New unification of private international air law - a rebirth of the "*Warsaw*" system?

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Acting under the *Procedure for the Adoption of International Conventions*[1], the Council of ICAO decided to convene from 11 to 20 May 1999 an International Conference on Air Law ("*Diplomatic Conference*")[2] to consider, with a view to adoption, a draft Convention intended to modernize and replace the instruments of the "Warsaw" system. It is to be seen whether the political will of states will be strong enough to make the necessary compromises, balance the divergent interests and make a major step towards the unification of modern law of liability in international carriage by air. The legal theory, academia and the practising professionals should assist in making the right decision.

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1) Originally Assembly Resolution A7-6, now consolidated in Resolution A3115, Appendix B.

2) C-WP/10867, 154th Session of the Council, 9 June 1998

Historical background

The *Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air* adopted on 12 December 1929 is currently in force for 140 States[3] and represents the most widely accepted unification of private air law. While adopted almost 70 years ago at the time of infancy of international air transport, this Convention proved to be a farsighted unification of law which achieved considerable unity in:

- the format and legal significance of the documents of carriage (passenger ticket, baggage check, air waybill)[4];

- regime of liability - liability is based on (presumed) fault and the burden of proof is reversed to the benefit of the passenger or shipper, a boldly progressive step in the legal thinking in 1929 when the protection of the consumer was less firmly established[5];

- limit of liability: as a quid pro quo for the aggravated regime of liability of the carrier the liability for death, wounding or other bodily injury of the passenger or for loss of or damage to baggage and cargo is limited by fixed amounts of money expressed in a gold clause in Poincare (French) francs;[6]

- jurisdiction of courts - the possible conflict of jurisdictions has been minimized by the determination of four fora before which, at the option of the claimant, an action may br brought[7].

The 1929 Convention was drafted under the predominant influence of the European ("civil law") concepts and its only authentic text was in French language. Soon after its entry into force many States realized a major flaw in this unification of law - it went far beyond the unification of substantive law and by imposing the strict and uniform limits of liability (breakable

3) See C-WP/10853 dated 20 May 1998
4) Articles 3-16 of the Convention
5) Articles 17 and 20 of the Convention
6) Article 22 of the Convention
7) Article 28 of the Convention

only in cases of faulty documentation or in case of "*wilful misconduct*" of the carrier[8]) it in fact attempted unrealistically to "unify" the cost of living in a widely divergent spectrum of States. The established limits soon proved inadequate and economically unrealistic for many States and most of the recorded jurisprudence deals with (mostly successful) claimants' attempts to exceed the limits.

In the historic perspective of 1929 it may have appeared logical to set limits of liability for the air carrier - aviation was a new industry fraught with catastrophic risks and the limit of liability could have been understood as a "subsidy" and special protection to this infant industry. Again, with the exception of the USA, all airlines of the world at that time were government-owned and government-controlled and by accepting the limit of liability the governments were in fact protecting their own interests. However, today's air transport is a strong global industry with vastly improved and steadily improving safety record, most of the airlines of the world have been privatized and comprehensive risk insurance is available at competitive rates to cover any types of damages. It would be difficult to find any convincing arguments for a special treatment to be accorded to airlines and for the perpetuation of the limits of liability in international air transport.

The 1929 "*Warsaw*" system did not remain static and underwent, under the aegis of ICAO[9]), series of amendments or attempted amendments - a true "unfinished symphony" of half-hearted governmental efforts to improve the Convention[10]):

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8) See Articles 3(2), 4(4), 9 and 25

9) While Article 41 of the Convention gave responsibility for the process of amendment of the Convention to the government of France, that government de facto renounced this responsibility in favour of the Legal Committee of ICAO and of Diplomatic Conferences convened by the ICAO Council; an explicit notification to this effect was given by France to ICAO on the eve of The Hague Conference in 1955

10) See, e.g., Milde, M. Warsaw Requiem or Unfinished Symphony, in Lloyd's Aviation

- The Hague Protocol of 28 September 1955[11] introduced minor amendments simplifying or clarifying the text and doubled the amount of the limit of liability with respect to the death, wounding or other physical injury of the passenger; the amount of the limit (equivalent to some US $ 20,000) is grossly inadequate by today's standards for most states. The US never ratified this Protocol[12].

- Guadalajara Convention of 18 September 1961[13] filled a perceived gap in the Convention and made the Convention expressly applicable also to the actual carrier who is in no direct contractual relation with the passenger or shipper. This instrument is in force for .. States[14].

- The "crisis" of the Warsaw Convention in 1965 which resulted from the denunciation of the Convention by the US government gave rise, after unsuccessful efforts within ICAO, to an IATA initiative in the *Montreal Agreement* 1966 in which the IATA airlines accepted strict liability regime (renouncing their defence under Article 20 of the Convention) and limit of US $ 75,000 for any carriage to, from or via the US territory[15]. This "agreement" is not an instrument of international law amending the Convention but a private agreement of the airlines with the US authorities on a particular interpretation and application of the Convention and on its basis the US government withdrew its denunciation of the Convention. This agreement represents a *de facto* amendment of the application of the Convention among certain states, it eroded the unification of law and was contrary to the precepts of the general international law of treaties. It is noteworthy that where ICAO failed, a non-governmental body of the airlines succeeded in reaching a workable compromise;

Quarterly, [1996-97] TAQ 1-86, Part 1, July 1996, pp. 37-51.

11) ICAO Doc 7632.

12) The Hague Protocol is in force for 121 States - see C-WP/10853 dated 25 May 1998.

13) ICAO Doc 8181

14) Ibid.

15) Agreement CAB 18900, approved by Order E-23680, May 13, 1966 (Docket 17325)

- a permanent solution was sought in the Guatemala City Protocol of 8 March 1971[16] which would have modernized the Convention by introducing, for the first time in the history of unification of liability arising out of contract, the regime of strict liability without any defence; the Protocol also modernized and simplified the documents of carriage and enabled their replacement by electronic data processing methods. The limit of liability was substantially increased to the equivalent of US $ 100,000 but the limit was to be the maximum limit, unbreakable under any circumstances. The Protocol was drafted as a concession to the legitimate interests of the US and could have entered into force only subject to ratification by the US[17]. This instrument is now a historic relic of an honest effort of the international community.

- The Additional Protocols of Montreal Nos. 1, 2 and 3[18] of 25 September 1975 substituted the concept of the Special Drawing Rights of the IMF for the gold clause, respectively, in the original 1929 Convention, that Convention as amended at The Hague and as amended by the Guatemala City Protocol. Protocol No. 3 was on repeated occasions submitted to the US Senate to consider its ratification but failed to achieve the statutory majority but Protocols No. 1 and 2 entered into force among 30 countries[19].

- Montreal Protocol No. 4 had as its purpose the amendment of the Convention as amended at The Hague with respect to liability for baggage and cargo. It introduced strict liability with few exceptions for damage or loss of cargo and simplified the requirements for the air way bill - making it possible to replace it by electronic data processing and a "receipt for cargo" while keeping the limit of liability at the 1929 level (17 SDR per kg). Although this instrument was most desirable in the practice and quite

16) ICAO Doc 8932/2
17) See Article XX of the Protocol which makes it statistically impossible to bring the Protocol into force without ratification by the USA
18) ICAO Docs 9145, 9146, 9147 and 9148
19) See C-WP/10853 - both on 15 February 1996

uncontroversial, it took almost 23 years before it came into force within a narrow group of 30 States that have ratified it.[20]

Since 1975 ICAO made no new effort to modernize the *Warsaw System* and restricted itself to repeated exhortations to States to ratify Protocol No. 3 (which encompasses the amendments introduced by the Guatemala City Protocol) and Montreal Protocol No. 4; the ICAO Assembly resolutions on this matter were adopted by full unanimity but no practical action by states followed[21].

The lack of progress in the modernization and updating of the Convention caused major dissatisfaction and frustration to governments and airlines. The main concern, although never expressed in the ICAO meetings, has been the possibility that the USA and other developed countries might denounce the Convention and thus throw international air transport into the unpredictable and uninsurable maze of conflict of laws and conflict of jurisdictions. A series of unilateral actions were adopted for practical application to bridge the deadlock reached in the international law-making. Many airlines - in particularly in the developed countries - unilaterally increased their limit of liability for passengers' death or injury to 100,000 SDR (equivalent to US $ 150,000). Italy adopted this limit for all Italian carriers and all other carriers operating from to or via Italy by law[22]. In November 1992 all Japanese air carriers adopted a new tariff provision according to which they would apply a two-tier system of liability: up to the sum of SDR 100,000 they would accept strict liability without any defence and beyond that amount (without any monetary limitation) they

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20) It came into force on 14 June 1998; see C-WP/10853, p. 11

21) The last such resolution was adopted in October 1995 - A31-15, Appendix C. It is worth noting that ICAO adopted this resolution less than four weeks before the Annual General Meeting of IATA in Kuala Lumpur during which, after a long preparation, a new initiative was adopted by the airlines- showing ICAO out of touch with reality!

22) Law No. 274 of 7 July 1988 - "Limit of Liability in International carriage by Air"

would accept liability based on presumed fault with a reversed burden of proof. This "Japanese initiative"[23] is a major historic innovation indicating the willingness and ability of the industry to accept liability without any monetary limit.

After some three years of preparatory work and consultations between 1993-1995 the IATA Annual General Meeting in Kuala Lumpur adopted, on 31 October 1995 the *Intercarrier Agreement on Passenger Liability*[24] followed by other instruments[25] the essence of which is to accept, in the airlines' tariffs, the principles of the "Japanese initiative", i.e., waiving the limitation of liability for recoverable compensatory damages in Article 22 paragraph 1 of the Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of Article 17 of the Convention; the airlines accepting this *Agreement* also committed themselves not to use the defence of Article 20 of the Convention for claims up to SDR 100,000, i.e., they accepted strict liability up to that limit. The IATA *Agreement* came into force on 14 February 1997[26] and it is claimed that it is in force for airlines carrying over 80% of all international air transport of passengers[27]. The IATA *Agreement* has thus become a benchmark of what is acceptable to the industry, insurers and the travelling public.

A multilateral legislative step was taken by the European Union which adopted, as a law to be applicable to its member states as of 17 October 1998 a Council Regulation on air carrier liability[28]. This EC Regulation

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23) For text see, e.g., Martin, P., "*Japanese Airlines - Looking Forward Rather than Back*", in (1992) 11:22 Lloyd's Aviation Law 2.

24) For text see, e.g., <http://www.iata.org/legal/index.htm>

25) MIA, ibidem

26) See Press Release of 14 February 1997 at <http://iata.org/....

27) By 17 November 1998 there were 118 airlines signatories of the Agreement - see Internet source cited in note 25 above.

28) Council Regulation (EC) No. 2027/97 of 9 October 1997, published in *Official Journal* L 285 on 17 October 1997. Under its Article 8 it entered into force one year after publication in the *Official Journal* - on 17 October 1998.

adopts the principles of the "Japanese initiative" and will be applicable both to domestic and international flights of the "Community carriers". The essence of the *Regulation* is the waiver of any liability limits for death or injury of the passenger coupled with strict liability for such claims up to SDR 100,000.

All unilateral actions by airlines, the IATA, by states or a group of states have one fundamental legal shortcoming: they may modify the practical application of the limit of liability (permitted by Article 22 (1) of the Convention as a "special contract") but cannot amend any of the substantive provisions of the Convention. The unilateral actions remain "attached" to the underlying existence and peremptory provisions of the Warsaw Convention of 1929 or that Convention as amended at The Hague in 1955 (some of which are outdated and call for an early modernization) and cannot "stand alone" as a rule of law. The Convention itself remains as the fundamental international legal framework among the parties and can be amended only in accordance with the international law of treaties[29]. No amount of unilateral "patchwork" can replace the appropriate process of amendment of the Convention and establish a solid international legal regime. ICAO appears to be the only international forum in which a new modernized unification of private air law can be accomplished - it has considerable tradition and experience in the unification of air law (including repeated actions for the amendments of the "Warsaw system") as well as the appropriate facilities and services. However, ICAO is no more than a forum of its member states and it hinges on the political will of its 185 sovereign member states whether the 1999 Diplomatic Conference will be a success or yet another in the series of failures.

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29) See the Vienna Convention on the Law of Treaties signed on 23 May 1969, Part IV. - Amendments and Modifications of Treaties, Articles 39-41.

ICAO draft Convention- background

ICAO was not a leader in the most recent efforts to modernize the Warsaw system and it was only the "Japanese initiative" of 1992 and the IATA *Intercarrier Agreement on Passenger Liability* of 31 October 1995 that provoked an ICAO reaction. On 15 November 1995 - under the fresh impact of the decision of the IATA Annual General Meeting in Kuala Lumpur - the Council of ICAO decided[30] to amend the General Work Programme of the ICAO Legal Committee by inserting an item "*The modernization of the 'Warsaw System' and review of the ratification of international air law instruments*". The Council stressed the urgency of the matter and the need for the Legal Committee to finalize the work on a new instrument by the close of its 30th Session so that a Diplomatic Conference could be convened as soon as possible thereafter to adopt formally the new instrument.

The procedure followed in ICAO on this subject strangely departed from the established and binding procedures applicable for ICAO's work in the preparation of international instruments.[31] The normal procedure would have called for the study by the Secretariat, appointment of a Rapporteur by the Chairman of the Legal Committee[32], establishment of a Special Subcommittee of the Legal Committee and finally preparation of the final draft by a session of the Legal Committee. Such an established procedure provides full transparency for the negotiating States and is fast and effective.[33] For reasons that were never expressly explained ICAO established a "Secretariat Study Group" which met in two sessions in 1996[34] and its

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30) Third Meeting of the 146th Session - see C-DEC 146/3

31) See *Procedure for the Preparation of Draft Conventions* in Attachment A to ICAO Doc 7669-LC/139/4

32) Rule 17 of the *Rules of Procedure of the Legal Committee* in Doc 7669-LC/139/4

33) The last instrument adopted within ICAO - the 1991 Montreal *Convention on the Marking of Plastic Explosives for the purpose of Detection* (ICAO Doc 9571) was prepared following this procedure within eleven months since the first initiative!

Report was presented to the Council "for information" only in October 1996[35]. The "Secretariat Study Group" has no precedents in the ICAO legal work and is not foreseen by the applicable procedures. The Group was composed of individuals selected by the President of the Council, never met in a complete composition as appointed and did not reflect either the desirable geographic composition or the leading expertise in the field. Only then was a Rapporteur appointed and he presented his Report in early 1997[36]. It is hard to understand why the Rapporteur's report had to be presented to the Council (he should report to the Legal Committee and before its session to a Special Subcommittee) and why the Council decided to convene the 30th session of the Legal Committee only for 28 April-9 May 1997 without agreeing to convene a Special Subcommittee which would have better prepared the work of the Committee.

The history will hardly evaluate the 30th Session of the Legal Committee as a success[37]. While the Legal Committee of ICAO is open to all 185 member states of ICAO, only 61 delegations participated - less than one third of the total membership. Moreover, the discussions were rather chaotic, many delegations came to familiarize themselves with the problem rather than to express any specific policy views and the excellent draft prepared by the Secretariat and the Rapporteur was weakened by the insertion of several alternatives to some critical provisions which were left open in square brackets for the final consideration by the Diplomatic Conference.[38] Nevertheless, the Committee considered its draft to be "final" and ready for presentation to a Diplomatic Conference. The Council did not record any comments on the draft and refrained from the convening of the Diplomatic Conference at that time

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34) 12-13 February 1996 (see LC30-WP/4-2) and 10-12 June 1996 (see LC30-IP/1)
35) C-WP/10470
36) Attachment A to C-WP/10576
37) For the Report of the session see Doc 9693-LC/190
38) Text of the "final draft" will be found in Attachment D to Doc 9693-LC/190, pages D-1 to D-18.

The draft was sent to States with a State letter dated 27 June 1997[39] and comments from States were further considered by yet further meetings of the Secretariat Study Group[40] and eventually by a "Special Group on the Modernization and Consolidation of the 'Warsaw System'" (SGMW) established by the Council on 26 November 1997[41] - yet another body not foreseen in the established procedures and not working with full transparency and wide representation. The SGMW met from 14 to 18 April 1998[42] and revised the draft prepared by the 30th Session of the Legal Committee - an admission that the Legal Committee's draft was less than mature for submission to a Diplomatic Conference. However, it is to be feared that this final draft is not yet endorsed by the political will of States at large and reflects only a compromise reached within a group of experts arbitrarily selected to participate in the SGMW.

Whatever criticism may be expressed with respect to the unusual, time-wasting and unrepresentative procedure adopted by ICAO, the resulting draft prepared by the SGMW deserves all praise as an excellent text reflecting the urgent needs for a modernized unified system of law. The draft is not a major creative achievement - it accepts verbatim the best elements of the "*Warsaw System*" (in particular the Guatemala City Protocol and Montreal Protocol No.4) which so far did not come into force and compiles them together with the Guadalajara Convention of 1961 and with the more and more widely entrenched principles of the "Japanese initiative", the IATA *Agreement* and the European Commission's *Regulation* on the waiver of any monetary limits of liability and strict liability up to a limit of SDR 100,000. These elements represent a "hard reality" or a "minimum benchmark" and no international Convention would be acceptable - in particular for states accounting for the largest share of international

39) LE 4/51-97/65
40) Third Meeting 4-5 December 1997 - see SGMW/1-WP/4; Fourth Meeting 26-27 January 1998 - see SGMW/1- WP/5
41) Decision on the basis of C-WP/10688
42) Report in SGMW/1 - Documentation

carriage by air - if it were to offer lesser overall protection to the consumer.

Main issues of the draft

1. Form of the instrument: the draft is formulated as a new Convention - separate and distinct from the previous instruments of the system. All previous amendments to the Warsaw Convention were adopted in the form of a Protocol, then Protocol-to-Protocol and, eventually, Protocol-to- Protocol-to-Protocol. The new Convention will obviously replace, among its parties, the original instruments and it is to be expected that upon its entry into force such parties will denounce the original instrument(s). That would abolish any Convention relations between the parties to the new instrument and the non-parties opening up a complex and practically uninsurable situation of conflict of laws and conflict of jurisdictions - a powerful stimulus for the non-parties to ratify the new instrument. Between the non-parties to the new instrument the old system would continue to apply but that would lead to *de facto* weakening of the global unified system of law without offering the non-parties any benefit s.[43] In any case, there is a possibility that some of the parties will require - as a condition of granting the operating permit - that all airlines operating to, from or via their territory comply with the terms of the new instrument.[44]

2. Scope of applicability: under the terms of Article 1 of the draft the new Convention will apply to all *international* carriage of persons,

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43) It is to be expected that the insurance premiums will be, on a world-wide scope, calculated on the basis of the highest risk and responsibility, i.e., according to benchmarks established in the new instrument. However, due to the highly competitive insurance market the insurance premiums need not be dramatically increased because even at present they are not calculated on the basis of the limits of liability but for the "worst scenario".

44) The US did so in 1966 with respect to the "*Montreal Agreement*" CAB 18900.

baggage or cargo defined, with drafting improvements, as in Article 1 of the original Convention. It would also apply to carriage performed by a "person other than the contracting carrier" as described in Chapter V of the draft which incorporates into the new instrument the essential provisions of the Guadalajara Supplementary Convention of 1961.

Article 2 would make the new instrument applicable to carriage performed by the State or by legally constituted public body; however, draft Article 48 would permit a reservation that the Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that state, the whole capacity of which has been reserved by or on behalf of such authorities.

The provisions on the carriage of postal items (Article 2, paras 2 and 3) accept the wording of the Montreal Protocol No. 4 of 1975 - the new Convention shall not apply to the carriage of postal items and the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Passenger ticket and baggage tag: the new instrument will still require the delivery of an individual or collective document but with minimum of formalities: indication of the place of departure and destination and, if places of departure and destination are within the territory of a single State Party, the indication of any agreed stopping place; such data are essential for the determination of applicability of the Convention.

However, paragraph 2 of Article 3 enables the substitution for the delivery of the document of "any other means which preserves the information" about places of departure, destination or agreed stopping places. This is a far reaching modernization enabling electronic data processing to substitute costly paper work and formal documentation and opening the door to

"ticketless" travel[45] - a major achievement for the airlines currently spending some 30% of their operating costs on "distribution". Nevertheless, completely "ticketless" travel may not be ever practicable since the passenger may need a written document for other purposes (accounting, for successive or return journey, for immigration purposes to prove his return travel arrangements or ongoing travel, etc.) and the carrier is obliged to *offer* to deliver to the passenger a written statement of the information preserved by the "other means" - in practice most probably a computer print-out very much resembling the traditional "ticket".

The new Convention would not provide for a separate *baggage check* (which in practice had always been integrated with the passenger ticket) and would oblige the carrier only to deliver to the passenger a *baggage identification tag* for each piece of checked baggage.

The Convention would still require that the passenger shall be given written notice that in international carriage the Convention may be applicable and that it in some cases limits the liability of carriers for death or injury, destruction or loss of, or damage to baggage, and delay. The continuing *notice* requirement appears unfortunate and may possibly lead to litigation alleging that an "effective" or "timely" notice was not given[46]. Would the requirement for a written notice be complied with if a poster at the check-in counter draws attention of the passengers - possibly in several languages - to the applicability of the Convention? The draft provides that the non-compliance with the ticket, baggage identification tag and notice provisions shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of the Convention. The notice provision seems to be an unfortunate relic off the past and the draft would not attach any sanction for the lack of the notice.

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45) Initiated already in the 1971 Guatemala City Protocol which never entered into force.

46) The *Lisi* and *Chan* cases before the US Supreme Court confirm that the "notice" provision could be a minefield in practical application.

A legal duty without some form of sanction is meaningless; if a "notice" requirement is retained at all, a provision could be made for an administrative penalty without any impact on the limits of liability.

4. Air waybill and cargo receipt: with respect to documentation for cargo the draft almost *verbatim* follows Montreal Protocol No. 4 of 1975 - it requires the delivery of a simplified air waybill but permits its substitution by "any other means which preserves a record of the carriage of cargo" enabling simplification of the paperwork and electronic data processing; however, the carrier is obliged, if requested by the consignor, to deliver a receipt for the cargo permitting identification of the consignment and access to the electronic record[47]. It is a pity that the draft does not expressly foresee the possibility of a negotiable air waybill but there is also no provision explicitly ruling out the issuance of a negotiable document. A simple provision along the lines "Nothing in this Convention shall prevent the issuance of a negotiable air waybill or cargo receipt" would go a long way towards the accommodation of possible future needs in the practice of foreign trade and banking.

5. Liability Regime for Passengers: the draft accepts the two-tier liability system with respect to accidental death or injury of the passenger. Claims up to SDR 100,000[48] would be based on strict liability (sometimes referred to as "objective" liability or liability "regardless of fault"). In the second tier - claims exceeding SDR 100,000 without any monetary limit - the carrier's liability would be based on *fault*.

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47) Article 4, para 2 of the draft

48) The 30th Session of the Legal Committee did not stipulate any specific amount of money; however, the discussion was tacitly based on the IATA Passenger Liability Agreement and on the legislative initiative of the European Union. The 1992 Japanese initiative also refers to SDR 100,000. It was only the non-representative SGMW that inserted the sum of SDR 100,000 into the draft. However, in the light of the precedents in practice it is unlikely that the Diplomatic Conference could accept a lower monetary amount - most states with an important share in international carriage by air would not be ready to accept less and may even require more.

However, no consensus has been reached at the 30th Session of the Legal Committee as to the burden of proof for the second tier of liability and the matter remained wide open for the Diplomatic Conference. The original Warsaw Convention, the IATA Passenger Liability Agreement, the European Union initiative, the Japanese initiative and the original Secretariat/Working Group draft were based on the "reversed" burden of proof, i.e., there is a presumption of fault of the carrier and it is for the carrier - if he wishes to be exonerated - to prove that he and his servants and agents have taken all necessary measures to avoid the damage. Some delegations in the Legal Committee believed that the reversal of the burden of proof in the Warsaw system was a *quid pro quo* for the limitation of liability which has no place in case of unlimited liability - it should be for the claimant to prove the fault of the carrier (*actori incumbit probatio*).

It would not have been easy to reconcile the divergent positions at the Diplomatic Conference. The Legal Committee prepared three variants for a possible solution[49] but each of them has serious inherent faults:

- according to the first variant each State party would, at the time of ratification of the Convention, make a declaration whether it accepts the system of reversed burden of proof or burden of proof on the claimant and such declaration would be binding on other States; this alternative would not solve the problem and would possibly introduce serious disunity in the system of liability and unsolved conflicts - how to solve the problem if the Sates of departure, State of destination, the State of the carrier and the State of the forum made different "declarations" under proposed Article 20?

- the second variant differs only cosmetically from the first one: the regime would be based on reversed burden of proof but each State is free to notify, at the time of ratification, that in any action before a Court within its territory for claims above SDR 100,000 the claimant must prove carrier's fault or neglect; again, this alternative does not solve the

49) See Article 20 of the draft as prepared by the 30th session of the Legal Committee in 1997 - Doc 9693-LC/190, Attachment D.

substance and would lead not only to disunity of the system but also to active "forum shopping" to bring the claim to a Court not requiring the claimant to prove carrier's negligence.

- the third variant is most far-fetched since it would introduce a three-tier system - strict liability up to SDR 100,000, reversed burden of proof up to as yet unspecified amount and proof of carrier's fault or neglect above such an amount.

None of these variants is acceptable for a unified system of law. The best course of action was clearly to return to the original Secretariat/ Working Group draft, follow the Japanese model, the IATA Passenger Liability Agreement and the European initiative in maintaining the reversed burden of proof. The final draft prepared by the SGMW[50] would exonerate the air carrier of liability in excess of SDR 100,000 if the carrier proves that he and his servants and agents had taken all necessary measures to avoid the damage, or it was impossible for the carrier or them to take such measures, or such damage was solely due to the negligence or other wrongful act or omission of a third party, thus coming back to the principle of presumed fault with reversed burden of proof.. The expression "solely due" may cause difficulties and differences in judicial interpretation and it may have been preferable to omit the word "solely" to permit more flexibility in judicial application.

The proposed Article 16 of the draft Convention bases the liability with respect of death or injury of passengers on an "accident" - a term divergently interpreted in the jurisprudence and not self-explanatory. It would have been preferable to maintain the term "event" as used in the 1971 Guatemala City Protocol[51] and in the Working Group/Secretariat draft. Similarly, the draft now retains liability for "bodily" injury - while the Guatemala City Protocol of 1971 used the more flexible term "personal injury" encompassing

50) Article 20 of the final draft
51) Article IV. of the Protocol amending Article 17 of the Convention.

also the "mental" injury - the issue of "mental trauma" caused considerable difficulties in jurisprudence and the practice of states varies. Article 16 of the draft would exonerate the carrier to the extent that the death or injury resulted from the state of health of the passenger - another potential minefield in litigation to find the degree to which the state of health was the cause of death or injury of the passenger (e.g., when a fatal heart attack during the flight may or may not have been triggered by a minor turbulence beyond any control of the carrier, etc.).

7. Liability for baggage: The Convention would be based on strict liability of the carrier with respect to checked baggage when the "event" (not "accident") took place on board, during embarkation or disembarkation or at any time while the baggage was in charge of the carrier; he can be exonerated only if the damage resulted solely from the inherent defect, quality or vice of the baggage. With respect of unchecked baggage and personal items the carrier is liable only if the damage resulted from his fault (to be proved by the claimant).The liability for baggage would be limited but the Legal Committee did not agree on a specific sum and only listed SDR 1,000[52] as an indication. It is noteworthy that the liability for baggage is not related to its weight - in conformity with the carriers' almost common practice to count pieces rather than weight.

8. Liability for cargo: The Convention accepts the solutions found in Montreal Protocol No. 4 of 1975. It will introduce strict liability for an "event" during the entire period of carriage. However, the carrier would be exonerated if he proves that the damage resulted solely from inherent defect, quality or vice of the cargo; from defective packing performed by another person; an act of war or an armed conflict or an act of public authority carried our in connection with the entry, exit or transit of the cargo. While no monetary limit was agreed, the Committee worked on the assumption that SDR 17 per kilogram[53] would be appropriate; this sum is equivalent to

52) This amount was foreseen already in the 1971 Guatemala City Protocol Art.22.

the 250 "francs" per kilogram used since 1929 in the "*Warsaw system*".

9. Liability for delay: The carrier will be liable for damage occasioned by delay in the carriage of passengers, baggage and cargo and could be exonerated if he proves that he and his servant and agents took all measures that could be reasonably required to avoid the damage or that it was impossible for him or them to take such measures.

The original Warsaw Convention of 1929 and that Convention as amended by The Hague Protocol of 1955 - the only instruments in force - did not stipulate a specific limit for the case of delay. The liability for delay in the carriage of passengers would probably be in the order of SDR 4150, for baggage and cargo the same as for its loss or destruction.[54]

10. Exoneration: The carrier shall be wholly or partly exonerated from his liability if he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation. This represents a progress in the unification of law - under the original Warsaw Convention it was only in the discretion of the Court seized of the case to take into account, in accordance with its *lex fori* any contributory negligence of the claimant.

11. Adjustment of the limits of liability: The Legal Committee recognized that the limits of liability (SDR 100, 000 for the first tier with respect to passengers and the appropriate limits for baggage, cargo and delay) are bound to become obsolete in due course in view of the inflationary trends. The draft incorporates, for consideration by the Diplomatic Conference, a profoundly innovative procedure to keep the limits up-to-date by a review every five years or on the initiative of one-third of the parties[55] if the

53) This limit was adopted in the 1975 Montreal Protocol No.4, Art. 22.
54) These sums were accepted in the Additional Protocol No.3 and Montreal Protocol No.4 of 1975.

inflation rate exceeds 10% or 30%. The revision would be made by two-thirds of the Council of ICAO and shall become effective six months after its submission to the States parties, unless within three months a majority of States register their disapproval with the Council. This represents a novel procedure in the amendment of a multilateral instrument[56] and confers on the ICAO Council a function not constitutionally foreseen in the Convention on International Civil Aviation. While such procedure is not expressly foreseen in the Vienna Convention on the Law of Treaties, there is no legal obstacle to such an innovation if agreed by States.

12. Exclusive remedy: Article 22 would make null and void any contractual provision tending to relieve the carrier of liability or to fix lower limits. However, Article 21 D of the draft gives the carrier full freedom to stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in the Convention or to no limits of liability whatsoever.

Article 23 stipulates that the Convention would represent an exclusive remedy - any action in damages, however founded, can be brought only subject to the conditions and limits of liability set out by the Convention. For greater certainty Article 23, paragraph 2 clarifies that the term "damages" does not include any punitive, exemplary or other non-compensatory damages.[57]

13. Jurisdiction: Article 27, paragraph 1 determines the four jurisdictions known from Article 28 of the original Warsaw Convention - the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the

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55) Draft Article 21 C.

56) A similar procedure was first introduced in the 1991 Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection - see Doc 9571.

57) The principle of "compensation" and "restitution" is stressed also in the third Preambular clause.

contract has been made or before the Court having jurisdiction at the place of destination.

Since 1971 the United States have vocally insisted on the introduction of "fifth" jurisdiction - the place of domicile or permanent residence of the passenger. Their wish was partly accommodated under different circumstances in the Guatemala City Protocol of 1971[58] - in the context of that Protocol it made no difference which Court would exercise jurisdiction when there was an absolute and unbreakable limit of liability which could not be exceeded under any circumstances. Under different circumstances (e.g., now with no limits of liability) this additional jurisdiction could make much difference for claimants domiciled or having permanent residence in the USA - the awards given by juries in the USA in particular for non-economic damage (loss of companionship or of parental guidance, loss of enjoyment of life, pre-death pain and suffering, etc.) vastly exceed the awards in other countries. The IATA strongly resisted the fifth jurisdiction in the implementation of its Passenger Liability Agreement; in any case, the introduction of an additional jurisdiction could not be implemented by an agreement of the airlines and would require an amendment of the imperative Article 28 of the Warsaw Convention.

The question of the "fifth jurisdiction" marshalled no consensus at the 30th session of the Legal Committee. It could be validly argued that a carrier should be subject to jurisdiction in any place where he operates air transport services or is otherwise "doing business" (e.g., where he has an establishment in the form of owned or leased premises from which he conducts the business of carriage by air); the "fifth" jurisdiction does not present an insurmountable obstacle and should not thwart the consensus on the entire Convention. However, many delegations were holding this point as a negotiating tool to achieve concessions in other respects (e.g., the burden of proof in Article 20). It is gratifying to note that the SGMW

58) New paragraph 2 to Article 28.

reached a consensus to accept the "fifth" jurisdiction in Article 27 paragraph 2 of the final draft. The additional jurisdiction would be in the territory of a State party in which at the time of the accident the passenger had his or her principal and permanent residence; and to or from which the carrier actually or contractually operates services for the carr- it will now take intensive work to convince the states that this is a fair draft not departing in any manner from the usual commercial practices. It is, however, regrettable that the SGMW tolerated a "poison pill" planted by the French delegation in Article 27 paragraph [3 *bis*] and left in square brackets for consideration by the Diplomatic Conference: this provision would enable states parties, at the time of ratification, accession or adherence, to declare whether or not they accept the "fifth" jurisdiction; any such declaration would be binding on all states and the depositary would notify all states parties of such declarations. The French proposal is not only a blueprint for a disunification of law but also a hazard which may thwart the success of the Diplomatic Conference - for many states, in particular the USA, the general acceptance of the "fifth" jurisdiction seems to be a sine qua non.

14. Arbitration: The modalities of alternative settlement of differences are gaining popularity in many parts of the world as more flexible, faster and cheaper than the judicial settlement. The original Warsaw Convention permitted arbitration only with respect to cargo but a number of delegations to the Legal Committee favoured arbitration also for the claims of passengers as a possible method that is in the interest of the consumers who would not have to resort to lengthy and costly court proceedings. Other Delegations believed that arbitration should be reserved only for disputes of commercial entities and that their domestic law may not permit arbitration of passengers' claims. The compromise reached[59] in Article 28, paragraph 2 of the draft (left in square brackets for the final decision by the Diplomatic Conference) would permit, subject to the applicable laws, arbitration to be held in any place where a Court of law would have

59) Paragraph 2 of Article 28 - as drafted by the 30th session of the Legal Committee and left in square brackets for the final decision of the Diplomatic Conference.

jurisdiction; however, a valid arbitration agreement would require the claimant's individual written consent or confirmation after the event giving rise to the dispute has occurred. Most unfortunately, the reference to arbitration with respect to passengers' claims disappeared from the final draft prepared by the SGMW. No doubt, *public order* may currently be opposed in some states to the arbitration of personal claims but in some other states the alternative modes of the settlement of differences are gaining in popularity. It could be farsighted not to close the door to any emerging new modalities of the settlement of differences and to include in the text a clause along the lines "nothing in this Convention shall be deemed to prevent the submission of other disputes to settlement by arbitration in accordance with the applicable law, provided that the p

15. Guadalajara Convention: The new draft would consolidate, in Chapter V[60] , the text of the 1961 Guadalajara Supplementary Convention into the body of the new instrument. Its essence is to provide for situations when a person (contacting carrier) as a principal makes an agreement for international carriage with a passenger while another person (actual carrier) performs the whole carriage or a part of it without being in direct contractual relation with the passenger. The Guadalajara Supplementary Convention extended the Warsaw regime of liability also on the actual carrier and the text will now be consolidated and will bring a beneficial clarification in some type of operations - among them the growing code sharing practices of the airlines.

16. Imperative nature of the Convention: Article 43 of the draft would repeat the essence of Article 32 of the original Convention making null and void any contractual clauses entered into before the damage occurred by which the parties purport to infringe the rules laid down in the Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction. This provision would confirm the mandatory (imperative) nature of the new instrument.

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60) Draft Articles 33-42.

17. Insurance requirements: The Legal Committee did not reach a consensus on the obligatory insurance of the air carriers but left for the Diplomatic Conference's decision draft Article 45 which would require every carrier to maintain insurance or other form of financial security, including guarantee, covering its liability for damage that may arise under the Convention in such amount, of such type and in such terms as the national State of the carrier may specify. The carrier may be required by the State into which it operates to provide evidence that this condition has been fulfilled.

This provision would represent a welcome innovation and safeguard for the consumers. However, it may prove difficult for smaller carriers in the developing countries to provide evidence of extensive insurance or other security and may create obstacles to their introduction or continuation of air services to some destinations. The SGMW agreed that this provision should be presented to the Diplomatic Conference as part of the final draft without the doubts expressed by the square brackets.

18. Final clauses: in accordance with the established practice the Final Clauses of an instrument are deemed to be the sovereign prerogative of the Diplomatic Conference and are not drafted by the Legal Committee or other body in advance. Such clauses may have far reaching policy impact and may require delicate compromise.

It is to be hoped that the text of the new instrument will be drafted in several authentic versions - in the English, French, Russian, Spanish and also Arabic and Chinese languages. The "*Warsaw System*" was handicapped by the fact that the underlying 1929 Convention existed only in the French authentic version (while the protocols for its amendment were authentic also in English and Spanish and eventually also in Russian) and there was no "consolidated" text authentic in other languages.

Another important issue will be how many ratifications will bring the new instrument into force. In the past practice the instruments of the "*Warsaw System*" stressed too much the interests of universality requiring 30 ratifications (in the case of the Guatemala City Protocol of 1971 imposing another condition - ratification by the USA) and that would slow down the entry into force of the new instrument. It would appear quite realistic to bring the new instrument into force upon ratification by some 5-10 states (most interested and in need of the modern unification of law) and let the instrument be tested in practical implementation as soon as possible.

As to the appointment of the depositary of the instrument, most (but not all) of the components of the "*Warsaw System*" have been deposited with the Government of Poland. However, there is no justification to perpetuate such tradition and the modern treaty practice more and more vests the depositary function for multilateral instruments with international organizations; the Secretary General of ICAO would be the most logical depositary of the new instrument. An exception in international practice is when a government of a state hosts the Diplomatic Conference - then it is usual to designate that host country as the depositary. Among the delegations to the 30th Session of the ICAO Legal Committee a hope was expressed in private conversations that the Diplomatic Conference might be held in Warsaw around the 70th anniversary of the 1929 Warsaw Convention. So far nothing seems to support this hope - Poland did not even send a delegation to the Legal Committee and the cost of being a host (difference between the cost of a Conference held at the ICAO Headquarters in Montreal and a different place) may not be among the current priorities for Poland.

Conclusions

The final draft of the new Convention as prepared by the ICAO SGMW represents a very positive contribution to international law making and deserves full support in general terms. It reflects the best modern trends reflected already in the Guatemala City protocol of 1971 and in the 1975 Montreal Protocols, as well as the aspirations of many states and airlines reflected in their individual or collective unilateral actions. The time has come to admit that the airline industry does not need and does not deserve a special protection in the form of limitation of liability for death or injury of passengers - the critical problem that has plagued the unification of private air law for decades. Again, the modernization and simplification of the documents of carriage is long overdue. Without an early modernization of the system there would be an imminent danger that several states with a great share in international carriage by air would denounce the antiquated unified system - with devastating results for the unity of law, predictability of the risks and impossibility to obtain at reasonable costs an adequate insurance coverage.

While states and their airlines accounting for over 80% of all international carriage by air have already in practice introduced the proposed new principles, the decision will not come easy for the developing states and their airlines in the emerging markets. Their concern is that the proposed new regime of liability may increase their insurance costs and they are most probably right - a regime without a limit of liability for the death or injury of a passenger will cost more to insure. In the competitive market it can be expected that major air carriers with vast fleets of modern aircraft and impeccable safety record will have lower rate of insurance costs than small carriers with older fleets and perhaps a recorded accident in the past years but that is to be expected in the global market of equal opportunities. It may be also argued that smaller airlines in the developing world have great competitive advantage in their generally lower labour costs. It must

be accepted that the cost of insurance is an integral part of the cost of "doing business" and the protection of the travelling public should not yield to the protection of the air carriers.

At the end of the day the decision of the 1999 Diplomatic Conference will a political one and the participating sovereign states are the only decision-makers. The adoption of the new instrument will, in accordance with the international law of treaties and general practice, require a two-thirds majority vote of those present and voting at the Conference. Since the final text of the draft instrument was not prepared with full transparency in a wide forum of the Legal Committee but in an "unorthodox" SGMW, it would not be surprising if the political will of states were to prove not united enough and not fully convinced by the proposal. If the Diplomatic Conference were to fail to achieve the required two-thirds majority, the development of the unification of private air law would be thrown back by decades and the credibility of the law-making machinery of ICAO would be irreparably damaged - all only because the draft was not convincingly explained to states and understood by them as the unavoidable direction to the future. The industry proved to be ready for this innovation and states should accept what is essentially the industry's initiative for the benefit of the travelling public.

Quite often the concept of "unlimited liability" is erroneously equalled with "astronomically high" compensation; that is not a correct understanding - the new draft is based on the principle of compensation and restitution (*restitutio in integrum*) as is common in the general field of liability and only the actual and proven economic and (in some jurisdictions) non-economic damage is to be compenstaed. The principle of *compensation* is stressed in the Preamble and in Article 23 of the draft.

It may not be easy for all delegations to the Conference to raise their hand in favour of the new instrument since they may require more time to

understand its implications and practical impact and to prepare for it better. However, such states could do much harm by voting against the draft at this time and could thwart the Conference. For those not fully convinced at the time of the Conference there is always the possibility to abstain in the vote rather than voting against. Only the positive and the negative votes are counted for the two-thirds majority of the Conference and those not fully convinced at the present time should not prevent the adoption of the new instrument by those who urgently need it.

The interests of international air transport in the 21st century will call for a great wisdom, foresight and courage of all delegations to the 1999 Diplomatic Conference.