The Montreal Convention : A First Impression

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- Abstract -

The Montreal Convention markedly changed the rules governing the international carriage by air of passenger, baggage and cargo. The introduction of a considerable number of modernized major elements including electric ticketing system, the unlimited passenger liability regime and a supplementary (fifth) jurisdiction should help to remove aged scheme that now exists in the Warsaw Convention and other related instruments. The key issue of the electric ticketing system

- 본고는 1999년 10월 서울에서 "새 천년의 항공우주법 및 정책의 주요 과제와 방향"이라는 주제로 개최된 제9회 항공우주법 국제학술세미나대회에서 발표된 논문임

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recognized by the Convention is how to describe reasonably and adequately the terms of written notices, in the light of the principle of consumer protection. Regarding liability regime for passengers, an unlimited passenger liability regime is realized. The carrier, in the first tier, is subject to a strict liability regime of up to 100,000 SDRs, and in the second tire, a regime of presumed fault liability without numerical liability limits. To add to the present four fora, the fifth forum is permitted. Regarding damage resulting the death or injury of a passenger, an action for damages may also be brought in its home territory with the considerably qualified narrow requirements. A strange deviation from the well-established "Procedure for Approval of Draft Convention" carried out by the Legal Committee left a considerable number of unrefined and incomplete passages. In the near future, their modification should be required.

I. Introduction

The Plenipotentiaries at the International Conference on Air Law held under the auspices of the International Civil Aviation Organization (ICAO) met at Montreal from 10 to 28 May 1999 for the purpose of considering the draft Article of the *Convention for the Unification of Certain Rules for International Carriage by Air*, prepared by the Legal Committee of the International Civil Aviation Organization (ICAO) and the *Special Group on the Modernization and Consolidation of the "Warsaw System"*(SGMW) established by the Council of the International Civil Aviation Organization (ICAO).[1] The Governments of

1) See the Final Act of the International Conference on Air Law held under the auspices of the International Civil Aviation Organization signed at Montreal on 28 May 1999 (hereinafter referred to as "the Final Act"), at 1. The Final Act has no Docket number. It seems to be a supplemental docket of Doc 9740 in which six authentic texts of the Montreal Convention are involved.

the 118 States were represented at the Conference, and the 11 international organizations furthermore were represented by Observers.[2] Following its deliberations, the Conference adopted on May 28 the text of the *Convention for the Unification of Certain Rules for International Carriage by Air*, done in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being *equally* authentic.[3]

Retrospectively, during its 146th Session on 15 December 1995, the Council decided that a Secretariat Study Group (SSG) was established to assist the Legal Bureau in a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System".[4] The SSG was requested to provide the Legal Bureau with its views that should permit the Council to consider the appropriate steps to be taken for the modernization of the "Warsaw System". Regrettably, it is rather curious and inequitable that almost all the absolute majority of its members had been constituted from the legal experts of the Common Law States and that no Chinese, Korea and Japanese legal experts of the Civil Law States had been selected. It is noteworthy that China and Japan had sent their legal experts to the first and second International Conferences of Private Air Law convened by the French Government in Paris and Warsaw in 1925 and 1929 and also to the three Sessions of the C.I.T.E.J.A. during the period. As a result, the common law oriented Group, for instance, had, as to a basic compensatory principle governing the new passenger liability regime, agreed upon the principle of "equitable compensation based on the principle of restitution", making reference to Article Ⅶ of the 1972 *Convention on International Liability for Damage Caused by Space Objects*,[5] which had set out a tortuous

2) The Final Act at 1 and 2.
3) The Final Act at 5, and Doc 9740 at 18.
4) LC/30WP/4, 31/1/97 at 2. Regarding untransparency on selecting process of members of the SSG, see 11 Korean J. Air & Space L., (1999) at 144.
5) LC/30WP/4, 31/1/97 at A12.

liability between the launching State and the claimant State, in other word, the state responsibilities. In this point, it should be recalled that the rapporteur Mr. Henry De Vos in his Report relating to the draft Warsaw Convention presented by him on 25 September 1928 had told us that the texts would apply only to the contract of carriage,[6]; in other word, it in principle was presumed to be a contractual liability between the private persons.

On 4 June 1997, during its 151st Session, the Council was informed that the 30th Session of the Legal Committee had approved the text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*.[7] Regrettably, this draft instrument contains a number of square brackets on certain important questions, on which no consensus had been found in the Legal Committee. The principal issues are, for the most part, addressed in the Convention without the necessary consensus among governmental delegations to support its ratification. These issues, including those which are directly related to the passenger liability regime, have therefore been left for subsequent discussion at the diplomatic conference. This unfortunate result stems from an unprecedented aberration in ICAO's law-making procedure. In this regard, former Director of the ICAO Legal Bureau and noted scholar Michael Milde highlights in his latest study that:

> "[t]he procedure adopted for work in ICAO in 1996 strangely departed from the well established and observed *Procedure for Preparation* [Approval] *of Draft Conventions* which would require a Secretariat Study, report by a Rapporteur, session of a Special Sub-Commi-

6) Rapport au nom du Comit International Technique d'Experts juridiques aeriens par M. Henry De Vos, Rapprteur, at 160 in the "II Confrence Internationale de Droit Priv Arien, 4-12 Octobre 1929, Varsovie".

7) CWP/10613, 2/6/97 at 1-5.

> ttee of the Legal Committee and a session of the Legal Committee. In fact, the draft was initially prepared, with the assistance of a Secretariat Study Group, by the Legal Bureau of the ICAO Secretariat acting in a highly convincing and respectable manner. The work required two sessions of the Working Group in 1996 and unnecessarily delayed the progress until almost mid-1997 -a single session of a Sub-Committee would have progressed the work faster and with a greater transparency, authority and geographic representation and with a more effective impact on the further work of the Legal Committee itself; the Legal Committee could have met during 1996 and the work could have progressed much faster".[8]

The Council, during the 151st Session, expressed the desire to consolidate the possible alternatives so that an appropriate solution to the different legal points could be found. One way of pursuing this objective could be through further meetings of the SSG. However, it was clear that a substantial part of the yet unresolved questions in the draft text reflected not only legal but also policy issues. Therefore, it might be appropriate to complement the further works of the SSG by input of another entry, which might add an element of governmental representation to the process, without unduly delaying the completion of a refined draft. As a result, a legal Panel named the SGMW could be set up for this purpose.[9]

On 14 to 18 April 1998, the first meeting of the SGMW comprising 20

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8) M. Milde, "Warsaw SystemFrom Requiem to Resurrection ?", [unpublished paper] 1997, subch 1, para 5.

9) CDEC 152/8, 26/11/97, and PRES AK/580, LE4/51.2, 15/12/97 at 1.

States with members of the SSG and the international organizations concerned was convened in order (i) to supplement the work achieved by the Legal Committee and to prepare drafting suggestions for resolving the outstanding questions in the draft text approved by the 30th Session of the Legal Committee, in particular the provisions presently contained in square brackets, and (ii) if appropriate, to elaborate on possible drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing.[10]

On 3 June 1998, at the seventh Meeting of its 154th Session, the Council decided to convene an International Conference of Plenipotentiaries on Air Law ("Diplomatic Conference") to be held from 10 to 29 May 1999 in Montreal, in order to review the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, and to adopt a new instrument.[11]

In this paper, the author describes briefly the basic features of the Convention, points out its problems if any and proposes the solution thereof, and also points out certain phrasing and wording which should be further refined, and finally makes some remarks.

Ⅱ. Major Elements of the Montreal Convention

The Montreal Convention is intended to replace the current complex of the "Warsaw System" which is constituted with the Warsaw Convention and other seven related instruments so as to restore legal clarity and transparency, while ensuring continuity as well as the required modernization in substance.

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10) CWP/10688, 24/11/97 at 2-3
11) DCW DOC No3, 9/11/98 at 1

The new Convention has a considerable number of major elements enumerated as follows:

1. Liability Regime for Passengers

The Convention introduces a two-tier liability system in case of eventual death or injury of passengers. Under this system, the air carrier would, in the first tier, be subject to a regime of strict liability of up to 100,000 SDRs, irrespective of the carrier's fault, and in the second tier, a regime of presumed fault liability without numerical liability limits.[12] In both tiers, only actual compensatory damages are recoverable and must be proven by the plaintiff. However, simple negligence is sufficient to establish air carrier's liability so that the claimant is no longer confronted with the requirement of proving "willful misconduct" in order to receive full compensation. The author in the past decade has urged a monistic regime of strict liability without numerical liability limits for passenger liability regime. This insistence was indirectly accepted by the new Convention: a carrier may stipulate in the means of a special contract that the contract of carriage shall be subject to higher limits which include the ceiling in the first tier of liability or to no limits of liability whatsoever.[13] In other words, the air carrier may be replaced the two-tier liability regime with a monistic regime of strict liability without numerical liability limits.

2. Adoption of Comparative Negligence Concept

The defense of contributory negligence remains available for air carrier in both tiers. Regarding the nature of contributory negligence, the

12) Article 21 of the Montreal Convention.
13) Article 25 of the Montreal Convention

concept of comparative negligence was adopted, since the air carrier shall be wholly or partly exonerated from its liability to the extent that it proves that the damage was contributed to by the negligence of the passenger.[14]

3. Liability Limits for Baggage, Cargo or Delay

The limits of liability for baggage, cargo or delay have been retained. Moreover, contrary to our expectation the amounts of the limits were no longer revised.[15] The possibility of making a declaration of value for baggage or cargo has also been retained, raising the limit of liability to the value declared.[16]

4. Jurisdiction

Under the new Convention, a fifth jurisdiction was added to the existing four jurisdictions in qualified narrow circumstances.[17] In respect of damage resulting from the death or injury of a passenger, an action for damages may additionally be brought in the territory of a State Party in which at the time of the event the passenger has his or her principal and permanent resistance and to or from which the air carrier operates for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreements, and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement. In accordance with the revision of Article 33 (Jurisdiction), it is desirable that the text of the Article 46

14) Article 20 of the Montreal Convention.
15) Article 22 of the Montreal Convention.
16) Paragraphs 2 and 3 of Article 22 of the Montreal Convention.
17) Paragraphs 2 and 3 of Article 33 of the Montreal Convention.

(Additional Jurisdiction) should also be revised in the same vein. The phrasing "the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business" should be replaced with the phrasing "the court of domicile of the actual carrier or of its principal place of business".

5. Documentary Requirements

Documentary requirements have been reformed in order to facilitate the smooth flow of traffic. In the light of recent development of computerization technologies, so-called "electric ticketing" was expressly affirmed in the Convention.[18]

6. Notice Requirement

The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.[19]

7. The Concept of Damages

The concept of damages, to be awarded in accordance with the law of forum, has been left unchanged. However for purpose of clarification, the Preamble of the Montreal Convention provides for a specific reference to the qualified narrow principle of restitution.[20] Moreover, the Convention

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18) In respect of the carriage of passengers, see paragraph 2 of Article 3 and in respect of the carriage of cargo, see paragraph 2 of Article 4

19) Paragraph 4 of Article 3 of the Montreal Convention.

20) See the third preambular paragraph of the Preamble of the Montreal Convention.

expressly stipulates that punitive, exemplary or any other non-compensatory damages shall not be recoverable.[21] Regarding death or injury of passengers, while the Legal Committee approved, without any objection, the phrasing "death or *bodily or mental injury*," the SGMW being beyond its authority granted by the Council replaced the phrasing with more restrictive phrasing "death or bodily injury."[22] Regarding this issue, the author of this paper already proposed that the phrasing "bodily or mental injury" should have been replaced with the phrasing "personal injury" which embodied the "lsion corporelle" in French. The French version of the new Convention uses still the "lsion corporelle" which partially includes "mental injury." Therefore, the phrasing "bodily injury" in the Convention written in English should appropriately be construed that it includes also a kind of mental injury.

8. Conversion of Monetary Units

The Convention stipulates that conversion of the sum into national currencies shall, in case of judicial proceedings, be made according to value of such currencies in terms of the SDR *at the date of the judgment*.[23] It is noted that, the value of the U.S. dollar in terms of the

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21) Article 29 of the Montreal Convention.

22) In the SGMW's deliberation relating to the United Kingdom's proposals on paragraph 2 of old Article 16 (present Article 17), the Chairman observed that these proposals represented substantive changes to the text, so that the SGMW should not examine them (see 3:5 of the final report done by the SGMW/1 on 27 May 1998). However, the same Chairman invited on the other hand the deliberation with respect to the deletion of the term "mental injury" in paragraph 1 of the same Article. Regarding this term, it is very clear that while the term was approved by the Legal Committee without any objection, the SGMW decided to adopt the deletion of the term that represented substantive changes to the text. The author of this paper believes that the deletion of the term "mental injury" by the SGMW represented substantive changes to the text. It is observed that the SGMW exercised beyond its authority granted by the Council in relation to the deletion of the term "mental injury".

SDR is the reciprocal of the sum of the dollar values, based on market exchanges rate, of specified quantities of the five currencies. Practically the exchange rates for this purpose in principle are the noon rates in the London foreign exchange market. Therefore, while it is easy for any Courts to get access to the homepage of the IMF and see the exchange rates, all the Courts located in the area from Tokyo to London can not get access to the correct value of their national currencies in terms of the SDR *at the date of the judgment* before the noon in accordance with the Greenwich time, but merely one at the previous date of the judgment. Regarding the phrasing of this sentence, reconsideration is to be required.

9. Escalator System Set out in Article 24

The escalator system contained in Article 24 embodies the inflation monism theory. Unfortunately, the drafter neglects an essential factor insofar as the nominal value of a national currency as expressed in SDRs may also fluctuate depending on the economic strength of the particular State, independent of its rate of inflation. Thus, the conversion rate rises or falls in inverse proportion to the economic strength of the relevant State, and this axiom may constitute an opposing notion named by the author as the proper nature theory.

For instance, in Japan, 100,000 SDRs was equivalent to \35,723,000 at the end of 1975. If a Protocol containing the escalator clause with a 10% automatic increase every five years had been adopted at that time and entered into forth in 1980, 100,000 SDRs would have been automatically modified to 110,000 SDRs in 1985, yet the exchange rate for 1 SDR at the end of 1985 was merely \220.23. Therefore 110,000 SDRs in 1985 would translate into only \24,225,300. Similarly, at the end of 1990,

23) Paragraph 1 of Article 23 of the Montreal Convention.

110,000 SDRs would automatically increase to 121,000 SDRs, while 1 SDR fell to \191.21, therefore 121,000 SDRs would be calculated as \23,136,410. Regarding SFr., 100,000 SDRs was equivalent to SFr. 306,710 at the end of 1975. However, nowadays (on December 15, 1998) 1 SDR fell to 1.889 SFr., therefore 121,000 SDRs would be calculated as SFr. 228,569.

The above illustration demonstrates that the escalator clause which is constructed according to the inflation monism theory for which the Legal committee had suggested and the SGMW had endorsed, fails to accomplish the desired result. For Switzerland, the abovementioned escalator clause would actually function as the so-called " de-escalator clause ". Therefore, it is submitted that the escalator clause should be redrafted according to both of the proper nature theory and the inflation theory.

In order to establish a functional review system, the following scheme should be considered.

In the first stage, considering the proper nature theory, the value of national currencies in terms of the SDRs of a State Party which is a Member of the IMF shall be calculated in accordance with the method of valuation applied by the IMF for its operations and transactions and shall also be fixed *e.g.*, at the date of entry into force of this Convention. The value of national currencies in terms of the SDRs of a State Party that is not a Member of the IMF shall be calculated and fixed in a manner determined by that State. In other word, in this stage, the nominal value of national currencies in terms of the SDRs of State Parties of the Convention shall be fixed at the date of entry into force of the Convention.

In the second stage, the limits of liability established under this

Convention should be reviewed by the ICAO at five-year intervals, by an inflation factor that corresponds to the accumulated rate of inflation, upon condition that it has exceeded 10%. It however is desirable that the first such review should not be taken place at the end of the fifth year following the date of entry into force of this Convention but be done at the fifth year date of entry into force of this Convention, since the end of the year is not the working date of the ICAO, and moreover at the date, the London market and the New York market will show the most dwindled dealings.

10. Waiver of Carrier's Defences

The Convention expressly stipulates that the carrier may waive any defences under the Convention.[24]

11. Advance Payments

A consumer-oriented clause was introduced into the Convention. In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, if required by its national law, make advance payments without delay to the claimants in order to meet their immediate economic needs.[25]

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24) Article 27 of the Montreal Convention.
25) Article 28 of the Montreal Convention.

12. Arbitration

Arbitration to disputes arising out of the carriage of cargo is expressly recognized. There is no arbitration clause regarding the carriage of passengers. However, it is understood that even without any expressed clause arbitration remained possible if permitted by the national law of the State concerned.[26]

13. Regional Economic Integration Organisations

Paragraphs 2, 3 and 4 of Article 53 of the Final Clauses recognize certain Regional Economic Integration Organisations to be duly authorized to sign and ratify, accept, approve or accede to the Convention. Regarding the clauses relating to such Organisation, it is noted that they involve inevitably a discriminative nature, since while each State Party of the Convention in principle has one voting right, however, each State Party of a Regional Economic Integration Organisation being also to a State Party of the Convention has one and one divided by number of the States Parties of the Organisation voting rights.

14. Insurance Clause

Another consumer-oriented clause was introduced into the Convention. States Parties *shall* require their carriers to maintain adequate insurance covering their liability under this Convention. Moreover, a carrier *may* be required by the State Party into which it operates to furnish evidence that it maintains adequate insurance covering its liability this Conventio n.[27]

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26) Article 34 of the Montreal Convention.
27) Article 50 of the Montreal Convention.

Ⅲ. Further Refinement of the Convention

1. Generalities

The texts of the Montreal Convention constitute of the preamble and seven modernized and consolidated chapters based on the Warsaw Convention and other related instruments. The first chapter (Article 1 and 2) provides for the "General Provisions"; Chapter Ⅱ (Article 3 to 16) relates to the "Documentation of Carriage"; Chapter Ⅲ (Article 17 to 37) describes "Liability of the Air Carrier"; Chapter Ⅳ (Article 38) stipulates "Combined Carriage"; Chapter Ⅴ (Article 39 to 48) relates to "Carriage by Air performed by a Person other than the Contracting Carrier"; Chapter Ⅵ (Article 49 to 52) provides for "Other Provisions"; and final Chapter (Article 53 to 57) stipulates the "Final Clauses".

2. The Title of the Draft Convention

The Title of the original draft instrument developed by the Legal Bureau of ICAO with assistance of SSG was *"ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air."* In the 30th Session of the Legal Committee, the Chairman proposed the term "ICAO" to be deleted. One delegation, supported by others, stated that the new convention convened many matters and emphasis should not be given in the title to liability issues. He proposed retention of the original title of the Warsaw Convention. Upon the suggestion of the Rapporteur, the Committee agreed to defer consideration of the title, until a clearer picture emerged of the contents of the proposed new instrument. In the final stage, the Committee reconsidered the title of the new Convention, as some delegations expressed their wish to retain the original of the Warsaw, while others preferred to modify it to take into account new realities, it was decided

to refer the matter to the Drafting Group. The Group decided it on the *"Draft Convention for the Unification of Certain Rules for International Carriage by Air"*. The title decided by the Drafting Group involving the same words "for" twice seems to require further refinement. One alternative is that the second "for" should be replaced with "relating to" or "in relation to"; the other is that the first "for" to be replaced with "on".

3. The Preamble

In conformity with modern treaty-drafting techniques, the Montreal Convention being also with an enunciation in the Preamble of three fundamental Principles including (i) evaluation of the significant contribution of the Warsaw System and the need of modernization and consolidation thereof, (ii) establishment of basic principles governing the new passenger liability Regime and (iii) the desirability of an orderly development of international air transport operations and the smooth flow of traffic.

Among the three abovementioned fundamental principles, the most significant principles are the basic principles governing the new passenger liability regime. According to the preamble, States Parties "recogniz[e] the importance of ensuring *protection of the interests of consumers* in international carriage by air and the need for *equitable compensation based on the principle of restitution*". At the same time, signatories affirm that "collective State action for further harmonization and codification of certain rules governing international carriage by air through a new Convention is the most adequate means of achieving an *equitable balance of interests*". From these premises arise the following three principles: (i) consumer protection; and (ii) equitable compensation based on the principle of restitution; and (iii) an equitable

balance of interests.

The inclusion of these fundamental tenets in the Preamble marks a significant shift in ICAO's focus and purpose. Whereas the present Warsaw System is based on an outdated notion that airlines require protection from potentially unlimited liability flowing from aviation disasters, the Montreal Convention specifically rejects this principle and replaces it with a consumer protection model. Thus, it is recognized that most carriers can adequately and independently manage these risks of liability without any need for favorable international rules that limit their potential liability. Second, this approach is given the force of law, partly by its inclusion in the treaty's preamble;[28] it is therefore binding on States and their judiciaries upon domestic implementation of these intentional legal obligations. Courts must consider and apply these three principles in all cases falling within their scope of application. For these reasons, a detailed examination of each principle is undertaken below.

A. Consumer Protection

Undoubtedly, the leading enunciated principle enjoys preemptive and superior status to those that follow it. Accordingly, the principles of equitable compensation and an equitable balance of interests ought to be construed in the context of this principle of consumer protection.

Air carriers are clearly not included within the ambit of consumer "interests" which must be protected. Moreover, the term "consumer" signifies a wider scope of application than "traveling and shipping public" and, as such, must be construed as further including those persons who directly or indirectly derive benefits from the traveling and shipping public.

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28) Vienna Convention of the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 art. 31(2). "The context for the purpose of interpretation of a treaty shall comprise, in addition to the text, *including its preamble* and annexes [……]". [emphasis added].

B. Equitable Compensation Based on the Principle of Restitution

Problems arise when considering the meaning and scope of this principle of equitable compensation based on the principle of restitution. In fact, its formulation reveals a degree of theoretical confusion of the drafters.

The roots of the term "equitable" are generally found in Common Law (*e.g.*, sustainable in the Court of Equity), but in other legal systems it may reveal a closer logical connection with the particular procedure for considering a claim: the procedure should be *most just* and engender the best possible result for the parties concerned while bearing in mind special protection for the consumer.

On the other hand, the term "restitution" refers to the substance of compensation and reflects the axiom of *restitutio in integrum*, which underlies the entire legal system of liability and compensation in both national and international law, whether based in tort or breach of contract. The substantive meaning of this concept is that the claimant should receive compensation that is equal to his actual damage, no less nor more. Many jurists consider that the term "restitution" is synonymous with the term "compensation;" however, in the Common Law of damages, only the latter concept covers the *expectation interests*.

To eliminate any possible confusion between these terms, having different connotations in different legal systems, the new Convention should instead use the expression "equitable procedure based on the principle of compensation."[29]

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29) The best academic book relating to "Equity" is "[t]he Judicial Decision: Toward a Theory of Legal Justification" by Richard A. Wasserstrom (Stanford University Press, 1961). The Chapter 5 of this book deals with equitable decision procedure. If you read this chapter, you will easily understand that the term "equitable" is not an appropriate adjective for the term "compensation". The best academic books relating to the English Law of Damages are "the Law of Damages (Butterworths, 1973)" by A. I. Ogis and "Assessment of Damages for Personal Injury and Death (Butterworths, 2nd E., 1983) by Professor Harold Luntz. In the English Law of Damages, the fundamental principle that underlies the whole law of damages, in

C. Equitable Balance of Interests

In light of the above interpretation of "equitable compensation," this third enumerated postulate loses its significance. The content of this principle would already be expressed in the preceding doctrine. Thus, to avoid burdening the text unnecessarily and in the interests of simplicity, the enunciation of the principle of "an equitable balance of interests" should be deleted.

4. General Provisions (Articles 1 and 2)

Regarding the title of Article 2, the author proposed that this article is a supplementary Article of Article 1 setting out the scope of application, the object of which is "carriage", and that therefore, in order to refine the title of Article 2, it should be considered whether or not the phrase "Carriage of" should be added before the term "Postal Items". The author's proposal was granted.

5. Documentation of Carriage (Articles 3 to 16)

A. he title of Chapter Ⅱ reads "Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo". This title includes the phrase "and Duties of the Parties". However, this Chapter also includes "Rights of Parties" e.g., in Articles 11 and 13. Therefore, it is recommended that the phrase "and Duties of the Parties" should be deleted. Moreover, in paragraph 1 of Article 1, the phrase "carriage of persons, baggage or cargo" is used. Therefore, it is recommended that the second "and" would be replaced with the term

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whatever area damages are awarded, is the principle of compensation. Usage of the Principle of *restitutio in integrum* is limited. The principle only is used in case involving damage to or the destruction of ship.

"or". In conclusion, the present title of Chapter Ⅱ should be replaced with the phrase "Documentation Relating to the Carriage of Passengers, Baggage or Cargo" or simply "Documentation of Carriage". However, the abovementioned proposal was not granted.

B. Paragraph 3 of Article 13 sets out the rights of the consignee in case of the loss or late arrival of the cargo and Paragraph 3 of Article 17 sets out the rights of passenger in case of the loss or late arrival of the checked baggage. However, it is pointed out that the former is stipulated in Chapter Ⅱ relating documentation of the carriage, while the later in Chapter Ⅲ relating liability of the carrier. Although both paragraphs deal with the same problems, they are differently positioned. The appropriate solution is that paragraph 3 of Article 13 relating the loss or late arrival of the cargo would be repositioned after paragraph 2 of Article 18 and paragraphs 3 and 4 of the Article should be renumbered as paragraphs 4 and 5. This proposal also was not granted.

C. The texts of Articles 3 and 4 expressly affirm the usage of so-called electric ticketing system for passenger and cargo. However, paragraph 2 of Article 3 relating to passenger reads "Any other means which preserves the information indicated in paragraph 1 may be substituted for delivery of the document referred in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved", while paragraph 2 of Article 4 relating to cargo sets out "Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill. If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a cargo receipt permitting identification of the consignment and access to the information contained in the record preserved by such other means".

In the light of paragraph 1 of Article 31 which has the wording "or

with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2", it is pointed out that the both paragraphs should be more refined.

Regarding paragraph 2 of Article 3, the simplest alternative is to add the words "a record of" after the term "preserves" and replace the term "so preserved" with the term "contained in the record preserved by such other means". Even if so revised, the chapeau of the second sentences of both paragraphs should also be unified either in a singular or plural formation.

The most refined alternative relating to paragraphs 1 and 2 of Article 3 and paragraphs 1 and 2 of Article 4 is as follows:

"Article 3

1. In respect of *the* carriage of passengers an individual or collective document of carriage shall be delivered containing :
   (a) an indication of the places of departure and destination ; and
   (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.
2. Any other means which preserves a record *of* the information indicated in paragraph 1 *of this Article* may be substituted for the delivery of the document referred to in that paragraph. *If such other means are used,* the carrier shall offer to deliver to the passenger a written statement of the information contained in the record preserved by such other means.

Article 4

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 of a single State 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 [nature and] weight, dimensions, packing and number of packages of the cargo.*

2. Any other means which preserves a record of the information *indicated in paragraph 1 of this Article* may be substituted for the delivery of the air waybill *referred to in that paragraph.* If such other means are used, the carrier shall, if so required by the consignor, deliver to the consignor a *cargo receipt* permitting identification of the cargo and access to the information contained in the record preserved by such other means".

D. Regarding Article 3, there are two terms to be required further refinement; first, the term "and" of the title thereof should be replaced with the term "or", since the paragraph 1 of Article 1 reads "all international carriage of persons, baggage or cargo", and secondly, the phrasing "in some cases" in paragraph 4 thereof should be replaced with the phrasing "in most case", since the 100,000 SDRs ceiling of the first tier is also to be construed as a limit.

E. Regarding Article 11, the author proposed inclusion of the term "the

cargo receipt" after the term "the air waybill" in line 4 of paragraph 2 thereof. The proposal was granted.

6. Liability of the Air Carrier (Articles 17 to 37)

A. The title of chapter Ⅲ reads "Liability of the Carrier and Extent of Compensation for Damage". The first part of the title sets out a general requirement but the second a specialized requirement mainly emphasizing Articles 21, 22 and other Articles relating to the limits. If the second part remains, other specialized requirements including jurisdiction, arbitration, limitation of actions and so forth also ought to be added to it. The title of Chapter Ⅲ of the Warsaw Convention has only the title "Liability of the Carrier". The same therefore is recommended. However, this proposal was not granted.

B. The title of Article 17 reads "Death and Injury of Passengers Damage to Baggage". The word "and" should be replaced with "or", since the paragraph 1 of this Article has the phrase "in case of death or bodily injury of a passenger".

C. The title of Article 27 is too enchanting; this Article by no means grants any freedom to contract to passengers, consignors or consignees. Therefore, the phrase "permitted by Carriers" should be added after the term "Contract". This proposal also was not granted.

D. The phrase "Basis of Claims" of Article 29 relates only to the first sentence. Regarding the second sentence, the title of this Article should be replaced with the phrase "Basis of Claims-Non-recoverable Compensatory Damages".

E. If paragraph 1 of Article 30 by no means revised, the first half of

the title should be replaced with the phrase "Servants or Agents", but if the phrase "a servant or agent" in this paragraph to be replaced e.g., with the phrase "servants and/or agents", then so replaced with.

7. Carriage by Air Performed by a Person other than the Contracting Carrier (Articles 39 to 48)

If the text of Article 43 is not revised, the title should be replaced with the phrase "Servants or Agents", but if the phrase "servant or agent" in this text to be replaced with the phrase "servant and /or agent", the title should be replaced with the phrase "Servants and/or Agents".

8. Final Clauses (Articles 53 to 57)

A. It is noteworthy that the Montreal Convention shall also be open for signature by Regional Economic Integration Organisation (REIO). Paragraph 2 of Article 53 stipulates that for the purpose of this Convention, a "Regional Economic Integration Organisation" means any organisation which is constituted by sovereign States of a given region which has Competence in respect for certain matters governed by this Convention and has been duly authorized to sign and to ratify, accept, approve or accede to the Convention. Regrettably, it is noteworthy that the clauses relating to the so-called REIOs reveal a discriminative nature; practically a State Party of the Convention which is furthermore a member of the States Parties of a REIO may have one plus one divided by number of the States Parties of the REIO voting rights. In other word, such a State Party may have bigger voice than normal States Parties of the Montreal Convention.

B. The title of Article 55, reads "Relationship with other Warsaw

Convention Instruments". In the light of preambular paragraph 2, this title should be replaced with the phrase "Relationship with the Warsaw Convention and other Related Instruments".

C. Regarding paragraph 2 of Article 55, the Phrasing "if there is an agreed stopping place within the territory of another State" should be inserted into between "this Convention" and "by virtue of", since carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not categorized as an international carriage for the purposes of this Convention and the Warsaw System.

Ⅳ. Miscellaneous Elements

1. Unification of the Wording Relating to Definition Provisions

Paragraph 2 of Article 1 sets out the expression *international carriage*. Paragraph 4 of Article 17 has the term "baggage". Paragraph 3 of Article 33 sets out "commercial agreement" and "principal and permanent residence". Article 52 reads "the expression days". In order to unify, all of the definition provisions have the term "the expression" before the words to be defined.

2. "Rules" and "Provisions"

The term "rules" being as a general term remains unchanged, but, in order to unify, certain "rules" indicating "provisions" are replaced with the term "provisions". Therefore, the terms "rules" of paragraph 5 of Article 3, Article 9, and Article 39 are replaced with the term "provisions". Regarding Article 49 reading "……to infringe the *rules* laid down by this Convention, ……the rules as to jurisdiction, ……",

it would be recommended that both *"rules"* of this Article remain unchanged. Moreover, regarding "the terms" of paragraph 4 of Article 1, it should be reconsidered whether it remains or be replaced with the term "provisions".

3. Unification of the Phrasing Relating to Articles 2, 36 and 38

Paragraph 1 of Article 2 has the phrasing "falls within the conditions laid down in Article 1", paragraph 1 of Article 36 reads "falling within the definition set out in paragraph 3 of Article 1", and then, paragraph 1 of Article 38 sets out "falls within the terms of Article 1". Therefore, it should be reconsidered whether they ought to be unified or not.

4. Unification of the Terms "accident(s)", "event(s)" and "occurrence(s)"

The wording relating to the facts which caused the recoverable compensatory elements should be reconsidered: in case of the passengers, the term "the accident" is used, while in case of the baggage, the term "the event", and in case of the cargo the term "occurrence". Moreover, in the provision of paragraph 6 of Article 22, the term "the occurrence" including accidents, events or delay is used, while in the provision of the paragraph 2 of Article 36, the term "accident or the delay" is used. In the later case, the term "accident" is deemed to include the term "the event", but exclude the term "delay". However, it should be noted that the term "the event" in the first line of paragraph 1 of Article 18 is used in the meaning of the term "case" exceptionally. In this context, in order to unify, it, in the author's opinion, is recommended to adopt the term "the event" which was adopted in the Guatemala City Protocol as the terms to indicate all the facts which cased the recoverable compensatory

elements.

5. Carrier's Liability Relating to Unchecked Baggage

The last sentence of paragraph 2 of Article 17 of the draft Convention approved by SGMW read that [I]n the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its *fault*. Regarding the term "its fault", the author of this paper proposed that the term "its fault" should be replaced with the term "its fault or its servants or agents acting within the scope of their employment". This proposal in principle is granted.

6. Phrasing of Article 19

In this Article the phrasing "damage occasioned by delay" is used twice, while in the paragraph 1 of Article 22, the phrasing "damage caused by delay" is done. Therefore, it is reconsidered which words should be adopted.

In this Article the phrasing "the carriage by air of passengers, baggage, or cargo" is used. However, for the sake of unification with other Articles, the term "by air" of this phrasing should be deleted.

In this Article the phrasing "all measures that could reasonably be required to avoid the damage" is used, in accordance with the case law in the United States. As a result, the requirements of carrier's defence seem to be lightened.

Professor Dr. Isabella Diedericks-Verschoor sent me a letter in which she urged inclusion of the definition clause of the term "delay". The author then tried, in order to respond to her desire, to categorize

appropriate and sufficient causes of delay, but the work yet unfinished.

7. The Phrasing "a servant or agent acting within the scope of its employment" in Articles 22, 41, 43 and 44

It is noted that regarding all the paragraphs and Articles concerned including the abovementioned phrasing, the term "or agency" after "employment" had been deleted. The original French version of the wording "employment" is "fonctions". Therefore, this uniformity may be estimated.

V. Final Remarks

There is no doubt that the Montreal Convention adopted at the International Conference on Air Law held at Montreal on 28 May 1999 markedly change the rules governing the international carriage by air of passenger, baggage and cargo.

The introduction of a considerable number of new major elements including electric ticketing system, the unlimited passenger liability regime and a supplementary (fifth) jurisdiction should help to remove an aged scheme that now exists in the Warsaw Convention and other related instruments. The recent experience in the United States shows that introduction of the electric ticketing system may reduce drastically carrier's operational costs, so that transference from the present passenger ticketing system to the electric ticketing system would on a world-wide scale be increased explosively. However, the Convention stipulates for the electric ticketing system merely minimum requirements by which the said carriage by air becomes on international carriage by air applied by the Montreal Convention. Therefore, how to describe the terms of written

notices becomes practically important. Incorporated terms thereof may at least include (i) limits (ceilings of the first tier) on liability for death or injury, (ii) limits on liability for baggage, (iii) claims restrictions including time periods, (iv) the air carrier's rights to change the terms of the contract in accordance with the rules concerned of the Montreal Convention, (v) rules on reconfirmation of reservations, check-in times, and refusal of carriage, (vi) limits on liability for delay, (vii) Rules in the case of refunds and exchanges, and (viii) effective period of the written notices. The Montreal Convention does not set down any rules relating "overbooking of flights". It is believed that the overbooking of flights ought to be accepted on condition that the carriers concerned should be responsible for the results thereof in the light of the principle of consumer protection, so that the carriers should deliver appropriate related notices and conditions thereof to the passengers.

Regarding liability regime for passengers, an unlimited passenger liability regime is realized. The air carrier would, in the first tier, be subject to a regime of strict liability of up to 100,000 SDRs, irrespective of the carrier's fault, and in the second tier, a regime of presumed fault liability without numerical liability limits. The new Convention furthermore rules that an air carrier may stipulate in the means of a special contract that the contract of carriage shall be subject to higher limits which include the ceiling in the first tier of liability or to no limits of liability whatsoever. In other words, there is the possibility of miracles that the air carrier may be replaced the two-tier liability regime with a monistic regime of strict liability without numerical liability limits.

To add to the present four fora, the fifth forum for bringing suits was permitted by the Convention with the considerably qualified narrow requirements. Regarding damage resulting from the death or injury of a passenger, an action for damages may also be brought in the territory of

a State Party in which at the time of the event the passenger has his or her principal and permanent residence and to or from which the carrier operates for the carriage of passengers, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreements, and in which the carrier conducts its business of carriage of passenger from premises leased or owned by the actual or contracting carrier with which it has a commercial agreement. The strongest advocator of the inclusion of this fifth forum is the United States. In the light of the expected enlargement of the borderless traveling in the next millennium, inclusion of the fifth forum in the new Convention should be estimated as a great contribution to not only wandering Americans but also wonderingly traveling public.

The Convention rules certain consumer-oriented scheme. Notice requirements, escalator regime, arbitration and the insurance clause are all items will give the claimants a much better regime than the existing ones. However, escalator clause may, as the author of this paper already mentioned, work as a de-escalator clause. Regarding this clause, reexamination will be required.

A strange deviation from the well-established Procedure for Approval of Draft Convention carried out by the Legal Committee left a considerable number of unrefined and incomplete passages. In the near future, their modification would be required. In this sense, the Montreal Convention is compared to "a sweet- tasting but worm-eaten apple". Should I eat or not?