provided that the event that caused the damage took place on board the aircraft or during any period within which such baggage was in the charge of the carrier.[279] However, under this liability regime the air carrier retains certain defenses such as the inherent defect, quality or vice of the baggage, by which the air carrier could exonerate itself or limit its liability.[280] As regards unchecked baggage, the liability of air carrier is based on fault liability. The claimant must prove the air carrier's negligence or that of its servants or agents in order to succeed on a claim for damages to unchecked baggage.[281]

A. Limit of liability for baggage

The carrier's liability for both types of baggage is limited to 1,000 SDR per passenger unless, in the case of checked baggage, the passenger has, at the time of handing over the baggage to the carrier, made a special declaration of the value of the baggage and paid a supplementary fee if required.[282] Nevertheless, the air carrier could reduce the amount declared if it proves that the value of the damage sustained is less than the passenger's actual interest in delivery at destination.[283]

3- Liability for cargo:

The new convention adopted the liability regime for cargo introduced by Montreal Additional Protocol No. 4.[284] This regime provides that liability arises only upon condition that the destruction or loss of, or damage to cargo occurred while the cargo was in the charge of the air carrier for the purpose of carriage by air. The Convention also states that a unilateral change in the mode of transport by the carrier will

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[279] *Ibid.* Art. 17(2).
[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid* Art. 22(2).
[283] *Ibid.*
[284] L. Weber and A. Jakob, The modernization of the Warsaw, *supra* note 206 at 343.

not change the carrier's liability, which will be governed by the provisions of the Convention.[285]

The air carrier could wholly or partially exonerate itself from liability if it proves that the damage resulted from: (i) the inherent defect, quality or vice of the cargo; (ii) from the defective packaging performed by a person other than the carrier or its servants or agents; or (iii) an act of a public authority connected with the entry, exit or transit of the cargo.[286]

A. Limit of liability for cargo:

The liability of the carrier for cargo in the case of destruction, loss, damage or delay is limited to 17 SDR per kilo. This limit was retained from the Warsaw Convention without change.[287]

The liability regimes for checked baggage and cargo have not created as much conflict between the interest of air carriers and consumers as that for passengers. This is because consignors and owners of checked baggage can avail themselves of the alternative to declare the actual value of the baggage or cargo at the time of handing them over to the carrier in the event that they are not satisfied with the limits of compensation provided in the Convention. This alternative may provide the basis in the future for the adoption of similar provisions regarding passengers liability so as to reduce pressure on the industry to increase the liability limits for passengers for death, wounding or bodily injury.

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[285] The Montreal Convention, *supra* note 18 Art. 18.
[286] *Ibid.* Art. 18(2).
[287] *Ibid.* Art. 22(3).

4- Liability for delay

The liability of the air carrier for delay of passengers, baggage and cargo is based on fault liability with a reversed burden of proof.[288] Just as in the Warsaw Convention, the Montreal Convention did not provide a definition of delay. This was left within the discretion of the Court seised of the matter.[289]

Air transportation operates in a special environment. As such, factors such as safety requirements, weather conditions, security measures and restrictions enforced by governmental agencies and airport authorities do cause delays and cancellation of flights without much advanced warning. As to whether or not delays in air transportation in each particular case are justified by the exigencies of the industry is a matter left to the discretion of the Court. In the author's view, the repetition of the Warsaw Convention's approach to liability for delay in the Montreal Convention was inappropriate since the situation affords air carriers defenses that enable them to easily exonerate themselves or limit their liability for damage caused by delay.

A. Limit of liability for delay

The liability for damage caused by delay was increased to 4,150 SDR in the carriage of passengers,[290] and in the carriage of baggage, to 1000 SDR for each passenger.[291] For cargo, the limit of 17 SDR was retained.[292] In the event of damage caused by delay of baggage or cargo, a consumer could obtain higher compensation if he had made a special declaration of interest and paid a supplementary fee to the carrier if

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[288] *Ibid.* Art. 19.
[289] Vijay Poonoosamy, "Warsaw: The next generation" (1998) XXIII Ann. Air & Sp. L. 175 at 180.
[290] The Montreal Convention, *supra* note 18 Art. 22(1).
[291] *Ibid.* Art. 22(2).
[292] *Ibid.* Art. 22(3).

required.[293] In addition, the air carrier cannot exonerate itself from liability, if the claimant proves that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly with knowledge that such damage would probably result.[294]

5- Advance payments

For the purpose of providing immediate financial assistance to the families of victims of aircraft accidents,[295] the Montreal Convention obliges air carriers, if required by national law, to make advance payments without delay to natural person(s) who are entitled to claim compensation in order to meet their immediate economic needs in the event of aircraft accidents resulting in death or injury to passengers. This innovative provision evidences the implementation of a shift in focus from protection of air carriers to protection of consumers and is justified by humanitarian considerations. In effect, the Montreal Convention extends protection far beyond airline passengers to their families.

6- Exoneration from the liability

Under the regime established by the Montreal Convention, the air carrier will still be able to exonerate itself wholly or partially from its liability for damage caused to passengers, baggage or cargo. The air carrier would be exonerated to the extent that he proves that the damage in question was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation or the person from whom such rights are derived.[296] These defenses are less onerous than the previous "all

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[293] *Ibid.*
[294] *Ibid.* 18 Art. 22(5).
[295] The Hon, *supra* note 232 at 75.
[296] The Montreal Convention, *supra* note 18 Art. 20.

necessary measures" which has been dispensed with under the Montreal Convention except in the case of air carrier liability for delay.

7- Review of liability limits

The Montreal convention establishes an avenue for reviewing the limits of liability by the Depositary at five-year intervals, if the rate of inflation of those states whose currencies comprise the SDR has exceeded 10 per cent.[297] Any such revision shall be effective six months after notification to the States parties unless the majority of States parties register their disapproval. In that case, the matter must be discussed at a meeting of the States parties. The States parties also have the right to call for a revision at any time provided that one-third of the parties so desire, and the rate of inflation has exceeded 30 per cent.[298]

This provision is one of the most significant and innovative provisions of the Montreal Convention. The ability to revise limits of liability is strongly expected to forestall frequent amendments of the Convention on grounds that the liability limits have become unrealistic and inappropriate due to ever changing global economic conditions.

8- The liability regime and documentation:

The new liability regime requires that, where the Convention applies and may limit the liability of air carriers in respect of the death of, injury to, or delay of, passengers and destruction or loss of, damage to, or delay of, baggage or cargo, written notice to that effect shall be given to the passenger.[299] However, the Convention did not prescribe any sanctions for non-compliance with this requirement. More significantly, the

[297] *Ibid.* Art. 24.
[298] *Ibid.* Art.24 (3).
[299] *Ibid.* Art. 3(1).

Convention did not prescribe any sanctions for non-compliance with the documentation requirements in respect of passenger tickets, baggage tags, and cargo waybills.[300]

Thus, in stark contrast to the situation prevailing under the Warsaw System, a carrier's failure to comply with the documentation requirements of the Montreal Convention in and of itself does not preclude it from relying on the liability limits prescribed in the Convention. This decoupling of the documents of carriage from the liability provisions is considered as one of the most innovative elements of the Montreal Convention, taking into consideration the predominant use of electronic ticketing in recent times and the savings associated therewith.

9- Liability regarding carriage performed by a person other than the contracting carrier:

The Montreal Convention specifically provides that the rules prescribed therein shall be applicable to carriage performed by a person other than the contracting carrier.[301] By adopting this approach, the Montreal Convention fills one of the gaps in the Warsaw Convention in respect of which there had been earlier attempts to make amends through the Guadalajara Convention of 1961.[302] In extending the applicability of the rules however, the Montreal Convention distinguishes between the contracting carrier and the actual carrier in the event of litigation. If the carriage was performed under a code-sharing system, then a claimant may bring action against either the contracting carrier or the actual carrier, but in case of the successive carriage, a claimant could only bring

[300] *Ibid.* Art. 3(5).
[301] *Ibid.* Arts. 1(3) & 39.
[302] Guadalajara Convention, *supra* note 13.

action against the air carrier who performed the carriage during which the damage in question occurred.[303]

III. Conclusion:

The foregoing examination of the liability provisions of the Montreal Convention has revealed that, to a large extent, the Convention has unified the rules and solved most of the long-standing problems of the Warsaw system. Regardless of the gap between the developed and developing countries that has become wider as a result of advancements in technology and changes in the global economy, the Montreal Convention reached a fine compromise to promote equity and uniformity between the conflicting interests of governments, consumers and air carriers. Thus, instead of subjecting claims to different liability regimes, the significant achievement of the Montreal Convention is that it continues the concept of a uniform liability regime and liability limits initiated by the Warsaw Convention.

Even though the IATA Inter-carrier Agreement and the Japanese Initiative demonstrated that the problem of liability limits could be solved, international law can only be made and changed by states. By its current provisions, this Convention improves upon the uniformity of private international air law. The liability limits established in the Convention will not be likely subjected to frequent amendment because of the two-tiered system and the built in avenues for periodic review of the liability limits. These provisions will help ensure that the new regime and its liability limits are up to date. It will also attract states to become parties to the Convention. Furthermore, the Convention provides an avenue for arbitration instead of adversarial litigation. It is submitted that

[303] The Montreal Convention, *supra* note 18 Arts. 36(2) & 41.

these arbitration provisions will eventually lead to the avoidance of wasteful and costly litigation.

The purpose of Montreal Convention was to move from a situation of unfair over-protection of the air carrier to the protection of consumers, and to achieve a fair balance between the interests of air carriers and consumers. Under the liability regime it establishes defenses by which the air carrier could easily limit its liability or be completely exonerated under the Warsaw System were removed. Instead, the new Convention adopts strict liability in the first tier of the liability for death or bodily injury to passengers. The limits of liability established by the Montreal Convention reflect up to date levels of compensation especially with regard to liability for death or bodily injury to passengers.

With the introduction of the fifth jurisdiction, consumers have a better range of options as regards the appropriate jurisdiction in which to sue. Moreover, in order to meet the immediate economic needs of victims' families, air carriers are obliged, if required by their respective national laws, to make advance payments to natural person(s) entitled to claim compensation without delay in the event of aircraft accidents resulting in death or injury of passengers.

With respect of protection of air carriers, the Montreal Convention grants limited liability up to 100,000 SDR to air carriers in the first tier of liability. The liability of the Carrier in the second tier is based on presumptive fault. However, the air carrier may resort to any defenses to exonerate itself wholly or partially from liability in this tier.

As regards documentation requirements, the new liability system departs from the Warsaw System by removing the connection between the issuance of documents of

carriage and liability Thus, any alleged imperfections in the tickets, baggage tags, cargo waybills, and written notices no longer deprive the air carrier of the opportunity to rely on the limits of liability established by the Convention.

On the issue of compensation, the Montreal Convention provides that "punitive, exemplary or any other non-compensatory damages shall not be recoverable in any action to which the convention applies."[304] Moreover, the convention does not expressly provide for the recovery of damages for "mental injury" not accompanied by bodily injury. As the case of the Warsaw System illustrates, this omission may provide the basis for further litigation between passengers and carriers.

In situations where the carriage is performed by any other person other than the contracting carrier, the new Convention adopts joint and several liability for all carriers engaged in such arrangements. The contracting carrier and the actual carrier are both liable.

In spite of all the improvements delivered by the Montreal Convention, it remains the product of human efforts, and not a heavenly gift. Therefore, there are bound to be some inherent weaknesses. Some opportunities appear to have been missed by the Convention. As noted, one of the most significant missed opportunities appears in article 17. This article contains certain terms which require precise meanings in order to reduce or eliminate the possibility of inconsistent and controversial interpretations across jurisdictions. It is submitted that in order to avoid the possibility of this happening, the Convention should have provided a definition for terms like "passenger", "accident", "bodily injury", "damage" and "in the course of the operations of embarking or disembarking".

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[304] *Ibid.* Art. 29.

The United States Supreme Court's definition of "accident" in *Air France v. Saks*[305] is not applicable in all states parties. Recently, there have been several lawsuits brought against air carriers on behalf of passengers who suffered Deep Vein Thrombosis (DVT) during long haul flights. The courts will have to determine whether or not the incidence of DVT is an accident within the meaning of the Montreal Convention. All this litigation could have been avoided if the Montreal Convention had taken the opportunity to define what constitutes an accident for purposes of recovery of damages. It is on the basis of these observations that the present author holds the opinion that the Montreal Convention represents an unfinished unification of law.

The Montreal Convention should not have adopted fault liability in respect of claims for the delay. In practice, the requirement of proof of fault in order to succeed on a claim for delay has meant that air carriers could easily escape liability for delay since, all too often, it is difficult if not impossible for a passenger to prove the fault of a carrier in such instances. Also, the "all necessary measures" defense is still open to carriers under the new Convention so far as liability for delay is concerned.

[305] *Air France v. Saks*, *supra* note 70 at 405.

Chapter Three: Should the Air Carrier be Liable for Damage Caused by Terrorist Acts?

I. Introduction

This chapter is devoted to a discussion of a peculiar issue relevant to each of the air carrier liability regimes discussed in the first two chapters, namely: air carrier liability for death, injury or damage caused as a result of terrorist acts. The liability implications of terrorist acts will be examined as a practical example under the two liability regimes *i.e.* the Warsaw Convention of 1929 and the Montreal Convention of 1999 in an effort to resolve the following issues:

- Whether a terrorist act is an accident within the meaning of the article 17;
- If it is an accident, should an air carrier be liable for death or bodily injury to passengers resulting from such acts even though they were not the result of its fault of negligence;
- If it is an accident, would the air carrier be able to use any defense(s) to exonerate itself or limit its liability; and,
- In such cases, would it be fair to hold the air carrier liable even though the security task is completely the responsibility of the airport authority or a governmental agency.

II. The Applicable Law

In accordance with the contract of carriage by air, the air carrier is obliged to transport the passenger to the agreed destination safely and within a reasonable time.[306] The air carrier's liability arises if it fails to carry out this duty. In other words, the carrier

[306] Milde, Lecture, *supra* note 34.

is liable if there is a breach of the contract of carriage. If the breach of contract results in death and/or bodily injury of passengers, or destruction, loss or damage to any luggage or cargo, the liability of the air carrier then falls to be determined under the Warsaw System or the Montreal Convention as the case may be. Whereas the basis of liability under the Warsaw Convention is fault liability, it is strict liability both under the Montreal Agreement 1966 and the Montreal Convention 1999 up to a maximum of 100,000 SDR.

The first issue is that, to obtain recovery under article 17 of the Montreal Convention, the claimant has to prove that the damage sustained was caused by an accident. But what does an "accident" mean? What requirements need to be present for an incident to be considered an accident under article 17? As noted in chapter two, the Convention neither provides a definition for the term "accident" nor any clues to assist in distinguishing an accident from other events. This task was left to be determined according to the law of the court seised of the case. Courts have to apply their national rules of interpretation to define the term "accident". The United States courts have held that "[a]n airline's liability under Warsaw Convention for a passenger's injury arises only if the event, which causes the passenger's injury, was abnormal, unexpected and unusual."[307] This formulation has since been referred to as the *Saks test.*

In this chapter, terrorist acts will be examined by subjecting them to the Saks test to find out whether they fall within the ambit of the term accident. Admittedly, terrorist acts are abnormal and unusual. In a sense, however, they are expected. One of the major purposes for implementing security measures consisting of specially trained security personnel and special equipment at airports all around the world is to prevent terrorist and other criminal acts and to provide a safe environment for travelers. This implies that

[307] *Air France v. Saks, supra* note 70 at 405.

terrorist and other criminal acts in aviation are expected. From the above we could conclude that the term "accident", as stated in the text of article 17 and as expanded by the United States Supreme Court, does not extend to terrorist acts.

1. The Warsaw Convention of 1929

Article 20 of the Convention allows an air carrier to avoid liability arising from damage including those caused by terrorist attacks if it can prove that it and its agents took all necessary measures to avoid the damage or that it was impossible for such measures to be taken. Consequently, if the cause of the accident is established as a terrorist attack, the carrier can claim that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures. Apart from this provision, the Warsaw Convention has no other specific provisions on death, bodily injury or damage arising from terrorist attacks.

2. The Montreal Agreement of 1966:

By removing the "all necessary measures" defense, the Montreal Agreement exposed air carriers who were party to it to a regime of strict liability regarding claims arising out of the death, wounding or other bodily injury of a passenger.[308] Thus, the air carrier could not be exonerated from liability arising from death or bodily injury to a passenger caused by a terrorist attack even if it was not the result of its fault or negligence. This situation was inconsistent with the express purpose of the Montreal Agreement 1966, which was "to redistribute the costs involved in air transportation."[309]

[308] The Montreal Agreement, *supra* note 16 Art. 2.
[309] Georgette Miller, *supra* note 29 at 110.

3. The Montreal Convention of 1999

Under the Montreal Convention, 1999, the application of strict liability has been extended to the liability of air carrier not only for the passengers but also for baggage and cargo. Therefore, the air carrier will be unable to exonerate itself from liability for damage caused to passengers, baggage and cargo by reason of a terrorist attack.

III - Jurisprudence

This section discusses some cases involving damage caused by terrorist attacks in an effort to answer two issues, namely: (i) whether a terrorist attack is an accident; and (ii) upon what basis does the court hold air carriers liable for the damages arising from terrorist acts including hijacking. The air carrier has usually been held liable for death or bodily injury to passengers resulting from terrorist acts,[310] on the ground that terrorist acts are considered to be accidents with the meaning of article 17 of the Warsaw Convention.[311]

Day v. TWA[312]

In this case, a terrorist attack took place while passengers where waiting in a terminal at Athens airport to board a TWA flight to New York. An action was brought against the air carrier for recovery of damages for the death of a passenger under the Warsaw Convention. Even though the Court of Appeals held the air carrier liable because the attack occurred during the course of embarking, the court did not discuss whether the terrorist attack was an accident. This decision could thus be considered as an implicit

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[310] Malcolm A. Clarke, *supra* note 2 at 97.

[311] Even though this chapter examines the liability of the air carrier in the case of criminal acts under the Montreal Convention of 1999, there has been no such decision under the same. Therefore, much reliance will be placed on cases decided under the Warsaw Convention of 1929 and the Montreal Agreement of 1966.

[312] *Day v. Trans World Airlines*, *supra* note 81.

admission that the terrorist attack in this case was an accident within the meaning of the Warsaw Convention.

In the view of the court, the air carrier should be liable for terrorist attacks because airlines are in a position to inspect security measures at the airports in which they operate to and they can discuss the deficiencies with the authorities of that airport. In addition, airlines have several alternatives to deal with security matters; they may establish their own security procedures and measures and implement these steps with their own security personnel.[313]

The court added that if passengers cannot recover from the air carriers for damage arising from terrorist acts, it would be almost impossible to recover from the airport authorities or, at best, it would take a long time to get compensation since such litigation would be too costly and claimants would have to prove fault on the part of airport authorities.[314]

Husserl v. Swiss Air[315]

A passenger claimed for bodily and mental injury caused by a hijacking, which took place after the airplane took off from Zurich, Switzerland to New York. Passengers were held on the plane by hijackers. Later, they were moved to a hotel for several days. In denying the defendant's arguments the court decided that "hijacking is an accident within the meaning of the Warsaw Convention."[316] The Court added that "hijackings

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[313] *Ibid.* at 34.
[314] *Ibid.*
[315] *Husserl v. Swiss Air, supra* note 54.
[316] *Ibid.* at 1241.

might not have been in the mind of the drafters of the Warsaw Convention but the Montreal Agreement eliminated any such doubt in respect of this matter."[317]

Furthermore, the court explained the liability regime contained in the Montreal Agreement, by stating: "if damage occurred to passengers as a result of the act of a third party, the air carrier would be liable for such damages. The air carrier was liable to the plaintiff for the recovery of damages for bodily and mental injury."[318]

Burnett v. TWA[319]

Plaintiffs in this case sought recovery for bodily and mental injuries as a result of the hijacking to Amman, Jordan of a TWA flight from New Mexico to New York. The defendant argued that hijacking of an aircraft did not constitute an accident within the meaning of article 17 of the Warsaw Convention. The court granted the plaintiff's motion for mental recovery resulting from the occurrence of bodily injury. The court did not discuss the defendant's argument directly but it seems that the court did not agree with that argument and, instead, considered a terrorist attack as an accident within the meaning of the Warsaw convention.

It would appear from the cases discussed above that courts consider a terrorist attack as an accident within the meaning of article 17 of the Warsaw Convention. However, the courts did not give any further explanation or justification in so deciding. They did not examine whether there had been any negligence in the security measures at the airports where the terrorist attacks had taken place. It is reckoned that this trend was due to a combination of one or more of the following facts: the air carriers in each case were subject to the strict liability rules contained in the Montreal Agreement of 1966 and

[317] *Ibid* at 1247.
[318] *Ibid.*
[319] *Burnett v. TWA*, *supra* note 41.

therefore, they were held liable without fault; secondly, the defendants might not have argued that there was negligence on the part of the airport authorities or governmental agencies in the performance of their security obligations. Moreover, under the Montreal Agreement, air carriers could not exonerate themselves or limit their liability by claiming that the damage was the result of an act of a third party since the liability of the air carrier was strict liability.

On the contrary, French courts have not held the air carriers liable for the damages arising from terrorist attacks or hijacking for two reasons.[320] First, French courts have always excluded damages which are not related to the nature of air carriage; secondly, the French courts applied only the Warsaw Convention as modified by the Hague Protocol.[321] This ensured that the carrier could be exonerated from liability by relying on the "all necessary measures" defense contained in article 20(1).[322]

IV. The views of authors

An author drew a comparison between the liability of the air carriers and the airport for damages arising out of terrorist attacks on one hand and the liability of owners of commercial buildings, for example a hotel, for a terrorist attacks. He indicates that if the terrorist attack occurs at an airport or on board an aircraft, strict liability for recovery applies against the air carrier for its failure to safeguard international passengers, whereas if the terrorist attack took place in a hotel or movie theater, proof of fault of the owner will be required to hold him liable for damages. The justification for the difference between these two categories is based on the requirements of security, which are less

[320] Georgette Miller, *supra* note 29 at 111.
[321] *Ibid;* See *Haddad c. Air France* 1979 RFDA 327; See also *Ayache c. Air France* 1984 RFDA 450.
[322] Georgette Miller, *ibid.*

stringent for a commercial building than those enforced at the airports or on board aircraft.[323] Thus, the proof of failure to carry out security requirements is not required for a claim for death or bodily injury by a terrorist attack in a commercial building.[324]

On the other hand, there is a view that denies the primary responsibility of air carriers for terrorist attacks.[325] This view is based on that the case of hijacking is beyond the scope of the liability regime under the Warsaw Convention, [326] which denies liability without fault. This intention would surely deny recovery of damages for victims of terrorist attacks. It inquires whether responsibility should be imposed solely upon the air carrier for the recovery of damages for a passenger caused by a terrorist attack in spite the role played by other participants in the operations of civil aviation such as the authorities in charge of security and air traffic control. Instead, the responsibility should be allocated among them. If the accident occurred as a result of security tasks, it is suggested that the governmental agency or the airport authority as the case may be should be held liable.[327]

Admittedly, the difficulty with this suggestion is that a state may not be subject to national courts to force that state to recover for victims of another country. Moreover, to sue airport authorities in other country is virtually impossible. Thus, it has been suggested that ICAO should prepare a convention to regulate airports operators' liability for terrorist attacks, whereby states agree to establish an international dispute settlement mechanism by arbitration or decision.[328] Air carriers could cover their liability by taking out insurance. However, that does not enhance the safety of international air

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[323] Carroll E. Dubuc, " Potential Civil Liability Resulting from Terrorist Acts in the International Travel Industry" (1998) XXIII No.2, Air & Space L. 58 at 60.
[324] *Ibid.*
[325] W. Muller, supra note 37 Art. 20 at 7.
[326] *Ibid.*
[327] *Ibid.* Art. 17. at 8.
[328] T.L. Masson- Zwaan & P.M. J. Mendes de Leon (eds.), *Air and Space Law: De Lege Ferenda* , (the Netherlands, Kluwer Academic, 1992) at 88.

transportation. As such, this author agrees with the second view, which will assist in establishing a fair situation between the participants in civil aviation and over and above all, will enhance security at airports.

V. Conclusion

The main purpose of most agreements is to provide a fair protection between its parties. The Warsaw convention was concluded to provide protection for air carriers while the Montreal convention was concluded to provide protection for consumers. In the author's opinion, justice could not be achieved by offering unbalanced protection either for consumers or air carriers under various justifications. The scales were tipped as the Montreal Convention was concluded to move from protection of air carriers to protection of consumers on the grounds that a consumer is the weaker party and as such deserves complete protection from air carriers. In fact, air carriers still need protection not on account of consumers but due the need to maintain a fair balance in both parties' rights and obligations. It should not be forgotten that there are thousands of people who will definitely suffer if they lose their jobs as a result of an air carrier's bankruptcy. These people also deserve protection. Therefore, Air carriers should not be hold liable for damages caused by terrorist acts or in the course of hijacking if the security measures are under the control of the airport authorities. The carriers would exempt from liability by proving that they took all necessary measures to prevent the terrorist acts or hijacking, or it was impossible for them to take such measures. However, Air Carriers should not be exempted from liability for terrorist acts, if such acts took place because something failed at some point in the security requirements which were under the control of the carriers.

Chapter Four: A Case Study of the Benefits accruing to the Kingdom of Saudi Arabia and its National Carrier, Saudi Arabian Airlines upon Ratification of the Montreal Convention of 1999

I. Introduction

Even though the Montreal Convention has some shortcomings, it also has several advantages for states that become party to it. This chapter provides a practical example of these merits by surveying the benefits that have accrued to the Kingdom of Saudi Arabia and its flag carrier, Saudi Arabian Airlines upon ratification of the Convention. The Kingdom of Saudi Arabia ratified the Montreal Convention of 1999 on November15, 2003.

II. The benefits to the Kingdom of Saudi Arabia

1- To regulate the relationship between air carriers and consumers

Since Saudi Arabian civil aviation law did not regulate the relationship between the air carrier and the consumers, there were no rules on the subject in existence prior to the advent of the Montreal Convention. Having ratified the Convention, the provisions thereof will be the applicable law in all cases before the courts concerning air transportation whether domestic or international. This is because States parties to the Convention are at liberty to apply the Convention to the situations beyond the scope of article 1.[329]

[329] Malcolm A. Clarke, *supra* note 2 at 7.

2- To narrow the conflict existing between the liability regime and the rules of the Islamic Law

The Kingdom of Saudi Arabia was established on September 23, 1932 as an Islamic state with the "Sharia"- Islamic Law - rooted in the Holy Quran and the teachings of the prophet Mohammed as its Constitution.[330] Accordingly, article 7 of the Basic Law of Government provides that: "Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunna of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State." [331] Also article 8 provides that "Governance in the Kingdom of Saudi Arabia is based on justice, shura (consultation) and equality according to Islamic Sharia."[332]

The limits of liability established in the Montreal Convention for death or bodily injury are higher than those prescribed under Islamic Law. The application of the provisions of the Montreal Convention by Saudi courts does not create any difficulty because there are no conflicts between the Montreal Convention and Islamic Laws in this respect. According to Islamic Law the recovery of damages consists of two parts. The first part is stated in the Sharia and it includes recovery for death or bodily injury. The second part is not stated in the Sharia, but is left to the discretion of the judge to decide either by himself or in accordance with the opinion of experts. This second part for example includes the authority to decide the value of damages that have not been stated

[330] Ministry of Information-The Kingdom of Saudi Arabia, *A Country and a Citizen for a Happy, Decent Life,* (Riyadh: Saudi Desert House Agency, 1998) at 28.
[331] Saudi Arabia, the Basic Law of Governance, No: A/90, Dated 27th Sha'ban 1412 H, Art.7.
[332] *Ibid.* Art.8.

in the Sharia, or the value of the financial damages caused to personal property such as goods or baggage.[333]

In case of death of bodily injury the following prescribed formulae apply: Compensation for death is pegged at 120,000 SR or the equivalent of 21,551 SDR.[334] Compensation for bodily injury starts from: full compensation for the loss of any part of the body that is not similar to any other part of the body such as the nose or the tongue; half compensation for a part of the body whose function(s) could be performed by another part of the human body, such as eyesight, hands, or legs; 1/10 of the full recovery for the loss of fingers or toes; and 0.5/10 for the recovery for loss of teeth and other similar parts of the body.[335]

However, the regime of limited liability regarding baggage and cargo does not conform to the rules of Islamic Law. The rules of Islamic Law do not allow the carrier to avail himself of limited liability as long as the damage was caused by his negligence while the baggage or goods were under his control even though the compensation for damage had been agreed upon and stated in the contract of carriage. In *Alkadamat Alhadeathah Inc. v. Saudi Arabian Airlines*,[336] a consignee sued Saudi Arabian Airlines seeking compensation for goods allegedly damaged. Even though the flight was a domestic one, the defendant sought to limit its liability under article 18 of the Warsaw Convention as amended by the Hague protocol of 1955. The defendant built its argument on the legal theory that the Convention had become part of the law of the Kingdom and

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[333] Wahba Al Zuhely, *The Rules of the Civil and Criminal Liability in the Islamic Sharia* (Dameskus: Dar Alfeker, 1982) at 95.

[334] One SDRs equals 5.568 SR according to the official website of International Monetary Fund, <http://www.imf.org/external/np/exr/facts/sdr.HTM> (date accessed: 21 January 2005).

[335] Mohammed Fozey Feazallah, *The Theory of Recovery in Islamic Jurisprudence* (Kuwait: Dar Alterath, 1983) at 146.

[336] *Alkadamat Alhadeathah Inc. v. Saudi Arabian Airlines*, Decision No. 20/D/A/9, 1414, Case No. 973/2/F

would be applicable on domestic flights since the Government of Saudi Arabia had ratified it, and also there was no specific domestic law to regulate the liability of the air carrier in Saudi Arabia. The Bureau of Grievance dismissed the motion of the airline and held it liable for a complete compensation for the damage. The Bureau based its decision on Sharia Law, which holds the carrier liable for damage if caused negligently or intentionally.

The Bureau did not mention why it ignored the defendant's request to apply the liability limits contained in the Warsaw Convention. In this case, the cause of damage did not consist of any one of the situations that precluded the carrier from availing itself of the liability limits prescribed by the Convention. In fact, the cause of action was the negligence of the carrier. In accordance with Sharia Law, the Bureau did not consider any of the defenses available to an air carrier under the Warsaw Convention.

Also in *Alghtany v. Saudi Arabian Airlines*,[337] a consignee brought an action against the carrier to recover the full value of a shipment of goods alleging that the damage was caused while the said goods were in charge of the defendant. The Bureau refused to limit the carrier's liability and held it liable for the full value of the damaged goods. The Bureau based its decision on the fact that the carrier may avail itself of the agreed limits of compensation provided that the damage that had occurred was beyond the control of the carrier. But where the carrier' negligence was the cause of the damage the carrier will not be allowed to avail itself of the liability limit as stated in the Convention. The Bureau added that once negligence was proved, the defendant was liable for the full value of the damaged goods.

[337] *Ali Gaber Alghtany v. Saudi Arabian Airlines*, Decision No.3/D/F/39 1993, Case No. 34/4/F 1413.

3- To unify the Warsaw Convention and its Numerous Amendments under one Instrument.

The most important objective that the Montreal Convention has achieved is the unification of all the private international air law instruments relating to international carriage by air under one treaty. Thus, instead of being subject to many different regimes (Warsaw System), the rules regarding the air carrier – customer relationship are unified under one international Convention. In future if all states ratify or accede to the Montreal Convention, this would ensure that there is only one regime applicable to all passengers on flights originating from Saudi Arabia, irrespective of their destinations.

4- To eliminate the fear of unlimited liability

There are many international airlines around the world that are flying without limited liability and they still fly. The Montreal Convention may remove the fear of unlimited liability, especially considering that Saudi Arabia's flag carrier has signed the IATA Inter-carrier Agreement but not the Agreement on Measures to Implement the IATA Inter-carrier Agreement (MIA).

The liability regime prescribed by the Montreal Convention of 1999 is actually not against the interest of the airlines. In fact, the liability under this convention provides an equal balance between the interests of the both parties to the air carriage contract in the 21st century. This liability regime is based on the real damage, and the claimant must prove the damage. It also provides fair defense for the air carrier to exonerate itself wholly or partially from its liability.

It should also be kept in mind that the second tier of liability does not necessarily translate into excessive awards of damages against the carrier in situations where the damages claimed exceed 100,000 SDR. The claimant has to prove that the amounts claimed were indeed damage sustained and he cannot base his claim on punitive, exemplary and other non-compensatory damages. In spite of the foregoing, it should be expected that some jurisdictions around the world award non-compensatory damages under heads such as pain and suffering, loss of enjoyment of life, loss of parental guidance and loss of companionship.

5- To enhance protection of the interest of Saudi citizens

The Convention provides passengers equitable compensation in the event of death or bodily injury to passengers, damage, destruction or delay to baggage and cargo occurring during international transportation by air. Thus, whenever Saudi passengers use international air services, their rights to reasonable compensation will be assured. For damages up to 100,000 SDR, the carrier is strictly liable and it cannot exclude or limit its liability except under article 20. Beyond that sum, the liability is based on fault with a reversed of burden of proof. The carrier is not liable above the sum of 100,000 SDR if it proves that the damage was not due to its negligence or other wrongful act or omission or that of its servants or agents.

Also, article 22(2) raises the limit of the liability for loss of, damage to or destruction of baggage. The limit is 1,000 SDR for each passenger, unless a special declaration of value has been made and the passenger has paid a supplementary sum. The total weight of such package or packages shall be taken into consideration in determining the limit of liability.

In respect of delay, the convention adopts a special limit (4,150 SDR) per passenger. This is a maximum limit subject to proof by the claimant of the actual loss suffered.

Most significant is the introduction of the concept of advance payments. Thus, in the event of death or injury of a Saudi passenger, the carrier is obliged to make advance payments to natural persons entitled to claim compensation in order to meet the immediate economic needs of such persons.

Also, Saudi citizens will be able to bring an action in the case of injury or death of a passenger before the courts in the territory of a state party to the Convention in which, at the time of the accident, the passenger had his principal and permanent residence, and to or from which the carrier operates services. This is known as the fifth jurisdiction.

One other significant benefit lies in the fact that the Montreal Convention requires the air carrier to submit proof of adequate insurance guaranteeing the availability of financial resources in the event of an accident. This will assure the Government that the air carrier is financially fit and able to bear the required compensation in the event of an accident occurring in the territory of the Kingdom

In addition, the Montreal convention adopts a modern and stable yardstick of value. Compensation is indexed in Special Drawing Rights (SDR) instead of gold due to the latter's unstable value. Moreover, to avoid the incidence of frequent amendments, the new Convention provides a built in system for periodic review of the monetary limits of liability in its article 24. This will provide flexibility to review the

limits of liability every five years in order to keep them abreast with the rate of inflation.

6- To enhance the orderly development of international air transport operations

Saudi Arabia, as one of the states that pay attention to the orderly development and improvement of civil aviation, considers the Montreal Convention to be most appropriate. The Montreal Convention has modernized and consolidated the Warsaw Convention and is expected to achieve smooth flow of passengers, baggage, and cargo in accordance with the principles and objectives of the Convention on International Civil Aviation, signed at Chicago on 7th of December 1944.

7- Wider scope and more flexibility:

The Montreal Convention extends its applicability to cover carriage performed by states or by legally constituted public bodies, but states reserve the right to declare that the Convention shall not apply to such carriage. The government of Saudi Arabia therefore has the discretion to make reservations in respect of those provisions that will not be of benefit to Saudi carriers.

8- Language of the Convention

The authentic version of the Convention was adopted in five international languages: Arabic, English, French, Spanish and Chinese. Thus, judges and lawyers in Saudi Arabia do not have to translate the Convention into Arabic in order to read, understand and apply its provisions. This is a great advancement.

III. The Benefits to Saudi Arabian Airlines

1- The scope of applicability

Even though the Convention does not apply to postal items, the carrier will be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carrier and the postal administration.[338] In situations where the carriage is performed by a person other than the contracting carrier, the Montreal Convention extends the contract of air carriage concluded between the passenger and the contractual carrier to the actual carrier.[339]

2- Reduced and simplified requirements of documentation and enhanced electronic ticketing

Saudi Arabian Airlines has established a Committee consisting of members from concerned departments to carry out the requirements of the Montreal Convention. The task that has been assigned to this committee is to apply the new requirements in the area of documentation of travel.

The committee has been given a mandate to study all the elements that need to be modernized in order to bring the airline's ticketing system in line with the requirements of the new Convention. The convention consolidates the efforts at modernization and simplification of documents both for passengers and cargo, initiated in the Guatemala City Protocol of 1971 (with respect to passengers) and the Montreal Protocol of 1975 (with respect to cargo). The Convention, for example, requires one single document for passengers and their baggage, and it further requires

[338] The Montreal Convention, *supra* note 18 Art. 2(2).
[339] *Ibid.* Art. 1 (4) & Arts. 39 to 48.

an individual or collective document of carriage to be delivered. Articles 3 and 4 affirm the use of so-called electronic ticketing for passengers and cargo. It reduces the extensive information that was previously required for air waybills under the Warsaw System.[340]

3- Removal of penalties for non-compliance with the requirement written notice.

The convention does not stipulate any penalty for non-compliance with the requirement to issue written notice to passengers. It confirms that non-compliance with the provisions regarding delivery of documents of carriage in articles 1 and 2 does not affect the existence or the validity of the contract of carriage and also does not exclude the applicability of the limits of liability. Thus, there is no longer any link between the issuance of tickets and the system of liability and therefore failure to issue documents of carriage may no longer be used by passengers as a basis for breaking the liability limits of the Montreal Convention.

4-Liability regime

The limits of liability have been raised to the levels proposed in the private agreements on air carrier liability, such as the Japanese Initiative and IATA Inter-carrier Agreement. This convention gives the air carrier the right to exonerate itself wholly or partially from liability even in the first tier of liability under 100,000 SDR if he can successfully prove that the damage was caused or contributed to by the negligence or other wrongful act or omission of the claimant.

[340] *Ibid.* Chapter II arts. 5-16.

The other significant element of exoneration is that the carrier may not be obliged to pay compensation beyond 100,000 SDR if it proves that the damage was solely due to the negligence or wrongful act or omission of a third party. However, the word "solely" narrows the defense of the carrier – the mere contributory negligence of a third party does not amount to a defense.

Moreover, punitive damages have no place under the unified system because article 17 talks about "damages caused" meaning thereby that its scope is only limited to compensation for real damage sustained. Article 29 of the Montreal convention 1999 puts the matter beyond doubt by prohibiting the recovery of punitive, exemplary or any other non-compensatory damages. Saudi Airlines may thus benefit from reduced insurance premiums as a result of the certainty in the maximum exigible compensation in the event of an accident.

5- Inducement of settlement of claims

As it is always desirable to settle claims out of court and reach a compromise between the parties, the Montreal Convention contains a settlement inducement clause in article 22(6). This will enable the claimant to avoid court costs and the other costs of litigation. The Convention also introduces the possibility of arbitration for disputes in cargo matters. It would be more useful if the proposal presented by the delegate of Saudi Arabia to ICAO to the effect that passenger claims be made to subject the settlement inducement clause was adopted for inclusion in the Montreal Convention.[341] And in cases where domestic law does not permit a settlement option,

[341] Milde, Lecture, *supra* note 34.

the Convention could provide that nothing therein shall preclude the application of national law.[342]

[342] *Ibid.*

Chapter Five: Conclusion

This study has examined the liability of the air carrier under the Warsaw Convention of 1929 and the Montreal Convention of 1999. The main purpose of studying the air carrier liability under these two regimes is to find out the basis of the liability under each Convention; to examine the justifications of each regime; to measure the importance of changes introduced by the new Convention; to determine whether the changes were sufficient to provide a fair balance between the interest of the air carrier and that of consumers; to examine the shortfalls of the new liability regime; and to consider whether there have been any missed opportunities.

The concept of liability under the Warsaw Convention was fault-based with a reversed burden of proof. This unique regime was embraced due to the fact that the air transportation industry was in its infancy and needed to be nurtured and supported. Thus, the liability of the air carrier to passengers in respect of death, wounding or bodily injury and also in respect of damage, loss or destruction of baggage or cargo was limited by the Warsaw Convention. Furthermore, the Convention provided a number of defenses to the Carrier, which it could rely on to wholly or partially exonerate itself from liability.

The regime did not require the passenger to establish a carrier's negligence. It was realized that such a burden on the part of the passenger would be extremely difficult to discharge since the entire operation of the aircraft was under the control of the carrier.[343] The Warsaw Convention therefore, presumed the fault of the air carrier. To exonerate itself from the liability, the carrier was required to prove that the accident or occurrence was not the result of its fault. To some extent, the Warsaw convention established a fair

[343] Milde, The Warsaw System, *supra* note 134, at 167.

situation for the providers and the users of air transportation services at the time when it was concluded in 1929. Clearly, the Warsaw system is considered to be of the greatest value to the civil aviation industry.

Even though, the Warsaw Convention did play an important role in the field of private international air law, the limits of the air carrier liability were later found to be inadequate and no longer acceptable. Advancements in technology rendered the rationale underlying the Warsaw Convention no longer valid. As a result, the Convention has over the years been amended several times, both formally (through Conventions and Protocols) and informally (through private contractual agreements).

The amendments to the Warsaw Convention were effected mainly because the liability limits prescribed therein had become unrealistic as time went on. However, these amendments produced a multiplicity of legal instruments without uniformity of membership. Thus, the proper development of private international air law could not proceed. Further, since some of these amendments were private agreements and not international treaties, the possibility of a high degree of non-compliance became a matter of concern. Thus, it was necessary to reunify all these instruments under one legal regime. The conclusion of the Montreal Convention 1999 was the only rational way out.

During negotiations preceding the conclusion of the Montreal Convention, the delegates did not have the option of adopting a regime different from what had been achieved through amendment of the Warsaw convention especially the Guatemala City protocol, the IATA Inter-carrier Agreement, the Japanese Initiative, and the EC Regulation No.2027 of 1997. Thus, the liability regime adopted by the Montreal Convention did not constitute a new invention. In fact, it represents seventy years

experiences and lessons learned under the Warsaw System. The concept of strict liability, for instance, was adopted initially in the Montreal Agreement of 1966 and then in the Guatemala City Protocol of 1971. The two-tiered regime of unlimited liability for death and injury to passengers was first adopted in the Japanese Initiative and later in the IATA Inter-carrier Agreement.

In addition, there were several different views representing the developed and developing states. Therefore, the solution was to achieve a fair compromise between the different interests.

Even though the Montreal Convention implements a shift in focus from the protection of the carrier to the protection of consumers, it still retains some sort of protection for the carrier. The liability regime provides protection for the carrier by limiting its liability in the first tier to 100,000 SDR. Also, the consumer is able to claim only for compensatory damages, and the Convention obviously does not allow any claim for punitive damages or non-compensatory damages. However, the new liability regime has a negative impact on the air carrier in the form of an increase in the insurance premiums.

The most significant impact of the Montreal convention is that it is an international treaty concluded under the auspices of ICAO that changes the rules of the previous Convention and Agreements. Since the Guatemala City protocol did not enter into force and the private agreements could not change the international law created by a convention, any change to the Warsaw Convention could only be effected via an act of all states under the supervision of ICAO.

Furthermore, the Montreal Convention established new rules that none of the previous protocols or agreements had adopted such as the fifth jurisdiction, advance payment, compulsory insurance which ensures quick and adequate recovery for passengers and protects air carriers from the risk of huge compensation. These new provisions are in the interest of the passenger and they reflect the new trend of providing fair protection to consumers. There are some other new provisions that distinguish the Convention from other previous instruments. These include the arbitration provision, the settlement inducement provision, and modernized and reduced documentary requirements.

Additionally, the Convention adopts a process to review the limits of liability periodically. This element prevents frequent amendments to the convention in order to increase the limits of liability.

However, the Montreal Convention does cover all the loopholes identified in the Warsaw Convention. Notably, the Montreal Convention simply repeated article 17 of the Warsaw Convention and failed to provide definitions for controversial terms such as "accident", "bodily injury" and "in the operations of embarking and disembarking" It will be recalled that the lack of definitions for these terms under the Warsaw Convention provided fertile grounds for litigation over the years. The Montreal Convention thus missed a great opportunity to advance the unification of private international air law in these areas.

To determine whether or not the air carrier should be liable for damages due to a terrorist attack, chapter three examined the basis of carrier liability under the two regimes of fault liability and strict liability. While the air carrier might exonerate itself or limit its

liability for damage caused by a terrorist attack in accordance with the rules of fault liability under the original Warsaw Convention, the carrier is unable to do so under the strict liability regime of the Montreal Convention. However, the issue whether or not a terrorist attack is an accident still needs more study. Since a terrorist attack is to be expected at all times, the definition of the accident according to the U.S. Supreme Court cannot be applied.

Furthermore, the fact that the air carrier is also a victim of a terrorist attack, should not be ignored and instead the air carrier should be protected just as passengers. It is not fair to hold the air carrier liable for damages due to events that are beyond his control. Since it is the duty of airport and/or governmental authorities to provide security at airports so as to prevent terrorist attacks, they, rather than air carriers, should be saddled with liability when damage results from terrorist attacks. The appropriate solution could be the conclusion of a convention or a protocol to elaborate the liability of all parties engaged in the operations of international transportation of passengers by air arising from a terrorist attack.

Since air carriers are not solely responsible for the incidence of terrorist attacks, the relevant entities should be made to bear their fair share of liability for such acts.

Finally, the fourth chapter demonstrated some of the great benefits of the Montreal Convention to the Kingdom of Saudi Arabia as a member state and to its national air carrier, Saudi Arabian Airlines. One of the most important benefits of ratification of the Montreal Convention is that the new liability regime and the new limits of liability conflict less with the Islamic Law applied in Saudi Arabia.

Appendix 1

CONTRACTING PARTIES TO THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 1929 AND THE PROTOCOL MODIFYING THE SAID CONVENTION SIGNED AT THE HAGUE ON 28 SEPTEMBER 1955[344]

Convention	**Entry into force**	The Convention entered into force on 13 February 1933.
	Status:	151 Parties.
Protocol	**Entry into force**	The Protocol entered into force on 1 August 1963.
	Status:	136 Parties.
This list, including the footnotes and reservations, reproduces the information received from the depositary, the Government of the Republic of Poland.		

State	WARSAW CONVENTION			THE HAGUE PROTOCOL		
	Signature	**Ratification, Adherence or Succession (s)**	**Date of entry into force**	**Signature**	**Ratification, Adherence or Succession (s)**	**Date of entry into force**
Afghanistan		20/2/69	21/5/69		20/2/69	21/5/69
Algeria		2/6/64	31/8/64		2/6/64	31/8/64
Angola		10/3/98	8/6/98		10/3/98	8/6/98
Argentina		21/3/52	19/6/52		12/6/69	10/9/69
Armenia		25/11/98	23/2/99			
Australia(1)	12/10/29	1/8/35	30/10/35	12/7/56	23/6/59	1/8/63
Austria	12/10/29	28/9/61	27/12/61		26/3/71	24/6/71
Azerbaijan		24/1/00	23/4/00		24/1/00	23/4/00
Bahamas(2)		23/5/75(s)	10/7/73		23/5/75(s)	10/7/73
Bahrain		12/3/98	10/6/98		12/3/98	10/6/98
Bangladesh(3)		1/3/79(s)	26/3/71		1/3/79(s)	26/3/71
Barbados(4)		29/1/70(s)	30/11/66			
Belarus		26/9/59	25/12/59	9/4/60	17/l/61	1/8/63
Belgium	12/10/29	13/7/36	11/10/36	28/9/55	27/8/63	25/11/63
Benin(5)		27/1/62(s)	1/8/60		27/1/62(s)	1/8/63
Bolivia		29/12/98	29/3/99			
Bosnia and		3/3/95(s)	6/3/92		3/3/95(s)	6/3/92

[344] Contracting parties to the Warsaw Convention 1929, ICAO website, online: <http://www.icao.int/icao/en/leb/wc-hp.htm> (date accessed: 15th January, 2005).

Herzegovina(6)						
Botswana(7)		21/3/77(s)	30/9/66			
Brazil	12/10/29	2/5/31	13/2/33	28/9/55	16/6/64	14/9/64
Brunei Darussalam(8)		28/2/84(s)	1/1/84			
Bulgaria		25/6/49	23/9/49		14/12/63	13/3/64
Burkina Faso		9/12/61	9/3/62			
Cambodia		12/12/96	12/3/97		12/12/96	12/3/97
Cameroon(9)		2/9/61(s)	1/1/60		2/9/61(s)	1/8/63
Canada		10/6/47r	8/9/47	16/8/56	18/4/64	17/7/64
Cape Verde		7/2/02	8/5/02		7/2/02	8/5/02
Chile		2/3/79r	31/5/79		2/3/79	31/5/79
China(10)		20/7/58	18/10/58		20/8/75	18/11/75
Colombia		15/8/66	13/11/66		15/8/66	13/11/66
Comoros		11/6/91	9/9/91			
Congo(11)		19/1/62r(s)	15/8/60		19/1/62r(s)	1/8/63
Costa Rica		10/5/84	8/8/84		10/5/84	8/8/84
Côte d'Ivoire(12)		22/2/62(s)	7/8/60		22/2/62(s)	1/8/63
Croatia(13)		14/7/93(s)	8/10/91		14/7/93(s)	8/10/91
Cuba		21/7/64r	19/10/64		30/8/65	28/11/65
Cyprus(14)		8/5/63(s)	16/8/60		23/7/70	21/10/70
Czech Republic(15)		29/11/94(s)	1/1/93		29/11/94(s)	1/1/93
Democratic People's Republic of Korea		1/3/61	30/5/61		4/11/80	2/2/81
Democratic Republic of the Congo(16)		1/12/62(s)	30/6/60			
Denmark	12/10/29	3/7/37	1/10/37	16/3/57	3/5/63	1/8/63
Dominican Republic		25/2/72	25/5/72		25/2/72	25/5/72
Ecuador		1/12/69	1/3/70		1/12/69	1/3/70
Egypt(17)		6/9/55	5/12/55	28/9/55	26/4/56	1/8/63
El Salvador				28/9/55	17/9/56	1/8/63
Equatorial Guinea		20/12/88	19/3/89			
Estonia		16/3/98	14/6/98		16/3/98	14/6/98
Ethiopia		14/8/50r	12/11/50			
Fiji(18)		15/3/72(s)	10/10/70		15/3/72(s)	10/10/70
Finland		3/7/37	1/10/37		25/5/77	23/8/77
France	12/10/29	15/11/32	13/2/33	28/9/55	19/5/59	1/8/63
Gabon		15/2/69	16/5/69		15/2/69	16/5/69
Germany(19)	12/10/29	30/9/33	29/12/33	28/9/55	27/10/60	1/8/63
Ghana		11/8/97	9/11/97		11/8/97	9/11/97
Greece	12/10/29	11/1/38	11/4/38	28/9/55	23/6/65	21/9/65

Grenada					15/8/85	13/11/85
Guatemala(20)		3/2/97	4/5/97		28/7/71	26/10/71
Guinea		11/9/61	10/12/61		9/10/90	7/1/91
Honduras		27/6/94	25/9/94			
Hungary		29/5/36	27/8/36	28/9/55	4/10/57	1/8/63
Iceland		21/8/48	19/11/48	3/5/63	3/5/63	1/8/63
India(21)		9/2/70(s)	15/8/47		14/2/73	15/5/73
Indonesia(22)		21/2/52(s)	17/8/45			
Iran (Islamic Republic of)		8/7/75	6/10/75		8/7/75	6/10/75
Iraq(23)		28/6/72	26/9/72		28/6/72	26/9/72
Ireland		20/9/35	19/12/35	28/9/55	12/10/59	1/8/63
Israel		8/10/49	6/1/50	28/9/55	5/8/64	3/11/64
Italy	12/10/29	14/2/33	15/5/33	28/9/55	4/5/63	2/8/63
Japan	12/10/29	20/5/53	18/8/53	2/5/56	10/8/67	8/11/67
Jordan(24)		8/12/69(s)	25/5/46		15/11/73	13/2/74
Kazakhstan					30/8/02	28/11/02
Kenya(25)		7/10/64(s)	12/12/63		6/7/99	4/10/99
Kuwait		11/8/75	9/11/75		11/8/75	9/11/75
Kyrgyzstan		9/2/00	9/5/00		9/2/00	9/5/00
Lao People's Democratic Republic(26)		9/5/56(s)	19/7/49	28/9/55	9/5/56	1/8/63
Latvia	12/10/29	15/11/32	13/2/33		2/10/98	31/12/98
Lebanon(27)		20/4/62(s)	22/11/43		10/5/78	8/8/78
Lesotho(28)		12/5/75(s)	4/10/66		17/10/75	15/1/76
Liberia		2/5/42	31/7/42			
Libyan Arab Jamahiriya		16/5/69	14/8/69		16/5/69	14/8/69
Liechtenstein		9/5/34	7/8/34	28/9/55	3/1/66	3/4/66
Lithuania					21/11/96	19/2/97
Luxembourg	12/10/29	7/10/49	5/1/50	28/9/55	13/2/57	1/8/63
Madagascar(29)		27/8/62(s)	26/6/60		27/8/62(s)	1/8/63
Malawi		27/10/77	25/1/78		9/6/71	7/9/71
Malaysia(30)		16/12/70(s)	16/9/63		20/9/74r	19/12/74
Maldives		13/10/95	11/1/96		13/10/95	11/1/96
Mali		26/1/61	26/4/61	16/8/62	30/12/63	29/3/64
Malta(31)		19/2/86(s)	21/9/64			
Mauritania		6/8/62	4/11/62			
Mauritius		17/10/89	15/1/90		17/10/89	15/1/90
Mexico		14/2/33	15/5/33	28/9/55	24/5/57	1/8/63
Monaco					9/4/79	8/7/79

Mongolia		30/4/62	29/7/62			
Morocco		5/1/58	5/4/58	31/5/63	17/11/75	15/2/76
Myanmar(32)		2/1/52(s)	4/1/48			
Nauru(33)		16/11/70(s)	31/1/68		16/11/70(s)	31/1/68
Nepal		12/2/66	13/5/66		12/2/66	13/5/66
Netherlands(34)	12/10/29	1/7/33	29/9/33	28/9/55	21/9/60	1/8/63
New Zealand(35)		6/4/37	5/7/37	19/3/58	16/3/67	14/6/67
Niger(36)		8/3/62(s)	3/8/60		8/3/62(s)	1/8/63
Nigeria(37)		15/10/63(s)	1/10/60		1/7/69	29/9/69
Norway	12/10/29	3/7/37	1/10/37		3/5/63	1/8/63
Oman		6/8/76	4/11/76		4/8/87	2/11/87
Pakistan(38)		30/12/69(s)	14/8/47	8/8/60	16/1/61	1/8/63
Panama		12/11/96	10/2/97		12/11/96	10/2/97
Papua New Guinea(39)		12/12/75(s)	16/9/75		12/12/75	16/9/75
Paraguay		28/8/69	26/11/69		28/8/69	26/11/69
Peru		5/7/88	3/10/88		5/7/88	3/10/88
Philippines		9/11/50r	7/2/51	28/9/55	30/11/66	28/2/67
Poland	12/10/29	15/11/32	13/2/33	28/9/55	23/4/56	1/8/63
Portugal(40)		20/3/47	18/6/47	28/9/55	16/9/63	15/12/63
Qatar		22/12/86	22/3/87		22/12/86	22/3/87
Republic of Korea					13/7/67	11/10/67
Republic of Moldova		20/3/97	19/6/97		20/3/97	19/6/97
Romania	12/10/29	8/7/31	13/2/33	28/9/55	3/12/58	1/8/63
Russian Federation(41)	12/10/29	20/8/34	18/11/34	28/9/55	25/3/57	1/8/63
Rwanda(42)		16/12/64(s)	1/7/62		27/12/90	27/3/91
Saint Vincent and the Grenadines		3/12/01(s)	27/10/79		3/12/01	3/3/02
Samoa(43)		20/1/64(s)	1/1/62		16/10/72	14/1/73
Saudi Arabia		27/1/69	27/4/69		27/1/69	27/4/69
Senegal		19/6/64	17/9/64		19/6/64	17/9/64
Serbia and Montenegro(44)		18/7/01(s)	27/4/92		18/7/01(s)	27/4/92
Seychelles		24/6/80	22/9/80		24/6/80	22/9/80
Sierra Leone(45)		2/4/68(s)	27/4/61			
Singapore		4/9/71	3/12/71		6/11/67	4/2/68
Slovakia(46)		24/3/95(s)	1/1/93		24/3/95(s)	1/1/93
Slovenia(47)		7/8/98(s)	25/6/91		7/8/98(s)	25/6/91
Solomon Islands(48)		9/9/81(s)	7/7/78		9/9/81(s)	7/7/78
South Africa	12/10/29	22/12/54	22/3/55		18/9/67	17/12/67
Spain	12/10/29	31/3/30	13/2/33		6/12/65	6/3/66

Yemen	6/5/82	4/8/82	6/5/82	4/8/82
Zambia(55)	25/3/70(s)	24/10/64	25/3/70	23/6/70
Zimbabwe(56)	27/10/80(s)	18/4/80	27/10/80	25/1/81

Sri Lanka(49)		2/5/51(s)	4/2/48		21/2/97	22/5/97
Sudan		11/2/75	12/5/75		11/2/75	12/5/75
Suriname		30/6/03	28/9/03		19/10/04	17/1/05
Swaziland					20/7/71	18/10/71
Sweden		3/7/37	1/10/37	28/9/55	3/5/63	1/8/63
Switzerland	12/10/29	9/5/34	7/8/34	28/9/55	19/10/62	1/8/63
Syrian Arab Republic(50)		3/6/64(s)	2/3/59		3/6/64(s)	1/8/63
The former Yugoslav Republic of Macedonia(51)		1/9/94(s)	17/9/91		1/9/94(s)	17/9/91
Togo		2/7/80	30/9/80		2/7/80	30/9/80
Tonga(52)		21/2/77(s)	4/6/70		21/2/77	22/5/77
Trinidad and Tobago(53)		10/5/83(s)	31/8/62		10/5/83	8/8/83
Tunisia		15/11/63	13/2/64		15/11/63	13/2/64
Turkey		25/3/78	23/6/78		25/3/78	23/6/78
Turkmenistan		21/12/94	20/3/95			
Uganda		24/7/63	22/10/63			
Ukraine		14/8/59	12/11/59	15/1/60	23/6/60	1/8/63
United Arab Emirates		4/4/86	3/7/86		18/10/93	16/1/94
United Kingdom (54)	12/10/29	14/2/33	15/5/33	23/3/56	3/3/67	1/6/67
United Kingdom for the following territories:		3/12/34	3/3/35		3/3/67	1/6/67
- Bermuda						
- British Antarctic Territory						
- Cayman, Turks, and Caicos Islands						
- Akrotiri and Dhekelia						
- Falkland Islands and Dependencies						
- Hong Kong						
- Montserrat						
- St. Helena and Ascension						
United Republic of Tanzania		7/4/65	6/7/65			
United States		31/7/34r	29/10/34	28/6/56	15/9/03	14/12/03
Uruguay		4/7/79	2/10/79			
Uzbekistan		27/2/97	28/5/97		27/2/97	28/5/97
Vanuatu		26/10/81	24/1/82		26/10/81	24/1/82
Venezuela		15/6/55	13/9/55	28/9/55	26/8/60r	1/8/63
Viet Nam		11/10/82	9/1/83		11/10/82	9/1/83

Appendix 2

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR DONE AT MONTREAL ON 28 MAY 1999[345]

Entry into force:	The Convention entered into force on 4 November 2003.
Status:	62 Parties.

State	Date of signature	Date of deposit of instrument of ratification, acceptance (A), approval (AA) or accession (a)	Date of entry into force
Albania		20/10/04 (a)	19/12/04
Austria (10)		29/04/04 (a)	28/06/04
Bahamas	28/05/99		
Bahrain		02/02/01(a)	04/11/03
Bangladesh	28/05/99		
Barbados		02/01/02 (a)	04/11/03
Belgium (1)(15)	28/05/99	29/04/04	28/06/04
Belize	28/05/99	24/08/99	04/11/03
Benin	28/05/99	30/03/04	29/05/04
Bolivia	28/05/99		
Botswana		28/03/01 (a)	04/11/03
Brazil	03/08/99		
Bulgaria		10/11/03 (a)	09/01/04
Burkina Faso	28/05/99		
Cambodia	28/05/99		
Cameroon	27/09/01	05/09/03	04/11/03
Canada (6)	01/10/01	19/11/02	04/11/03
Central African Republic	25/09/01		
Cape Verde		23/08/04 (a)	22/10/04
Chile	28/05/99		
China	28/05/99		
Colombia	15/12/99	28/03/03	04/11/03
Costa Rica	20/12/99		
Côte d'Ivoire	28/05/99		
Cuba	28/05/99		
Cyprus		20/11/02 (a)	04/11/03
Czech Republic (3)	28/05/99	16/11/00	04/11/03
Denmark (1)(11)	28/05/99	29/04/04	28/06/04

[345] Contracting parties to the Montreal Convention 1999, ICAO website, online: <http://www.icao.int/icao/en/leb/mtl99.htm> (date accessed: 15th January, 2005).

Dominican Republic	28/05/99		
Estonia	04/02/02	10/04/03	04/11/03
Finland (4)	09/12/99	29/04/04	28/06/04
France (1)	28/05/99	29/04/04	28/06/04
Gabon	28/05/99		
Gambia		10/03/04	09/05/04
Germany (1)(12)	28/05/99	29/04/04	28/06/04
Ghana	28/05/99		
Greece (1)	28/05/99	22/07/02	04/11/03
Hungary		08/11/04 (a)	07/01/05
Iceland	28/05/99	17/06/04	16/08/04
Ireland (1)	16/08/00	29/04/04	28/06/04
Italy (1)	28/05/99	29/04/04	28/06/04
Jamaica	28/05/99		
Japan (8)		20/06/00 (A)	04/11/03
Jordan	05/10/00	12/04/02	04/11/03
Kenya	28/05/99	07/01/02	04/11/03
Kuwait	28/05/99	11/06/02	04/11/03
Latvia		17/12/04 (A)	15/02/05
Lithuania (17)	28/05/99	30/11/04	29/01/05
Luxembourg (2)	29/02/00	29/04/04	28/06/04
Madagascar	28/05/99		
Malta	28/05/99	05/05/04	04/07/04
Mauritius	28/05/99		
Mexico	28/05/99	20/11/00	04/11/03
Monaco	28/05/99	18/08/04	17/10/04
Mongolia		05/10/04 (a)	04/12/04
Mozambique	28/05/99		
Namibia	28/05/99	27/09/01	04/11/03
Netherlands (14)	30/12/99	29/04/04	28/06/04
New Zealand (5)	13/07/01	18/11/02	04/11/03
Niger	28/05/99		
Nigeria	28/05/99	10/05/02	04/11/03
Norway		29/04/04 (a)	28/06/04
Pakistan	28/05/99		
Panama	28/05/99	13/09/02	04/11/03
Paraguay	17/03/00	29/03/01	04/11/03
Peru	07/09/99	11/04/02	04/11/03
Poland	28/05/99		
Portugal (1)	28/05/99	28/02/03	04/11/03
Romania	18/11/99	20/03/01	04/11/03

Qatar (16)		15/11/04 (a)	14/01/05
Saint Vincent and the Grenadines		29/03/04 (a)	28/05/04
Saudi Arabia	28/05/99	15/10/03	14/12/03
Senegal	28/05/99		
Slovakia	28/05/99	11/10/00	04/11/03
Slovenia	28/05/99	27/03/02	04/11/03
South Africa	28/05/99		
Spain (13)	14/01/00	29/04/04	28/06/04
Sudan	28/05/99		
Swaziland	28/05/99		
Sweden (1)	27/08/99	29/04/04	28/06/04
Switzerland	28/05/99		
Syrian Arab Republic		18/07/02 (a)	04/11/03
The former Yugoslav Republic of Macedonia		15/05/00 (a)	04/11/03
Togo	28/05/99		
Tonga		20/11/03 (a)	19/01/04
Turkey	28/05/99		
United Arab Emirates		07/07/00 (a)	04/11/03
United Republic of Tanzania		11/02/03 (a)	04/11/03
United States (7)	28/05/99	05/09/03	04/11/03
United Kingdom (1)	28/05/99	29/04/04	28/06/04
Uruguay	09/06/99		
Zambia	28/05/99		
Regional Economic Integration Organisations			
European Community (9)	09/12/99	29/04/04 (AA)	28/06/04

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