

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

**REFORM OF THE LIABILITY PROVISIONS OF THE CONVENTION FOR THE
UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL
CARRIAGE BY AIR SIGNED AT WARSAW ON 12 OCTOBER 1929.**

BY

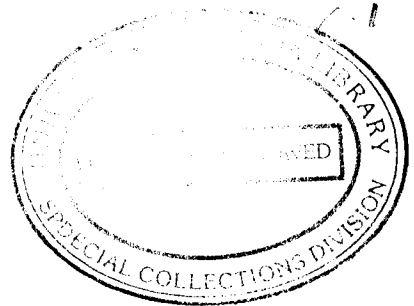
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**A dissertation submitted to the University of Zambia in partial Fulfilment of the
requirements of the degree of Bachelor of Laws (LLB) in the School of Law**

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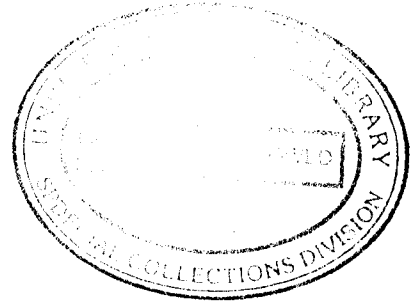


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**REFORM OF THE LIABILITY PROVISIONS OF THE CONVENTION FOR THE
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ABSTRACT

This paper is an attempt to identify the problems surrounding the Convention for the Unification of Certain Rules Relating to International carriage by air (Warsaw Convention) one of the goals of the Convention was to unify the regulations relating to air travel and to harmonise the different aspects relating to cross boarder flights. Despite the world wide acceptance of the Warsaw Convention it still had its flaws and was subjected to amendments. These amendments have usually focused of the provisions relating to the limitation of liability of the carrier amongst others, this paper focuses on the limitation of liability provisions only. This became a concern as some member states for instance the United States of America considered the then limitation of liability of the carrier which was approximately limited to US \$ 8,300 as being too low. This led to the United States' denunciation of the Warsaw Convention, delegates met at the Hague to amend the Warsaw Convention particularly addressing the possibility of increasing the limitation of liability of liability of the carrier. The result of these conferences at the Hague produced the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air (The Hague Protocol 1955). The Hague Protocol doubles the carriers' limitation of liability to approximately US \$ 16,600. This still proved to be inadequate as calls for further increase were once again echoed. So a new convention was born amending the Hague protocol of 1955 this was The Montreal Convention which introduced new provisions of liability of the carrier for instance it introduced the provision providing for limitation of liability of the carrier to 4,150 Special Drawings in the case of passenger delay and 1000 Special Drawings per passenger. This paper considers the weakness and loopholes in the Conventions, the reasons and need for amends which have been carried out. It concludes by providing recommendations as to what measures need to be taken or rather considered in order to improve the current Montreal Convention of 1999.

ACKNOLEGEMENTS

While researching and writing this obligatory essay I have benefited from the support of others to whom I owe generous debts of appreciation. Firstly I would like to thank God for giving me this opportunity and keeping me safe during this entire period, while embarking on this quest to complete my obligatory essay. Secondly I would like to acknowledge and thank my supervisor Mr Malila M (SC) for his enthusiasm and interest in my work. I would also like to take this opportunity to thank my family and friends for the support and encouragement shown during the lengthy period of my research.

TABLE OF CONVENTIONS

The Hague Protocol(1995) Protocol to Amend The Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929).

The Convention for the Unification of Certain Rules Relating to International Carriage by Air (1929).

Chapter XXI Convention for the Unification of Certain Rules for International Carriage by Air (1999).

TABLE OF CASES

Forman v. Pan American Airways, 284 App. Div. 935, 135 N.Y.S.2d 619 (1954).

LIST OF ABBREVIATIONS

WARSAW CONVENTION: Convention for the Unification of Certain Rules Relating to International Carriage by Air.(1929)

THE HAGUE (1955): Hague Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air.

THE MONTREAL CONVENTION: Convention for the Unification of Certain Rules for International Carriage by Air.

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1. CHAPTER ONE:

1.1 Introduction

This paper begins by looking when the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on October 1929. This convention regulates air travel in member states that have ratified the Convention. This Convention has been subjected to various amendments over the years, the main changes have been in relation to the provisions relating the carriers liability for damage sustained in case of death or bodily injury of a passenger. This research paper mainly focuses on the provisions of the carriers liability, and considers prior amendments made in relation to these provisions. The first part of the paper is a general introduction and explores some aspects related to the genesis of the Warsaw Convention of 1929. The second chapter considers the historical background of the inception of the Warsaw Convention and its effect it had on aviation law. The third chapter considers the amendments that were carried out at the Hague commonly referred to as the Hague protocol of 1955 following dissatisfaction of member states and stake holders as to the low limits of liability adduced to carrier. The third chapter deals with the third amendment which was signed in Montreal this is also known as the Montreal Convention of 1999. Chapter five recommends that certain aspects in relation to the limitation provision be considered for reform. About seventy seven years ago, on February 13, 1933 the Warsaw Convention for the unification of certain rules relating to international carriage by air came into force.

This was the first stride towards the unification of private international air law and it seems worth while making a few observations on the impact that this convention brought into aviation law. It has been subject to three protocols amending the original text.¹

As of September 10, 1955, 45 countries had either ratified or adhered to the Convention. Thus the Warsaw Convention for a substantial part of a generation had governed the liability of air carriers to shippers and passengers in a major and ever increasing part of the world's international commerce by air.²

The Convention provides that when an accident occurs during international carriage,³ as defined in the Convention, and causes damage to a passenger or shipper of goods, there is a presumption of liability on the part of the carrier.⁴ The defences of the carrier are that he or his agents have taken all necessary measures to avoid the accident, that it was impossible for him or them to take such measures⁵, or that the damage was caused or contributed to by, the negligence of the person suffering the damage.⁶

Under Article 22(1) the air carrier for passenger injury or death to approximately limited to US \$10,000. This limit does not apply in the case of wilful misconduct of the carrier, or if there is such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.⁷

Furthermore Article 28 of the Warsaw Convention provides that an action for damages governed by the Convention must be brought , at the option of the passenger place of business, or where he has a place of business through which the contract has been made or before the court at the place of destination.

¹ The Hague Protocol (1955) Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw 12 October 1929, Done at the Hague on 28 September 1955, (entered into force on August 1, 1963), Montreal Protocol No.4 (1975): Signed at Warsaw October 12 1929 (entered into force on June 14, 1998).

² Nathan G. Calkins, 'Grand Canyon: Warsaw and The Hague Protocol' (1956), 23 J. Air & Com. 253 at 257.

³ Article 1(2) of The Warsaw Convention (1929).

⁴ Article 20 Warsaw Convention.

⁵ Article 20(1) Warsaw Convention.

⁶ Article 21 Warsaw Convention.

⁷ Article 25.

In the late 1940's and early 1950's there was widespread dissatisfaction with the passenger limit and the Convention was amended by the Hague Protocol of 1955 to double the passenger limit to 250,000 gold francs (\$16,600 U.S.) and also to provide for a stricter rule concerning the possible breach of the limits of liability.⁸

This new rule provided that the liability of the carrier will be unlimited if it is proved that the damage resulted from an act or omission of him, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.⁹

Other amendments to the Warsaw Convention include The Guadalajara Supplementary Convention (1961), Guatemala City Protocol (1971) and Montreal Protocol Nos. 1,2 and 3. In any case none of these amendments satisfactorily addressed the concerns relating to the low limits of liability.

Further amendments were carried out in Montreal which is at times commonly referred to as the Montreal Convention for the unification of certain rules for the international carriage by air took effect in France and in the Netherlands on June 28, 2004. The Montreal Convention covers different aspects but for the purposes of this discussion the main focus will be in relation to the provisions of liability of the carrier an example being that; the carrier is liable for damages sustained in case of death or bodily injury of a passenger.¹⁰

Under Article 20 the Montreal Convention, "carriers can only exempt themselves from liability if they can prove that the damage was caused or contributed to by the negligence or omission of the person claiming compensation, or the person from whom he or she derives his or her rights....carrier shall be wholly or partly exonerated from its liability to the claimant to the extent such negligence or wrongful act or omission caused or contributed to the damage."

⁸ Article XIII of the protocol-new art. 25 of the Convention.

⁹ Gerald F. FitzGerald, 'Liability Rules in the International Carriage of Passengers by Air and the Notice of Denunciation of the Warsaw Convention by the United States of America' 4 Can. Y.B. int'l L. 194 (1966) at 196.

¹⁰ Article 17 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air (1999).

The Montreal Convention further introduces an unbreakable limit of liability for carriers, Article 22, it states that the carrier's liability is now limited to a maximum of 17 special drawing rights (SDR) per kilogram unless the consignor has made, at the time when the package was handed over had made special declaration. Also under the Montreal Convention the possibility of unlimited carrier liability, as previously defined under Article 25 of the Warsaw Convention, no longer applies as the carrier may specify that the contract of carriage will be subject to higher limits of liability than those provided in the Convention or having no limits of liability at all.

1.2 Statement of the Problem

The Warsaw convention seemed to have been received and welcomed by most countries. After being in operation for about twelve years, the outcome appears to have been most accommodating and acceptable.

Signed in the early days of aviation, it has proved, in the course of the years, to be a useful instrument in furthering international air transportation.¹¹

The present weakness of the original Convention lies primarily in the relatively low limits of liability in the cases of death or bodily injury to passengers. The maximum amount of compensation for the death of a passenger is equivalent to approximately \$8,300 (U.S.), while compensation between \$10,000 and \$100,000 (U.S.) in cases of accidental death is not uncommon in North America and in some parts of Europe.¹²

These low limits were the reasons why the US denounced the Warsaw Convention according to them the low limit of liability, which amounts approximately to \$8,300 U.S. applicable in the case of death of, or injury to, a passenger in international carriage was considered to be no longer adequate to protect United States citizens of

¹¹ Rene H. Mankiewicz, 'Hague Protocol to Amend the Warsaw Convention' 5Am..J.Comp.L. 78 (1956) at 78

¹² Ibid at 79.

practically all economic levels who in ever-increasing numbers are making use of international air transport.¹³

By 1955 the airlines realised that the public indignation arising primarily from the Forman case¹⁴ had come to a point that something was required to quell it: for this reason the Hague Conference in 1955 was called. A proposed amendment to the Convention, The Hague protocol was enacted which increased or doubled the amount the limit to US \$16,600 this also was not satisfactory as it had its own problems it would restrict the wilful misconduct exception so as to make it virtually impossible to prove.¹⁵

The reason given above resulted in a further amendment after the Hague protocol was done in Montreal as the current limit of US \$ 16,600 were considered to be too low in, which the series of amendments that resulted from this point will be dealt with in full in-depth in the chapters to come. This is considered to be one of the indications that the articles relating to the carrier's liability have proved to be problematic and thus the need for amendments.

1.3 Objectives of the Research

The discussion centres around the limitation of the carriers liability towards passengers, which was previously limited to approximately US \$8,300 per passenger under the Warsaw Convention and then doubled to approximately US \$ 17,000 under the Hague Protocol and later more amendments were made at Montreal other significant changes or amendments will be considered.

The objective of the research paper is to assess whether the current provisions relating to the limitation of liabilities in the Montreal convention are efficient, after having been amended. In doing so the historical background to the unification of certain rules relating to international carriage by air will be explored. The paper also examines the role played by the

¹³ FitzGerald Supra note 9 at 194.

¹⁴ Forman v. Pan American Airways, 284 App. Div. 935, 135 N.Y.S.2d 619 (1954).

¹⁵ Lee S. Kreindler, 'The Denunciation of the Warsaw Convention,' 31 J.Air L. & Com. 291 (1965) at 295.

various Conventions and their amendments and at the same time acknowledging its importance as one of the significant break-through in the law of aviation. Furthermore the paper considers whether there is need to carry out reforms on the current provisions relating to limitation of liability.

1.4 Research Significance

The Warsaw Convention deals primarily with the extent of the liability of international air carriers towards passengers and owners of cargo carried by air. The study is important because it will bring to light important aspects in relation to liability of carriers towards passengers and it will also be a modern contribution to the literature on aviation law. This research will also afford information on whether the current provisions are adequate this also has an impact on Zambia as we are a party to this Convention.

1.5 Literature Review

The literature review on this area of law is substantive; it mainly consists of commentary and rather different opinion of legal scholars who all recognise the huge impact that the Warsaw Convention brought in aviation law and some anomalies in relation to the provisions on carriers' limitation of liabilities.

Rene¹⁶ states that while establishing the principle of presumptive liability, the Warsaw Convention limits the amount of compensation due by the carrier, except in case of wilful misconduct and of negligence comparable to wilful misconduct. It also regulates various technical and procedural questions relating to traffic documents and actions for damage, respectively.

G.I. Whitehead¹⁷ is of the view that it is the unquestioned right of all to stand up and forthrightly argue for what they feel is right. He goes on to state that it is quite easy to

¹⁶ Mankiewicz *supra* note 11 at 78.

¹⁷ G.I. Whitehead, JR 'Some Aspects of Warsaw Convention and The Hague protocol to Amend,' A.B.A. Sec. Ins.Negl.& Comp.L.Proc.37 (1957) at 44.

say that those who take the other side in a controversy are prejudiced, while we are motivated only by strong convictions. Perhaps you will be one to take sides with those I mentioned at the outset who say: "Why all this fuss about Warsaw Convention?" It really is a specialized and limited field and this attitude is understandable. But those who toil in the aviation claims-legal business, whether for plaintiff or defendant, find it difficult to be objective and restrained on the subject of Warsaw Convention, and I am candid enough to admit that this is so. In answering the questions-Is it right or is it wrong for the United States to continue to be a party to the Warsaw Convention? Is it wise or is it unwise for the United States to ratify The Hague Protocol?-I would say that Warsaw Convention has been successful in meeting the demands made by modern international air transportation because it represents intelligent compromise made a long time ago by farsighted people from many nations who saw a challenging future in this young industry for passengers, shippers and the carriers. Nothing should be done to kill its usefulness.

Calkins states that the Warsaw Convention for a substantial part of a generation has governed the liability of air carriers to shippers and passengers in a major and ever increasing part of the world's international commerce by air, and is a beneficial Convention.¹⁸

Also the rules presently applicable to airline passenger injury and death claims promote injustice, foster unnecessary litigation and increase costs of making reparation when accidents arise. The Warsaw Convention, as amended by The Hague Protocol, is a good approach to this problem, and while the limits of liability set forth therein may be too low for domestic use, in its basic approach is believed best for the travelling public and for air transportation.¹⁹

1.6 Research Methodology

This research will employ both empirical and theoretical research methodologies. The literature considered comprises of statutory regulation, articles, academic opinions, case law and all other

¹⁸ Calkins Supra note 2 at 257.

¹⁹ Ibid at 271.

relevant literature on this area of law. The result of the literature considered will form the basis of this research paper.

2. CHAPTER TWO: THE WARSAW CONVENTION

2.1 History Background

Before discussing the new changes to the Warsaw Convention a review of its original purpose will be considered first. The Convention for the Unification of Certain Rules Relating to International Transportation by Air came to being at Warsaw on October 12, 1929. It has had wide acceptance, 91 ratifications or adherences worldwide. The Convention had established a uniform presumption of liability on the carrier's side under Article 20.

Without the Convention, common law liability rules would require the passenger to prove the carrier's negligence unless "the case speaks for itself" (*res ipsa loquitur*), which again could be rebutted by the carrier. The "res ipsa" doctrine, doubtful in its application in general, has proven rather unsatisfactory in aviation cases," and would not, in any event, be available to American passengers suing abroad.²⁰

The Convention protects passengers against lower limitations and contractual waivers of liability, it also renders the carrier liable without limitation if it fails to issue the proper Warsaw passenger ticket.²¹ The Convention grants to the passenger a choice among four jurisdictions in which to bring his action: the carrier's domicile, its principal place of business, its place of business through which the contract was made, or at the place of destination.²²

²⁰ Peter H. Sand, 'Air Carriers' Limitation of Liability and Air Passengers Accident Compensation Under The Warsaw Convention,' 28 J.Air L. & Com.260 (1961-1962) p. 262.

²¹ Article 3 paragraph 2 of the Warsaw Convention (1929).

²² Article 28 of the Warsaw Convention (1929).

The basis for, and the maximum amount of, the liability of the carrier for injury, death or damage are prescribed in Chapter III of the Warsaw Convention; while this limits the amount recoverable it also prevents the establishment of a lower limit by statute or tariff rule.²³

It permits a higher limit to be set by agreement²⁴ and permits the court to award a higher amount when the carrier's fault is equivalent to wilful misconduct.²⁵ Article 30 specifies the rules applicable when transportation is performed by successive carriers.²⁶ The Warsaw deals with other aspects pertaining to air travel, but the focus of this research is to address the provisions which impose limitation on the amount recoverable for passenger' death, injury and loss and damage to cargo.

The Convention places primary liability on the carrier damage to passengers baggage and goods unless the carrier can affirmatively prove that it and its agents have taken all necessary measures to avoid the accident or that it was impossible to take such measures²⁷ or that the damage was caused by an error in piloting or navigation.²⁸

In essence the Convention sought to establish international claims uniformity among nations with different legal systems and to set fair limitations of liability in instances where passengers bring a claim against a carrier.

2.2 Liabilities of the Carrier

The following listed provisions deal with the liabilities of the carrier under the Warsaw Convention of 1929 these were amended at The Hague and will be discussed in the paragraphs to come. These provisions stood the test of time until issues of dissatisfaction with

²³ Article 23 of the Warsaw Convention (1929).

²⁴ Article 22(1) of the Warsaw Convention (1929).

²⁵ Article 25 of the Warsaw Convention (1929).

²⁶ Paul Reiber, 'Ratification of The Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law Achieved By The Warsaw Convention,' 23 J.Air L. & Com. 272 (1956) at 273.

²⁷ Art. 20(1).

²⁸ Art. 20(2).

these provision proved futile and there a need to act by responding to the outcries of interested parties.

Article 17

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

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air. 2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever. 3. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Article 19

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

Article 20

The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. 2. In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

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

Article 22

1. In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2. In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery. 3. As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

Article 25

1. The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct. 2. Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

For the purposes of this research paper only the four articles dealing with the aspect of liability to damage of passengers goods will be considered this is not to say that these were the only significant provision. Other provisions will also be discussed below a brief explanation on the above provisions follows. Article 18 imposes liability on the carrier for damages sustained or loss to any luggage, it specifies the period of the carriage by air and excludes certain cases including by land or sea. Article 20 relieves the carrier of liability if he proves that he and his employees have taken reasonable measures to avoid damage or that it was impossible for him to have taken such measures. The burden of proof was upon the carrier to establish that both he, his servant and agents took all reasonable measures to avoid the damage.

This fact alone took care of the liability of the carrier's principle for his negligent agent within the limitations prescribed. It also took care of the liability of the carrier's principle for his negligence agent within the limitations prescribed. It also took care of the agent who negligently failed to act, as well as the agent who wasn't there at all, when he reasonably should have been.²⁹

Article 22 is the limitation of liability clause, and Article 25 also imposes liability on the carrier by barring him and his agent from relying on the limitation of liability provisions if the damage was caused by his wilful misconduct.

²⁹ G. Nathan Calkin, 'The Cause of Action Under The Warsaw Convention Part I,' 26 J.Air L. & Com.217 (1959) at 233.

2.3 Warsaw to The Hague

The Warsaw Convention (1929) was amended for the first time by the Protocol signed at The Hague on September 28, 1955.

Signed in the early days of aviation, it has proved, in the course of the years, to be a useful instrument in furthering international air transportation. Passenger air traffic has increased 240 fold since 1929, and although such traffic no longer presents the same hazards as in the late '20's, when the Convention was signed, its rules have never become outmoded. The inherent merits of the Convention, moreover, are exemplified by the fact that its rules have been adopted by various states for the regulation of the carrier's liability in domestic air transport.³⁰

However it goes without question that the original Convention also had its own weakness, which were primarily low limits of liability of the carrier amongst others. In spite of the high degree of agreement among international lawyers on the need for revision of the Convention, the task has proved rather delicate. For its general acceptance throughout the world had made its provisions practically universal rules of liability for air carriers. Thus, it was necessary to limit revision to such amendments as were generally acceptable to states that were already parties to the Convention.³¹

The effect of these low limits of the carrier's liability for example resulted in the denunciation of the Warsaw Convention on 15 November 1965 by the United States. The Act of Denunciation consisted of a Notice delivered to the Polish government by the United States embassy in Poland.³² Under the terms of the Convention the denunciation becomes effective six months later.³³ However, the Notice of Denunciation will be withdrawn, the State Department has said, if the airlines that serve the United States agree, before 15 May 1966, to waive the present limit (8,300 dollars) to 75,000 dollars, with an ultimate waiver to at least 100,000 dollars agreed upon. This is just one indication of how important a review of the Conventions' provisions was needed if countries like the United States were prepared to denounce it.

³⁰ Mankiewicz supra note 11 at 79.

³¹ Ibid.

³² Kreindler Supra note 15 at 291.

³³ Article 39 of the Warsaw Convention (1929)

The move in the United States to withdraw from the Warsaw Convention began to gain momentum in the early 1950s with public shock and resentment at the result in the case of entertainer Jane Froman³⁴ who had been badly injured in a Pan American Airways crash in Portugal in 1943. Despite her serious injuries and large medical bills, her 1953 award against Pan American was limited to 8,300 dollars, resulting in considerable public indignation throughout the United States.³⁵

By 1955, the airlines realized that the public indignation arising primarily from the Forman case had come to the point that something was required to quell it; for this reason, The Hague Conference of 1955 was called. Its purpose was twofold first, to increase the limits to the point where United States opposition would be quieted and, second, to plug up some loopholes that were permitting recoveries in excess of the limits.³⁶

These considerations led the Legal Committee of ICAO at its meeting in Rio de Janeiro, 1953, to discard previous drafts of the revised Warsaw Convention the last produced by a sub-committee of the Legal Committee in Paris in 1952 and to adopt the following principles: changes should be limited to modifications most likely to be accepted by a substantial majority of the states parties to the original Convention; the amendments to the Convention should be incorporated into a protocol rather than in a revised text of the Convention, thereby leaving open the possibility of the original Convention continuing to be applied by states hostile to the amendments. The draft thereafter produced by the Legal Committee of ICAO in 1953 is generally known as the Rio raft Protocol.³⁷

2.4 Provisions of The Hague Protocol

This part of the paper discusses the description of the substance and effects that the amendments to the Warsaw Convention. Extensive amendments were made to the provisions relating to the carriers limitation of liability it is worth noting that the Hague Protocol also

³⁴ *Forman v. Pan American Airways*, 284 App. Div. 935 N.Y.S.2d 619 (1954).

³⁵ Kreindler Supra note 15 at 294.

³⁶ Ibid at 295.

³⁷ Mankiewicz Supra note 11 at 80.

made other substantial changes to other provisions included in the Convention which will be discussed at a later stage.

To begin with the need for new rules raising or increasing the limitation of liability of the carriers will be considered. The Warsaw Convention limits the maximum compensation for death of a passenger to approximately \$8,300. It also provides for unlimited liability under Article 25, which provides that;

“if the damage was caused by wilful misconduct of the carrier or of any of his servants or agents acting within the scope of their employment, or by such default on the part of the said persons as, in accordance with the law of the court seized of the case, is considered equivalent to wilful misconduct.”

As already mentioned in the above paragraphs there was a general feeling in air transport and legal circles that these limits (for damage in cases of death or bodily injury of a passenger) had become inadequate, especially in view of the practice of certain courts, notably in the United States, allowing much higher compensation for death occurring in accidents on domestic flight.³⁸

Furthermore, it was remarked that the courts of some countries have been inclined to give a very liberal interpretation of the concept of wilful misconduct or equivalent default, in order to "break" the barrier of limits of liability, by them regarded as too low. When the question of increasing these limits of liability for death and bodily injuries was discussed in The Hague Conference, the United States delegate made it plainly understood that his Government might consider denouncing the Warsaw Convention, and thereby revert to the general principle of unlimited liability, if the present limits of the Convention were not substantially increased. The argument was also advanced that it would be advisable to establish relatively high limits of liability for death or bodily injury of passengers and in exchange to eliminate unlimited liability for injury caused by wilful misconduct.³⁹

³⁸ Ibid Mankiewicz at 80.

³⁹ Ibid 81.

At the Hague Conference the United States proposed a raise in the limit of liability to approximately US \$25,000. In response to the proposed amount, most of the delegates opted to propose that the limit of liability be set at approximately 13,300 United States dollars.

After much deliberation on the matter, a limit of approximately 16,600 United States dollars was adopted as the new ceiling of recovery.⁴⁰ The issue of unlimited liability was redefined so as to avoid use of the concepts of wilful misconduct. Article 25, paragraph 1, of the Warsaw Convention as amended by this provision reads as follows:

“The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with the intent to cause damage or recklessly and with the knowledge that damage probably would result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.”

The proposed liability limitation in the Hague Protocol received a cool reception in the United States. The American delegation to the convention recommended that the United States sign the Protocol.⁴¹

Secondly the liability of the servants and agents of the carrier. The Warsaw Convention deals only with the liability of the carrier. It contains no rule limiting the liability of his servants or agents, who are therefore believed to be liable without limitation for wrongful acts committed within the scope of their employment. As conditions of employment of pilots normally provide for reimbursement by the carrier of compensation paid by them to victims of their negligent conduct, it is thus possible indirectly to make the carrier liable without limitation for damage for which the Convention stipulates limited liability.⁴²

Other delegates, however, believed that there was neither place nor need in the Convention to regulate the liability of the carrier's servants or agents; if their liability

⁴⁰ David I. Sheinfeld, 'From Warsaw to Tenerife A Chronological Analysis of The Liability Limitations Imposed Pursuant to the Liability limitations Imposed Pursuant to the Warsaw Convention' 45 J.Air L. & Com. 653 (1979-1980) at 660.

⁴¹ Ibid at 661.

⁴² Mankiewicz Supra note 11 at 82.

was to be limited, detailed rules on the subject matter should be included in the Protocol amending the Warsaw Convention or even in a new Convention dealing with servants and agents.⁴³

The majority preferred the first alternative which was embodied in a new Article 25 A, to the effect that, except when the servant or agent has acted negligently in the particular manner described in the new Article 25, he cannot be condemned to pay a higher compensation than the carrier, this rule is intended to prevent law suits against the pilot in order to extract indirectly a higher indemnity from the carrier.⁴⁴

This chapter has discussed the various issues which led to the implementation of the new amendments to the Warsaw Convention. It has also considered the new provisions which were amended at the Hague. The next chapter considers the actual amended provision and what perception the international world had having amended the old and outdated provisions of the Warsaw Convention in relation to the carriers limitation of liability.

⁴³ Ibid.

⁴⁴ Ibid at 83

3. CHAPTER THREE: THE HAGUE PROTOCOL

3.1 Introduction

After being signed at the Hague on September 28, 1955, the limit of liability of international air carriers was increased by 100 percent amounting to \$ 16,600 and also redefined the acts of wilful misconduct which prevented the carrier from invoking the limitation of liability.

The U.S. signed The Hague Protocol, which came into force on August 2, 1963, but never ratified it because it considered the new liability limit too low. Instead, the U.S. on November 15, 1966 gave notice of denunciation of the Warsaw Convention, effective from May 15, 1966. This, in turn, led to the so-called Montreal Agreement which will be considered in the chapter to come. The U.S. agreed to withdraw their denunciation of the convention, but pressed for an even higher liability limit in case of death or personal injury, first of \$100,000 and finally in the order of \$200,000 to \$300,000.⁴⁵

3.2 Amendments

A range of amendments were made by the Guatemala Protocol to the Warsaw Convention as amended at The Hague the ones concerned with the limitation of liability are: paragraph 1 of Article 24 of the original convention which stipulated that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." As regards liability for damages caused to passengers and their luggage, the meaning of that rule has been further clarified by adding, after the words "however founded", the words "whether under this convention or in contract or in tort or otherwise".

Furthermore the redefinition of wilful misconduct was also dealt with, The Hague Protocol would make a fundamental change in the definition of "wilful misconduct," as it provides that the words *dol* or "wilful misconduct" are to be, deleted from the Warsaw Convention and the following provision substituted: The limits of liability

⁴⁵ Rene H. Mankiewicz, 'Warsaw Convention: The 1971 Protocol of Guatemala City' 20 Am.J.Comp.L. 335 (1972) at 335.

specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents done with intent to cause damage or recklessly and with knowledge that damage would probably result.⁴⁶

The Hague Protocol, therefore, makes avoidance of the damages limit virtually impossible, it would be the plain, simple fact that the settlement value of any Warsaw-Hague case would be 16,600 dollars or less, with no opportunity for a claimant to recover reasonable damages. The cases would actually be worth less in settlement under The Hague Protocol than they are under the Warsaw Convention with its more liberal interpretation of wilful misconduct, despite the doubling the limit.⁴⁷

Furthermore the second major loophole in the Warsaw Convention, which has permitted passengers or their estates to defeat the 8,300 dollars limitation, is its failure to limit the Liability of servants and agents of the airlines under the Warsaw Convention.⁴⁸

In Article 23 of the Convention, was amended to read Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.⁴⁹ Under the Warsaw Convention for example a judgment obtained in favour of a passenger or his estate against a pilot in excess of US \$8,300 dollars may be compensated from the airline itself or its insurance carrier of course keeping in mind the Conventions limitation. The Hague protocol came in and changed the position by adding in a new article making it applicable to servants and agents a recovery amount fixed at the limit of US \$16,600 almost a 100 percent increase from the previous limit in the Warsaw Convention.

Article 26 (2) of the Warsaw convention was deleted and replaced and it stated that “ in cases of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of damage, and at least, within seven days from the date of receipt in the case of cargo...” the notion employed here still holds the carrier liable to any damage detected on

⁴⁶ The Hague Protocol, Art. XIII, 1955 U.S. & Can. Av. 523-51.

⁴⁷ Kreindler Supra note 32 at 294.

⁴⁸ Article 25 of the Warsaw Convention 1929.

⁴⁹ Article 23 of the Hague Protocol (1955).

goods the carrier might escape liability if the person entitled to delivery does not apply for a complain in the stipulated time frame.

Further amendments to Article 25 and 25A, these articles, providing for unlimited liability in case of wilful misconduct of the carrier or his agents or servants, were amended with a view to making the rule applicable only to the carriage of goods thereby making the limit “unbreakable” in case of damage suffered by passengers.⁵⁰

Legal scholars and writers are of the view that when the conference at the Hague doubled the limit to \$16,600, the delegates were ad hearing to the needs or proposed high increase in liability of carrier, it is submitted that the delegation at the Hague tilted towards the United States proposals and seem to have a lot of influence being capable of getting what they had wanted in the first place i.e an increase in the limitation of liability of carriers.

3.3 Amended Provisions of the Hague Protocol

Article 22. (1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

2 (a) In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that: that sum is greater than the passenger's or consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining

⁵⁰ Supra Mankiewicz note 45 at 338.

the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

3. As regards objects of which the passenger takes charge himself, the liability of the carrier is limited to five thousand francs per passenger. 4. The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

Art. 25 states that the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Art. 25 A. 1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

2. The aggregate of the amounts recoverable from the carrier, his servants agents, in that case, shall not exceed the said limits.

3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

These were the new provisions that were finally agreed and drafted at The Hague. One would acknowledge that this was a significant change made to the previous Warsaw Convention as they doubled the amount of limitation of liability of carries. One would agree that the delegates and concerned parties had modernised and finalised on the provisions relating to liability and would mark an end to further amendments. This was not the case as it will be discussed in the next Chapter some stake holders still strongly felt that they could do more.

4. CHAPTER FOUR: THE MONTREAL CONVENTION

4.1 Introduction

The Warsaw Convention which governs the international carriage by air of passengers, baggage and cargo, is one of the widely adhered treaties in the world which was welcomed by most states this was still subject to amendments that have been discussed in the above paragraphs. As pointed out in the above paragraphs the Convention has been subject to three Protocols amending the original text the third amendment that is dealt with in this chapter. The primary means of the change to the original Warsaw Convention has been the dissatisfaction, particularly by the United States with the low limits of liability; these changes have been discussed in the earlier chapters.

In 1999, the international Civil Aviation Organisation (ICAO) adopted a new Convention to replace the existing Warsaw System in its entirety. The effect of the 1999 ICAO initiative was the entry into force in 2003 of the "Convention for the Unification of Certain Rules for International Carriage by Air," generally known as the Montreal Convention of 1999.

4.2 The Montreal Convention 1999

Finally, in May 1999, after a decade of discussions about achieving a new comprehensive intergovernmental regime, ICAO convened a Diplomatic Conference in Montreal attended by 118 states. The purpose of this conference was to consider a new convention intended to modernise and replace the Existing Warsaw System liability. On May 28, 1999 the Montreal Convention was adopted and signed by 52 states, including the United States.⁵¹

⁵¹ Christopher R. Christensen, 'The Montreal Convention of 1999,' American Bar Association Aviation Litigation Seminar, (2005) at 9.

The Montreal Convention applies to all carriage originating and having a final destination in States which are Parties to the Montreal Convention, as well as to all round-trip journeys originating and terminating in any single State Party with an intermediate stop in another country. In countries where the convention is applicable, Article 55 dictates that the Montreal Convention should prevail over any other rules that have applied to “international carriage” by air which traditionally have been governed by the Warsaw Convention of 1929, amendments thereto and the IATA Inter-carrier Agreements. The most striking aspect of this Treaty is that it completely changes the basis for damage claims and the liability rules to be employed. The Montreal Liability Convention establishes a two-tiered recovery system for death or injuries arising from an international air accident.⁵²

The first tier of recovery raises the limit from its Warsaw System/Montreal Agreement limits of \$75,000 for developed nations who signed the Montreal Agreement, and approximately \$8700 for many of the other nations, to approximately \$135,000 (or 100,000 Special Drawing Rights or SDRs) for all member states.⁵³

The Second tier of recovery is activated if the damages sought are above the initial amount of 100,000 SDRs. If a plaintiff alleges that the air carrier was negligent, higher amounts may be awarded unless the carrier can prove it was not negligent. This effectively means that there will be no limit to damage recovery for actual damages.⁵⁴

With regard to personal injury, article 22 of the Warsaw Treaty provides:

(1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.⁵⁵

⁵² Larry Moore, ‘The New Montreal Liability Convention, Major Changes In the International Air Law: An End to the Warsaw Convention,’ 9 *Tul.j.Int’l & Comp. L.*223 (2001) at 227.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ Warsaw Convention Supra note 3 Article.21.

The new liability terms of article 21, dealing with compensation in case of death or injury of passengers, of Montreal Liability Agreement provides:

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability. 2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that: (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrong full act or omission of a third party.⁵⁶

In essence, when article 21, sections 1 and 2 above are taken together, the result is that there is no liability limit at all if the injury is a result of negligence. Section 2 shifts the burden of proof onto the airline to show that it was not negligent, additionally, the section seems to imply that negligence will be presumed and that higher damage awards would follow automatically.

That is, an unrefuted negligence claim under the Montreal Convention would yield the same resulting damages as would a successful ordinary negligence claim anywhere else.⁵⁷ In effect, the Montreal Liability Convention operates as a revocation of the governing principle behind the Warsaw Convention, which was to set a definite amount for damages so that any passenger travelling in the Warsaw system would know what they would generally be entitled to before an accident occurs.⁵⁸

The new Convention eliminates the principle underlying article 25(1) of the Warsaw Treaty, which only allowed unlimited damages if the airline was proven guilty of wilful misconduct. This was the only basis for eliminating liability limits under the Warsaw Treaty.⁵⁹

Some of the more significant changes made to provisions in the Montreal Convention of 1999 include:

⁵⁶ Article 21 of the Montreal Convention (1999).

⁵⁷ Moore Supra note 52 at 228.

⁵⁸ Ibid at 299.

⁵⁹ Ibid.

- (i) **Liability Limit for Delay, Baggage and Cargo (Article 22):** The liability limit in case of passenger delay is 4,150 Special Drawing. In the carriage of checked or unchecked baggage, the liability limit for loss or delay is 1000 Special Drawings per passage. For the destruction, loss damage or delay to cargo, the air carrier's liability is limited to 17 Special Drawings per kilogram.
- (ii) **Documentation (Articles 3-16):** The Montreal convention streamlines documentation requirements for the carriage of passengers, checked baggage and cargo, embracing electronic ticketing and air waybills. Moreover, there are no sanctions for non-compliance with the new documentation requirements.⁶⁰
- (iii) **Jurisdiction (Article 33)** in addition to the four jurisdiction presently specified where an action for damages must be brought in Article 28 of the Warsaw Convention, a "fifth jurisdiction" is added which is defined to include the principal and permanent residence of the passenger and to or from which the carrier operates and in which that carrier conducts business.⁶¹ In providing for the "fifth jurisdiction" it appears the drafters intended to permit a passenger or his heirs to obtain jurisdiction in the place of his permanent residence over both carriers who are a party to a code- share agreement, but where only one of the carriers operates flights into the jurisdiction.⁶²
- (iv) **Types of Damages (Article 17 and 29):** There is no limitation on the types of recoverable compensatory damages. However, the Montreal Convention still does not allow the recovery of damages for pure mental injury and contains an express prohibition on the recovery of punitive exemplary or any non-compensatory damages.⁶³
- (v) **Advanced payments (Article 28):** this provision is made that a carrier is obligated to make advanced payments without delay to natural person or persons who are

⁶⁰ Christensen Supra note 51 at 11.

⁶¹ Article 33(1) of the Montreal Convention (1999).

⁶² Christensen Supra note 51 at 11.

⁶³ Ibid.

entitled to claim compensation in order to meet the immediate economic needs of such persons.⁶⁴

⁶⁴ Article 28 of the Montreal Convention (1999).

5. CHAPTER FIVE

5.1 Conclusion

According to Christensen the Montreal Convention of 1999 moves the international aviation community past the collage system of liability stemming from the original Warsaw Convention and establishes a comprehensive liability regime for air carriers engaged in international carriage. The Montreal Convention provides a much needed limit on liability for the delay and sets forth clear limits on liability for lost or damaged baggage and cargo. The Montreal Convention simplifies documentation requirements by the implementation of electronic ticketing and air waybills. One of the most significant aspects of the Montreal Convention is the new liability limit for passenger injury or death.⁶⁵

The new limit liability provisions require that air carriers will be held absolutely liable for the first 100,000 SDR of damages, even if the damage was caused by a third party, so long as the injury producing event meets the conditions for liability under Article 17 and was not contributed to by the passenger. The U.S. Department of State has hailed this new passenger liability regime as the culmination of years of work by the United States to increase, and later eliminate what it viewed as the “unconscionably low” liability application under the Warsaw System.⁶⁶

Not only did the new Montreal Liability Agreement reverse all prior standards of international commercial aviation, but, according to Sven Brise, it also staged a revolution that, in effect, replaces all previous case law.⁶⁷ Larry Moore⁶⁸ agrees with Brise’s statement, “that under the Warsaw Treaty there has been a consistent effort to achieve and maintain the goal of providing a uniform and unified air law, the new Convention,, however, could easily lead to a complete disunification as a result of litigation.”

⁶⁵ Christensen Supra note 51 at 12.

⁶⁶ Christensen Supra note 51 at 12

⁶⁷ Sven Brise, Economic Implications of Changing Passenger limits in the Warsaw Liability System, 22 *Annals Air & Space L.* 121, 129 (1992).

⁶⁸ Moore supra note 52 at 231.

Brise also argues that this fragments the Treaty solely for the benefit of the United States and for the benefit of U.S. citizens.⁶⁹ Regardless of where an accident occurs, as long as it was one of the many nations party to the new Treaty, a U.S. citizen could always sue in a U.S. court.⁷⁰

In the international community the Warsaw Convention was generally approved and respected. The issues relating to the low limits of liability seem to have been the main driving force or rather the main reason as to the several amendments carried out since the Warsaw Convention came into force. Instead of holding conferences trying to change other aspects of the Convention when it was a well know fact that the main flaws were in the liability provisions of carriers. All that needed to be done was to raise the liability amounts, not to morsel the old Warsaw Convention altogether.

5.2 Recommendations

Due to the controversy over the Warsaw Convention's liability limits and the amendments carried out, this paper recommends that the Japanese initiative as an alternative to be considered.

5.3 The Japanese Initiative

On November 20, 1992, ten Japanese airlines voluntarily abandoned the international liability limits of the Warsaw Convention. This was after receiving approval from the Japanese Ministry of Transport, to amend all Japanese international airlines conditions of carriage to waive the passenger liability limits in international transportation by air under the Warsaw Convention. The main aim of this amendment was to preserve certain aspects of the Warsaw Convention, while abolishing the Convention limits of liability. Traditionally, the Japanese legal system encourages settlement. Under this system the plaintiff requests an amount, and the defendant

⁶⁹ Brise Supra note 67 at 125.

⁷⁰ Christopher Chipello & Anna Wilde Mathews, 'Accord Is Reached to Increase Liability. Remove low Caps for Plan Accidents,' Wall St.J. June 1, 1999 at 88.

either gives the plaintiff the requested amount or the two parties negotiate until a mutually acceptable settlement is reached.⁷¹

In order to effectuate the removal of Japanese airlines from the Warsaw Convention's liability limits, two paragraphs concerning passenger liability on international flights were added to the air carriers' conditions of carriage.⁷²

The first paragraph stated: "Each airline shall not apply the applicable limit in article 22(1) of the Warsaw Convention in defence of any claim arising out of the death, wounding or other bodily injury of a passenger within the meaning of the convention."⁷³ This paragraph ensures the passenger is well informed and aware that the flight was not covered by the Warsaw Convention's liability limits.

The second paragraph added to the conditions of carriage that "each airline shall not use any defence for negligence as stated in Article 20(1) of the Warsaw Convention up to 100,000 SDRs (standard drawing rights) worth U.S. \$137,500, but will use those defences thereafter, excluding legal costs awarded by a court, this waiver of the Warsaw Convention liability limits applied only to Japanese airline and not to any other airline involved in inter-airline ticket."⁷⁴

Increased liability limits, or unlimited liability attributed to the carrier as proposed by the Japanese, afforded the travelling passengers supplementary safeguards. Supporters of the Japanese Initiative believe that removal of Warsaw Convention liability limits will decrease litigation, plaintiffs enter into litigation in an attempt to prove an air carrier's wilful misconduct, thereby increasing their damage awards.⁷⁵ Litigation is costly and time consuming, and it defeats the original purpose of the Warsaw Convention.⁷⁶ Further complicating matters is the fact that under the Warsaw Convention, passengers on the same

⁷¹ Naneen K Baden, 'The Japanese Initiative on the Warsaw Convention' 61 J. Air L & Com (1995-1996) at 437.

⁷² Stacy Shapiro, 'Debate Rages on Airline Liability Caps, BUS. INS. (1993) at 3.

⁷³ Ibid Shapiro.

⁷⁴ Ibid.

⁷⁵ Baden supra note 71 at 456.

⁷⁶ Kreindler supra note 15 at 294-95.

flight suffering from the exact same injuries may receive different amounts in damages awards.⁷⁷ Proponents of the Japanese Initiative believe that contracting out of Warsaw Convention liability limits, as the major Japanese airlines have done, is the best way to prevent inequities in compensation to airline crash victims.⁷⁸ Fixed liability limits allow for damages to be based on fault, rather than strict liability.

The Japanese Initiative does not provide absolute unlimited liability in international air travel, it returns the Warsaw Convention to true fault-based liability.⁷⁹

The Japanese amendment to the airline's conditions of carriage achieves this sense of fault-based liability by removing the liability limitations of any international treaty concerning passenger personal injury or death from an accident covered by Article 17 of the Warsaw Convention.⁸⁰ The Convention's article 20 defences are waived up to the 100,000 SDR limit, but for compensation over 100,000 SDRs, the defences are reinstated.⁸¹ This means that there is no need for the ticketing requirement of Article 3 or the provision on wilful misconduct. In essence, the Japanese Initiative merely allows the Japanese airlines to negotiate settlements that exceed the Warsaw Convention's limitation of liability, without requiring passengers' families to resort to lengthy litigation to prove wilful misconduct by the air carrier.⁸²

The reason behind the reinstatement of Article 20 defences for claims great than 100,000 SDRs is for the purposes of protecting the air carrier from claims made by third parties such as claims by air manufacturers and air traffic control facilities. By waiving article 20 defences, the airline risks becoming a "volunteer," and may not be entitled to seek indemnification from a responsible third party, therefore reinstitution of the Article 20 defences allows the air carrier to negotiate settlements with passengers' families that exceed Warsaw Convention liability limits without

⁷⁷ Kimberlee S. Cagle, 'The Role of Choice of Law in Determining Damages for International Accidents' 51 J.Air L& Com. 953(1986) at 959.

⁷⁸ George N. Tompkins, Remarks at the New York County Lawyers Association Evening Forum- The Japanese Initiative: Absolute Unlimited Liability in International Air Travel 9-15 (Feb.3, 1994) at 821-33.

⁷⁹ *Baden supra* note 71 at 459.

⁸⁰ *Ibid.*

⁸¹ *Ibid* at 460

⁸² *Ibid.*

prejudicing the air carrier's own claims for indemnification against any liable third parties.⁸³

Some aviation underwriters have alleged that removing the Warsaw Convention liability limits will increase insurance premiums, thereby costing the airline industry more than it will save in decreased litigation costs.⁸⁴ The allegation, however, has no basis. For example, premiums for liability coverage for passengers amounted to U.S. \$150 million in 1989.⁸⁵

Shapiro argues that even if underwriters increased premiums by fifty percent to cover increased litigation costs resulting from unlimited liability, airlines would only have to pay U.S. \$37.5 million more than they are presently paying. In 1989, there were approximately one billion airline passengers. In order to pay for the increased insurance costs, passengers would have to expend an additional four cents per ticket purchased. Therefore, the allegation that unlimited liability would be more costly to airline industry than protracted litigation seems to be unfounded.⁸⁶

Martine and French⁸⁷ poses a question stating that assuming that unlimited liability is not prohibitively expensive for the airline industry, what then are the benefits of unlimited liability to the airline industry? After all, it would not be economically advantageous to the airlines to advertise that passengers can now recover more money if they are killed in plane crashes. From the preliminary issues outlined on the Japanese initiative it seems to be the answer to the recovery problems associated with the Warsaw Convention, particularly on the provisions in relation to the limitation of liability of the carrier.

⁸³ Ibid.

⁸⁴ Shapiro note 72 at 3.

⁸⁵ Stacy Shapiro, 'Scrap Warsaw Limits: Aviation Broker,' BUS.INS.(1990) at 14.

⁸⁶ Ibid.

⁸⁷ Peter Martin and Trevor French, 'Blown Cover: Japanese Airlines Have Unilaterally Opted for Unlimited Passenger Liability,' AIRLINE BUS. Feb. (1993) at 44.

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