

Consolidation of the Warsaw/Hague System

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Introduction

The purpose of this article is to examine the possible consolidation of the instruments of the Warsaw/Hague System in a single convention and to make some comments and suggestions. The possibility of consolidation was introduced by Resolution incorporated in the Final Act of the International Conference on Air Law held in Montreal from 3 to 25 September 1975.¹

In order to facilitate analysis of the provisions of the above-mentioned resolution, the fundamental concepts and principles of the Warsaw Convention of 1929² along with amending or supplemental Conventions and Protocols shall briefly be described, since they serve as the basis of the proposed consolidation. It is then proposed to examine how this consolidation can be accomplished.

I. Historical background

A. Warsaw Convention

This Convention deals principally with the documents of carriage and the liability of the air carrier. With respect to the first item, the Warsaw Convention contains rules concerning the passenger ticket,³ baggage check,⁴ and air waybill,⁵ including the designation of persons responsible for issuing them, their preparation, their proper content, and the legal implications in cases of deficiencies in their issuance.⁶ With respect to the second item, the Convention provides for a presumption of carrier liability in cases of death or injury of a passenger,⁷ destruction or loss of baggage,⁸ destruction

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¹ ICAO Doc. 9144 (1975).

² *Convention for the Unification of Certain Rules Relating to International Carriage by Air* 49 Stat. 3000; T.S. No. 87 (1929) [hereinafter Warsaw Convention]. This translation of the authoritative French text is that followed by the United States.

³ *Ibid.*, Art. 3.

⁴ *Ibid.*, Art. 4.

⁵ *Ibid.*, Arts. 5-16.

⁶ *Ibid.*, Arts. 3(2), 4(4) and 9.

⁷ *Ibid.*, Art. 17.

⁸ *Ibid.*, Art. 18(1).

or loss of goods,⁹ and delay in the carriage of passenger, baggage and goods.¹⁰

The liability regime of the carrier as provided for by the Convention is based on *fault*. According to Article 20(1), the carrier shall not be liable if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures. Furthermore, with respect to the carriage of goods and baggage, Article 20(2) provides that the carrier shall not be liable if it proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation, and that in all other respects it and its agents have taken all the necessary measures to avoid the damage.

Principally, the liability of the carrier is *limited*. Though under obligation to compensate the victim for the actual damage suffered, the carrier is not obligated to make payments above the liability limits.¹¹ However, the carrier loses the benefit of this limited liability if the damage was caused through its wilful misconduct or gross negligence,¹² or if the documents of carriage were either not issued at all or not in conformity with standards laid down by the relevant articles.¹³ The limits are as follows: 125,000 gold francs per passenger; 250 gold francs per kilogram of checked baggage and cargo; 5,000 gold francs for articles which the passenger carries with him.¹⁴

B. *The Hague Protocol*

This Protocol¹⁵ simplified the rules relating to documents of carriage and reduced the number of mandatory provisions therein. Paragraph 2 of Article 20 was deleted,¹⁶ and a new article was added enabling the servants and agents of the carrier to take advantage of the limits of liability enjoyed by the carrier.¹⁷ No change was made in the limits relating to baggage, goods and articles which the

⁹ *Ibid.*

¹⁰ *Ibid.*, Art. 10.

¹¹ *Ibid.*, Art. 22.

¹² *Ibid.*, Art. 25.

¹³ *Ibid.*, Arts. 3(2), 4(4) and 9.

¹⁴ *Ibid.*, Art. 22. For the value of a "gold franc", see Art. 22(4).

¹⁵ *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 7632 (1955) [hereinafter *The Hague Protocol*].

¹⁶ *Ibid.*, Art. X.

¹⁷ *Ibid.*, Art. XIV, adding Art. 25A.

passenger carries with him, but the limit of liability per passenger was doubled to 250,000 gold francs.¹⁸

C. *Montreal Agreement, 1966*

The United States, on November 15, 1965, gave notice of its intent to denounce the Warsaw Convention on the grounds that the liability limits were below those reasonably acceptable for the protection of its citizens' interests.¹⁹ After much work and debate, a compromise solution was found and accepted at a conference at Montreal sponsored by the ICAO in May 1966,²⁰ according to which the limits of liability of the carrier were raised to \$75,000 inclusive of legal fees and costs (\$58,000 exclusive of legal fees and costs) per passenger on a flight with an agreed stopping place in the United States of America. Furthermore, the carriers agreed to waive their rights to the defence available under Article 20(1) of the Warsaw Convention and submit to a regime of *absolute liability*. However, the Montreal Agreement was not adopted at the end of the Conference and thus does not amount to an amendment of the Warsaw Convention or of The Hague Protocol.²¹

D. *Guatemala City Protocol*

This Protocol²² was intended to amend the Warsaw Convention as amended by The Hague Protocol. It dealt mainly with the provisions concerning passengers and baggage. Liability of the carrier in respect of death or bodily injury of the passenger together with its liability in respect of loss of or damage to checked baggage was

¹⁸ *Ibid.*, Art. XI.

¹⁹ Under Art. 39(1) of the Warsaw Convention, any High Contracting Party may denounce upon giving notification to the Government of the Republic of Poland. Art. 39(2) provides that the denunciation will take effect six months after notice is given.

²⁰ *Agreement Relating to Liability Limitations of the Warsaw Convention and The Hague Protocol*, Agreement C.A.B. No. 18990 (1966) [hereinafter *Montreal Agreement, 1966*].

²¹ See Kreindler, *Aviation Accident Law* (1974), vol. 1, § 12 A-02; Milde, *Consolidation of the "Warsaw System"* (1976) 1 *Annals of Air and Space Law* 257. Milde defines the Montreal Agreement as "an ingenious private contractual interpretation" of the Warsaw Convention. For a complete and detailed analysis of the Montreal Agreement, see Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention* (1967) 80 *Harv. L. Rev.* 497.

²² *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 8932/2 (1971) [hereinafter *Guatemala City Protocol*].

converted into *absolute liability*.²³ Liability based on fault in cases of loss of or damage to cargo was left intact. The Protocol further simplified the provisions relating to passenger tickets and baggage checks by introducing new rules enabling carriers to use automated data processing systems in the carriage of passengers and baggage; computerized information could be put into use instead of the usual ticket and baggage check.²⁴ While limits of liability were raised, it was stipulated that these were to be *unbreakable*.²⁵

E. *The Montreal Protocols*

The International Conference on Air Law held in Montreal from 3 to 25 September, 1975 adopted four protocols. Additional Protocol No. 1²⁶ introduced the use of Special Drawing Rights instead of the Poincaré franc for the member states which belonged to the International Monetary Fund. Those states which did not belong to the International Monetary Fund and whose law did not permit the use of Special Drawing Rights were entitled to use the Poincaré franc, but under the name of "monetary unit".²⁷ Additional Protocol No. 2²⁸ contained similar provisions with respect to The Hague Protocol.²⁹ Additional Protocol No. 3³⁰ provided for the same with respect to the Guatemala City Protocol.³¹ The Montreal Protocol No. 4³² on the one hand introduced the parallel provisions concerning the use of Special Drawing Rights,³³ and on the other modified the provisions of The Hague Protocol relating to the carriage of cargo to bring them into parallel lines with those of the Guatemala City Protocol where the rules relating to the carriage of passenger and

²³ *Ibid.*, Art. IV, amending Art. 17(1) and (2).

²⁴ *Ibid.*, Arts. II(2) and III(2), amending Arts. 3 and 4.

²⁵ *Ibid.*, Art. IX, amending Art. 24(2).

²⁶ *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 9145 (1975).

²⁷ *Ibid.*, Art. II, amending Art. 22.

²⁸ *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 9146 (1975).

²⁹ *Ibid.*, Art. II, amending Art. 22.

³⁰ *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 9148 (1975).

³¹ *Ibid.*, Art. II, amending Art. 22.

³² *Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, ICAO Doc. 9148 (1975).

³³ *Ibid.*, Art. VII, amending Art. 22.

baggage were dealt with: limits of liability in respect of cargo were raised and were made unbreakable, the carrier was put under *absolute liability* in respect of loss of or damage to cargo, with limited defences, and automated data processing systems were introduced for the carriage of cargo.³⁴

F. Guadalajara Convention

In principle, this Convention³⁵ is not regarded as an essential part of the Warsaw/Hague System,³⁶ but as a supplement to it. It extended the protection afforded to the contracting carrier by the Warsaw Convention and The Hague Protocol to the carrier that, without being a party to the contract of carriage by air, nevertheless actually performs the carriage.

Among these Conventions, Protocols and Agreements which constitute the Warsaw/Hague System, those in force as of December 1979 are the Warsaw Convention of 1929, The Hague Protocol of 1955, the Guadalajara Convention of 1961, and the Montreal Agreement of 1966.

The International Conference on Air Law held in Montreal in 1975 adopted the following Resolution:

The International Conference on Air Law,

WHEREAS

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

RESOLVES

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

³⁴ *Ibid.*, Art. IV, amending Art. 18.

³⁵ *The Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, ICAO Doc. 8181 (1961) [hereinafter *Guadalajara Convention*].

³⁶ Fitzgerald, *The Warsaw Convention as Amended by the Montreal Conference on International Air Law* (1976) 1 *Annals of Air and Space Law* 49, 51.

2. that the said draft be examined at a Diplomatic Conference to be convened by the Council of the International Civil Aviation Organization in accordance with the established procedure as soon as possible.³⁷

II. Preliminary proposals with respect to the consolidation

The Warsaw Convention of 1929 was drafted and prepared when international civil aviation, both as an industry and as a commercial venture, was in its infancy. It is very doubtful that the draftsmen of the original Convention ever foresaw the level that international civil aviation would reach or even how smoothly and quickly technological and commercial evolution (with its concomitant perils) would advance. Such a rapid evolution brought with it the need for new regulation. Therefore, it is not surprising that the Warsaw Convention was subjected to more modifications than are normally suffered by similar conventions existing in the transportation law area.

Although many of the amendments to the Warsaw Convention are not yet in force, they reflect the desire for change in important areas of international aviation. It may be appropriate to state that a certain line can be drawn between the achievements and sources of inspiration of "technicians" in international forums and those of politicians acting in the parliaments of their respective countries. It is submitted that the thoughts and ideas reflected in the work of international forums or their subdivisions more accurately represent the requirements of international civil aviation than do the attitudes of politicians casting votes in their national parliaments. As a result, one can conclude that each instrument amending or supplementing the Warsaw Convention, whether or not it is in force, corresponds both to the requirements of aviation — necessitated by the occurrence of ever-increasing developments in the technological and commercial spheres — and to the requirements felt by the general public within a time span of forty-six years (1929 to 1975). Accordingly, efforts towards consolidation of the Warsaw/Hague System should consider all the provisions contained in the aforementioned documents in order to achieve a modern version of the allegedly outmoded Warsaw/Hague System. However, of the provisions contained in the different documents, only those formulated to reflect trends toward modernization ought to be included in the consolidation.

Consequently, the trend toward basing the proposed consolidation only on the provisions of documents now in force should not be

³⁷ ICAO Doc. 9144 (1975).

given prominence, as this will result only in the amalgamation of the original Warsaw Convention and The Hague Protocol, with the possible inclusion of some relevant portions from the Guadalajara Convention.³⁸ This so-called modernization would in fact be a retrogression to 1955 or 1961 at the latest. Such a result could not be deemed a consolidation, since the prevailing regime is already the Warsaw Convention as amended by The Hague Protocol. Also, since the International Conference, in the opening clause of its Resolution, expressly recited all of the Conventions and Protocols and expressed the desire of combining all these instruments into a single convention, and since the Resolution in the resolving clause referred to the instruments *amending* or *supplementing* the Warsaw Convention, whether actually in force or merely in existence, a consolidation which took into account only the Warsaw Convention and The Hague Protocol would do so in disregard of the Resolution.

Pursuant to the principle laid down by the Resolution, no new document with novel rules and provisions should be devised. The International Conference did not anticipate a new convention but provided simply for the consolidation of the Warsaw/Hague System by combining the various rules embodied in different documents. However, it should be possible nonetheless to introduce provisions that would clarify, modernize, streamline and harmonize the prospective document. This is surely within the spirit of the Resolution, since complaints commonly arise over the complicated nature of the present system. Accordingly, any obscure or complicated provisions should be rewritten or reformulated. In addition, an attempt should be made to standardize the vocabulary used; at present, similar concepts are frequently expressed in different words.

With respect to method, one possibility open to any draftsmen burdened with the task of preparing a text is to select the parts and portions from each instrument referred to in the Resolution which represent the most modern trends. Another and more practical method might be to take the latest instrument first and work backwards, filling in the gaps. However, while pursuing such a method one must be careful to keep strictly within the structure of the instrument lest superfluous items or duplications be inserted. Moreover, each rule or clause should be analysed with a view to including only those which modernize the Warsaw/Hague System. In any

³⁸ The proponents of this view admit that the consolidated text may include some provisions of the instruments of the Warsaw/Hague System which reflect the generally acceptable trends of carriage by air. Such a theory, being incoherent in itself and inconsistent with the basic idea, should be rejected.

event, in matters of passengers and baggage, the Warsaw Convention and its amendments in The Hague Protocol, the Guatemala City Protocol and the Additional Protocol No. 3 of Montreal will constitute the essential components of the consolidation. In matters of cargo, the Warsaw Convention and its amendments in The Hague Protocol and the Montreal Protocol No. 4 will provide the elements for the consolidated text.

A controversial subject involves the limits of flexibility to be granted the draftsmen in rewording or reformulating the clauses or phrases selected from the various instruments. Some guidelines are not in dispute. Each concept or principle should be expressed in the same words or phrases throughout and each word or phrase should bear the same meaning whenever it is used. Detailed provisions which reflect some underlying concept should in certain cases be added. Some clauses or phrases can be rewritten more simply and clearly.

However, should the draftsmen of the consolidated text take into account the interpretation and application of the provisions of the Warsaw/Hague System in the doctrine and jurisprudence, and should they use such material as a means of clarification and even modernization? Such an option may well bring the Warsaw/Hague System into line with current trends without diverting from established fundamental principles.

If this option were embraced, the draftsmen would have to be capable legal scholars, able to discern trends and reconcile diverging viewpoints.

III. Studies made in relation to the consolidation of the Warsaw/Hague System

Pursuant to the Resolution of the Diplomatic Conference,³⁹ the Council of ICAO decided to amend the general work programme of the Legal Committee to include, as the item of the highest priority, a "Study of the consolidation of the instruments of the 'Warsaw system' into a single convention".⁴⁰ It furthermore requested the Chairman of the Legal Committee to establish a special subcommittee to study this question and report to the twenty-second session of the Legal Committee to be held in Montreal in 1976.⁴¹ The Subcommittee thus formed met in Montreal in the late spring of 1976

³⁹ ICAO Doc. 9144 (1975).

⁴⁰ ICAO Council, *Minutes* 86/1-20, ICAO Doc. 9158-C/1028 (1976), 41.

⁴¹ *Ibid.*, 56-57.

and prepared a draft consolidated convention,⁴² which it submitted to the Legal Committee.⁴³

In December 1976, the Council of ICAO considered the Report of the Legal Committee and decided in accordance with the opinion expressed therein to postpone the preparation of the consolidated text.⁴⁴ It directed the Legal Bureau to prepare two draft texts of convenience, one to consolidate the provisions of those instruments *in force* in the Warsaw/Hague System and the other to consolidate *all* the instruments of the System.⁴⁵

The drafts prepared as a result of the studies conducted pursuant to the Resolution are as follows.

A. *Draft consolidation of Warsaw regime*

This text was prepared by the IATA Legal Committee and submitted to the Subcommittee established by the Legal Committee of ICAO.⁴⁶ It was modelled on the system and framework of the original Warsaw Convention, except for the insertion of the relevant provisions of the Guadalajara Convention as Chapter V.

In the text, the provisions of the Warsaw Convention as amended by The Hague Protocol, the Guatemala City Protocol and the Additional Protocol No. 3 of Montreal have been given prominence with respect to the carriage of passengers and baggage (including the liability of the carrier connected therewith). The provisions of the Warsaw Convention as amended at The Hague and by Protocol No. 4 of Montreal regulate cargo and the carrier's liability in the carriage of cargo. Necessary modifications and amendments were made with the aim of creating a consistent and coherent system. Procedural provisions dealing with ratification, accession, entry into force and like matters are not dealt with in this draft. However, the Committee recommended that the final form of the convention should contain an article similar to Article XX of the Guatemala City Protocol.⁴⁷

⁴² IATA Observer, *Report on ICAO Legal Subcommittee*, IATA Doc. 2 July 1976, Ref. 3401B, App. C.

⁴³ ICAO Doc. 9222-LC/177-1 (1979), 7-8.

⁴⁴ ICAO Council, *Minutes* 89/1-20, ICAO Doc. 9189-C/1034 (1977), 112.

⁴⁵ ICAO State Letters, Ref. LE 3/29-77/101 (1977).

⁴⁶ *Supra*, note 42, App. B.

⁴⁷ See *ibid.*, 3.

B. *Draft consolidated convention*

This document, based on the text submitted by the ICAO Legal Bureau,⁴⁸ was prepared by the Subcommittee. The provisions of the Warsaw Convention as amended at The Hague, at Guatemala City and by the Additional Protocol No. 3 of Montreal were taken into account in respect of passengers and baggage. The provisions of the Warsaw Convention as amended at The Hague and by the Montreal Protocol No. 4 were followed in respect of cargo. The Subcommittee also included certain provisions of the Guadalajara Convention in Chapter IV of the draft.

The Subcommittee, instead of regulating the regime of the carrier's liability under an independent and separate heading to encompass all the contingencies — as is the case in all of the existing instruments — chose to deal with the matters of liability in two distinct chapters, one relating to the carriage of passengers and baggage and the other relating to the carriage of cargo.⁴⁹ It is submitted that this arrangement leads to unnecessary duplication. The Subcommittee has referred to article 58 in defence of its arrangement;⁵⁰ however, the proposition contained in that article does not seem to be an appropriate one either.⁵¹

C. *Texts of convenience*

The first text of convenience was compiled by the ICAO Legal Bureau.⁵² It consists of a transcription of the Warsaw Convention as amended by The Hague Protocol.

The second text of convenience was also prepared by the ICAO Legal Bureau.⁵³ This document combines the Warsaw Convention regulations on carriage of passengers and baggage as amended at The Hague, at Guatemala City, and by the Additional Protocol No. 3 of Montreal with the Warsaw Convention regulations on carriage of cargo as amended by The Hague Protocol and by Montreal Protocol No. 4. While necessary amendments and adjustments were made, the Guadalajara Convention was not dealt with, nor were the final clauses and procedural provisions given consideration.

⁴⁸ *Ibid.*, App. C.

⁴⁹ *Ibid.*, ch. II, Arts. 5-13 and ch. III, Arts. 26-32.

⁵⁰ *Supra*, note 46, 2.

⁵¹ Art. 58 permits states to declare at the time of ratification or accession that they shall not be bound by ch. II (Carriage of Passengers & Baggage) or ch. III (Carriage of Cargo).

⁵² *Supra*, note 45.

⁵³ *Ibid.*

IV. Comments and suggestions on the consolidation of the Warsaw/Hague System

When a critical analysis is made of the provisions contained in the various instruments pertaining to the Warsaw/Hague System, some clearly discernible alterations in the basic concepts can be distinguished. A discussion of whether such changes constitute a development does not fall within the scope of this article, nor do the philosophical, social or economic causes or aspects of any alteration. Rather, this article will discuss certain policy considerations and make a number of concrete suggestions for the improvement of the draft consolidations.

A. *Policy considerations*

The trends in the present and future regime of the Warsaw/Hague system can be analyzed and evaluated in terms of two different policy considerations: protection of the general public and protection of civil aviation. While the transition from liability based on fault to absolute liability is concerned mainly with the protection of the public, it relates as well to the interests of civil aviation insofar as a regime of absolute liability may serve to reduce the inclination toward litigation. However, limited liability coupled with unbreakable limits better benefits the civil aviation interest in that this regime affords the airlines protection against unbearable risks and hence serves as an incentive to investment and development. It also allows the airlines to calculate with some accuracy their potential exposure to liability, and thus to avoid the extra expense involved in obtaining insurance to cover all contingencies. This operates to the benefit of the travelling public since the cost of insurance coverage to be distributed is less than it would be under a regime of unlimited liability.

Limitation of liability with unbreakable limits, even in cases of wilful misconduct,⁵⁴ would enhance the out-of-court settlement option. However, it is essential that the limit be fixed so as to be of substantial value to a large percentage of the claimants.

A trend to simplifying documentation is of undeniable advantage to the airlines. Nevertheless, the time and money saved through such simplification reduces the operating costs of the airlines, and

⁵⁴ Compare Orr, *Fault as the Basis of Liability* (1954) 21 J. Air L. and Com. 399, 404 and Hickey, *Breaking the Limit — Liability for Wilful Misconduct Under the Guatemala Protocol* (1976) 42 J. Air L. and Com. 603, 608.

the resulting saving may be passed on to the customer.⁵⁵ The introduction of automated data processing systems would be of major advantage to the airlines and to the industry in general. The technical developments engendered ultimately will be beneficial to the travelling public.⁵⁶

B. *Suggestions for improvement*

Of the existing draft texts, that prepared by the Legal Committee of IATA (submitted to the Subcommittee of the ICAO Legal Committee)⁵⁷ is the most comprehensive and has the additional merit of adhering to the structure of the original Warsaw Convention and including the relevant provisions of the Guadalajara Convention.⁵⁸

1. *Headings*

The IATA Draft seems to appreciate the undeniable usefulness of employing headings, as it retains them in Chapters I, III, IV, V and VI. However, headings are omitted in Chapter II and that chapter is no longer divided into sections. It is submitted that the omission of these headings is not justified by the blanket provision of "other means".

The introduction of the words "other means" envisages use of automated data processing systems in the carriage of passengers,

⁵⁵ Grönfors, *Simplification of Documentation and Document Replacement* (1976) 3 Lloyd's Maritime and Commercial L.Q. 250.

⁵⁶ See generally Drion, *Limitation of Liabilities in International Air Law* (1954); Grönfors, *Air Charter and the Warsaw Convention* (1956), 70; Fitzgerald, *supra*, note 36; Matte, *The Most Recent Revision of the Warsaw Convention: the Montreal Protocols of 1975* (1976) 11 European Transport Law 822; Hickey, *supra*, note 54; Sand, *Risk in the Air and the Myth of Fault* (1967) 33 J. Air L. and Com. 594; Swart, *Prospects of Amendment of the Warsaw Convention* (1967) 33 J. Air L. and Com. 616; Legal Committee of ICAO, "Report on Revision of the Warsaw Convention" in *International Conference on Private Air Law* (1955), vol. II, 93, ICAO Doc. 7686-LC/140; Subcommittee of the Legal Committee, *Report on the Revision of The Warsaw Convention as Amended by The Hague Protocol* (1969), vol. I, 2, ICAO Doc. 8839-LC/158-1; Legal Committee, *Documents* ICAO Doc. 9131-LC/173-2 (1975), 112; IATA, *Report on Conference of Airline Lawyers* (1974).

⁵⁷ *Supra*, note 42, App. B.

⁵⁸ Although provisions relating to ratification, accession, and entry into force are not dealt with, these provisions are more or less standard. Some debate revolves around the number of ratifications required and the time limits for entry into force. These matters are expected to be resolved by diplomatic conference.

baggage and cargo.⁵⁹ However, the words "other means", although principally referring to the anticipated use of electronic devices, cannot be restricted to them. This is a very broad reference to cover the possible employment of innumerable methods still to be developed.⁶⁰ Therefore, the words "other means" do not necessarily refer only to electronic systems. Even in cases of automation, Article 5(2) provides for a cargo receipt — documentary evidence having legal consequences.⁶¹ Therefore, since automated data is not the only process envisaged and encompassed by the words "other means", contemplation of the use of this method cannot serve as a justification for omitting the headings from Chapter II.

Since the word "document" might be too narrow to encompass the general sense of the chapter, "documentation" is to be preferred. Accordingly, the heading of Chapter II should be: "Documentation Relating to Carriage of Passengers, Baggage and Cargo", and the headings for the respective sections should be: "Documentation Relating to Carriage of Passengers", "Documentation Relating to Carriage of Baggage" and "Documentation and Other Provisions Relating to Carriage of Cargo".⁶²

2. Various articles

a) Article 2(2) and (3)

The underlying concept of the Warsaw/Hague System is to regulate the contractual relationship between the carrier and the passenger or consignor. Except by express provision to the contrary, the articles of the Convention are applicable only to the parties to a contract of carriage: thus in the carriage of postal items, the carrier enters into a contractual relationship with the local postal administration and not with the individuals whose parcels are carried. Although the Warsaw/Hague System can be applicable between the carrier and the concerned postal administration, it is a well established policy of the Convention to give prominence to the rules which exclusively govern the relation between the postal

⁵⁹ The passenger ticket, baggage check and air waybill are nevertheless retained, and data processing systems are given a secondary role: *supra*, note 57, Arts. 4 and 14.

⁶⁰ See Matte, *supra*, note 56, 827.

⁶¹ See *supra*, note 57, Arts. 8, 9, 10, 11, 12(3) and 15(2).

⁶² Ch. II, Sec. III of the Warsaw Convention is headed "Air Waybill". Montreal Protocol No. 4 substituted "Documentation relating to cargo". However, this section is not confined to documentation matters, but also regulates the rights and obligations of consignor and consignee; thus, a broader heading is appropriate.

authorities and the carriers. Article 2(2) and (3) as amended by Montreal Protocol No. 4 gives effect to this policy and the consolidation should incorporate this version.

b) *Articles 3 and 4*

The wording of Article 5(2) as established by Montreal Protocol No. 4, *mutatis mutandis*, is to be preferred to the draft's proposal for Articles 3(2) and 4(2). In this way the travelling public will be afforded a measure of protection, and will not be forced to accept some method which it might not find suitable in a particular case.⁶³ The choice given to the consignor in respect of the goods shipped should also be granted to the passenger. Furthermore, in cases where the "other means" are used, some kind of document similar to the "receipt for the cargo" should be given to the passenger if and when requested.

For the sake of consistency, it is proposed that Article 5(3) of the IATA Draft (reproducing article 5(3) of Montreal Protocol No. 4) should then be included as a new third paragraph to Articles 3 and 4. The present paragraph 3 in each article would then become paragraph 4. Through such modifications, basic principles relating to the documentation of the carriage of passengers, baggage and cargo will be brought into greater harmony. Needless to say, when Article 5(2) of Montreal Protocol No. 4 replaces the present Article 3(2) and 4(2), alterations in the wording should be made to indicate that the paragraph relates to passenger or baggage, as the case may be.⁶⁴

⁶³ Except for cases in which the contrary is provided, contracts of carriage generally, and contracts of carriage by air in particular, can be concluded orally. However, the passenger ticket, the baggage check and the air waybill are well established documents, and serve certain purposes due to the intricacies involved in air transportation. While the airline ticket constitutes evidence of the contract of carriage and embodies the general conditions of the contract, it also bears a promise to repay: see Zethraeus, *An essay on 'Panair do Brasil' Tickets* (1976) 1 Air Law 286. In addition to the disruptions which dispensing with tickets might cause to travellers, it might be disadvantageous for the airline to rely only on the automated systems. Therefore, having some sort of document in hand would likely prove useful.

⁶⁴ The suggested wording of Arts. 3 and 4, combining the IATA Draft and the Montreal Protocol No. 4, is as follows:

Article 3

1. ...
2. Any other means which would preserve a record of the information indicated in (a) and (b) of the foregoing paragraph and the carriage to be performed may, with the consent of the passenger be substituted for the delivery of the document referred to in that paragraph. If such other

c) *Articles 5-16*

The IATA Draft reproduces Articles 5 through 16 of Montreal Protocol No. 4. It is submitted that this is the best approach. However, for the sake of consistency, Article 8 of the Draft should be incorporated into Article 5(1) as subparagraphs (a), (b), and (c). The words "and the receipt for the cargo" in the first line of the present Article 8 should be deleted and the first paragraph of Article 5 should be rewritten to accord with its counterpart in Articles 3 and 4.⁶⁵

means are used, the carrier shall, if so requested by the passenger, deliver to the passenger a voucher permitting identification of the carriage and access to the information contained in the record preserved by such other means.

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

4. ...

Article 4

1. ...

2. Any other means which would preserve a record of the information indicated in (a) and (b) of the foregoing paragraph and the carriage to be performed may, with the consent of the passenger be substituted for the delivery of the document referred to in that paragraph. If such other means are used, the carrier shall, if so requested by the passenger, deliver to the passenger a voucher permitting identification of the carriage and access to the information contained in the record preserved by such other means.

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

4. ...

By the amendments made in Arts. 3, 4 and 5, the requirement of notice in the respective documents of carriage has been eliminated. However, it is open to debate whether contracting states can still impose on the airlines, for carriages affecting their countries, the obligation to give notice of the applicability of the limitation of liability. This possibility militates against the goal of achieving unification in international air law. On the other hand, the Montreal Agreement, 1966 is valid and binding on the signatory airlines. It might therefore be appropriate to suggest that this subject be clarified at the next diplomatic conference.

⁶⁵ The suggested wording of Art. 5 combined with Art. 8 is as follows:

Article 5

1. In respect of the carriage of cargo an air waybill shall be delivered, containing:
 - (a) an indication of the places of departure and destination;
 - (b) if the places of departure and destination are within the territory

In Article 10, the Draft makes an express reference to the "other means". If any other means, method, usage, form is simply envisaged as having a secondary or supplementary nature and is therefore to be used only to replace the basic documents (the passenger ticket, baggage check or air waybill), then such "other means" shall be covered and consequently be bound by the provisions regulating or pertaining to the basic document. If, on the other hand, "other means" is intended to create an additional independent entity, the need then becomes apparent to regulate its legal impact. Although the former view appears to be the correct one, it may be of practical importance to incorporate the term "other means" into all relevant provisions, including Articles 11, 12(3) and 15(2).

d) *Article 19*

The liability of the carrier for the damages sustained in cases of death or personal injury to a passenger was converted from fault liability to strict liability by Article IV of the Guatemala City Protocol. In respect of damages sustained by the destruction or loss of or damage to cargo, absolute liability to replace liability based on fault was introduced by Article IV of the Montreal Protocol No. 4. However, both Protocols retained the regime of liability based on fault in case of damages occasioned by delay.⁶⁶ Accordingly, the fundamental principle that the liability of the carrier for damages caused by delay is fault-based can be expressed in a single article. Such article could be formulated along the lines of the Guatemala City Protocol and the Montreal Protocol No. 4, with the necessary amendments. The IATA Draft preferred to take Article 19 of the Warsaw Convention and append to it Article 20 as amended by Article V of Montreal Protocol No. 4. This formulation is equally acceptable, since the opening clause establishes the liability of the carrier and the remainder of the article sets out the available defences.⁶⁷

of a single Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place; and

(c) an indication of the weight of the consignment.

2. ...

3.

⁶⁶ See Guatemala City Protocol, Art. VI; Montreal Protocol No. 4, Art. V.

⁶⁷ The concept of delay in respect of Art. 19 has been the subject of some debate and controversy. Since the liability of the carrier in respect of delay has to be ascertained with reference to a time factor, the limits within which Art. 19 is applicable need clarification. To this end, a reference to time limits describing the beginning and the end of the period restricting the

e) *Article 20*

An analysis of the provisions of the Warsaw/Hague System regulating the legal consequences of contributory negligence demonstrates that, as the regime of liability progressed from fault toward absolute liability, the defence of contributory negligence was reformulated in order to afford the carrier a more secure defence. Article 20 of the IATA Draft clearly reflects this trend and should be maintained.

f) *Article 21*

For the sake of consistency, it is proposed that Article 21(2)(a) be rewritten as follows:

In the carriage of cargo the liability of the carrier in the case of destruction, loss, damage or delay, is limited. . . .

In this manner the ground for liability would be expressed in words parallel to those used in the first paragraph.

The hazards inherent in Article 21(4) and (5) should perhaps be noted at this point. The Montreal Conference (Article 22 of the Montreal Additional Protocol No. 3 and Montreal Protocol No. 4) decided to abandon the Poincaré franc and with it the gold standard, and introduced instead the Special Drawing Right as the measure determining the limit of liability. Multiple devaluations, existence of a double market for gold, abolition of the convertibility of the dollar, and fluctuations in the market were some of the reasons behind the introduction of the SDR into the Warsaw/Hague System and consequently into some other international conventions.⁶⁸ However, Article 21 in its present form is far from providing the remedy for the contingencies which the drafters were anxious to contain. The gold standard still exists, though under a different name and with some restrictions. Therefore, the dangers connected with the application of the gold value are still imminent. The last sentence of Article 21(5) allows for different computations in determining the compensation to be paid. In addition, Article 21(4) permits different

liability of the carrier in Arts. 17(1) and (2) and 18(3) can be considered. On the other hand, the theoretical basis of this provision is a defence based on the concept of *force majeure*. See in general Shawcross & Beaumont, *Air Law* 3d ed. (1966), 431; Lopez, *Air Carriers' Liability in Cases of Delay* (1976) 1 *Annals of Air and Space Law* 109. For the scope of the provision relating to liability for delay, also see Matte, *supra*, note 56, 832-33.

⁶⁸ See Bristow, *Gold Franc-Replacement of Unit of Account* (1978) 1 *Lloyd's Maritime and Commercial L.Q.* 31, 35-38; see also Matte, *supra*, note 56, 836; Wijffels, *Gold Value and Special Drawing Right (SDR) With Regard to Total Vessel or Tonnage Limitation* (1977) 12 *European Transport Law* 195.

calculations of the SDR as well. When these two provisions are taken together with Article 27, one might argue that there is still sufficient inducement for forum-shopping for damages. It is submitted that it is open to debate whether or not it is appropriate to retain Article 22(2) of the IATA Draft, the origin of which dates back to Article XII of The Hague Protocol. This article provides that the carrier is entitled to evade liability if it proves itself to have been without fault. The anomaly is that the provision is found in an instrument providing for absolute liability of the carrier, with only limited defences in respect of cargo. In principle, to allow the carrier to insert provisions excluding itself from the liability provided for or fixing lower limits than those established by the Convention is to contradict the essence of the liability regime underlying the latest phase of the Warsaw/Hague System. Therefore, Draft Articles 22(2) and 18(2) should be examined together. Article 22(2) should either make a reference to the whole of Article 18(2) or be deleted. A reference in Article 22(2) only to Article 18(2)(a) is inconsistent and superfluous as it allows the carrier to insert reservation clauses for cases in which it already had the right to avoid liability by proving certain facts. Since a general reference to the entirety of Article 18(2) is contradictory to the fundamental concept of the present liability regime, it is submitted that Article 22(2) should be deleted.

h) *Articles 25, 40 and 43*

A reference in paragraph 1 of Article 25 to the receipt for cargo or the information preserved by "other means" would be in order. Previous comments on Article 22(2) apply equally to Article 40(2). Article 40(3) and Article 42, though reflecting the same principle, differ in their wording since each is based on different sources. It is submitted that Article 40(3) should be rewritten, using the wording of Article 42. With respect to the suggestions relating to Articles 3, 4 and 5, a reference to the new paragraph 3 of Articles 3, 4 and 5⁶⁹ should be inserted in Article 43.

Finally, the attention of future drafters and negotiators should be drawn to the following point. At present the Warsaw/Hague System consists of nine instruments.⁷⁰ Ratification of different instruments by different states gave rise to the existence of various

⁶⁹ See *supra*, note 64.

⁷⁰ Milde, *supra*, note 21, 259, counts them as eight. He does not take into account the Montreal Agreement, 1966.

combinations of regimes in force among different states.⁷¹ The provisions relating to ratification and entry into force of the proposed consolidated instrument together with those relating to the denunciation of the instruments now in force ought to be drafted with utmost precision, so that the transition from the present complicated situation to the new regime will be as smooth as possible.

The proposed consolidation of the Warsaw/Hague System might be a little revolution in international civil aviation. It is, however, a sacred duty to see that it takes place with as little damage to the existing structure as possible.

⁷¹ For a splendid exposé of how a striking uniformity is achieved today, consult Mankiewicz, *A galaxy of unified laws will replace the uniform regime created in 1929 in Warsaw or The death-blow to the uniform regime of liability in international carriage by air* (1976) 1 Air Law 157.