TRUCKING AIR CARGO: THE APPLICATION OF THE WARSAW SYSTEM TO BIMODAL TRANSPORT

Philip Croes
Thesis Master of Laws
Institute of Air and Space Law
Mc Gill University
Montréal
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SUMMARY

The recent expansion of air trucking operations in Europe has put a strain on the traditional concept of air carrier's liability.

Short-haul pick-up and delivery services have gradually given rise to more complex pattern of hubbing and substitutive transport by road, possibly undertaken without consent of the consignor of the goods.

In the absence of a set of international rules for multimodal transport, each segment is subject to a separate legal regime. An evolutive interpretation of the original Warsaw Convention, though, fits the newly developed bimodal operations *prima facie* into the sphere of air carrier's liability.

Problems of delay are dealt with using an elaborate model on the concept of time in the several branches of transport law. The spectrum is completed by a discussion on the plurality of the parties involved in the entire process.

RESUME

En Europe, l'expansion récente du transport par voie terrestre des marchandises a notamment eu pour effet d'obliger à la redéfinition du concept traditionnel de la responsabilité du transporteur aérien.

Les services courte distance de collecte et de livraison des produits ont progressivement eu recours à une structure complexe de centres et à des moyens de transports routiers de substitution, dont l'exploitation s'effectue parfois sans le consentement de l'expéditeur.

En l'absence d'un ensemble de règles internationales en matière du transport par des moyens multiples, chaque segment de l'opération reste régi par un ré,ime légal particulier. Une interprétation évolutive de la Convention de Varsovie permet cependant à prime abord d'inclure les opérations de moyen double dans la sphère de la responsabilité du transporteur aérien.

Les problèmes de retard sont traités à partir d'un modèle découlant du concept de temps, tel que défini et développé dans des différentes branches du droit de transport. L'analyse est complétée par une discussion sur la pluralité des parties impliquées dans tout le processus.

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I. INTRODUCTION

1. Recent Developments in Bimodal Air-Land Transport

Air freight has traditionally been considered the stepchild of aviation industry, moving in the shadow of passenger traffic.[1] With the changing management and marketing techniques, this initially minor by-product in the airlines' home markets has become a fast growing revenue source for airlines, which currently accounts for 15 to 20 percent of their total revenues on average.[2] This evolution, however, did not run on wheels.

Airline policies over the past decades constantly vacillated between acquiring and disposing of all-cargo aircraft. Eventually one estimated that- with the exception of certain routes where freight demand exceeds the capacity which can be accomodated on passenger flights- the operation of dedicated all-cargo aircraft seemed hardly profitable, particularly in view of the increasing aviation fuel costs. During the recession, airlines gradually withdrew all-cargo aircraft from their fleet and concentrated on filling up the enlarged capacity of "combi" (passenger/cargo) wide-body aircraft.[3]

As an apparent result of the lack of interest shown by the major airlines, vertically integrated express carriers conquered the intra-European air freight market by offering time-defined door-to-door services, irrespective of the

[1] VIDELA ESCALADA, F., N., *"Aeronautical Law"*, Sijthoff & Noordhoff, Alphen aan den Rijn, 1979, 390; TAPNER, H., "Air Cargo", Casell & Company Ltd., London, 1967, 128.

[2] "Air Freight", *Backgrounder*, IATA, Geneva, gva 8210; MAGDELÉNAT, J.-L., "Le fret aérien", *Annals of Air and Space Law*, 1976, Vol. I, 97.

[3] ROBINSON, J., "Intermodality", *Air Cargo Magazine*, October 1982, 24; DORRESTEIN, T., H., "Recht van het Internationale Wegvervoer", Tjeenk Willink, Zwolle, 1977, 7-10.

transport modes involved.[4] These integrators have developed networks of small freighter night hubs and dedicated truck line haulage which provide a greater range of service options at competitive prices. To their credit, the rather homogeneous needs of the passengers have become clearly separated from those of the air cargo shippers.[5]

The airlines for their part have focused on the intercontinental air cargo market. Some major airlines have resorted to expedited truck services as a prime means to obtain more points of pick-up and delivery and to expand their liner transport, linking up with routes where they do not offer an air product. The surface networks also provide a welcome alternative to shorthaul air traffic between congested and expensive airports. Given the limited capacity of aircraft serving a particular route, considerable air freight tonnages are trucked throughout the European countries. Special feeder trucks carry consolidated goods internationally in containers or pallets from wide areas to the gateway airports for transport by large passenger or freighter aircraft to the rest of the world.[6]

Co-operation between various modes of transport as such is obviously not a new phenomenon. The movement of air cargo, as indicated by the terms door-to-door carriage and total transportation service, is essentially bimodal. Trucking, as

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4 PARIKH, A., N., et al., "Services Available- Freight Forwarder's Views", unpublished, *International Symposium "Air Freight for Profit"*, International Chamber of Commerce, Heathrow, 1987, 1-13; *"Airline Freight under Air Waybill"*, unpublished, Triangle Management Services, Buckinghamshire (United Kingdom), 1990, 5-6

5 SMITH, P., S., *"Air Freight Operations, Marketing and Economics"*, Faber & Faber Ltd., London, 1974, 188.

6 PELLON RIVERO, R., *"El Transporte Multimodal Internacional de Mercancias", XIV Jornadas iberoamericanas de derecho aeronáutico y del espacio de la aviación comercial*, Instituto Peruano de Derecho Aerospacial, Lima, 1984, 88.

an independent and flexible means of transport, allows better control and total dedication. It enables to directly bridge the physical gap between demand and supply at both ends of the air leg. However, the multimodality was initially confined to the short haul pick-up and delivery of airborne cargo to and from airports. The nodes in transport networks-such as harbours, railway stations and airport terminals-were viewed as "assembly and break of bulk" points, marking the end of one transport link and the beginning of another. This unimodal approach and the emphasis on the "terminus" (rather than nexus) function of nodes gradually eroded two decades ago with the ever growing intermodal connections.[7] Studies show that today between thirty to eighty percent of all European intercontinental air cargo is internationally trucked at some point in its transit.[8] Anticipating the 1993 deregulation and harmonisation within the European Community, carriers have thus *de facto* spread their wings over a new "domestic" air cargo market.

2. Implications on Private International Air Law: a Caleidoscope of Colliding Scopes

In a comparatively short period of time, the new air/road alliance has become a way to accommodate high-grade distribution needs. Reshaping the essence of the air cargo product, major airlines now often schedule their surface movements pretty much like air transport, fully fledged with a four digits flight number and an air waybill covering the transit from the very origin to the final destination.[9]

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[7] HAYUTH, Y., *"Intermodality: Concept and Practice"*, Lloyd's of London Press Ltd., London, 1987, 8.

[8] *"Airline Freight under Air Waybill", op.cit. (note 4)*, 14.

[9] *"Airline Freight under Air Waybill", op.cit. (note 4)*, 17; DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *"Traité*

Against these operational innovations, which have taken place on a musts and needs basis, the lagging international legal framework appears increasingly anachronistic. A sometimes blurred patchwork of various rules, modelled on the proper economic structure and rationale of each underlying transportation mode, regulates individual portions of the journey.[10] The most critical legal issues are presently the application of dangerous goods regulations and carrier liability rules.

The following analysis is about how this rather unstructured expansion of the "flying trucks" phenomenon is dealt with in private international air law and more specifically in the so-called Warsaw system.[11] The vital question when the period of the air carrier's liability for cargo begins and when it ends, is one of the most controversial issues in private air law. Coincidentally, the weak links in the air transport chain- i.e. where air cargo shipments appear most prone to damage and delay- are situated at the brink of the Warsaw

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de Droit Aérien", Tome I, Libraire générale de droit et de jurisprudence, Paris, 1989, 1072.

10 SASSOON, D., M., "Liability for the International Carriage of Goods by Sea, Land and Air: Some Comparisons", *Journal of Maritime Law and Commerce*, 1971-72, Vol. 3, 759.

11 With respect to air cargo, the Warsaw system includes the original Warsaw Convention for the Unification of Certain Rules Relating to the International Carriage by Air (October 12 1929, 137 L.N.T.S. 13), the amending The Hague Protocol (September 28 1955, 478 U.N.T S. 371, ICAO Doc. 7632) and the Montréal Protocol 4 (September 25 1975, ICAO Doc. 9148) together with the implementing Guadalajara Convention (September 18 1961, 500 U.N.T.S. 31, ICAO Doc. 8181);
see *"International Transport Treaties"*, Kluwer Law and Taxation Publishers, Deventer-Boston, supplemented, III, 1 etseq.; MATTE, N., M., *"Treatise on Air-Aeronautical Law"*, ICASL, Montréal, 1981, 706 etseq.
See also (critical summaries): DIEDERIKS-VERSCHOOR, I., H., *"An Introduction to Air Law"*, Kluwer, Deventer, 1985, 45-81, CHENG, B., "Sixty Years of the Warsaw Convention. Airline Liability at the Crossroads (Part I)", *Zeitschrift fur Luft- und Weltraumrecht*, 1989, Vol. 38, 319-344; MILDE, M , "ICAO Work on the modernization of the Warsaw System", *Air Law*, 1989, Vol. XIV, 193-207; DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G , M., *op.cit. (note 9)*, 941-965.

system, prior or posterior to the air segment. Except for air disasters, damage during flights is primarily confined to live animals and temperature-sensitive shipments.[12]

The counterpart of the Warsaw system for cross-border road transport in Europe is the 1956 Geneva Convention on the International Carriage of Goods by Road (CMR),[13] which is likely to play a principal role in view of the small land area and the extensive international road links on the continent. In practice, most air carriers tend to guarantee the quite generous Warsaw limits for trucking as part of the service to their customers, although theoretically the CMR provisions would apply.[14] The Warsaw Convention itself, following Articles 18§3 and 31, divides the air/road interface into two broad categories: one where the surface transport is performed for the purpose of loading, delivery or transshipment, and another for the remainder of combined transports. Considering the different frames of these provisions on the applicability of the Warsaw system, it will be essential to know when the surface segment is considered to be incidental to air carriage.

The concept of transportation time is further discussed with respect to claims for delay, although it is an aspect of the carrier's liability, rather than an element of legal applicability. A bird's-eye view is also taken at the plurality of parties on both sides of the contract, yet another typical factor in transportation law that is

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[12] DU PERRON, A., E., "Aansprakelijkheid van de luchtvervoerder voor goederen", VAN BAKELEN, F., A., *"Teksten van de op 27 maart 1985 te Groningen gehouden studiedag"*, Uitgaven Vakgroep Handelsrecht R.U.G., unpublished, 1985, 67.

[13] *Convention relative au contrat de transport international de marchandises par route*, CMR 399 U.N.T.S., 210; *"International Transport Treaties"*, Kluwer Law and Taxation Publishers, Deventer-Boston, supplemented, IV, 1 etseq.; DONALD, A., E., *"The CMR"*, Derek Beattie Publishing, London, 1981, 116-134.

[14] LEGREZ, F., "Should the new Convention on International Intermodal Transport be ratified?", *ITA Bulletin*, October 1980, No. 36/27, 846.

intertwined with the carrier's liability. The study sets off with a short digression upon containerization and the 1980 Geneva Convention on Multimodal Transport. This may seem purely academic, since this instrument is not likely ever to come into force, but it does render some interesting perspectives for the extent of intermodal movements linked to air transport and for discussions later on.

If a study is characterized by what it doesn't say, then a long list should be added to this introduction, since the selected items do not make up a full review detailing the realm of rules and decisions pertaining the carriage of cargo by air. Even this restricted analysis does not appear immune to possible criticism, since it goes further than a mere description of standpoints that can be found in comments and jurisprudence. It often comprises a normative element, a purposeful choice made between several valid theories put forward as an appropriate tool to solve legal problems in bimodal air/road transportation.

The entire issue does not only stay evergreen when Montréal Protocol 4 on air cargo will have come into force, but its overall importance will even increase. The original concept relating to the period of carrier's liability will remain unchanged.[15] However, the principle of strict liability with set defences and unbreakable limits in the new air law regime will differ fundamentally from the presumed fault liability of the CMR and many domestic legislations.

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[15] EHLERS, P., N., "Montrealer Protokolle Nr. 3 und 4, Warschauer Haftungssystem und neuere Rechtsentwicklung", *Schriften zum Luft- und Weltraumrecht*, Carl Heymans Verlag KG, Koln, VII, 81-108; FITZGERALD, G., F., "The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air", *Journal of Air Law and Commerce*, 1976, Vol. 42, 273-350.

II. CONTAINERIZATION AND THE MULTIMODAL TRANSPORT CONVENTION

1. Background: Containerization and Standardization

In the 1950s and the early 1960s, the maritime sector was plagued by an increased demand of international trade coming up against an older fleet of conventional general cargo vessels and inefficient, heavily congested port facilities. While the shipping industry itself had passed several milestones like the introduction of motorized ships and iron hulls, there had been harldy any advance in the methods of cargo handling. As in earlier centuries, goods were dealt with manually or by crude mechanical means, loading them in bulk or sometimes in packaged, baled or crated units of general cargo.[16]

A drastic innovation of the transport system, which was improve the turnaround of ships, took place during the 1960s and 1970s. The technological cornerstone in the unitization of cargo was the use of containers, structural units forming an integral rigid shell enabling the consolidated handling of a number of heterogeneous individual packages as a single item.[17] They produce a higher load density, require a minimum of manpower in stowing and handling, and they offer better protection against bad weather conditions, pilferage, and damage.[18] Lower rates for shipper-loaded units make that traffic handling costs are inversely proportional to the degree of containerization by the shipper. Last but not

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[16] HAYUTH, Y., *op.cit. (note 7)*, 1 and 13-14.

[17] TANEJA, N., K., *"The U.S. Air Freight Industry"*, Lexington Books, Toronto, 1979, 185.

[18] SCHRIER, N., "How to cut international air cargo costs", *Canadian Transportation and Distribution Management*, November 1987, 71-76.

least, the movement of goods in a single container has allowed the development of true intermodal transport systems. Because of the aforesaid advantages, containerization has become the dominant way of unitized transport in international ocean-borne trade.

Standardization, in connection with containerization, is essential for the smooth functioning of the world's freight system. The International Standardization Organization (ISO) approved uniform dimensions to permit the carriage of several parts of cargo in major units of the same form for all transport modes.[19] A lot of non-ISO-size containers, however, are built according to the proper considerations of shippers and carriers. Most importantly, the entire domestic intermodal system of the United States is non-compatible with the international ISO container system, since it uses longer (45 and 48 feet) and higher equipment and double-stack container trains.[20]

The lack of worldwide standardization and interchangeability has been a major obstacle for the expansion of the container program for air carriage, despite of the combined efforts of ISO, ATA and IATA.[21] There are manifest technical differences between the devices used in aviation and the international system of sea-land intermodal containers, which are 8x8 feet in cross-section and come in modules of 10 feet up to 40 feet. To achieve stackability and overhead handling (using ISO corner fittings), the latter have a heavy duty structure

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19 DONATO, A., M., "Implicancias del Transporte Multimodal de Mercaderias en el Transporte de Carga Aerea", *XIV Jornadas iberoamericanas de derecho aeronáutico y del espacio de la aviación comercial*, Instituto Peruano de Derecho Aerospacial, Lima, 1984, 173-174.

20 HAYUTH, Y., *op.cit. (note 7)*, 20.

21 SMITH, P., S., *op.cit. (note 5)*, 200-203; DONATO, A., M., *op.cit. (note 19)*, 173-4; TANEJA, N., K., *op.cit. (note 17)*, 199.

to support considerable forces from both inside and outside the container. This structure necessarily involves substantial tare weigth which, given the critical weight load limitations of even the largest and most modern aircraft, severely limits the economic feasibility of moving goods packed in surface containers by air.[22]

The development of a fully intermodal container with the same dimensions as the ones used in land and sea transport is troubled by the need of costly materials with a high strength-to-weight ratio in the aircraft industry. The shape and the physical characteristics of containers used in pressurized and generally cylindrical aircraft require special handling techniques. The most widely used aircraft unit loading devices (ULDs) are the standard A type, carried on main deck.[23] These containers (or igloos using a structural shell secured to the pallet base) require dolly transporters and cannot be handled by a forklift. Special container development programmes subsequently led to the production of half-size lower deck units to reduce turnaround times, ramp congestion, and ground handling costs. Until the introduction of wide-body aircraft, air shippers could not take full advantage of intermodal movements with jet aircraft since the surface container did not fit in the standard-body aircraft of the B-707 and the DC-8 type. Shipments had to be (un)loaded into or out of the unit between the air segment and each other segment.[24]

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[22] ICAO Legal Committee, 24 th Session, Summary Report on the Work of the Legal Committee During its 24 th Session, pp. 15-63, ICAO Doc. 9271, LC/182/28-5-79, 52.

[23] IATA Resolution 680, General Rules for the Use of Unit Load Devices, *Cargo Services Conference Resolutions Manual*, IATA, Montréal, 1991, 86.

[24] COOK, J., C., *"International Air Cargo Strategy"*, Freight Press Inc., Philadelphia, Pennsylvania, 1983, 163 etseq..

In expectance of a commercial ultra-high-capacity aircraft,[25] only particular versions of the B-747 are able to carry intermodal containers. Common main-deck swap bodies, measuring full-size 10x8x8 feet or 20x8x8 feet, produce a common denominator for air-sea and air-land intermodal movements. The improvement of ground facilities for freight handling at many airports has further enhanced the use of intermodal containers. However, their sheer size implies that they can only be useful for larger consignments to the other end of the globe. Another hindrance for containerization in the airfreight industry are the high backhaul costs of the containers, which are mostly owned or leased by the air carrier.[26]

The concept of unitized cargo has raised a plethora of litigation in air law, which has traditionally focused on the air carriage of individual packages.[27] For example, when a locked and sealed container is delivered at the terminal, the airline personnel cannot possibly count the number of packages inside the container, nor ascertain the external condition thereof, the effectiveness of stowage or the adequacy of packaging. Such verifications are to be made by the cargo consolidator when completing his house air waybills (see *infra*).[28]

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25 RUDOLPH, B., "Will this Jumbo ever fly?", *Time International*, January 25 1993, 36-37.

26 NDUM, F., N., *"Economic and Legal Development on the Carriage of Goods by Air"*, Institute of Air and Space Law, Montréal, 1982, Thesis LL.M., 206; DONATO, A., M., *op.cit. (note 19)*, 165-189; TANEJA, N., K., *op.cit. (note 17)*, 174.

27 SASSOON, D., M., *op.cit. (note 10)*, 766.

28 TAPNER, H., *op.cit. (note 1)*, 124.
Remark: In order to minimize overlaps, references to other parts of the thesis are unavoidable.

Analogous to container traffic under the Hague-Visby rules for ocean shipping[29], the limits per Article 22 of the Warsaw Convention should be calculated on the basis of the weight of the affected goods within the ULD only (insofar as they are mentioned separately on the master air waybill).[30] Where the air waybill does not specify in detail the contents of the container, the composite consignment must be treated as a single package.[31]

2. The Multimodal Transport Convention

The development of international containerized carriage of goods has given impetus to the movement of cargo by several modes of transport under a single rate. However, the liability for such transport laid scattered over a variety of regimes for each mode separately.[32] Different documents were used for a multitude of ocean shipping conferences and the other modes of surface transport. In order to facilitate the

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29 International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels, 1924), 120 L.N.T.S. 157; amending Protocol (Brussels, 1968), *Register of Texts of Conventions and Other Instruments concerning International Trade Law*, II, UN Publications.

30 Data Card Corp. et al. v. Air Express International Corp. et al., Queen's Bench (Commercial Court), March 28 1983, *Lloyd's Law Reports*, 1983, Vol.II, 81-85.

31 Ass. Mij Nieuw Rotterdam N.V. v. Seaboard World Ltd., Arrondissementsrechtbank te Haarlem, January 11 1983, VAN BAKELEN, F., A., and DIEDERIKS-VERSCHOOR, I., H., *"Compendium Jurisprudentie Luchtrecht"*, Tjeenk Willink, Zwolle , 1988, 152-6; *European Transport Law*, 1983, Vol. XVIII, 236-241; *Air Law*, 1983, Vol. VIII, 169-171.
Article XI of the Hague Protocol specifies the case of partial loss or damage, pointing out that the weight of "the package" concerned should be taken into account to determine the amount to which the carrier's liability be limited.
Following Article 7 of the Warsaw Convention, the carrier may diminish his commitments by requesting that several air waybills are made out for a consolidated shipment.

32 SAMPAIO DE LACERDA, J., C., "The Intermodal Transport Contract", *Annals of Air and Space Law*, 1977, Vol. II, 170.

development of efficient multimodal services, a Conference was held under the auspices of the United Conference on Trade and Development (UNCTAD) at Geneva. It resulted in the adoption of the 1980 United Nations Convention on International Multimodal Transport of Goods (abbreviated "the MT Convention").[33]

The main purpose of this convention was to establish a liability regime applicable to a new player in the transport world, namely the multimodal transport operator (MTO).[34] The MTO, acting as a principal with the consignor or the consignee, would undertake full responsibility for the international transport of goods by underlying carriers of various transport modes on the basis of a single multimodal transportation contract. The MT Convention was primarily meant for the international multimodal movements with a long maritime leg and using large, heavy containers.[35] Its redaction and philosophy was essentially schemed on the Hamburg Rules,[36] which embodied the latest evolutions in the field of international transport of goods by sea. Experts in air law, sitting in the back row as observers, had only a marginal influence on the process.[37]

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33 TD/MT/CONF/16, Geneva Conference (1979-80) documents; UN Convention on International Multimodal Transport of Goods, *Annals of Air and Space Law*, 1981, Vol. VI, 657-691.

34 FITZGERALD, G., F., "The United Nations Convention on the International Multimodal Transport of Goods", *Annals of Air and Space Law*, 1980, Vol. V, 51.

35 FITZGERALD, G., F., "The Implications of the United Nations Convention on International Multimodal Transport of Goods (Geneva 1980), for International Civil Aviation", *Annals of Air and Space Law*, 1982, Vol. VII, 41.

36 United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978), A/Conf. 89/13.

37 PELLON RIVERO, R., *op.cit. (note 6)*, 66.

It is understandable that the coexistence of the MT Convention with other mandatory international instruments governing carriage by the underlying modes would be highly controversial.[38] Though the system of liability of the MTO, based on a presumed fault and with breakable limits, was not *ab ovo* but followed from existing principles, it cut across the scopes of underlying unimodal transport conventions.[39] Articles 1 and 31 of the Warsaw Convention imply that- specifically in the case of combined carriage partly performed by air- its provisions must be observed with regard to the air segment. Any contractual deviation from those rules would be null and void. The most striking differences between the MT Convention and the Warsaw system (as with the CMR, see *supra*) concern the limits of liability, the periods of notice, the limitation periods of actions and the jurisdiction of courts.[40] A myriad of discrepancies may thus affect recourse actions by the MTO against the carrier. When the strict liability regime of Montréal Protocol 4 enters into force, it will yet widen the gap with the MT Convention's system of presumed liability.

In the heart of the controversy, basically two opposing views were presented as to the possible conflict between the MT Convention and the unimodal transport conventions.[41] The *sui generis* or dual capacity approach implied that the MT Convention governed the contractual relationship solely

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[38] FITZGERALD, G., F., *op.cit. (note 34)*, 75.

[39] GANTEN, R., "Das Ubereinkommen uber den internationalen kombinierten Guterverkehr- ein neuer Anlauf auch im Hinblick auf die Luftbeforderung?", *Zeitschrift fur Luft- und Weltraumrecht*, 1975, Vol. 24, 121.

[40] TD/B/AC 29, 32, United Nations Conference on Trade and Development (UNCTAD) Intergovernmental Preparatory Group documents; DONATO, A., M., *op.cit. (note 19)*, 1984, 181-182.

[41] ICAO Legal Committee, *op.cit. (note 22)*, 16-34; ICAO Doc 9096 LC/171-2,31; FITZGERALD, G., F., *op.cit. (note 35)*, 72-4.

between the MTO and the consignor or the consignee, which had to be distinguished from the transport contracts between the MTO and the subcontracting unimodal carriers.[42] The MT contract would establish an entirely new type of legal position, different from combined carriage in the traditional sense, as referred to in Article 31 of the Warsaw Convention. Since a participant in his capacity of MTO acted as a distinct legal subject and not as a unimodal carrier, the conflict between the MT Convention and the Warsaw system would be converted into a non-problem.

The opposing view was that the *sui generis* approach was untenable and, consequently, that either the MT Convention or the Warsaw system should prevail in case of incompatible provisions. Following Article 31 of the Warsaw convention, The MTO would assume the mandatory obligations of an air carrier because he procures the performance of, *inter alia*, air transport. Another argument would be that the concepts of the MTO and the subcontracting air carrier coincide with respectively the contracting and the actual carrier within the meaning of Article 1 of the Guadalajara convention of 1961 (see *infra*).[43] The liability of an MTO who makes, as a principal, arrangements for an air leg would thus be governed by the Warsaw system.

The conflict between these approaches was not really overcome in the eventual MT Convention. Article 19 of the MT Convention settles the problem of competing conventions partially by the introduction of a network system for localized damage, i.e. when it is known on which particular stage of the multimodal transport the loss or damage

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42 ICAO Legal Committee, *op.cit. (note 22)*, 18 and 26-7.

43 NAVEAU, J., "Combined Transport and the Airlines", *European Transport Law*, 1975, Vol. X, 727-728; FITZGERALD, G., F., "The United Nations Convention on International Multimodal Transport of Goods (1980) - Discussion of the Operations of Pick-up and Delivery with Particular Attention to the Air Mode", *Air Law*, 1982, Vol. VII, 205.

occurred. The limit of the MTO's liability for such loss or damage is determined by the applicable mandatory national or international law, only where it provides a higher limit of liability than the one specified in Article 18 of the MT Convention. The latter provision distinguishes the liability limitations for loss or damage according to the transport modes involved. If the international multimodal transport includes any transport by sea or inland waterways, the compensation may not exceed 920 Special Drawing Rights (SDRs)[44] per shipping unit or 2.75 SDRs per kilogram of gross weight of the goods lost or damaged, whichever is higher. For other combined surface and air transport the limit is 8.33 SDRs per kilogram, which is still far below the Warsaw limit of 17 SDRs (see *infra*).

The strong opposition of air carriers against the MT Convention concerned also practical matters. IATA and several delegations at the ICAO forum pointed out that there was no suitable alternative to the exclusion of the air mode from the scope of the MT Convention, would it not disturb the existing efficiently run air/road operations. International air transport involves unique technical and economic characteristics such as an intense mobilization of capital, extraordinary energy expenditures, limited vehicle size and use of advanced technology.[45] Due to relatively high operating costs, air freight often comprises high value items and urgent shipments which require a certain standard of service in terms of security, careful handling, speedy processing and packaging.

To set a worldwide expedited distribution system, the airlines have tailored comprehensive and satisfactory

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[44] The SDR currency unit was created by the First Amendment of the Articles of Agreement, International Monetary Fund, Article XXI s 2; WARD, L., "The SDR in Transport Liability Conventions: Some Clarifications", *Journal of Maritime Law and Commerce*, 1981, I, 5.

[45] ICAO Legal Committee, *op.cit. (note 22)*, 52.

arrangements with the trucking mode with respect to short-haul pick-up, delivery and transshipment activities (i.e. trucking in the strict sense).[46] In addition, airports are fed by surface liner transport from a wide area around hubs at the origin and destination of long distance aircraft routes. Substitute transport is also performed by road in situations in which air shipment is not immediately available or where the use of a truck would speed up the process (e.g. to take advantage of relatively less-used customs areas). These services are all offered and billed pursuant to the same air waybill covering the entire journey and they are subject to the high limits of the Warsaw system.[47] The trucking arrangements remain essentially ancillary to the principal movement by air, as is shown by the fact that they involve air-eligible goods, intended and prepared for air shipment from the start.

For reasons mentioned above, the combination of air transport with other modes of surface transport (rail, ship or barge) appears to be a negligible exception to date. The current containers for air cargo are normally not interchangeable with those used for surface transport.

The introduction of the MT document- with numerous mandatory entries not required for the simplified documentation under the Warsaw system- appeared to be both unnecessary and expensive.[48] The cost of handling and processing constitutes one of the most important economic factors for the air freight industry. New requirements would burden on-line and interline carriage of air freight under the existing standardized IATA air waybill, which serves as a cornerstone

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46 LEGREZ, F., *op.cit. (note 14)*, 845-847; DORRESTEIN, T., H., *op.cit. (note 3)*, 10.

47 Legal Committee, *op.cit. (note 22)*, 56-57.

48 TD/MT/CONF/NGO/4, ii; FITZGERALD, G., F., *op.cit. (note 35)*, 52 and 60-1.

for the international services of nearly all airlines. Moreover, air waybills may be produced automatically by computerized systems, as well as by the traditional manual methods.[49] This automated cargo documentation gives valid evidence of the contract of carriage, contains standard conditions of contract and functions as a receipt for the parties.

The negociability of the MT document would adversely affect the speed of air transport, thus raising insurance, inventory and stock costs. More warehouse facilities would be necessary in order to congest the goods while awaiting the acceptance by the holder of the negotiable document.

When the initial proposal of IATA- the total exclusion of air mode related transport from the scope of MT Convention- was not accepted, the Association defended its alternative fall-back position. At least short-haul pick-up, delivery and transshipment operations carried out in the performance of an air transport contract should be excluded. To allay the concerns voiced by the airlines, a compromise was reached at the Geneva Conference to insert a second sentence in Article 1 of the MT Convention, stating that purely incidental transport would not be considered as international multimodal transport.[50] Though the exception is openly formulated for all modes, its language seems to coincide more or less with the terms of Article 18§3 of the Warsaw Convention.

The MT Convention handily avoids the complex question of defining the somewhat imprecise concept of incidental operations in terms of areas around airports, leaving it up

[49] Preparatory works of Montréal Protocol 4: ICAO Legal Committee, 21st Session, Montreal, 3-22 October 1974, Vol. I Minutes, Montreal, 1976, Doc. 9131- LC/173-1, 8-20; EHLERS, P., N., *op.cit. (note 15)*, 81-108; FITZGERALD, G., F., *op.cit. (note 15)*, 282-301; SUNDBERG. W., F., "The Changing Law of Air Freight", *Air Law*, 1981, Vol. VI, 234-238.

[50] FITZGERALD, G., F., *op.cit. (note 43)*, 205; ICAO Doc.9096-LC/171-2, Legal Committee, 19th Session, Montréal, May 22/June 2 1972, II, 40.

to national courts to decide on how limited the exclusion of these operations may be (see *infra*). The text does not explicitly mention transshipment movements, but they could conceivably be interpreted as being covered by the exception.

In addition to private-law liability aspects, the MT Convention deals with certain public-law matters such as the regulation and the control of multimodal transport and customs transit. This was part of a delicately balanced compromise between the developing states and market-economy states, reflected primarily in the preamble of the Convention and in one article thereof.[51] Given the overoptimistic objectives of the Convention and the numerous controversies, most commentators agree that the universal rules on multimodal transport may never come into force. Legal uniformity at international level is still achieved by conventions for each segment of global or regional transport. On the other hand, the Convention has influenced the legislation of several countries.[52] However, since there is only a sectorial unification at international level, domestic multimodal legislation can only apply when origin and destination are in the same country. Theoretically, one could imagine some kind of paramount clause to be mandatorily inserted in contracts of international carriage, but even then the domestic multimodal legislation would only be valid if it increases the carrier's liability based on prevailing sectorial international conventions.

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51 FITZGERALD, G., F., *op.cit. (note 34)*, 52-3.

52 PELLON RIVERO, R., *op.cit. (note 6)*, 63.

III. TRUCKING AIR CARGO: THE APPLICATION OF THE WARSAW SYSTEM

All legal regimes of transportation modes basically apply to operations performed in their respective milieu: land, rivers, sea and air. The Hague/Visby Rules on ocean transport (see *supra*) for example, apply from the time of loading on board the vessel until the time of discharge off the vessel. Consequently, the sea carrier may exclude or limit his liability for loss or damage of the goods being in his custody as long as it relates to a period prior to the time of loading and after the time of discharge.[53] Agreements generally state that the sea carrier receives and delivers the goods on the quay (under the ship's tackle), which can be further specified according to the local usages of the particular harbour.

Under the Warsaw system, however, there is no straightforward tackle-to-tackle criterion. Article 1 of the Warsaw Convention in general states that the Convention applies to carriage by aircraft. Article 31 specifies this by providing that in case of combined carriage performed partly by another mode of carriage, the provisions of the Convention apply only to the carriage by air. Neither of these provisions tend to define the period of liability.[54] The relevant Articles 18§2

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53 MARTINEZ CASIELLES, J., A., *"Cargo Insurance Claims and Subrogation in International Law- a Comparative Study in Marine and Aviation"*, Thesis LL.M., Institute of Air and Space Law, Montreal, 1985, 114-115; VREEDE, F., G., "Diefstal van Luchtvracht, De Limiet Doorbroken?", *De Beursbengel*, maart 1986, 94-95; HADJIS, D., A., *"Liability Limitation in the Carriage of Passengers and Goods by Air and Sea"*, Institute of Air and Space Law, unpublished, Thesis LLM., Montreal, 1958, 115.

54 DRION, H., *"Limitation of Liabilities in International Air Law"*, Martinus Nijhoff, The Hague, 1954, 82-3; KOLLER, I., "Die Haftung fur Sachschaden infolge vertragswidrigen Truckings im grenzuberschreitenden Luftfrachtverkehr", *Zeitschrift fur Luft- und Weltraumrecht*, 1989, Vol. 38, 361.

and 18§3 do not confine the scope of the Convention to the period during which the goods are on board the aircraft. It extends to the period during which the goods are at the airport or any other place of landing, as long as the carrier keeps legal control of them. Even transportation by other means of transport outside an airport performed for the purposes of loading, delivery or transshipment are *prima facie* covered by the mandatory Warsaw system.

The double standard is the result of a compromise between the view of the British delegation at the Warsaw Conference, namely that the period of the carrier's liability should begin when the goods enter the airport, and the approach of the French delegation, stating that the acceptance by the carrier for transportation is the correct moment of reference. The *travaux préparatoires* do not give a clear and indisputable indication of the respective importance of both criteria. It is safe to say, though, that the two conditions are cumulative, each being a *conditio sine qua non* but *per se* not sufficient to engage the liability of the air carrier. Hence, the mere presence of a consignment in the airport area does not make the Warsaw system applicable.[55]

1. First Criterion: "In Charge"

The goods have to be in charge of the carrier and the control hereof has to be exercised in specified places. The concept of "charge" in the meaning of Article 18§2 of the Warsaw Convention originates from the essence of the duty to protect the goods against loss or damage. In view of the purpose of the Convention, the term "charge" should not be influenced by diverse concepts of domestic law like "possession" and

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[55] MAGDELENAT, J.-L., *"Air Cargo, Regulation and Claims"*, Butterworths & Co. Ltd., Toronto, 1983, 83; Cour d'Appel de Paris, June 27 1969, Sprinks & Cie. v. Air France, *Revue française de droit aérien*, 1969, 405.

"custody".[56] On the contrary, in order to achieve uniform private air law at international level a distinctively independent meaning should be derived from the logic-systematic context and the *travaux préparatoires* of the Convention. Looking at the spectrum of interpretations surrounding the much commented concept of wilful misconduct in the unamended version of the Warsaw Convention, for example, the search for such an extranational description might not prove to be a light task.[57]

From the *sui generis* concept *"la garde"* in the authentic French text it could be adequately understood that the air carrier is in charge of the goods when he can exercise actual control over them to avoid loss or damage.[58] The easiest construction would be that the cargo must be physically possessed by the air carrier. But even this factual criterium does not appear decisive, as long as the carrier- by his behavior- has not expressed a clear intention to take over

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[56] DU PONTAVICE, E., "L'interprétation des conventions internationales portant loi uniforme dans les rapports internationaux", *Annals of Air and Space Law*, 1982, Vol. VII, 16; Bundesgerichtshof, October 27 1978, *European Transport Law*, 1979, Vol. XIV, 651-659.; *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 61-66.

[57] With respect to air cargo, see (*inter alia*): SOLOMON, S., H., and GOLDMAN, S., E., "Recovery under the Warsaw Convention for loss of valuable air cargo", *Lloyd's Maritime and Commercial Law Quarterly*, 1982, 453-462; CHENG, B., "Wilful Misconduct: from Warsaw to The Hague and from Brussels to Paris", *Annals of Air and Space Law*, 1977, Vol. II, 55-99; CHAVEAU, P., "La faute inexcusable", *Annals of Air and Space Law*, 1979, Vol. IV, 3-9; SUNDBERG. W., F., *op.cit. (note 49)*, 239-245; Schweizerisches Bundesgericht, 11 July 1972, *Zeitschrift fur Luft- und Weltraumrecht*, 1973, Vol. 22, 129-138; Bundesgerichtshof, February 16 1979, Zeitschrift fur Luft- und Weltraumrecht, 1980, Vol. 29, 55-61; *Air Law*, 1981, Vol. VI, 97-100.
In view of the varying interpretations, the Hague Protocol replaced Article 25 by a new Article describing more clearly when the Warsaw limits will not apply. Comparison with version amended by the Protocol of The Hague: Swiss Bank Corp. v. Air Canada et al., Federal Court of Canada, Trial Division, October 22 1981, *Annals of Air and Space Law*, 1982, Vol. VII, 533-538.

[58] Oberlandesgericht Frankfurt, 21 May 1975, *Zeitschrift fur Luft- und Weltraumrecht*, 1975, Vol. 24, 218-221; Oberlandesgericht Frankfurt am Main, 10 January 1978, *Zeitschrift fur Luft- und Weltraumrecht*, 1978, Vol. 27, 215-217.

the goods under his responsibility (see *infra*). The carrier must have effective control over the goods in the true legal sense.[59] The circumstances of each case will determine when the carrier actually takes over the goods.

1.A. The Beginning of the Period

The period of liability of the air carrier does not necessarily begin when the contract of carriage is concluded, as shown by the air waybill following Article 11§1 of the Warsaw Convention. The argument that the air carrier did not formally accept the goods is quite irrelevant to the period of liability. The crucial moment is the taking into charge, an informal legal act by which the carrier accepts the goods for carriage. On the other hand, the document supplies *prima facie* evidence of receipt of the goods by the carrier in apparent good condition. This presumption- subject to proof of the contrary- applies even before the arrival of the goods at the airport.[60]

Following Article 9 of the Warsaw Convention, the carrier shall not be entitled to invoke the provisions which exclude or limit his liability, if he accepts goods without having issued an air consignment note. A document does not necessarily have to be signed before it may be said to be "made out" according to the meaning of Article 9, though an air waybill which is not signed has less evidentiary value. According to Article V of the Hague Protocol, the air waybill must be signed by the carrier before the loading on board the aircraft and not at the very acceptance of the goods. This amendment reflects the reality of door-to-door transportation by taking into account the unpractical situation of truck

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59 La Neuchateloise v. Deutsche Lufthansa A.G., Tribunal de Première Instance, *Annals of Air and Space Law*, 1986, Vol. XI, 377-383.

60 MARTINEZ CASIELLES, J., A., *op.cit. (note 53)*, 171-173.

drivers completing air waybills on the premises of the consignor.[61]

The time at which an air waybill is issued has further relevance as to the obligations of the air carrier and to the proof of the apparent condition of the goods at the moment they were accepted by the carrier. An air waybill rarely contains an annotation stating that the cargo does not appear to be in good condition at the time of delivery for transport. In the absense of any remarks, *quod plerumque fit*, a clean air waybill has- by virtue of Article 11§2- prima facie evidentiary value as to the good apparent condition of the cargo. This proof does not pertain to the actual condition of the goods, unless it has been verified by the carrier and consignor, and such fact has been inserted in the air waybill. The document thus plays a key role in the presumption of the carrier's liability according to Article 18, where the consignee or consignor still has to prove that the goods were not damaged when air transportation began. A statement as to the apparent condition of the goods is not mandatory where the Hague Protocol applies.

Finally, the fact that the consignor has not received a copy of the air waybill before the damaging incident can also be relevant with respect to the foreknowledge of its terms unless the same form of air waybill had frequently been used between the same carrier and shipper.

The sole use of a special container (like for the transportation of horses) made available by the air carrier, does not engage any liability under the Warsaw system, before the shipment has been handed over to his effective control in the airport area.[62]

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61 ICAO Legal Committee, 9th Session, Rio de Janeiro, August 25-September 12 1953, Minutes, Vol. I, Montreal 1954, Doc. 7450- LC/136, 198-202; NDUM, F., N., *op.cit. (note 26)*, 123.

62 Oberlandesgericht Nurnberg, May 29 1987, SCHMID, R., and BRAUTLACHT, A., "Ausgewahlte internationale Rechtsprechung zum Warschauer Abkommen

The air carrier is in charge of the goods once they are delivered to him by the consignor's lorry and as soon as the air carrier begins their unloading with his special equipment, for instance by means of fork-lift trucks.[63] The opening of the load door, the loosening of the blocks of the pallets puts the air carrier in a position to take over the goods and the commencement of the unloading expresses his readiness thereof.[64]

High value cargo is often driven in an armoured van of a security company, locked and guarded, into the warehouse of the carrier's ground handling agent. As long as the unloading process has not begun, the consignment does not come into the charge of the carrier when the warehouse staff has no actual control over it and no access to it.[65]

Although the cargo may be looked after on board an aircraft by the consignor or the consignee- or by their representatives- (e.g. with live animals) it remains in charge of the carrier within the meaning of Art. 18(2).[66]

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in den Jahren 1980-1987, Teil II", *Zeitschrift fur Luft- und Weltraumrecht*, 1988, Vol. 37, 23 and 184-186.

63 Bundesgerichtshof, October 27 1978, *European Transport Law*, 1979, Vol. XIV, 651-659; *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 61-66; DU PERRON, A., E., *op.cit. (note 12)*, 68.

64 Here a possible conflict may arise with the CMR, where it is generally accepted that (un)loading operations are part of the trucker's obligations. This follows *a contrario* from Article 17§4,c CMR, which relieves the road carrier of his liability if the unloading is done by the consignee or persons acting on his behalf. These findings can be easily transposed to the situation where an air carrier takes over the goods.

65 Swiss Bank Corp. et al. v. Brink's-Mat Ltd. et al., Queen's Bench Division (Commercial Court), November 14 1985, *Lloyd's Law Reports*, 1986, Vol.II, 79-99.

66 United International Stables Ltd. v. Pacific Western Airlines Ltd., British Columbia Supreme Court, March 26 1969, *Dominion Law Reports*, Third Series, 1969, Vol.5, 67-77; GOLDHIRSCH, L., B., *"The Warsaw Convention Annotated: a Legal Handbook"*, Martinus Nijhoff Publishers, Dordrecht (The Netherlands), 1990, 70-1.

However, the carrier may invoke contributory negligence, if applicable.

1.B. The End of the Period

Most difficulties about the concept of goods being in the charge of the carrier pop up at the place of destination. Judicial opinions appear to be evenly divided between basically two views on the matter.[67]

According to the first interpretation, the goods are in charge of the carrier from the moment they have been handed over to him until they are finally put at the disposal of the person entitled to delivery (see *infra*). This opinion, followed by a majority of the jurisprudence, is supported by the text of the Convention, that extends the period in order to include the period during which the goods are at an airport or even beyond.

The destruction of parcels because of an error committed by an airline while transferring them to the consignee, thus renders the former liable under the Warsaw system.[68] The mere fact that the merchandise was unloaded from the aircraft does not mean that the air transport has terminated.

The goods are also considered to be in custody of the carrier when they are still stored in his facilities, even when the

[67] DRION, H., *op.cit. (note 54)*, 83; Caisse Parisienne de Réescompte v. Air France, *Revue française de droit aérien*, 1955, 439; TOBOLEWSKI, A., *"The Evolution of the Provisions of the Warsaw Convention Relating to the Carriage of Cargo"*, Institute of Air and Space Law, Thesis LL.M., unpublished, Montreal, 1976, 58 etseq.

[68] Banque Libanaise v. SAS, Cour d'Appel de Paris, February 3 1977, *Revue française de droit aérien*, 1977,282; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 1-3, 45-81 and 117-125, 60-61; see also (post-delivery destruction): Cour de Cassation de France, 5 July 1988; Queen's Diffusion Top 21 SRL v. Société des Transports Internationaux Nord Express Skandiatransports SA, *European Transport Law*, 1988, Vol. XXIII, 734-737; Nevelle R. Stud v. Trans Internationa Airlines, US Court of Appeals, 9th Circuit, March 8 1984, 18 Aviation Law Reports. 17.684.

consignee or his agent has declared previously that the goods arrived in good condition in order to obtain the documents for customs clearance.[69]

The second view, based on the ordinary meaning of words, is that the goods must be deemed in the charge of the carrier until they lawfully leave his custody.[70] There are indeed situations where the air carrier cannot supervise the cargo or choose the entities or persons with whom he has to co-operate. Article 14 of the MT Convention states that the operator is no longer in charge of the goods when he has handed them over to an authority or other third party to whom the goods have to be entrusted pursuant to the local regulations of the destination. The concept of charge thus becomes double-edged, extending the period of liability beyond the air transport sensu lato (see *infra*, pick-up and delivery) or shrinking it to a time before delivery to the consignee.

The discussion becomes crucial in the quite common situation where goods are lost or damaged after having been delivered by the carrier to the customs authorities at the airport of destination, and stored in a warehouse pending clearance on behalf of the consignee.
The first construction attaches *prima facie* liability to the carrier pursuant to Article 18 of the Warsaw Convention. The second construction renders the Convention inoperative, as soon as the goods are legally handed over to someone else's control, and leaves the determination of a possible liability

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69 SCHMID, R., and BRAUTLACHT, A., *op.cit. (note 62)*, 23; Cour de Cassation (France), October 15 1968, Gaz.Pal., 1969, I, 105; DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1183-1184.

70 MAGDELENAT, J.-L., *op.cit. (note 55)*, 81.

to the relevant national law.[71] The carrier himself consequently would be entitled to invoke the limitation provided in Article 22, only to the extent that limitation would have been made part of the contract and that the clause would be held valid by the applicable national law. This view is expressed in Clause 8.2.2 of the IATA Conditions of Carriage for Cargo,[72] which specifies that delivery occurs when the carrier turned the goods over to customs.
Similarly, goods which are in private bonded storage after arrival- the sealing and opening of which must be done with the assistance of another company and the customs authorities- would not be in the carrier's care.[73]

In practice, however, the carrier may be held not liable consistent with either construction.[74] The second interpretation relieves the carrier anyway from liability with respect to goods which cease to be under his control.
According to the first interpretation, a carrier who is objectively reponsible for consignments while they are under the control of the customs authorities, may succeed in establishing a defence under Articles 20 and 21 excluding him from any liability. In most cases the air carriers cannot possibly take the necessary measures in order to avoid any damages, because public authorities act independently.[75] This

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71 SCHONER, D., "Die internationale Rechtsprechung zum Warschauer Abkommen in den Jahren 1974 bis 1976, Teil II", *Zeitschrift fur Luft- und Weltraumrecht*, 1978, Vol. 27, 156-157.

72 IATA Recommended Practice 1601, *Cargo Services Conference Resolutions Manual*, IATA, Montréal, 1991, 140-147.

73 Hermes Assurance Company v. PANAM, Court of Appeal of Buenos Aires, June 7 1973, *Novum Forum*, 1975, V-VI, 121; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 60.

74 MILLER, A. , J., *International carriage of cargo by air*, Institute of Air and Space Law (thesis LLM), Montréal, 1972, 75.

75 Favre v. Sabena, *US Aviation Reports*, 1950,392.

would be different when a private customs clearing company acts as a representative of the airline.
When the new regime of Montréal Protocol 4 comes into force, it will substitute presumed fault liability for strict liability (except for cases of delay), thus excluding the "all necessary measures defence". One of the four grounds on which the carrier may waive his liability, listed in Article 18§3, includes acts of public authorities carried out in connection with entry, exit or transit of cargo. As far as this refers to regular customs requirements, it suggests that the carrier would have been principally liable.

The *mise-en-scène* with spiteful incidents occurring at the customs authorities can be further complicated if one of the parties contributes to the damage or loss. A consignor may want to sue the carrier to recover the value of a consignment that has been seized by customs authorities at the airport of destination. The question then arises whether the carrier's conduct was responsible for the retention of the goods. The consignor may also find out that the consignee has refused to pay storage costs to the customs authorities, who subsequently have sold the goods.[76]

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For a number of reasons, it seems preferable to hold the air carrier *prima facie* liable for damage or loss before the goods are eventually made available to the consignee. The special weight given to the term "in charge" in the second interpretation probably originated in the context of the rather outdated idea of airport-to-airport services. Suspending the carrier's liability seems to unnecessarily complicate the matter by chopping up the transportation process, thus compelling the claimant to take action against previously unknown and literally distant third parties under an equally foreign legal regime. The latter are not subject

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[76] MILLER, A. , J., *op.cit. (note 74)*, 76.

to any equivalent of the jurisdiction rule under Article 28 of the Warsaw Convention, which enables the plaintiff in a limited way to choose a forum, most practically in the carrier's local place of business. Actually, the airline's responsibility never ends at the destination airport, as is shown by the carrier's obligation to follow up any instructions by the consignor according to Article 12 (stoppage in transit). The carrier should thus not be able to give up all control of the cargo at a stage where it is not actually made available to the consignee.[77]

Moreover, the Warsaw system does not seem to allow that a carrier- who has taken charge of the goods to be transported by air- would at the same time accept liability, not in his capacity as a carrier, but under another type of contractual relationship that possibly requires a lower standard of care of the carrier. It could sometimes be tempting to qualify a ground handling agent of the carrier as a warehouseman or as a bailee, who has "only" a duty of reasonable care in the light of the circumstances known to him at the time (see *infra*). Even the fact that the carrier may be unable to effect delivery of a shipment to the person entitled to receive it, does not excuse him from his obligations *vis-à-vis* the consignor. The responsibility of an air carrier is not limited to the transfer of goods from one place to another, but it extends to all other accessory activities necessary to reach the practical end of the contract of carriage.[78] Nothing prevents, of course, the explicit

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[77] Caisse Parisienne de Ré-Escompte v. Air France, Cour d'Appel de Paris, May 31 1956, *Revue française de droit aérien*, 1956, 439; Rechtbank van Koophandel, Antwerpen, 10 December 1975, The Guardian Insurance Company v. Sabena et al., *European Transport Law*, 918-934; Oberlandesgericht Frankfurt, 21 May 1975, *Zeitschrift fur Luft- und Weltraumrecht*, 1975, Vol. 24, 218-221; GOLDHIRSCH, L., B., *op.cit. (note 66)*, 71. DU PERRON, A., E., *op.cit. (note 12)*, 71.

[78] (non-Warsaw): Magnetofoni Castelli v. Jacky Maeder and Alitilia, Court of Appeals of Milan, October 18 1977, *Air Law*, 1988, Vol. XIII, 189; see also, *mutatis mutando* (surface transport): Mc NEIL, J., S., *"Motor Carrier Cargo Claims"*, The Carswell Company Ltd., Toronto, 1986.

establishment of a separate contract for warehousing prior or posterior to the carriage by air.

The system adopted at the Warsaw Conference of 1929 is analogous to Article 27§1 of the International Convention concerning the Carriage of Goods by Rail (CIM)[79], which is construed to include the period that the goods are being handled by the administrative authorities.[80] In the CMR system, passing through customs at borders is also considered to be a circumstance ancillary to the carrier's operations.[81] One could easily submit, of course, that a truck driver- contrary to an air carrier- usually stays with the goods, exercising direct control over them (*omnis comparatio claudicat*).

2. Second Criterion: Air Transport Sensu Lato, On Board the Aircraft or in the Airport Area

Following Article 18§2 of the Warsaw Convention, the period of the transport falling under the Warsaw Convention requires principally that the goods have to be on board of an aircraft, in the airport, or in the case of a landing outside an airport, in any place whatsoever. The period of liability in the last situation appears to be solely determined by reference to the fact that the goods are in the charge of the carrier.

The term "airport" should not be taken in the strict and plain sense of the word, namely as a zone that is limited to

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79 *Convention relative au contrat de transport international de marchandises par chemin de fer*, "International Transport Treaties", Kluwer Law and Taxation Publishers, Deventer-Boston, supplemented, V, 58 etseq.

80 DRION, H., *op.cit. (note 54)*, 84.

81 See cases: PONET, F., *"CMR Rechtspraak"*, 1986, Kluwer Rechtswetenschappen, Antwerpen, 317 etseq.

air traffic. According to the general intent of the Convention's framers, the area encompassed by the heightened liability standard of the Warsaw system is defined by its economic perimeter, rather than to stop at the airport fence.[82]

If, for example, a consignment of gold is stolen from airport warehouses or strong rooms of the carrier or his agent, then the definition in Article 18(2) will be satisfied.[83] The carrier will be *prima facie* liable for the damage suffered and his liability will be limited in accordance with the terms of the Warsaw system.

This case may be contrasted with the theft of a consignment from the city office of a carrier outside the airport area, before or after the completion of the transportation.[84] Even though the consignment was under the carrier's custody, the Warsaw system does not apply because the goods were not lost during the transportation by air *sensu lato*. The carrier's liability will then be determined by a possibly more favourable national law (see *infra*).

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[82] La Neuchateloise v. Deutsche Lufthansa A.G., Tribunal de Première Instance, *Annals of Air and Space Law*, 1986, Vol. XI, 380-1; KATTEN, MUCHIN, ZAVIS and DOMBROFF, *18th Annual ATA Claims Prevention Seminar*, Arlington (Virginia), May 28-30 1991, unpublished, 8-9; contra: Victoria Sales Corporation v. Emery Airfreight Inc., 917, *Federal Reporter* 705, 1990.

[83] Eve Boutique Imports Inc. et al. v. Swiss General Insurance Co., Civil Court of the City of New York, January 5 1968, *US Aviation Reports*, 1968, 33-35; Corocraft Ltd. et al. v. Pan American Airways Inc., Court of Appeal (Great Britain), November 7 1968, *US Aviation Reports*, 1969, 661-698; KERR, R., E., and EVANS, A., H., M., *"Lord Mc Nair: The Law of the Air"*, Stevens & Sons, London, 1964, 183-184.

[84] see cases: SCHONER, D., *op.cit. (note 72)*, 157.

3. Extension: Pick-up and Delivery

3.A. Principle

Probably the most important question of this study boils down to whether surface transportation is to be governed by the Warsaw system or by international or domestic rules of road haulage. The previous explanation may suffice if the involvement of the air carrier is limited to his classical function of airport-to-airport carriage, leaving the organization of surface transport prior to acceptance and after delivery to the consignor or the consignee. However, the problem becomes more complicated in a situation where the air carrier committed himself to a door-to-door delivery.

Contrary to the principle of solidarity among successive carriers of the same mode towards consignors and consignees (Article 30 of the Warsaw Convention), carriers of separate modes operating under a unique contract are not jointly and severally liable for the performance of the entire transport.[85] The history of the Multimodal Transport Convention shows that any form of solidarity among carriers with non-identical legal positions can hardly be achieved.
Unimodal conventions resolve legal issues as to continuous transport involving several modes by applying the proper regime of each segment between origin and destination of the goods or by scheming a principal mode and another secondary.[86] The first mode is used for the largest and most expensive part of the journey, the second- mainly transport by road- on the feeding routes to and from ports, stations and airports.

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[85] RODIERE, R., *"Droit des transports terrestres et aériens"*, Dalloz, Paris, 1981, 351.

[86] PELLON RIVERO, R., *op.cit. (note 6)*, 57.

Article 18§1 of the Warsaw Convention places the onus on the claimant to establish that the event which caused the damage took place during the transportation by air.[87] In order to ease the problems that a plaintiff may face in establishing the precise time that cargo was lost or damaged, a rebuttable presumption of liability is applied in his favour. This technique links up with the plain observation that air cargo, unlike passengers, cannot relate its whereabouts. Passengers can immediately take the initiative to complain or make arrangements with the airline, while delay, loss or damage to cargo is usually traceable only after a substantial period of time.[88]

If the goods are accepted outside the airport area and surface transportation takes place in the performance of a contract of carriage by air for the purposes of loading, delivery or transshipment, then any damaging event is deemed (juris tantum) to have occurred during the air segment (Article 18§3). The onus thus shifts to the parties to prove the contrary, namely that the event took place outside this period.

The presumption is clearly grafted upon the principle that the period of liability starts at the time of actual acceptance of the goods by the carrier for air transportation and terminates at their delivery to the consignee at the airport or on the latter's premises. However, paragraph 3 of Article 18 does not eliminate the second criterion that the goods have to be on board of an aircraft or in the airport area. The so-called extension for damage outside an airport rather constitutes a procedural aid to define the period of

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[87] The term "event" is conceived to be wider than the word "accident" used in Article 17 with respect to the air transport of passengers. See: GOLDHIRSCH, L., B., *op.cit. (note 66)*, 72-4.

[88] CORREA, J., B., *"La Responsabilidad en el Derecho Aereo"*, Consejo Superior de Investigaciones Cientificas junta de Estudios Economicos, Juridicos y Sociales, Madrid, 1963, 71-2; NAVEAU, J., GODFROID, M., *"Précis de droit aérien"*, Bruylant, Brussels, 1988, 225.

liability, shifting the burden of proving the contrary to either party involved. If it appears that the damaging event actually took place during the surface transport, the Convention will not apply- even when such transportation was incidental to an air carriage contract. This preliminary attribution of damage to the air phase reflects the nature of air transport, which requires the support of other modes to connect airports with the ultimate destinations.

On the whole, the air carrier may find himself in a comfortable position where the surface transportation takes place for the purposes of loading, delivery or transshipment. If the Warsaw system is more favourable to him, he may require that the consignor or the consignee proves that the damage occurred during surface transportation. Without this proof, the presumption will stand. When possible, he may also prefer to establish that proof himself. Of course, the plaintiff may also be interested in such a proof when he can rely on a liability regime that offers a better compensation than the Warsaw system. In practice, the carrier usually sits at the source of the relevant information, and this often turns out to be a considerable advantage.

3.B. Definition

The operation of the presumption depends upon the meaning of "for the purpose of loading, delivery or transshipment". Transshipments, not originating in the airport of departure or arrival, are inevitable where no direct services exist.[89] Where the water gets deep when venturing into the subject of pick-up and delivery, the concept of transshipment does not appear to raise many issues of significance, so that it can be retained on the background of the following discussion.

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89 SMITH, P., S., *op.cit. (note 5)*, 205.

Transfers between successive air carriers within the airport area and surface movements between aircraft and airport facilities, performed by the airlines themselves or by their handling agents, are obviously for the purpose of loading or unloading. Even though, these operations could better be qualified as air transport *sensu lato* under Article 18§2 instead of "transshipment" under Article 18§3.

Road transport can be provided for at the issuance of the air waybill to pick up or deliver the goods, making it a phase which is incidental to the performance of the air carrier. However, this does not imply that the parties themselves are free to define these operations to their own benefit.

The Warsaw system does not apply when the initial or final transport is done by the consignor or the consignee or by a carrier appointed by one of them. On the other hand, the definition of incidental transport cannot be based on whether the surface transport is performed by the airlines themselves or by other companies. The service is complementary due to the nature of the transport itself, abstract from the diversity of entities exploiting the vehicles.[90] Obviously, this reduces the legal relevance of the distinction between vertically integrated companies and companies which resort to the services of independent subcontractors for trucking, local cartage, handling and customs clearance (see *infra*).

The problem of defining auxiliary transport to the air segment had also to be dealt with in domestic public air law, seeking a fair and workable system to avoid potential conflicts between several authorities. A good example is found back in the United States federal law before the

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[90] MAPELLI Y LOPEZ, E., *"El Contrato de Transporte Aereo Internacional"*, Ed. Tecnos, Madrid, 1968, 277.

deregulation of trucking by the 1980 Motor Carrier Act.[91] The interstate movement of property by truck was normally subject to economic regulation by the Interstate Commerce Commission (ICC), except for motor transportation incidental to transportation by aircraft pursuant to section 203(b)(7a) of the Interstate Commerce Act. The latter type of movements fell under the regulations of the Civil Aeronautics Board (CAB) and were regulated as services in connection with air transportation within the meaning of section 403(a) of the Federal Aviation Act. This division recognized that the modus operandi of air carriers is sufficiently different from that of land carriers.[92]

The proper line of demarcation between the ICC and CAB overlapping jurisdictional spheres was a matter of interpretation, since the Interstate Commerce Act failed to specify where exactly truck delivery services in and around airports ceased to be transportation incidental to air service and became subject to ICC jurisdiction.
Three cumulative conditions must be met by motor carriers in order to qualify for exemption from ICC economic regulations. Road transport was to take place immediately prior or subsequent to movement by a direct air carrier and it had to be part of a continuous line-haul movement under a through bill of lading, issued by either a direct or indirect air carrier. Finally, the service must be performed within the terminal area of either the direct or indirect carrier according to its tariff.

The only fairly workable delimitation between exempt and non-exempt operations was the scope of the operational terminal area, reflecting the exempt motor collection and distribution

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91 DONOGHUE, J., "Air Freight Forwarders Struggle to adapt to a New Environment", *Air Transport World*, 2, 1982, 52-3.
92 In Re Philadelphia International Airport, Interstate Commerce Commission, July 3 1975, *US Aviation Reports*, 1975, 627.

service zone that had developed as a result of the practical and economic necessities of the air transportation industry. The CAB used a 25-mile "rule of thumb" to determine a quantified geographical radius for air carrier pick-up and delivery service tariffs, unless such service constituted a bona fide pick-up and delivery service within the limits of a larger terminal area generally delineated by considerations of community homogeneity.[93]

It remains doubtful whether a similar solution could be transposed to private international air law. A confinement to local traffic within city or even state limits might prove unreasonably restrictive in Europe, where airports may be situated virtually on the state border. The immediate area around the Maastricht airport, for example, encompasses no less than three countries. Nor would a mileage limitation be practicable in view of the substantial distances separating some ports and airports from the population centres they serve (e.g. as in the United States).[94]

Incidental road transport and other bimodal services are not to be distinguished by the length of the surface leg, but rather by their purpose. The essential element is surely that the pick-up and delivery services must be performed pursuant to a contract providing for a transport by a main mode and a mode incidental to such transport.

It is a public secret that air carriers find it sometimes convenient to transport air cargo alternatively by truck. A flight may not be immediately available or, for a number of reasons, the use of a truck for a particular segment may be advisable in the interest of speed. Such substitute services

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[93] In Re Philadelphia International Airport, *op.cit. (note 92)*, 628.

[94] FITZGERALD, G., F., *op.cit. (note 43)*, 211.

stand rather by their own and can hardly be considered incidental to the air segment.
A simple example of non-incidental transport for economic reasons would be a combined sea-air transport, whereby goods are flown from JFK, New York, to Los Angeles and further carried by ship to Kobe, Japan. Such combinations would offer a wide range of options with regard to available routes and modes, based on a trade-off between the high freight that the sole use of air transport would necessitate and the saving in transport time.[95] Admittedly, the extensive variety of bimodal truck-air operations are more difficult to define.

As the CMR does not extend its scope beyond transport of goods on wheels across a frontier[96], there is no other overlap between the Warsaw system and the CMR than the subsidiary application of the former to pick-up and delivery situations. Article 2§1 CMR only envisages so-called kangaroo transport, which is extremely exceptional in civil air transport. Where the vehicle (i.e. not just a container, but with a trailer) loaded with the cargo is carried partly by sea, rail, inland waterways or air, the CMR will thus under certain conditions apply to the entire carriage.[97]
In the past, however, there have been "usurpations" by one Convention, since some major container shippers extorted from sea carriers the applicability of the CMR to the entire combined transport.[98]

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95 TAPNER, H., *op.cit. (note 1)*, 38-39.

96 DONALD, A., E., *op.cit. (note 13)*, 8; CMR Article 1.

97 ASTLE, W., E., "International Cargo Carriers' Liabilities", Fairplay Publications Ltd., London, 1983, 117-121.

98 DORRESTEIN, T., H., *op.cit. (note 3)*, 68-83.

3.C. Long Haul Road Feeder Services

Hubbing or road feeder services (RFS), pioneered by the integrators to feed the main gateways, are more problematic. Driven by a number of strongly interlinked factors, there has been an apparently increasing momentum of moving freight under air waybill by road throughout Europe.[99] With the introduction of wide-bodied aircraft in the 1970s airlines not only increased passenger capacity but also the available amount of freight capacity. The "combi" Boeing 747 aircraft offers between 30 and 40 tons freight capacity, substantially more than existing narrow-bodied aircraft.[100] Attempts to fill this extra belly space resulted in the softening of air cargo revenues and the spread of the airlines' marketing nets for international cargo, attracting more traffic from regions other than their domestic markets. The move to trucks on feeding gateways appeared to be logical to improve aircraft utilization by developing a better mix of dense and volumetric commodities, and to obtain rate discounting required to attract traffic for what was in effect a deferred air freight service (compared to the direct services available).

Passenger feeder aircraft were mostly uncapable of carrying interline unit load devices (see *supra*) and the scheduling compatibility between passenger and freight demands was utterly poor. Moreover, consignment characteristics such as height, weight or hazard required often the use of freighter aircraft only. The use of the latter vehicle was by itself hampered by the unfavourable economies of short-haul freighter operations and the increasing bans of pure freighter night-flying services in Europe.

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99 "Airline Freight under Air Waybill", *op.cit. (note 4)*, 13-17.

100 DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1989, 1069.

The development of surface feeder networks was further given impetus by export clearance delays and congestion in airports, airline terminals and passenger arrival halls.
Finally, air cargo carriers were confronted with duopolies of flag carriers on authorized routes, following bilateral agreements restricting flight capacity and rights to market entry. Since it is rather easy to have market access and to hire extra capacity in road transport, European-wide truck feeder and distribution systems have been developed as an alternative to service intercontinental air cargo gateways.

The practice of hubbing is predominantly orientated towards the movement of intercontinental traffic to and from a major airport.[101] That share of the intra-European air cargo traffic which remains with the schedule carriers is mostly flown in passenger aircraft.
The entire development of hub and spoke systems by truck is splendidly reflected by the design of airport facilities. A few decades ago, all air cargo would be collected or delivered in small trucks within the catchment area of the airport and flown to or from that airport by freighter aircraft. Most of European airport cargo areas were therefore re-designed in the 1960s and the 1970s with airside parking areas for freighter aircraft adjacent to a customs bonded freight transit terminal. Nowadays, the drop out of cargo aircraft has freed up slots and airside facilities for additional passenger aircraft. On the other hand, an increasing volume of unflown air cargo trucked on the landside of airports seems to cause new concerns among airport authorities.[102]

Obviously, these international feeder services have also shaped the concept of air cargo, but there remains a lot of

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101 FITZGERALD, G., F., *op.cit. (note 43)*, 207.

102 *"Airline Freight under Air Waybill", op.cit, (note 4)*, 16-17.

confusion in dealing with the phenomenon legally. Airlines now schedule road feeder services in much the same way as they would schedule an aircraft. Most carriers clearly mention RFS connections in their service tables giving routes, days, departure and arrival times, while notional slot times exist in order to meet scheduled connections. For customs and carrier purposes truck movements are given a flight number which usually consists of the carrier code and four digits.

Testing these operations by the above description of incidental transport, there seems to be no fundamental objection against qualifying hubbing services as for the purpose of pick-up or delivery. The surface segment of door-to-door services then passes two distict phases. The contracting carrier organizes RFS following a fixed schedule on specified routes to and from airports (B-C), preceeded or followed by the actual pick-up and delivery to and from the outer points of the transport (A-B and C-D).[103] Admittedly, the authors of the vintage Warsaw Convention probably had a totally different situation in mind when setting the rules for auxiliary surface transport. However, nothing prevents an evolutive interpretation of the drafters's intentions (if they can be discerned) where the text itself would lead to inacceptable results.[104] The construction encompassing RFS might become questionable in case of an incomplete service, i.e. when the consignor or the consignee himself takes takes care of the section between the liner station and the premises. Unfortunately, no known court decision has dealt with this hypothesis yet.

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[103] DORRESTEIN, T., H., *op.cit. (note 3)*, 9.

[104] With respect to the Vienna Convention on the Law of Treaties (July 10 1964), see: DU PONTAVICE, E., *op.cit. (note 56)*, 25; DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 992-993.

Maintaining the link with air transport, the trucked goods have to be air-eligible, i.e. physically, legally and economically suitable for air carriage.[105] Goods to be loaded on aircraft may be precluded by nature, excessive weight or volume. Only a high value/weight ratio justifies elevated air freight charges. Where possible, carriers load all cargo into unit load devices (see *supra*) so as to allow immediate transfer onto connecting flights.

However, the use of air transport documents and packaging methods for road feeder services is not always compatible with domestic and international trucking regulations, especially those for hazardous materials.[106]
The handling and packaging specifications, labelling, marking, classification and quantity limitations for such air cargo are covered in detail by the ICAO Annex 18 and Technical Instructions, which are practically in line with the present manual of IATA Dangerous Goods Regulations.[107]
The regulations for movement of dangerous substances and articles by "combi" (passenger/cargo) aircraft (PAX OK) are especially stringent as to the formalities prior to loading, the positioning of consignments on board aircraft and the weight or volume allowed on each flight. Some materials such as explosives and radioactive materials may be conveyed by cargo aircraft only (CAO). Since few freighter aircraft are available for feeder services, a large amount of dangerous materials is alternatively trucked to the hub airport.

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105 VIDELA ESCALADA, F., N., *op.cit. (note 1)*, 396.

106 The transport of such substances by air now accounts for an average of 10% to 15% of all air cargo; "Air Freight", *Backgrounder*, IATA, Geneva, gva 8210, 2.

107 MAGDELÉNAT, J.-L., "Le transport par air des matières dangereuses et la nouvelle Annexe 18 de la Convention de Chicago", *Annals of Air and Space Law*, Vol. VI, 75-87; IATA Resolutions 618-619, *Cargo Services Conference Resolutions Manual*, IATA, Montréal, 1991, 59-60.

As for trucking, for example, consignments moving under the ADR (*l'accord européen concernant le transport international des marchandises par route*)[108] require that a TREMCARD be completed for each language of the countries transited. In addition the vehicle must be plated and furnished with equipment capable of dealing with an incident. Passage through tunnels is subjected to special restrictions.

For the time being, some air carriers scrutinously observe the appropriate documentation and handling prescriptions when trucking dangerous materials, while others simply adhere the principal of precedence by complying with the most strict regulations, being those issued by ICAO and IATA.

4. Contractual Extension: Combined Transportation and Damage Localized in a Surface Segment

As a preliminary remark, no uniform criteria exist to clear out the promiscuous use of the terms "intermodal", "combined", "multimodal", "mixed", "containerized" and "unitized". Without polemizing the matter, the term "combined" transport could be used for the carriage of the goods with several modes under a sole transport document, but governed by a different legal regime for each type of transport.[109] "Multimodal" transport is understood as the carriage of goods involving at least two modes under a multimodal contract and subjected to one legal regime (see *supra*).

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[108] 1957 Geneva Convention on the International Transport of Dangerous Goods by Road, "*Transport Laws of the World*", Oceana, New York, I, IB II.

[109] PELLON RIVERO, R., *op.cit. (note 6)*, 60; DONATO, A., M., *op.cit. (note 19)*, 170.

4.A. Principle

Article 31 of the Warsaw Convention- in accordance with the general terms of Article 1- provides that in cases where one stage of the journey is performed by non-aerial transport, the convention shall only apply to the carriage by air. In principle, the surface segment is to be governed by the appropriate domestic or international regime of the mode involved.[110]

Article 31§2 allows the parties to insert a limitation of liability clause in the air waybill insofar as it relates to surface transportation only, i.e. without abrogating any provisions of the Convention for the air segment. At least under French law, airlines are thus able to benefit from exoneration clauses in the road haulage contract.[111]

On the other hand, Article 31§2 also allows to extend the conditions of the Warsaw system to the surface segment by virtue of contract. Air carriers have been issuing through air waybills covering transport from door to door whenever they carry out a combined goods transport operation, even if Article 18 is not satisfied (such as with substitute road haulage). In the non-aviation part of transport, users may then benefit from the Warsaw system, which is often more advantageous to them than other regimes- especially with regard to the limits of liability. Shippers also prefer to deal with a single airline from origin to destination instead of multiple parties, because it facilitates tracing, security, insurance and claims.[112]

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110 Landgericht Koln, 10 June 1987, *Zeitschrift fur Luft- und Weltraumrecht*, 1988, Vol. 37, 262-265.

111 MAGDELENAT, J.-L., *op.cit. (note 55)*, 82.

112 TANEJA, N., K., *op.cit. (note 17)*, 108.

However, where the Warsaw system comes into force by the contractual stipulations between parties only, it rarely regulates the whole contract in the performance of the various parts.[113] While it is crystal clear that the Warsaw system does not apply where damage has arisen during the course of the road segment of a combined carriage, it seems to be more difficult to determine what exactly does apply. One cannot assume that surface carriage takes place in a permissible vacuum, leaving complete freedom of contract (or better: the freedom of contracting out) to the parties. The contractual extension of the Warsaw system to a surface mode can thus only be valid insofar as it is not contrary to the compulsory rules of domestic or international law with respect to that mode.

In the European context, this means that the contract of cross-border road transportation is likely to be governed by the 1956 Geneva Convention on the International Carriage of Goods by Road (CMR, see *supra*), possibly modified in order to attain the relatively high limits of Article 22 of the Warsaw Convention.

Save compensation *ad valorem*, the CMR limits carrier's liability to a comfortable 8.33 Special Drawing Rights of the International Monetary Fund (or 25 Germinal gold francs) per kilogramme, approximately half as much as the 17 SDR (or 250 gold francs Poincaré) limit operative in the Warsaw system.[114]

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[113] MAPELLI Y LOPEZ, E., *op.cit. (note 90)*, 275.

[114] Montréal Protocol 4 introduces the SDR currency units (see *supra*) for the Warsaw system; EHLERS, P., N., *op.cit. (note 15)*, 81-108; FITZGERALD, G., F., *op.cit. (note 15)*, 323-330.
For the conversion of gold francs or SDR into national currencies, see Trans World Airlines v. Franklin Mint Corp. et al., US Supreme Court, April 17 1984, *US Aviation Reports*, 1984, 42-83; *Lloyd's Law Reports*, 1984, Vol.II, 432-443; *Zeitschrift fur Luft- und Weltraumrecht*, 1983, Vol. 32, 155-163; *Zeitschrift fur Luft- und Weltraumrecht*, 1984, Vol. 33, 231-239; *Annals of Air and Space Law*, 1984, Vol. IX, 533; US Court of Appeals, 2nd Circuit, September 28 1982, *Lloyd's Law Reports*, 1984, Vol.I, 220-225; *Annals of Air and Space Law*, 1982, Vol. VII, 601-611;

However, the lesson from the MT Convention learns that a comparison of the conditions of liability of international transport conventions cannot be limited to the simple arithmetics of the quantum of damages. Extensive discrepancies may occur relative to standards of care, exoneration, liability of agents, time limitations, etc. linked to each mode of carriage.

For example, Article 26§2 of the Warsaw Convention requires that- except when fraud is at stake- a written complaint for damage (or partial loss) must be made within seven days from the date on which the goods were placed at the disposal of the person entitled to delivery.[115] In case of delay, the air carrier must be notified within fourteen days from that date. Article XV of the Hague Protocol extended these notification periods for damage and delay to fourteen days and three weeks respectively. If the goods have not arrived at their destination after seven days from the date on which they are due, then Article 13§3 of the Warsaw Convention grants a right of action to the consignee, subject only to the two-year limitation period contained in Article 29. However,

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EHLERS, N., "Ein Erdutsch in der deutschen Rechtsprechung zur Frage der Umrechnung des Poincaré-Franc?", *Zeitschrift fur Luft- und Weltraumrecht*, 1985, Vol. 34, 68-73; S.S. Pahramaceutical Co. Ltd. et al. v. Qantas Airways Ltd., Supreme Court of New South Wales (Australia), Commercial Division, September 22 1988, *Lloyd's Law Reports*, 1989, Vol.I, 319-330; BARLOW, P., "Article 22 of the Warsaw Convention: in a state of limbo", *Air Law*, 1983, Vol. VIII, 2-30.

[115] Notification for partial damage as for damage: Fothergill v. Monarch Airlines Ltd. et al., House of Lords, 10 July 1980, *European Transport Law*, 1983, Vol. XVIII, 609-653; *Air Law*, 1981, Vol. VI, 40-43; Court of Appeal (great Britain), July 31 1979, *US Aviation Reports*, 1979, 941-963; M.E. Benby v. Seaboard World Airlines and Flying Tiger Lines, US Court of Appeals, 2nd. Circuit, June 7 1984, 18 Aviation Law Reports 17.970; Affretair v. VOB, Hoge Raad, February 12 1982, *Air Law*, 1982, Vol. VII, 173-177.
As for loss: Rechtbank van Koophandel te Brussel, 8 June 1982, Guardian Royal Exchange Ass. et al. v. Air Zaire, *European Transport Law*, 1986, Vol. XXI, 273-276; Court of Appeal of Beirut, 4 April 1973, *Zeitschrift fur Luft- und Weltraumrecht*, 1974, Vol. 23, 144-145; Bernard Schimmer v. Air France et al., Civil Court of the City of New York, June 2 1976, *US Aviation Reports*, 1976, 482-485.

Article 12.2.4 of the IATA Conditions of Carriage for Cargo requires that complaint for loss is made within 120 days from the date of issue of the air waybill. The validity of this standard clause remains controversial.[116]

According to Article 30 of the CMR, reservations must be given not later than the time of delivery in the case of apparent loss or damage. Claims for non-apparent loss or damage must be notified within seven days after delivery to the consignee.[117] Following Article 30§3 of the CMR, claims for delay are not valid (sic) unless a reservation has been sent in writing to the carrier within twenty-one days from the time that the goods were placed at the disposal of the consignee. The Warsaw Convention, contrary to the CMR, does not exclude Sundays and other (locally diverse) public holidays from the computation of the notice period. Under the Warsaw system and the CMR, the lack of timely notice for damage will result in an assumption that the shipment has been delivered to the consignee in good condition.[118]

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[116] Valid: Bernard Schimmer v. Air France et al., Civil Court of the City of New York, June 2 1976, *US Aviation Reports*, 1976, 482-485. Null and void: Bundesgerichtshof, 22 April 1982, *European Transport Law*, 1983, Vol. XVIII, 675-685; *Zeitschrift fur Luft- und Weltraumrecht*, 1982, Vol. 31, 378-382; Cour d'Appel de Paris, Cie. Générale de Géophysique v. Cie. Sabena, 16 October 1979, *European Transport Law*, 1983, Vol. XVIII, 686-694; Affretair v. VOB, Hoge Raad, February 12 1982, *Air Law*, 1982, Vol. VII, 173-177.

[117] The Warsaw Convention does not technically distinguish between apparent and non-apparent damage. See: FITZGERALD, G., F., "The Provisions concerning Notice of Loss, Damage or Delay and Limitation of Actions in the United Nations Convention on International Multimodal Transport of Goods (Geneva 1980)", *Annals of Air and Space Law*, 1983, Vol. VIII, 45 and 62-63.

[118] Tribunal de Commerce de Bruxelles, 13 January 1982, Orient Fire and General Ins. v. S.A. Swissair and Sabena, *European Transport Law*, 1983, Vol. XVIII, 695-701; Rechtbank van Koophandel te Brussel, 4 February 1987, Ketzel Klaus et al. v. NV Belex Air Freight, *European Transport Law*, 1987, Vol. XXII, 468-474.

Moreover, Article 32 of the CMR provides a one-year limitation period (three years in case of wilful misconduct) to file any actions, commencing on various dates depending upon specified circumstances.[119] The Warsaw Convention sets a two-year period, commencing from the date of arrival at the destination, or from the date on which the aircraft should have arrived, or from the date on which the carriage stopped. The mentioned periods may in practice are only a minimum duration for the limitation period, because the method of calculating the period, including the possibility of suspension or interruption, is determined by the law of the forum. If the air carrier deals with a claim following the Warsaw system, it may be impossible to start a recourse action against the road carrier, since the period during which one can claim is shorter for road transport than for air transport.[120]

These remarks are meant to be indicative, rather than exhaustive. In certain countries the regime governing domestic carriage may be considerably different from that governing international carriage for the same mode of transport, resulting in a more favourable situation for either the cargo owner or the carrier. To the benefit of the plaintiff, national legislation may provide a higher standard of care for a surface carrier than the CMR or the Warsaw standard (all necessary measures). It may impose the liability of an insurer of the goods in his custody or it may deny any limitation of damages.[121] Domestic law, as the Warsaw

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[119] RIDLEY, J., *"The Law of the Carriage of Goods by Land, Sea and Air"*, Shaw and Sons Ltd., Shaway House, 1978, 250.

[120] DOBBELAER, J., et al., *"KLM Trucking, Een Nieuwe Visie op aan- en afvoer"*, unpublished, Amstelveen, 1988, 27.

[121] Dora Pick v. Deutsche Lufthansa Aktiengesellschaft et al., Civil Court of the City of New York, December 3 1965, *US Aviation Reports*, 1967, 973-985; Silberman Fur Corporation v. Air Freight Transportation Co. et al., Civil Court of the City of New York, December 17 1968, *US Aviation Reports*, 1968, 288-288.

Convention and the CMR, usually nullifies exculpatory clauses for cases within its scope.[122]

It can be safely concluded that the unicity of the document formalizing the contract of carriage does not eliminate the diversity of rules applied in the separate segments of the performance. This problem will grow even more important when Montréal Protocol 4 enters into force, creating a legal regime that in many respects considerably differs from the CMR and most domestic regimes.

4.B. Not Localized Damage in Combined Transportation

The presumption of Article 18 § 3 that the damage occurred during the air segment, does not apply when the surface transportation does not constitute an incidental part of the combined contract. The plaintiff would have to establish the difficult proof that the damaging event occurred during the period of transportation by air.[123]
Unfortunately, following the CMR the parties are not entitled to a corresponding presumption that the loss was sustained during surface leg of a combined transportation.
Since both the Warsaw system and CMR require proof by the plaintiff that the damage occurred during the air or land segment respectively, he could be conceivably barred from both regimes. According to both systems it is obvious that the carrier would be prima facie liable after accepting the goods in apparent good condition, but under which regime and which carrier exactly? Alleging that the contracting air carrier bears the responsibility for the entire journey seems logic, but that solution again leads back to the- here excluded- hypothesis of incidental surface transport.

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[122] PELLON RIVERO, R., *op.cit. (note 6)*, 90.

[123] GOLDHIRSCH, L., B., *op.cit. (note 66)*, 74.

Where the transport is clearly segmented, the probatory function of the multiple traffic documents could come into play to break the vicious circle. The document for surface transport would show that the first carrier received the shipment in apparent good condition (quod plerumque fit).[124] If the air carrier issued also a clean air waybill, then the presumption of fault shifts to the latter- or even to the carrier of the last surface leg.[125]

Even if the goods travel under a sole document of carriage covering the entire voyage, namely the air waybill, it could still be possible to invoke a presumption of fault under a particular regime. In a rather theoretical cluster of presumptions, the last (surface) carrier would turn out to be liable for non-localized damage. The single transport document shows that he has received the consignment in apparently good condition, while he has not made any protest against preceeding carriers with regard to loss or damage. This rather absurd situation could be avoided by scrupulously following signature and annotation procedures for each shipment.[126] Each participant, in his capacity of air or surface carrier, should make his reservations on the

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124 Following Article 11§2 of the Warsaw Convention, statements relating to the quantity, volume and (non-apparent) condition of the goods do not constitute evidence, except when they are checked in the presence of both the consignor and the carrier. The carrier does not have to make any reservation concerning this information if it is recorded by the consignor only. See: Hof van Cassatie van Belgie, 30 September 1988, Pacific Employers Insurance Company v. KLM et al., *European Transport Law*, 1988, Vol. XXIII, 97-100; Landgericht Frankfurt am Main, 6 January 1987, *Zeitschrift fur Luft- und Weltraumrecht*, 1988, Vol. 37, 85-86; GIEMULLA, E., and SCHMIDT, R., "Ausgewahlte internationale Rechtsprechung zum Warschauer Abkommen in den Jahren 1987-1989", *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 174-175

125 MARTINEZ CASIELLES, J., A., *op.cit. (note 53)*, 171-173.
Article 35§1 CMR stipulates that a carrier accepting goods from a previous carrier, shall give the latter a dated and signed receipt. As in air transport, this duty is not often observed.

126 BERNAUW, K., C., A., *"The Legal Aspects of International Air Courier and Air Express Services"*, Institute of Air and Space Law, unpublished, Thesis LLM., Montreal, 1985, 37 and 130.

document upon receipt in order to avoid any liability for visible damage or apparent delay.

Air express companies use a computer tracking system to provide information for the customer about their shipments during the entire transit time. Especially for government controlled drugs and high value merchandise, a record is kept of the signatures made by each person responsible for custody of the package from origin to destination. Fully integrated companies can easily take advantage of closed loop services, in which the shipment from pick-up until delivery never leaves the direct control of the company itself.

Obviously, many problems concerning the applicable law could be circumvented by pinpointing loss, damage or delay via such a chain of signatures. In general, this ideal is hardly ever reached, since it runs into the economic principle of minimalizing handling and paperwork.

5. Unauthorized Surface Transportation: *Pacta sunt servanda* ?

The above discussion is construed on the axioma that an air carrier performs the surface transport in conformity with the air carriage contract, because the parties agreed to a combined transportation. The mode of transportation could also be entirely changed from air to land according to a prior agreement and with due regard to the interests of the shipper. The carrier would then obviously not be liable under the Warsaw system for such transportation by land, which is not for the purpose of loading, delivery or transshipment. The Warsaw limits can be made applicable only by explicit agreement, subject to the aforementioned restrictions of national and international law.

Aware of the developments in air cargo trucking, IATA introduced in 1971 Resolution 507b, which allows the air

carrier to substitute- in clearly defined circumstances- air carriage by other means of transportation without notice.[127] This Resolution was to be adopted by the respective governments of IATA member carriers.

Substitute trucking may be undertaken for pragmatic reasons such as lack of available space on aircraft, or where the consignment's size, weight or nature is such that it cannot be accommodated in an aircraft operated by a carrier, or where an originating or interline carrier refuses to fly a consignment. The transport may also be entrusted to a surface carrier, where carriage by air will cause delay in transit or- more specifically- where carriage cannot be accomplished within 24 hours after acceptance, or where carriage by air will result in a missed connection.

Legally, however, airlines can invoke the resolution only if it is incorporated in the air waybill. Moreover, carriers do not have *carte blanche* to arbitrarily determine the routing and method of transportation of air cargo.

What if the airline by routine takes the initiative to organize (without the consent of the shipper or without even notifying him) substitute trucking between two airports between which the company has several weekly or even daily flights? Some airline marketing organizations have used Resolution 507b as a tool enabling them to develop a lower yield market share outside their traditional home markets.[128] With all respect, IATA Resolution 507b seems to cover only occasional truck substitution if necessary for operational, not purely economic reasons. As mentioned before, the movement of air cargo by road are often incorporated in the airlines' systems, scheduled with a flight number and fixed

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127 *"Airline Freight under Air Waybill", op.cit. (note 4)*, Appendix C, 85.; a broader formula is found in: Emery Air Freight Corp. v. United States, United States Court of Claims, July 19 1974, *US Aviation Reports*, 1974, 112-123.

128 *"Airline Freight under Air Waybill", op.cit. (note 4)*, 15.

times of departure and arrival. One major carrier indicated that approximately 70% of road feeder services are published in advance, the remainder being ad hoc connections, often directly to or from the consignors' premises. Other air carriers may choose to conceal the frequent use of wingless vehicles as a matter of their marketing policy.[129]

The case of non-agreed trucking is not mentioned in Article 31 of the Convention. Put straightly, any liability for damages proven to be sustained during actual transportation by road shifts outside the Warsaw system. The requirement of Articles 1, 18 and 31, that the carriage must be performed by air, seems to set aside the bare intentions of the parties. The air carrier would thus be subject to the liability regime of the transport means he has chosen, i.e. the international or domestic law of road haulage.
For damage localized in the trucking segment, whether allowed by the consignor or not, the air carrier would be anyway liable on the basis of the provisions for road transport. This could be acceptable in situations where domestic law of road haulage provides higher liability limitations than those of the Warsaw system, e.g. in the German *Kraftverkehrsordnung*.[130] The air carrier would then, fairly enough, not be entitled to invoke the benefits of the Warsaw limits. However, most liability regimes for surface modes provide lower limits and it would be common sense that a contract-breaching party should be liable at least to the same extent as a party performing in conformity with the contract. Correspondingly, the consignor should be able to

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129 HAGAN, P., "Freight Forwarding Roles Change at Dizzying Pace", *Air Cargo World*, March 1985, 40; BERNAUW, K., C., A., *op.cit. (note 126)*, 122.

130 Bundesgerichtshof, May 17 1989, *Zeitschrift fur Luft- und Weltraumrecht*, 1990, 108-110; SCHMID, R., "Trucking air cargo- which liability regime will be applicable", *Air Law*, 1991, Vol. XVI, 31-33.

defend his legitimate expectations in accordance with the central legal adagium *"pacta sunt servanda"*.[131]

The argument that a "guilty" carrier should not be in a better position than a *bona fide* carrier, handily avoids the question of applicability by simply comparing the limits of each regime possibly at issue. The solution reminds of the network system of the defunct MT Convention. It might prove difficult to obtain such an evaluation of the most severe standard, if one considers all the elements of liability in favor of or against the carrier.

Another approach than that of the actual use is that the air carrier- in charge of the cargo- acted with wilful misconduct in the meaning of Article 25 of the Warsaw Convention, since he breached the air transportation contract by entrusting a trucking company with the ground transportation of that cargo. Indeed, if the carrier had complied with the contract, carrying the consignment all the way by air, the damage might never have been sustained.
In this context, it should also be noted that trucks carrying air cargo- as well as other trucks- can get stuck into traffic jams or can be diverted because of road repairs. They are subjected to the normal border customs procedures, with checks being as speedy or as slow as is usual at a particular point. The calculation of delay in unauthorized substituting surface carriage according to the aviation standards could prove very uncomfortable to the air carrier in particular cases (see *infra*).[132]

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131 KOLLER, I., *op.cit. (note 54)*, 361.

132 (non-Warsaw case) BDC Ltd. v. Hofstrand Farms Ltd., Supreme Court of Canada, March 20 1986, *Dominion Law Reports*, Fourth Series, 1986, Vol. 26, 1-15.

It can equally be argued that the use of another than the agreed means of transport be qualified as a faulty contractual performance, resulting in unlimited liability according to the appropriate domestic law (see *infra*). The entire Warsaw system makes up a part of the contractual conditions, because it has been adopted by reference in the air waybill.[133] The application of unlimited liability then becomes part of a policy to prevent air carriers from unilaterally opting out of their contractual duties.[134]

In practice, airlines have a Pavlovian reaction to rely on the liability limitations of air transport regime as part of the service they offer. That does not prevent that- at least in theory- the airlines may fall back on the lower liability cover of the CMR if circumstances dictate so. Admittedly, Article 1 of the Warsaw Convention requires *inter alia* that the transportation is international and performed by aircraft in order for the Convention to be applicable. According to Article 1§2, the contractual intentions of the parties must be examined to determine the international character of the transportation, regardless of the actually covered route. The common law doctrine favouring unlimited liability for unallowed deviations can apparently not be invoked to set aside the Warsaw system.[135] However, no such instruction can be found with respect to the criterium "performance by aircraft".[136]

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133 SCHMID, R., *op.cit. (note 130)*, 31-33.

134 GATES, S., et al., *18th Annual ATA Claims Prevention Seminar, Arlington (Virginia)*, May 28-30 1991, unpublished, 4-9.

135 BOOYSEN, H., "When is a Domestic Carrier Legally Involved in International Carriage in Terms of the Warsaw Convention?", *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 329-344; Chandler v. Jet Air Freight, Illinois Apellate Court, November 15 1977, 14 *Aviation Law Reports* 18.321.

136 Article 1§1 of the CMR speaks in a more general way of the apllication to contracts of carriage, rather than the carriage itself. This implies that in case of non-agreed trucking, the CMR cannot be applied. see: DONALD, A., E., *op.cit. (note 13)*, 8.

Though an indisputable justification for any of the above mentioned solutions for unilateral mode substitution seems to be lacking, the only viable alternative appears that the terms of the contract prevail against the actual situation when determining the proper legal regime for the part which is substituted by surface transport (see also *infra* for the discussion about the fragmentary view on the Warsaw Convention). The air carrier has indeed committed himself to a safe transport of the goods in his care under the conditions set in the contract.[137] In the same line, the notorious Alvor Draft Convention adds a fourth paragraph to Article 18 of the original Warsaw Convention, clarifying that if a carrier- without the consent of the consignor- substitutes carriage by another mode of transport for the whole or part of a carriage intended between the parties to be carriage by air, such carriage by another mode is deemed to be within the period of carriage by air.[138]

Cross-border surface movements may also raise questions about the international nature of the air segment in a combined transportation. For example, shipments could conceivably be trucked from Toronto over the U.S.- Canadian border to Chicago, where it is put on a domestic flight to Los Angeles. It follows from Article 31 that only the points of departure and destination of the air leg seem to be relevant to determine the applicability of the Warsaw system. This solution remains questionable if the customer did not knowingly contract for such combined transportation, but for total air carriage.

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137 KOLLER, I., *op.cit. (note 54)*, 360; Landgericht Hamburg, 19 Juni 1989, *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 229-231; UTA and Air Afrique v. Electro Entreprise, Cour de Cassation (France), *Revue française de droit aérien*, 1979, 310.

138 CHENG, B., "Sixty Years of the Warsaw Convention: Airline Liability at the Crossroads (Part II)", *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 12-13.

As far as the CMR is concerned, there seems to be a growing tendency to take any trucking as part of an international combined transport out of the sphere of domestic legislations.[139]

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[139] DORRESTEIN, T., H., *op.cit. (note 3)*, 10.

IV. BUYING TIME: LIABILITY FOR DELAY

1. Introduction: Delay, a "Peril of the Air"?

From the very beginning, the principle of liability for delay has been under fire by the air carriers.[140] During the 1929 Warsaw Conference, the British delegation sustained that liability for delay should always be optional, whereas the French delegation favoured a mandatory ground in aviation.[141] Even though the French thesis was finally adopted in the Convention, the issue remains to date subject to controversial opinions.

Financial objections have rarely been expressed, but it is obvious that a too strict liability regime for delay would put an extra strain on the economy of the airline companies. The arguments of the latter, voiced by both IATA and aviation insurers, run like a *fil rouge* through international conferences in the past decades.

In spite of the fact that the initial technical imperfections in the control of the air are overcome by a spectacular development in safety and efficiency, it is still thought that a burdensome liability for delay may jeopardize the flight. The aircraft commander may not seek to arrive on time at all cost. Adherence to safety requirements (in particular, compliance with weather minima, maintenance schedules and crew rest provisions) has thus been quoted as a basic interest that should not be sacrificed for speed.[142]

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140 MAPELLI Y LOPEZ, E., "Air Carriers Laibility in Cases of Delay", *Annals of Air and Space Law*, 1976, Vol. I, 115.

141 VIDELA ESCALADA, F., N., *op.cit. (note 1)*, 579-80.

142 NDUM, F., N., *op.cit. (note 26)*, 153-4.

Indeed, the unique safety standards for air transport, commonly carrying both cargo and passengers in "combi" flights, imply that the carrier's obligation to timely arrive should not be as rigidly evaluated as in the case of surface carriage. Moreover, the circumstances in which aviation takes place offer particular uncertainties likely to have impact on the punctuality of flights (see *infra*).

These observations echoed even through the twenty-first session of the ICAO Legal Committee (1974) and the Conference in preparation of Montréal Protocol 4 (1975), where a curious double standard framework for the liability of the air carrier was accepted.[143] A system of strict liability with a limited number of defenses and an unbreakable limit was to govern loss or damage to cargo. For damage occasioned by delay, however, it was retained without any opposition (*sic!*) that the basis for the liability should be a rebuttable presumption of fault on behalf of the air carrier, completely in line with the existing Warsaw system and the Guatemala City Protocol with respect to delay of passengers.[144] By deleting any sanction for wilful misconduct under the Warsaw/Hague Article 25, this crippled fault principle results in a strange and unbalanced combination.

On the other hand, it cannot be denied that speed is a basic characteristic that should always be taken into account when dealing with air transport. While it is true that no single factor can be isolated as being the principal one for all commodities in the mode-choice process, the total transit time has frequently been mentioned as the most significant

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143 TOBOLEWSKI, A., *op.cit. (note 67)*, 121.

144 ICAO Legal Committee, 21st Session, Montreal, 3-22 October 1974, Vol. I Minutes, Montreal, 1976, Doc. 9131- LC/173-1, 88-89; FITZGERALD, G., F., *op.cit. (note 15)*, 302 etseq..

variable when evaluating a preferred transport mode.[145] During the past few years, the time factor has even gained overall importance in transportation law, because various modes compete increasingly with speed of carriage as a selling argument. Short transit time is correspondingly often the decisive factor in the choice of the air mode, particularly for medium and long hauls. This concerns *a fortiori* the small package and courier market, where shipments are time-sensitive rather than price-sensitive.

The emphasis on this particular aspect of air transport may also vary according to the shipped commodity. Delay and spoilage, for example, are the major problems in the segment of perishable goods,as they account for about three quarters of the claims. With modern forms of stock management, untimely delivery of semi-manufactured articles may disrupt an entire production line.[146]

2. Legal Analysis: Outline

The principle that the air carrier is liable for damage occasioned by delay is stated in Article 19 of the Warsaw Convention, separately from the provision on loss and damage. This division into different articles follows an old tradition in transportation law, which does not appear in

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145 Ets. Peronny v. Ethiopian Airlines, Cour d'Appel de Paris, *Revue française de droit aérien*, 1975, 395; SCHONER, D., *op.cit. (note 72)*, 159-160; HAYUTH, Y., *op.cit. (note 7)*, 129; MAGDELÉNAT, J.-L., *op.cit. (note 2)*, 106; DONATO, A., M., *op.cit. (note 19)*, 175; Bianchi v. United Airlines, 15 Avi. 17, 426; TAPNER, H., *op.cit. (note 1)*, 136; DAVIS, G., J., and GRAY, R., *"Purchasing International Freight Services"*, Gower, Aldershot (UK), 1985, 81-96.

146 DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1989, 1148.

more recent Conventions such as the CIM of 1952 and the CMR of 1956 (unique Article 17).[147]

Unfortunately, the nebulous formula as such contains many loopholes, since it fails to clarify (as opposed to Articles 17 and 18) the period to be taken into account for the completion of the journey and the conditions under which delay should be calculated.[148] Although the definition of a more specific concept is left up to the courts, it is generally held that delivery should take place within reasonable time. This principle, traced back to the preparatory works of the Warsaw Convention, is parallel with the detailed characterization of the allowed period for the carriage in the European Road Transport Convention (CMR).
Article 19 of the CMR specifies that, if there is no agreed time-limit in accordance with Article 6 § 2 (f), delay in delivery occurs when the actual duration of the carriage- in view of the circumstances of the case- exceeds the time that would be reasonable for a diligent carrier.[149]
The necessity of complying with the contract of carriage in due time avoids that the carrier adapts it to his own convenience and overlooks the consideration of the interests of the users.

Making a rough draft, delay in the carriage by air is defined in two distinct hypotheses: either when the goods are not delivered within the time expressly agreed upon by the parties or when the actual period of transport substantially exceeds the time that was normally required for its

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147 DORRESTEIN, T., H., *op.cit. (note 3)*, 234.

148 DIEDERIKS-VERSCHOOR, I., H. " De aansprakelijkheid van de Vervoerder in het Luchtrecht", VAN BAKELEN, F., A., *"Teksten van de op 27 maart 1985 te Groningen gehouden studiedag"*, Uitgaven Vakgroep Handelsrecht R.U.G., unpublished, 1985, 50-1; RIDLEY, J., *op.cit. (note 119)*, 233.

149 DONALD, A., E., *op.cit. (note 13)*, 16-17.

performance by a diligent carrier, taking into account the actual circumstances.

A lacuna in most commercial contracts of air cargo up to now is the lack of feedback of the status (notice of delay) of the shipment to the consignor, who mostly pays the freight under the conditions of CIF and C&F.[150] The introduction of computerized reservations systems may facilitate the follow-up of urgent consignments.

3. Fixed Time-Limit

Contrary to the archetype of a contract, the sales contract, the time for delivery is usually not agreed upon in a contract of carriage. It seems that the complex pattern of contracts of carriage- mostly an appendix to a sale of goods transaction- describes primarily the reciprocal rights and duties of the parties, rather than the modalities of the actual performance.[151]

There is of course a possibility that the time limit allowed for the transport has been fixed beforehand by the contract of carriage, in special legal rules or by custom. Any excess of that limit then simply means that delay has occurred. In this case it won't be necessary to find methods of calculating the time-limit, as no individual adjustment will be allowed.

The initial text of the Warsaw Convention foresees a reference to a time-limit on the traffic document, but its

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150 Oberlandesgericht Frankfurt am Main, 3 August 1982, *Zeitschrift fur Luft- und Weltraumrecht*, 1983, Vol. 32, 59-60.

151 GRONFORS, K., *"The Concept of Delay in Transportation Law"*, *European Transport Law*, 1974, Vol. IX, 402-403.

omission does not imply that the limitations of liability are forfeited. The simplification of the air waybill by the Hague Protocol makes any statement of a specified delivery time completely optional.

One should also mention Clause 6.3.1 0f the IATA Conditions of Carriage for Cargo, which states that no representative of the carrier has the authority to alter or waive any provision of the contract. This condition precludes an oral warranty of a specific delivery date from modifying the general conditions of carriage. Deviations from these conditions agreed upon with a representative of an airline are consequently only binding for the carrier if they are stated on the air waybill.[152]

The European Railroad Transport Convention (CIM) itself has specified the delivery time in relation to, mainly, the distance of transportation and the handling of cargo.[153] If the rather largely measured time-limit for delivery has been exceeded, then the railway is liable for damage caused, irrespective of any fault. At the drafting of the CMR, one considered a system similar to that of the railroad regime, but it proved to be impracticable in view of the different circumstances of carriage.[154] The last remark could equally be made in view of the aviation industry, which requires more flexibility in the transport schedules.

Airlines of Eastern Europe used to have clear provisions on travelling time, a model that could be applied universally. The general conditions of carriage of the former DDR airline INTERFLUG, for example, specified delay as exceeding the

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[152] VIDELA ESCALADA, F., N., *op.cit. (note 1)*, 581.

[153] RIDLEY, J., *op.cit. (note 119)*, 250; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 148)*, 1985, 52.

[154] DORRESTEIN, T., H., *op.cit. (note 3)*, 232.

schedule with 30 minutes. The liability of the airline was limited to double the price of transport.[155]

Many air express companies not only advertise swiftness of their services, they also publish delivery standards and guarantee on-time delivery. They often guarantee with their priority services delivery on the same day or on the next morning (not later than 10:30 am local time). Semi-priority services cover deliveries on the next, second or third business day.[156]
The Postal Services, on the other hand, are not at all liable for delay in the delivery of letters or packages, simply because this ground does not appear among the explicit exceptions to the principle of non-liability.[157]

4. Reasonable Dispatch

4.A. Definition: The GRÖNFORS Model

If there is no time-limit specified *inter partes* or *erga omnes* (as in railway law), then the contract indicates only the framework for the period of time allowed, based on the principle of reasonableness.

The concepts "reasonable" and "delay" are clarified and elaborated on the basis of their actual use in a wide variety

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155 SCHONER, D., "Die internationale Rechtsprechung zum Warschauer Abkommen in den Jahren 1977 bis 1980", *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 345; see also: MAPELLI Y LOPEZ, E., "Air Carriers Laibility in Cases of Delay", *Annals of Air and Space Law*, 1976, Vol. I, 128-130.

156 HEMPSTEAD, G., M., "What is the current and future status of integrated operators, scheduled carriers and forwarders, domestically and world-wide?", *Cargo Express*, November 1990, Vol. 11-10, 6-8; BERNAUW, K., C., A., *op.cit. (note 126)*, 30.

157 BERNAUW, K., C., A., *op.cit. (note 126)*, 170.

of legal materials on this subject-matter, including *travaux préparatoires*, decisions made by courts and legal writings. The terminology for this analysis is borrowed from a model designed by Professor Kurt GRÖNFORS in order to resolve practical legal problems on delay.[158]

By lack of any definition in the Warsaw Convention, delay could adequately be described as "being late in relation to a certain standard". In order to perform the carriage with reasonable dispatch, the carrier has to commence the voyage without unreasonable delay, which allows a certain flexibility in his cargo operations. This means that the goods must not necessarily be transported on the first available flight after the carrier has taken the goods into charge. Ultimately, the goods have to be delivered at the very destination as soon as practically possible. All these operations necessarily imply vague evaluations and the use of flexible margins.

It seems rather unsuitable to take into account the expectations of the parties about the time due. Such a subjective norm involves quite some practical difficulties like resolving cases where the parties have incompatible ideas or assessing the individual expectations.

The obvious comparison is with the period of time normally used for the carriage in question. In commercial air transport, this time to perform the contract can nowadays be set *a priori* with at least some approach to certainty, even with regard to flights to the other end of the world. To establish this more objective standard, it is necessary to calculate the time-limit allowed indirectly on the basis of similar experiences and also with reference to some datas of particular cases.

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158 GRONFORS, K., *op.cit. (note 151)*, 400-413.

4.B. Period of time allowed

4.B.1. The period of time normally required for the carriage: calculation at a general level

The task of establishing a general and objective standard is often facilitated by the issuance of very accurate time-tables by the airlines. A considerate judgment on the normal duration of a flight is thereby supplied by expert technical services of the airline companies themselves. Distance, frequency of service and- to a lesser extent- type of aircraft make up the determining factors of average timing.[159]

Service tables seem less effective for trucking, which can serve places without airports or without regularity. A recent study on air-trucking on the European continent shows that same day delivery can be achieved to a restricted number of locations up to 300 kilometers from the main airport. Further up to 900 kilometers delivery can mostly be offered on the second day in the morning.[160]

As mentioned above, air carriers refrain from establishing a time-limit. Clause 6.3.1 of the IATA Conditions of Carriage for Cargo, usually reiterated on the back of air waybills, provides that times shown in time-tables or elsewhere are approximate and form no part of the contract of carriage.

Viewed as an *a priori* waiver, tending to prevent the realization of delay, it seems *prima facie* to be in conflict with the categorical sanction of Article 23 of the Warsaw

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159 DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1144; MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, Vol. I, 119.

160 DOBBELAER, J., et al., *op.cit. (note 120)*, 4 and 11-13.

Convention, nullifying any clause which tends to alleviate the carrier of his obligations.[161]

The no-time clause can only be interpreted validly, for as much as it does not exempt the carrier of his liability for delay, but simply clarifies that the carrier is not bound by the published times of departure and arrival as a fixed time guarantee.[162]
While damage resulting from delay cannot be claimed when the scheduled time limit is exceeded, it may not be concluded that the time of transport can be determined at the whims of the carrier. Moreover, the fact that scheduled times of arrival are looked upon as mere guidelines as to the average transportation time, does not affect their evidentiary value with regard to the fact of delay (added to- *inter alia*- the consignor's prior dealings with the carrier and statements the carrier made in advertisements).
The right of the carrier under the no-time clause thus stands as a derivation of the duty under Article 8 (p), which requires that any agreement upon the time fixed for completion of the transportation be mentioned on the air waybill.[163]

Another, wider construction would render the realization of delay impossible, except when the delay was caused by wilful misconduct of the carrier or when the carrier had performed the carriage in bad faith. This meaning stretches to the very limits of the freedom of contract, being the morality or public order of a national law system.

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161 NDUM, F., N., *op.cit. (note 26)*, 161; MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 117-118.

162 Hof 's-Gravenhage, March 8 1962, VAN BAKELEN, F., A., and DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 31)*, 34-39; MILLER, A. , J., *op.cit. (note 74)*, 82-3.

163 MAGDELENAT, J.-L., *op.cit. (note 55)*, 84.

The total exclusion of the right to expect a performance of the carriage at a particular time, is too presumptuous to be acceptable today. Considering the economics of the contract, the time-table is one of the most important clauses for the consignor, who has selected air transport as the fastest transport mode. The contract of carriage by air creates an accessory- though not absolute- obligation of speed. Finally, the special nature of the contracts of adhesion gives rise to suspicions in the opinion of many law practicers.[164]

4.B.2. The Period Reasonably Required for the Carriage: Calculation at an Individual Level

Delay is not proven by the simple confrontation of the hour of arrival at destination with the schedule of the airline correspondent with the first available flight after the carrier has accepted the cargo.

In order to achieve a more flexible criterion as intended by the drafters of the Warsaw Convention, the average result of the first step has to be adjusted with regard to a series of factors surrounding air traffic, which can be catalogued on the basis of experience.[165] If such special circumstances do not permit a diligent carrier to organize the transport of the goods within the objectively measured period of time, then the period will be extended accordingly.

Typical are adjustments because of meteorological conditions during a particular voyage. They may result in the temporary closing of the airport of departure or arrival, which could lead to delay or cancellation of the flight, or diversion to another airport with acceptable meteorological conditions.

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164 MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 118.

165 MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 111-115.

The accessory obligation of speed, mirrored in the time-tables, can obviously not be guaranteed when the hierarchical higher obligation of security is involved. These kinds of adjustments are usually drawn into the picture under the form of a substantive defence made by the carrier showing that the delay was caused by circumstances beyond the carrier's control (*force majeure*).[166]

Another type of individual facts relevant to estimate the allowed period of time is the kind of goods carried. Usually goods must stand up to normal transport, but not to transport that is much slower and more hazardous than could be reasonably anticipated. For some goods which by their nature alone require delivery as soon as possible, like live animals and perishables, the carrier has to comply with strict demands as to the time used.[167] Perishable shipments are in daily practice not always treated priority cargo because of the relatively low price per kilogram. This increases the already higher risk for damage from delays.[168]
However, the knowledge that the shipment is of perishable nature requires air carriers to exercise ordinary care to protect such goods from spoilage. If the carrier cannot match the standards to carry a particular kind of goods, he still has the right to refuse the conclusion of the contract, as recognized by the Warsaw Convention.[169]

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166 GOLDHIRSCH, L., B., *op.cit. (note 66)*, 77-79; Air France v. Lamour, Cass., November 10 1971, *Revue française de droit aérien*, 1972, 47.

167 Connaught Laboratories Ltd. v. Air Canada, Ontario High Court of Justice, October 10 1978, *Dominion Law Reports*, Third Series, 1979, Vol. 94, 586-594.

168 18th Annual ATA Claims Prevention Seminar, Arlington (Virginia), May 28-30 1991, unpublished, attachment B, 2.

169 Following IATA Resolutions 620 and 621(*Cargo Services Conference Resolutions Manual*, IATA, Montréal, 1991, 61), rules have been developed on special container designs, the preparation of live animals prior to dispatch and special handling methods. The IATA Live Animals Regulations, regularly updated by a board of experts, have been approved by several governments as part of their national legislation; "Air

Operational problems because of congestion at airports have drawn a lot of attention of IATA, since the capacity of airports to absorb air traffic has developed at a slower pace than the increase in air traffic itself. Frequently, upon punctual arrival of an aircraft to the control zone of an airport, it is assigned a turn because of local congestion.

Overhauls or last minute repairs of aircraft may also affect the schedule of one or even several flights. IATA conditions specify that a technical malfunction does not constitute delay or refusal to perform. This details Article 20 of the Warsaw Convention with respect to the carrier's defence that he and his subordinates took all necessary measures to prevent damage. It is the duty of an airline, however, to ensure the airworthines of its aircraft. The carrier even risks unlimited liability when following standards which are lower than the average. If there is a delay due to engine malfunction, technicians from the carrier's overhaul department could testify as to the used precautions and recommended maintenance.

The constant use of expensive commercial aircraft can have the effect that no reserve equipment may be available to serve in a specific emergency case. An airline failing to arrange (when possible) for a substitute aircraft from another airline or via an indirect connection in order to deliver on time, can possibly be held liable for delay in the conveyance of goods left behind on the ground, especially when the delivery time is mentioned on the air waybill.[170]

Freight", *Backgrounder*, IATA, Geneva, gva 8210, 4; see also: DANIEL, M., D., "Air Transportation of Animals: Passengers or Property?", *Journal of Air Law and Commerce*, 1986, Vol. 51, 497-529; Rotterdam Zoological Gardens v. Air France, District Court of Amsterdam, June 15 1956, *International Law Reports*, London, 1957, Vol. XXIV, 645-646.

[170] Hennesy v. Air France, Cour d'Appel de Paris, February 25 1954, *Revue française de droit aérien*, 1954, 45; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 1-3, 70.

The untimely delivery of cargo travelling in the holds of passenger aircraft, *quod plerumque fit*, may be intertwined with a cluster of seemingly banal administrative or practical issues, such as the checking of persons and luggage, the attention to the meals that should be put on board, the preparation of documents and the non-arrival of some passengers or a person embarking on a flight with a totally different destination. Another fact of airline life is that- whatever the efforts being made to trim down the paperwork in cargo matters- one can hardly simplify the precautionary security measures that should be taken to avoid aviation related delinquency.[171]

As mentioned before, circumstances which may be directly attributed to the carrier cannot be taken into account to correct the general standard. It is, for example, hardly a valid excuse for delay that an aircraft has to wait for a connection that is not mentioned in the scheduled services. Delay in air carriage caused by the carrier by putting urgent shipments on a next flight because of lacking capacity, also constitutes a risk which is inherent to the enterprise of air cargo.

The presence of voluminous mail and excessive baggage at a particular flight, however, may be considered as a valid excuse. In accordance with an agreement between the Universal Postal Union and IATA, mail has always priority over cargo. Most general conditions of carriage for goods reserve also priority for the carriage of passengers, extended to the luggage they bring with them. Unlike the carriage of goods, the air transport for baggage is basically accessory to passenger traffic.[172]

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[171] MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 111.

[172] BAUZA ARAUJO, A., *"Tratado de Derecho Aeronáutico"* , Tomo III, Ed. Amalio M. Fernandez, Montevideo, 1981, 60; MAGDELÉNAT, J.-L., *op.cit. (note 2)*, 99.

On the other hand, reserving capacity for regular cargo shippers does not guarantee that the consignment will be carried on schedule under all circumstances. Clause 6.3.5 of the IATA Conditions of Carriage for Cargo states that, subject to applicable government laws, regulations and orders, the carrier retains the right to determine the priority of carriage between consignments. This does not imply that the carrier may arbitrarily apply these standard clauses. They have to be applied under circumstances showing good faith and after verification whether the subordination of a particular consignment can be justified. Bad faith has to be distinguished from the concept of wilful misconduct, since comparative studies show that the severity of a fault is not relevant for the validity of an exoneration clause.
It is not exceptional that an airline oversells its capacity because shippers simply don't show up for a particular flight (overbooking as a reaction to no-show).[173] Airlines can also serve more stations economically by consolidating less time sensitive shipments in regional hubs, while flying or trucking smaller shipments with short transit times via only one European network.[174] It remains doubtful, however, whether airlines may sacrifice speed for purely economic reasons...

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[173] An inquiry among members of the Association of European Airlines (AEA) in 1983 indicated that this problem amounts to losses of approximately 200 million US$ for the airlines. See: Rb. 's Gravenhage, June 13 1957, VAN BAKELEN, F., A., and DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 31)*, 10-18.

[174] DOBBELAER, J., et al., *op.cit. (note 120)*, 12-13.

4.C. The Period of Time Allowed Related to the Period of Time Used

4.C.1. The Beginning of the Period

Having obtained the length of time, one must relate the beginning of the period of time used to the chain of events. Article 19 of the Warsaw Convention merely states that the damage may be recovered from the carrier if it occurred by "delay in the transportation by air". The key question is whether the Warsaw system will apply to the damage tied to delay during the surface segment.
The date of signing of the contract does not constitute a relevant point of reference, because there is no textual basis for it in the Convention. Moreover, the reference does not fit into the commercial practice, as the air waybill can be signed well before the carrier has accepted the cargo, or after it, or even not at all (see *supra*).

In the legal literature, three schools of thought have been presented as to the meaning of the formula of Article 19.[175]

According to what is known as the early Goedhuis interpretation, the phrase only refers to delay that occurs while the cargo is actually airborne.[176] However, it should be pointed out that the adoption of such a narrow interpretation would lead in a vast majority of cases (*inter alia* all surface transport) to an exclusion of the carrier's liability

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[175] COLAS, E., "La responsabilité du transportaeur aérien pour retard dans la livraison d'un colis", *Annals of Air and Space Law*, 1981, Vol. VI, 20; MAGDELENAT, J.-L., *op.cit. (note 55)*, 89; SCHONER, D., *op.cit. (note 72)*, 162.

[176] GOEDHUIS, D., *"La Convention de Varsovie du 12 Octobre 1929"*, Den Haag, 1933, 166.

for delay.[177] *Ab absurdo*, damages for postponed or cancelled flights could never be compensated under Article 19.

The standpoint favoured by Drion simply refers to delay in the total transport, arising if the cargo arrives at its destination later than the time it ought to have arrived, whatever that actually may mean. Indeed, the authentic French text uses the expression delay "in" (*dans*) the carriage by air, and not the linguistically narrower term "during" (*pendant*).[178]

The most widely accepted interpretation views Article 18 of the Warsaw Convention as a guideline for claims under Article 19 as the period of liability is concerned.[179] The condition that the goods are taken into charge by the carrier is cumulated with the prerequisite that the goods must also pass the border line of the airport- if the carrier has not accepted a wider scope of liability for surface movements. However, even this classical *deus ex machina* theory does not prove to be safe from critical analysis. From the point of legal policy, it would be unacceptable in liner traffic to use a geographical confinement to draw limits in the dimension of time. Goods delivered for transportation could lie "on the quay" waiting for loading or be stored by the air carrier outside the airport area for a very long time without any delay on behalf of the carrier, as the allowed period of time has technically not begun.[180]

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177 TOBOLEWSKI, A., *op.cit. (note 67)*, 63.

178 DRION, H., *op.cit. (note 54)*, 1954, 85-86; Dora Pick v. Deutsche Lufthansa Aktiengesellschaft et al., Civil Court of the City of New York, December 3 1965, *US Aviation Reports*, 1967, 973-985.

179 Oberlandesgericht Frankfurt am Main, 4 December 1979, *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 441-444; Transports Mondiaux v. Air France and Lufthansa, Cour d'Appel de Paris, March 14 1969, *Revue française de droit aérien*, 1969, 317.

180 GOLDHIRSCH, L., B., *op.cit. (note 66)*, 80.

It would therefore be preferable to start the clock as soon as the carrier has taken the goods in charge for the purpose of transportation. This moment may coincide with the beginning of the period of liability under Article 18, but basically it is independent from it.[181]

4.C.2. The End of the Period

Having determined the length of the period of time allowed for the carriage and the point where this period starts to run, the end of the "yardstick" has come into position. Logically, the period of responsibility basically ends with the effective delivery of the goods to the consignee at destination, in special cases even earlier. It occurs that the cargo arrives in time at the premises of the consignee, but cannot be delivered because the consignee could not be reached. It would depend entirely on the loyal and efficient co-operation of the receiver to take care of the goods as soon as practically possible.

The end can consequently best be described as the moment where the carrier has made the goods available for delivery to the consignee at the final destination, either in the terminal of the carrier or, according to contract, on the premises of the consignee. However, it should be mentioned that Articles 12§1 and 13§1 of the Warsaw Convention envisage possible changes of the agreed plan before normal delivery takes place. Under prescribed conditions, consignor and consignee have alternatively the right to dispose of the goods by giving instructions to the air carrier.

The CMR specifies in detail the road carrier's right of disposal or destruction of the cargo when delivery appears to be impossible. Article 16§3, for example, enables the road carrier to sell the goods without seeking instructions if the

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181 GRONFORS, K., *op.cit. (note 151)*, 409.

goods are perishable or their condition warrants such a course, or if storage expenses would be out of proportion to the value of the goods, or after the expiry of a reasonable period, the carrier has not received instructions to the contrary which he can reasonably obey. A similar provision on the disposal of perishables is incorporated in the IATA Conditions of Carriage for Cargo under Clause 8.5.

4.D. Relevant Delay

One last prerequisite for delay has to be tested, since not every excess of the period allowed by the period actually used is sufficient to result in liability. The time-limit allowed has to be substantially exceeded before the delay is considered legally relevant.[182]

The Anglo-American formula goes that the carrier is bound by a liability only for an "abnormal delay", which could have been avoided or shortened. However, the air carrier has to fulfil his common law duty of informing the shipper that a certain delay can be expected. Civil law courts reached a similar conclusion, holding that anything further than a "slight or minor delay" gives rise to liability under Art. 19 of the Warsaw Convention.[183]
One argument is that if the delay was really unimportant, it could not cause the customer any damage at all. A further argument is that the calculation as a whole contains many uncertain elements of evaluating the reasonableness and so forth, that the outcome in fact can differ more or less slightly.

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[182] GRONFORS, K., *op.cit. (note 151)*, 411.

[183] Fret et Transit Aérien v. Sté Hernu-Perron et al., Cour de Cassation, *Revue française de droit aérien*, 1979, 175; MAGDELENAT, J.-L., *op.cit. (note 55)*, 87.

On the other hand, if the cause of even a short or *prima facie* reasonable delay is gross negligence on behalf of the carrier, the court may nevertheless hold the carrier liable despite of a "no time" clause.[184] By agreement the criterion of excess of time can be changed either in the direction of allowing even the slightest excess to be relevant (the strict time guarantee of the courier companies) or in the direction of requiring a grave excess as a condition for relevancy, the common clause for air carriers under the Warsaw system.

As to integrators, the time by which the carriage must be performed, is often narrowly described either expressly in the contract of carriage or by reference to the service guide and advertised warranties that have to be backed up.[185] Some types of services have patented denominations that can be found back in service guides or advertisements, where the nature and conditions of the service are explained. Timely delivery may be normally expected from a courier company, which stands for accurate time-sensitive services, costing up to 100 times the price it would have cost using the postal service.[186]

In the railway convention CIM, as always more elaborated and accurate as far as delay problems are concerned, the substantial time-limit is fixed to exactly 48 hours.

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184 Générale Air Fret v. TWA, Tri. Comm. Seine, February 23 1956, *Revue française de droit aérien*, 1956, 324; GOLDHIRSCH, L., B., *op.cit. (note 66)*, 77.

185 DAVIS, G., J., and GRAY, R., *op.cit. (note 145)*, 85-87 and 127-128.

186 BERNAUW, K., C., A., *op.cit. (note 126)*, 150-3.

5. Damages

5.A. Material Damage

It does not suffice to prove the first two elements of Article 19, namely the delay itself and the fact that it actually occurred during the transportation by air *sensu lato*. The onus also rests on the claimant to show evidence that he had suffered damage and that the damage was proximately caused by the delay. It is then up to the carrier to rebut the presumption of fault imposed upon him by Article 19, proving that the delay is due to a particular cause which is foreign to his enterprise.[187] For example, the carrier can avoid liability showing that a cargo delay resulted from incorrect statements in the air waybill or that he refused to make a delivery to anyone but the named consignee.

Damage and causation are, by lack of substantial international rules on the subject, determined according to the relevant national law. The amount of damages is generally tied to the loss of the market value of the goods due to delay.

Typical for cargo is that both Articles 18 and 19 can be at stake, if the delay causes material damage or loss of the goods.[188] Article 18 does not refer to a special cause of damage or loss as a separate criterium to distinguish the two competing grounds. To be exact, the carrier is liable under Article 19 when the goods would have arrived in good condition within reasonable time, but suffered damages because it could not bear any longer the conditions of

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187 DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1989, 1146.

188 SCHONER, D., *op.cit. (note 72)*, 163.

transport.[189] Especially with perishables like cut flowers, fresh fruit, live animals or pharmaceutical products, it is often not important whether delay occurred or not, if the physical damage could be explained by either the passing of time or because the goods had not been dealt with properly. It is not always possible to pinpoint the very cause if, for example, a delayed shipment has not been kept at the prescribed temperatures.[190] Additionally, perishable cargo may have a usual rate of mortality or weight loss en route even when the flight is not delayed.[191] With live animals, expert testimony may be required to establish when exactly the injury or death occurred.[192] The carrier could also take advantage of an exoneration clause for inherent vice (without violating Article 23 of the Warsaw Convention) in those cases where the of the Hague Protocol is applicable.[193]

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189 COLAS, E., *op.cit. (note 175)*, 20.

190 Oberlandesgericht Frankfurt am Main, 25 Januar 1983, *Zeitschrift fur Luft- und Weltraumrecht*, 1983, Vol. 32, 57-58; Cour de Cassation de France, 26 February 1985, Cy. Helvetia Saint Hall v. Air France and UTA, *European Transport Law*, 1985, Vol. XX, 361-364; Landgericht Frankfurt/Main, 7 March 1973, *Zeitschrift fur Luft- und Weltraumrecht*, 1973, Vol. 22, 306-309.

191 Ets. Peronny v. Ethiopian Airlines, Cour d'Appel de Paris , May 30 1975, *Revue française de droit aérien*, 1975, 395; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 69.

192 Fret et Transit Aérien v. MEA, Cass., January 9 1979, *Revue française de droit aérien*, 1979, 175; GOLDHIRSCH, L., B., *op.cit. (note 66)*, 80.

193 Application to live animals: Attorney-General of Canada et al. v. Flying Tiger Line Inc. et al., High Court of Justice (Canada), October 14 1987, *Ontario Reports*, 1988, Second Series, Vol. 61, 673-681; *Dominion Law Reports*, Fourth Series, 1988, Vol. 43, 685-693; *Air Law*, 1988, Vol. XIII, 37-38; DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1153; ICAO Legal Committee, 21st Session, Montreal, 3-22 October 1974, Vol. I Minutes, Montreal, 1976, Doc. 9131- LC/173-1, 31-32.

IATA issued strong reservations about the liability for perishable goods, which are more sensitive to the slightest delay than other merchandise.[194]

Though the consequences of delay and damage or loss are often the same, an exclusion of one ground could be useful in view of the notice requirements and the proper defences that the carrier may invoke (see *supra*).[195] The solution could lie in the prevalence of Article 18, which seems rather arbitrary, or in the cumulative application of both grounds for liability.

Article 20 § 1 of the CMR, on the other hand, clarifies that goods are treated as totally lost when they have not been delivered within thirty days following the expiry of the agreed time-limit or otherwise within sixty days from the time when the carrier took over the goods. The carrier's liability is then calculated according to the provisions on damage and loss and the carrier may invoke specific defences under Articles 17 § 4 and 18 § 2 of the CMR.
Article 34 § 3 of the CIM deals extensively with the matter. No indemnity for delay may be claimed in case of partial or total loss, while the compensation for both damage and delay may not exceed the highest amount allowed for total loss of the shipment.

In practice, delay quite rarely gives way to compensation for the simple reason that- except for certain categories of cargo- users generally suffer no damage for that reason.

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194 COLAS, E., *op.cit. (note 175)*, 20; DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 148)*, 57.

195 Oberlandesgericht Frankfurt am Main, 15 January 1980, *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 146-151.

5.B. Consequential Damages

There is no exaggerating in saying that damage caused by delay is consequential by excellence. If liability for delay were limited to material damage, Article 19 would be little more than an explanatory duplication of Article 18. The important financial consequences of the timely delivery are reflected by the high price the consignor is willing to pay for this service.

The assessment of such indirect damages is a matter of national law, since there is no clear provision in the Warsaw Convention on the compensation to be awarded for late delivery not resulting in direct physical damage to the consignment itself.[196] Article 23§5 of the CMR is a bit more specific, since the French text uses the word *préjudice* (commercial prejudice) in connection with delay, whereas physical damage is referred to as *avarie* elsewhere in the Convention.[197]
One observes that the domestic legal concept of forseeability plays an important role at this level. Evidence has to be produced that the carrier, at the time the contract was made, was aware of possible consequential damages in case of faulty performance. The consignor should take precautionary measures by describing precisely to the carrier the contents of a consignment, and by warning him of the necessity to ship it within a reasonable time and the probability that damage could result from delay.[198] However, even where the

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[196] Neither are conflicts of law regulated by the Warsaw Convention (except for some references to the law of the court seized of the case, *lex fori*). In the absence of any contractual provision on the applicable law, courts should therefore first decide upon the complementary national law at stake. See: FRINGS, M., "Kollisionsrechtliche Aspekte des internationalen Luftbeforderungsvertrages", *Zeitschrift fur Luft- und Weltraumrecht*, 1977, Vol. 26, 8-22.

[197] DONALD, A., E , *op.cit. (note 13)*, 37.
[198] COLAS, E., *op.cit. (note 175)*, Vol. VI, 18.

forseeability of important economic losses arising from untimely delivery is not objectively apparent from the documents accompanying the shipment, it may be assumed that the carrier should have known the risk from the very nature of a particular shipment or of the express services rendered.

The problem of forseeability remains of course also with respect to the exact amounts involved. Consequential damage is more difficult to assess than visible damage which entails reduction in the value of the goods in question. Where the loss of profits is not determined by prior experience and there is no contract provision for economic damages, they have often been deemed to be too speculative.[199] The fulfilment of the consignee's obligations to third parties could amount to further complications.

Clause 11.2 of the IATA Conditions of Carriage for Cargo excludes any liability for consequential loss or damage, whether or not the carrier had knowledge that such loss or damage might be incurred. This leaves only the intrinsic value of the shipments to be covered: the cost of repair, replacement, resale or the fair market value. It brings the liability of the carrier for documents drastically down to- as a matter of speaking- the cost of the paper and the ink.[200] Clauses excluding recovery for consequential damages in case of unaccountable delay (and sometimes for whatever damages for delay) seem inconsistent with Article 19 of the Warsaw Convention.[201] Furthermore, courts will be suspicious of contracts of adhesion, the more when they are concluded with non-professionals whose bargaining power is very limited.[202]

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199 GOLDHIRSCH, L., B., *op.cit. (note 66)*, 81.

200 BERNAUW, K., C., A., *op.cit. (note 126)*, 158.

201 Saiyed v. Transmediterranean Airways et al., United States District Court, Western District of Michigan, March 17 1981, *US Aviation Reports*, 1981, 1-6.

202 MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 118.

The very small and almost illegible print of the general conditions of carriage will also render courts hesitant to apply the exoneration clauses. When courts do apply them, they will rather interpret the text *contra proferentem*. In practice, the validity of such clauses will become important only when the Warsaw limits do not apply for one reason or another. In case of wilful misconduct it is generally accepted that the carrier cannot invoke any contractual exoneration, since it would be against public policy.
According to the common law doctrine of fundamental breach, which is sometimes advocated in this context, the whole contract- including the exoneration clauses- comes to an end in case of non-performance (see *infra*).

5.C. The Breakable Limits of Liability

In connection with liability for delay controversial opinions similarly exist as to the application of a quantitative limitation of liability.[203] Article 22 of the Warsaw Convention, which sets a limit of 250 Poincaré gold francs (or 17 SDRs) per kilogramme for damage and loss, does not explicitly mention that there is also a maximum amount for liability for delay. In view of the purpose and the economy of the Warsaw system, however, the only logic and generally accepted interpretation is that damages for delay are equally limited.[204] This view is endorsed by Article 24(1), which provides that actions under Articles 18 and 19, however founded, can only be brought subject to the conditions and limits set out in the Convention. The orphaned Guatamala Protocol of 1971, in its Article VIII, earns the merit of

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203 VIDELA ESCALADA, F., N., *op.cit. (note 1)*, 582.

204 UTA v. Blain, Air-Mer International, Lufthansa, Cour d'Appel de Paris, January 6 1977, *Revue française de droit aérien*, 1977, 181; MAPELLI Y LOPEZ, E., *op.cit. (note 155)*, 121.

bringing the case of delay explicitly under the umbrella of the 250 francs limit. This might be of particular importance, since the consequential losses due to delay can be considerable.[205]

While liability for delay is limited per kilogramme in international air law, it is not a universal phenomenon in transportation law. Regulations of other modes award a lump sum indemnity for the simple fact of delay, often related to the cost of transportation or the declared value of the goods.[206] Article 23§5 of the CMR sets out that the compensation for delay may not exceed the carriage charges for the journey. Article 34 of the Berne Convention on the transportation of cargo by rail (CIM) provides a mixture between a penalty and damages for delay, the indemnity being proportionate to the delay incurred and linked to the transportation charges.[207] Article 18 of the 1980 MT Convention- as the Hamburg Rules- limits liability for delay to an amount equivalent to two and a half times the freight payable for the goods delayed, but not exceeding the total freight payable under the MT contract.

Aviation insurers did propose to insert a lump sum indemnity for delay into the Warsaw system, limited to the double of the amount of freight paid, but that has been rejected at the Conference preparing the Hague Protocol. The credibility of this proposal could have been undermined by the initial demand to plainly abolish the carrier's liability for delay, which was both unrealistic and absurd.[208]

The present limit for delay, based on the weight of the shipment, is generally considered to be very satisfactory in

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205 DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 61.

206 MAGDELENAT, J.-L., *op.cit. (note 55)*, 90.

207 DORRESTEIN, T., H., *op.cit. (note 3)*, 231.

208 MILLER, A. , J., *op.cit. (note 74)*, 91.

comparison with other modes of transport. However, since the conveyance of documents made its way as an alternative for the carriage of mail and postal items, those weight-based limits do not appear *grande chose*.

Some air express companies therefore offer in their general conditions of carriage a fixed amount or a "money-back" guarantee, i.e. a refund of the transportation charges if the shipment is not made available on time, excluding all other types of compensation.[209] The validity of these last ditch waivers, tending to escape full liability after delay has been established, has to be examined in the light of Article 23 of the Warsaw Convention, that declares null and void any provision tending to relieve the carrier of his liability. Consequently, such clauses are only valid if the Warsaw limits *in casu* do not exceed the transportation charges.

Although cases of delay are subjected to the same defences and grounds allowing to break through the limits of Article 22 as cases of damage and loss, its actual application may differ. Having accepted Article 19, which harbours a presumption of fault against the carrier, only a few decisions go any further to accept that the fault constitutes *in contreto* a wilful misconduct, engaging complete liability of the carrier. For example, the opinions are divided as to whether mixing up two similar packages with different destinations, without verifying the copies of the air waybill issued for each of the packages, should be considered as wilful misconduct or as just an unhappy transportation incident.[210] The matter appears less controversial when the carrier, on top of the first error, has not taken the necessary measures to retreive the goods at the wrong

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[209] BERNAUW, K., C., A., *op.cit. (note 126)*, 155.

[210] COLAS, E., *op.cit. (note 175)*, 21-25.

destination and immediately send them to the correct destination.[211]

This whole discussion will, of course, become redundant in the context of Montréal Protocol 4, when the limits become unbreakable as a *quid pro quo* for the imposed strict liability for damage or loss (see *supra*).

Another issue is the qualification of late delivery of goods conveyed by another mode of transportation instead of by air. The various standpoints as to unlimited liability and application of the Warsaw Convention in cases of substitution are dealt with earlier.

6. Non-delivery: Within or Without the Warsaw System?

It is commonplace to say that the Warsaw system provides only a fragmentary regulation of private air law. A small portion of legal problems is dealt with, namely in principle those concerning loss, damage and delay of goods in the custody of the carrier.[212] Article 21 of the CMR, for example, contains specific provisions on the carrier's liability for collecting cash on delivery, while the Warsaw Convention- in Article 8 (l)- merely states that such a modality of delivery must be mentioned on the air waybill.

It has therefore been argued that, if there is partial or entire non-performance of the contract of carriage, the carrier's liability would not be regulated by the Warsaw

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211 Restrictive interpretation of "wilful misconduct" (unamended version): Télé-Montage Inc., Select Films Inc. c. Air Canada, Cour d'Appel, Montréal, *Annals of Air and Space Law*, 1981, Vol. VI, 592-598;

212 FRINGS, M., *op.cit. (note 196)*, 8.

Convention.[213] If the goods are not flown- because the shipper prefers another carrier or because later shipment appears pointless- then there is no "international carriage performed by aircraft" as expressed in Article 1 of the Warsaw Convention. Though this terminology does not explain the legal situation when the contract of air carriage is not complied with, many courts will find enough reasons to call upon solutions of national law. The validity of exonerations in the general conditions of carriage is then to be investigated in view of national contract law. It has further been argued that the carrier cannot rely on the limits of liability or defences provided by the Warsaw system, if the goods are not delivered within the expressly agreed time, i.e. in breach with the original contract of carriage.[214]

There is, however, on the other side of the pendulum an antipode which leans to yet another triviality in air law, namely that the purpose of the Warsaw system is to unify substantive rules at international level. It is submitted that the operation and objectives of an international treaty should not be thwarted by doctrines of national law. According to this universal view, it is held that the expression "delay" of Article 19 is broad enough to cover the cancellation of a flight. The concept of "damages" in Article 19 thus encompasses all foreseeable damage resulting from failure to perform the transportation within the stipulated time.

It seems logic to conclude that acceptance of the goods for transport is considered as at least a commencement of performance, so that diverse situations occurring thereafter

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213 DE JUGLARD, M., DU PONTAVICE, E., DUTHEIL DE LA ROCHERE, J., MILLER, G., M., *op.cit. (note 9)*, 1989, 1168 etseq.

214 Bianchi v. United Airlines , C.A. Washington, 1978, 587 *Pacific Reporter, Second Series*, 632; GOLDHIRSCH, L., B., *op.cit. (note 66)*, 83.

can easily be qualified to fit into the Warsaw system- whether air transport actually took place or not. This could be understood by Article 24 which requires actions brought under Article 19 to be governed by the Convention "however founded", which does not only refer to the basic grounds of contract and torts law.

It would be rather absurd that the carrier could improve his position by leaving the goods in hangars instead of taking them to their destination. A consignor should on the other hand not be penalized for seeking alternate transportation in an attempt to lessen the effects of the delay.

It would equally be incorrect to invoke *contra legem*, i.e. against the Warsaw Convention, a common law theory that unfulfilled assurances concerning the time of delivery amount to a material deviation from the terms of the contract as a sufficient reason to vitiate the contract of carriage.[215]

The fragmentary view entails a practical problem of factual appreciation whether there is a second degree non-compliance, when the obligation to carry is fulfilled but tardily, or non-delivery. The latter hypothesis has sometimes been described as a cumulation of two rather vague conditions. The consignor or consignee would be justified to treat the contract as broken when the transport has not been performed within the objectively measured period of time, and where the consignor cannot have interest anymore in the offer made by the carrier.[216] The late arrival of documents in a deadline situation, for example, could qualify for a first degree non-compliance, a non-performance. If the deadline is not met, then the delivery of the documents has become completely pointless.

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215 RIDLEY, J., *op.cit. (note 119)*, 157.

216 SCHONER, D., *op.cit. (note 72)*, 165; SCHONER, D., *op.cit. (note 155)*, 344-345.

Finally, the fragmentary view suspends key elements of the system, such as Article 26, which provides that the interested party has to notify the carrier in writing within fourteen days (lengthened to three weeks under the Hague Protocol, the same duration as in the CMR, see *supra*) after the goods have been placed at the disposal of the cargo owner. Neither may the two-year limitation of Article 29 nor the provisions on jurisdiction in Article 28 be applied.

Any compromise between both theories seems hardly feasable. For example, it would not be logically consistent to put the concept of delay aside when proving non-performance or breach of the contract under national law and at the same time apply the limits of the Warsaw system.

The fact that the carrier reserves the right without notice to substitute alternate carriers or to cancel or postpone any flight,[217] cannot be invoked *per se* as a valid excuse for non-performance during a considerable period of time.

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[217] Clause 6.3.3 of the IATA Conditions of Carriage for Cargo.

V. PLURALITY OF PARTIES IN THE TRANSPORT CHAIN

It is not the purpose of this study to elaborate on the rights and the obligations of parties, but a few remarks should be in place. The plurality of participants and functions in transport law not only increases the risk of proceeding against the wrong defendant, but also the question of carrier's liability itself is often intertwined with an investigation of the relationship between the ultimate wrongdoer, the qualified air carrier and the cargo owner.[218] As mentioned before, it is on the non-carrier segment of the movement of goods, before and after carriage, that incidents of loss and damage most frequently occur.

1. Carrier

1.A. Definition

The drafters of the Warsaw Convention refrained from defining the term "carrier", because aviation should not be tied down while still in its early stages of development.[219] The increased number of charters after the Second World War, however, urged to develop additional rules to explicitly extend the Warsaw system to such arrangements.[220] This supplement took shape in the amending 1961 Guadalajara Convention, which removed to some extent the uncertainty around the concept of air carrier.

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218 TETLEY, W., "Marine Cargo Claims", Toronto, 1978, 59.

219 DRION, H., *op.cit. (note 54)*, 133; DIEDERIKS-VERSCHOOR, I., H., et al. "Some Observations Regarding the Liability of the Carrier in Air and Maritime Law", *European Transport Law*, 1973, Vol. VIII, 255.

220 DIEDERIKS-VERSCHOOR, I., H., *op.cit. (note 11)*, 1-3, 73-75.

The Guadalajara Convention provides that when the whole or part of the carriage by air is performed by a legal person who is not a party to the agreement for carriage, both the contracting and the actual carrier shall be subject to the rules of the Warsaw Convention. Following Article III of the Guadalajara Convention, the contracting carrier is liable for the entire air carriage contemplated in the agreement, whereas the actual carrier is responsible solely for the part of the carriage that he performs. The latter can never be held liable for the acts and omissions of the contracting carrier and his servants or agents beyond the limits specified in Article 22 of the Warsaw Convention.

This dual system of liability for contracting and actual carriers has to be distinguished from other forms of plurality of carriers, being successive and combined transportation within the meaning of Articles 30 and 31 of the Warsaw Convention. Successive air carriers performing chronologic parts of an undivided service are jointly and severally liable to the cargo owners, whereas combined carriers of various transport modes are each subjected to their respective regimes of transport law.

Considering the basic types of charter contracts, only wet leasing falls within the framework of the Guadalajara Convention.[221] In case of a bare hull charter (dry lease), the aircraft owner is merely bound to supply the lessee an airworthy aircraft without crew. The lessor does not operate the aircraft, nor does he enter in any contractual relationship with cargo shippers, so that a contract for the hire of an aircraft falls beyond the ambit of the Warsaw system. On the other hand, in a voyage charter (wet lease) the lessor acts in the capacity of a carrier, since he retains control over the aircraft together with the crew. If

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221 MAGDELENAT, J.-L., *op.cit. (note 55)*, 27-29.

the predetermined voyage satisfies Article 1 of the Warsaw Convention, it is subjected to the conditions of international air carriage. An operator who gives an aircraft with crew in time charter (wet lease) cannot be viewed as a Warsaw carrier, since the choice of route- national or international- is entirely left to the charterer upon conclusion of the contract.[222] It is interesting to note that the United States delegation at the 1961 Guadalajara Conference wanted to exempt the freight forwarder from the qualification "carrier", a proposal that would have considerably reduced the importance of the new Convention. Finally, the opinion of the European delegations prevailed to retain a general definition of the term "carrier" as a contracting carrier, contrary to the Anglo-American doctrine which put emphasis on the legal person who actually performed the carriage.[223] The contract of air carriage for cargo can be defined as that on the basis of which a carrier obliges himself to a consignor to transport cargo by air to a particular destiny.

Even in countries that have not ratified the Guadalajara Convention, it is now generally held that a carrier in the meaning of the Warsaw Convention is the legal person who by contract obliges himself in his own name to carry goods by air, also when he passes on the performance of the actual carriage to someone else.[224] For the purposes of Article 18§2

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222 MILLER, A. , J., *op.cit. (note 74)*, 15-20.

223 ABEYRATNE, R., I., "The Liability of the Actual Carrier in the Carriage of Goods by Air and in Multimodal Transport Transactions", *Air Law*, 1988, Vol. XIII, 129-137; Bundesgerichtshof, 10 May 1974, *European Transport Law*, 1974, Vol. IX, 630-636; SCHONER, D., "The Freight Forwarder as an Air Carrier", *Air Law*, 1980, Vol. V, 10; ICAO Doc. 7921-LC/143-2, 10-16 and 143-1,40 et seq.

224 MAGDELÉNAT, J.-L., *op.cit. (note 2)*, 102.
contra: some U.S. cases, see: GIEMULLA, E., and SCHMIDT, R., "Ausgewahlte internationale Rechtsprechung zum Warschauer Abkommen in den Jahren 1987-1989", *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 167.

of the Warsaw Convention, the contracting carrier will be liable while the goods may be in direct charge of a subcontracting carrier. In non-Guadalajara cases, the person who actually performs the carriage will be classified as a servant or agent.[225] Under Article VII of the Guadalajara Convention, the claimant has still the option to bring an action against either the actual carrier or the contracting carrier, or against both. The rights and obligations of carriers *inter se* remain generally subject to national law (Article X of the Guadalajara Convention).

A similar system prevails in the CMR (Article 3) and in maritime law where, according to Article 1 of the Hague-Visby Rules the carrier comprises the owner of the ship or charterer who enters into a contract with a shipper to transport goods by sea.[226]

1.B. Intermediaries

1.B.1. Intermediaries as Carriers

Like in road transportation, the qualification of freight forwarders or consolidators as carriers is of utmost importance. The freight forwarder has traditionally been an interface between shipper and airline, arranging in his own name the carriage of goods for the account of the consignor or the consignee.[227] In practice, this means that he offers expert advice, processes documentation and organizes carrier

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225 MANKIEWICZ, R., *"The Liability Regime of the International Air Courier'*, Antwerp, 1981, 38.

226 MARTINEZ CASIELLES, J., A., *op.cit. (note 53)*, 150; HADJIS, D., A., *op.cit. (note 53)*, 145; DIEDERIKS-VERSCHOOR, I., H., et al. *op.cit. (note 219)*, 256.

227 Mc NEIL, J., S., "Motor Carrier Cargo Claims", The Carswell Company Ltd., Toronto, 1986, 17-24; NAVEAU, J., *op.cit. (note 43)*, 725-726.

support in various modes. The clear distinction between direct carriers and indirect carriers (read: freight forwarders) has faded away as the latter have become integrators, operating their own means of carriage on a door-to-door basis.[228]

Integrators, particularly from the USA and Australia (e.g. DHL, TNT and Federal Express), have made inroads into the more profitable smaller consignment market, introducing complete door-to-door integrated services via exclusive multimodal networks. These air express companies focused on time- guaranteed transits with through price reductions based on an optimum mix of express parcels and high density materials at lower weight bands (up to 35 kilogrammes).[229]

The main reason for forwarders and express companies to turn air carriers- apart from the potential benefits of cost scale economies- was that airlines put emphasis on the needs of scheduled passenger traffic. That philosophy often dictated the choice of aircraft on certain routes to the detriment of air cargo space and which impaired the efficient and speedy transit of air cargo. Intercontinental air freight, usually available at the end of the working day, moves at best overnight via a gateway to allow next day delivery at its ultimate destination.[230] The gate was thus left open for the integrators to provide the level of service that a competitive market requires. The increasing demand for exclusive air cargo freighter services revealed a growing distinction between the needs of the passenger and those of the shipper.

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228 DAVIS, G., J., and GRAY, R., *op.cit. (note 145)*, 101-108.

229 Over 60% of all air cargo shipments are under 30 kilogrammes representing some 15-20% of all weight carried; *"Airline Freight under Air Waybill"*, *op.cit. (note 4)*, 14, 16 and 33.

230 Recently, however, rather environmental considerations require aircraft to move during daylight hours at many airports in populated areas.

Moreover, the United States' carrier deregulations in the early eighties furthered a proliferation of integrated companies in the world's largest domestic air transport market by allowing indirect carriers to become direct carriers. Previous forwarders and couriers not only relied on traditional methods such as buying main deck or belly-space on scheduled passenger or all cargo flights, or employing on-board couriers with luggage on scheduled passenger flights, but they could also charter entire aircraft or simply operate their own. Surface carriers turned into air carriers, while scheduled passenger airlines entered the forwarding and air express market, and acquired their own fleet of vans and trucks.[231]
Participants in the transport sector thus tend to mirror one another in their attempt to offer a complete package including trucking, handling, customs clearance.

The development of containers gave an impetus to the business of consolidators. Consolidation, also known as groupage, is an arrangement for loose freight received from several consignors to be carried on the same trunk route at approximately the same time.[232] Consolidated goods are covered by a master air waybill and for each shipment within a consolidation also a house air waybill is issued by the forwarder. The forwarder then makes a grouping arrangement with the carrier for transport at a lower rate.

It is not easy to distinguish the freight forwarder from a carrier. The legal position of the freight forwarder- and consequently the extent to which his rights and obligations differ from those of the carrier- varies considerably from

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231 TAPNER, H., *op.cit. (note 1)*, 40; BERNAUW, K., C., A., *op.cit. (note 126)*, 44-47; PARIKH, A., N., et al., *op.cit. (note 4)*, 1-13.

232 DAVIS, G., J., and GRAY, R., *op.cit. (note 145)*, 27-28; TAPNER, H., *op.cit. (note 1)*, 115-166.

country to country. As a starting point, mandatory international law (*in casu* the qualification of a carrier under the Warsaw system) overrides domestic legislation (particularly on freight forwarding).[233]

A careful analysis of the facts in each individual case is indispensable to determine whether an intermediary is in fact a freight forwarder or carrier. Air freight forwarders and consolidators who issue in their own name separate documents of carriage to the original shippers at the acceptance of the goods, qualify *prima facie* as (contracting) carriers in the meaning of the Warsaw and the Guadalajara Convention.[234] This finding may be confirmed if the air waybill also mentions a fixed freight for the whole carriage.[235] Such single rate packages make up a basic characteristic of integrators' activities, as contrasted with the traditional air cargo movement which is subject to composit pricing for surface transportation, handling, air freight and customs clearance.
An intermediary might possibly sign a house air waybill in the capacity of an agent of the carrier (see *infra*) or as an agent of the consignor. Forwarding agents acting for a named principal are personally liable to the air carrier for the freight, but they may bring a recourse action against the ultimate consignor, who remains primarily liable for the

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233 Oberlandesgericht Frankfurt am Main, 4 December 1979, *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 441-444.

234 X v. KLM, Tokyo District Court, 15 July 1985, *Annals of Air and Space Law*, 1987, Vol. XII, 450-452; Salsi v. Jetspeed Air Services Ltd., Queen's Bench Division, *Lloyd's Law Reports*, 1977, II, 57; Oberlandesgericht Frankfurt am Main, 10 January 1978, *Zeitschrift fur Luft- und Weltraumrecht*, 1978, Vol. 27, 215-217; Landgericht Frankfurt/Main, 20 September 1985, *Zeitschrift fur Luft- und Weltraumrecht*, 1986, Vol. 35, 154-157; SCHONER, D., *op.cit. (note 155)*, *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 330-331; SUNDBERG. W., F , *op.cit. (note 49)*, 239.

235 Jonker and Schadd v. Nordisk Transport Company, City Court of Stockholm, June 20 1956, *US Aviation Reports*, 1961, 230-241.

freight.[236] An air freight broker acting as principal has no obligation to carry the goods personally, but he is only bound by a forwarding contract to procure that the goods are carried by a third party.[237]

Another decisive factor in assessing the legal position of the intermediary is the conduct of the freight forwarder *vis-à-vis* the consignor. If a freight forwarder advertises with regular flight services, flight rates, he will create the impression of offering air carriage for the proper performance of which he will be liable. Criteria such as "dominating activity" or "past business connections", sometimes used in this context, seem unsuitable for want of clarity.[238]

Even the terms specified by the parties in the general conditions of the contract cannot serve as watertight guidelines to define the position of the intermediary. One can be considered as a (contracting) carrier, despite the mention "as agents only" or the specification that he is acting in the capacity of an air freight broker. The International Federation of Freight Forwarders Associations (FIATA) has been promoting air waybills with a clause stating that transportation to the airport of departure does not constitute part of the air carriage contract, whenever a forwarder issues an air waybill. Such services would be under a separate forwarding contract. There is no reason, however, that a forwarder could not be regarded as a carrier within the ordinary meaning of the word. The language of the clause is so vague that the intention of the forwarders to impose

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236 Perishables Transport Company Ltd. et al. v. Spyropoulos London Ltd. et al., Queen's Bench Division, October 5 1964, *US Aviation Reports*, 1966, 103-107.

237 Salsi v Jetspeed Air Services Ltd., Queen's Bench Division (Commercial Court), January 14 1977, *Lloyd's Law Reports*, 1977, Vol.II, 57-61.

238 SCHONER, D., *op.cit. (note 223)*, 13.

conditions upon surface carriage would be likely to fail in court.[239]

A surface carrier in combined transport cannot be seen as a contracting air carrier, unless he is an air carrier, forwarder or integrator operating his own fleet of trucks.

1.B.2. Non-carrying Intermediaries

Contrary to the high degree of uniformity achieved by international transport Conventions with respect to the liability of carriers, the legal position of non-carrying intermediaries remains governed by disparate domestic regimes. In the margin of air transport, independent subcontractors are involved in customs clearance (frequently linked with de-consolidation), warehousing, ground handling, catering, repair of aircraft and numerous other services not covered by international air law.[240]

In some countries, the warehousing bailees can avail themselves from certain obligations or enjoy limits of liability far below the Warsaw limits. When the period of responsibility of the carrier (which extends beyond the time that the goods are actually airborne) overlaps with that of the non-carrying intermediary, the former may thus have a considerable disadvantage with recourse actions against warehousemen.

Both common law and civil law traditionally distinguish between a gratuitous bailee, who is required to do no more than what is reasonable, and a bailee for reward, who is subjected to a higher standard of care. If a warehouseman for reward fails to deliver the goods properly, the onus usually

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239 GATES, S., *op.cit. (note 134)*, 1-3.

240 BAUZA ARAUJO, A., *op.cit. (note 172)*, 135.

rests upon him to establish that he exercised such care and diligence with regard to the goods in his custody as a careful and vigilant owner of similar goods. The civil law bailee is obliged to deliver in good condition the goods entrusted to him (*obligation de résultat*) unless he can show that the performance has become impossible (*force majeure*).[241]

In current commercial practice, the same company often takes care of warehousing as well as of specific ground operations. The latter services cover the traditional field of handling agents (possibly monopolized by airlines) who receive, store, stow and (un)load goods on behalf of the air carriers.[242] Handling companies tend to include in their contracts clauses of exoneration for damages occurring during their services, but they are not binding to third parties.

To fill the gap in the liability regimes, the International Institute for the Unification of Private Law (UNIDROIT) prepared a preliminary draft Convention on the Liability of Operators of Transport Terminals.[243] The text offers due protection to persons with interests in cargo, and facilitates recourse by carriers *sensu lato* against non-carrying intermediaries for operations that are related to international carriage of cargo. The uniform rules are designed for warehousemen in the modern sense. Apart from the safekeeping of goods, additional stevedoring or handling operations may also be covered. The operator of a transport terminal would be liable according to the presumed fault standard as found in the Hamburg Rules of 1978 on the

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241 FITZGERALD, G., F., "The Proposed Uniform Rules on the Liability of Operators of Transport Terminals", *Annals of Air and Space Law*, 1985, Vol. X, 34-38.

242 La Neuchateloise v. Deutsche Lufthansa A.G., Tribunal de première instance, *Annals of Air and Space Law*, 1986, Vol. XI, 377-383.

243 FITZGERALD, G., F., *op.cit. (note 241)*, 29-60; UNCITRAL, A/CN.9/252, 23-29.

Carriage of Goods by Sea and the 1980 MT Convention of Geneva. However, the applicability of the draft Convention to aviation would be rather restricted, because air carriers- as opposed to sea carriers- frequently store the goods in their own facilities. Moreover, the uniform rules would not apply to a non-carrying intermediary acting as an agent of an air carrier, who is entitled to invoke defences and limits of liability under the Warsaw system.

IATA elaborated a standard ground handling agreement detailing the standard of services, accounting and, of course, the issue of liability.[244] The arrangement envisages a certain interaction between the two parties at operational level. For example, Article 4.1 of the agreement allows the carrier to maintain a representative in order to advise and assist the handling company and to inspect its services furnished pursuant to the agreement. Article 5.5 requires the carrier to supply the handling company with sufficient information and instructions enabling the latter to perform its handling properly.

Following Article 8.1, the carrier waives any claim against the handling company and promises to indemnify the latter against any liability to third parties for, *inter alia*, damage to or delay or loss of cargo arising from acts or omissions by the handling company (including its employees, servants, agents and subcontractors), save intentional or reckless faults. For cargo directed to or from the United States, this indemnification may not exceed the amount due under the Warsaw Convention, even if another legal regime is to be held applicable. The third paragraph of Article 8 clarifies that the waiver of indemnity for surface transportation relates only to operations of (un)loading, parallel to the ordinary liability of the air carrier. Disputes should be settled by arbitration according to

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244 *"Standard Ground Handling Agreement"*, IATA, IGHC/5, 1992, Attachment C, 1-41.

procedures set forth in Article 9, resulting in a final and binding award.

1.C. Agents and Servants

Agents and servants cannot as such be considered as air carriers, because they do not undertake air transportation as a principal *vis-à-vis* the consignor.
The term *"préposé"* used in the authentic French text of Article 20, 25 and other articles of the Warsaw Convention comprises, besides employees and agents of the air carrier, independent subcontractors for- *inter alia*- cargo handling, transshipment, customs clearance (by private companies), local cartage and air carriage.[245] The self-explanatory Article 3 of the CMR speaks in more general terms of persons of whose services the carrier makes use for the performance of the carriage.

The original Warsaw Convention renders the air carrier vicariously liable for acts of his servants and agents within the scope of their employment.[246] At present, it is generally accepted that independent contractors as well as the airline's agents and servants are correspondingly entitled to the limitations of liability under Article 22, at least when

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245 GOLDHIRSCH, L., B., *op.cit. (note 66)*, 68; Oberlandesgericht Frankfurt, 21 May 1975, *Zeitschrift fur Luft- und Weltraumrecht*, 1975, Vol. 24, 218-221; Oberlandesgericht Frankfurt am Main, 10 January 1978, *Zeitschrift fur Luft- und Weltraumrecht*, 1978, Vol. 27, 215-217.

246 Definitions: Rustenburg Platinum Mines Ltd. et al. v. South African Airways and Pan American World Airways Inc., Court of Appeal (United Kingdom), July 11 1978, *Lloyd's Law Reports*, 1979, Vol. I, 19-25; Cour de Cassation de France, 17 November 1981, Compagnie Générale d' Electrolyse du Palais v. Sabena et al., *European Transport Law*, 1983, Vol. XVIII, 604-608; Cour de Cassation de France, 21 July 1987, Sabena et al v. Compagnie Générale d' Electrolyse du Palais, *European Transport Law*, 1987, Vol. XXII, 764-767; Air Canada v. Swiss Bank Corp. et al., Court of Appeal, July 9 !987, *Canada Federal Court Reports*, 1988, Vol. I, 71-83.

the applicable domestic law allows a direct action against them.[247] This interpretation is explicitly adopted in Article XIV of the Hague Protocol.
The Guadalajara Convention clarifies that servants and agents of the contracting or actual carrier are liable for their acts and omissions within the scope of his employment.

As mentioned before, the Warsaw system is deemed to be applicable to pick-up, transshipment and delivery services. For damage proved to have occurred during the surface leg, the air carrier may be liable as a principal according to the appropriate domestic or international law. Not all air carriers operate their own surface vehicles, preferring commercial co-operation with specialist surface distributors. Especially airlines lack the knowledge for the development of an own distribution network and appear weary of the high investments and risks involved.
They are nevertheless liable to the customer for the acts and omissions of independent subcontractors who actually perform the trucking. The latter often work exclusively at the air carrier's instructions and use his flight numbers, with their fleet of dedicated trucks bearing the airline's colours and logo and their drivers dressed in the air carrier's uniforms.[248] Moreover, such hauliers operate special vehicles equipped with roller-beds for unit load devices.[249]
Recovery as between carriers involves few rules, so airlines or the integrators and subcontracting surface carriers should conclude detailed agreements to apportion between them the

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247 Reed v. Wiser, US Court of Appeals, 2nd. Circuit, 14 Avi. 17, 841; SCHONER, D., *op.cit. (note 155)*, 332-333.

248 BERNAUW, K., C., A., *op.cit. (note 126)*, 147-148.

249 In many cases hauliers have to arrange their own back haul loads- if cabotage is allowed- or return empty, since the same haulier will not necessarily be used in both directions. On average the vehicles are utilized for 50% on either a weight or volume basis.

ultimate liability for cargo damage and to specify proper handling standards.

Surface movements fall completely outside the air carrier's liability when the consignor deals personally with the surface carrier. The air carrier cannot claim to act as an agent of the consignor in organizing trucking, if the air waybill does not mention a separate price for the transportation paid by the airline to the surface carrier. Interestingly enough, German courts held that- irrespective of the legal ties between the consignor and the surface carrier- airlines were liable when they were in the possibility to exert effective control to avoid the damage at the time of the incident.[250] An air carrier could not successfully invoke contributory negligence, if the consignor's lorry-driver offered his assistance in the unloading process at the airport terminal, because the latter then acted on behalf of the instructing air carrier, who also disposes of the proper equipment to accomplish the task. This functional approach seems to imply that the actual phase in the performance of the contract takes precedence over the strictly legal relations between the participants (see *supra* about the possible conflict with the CMR).

2. Cargo owners

Plainly spoken, the consignor concludes a contract with a carrier, whereas the consignee is designated on the air waybill and to whom the merchandise must be handed over by the carrier. The principal of the consignor named in the air waybill may sometimes be undisclosed, but it is usually easy to identify the consignor in a given case. Identifying the

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250 Bundesgerichtshof, 27 October 1978, *European Transport Law*, 1979, Vol. XIV, 651-659; *Zeitschrift fur Luft- und Weltraumrecht*, 1980, Vol. 29, 61-66.

consignee- sometimes considered as a party to the contract of carriage, sometimes as a third beneficiary- is more problematic.[251]

The respective legal position of the consignor and the consignee depends *inter alia* of the terms in the underlying contract of sales between them. Commonly three basic modalities are used for air carriage: franco domicile (freight prepaid from door to door), ex works (a charges collect system) and FOB (free on board).[252] The last clause implies that the seller must deliver the goods on board the vehicle at his expense. From the moment that the goods are in the possession of the carrier, the contractual responsibility of the seller terminates and the property and the risk pass on to the buyer, who is responsible for the transportation costs and all subsequent expenses.[253] Consequently, the transfer of legal interests in the shipment does not always coincide with the passage of the right of disposal on arrival of the shipment at the place of destination, as described in Article 13 of the Warsaw Convention.

Like the CMR consignment note, the air waybill is not a document of title in the strict sense, its transfer does not affect ownership of the goods or the rights and liabilities arising from the contract of carriage. The speed of the service makes any intermediate transactions with a second buyer hardly feasable. Nevertheless, at the Hague Conference a third paragraph was added to Article 15 to the effect that nothing in the Convention prevents the issue of a negotiable

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251 VIDELA ESCALADA, F., N., *op.cit. (note 1)*, 392.

252 FOB is one of the INCOTERMS, which are widely used standard terms of sale advocated by the International Chamber of Commerce; DAVIS, G., J., and GRAY, R., *op.cit. (note 145)*, 24-27; SUNDBERG. W., F., *op.cit. (note 49)*, 231-2; TAPNER, H., *op.cit. (note 1)*, 38.

253 House of Bradley Inc. c. Bivansa Inc., Cour d'Appel, Montréal, *Annals of Air and Space Law*, 1980, Vol. V, 676-679.

air waybill.[254] This provision was deleted again at the 1975 Montréal Conference as a normal consequence of the upcoming computerized processing of traffic documents.[255]

The air waybill, though in principle not a negotiable document, has been accepted in a limited way as a security in credit transactions.[256] Banks that have advanced the purchase price to the seller (until the buyer repays the credit or executes further security for released goods), do not have any rights under the contract of carriage nor any title to the goods. But by holding the consignor's copy of the air waybill they can effectively prevent the consignor from exercising his right of disposition to interfere with the regular delivery conforming the air waybill. Article 12(3 of the Warsaw Convention makes the carrier liable towards any person who regularly possesses the air waybill, for damages resulting from the fact that he would have followed the consignor's instructions under Article 12(1 (stopping of goods or having them returned or delivered to another person than the consignee) without having required that the consignor produced his part of the air waybill.[257] More often than not, non-compliance with these provisions may lead to unlimited liability under Article 25 of the Warsaw Convention.

At present, often a bank is named as the consignee, which is obviously not the company or person to ultimately take possession of the goods.[258] When the bank is the consignee for

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254 ICAO Legal Committee, 9th Session, Rio de Janeiro, August 25-September 12 1953, Minutes, Vol. I, Montreal 1954, Doc. 7450- LC/136, 69 etseq.

255 SUNDBERG. W., F., *op.cit. (note 49)*, 233.

256 NDUM, F., N., *op.cit. (note 26)*, 133-134.

257 DRION, H., *op.cit. (note 54)*, 77; Bundesgerichtshof, March 19 1976, *Zeitschrift fur Luft- und Weltraumrecht*, 1977, Vol. 26, 79-85; *European Transport Law*, 1976, Vol. XI, 880-893.

258 Oberlandesgericht Frankfurt/Main, 27 January 1989, *Zeitschrift fur Luft- und Weltraumrecht*, 1990, Vol. 39, 224-229.

the purpose of honouring a letter of credit, the ultimate consignee should appear in the box "also notify" on the air waybill. Another practice is making the customs agent of the ultimate consignee the named consignee on the air waybill.

If the actual cargo owner is not a consignor or a consignee shown on the AWB, what about the owner qualifying as an "also notify" party? Several French and U.S. cases hold that only the consignor and the consignee named in the air waybill may take action under the Warsaw system, except when an insurer has paid the claim and is subrogated to the rights of the claimant.[259] The carrier could then be sued exclusively by those whom he has knowingly dealt with.

Elsewhere it is mostly held that the Convention should not be so narrowly construed, if that would defeat the rights of the cargo owner.[260]

The key argument in favour of the first view focuses on Article 14, which states that the nominal consignor and the consignee can respectively enforce all the rights given to them by Articles 12 and 13, whether he is acting in his own interest or in the interest of another. Even if Articles 12 through 15 are supposed to be read as restrictive in effect, they deal exclusively with documentary requirements and modalities as stoppage in transitu and the uplifting of air

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259 Air France v. Sté Laiterie de Curepipe, Court d'Appel de Paris, June 21 1985, *Revue française de droit aérien*, 1085, 343; Manhattan Novelty Corp. v. Seaboard and Western Airlines, Supreme Court of New York, Aviation Law Reports, 1957, 5, 17229; American Banana Company v. Venezolana Internacional de Aviación S.A., State of New York, Court of Appeals, March 20 1980, *US Aviation Reports*, 1980, 1441-1443; GOLDHIRSCH, L , B., *op.cit. (note 66)*, 50-51; KUHN, R., "Sonderfalle der Anspruchs berechtigung bei Art. 17, 18, 19 WA, WA/HP", *Zeitschrift fur Luft- und Weltraumrecht*, 1989, Vol. 38, 21-29.

260 Leon Bernstein Commercial Corp. v. Pan American World Airways, State of New York, Appelate Division, November 20 1979, *US Aviation Reports*, 1979, 1000-1002.

cargo at its destination.[261] The liability provisions in Articles 18 and 19 *per se* are silent on the matter whether the cargo owner must be consignor or consignee named in the air waybill. On the other hand, Article 14 does not enable a consignee or a consignor to act in the interests of another except in circumstances which arise out of the exercise of a right conferred by Articles 12 and 13. Consequently, a freight forwarder -being the consignor shown on the air waybill- cannot in that capacity bring an action against the air carrier for damage under Article 18 or 19, if he has no special interest in the goods. The same can be said of a bank as the *ex facie* consignee, when it is fully compensated for the credit granted. The claimant must establish a necessary ownership interest or some other special interest in the delayed, damaged or lost shipment. The assumption that the consignor or the consignee named in the air waybill has an ownership interest is obviously rebuttable.

Also Article 30, which deals with the particular case where the transport is to be performed by various successive carriers, has been cited in support of the first view. It provides that the last carrier and also the carrier who performed the carriage during which the destruction, loss, damage or delay occurred, will be jointly and severally liable to the consignor or consignee. The provision does not say that the cargo owner, other than the consignor and the consignee, would be deprived of his proper remedies against carriers.

According to Article 24§1, any actions, whether founded on the contract or on tort, may be brought subject to the

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261 Tasman Pulp and Paper Company Ltd. v. Brambles J.B. O'Loghlen Ltd. et al., High Court of New Zealand Auckland Registry, June 29 1981, *Annals of Air and Space Law*, 1987, Vol. XII, 421-433; *Air Law*, 1982, Vol. VII, 64-65; Gatewhite Ltd. et al. v. Iberia Lineas Aereas de España Sociedad, Queen's Bench Division (Commercial Court), July 29 1988, *Lloyd's Law Reports*, 1989, Vol.I, 160-166.

conditions and limits set out in the Convention.[262] The drafting history of the Warsaw Convention confirms that the limits of Article 22 apply even if the claimant suffering damages is not a party to the contract of carriage. This construction is logically consistent with the hands-off provision in Article 24§2, which leaves the matter of who has the right to bring action in case of death or injury to a passenger up to the national courts.[263]

Article 26 requires that in the case of damage to goods, "the person entitled to delivery" notify the carrier after the discovery of the damage. This provision clearly contemplates that the real party in interest is not by definition the consignee named in the air waybill.[264]

It may be concluded that the Convention did neither expressly nor by a necessary implication deprive an injured party from his common rights. Another construction would be contrary to the meaning and purpose of Article 18 which says that the carrier is liable for damage to cargo. The person with legal interests in the goods, can sue a carrier for loss or damage even if he is not a party to the contract of carriage (assuming a direct causal connection between the damaging event and the damage he sustained). *Ab absurdo*, the restriction of the right to sue the carrier for the consignor or the consignee only would render documentary sales with air waybills hardly practicable. Moreover, it would be unreasonable that the true cargo owner would have no alternative than to circumvent the restriction by obtaining

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262 NDUM, F., N., *op.cit. (note 26)*, 120.

263 KEAN, A., "Cargo Liability under the Warsaw Convention", *Air Law*, 1988, Vol. XIII, 187-188.

264 (dissenting opinion) American Banana Company Inc. v. Venezolana Internacional de Aviación S.A., State of New York, Appelate Division, January 4 1979, *US Aviation Reports*, 1979, 631-645.

an express assignment of the right of action from the nominal consignee in accordance with complementary national law.[265] The latter, whether a freight forwarder or a customs agent or a bank, may be incapable or averse to proceed against an airline for a variety of reasons. Finally, the carrier himself may run the risk of being sued in tort for amounts exceeding the Warsaw limits.

The CMR, in its Article 28, puts the rules concerning contractual and extra-contractual claims for loss, damage or delay on the same line. Third parties may consequently be confronted with the Convention's provisions on the carrier's defences, the compensation due and the time limitations.[266] Article 11.1 of the IATA Conditions of Carriage for Cargo goes along with this view, stating that the carrier's liability stretches to the shipper, consignee or "any other person". This does obviously not imply that the carrier can be exposed to the same liability claim at the instance of more than one person.

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265 HYMAN, P., "Strict Construction of the Warsaw Convention", *18th Annual ATA Claims Prevention Seminar, Arlington (Virginia)*, May 28-30 1991, unpublished, 4.

266 DORRESTEIN, T., H., *op.cit. (note 3)*, 59-60.

VI. CONCLUDING REMARKS

Air cargo trucking has now very much become part of the air cargo product, which can no longer be considered as a single route service within a well-defined area. An ever expanding fleet of trucks crosses Europe daily to collect or deliver air cargo consignments to and from airports. It could be expected that- at least in the near future- road/air movements will remain the only viable combination with air transport. The 1992-93 liberalization and harmonisation of the internal market in the European Community will probably have a vast and positive impact on the transportation by air and by road.

Air trucking operations are often undertaken without a thorough understanding of the legal consequences involved. The period of the carrier's liability according to the original Warsaw Convention of 1929 remained untouched by the subsequent amendmends of The Hague Protocol of 1955 and the Guadalajara Convention of 1961. Neither has Paragraph 4 of Article IV of the Montréal Protocol 4 of 1975 shed any light on the matter. The absence of solidarity among combined carriers, due to the lack of homogeneous legal regimes, requires from the plaintiff a difficult proof that the damage occurred during a particular segment. Hence a recourse to concepts like pick-up and delivery, of which the definition represents nothing less than the enclosing of a wilderness within a wall of words. It is today highly controversial whether long haul hubbing or road feeder operations under air waybill can be conceived as incidental to air carriage.

A straightforward proposition would be to bring all agreed truck movements linked with international air transport as a principal mode and covered by a single air waybill under the aegis of a common denominator entailing the rebuttable

presumption that the entire Warsaw system is applicable for non-localized damage. Of course, nothing prevents air carriers from guaranteeing the Warsaw standards to damage localized in the surface leg, as far as the applicable regime does not impose a higher level of liability.
The extended and simplified concept of auxiliary surface transport is contrasted only with segmented transport following several individual contracts of carriage without any connection between them. An evolutive interpretation renders redundant a plethora of litigation about the frustrating question to qualify road transport. It makes sure that damage involving goods *en route* to the final destiny can be compensated by an easy accessible instance which takes responsibility for the entire carriage.

Another snag is the legal position of the air carrier and the cargo owners when the surface transport is neither specifically nor generally (per IATA Resolution 507b) covered by the original contract. Except when problems occur, especially smaller shippers are not always fully aware of the airlines' practice of moving air consignments by road. Apparently there is a need for more transparency about the trucking systems of many airlines, emphasizing that carriers have the right- beyond occasional substitution of modes- to routinely carry goods by road for particular parts of the journey. Such a clarification at the conclusion of the agreement would avoid unlimited liability outside the framework of the Warsaw system for breach of contract.

As for delay, even with the help of the Gronfors model it remains a fairly complex aspect of liability. It might be a necessary evil, because a quasi-automatic indemnity for even short delays would be too onerous for the safety and operation of aviation. However, the curious retention of fault liability (with weight-based limits) for delay in Montréal Protocol 4 is not very satisfactory and it proves

that air law has still much to learn from specialized cargo Conventions for other modes.

Admittedly, the last word has not been said on this matter. The picture on the airlines' radar screen is far from clear and the novel system for carrier's liability will certainly bring new enigmas. The discussed basic legal and economic pattern, though, will continue to determine the aviation industry for some time to come. The present analysis has followed a supra-national approach to highlight the concept of time in connection with delay and the period of liability, which is closely knit to the ability to exercise control over the cargo in order to avoid damage or loss. Loyal to the philosophy expressed in the Preamble of the Warsaw Convention, there has been invariably chosen for a broad interpretation in favour of the applicability of an internationally uniform and predictable solution against the diversity of national legislations. Indeed, ICAO's and IATA's efforts to elaborate a universal unification in private air law would be in vain if its scope is shrunk and perforated like a Swiss cheese...

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