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INTERNATIONAL CONFERENCE ON AIR LAW

(Convention for the Unification of Certain Rules for International Carriage by Air)

Montreal, 10 – 28 May 1999

VOLUME III

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MONTREAL CANADA

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International Civil Aviation Organization

INTERNATIONAL CONFERENCE

ON AIR LAW

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MONTREAL **CANADA**

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WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

C-WP/10381
5/3/96

COUNCIL – 147th SESSION

REPORT ON MODERNIZATION OF THE "WARSAW SYSTEM"

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Conventions

(Presented by the Secretary General)

SUMMARY

This paper presents for Council's information the results of the deliberations of the Secretariat Study Group on the "Warsaw System" and their recommendations concerning the adoption of a new international instrument to modernize the legal framework for air carrier liability, and invites the Council to approve these recommendations.

REFERENCES

AT-WP/1769
AT-WP/1773
C-WP/10289
C-DEC 146/3

1. INTRODUCTION

1.1 The Council, on 15 November 1995 during its 146th Session, decided to amend the second item of the General Work Programme of the Legal Committee to read: "The modernization of the 'Warsaw System' and review of the question of the ratification of international air law instruments." The Council further decided that a Secretariat Study Group be established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System". The Group was requested to provide the Legal Bureau with its views which should permit the Council to consider the appropriate steps to be taken for the modernization of the "Warsaw System". The Legal Bureau was requested to present its Report to the Council during its current (147th) Session.

1.2 This paper summarizes the discussions and recommendations of the Study Group which met on 12-13 February 1996 in Montreal. The Report of the Study Group is reproduced in the **Appendix** to this paper.

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1.3 In accordance with the decision of the Council referred to in paragraph 1.1 above, the Study Group used as basis for its discussions the terms set out in C-DEC 146/3, and in particular the results of the socio-economic analysis of the limits of liability under the Warsaw Convention System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA) (AT-WP/1769 and AT-WP/1773), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Intercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995) (Appendix B to AT-WP/1773).

1.4 As regards the comments of the Air Transport Committee on the socio-economic study, the Study Group was informed that in considering this subject on 24 January 1996, the Air Transport Committee had decided, in view of the complexity of the issues, to refer to the Study Group the analysis of this matter which should form part of the Report to the Council.

2. STATUS OF WARSAW CONVENTION SYSTEM

2.1 After more than two decades of unsuccessful attempts to bring the Guatemala City/Montreal Protocol amendments into effect, certain States, regional and global organizations, and air carriers have proposed or taken action to raise air carrier limits of liability to what they consider appropriate levels. It was considered that the limits available under the Warsaw Convention and the Hague Protocol had been eroded by inflation and were no longer responsive to current socio-economic developments. However, these steps present a serious risk of fragmentation and were seen as interim solutions, awaiting action by governments to promote through ICAO a modernized legal framework and harmonize the needs of the air transport community world-wide.

3. NEED FOR ICAO ACTION

3.1 The Group was unanimously of the view that ICAO action is urgently needed to redress the major shortcomings of the present system of liability, particularly regarding passengers, but also for baggage and cargo, and to develop a new international instrument to consolidate the Warsaw System, bringing it in line with today's requirements.

4. TWO-TIER LIABILITY REGIME FOR PASSENGERS

4.1 After considerable discussion on the justification for and appropriate level of liability limits, the Study Group recommended the adoption of a two-tier liability regime providing for compensatory, recoverable damages in case of accidental death or injury of passengers up to the amount of [100,000 SDR] irrespective of the carrier's fault, and liability of the air carrier on the basis of carrier's negligence for amounts exceeding [100,000 SDR], the defence of contributory negligence of the passenger remaining available to the air carrier in both instances.

4.2 This new approach not only incorporates elements of the Guatemala City/Montreal Protocol amendments, but also attempts to address the inherent deficiencies of the present system, in particular the dissatisfaction with currently prevailing limits of liability and problems associated with the attempts of circumventing them. The Group firmly believed that limits of liability of the type presently

contained in the Warsaw Convention System are not susceptible to world-wide unification due to the diversity of socio-economic circumstances and varying costs of living in different parts of the world.

4.3 Under this proposed mechanism, full recovery of damages sustained is no longer predicated upon proof of wilful misconduct on the part of the air carrier since it is sufficient to establish the required element of negligence in order to be compensated.

4.4 The Group reiterated that the suggested approach still limits the amount of compensation to the extent of recoverable, compensatory damages to be proved by the claimant; it also considered the insurance aspects of such proposal.

4.5 With respect to paragraph 4.1, it should to be noted that the figure of [100,000 SDR] as threshold for the application of the second tier of liability was set as a tentative figure for the purpose of the Group's discussion and recommendations. In order to take account of the situation of developing States, the Group considered that, in future deliberations within ICAO, the adoption of a mechanism could be explored permitting developing States to apply a lower amount: such mechanism might be suitable for States where experience with settlement of claims has shown that the amount of compensation will virtually always remain below [100,000 SDR] per passenger. A similar mechanism is also foreseen in the Implementation Agreement to the IATA Intercarrier Agreement.

4.6 The Study Group also examined questions relating to the standard and burden of proof to be employed in the new instrument in the second tier of liability. It agreed to retain the concept of negligence, leaving open for further discussion in the ICAO Legal Committee the question whether the passenger has to prove negligence of the carrier or whether the air carrier has to prove absence of negligence. This question was left open not only because of differing views among the Members of the Study Group but also because of known positions among Member States.

5. REVISION OF BAGGAGE LIMITS OF LIABILITY

5.1 The Group concluded that there should be a revision of limits of liability for damage to, or loss or delay of, baggage comprising checked and unchecked baggage. It also believed that further consideration should be given to introducing different types of limits than those presently contained in the Warsaw Convention System.

6. MODERNIZATION OF RULES REGARDING PASSENGER TICKET, BAGGAGE CHECK, AND OTHER DOCUMENTARY REQUIREMENTS

6.1 The Study Group further recommended to modernize the rules on the passenger ticket, baggage check, and other documentary requirements with the aim of achieving simplicity and compatibility with modern technologies.

7. ADOPTION OF A NEW CONSOLIDATED INTERNATIONAL INSTRUMENT

7.1 There was consensus to promote the adoption of a single, consolidated legal instrument which will incorporate useful elements of other instruments of the Warsaw System, to the extent that they are consistent and compatible with the other recommendations.

7.2 The Group considered the question whether any new instrument should contain a provision for an additional forum, namely the place of the domicile or permanent residence of the passenger, and whether it should also address matters related to liability in cases of code sharing and other forms of airline cooperation, but decided not to make any firm recommendations without further studies.

7.3 The Group further examined several other mechanisms which could usefully be accommodated in the new framework and which might deserve further study in the future work to be carried out. The relevant considerations are reflected in paragraphs 6.24-6.33 of the Report.

8. RATIFICATION OF MONTREAL PROTOCOL NO. 4

8.1 The Group unanimously expressed the view that ICAO should continue to encourage ratification of Montreal Protocol No. 4 so that its provisions could enter into force while awaiting the completion of the work on the new instrument.

9. RECOMMENDATIONS OF THE STUDY GROUP

9.1 After finalizing their deliberations, the Study Group adopted the Recommendations set out in paragraph 9.2 below for consideration by the Secretary General and subsequent submission to the Council. As regards Recommendation 2, the Council is invited to approve this Recommendation in principle only, since it may wish to leave the fine-tuning and the legal details of the proposal to further discussions in the Legal Committee. Approval of the action plan set out in Recommendations 1 and 3-9, and approval in principle only of the approach taken in Recommendation 2 does not in any way prejudge any action States may take or may consider with regard to the IATA Intercarrier Agreement. While the Recommendations are compatible with the Intercarrier Agreement, they are not identical with it, nor are they in any way linked. Therefore, the Council is invited to consider the following Recommendations on their own merits.

9.2 The Study Group recommends:

1. that action should be taken to develop a new international instrument to consolidate and modernize the Warsaw Convention System and bring it in line with present-day requirements;

2. that such new instrument should, in particular:

   a) provide for a two-tier liability regime for recoverable compensatory damages in case of injury or death of passengers, comprising:

      i) liability of the air carrier up to [100,000 SDR] irrespective of the carrier's fault;

      ii) liability of the air carrier in excess of [100,000 SDR] on the basis of the carrier's negligence,

   the defence of contributory negligence of the passenger or claimant being available in both instances;

b) revise the limit of liability for checked and unchecked baggage;

c) modernize the provisions regarding the ticket and other documentary requirements;

d) include elements of the Warsaw Convention, the Hague, Guatemala City, and Montreal Protocols as well as the Guadalajara Convention, to the extent that they are appropriate, give effect to, and are consistent with the foregoing.

3. that such action be commenced without delay;

4. that a first draft for the new instrument be developed by the Legal Bureau, with the assistance of the Study Group; that a Rapporteur be appointed by the Chairman of the Legal Committee to review and revise the draft and present a report thereon;

5. that the draft instrument, together with the Rapporteur's report, be submitted to a Sub-Committee of the Legal Committee, which should be convened for this purpose as early as possible;

6. that as early as practicable thereafter, the matter be reported to the Legal Committee;

7. that upon approval of the draft instrument by the Legal Committee, the Council convene a Diplomatic Conference as soon as possible for the formal adoption of the instrument;

8. that the Council urge States which have not done so, to ratify Montreal Protocol No. 4, relating to cargo liability;

9. that the Secretary General be requested to take all necessary measures for the early implementation of this action plan.

10. ACTION BY THE COUNCIL

10.1 On the basis of the Report of the Secretariat Study Group, the Council is invited:

a) to note this paper and the attached Report;

b) to approve the Recommendations of the Study Group set out above, but to approve the approach with respect to Recommendation 2 of paragraph 9.2 above in principle only;

c) to refer this matter, in line with Recommendations 4 - 6 of paragraph 9.2 above, to the Legal Committee, which should report back to the Council as soon as possible.

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APPENDIX A

REPORT OF THE

SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE WARSAW CONVENTION SYSTEM

(Montreal, 12-13 February 1996)

1. INTRODUCTION

1.1 Pursuant to the decision of the ICAO Council taken at its 146th Session on 15 November 1995 (C-DEC 146/3), a Study Group was established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the Warsaw Convention System.

1.2 The President of the Council, Dr. Assad Kotaite, opened the meeting and, on behalf of the Council and Secretary General, welcomed the Members of the Group. In his opening address, he recalled that the modernization of the Warsaw Convention System had been the subject of a number of diplomatic conferences and amending international instruments since the adoption of the original Convention in 1929. The limits of air carrier liability and their socio-economic aspects presented particularly difficult problems. None of the four Protocols adopted in 1975 to amend the Warsaw Convention System had so far entered into force. The Council decided therefore in June 1994 that a socio-economic analysis of the limits of liability should be undertaken by the ICAO Air Transport Bureau in co-ordination with the International Air Transport Association (IATA). The 31st Session of the Assembly had mandated the Council to continue its efforts to modernize the Warsaw System as expeditiously as possible. The Council had therefore decided to establish the Study Group to assist the ICAO Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the Warsaw System. The Legal Bureau was requested to present a Report to the Council during its current (147th) Session. The President concluded by stating that the subject was complex and had multilateral aspects; the Group was requested to provide the Legal Bureau with its views which would permit the Council to consider the appropriate steps to be taken for the modernization of the Warsaw System.

1.3 The Members of the Study Group having attended the meeting are listed in Attachment A. Members attended the meeting in their personal capacity; their views ought not be attributed to their Governments or other institutions with whom they may be affiliated. Dr. L. Weber, Director of the Legal Bureau, was the Moderator of the Study Group. He was assisted by Mr. J.V. Augustin, Legal Officer, Mr. A. Jakob, Legal Adviser to the Director, Legal Bureau and Mr. A.A. Costaguta, Chief, Statistics and Economic Analysis Section, Air Transport Bureau.

2. TERMS OF REFERENCE

2.1 In accordance with the decision of the Council referred to in paragraph 1.1 above, the Study Group used as basis for its discussions the terms set out in C-DEC 146/3, and in particular the results of the socio-economic analysis of the limits of liability under the Warsaw Convention System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA) (AT-WP/1769 and AT-WP/1773), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Intercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995) (Appendix B to AT-WP/1773).

3. DOCUMENTATION

3.1 A list of documents presented to and considered by the Study Group is found in Attachment B.

4. AGENDA

4.1 At the Moderator's proposal, the Study Group adopted the agenda of the meeting set out in Attachment C.

5. GENERAL DISCUSSION

5.1 The Moderator recalled the mandate which the Council had given to the Working Group, as referred to in paragraph 2.1 above. The materials set out therein should form the basis of discussions.

5.2 As regards the comments of the Air Transport Committee on the socio-economic study, the Study Group was informed that in considering this subject on 24 January 1996, the Air Transport Committee had decided, in view of the complexity of the issues, to refer to the Study Group the analysis of this matter which should form part of the Report to the Council.

5.3 The Moderator pointed out that 25 years had elapsed since the adoption of the 1971 Guatemala City Protocol, and more than 20 years since the four Montreal Protocols of 1975. Pending entry into force of Additional Protocol No. 3 of 1975, ICAO had refrained from any action which would impede its ratification. However, during the last five years, certain States, regional and global organizations, and air carriers had each proposed or taken action to raise air carrier limits of liability to what they considered to be appropriate levels. The limits under the Warsaw Convention and the Hague Protocol had been eroded by inflation. Therefore, the first question to be considered was whether or not ICAO should take new action to modernize the Warsaw System, focusing for the time being on passenger liability limits and leaving baggage and cargo limits aside.

5.4 The Group was unanimous that ICAO action was necessary to modernize the System. It was recognized that the Warsaw System as such should be preserved, but that major shortcomings needed correction. The majority of States responding to the Questionnaire were dissatisfied with the present regime, and in particular with the limits of liability. The level of these limits meant that the

interests of the passengers were not sufficiently taken into account, and the Warsaw Convention encouraged litigation by claimants to break the existing limits. Certain initiatives had been taken recently, but these were interim in nature, awaiting action by governments. Governments should now take their responsibility. Several Members felt that modernization had to focus on both the limits and the nature of the carriers' liability. The view was expressed that if world-wide uniformity was desirable, ICAO had to act in this area. One Member indicated that it was necessary to have a new international instrument, with the possibility of ICAO periodically adjusting the limits of liability. Another Member felt that ICAO action could be viewed from both the short-term and long-term perspectives: in the immediate future, the Organization could pronounce itself on some of the principles agreed to by the carriers, as well as promote knowledge of the Warsaw System; in the long-term, consideration should be given to amending the System.

6. DISCUSSION OF ISSUES RELEVANT TO MODERNIZE THE WARSAW SYSTEM

a) Revision of passenger liability limits

b) Revision of liability regime

c) Implications of current other initiatives, including the IATA Intercarrier Agreement

6.1 The Moderator invited views on the question whether there should be a revision or even removal of the passenger liability limits in the Warsaw System. This issue could not be properly discussed without taking into consideration Agenda Items 3 b) and c); it was therefore decided that all three issues should be dealt with concurrently.

6.2 Many Members were of the preliminary view that the concept of limitation of liability should be abandoned as limits were not susceptible to world-wide unification and difficult to reconcile with varying socio-economic factors throughout the world. Furthermore, the mere existence of limits would encourage litigation to break those limits and from the consumer's viewpoint, limits of liability inequitably favoured the air carrier. One Member was of the opinion that liability limits were normal, taking into account the need for insurance; he preferred however, a limit below which the carrier would be strictly liable, but that the carrier would be subject to unlimited liability if its actions were tortious or delictual. Another Member expressed the view that limits of liability departed from the fundamental legal principle that one is fully liable for damage one has caused. The view was expressed that airlines were considering eliminating the limits of liability under the Warsaw System, and that governments may now be willing to re-examine the question. Some Members stated that one of the reasons why carriers now favoured unlimited liability was that insurance premiums would most likely increase on a one-time basis with adjustments made in the light of experience; any regime providing for limits would allow the insurance industry to make continuous upward increases to the premium payable in cases of upward revision of limits. Many Members of the Group were of the view that the abolition of limits of liability would be the most comprehensive solution, but acknowledged that this would represent a substantive departure from the *status quo*.

6.3 Another Member of the Group pointed out that Articles 22 and 25 of the Warsaw Convention were to be seen as the main aspects of the current problem. He expressed the view that the issues of limits of liability and issues of fault of the air carrier were intertwined. He also viewed recent

concerted actions of the air carriers and regional developments as evidence that air carriers were in principle willing to question the merits of limits. He cautioned, however, that air carriers must not be pushed into the role of an insurer of the passenger and also that air carriers from developing countries may find it hard to agree to a general waiver of all liability limits.

6.4 Some Members favoured a regime of liability which would require the carrier to prove that it was not at fault; others would see the passenger or claimant having to prove the fault of the carrier. One Member questioned the acceptability by governments of a regime which provided for unlimited liability of the carrier based on its presumed fault, which he thought was tantamount to strict liability. Another Member favoured the strict but not absolute liability of the carrier, coupled with no limits of liability. Another Member stressed that care should be taken in moving from the Warsaw System to the other extreme of providing for unlimited and absolute liability, and that no airline should be so penalized that it became a matter of survival.

6.5 One Member stressed that the acceptability of a regime by carriers did not necessarily mean acceptability of that regime to governments also; governments had to consider not just the regime in the aviation field but also that applied to other modes of transportation. Another Member, however, questioned the extent to which considerations relating to other modes of transportation should impact on what he thought was the universal and most widely used form of transportation, namely, aviation.

6.6 In view of the foregoing, the question arose as to the manner of interpreting certain replies to the ICAO and IATA questionnaires. The Group was informed by the Secretariat that replies were received before the air carriers initiated the discussions which led to the new IATA Intercarrier Agreement (ICA) which does not set out any specific limit of liability. One might therefore assume that the responses were predicated on the continued existence of limits of liability, albeit increased.

6.7 One Member of the Group believed that the removal of liability limits in the ICA had not faced major opposition among the air carriers, and that therefore, one could expect a similar reaction in those cases where governments were shareholders in the air carrier. This view was also shared by another Member of the Group, though in general, the Group acknowledged that a distinction should be made with respect to the commercial entity (air carrier, which may be State-owned) and governments. Two Members cautioned as to the acceptability of the ICA to carriers themselves, one of these Members noting particularly that a number of middle-size and small airlines were unhappy with the result.

6.8 One Member questioned the meaning of the concepts of strict liability and fault-based liability. The view was expressed that, in practice, fault-based liability under the Warsaw Convention was close to strict liability and that the defences available to the carrier under Article 20 of the said Convention were usable in only a few cases, although the theory and perception was that there was a greater difference between the two. Another Member cautioned against delving too deeply into definitions at this stage of the work.

6.9 Although he favoured the concept of unlimited liability, one Member believed that all options should remain open for future consideration, including the possibility of having limits of liability. However, since the main beneficiaries of limits were of the opinion that they no longer required it, he wondered as to who would in fact favour having limits.

6.10 One Member stated that any proposal should try to accommodate the position taken by the United States Government since endorsement by that State was necessary to have a world-wide, effective solution.

6.11 In summing up the discussion to this point, the Moderator indicated that two positions had been developed:

1) the first view was in favour of removing the limits of liability, leaving open for the time being whether such liability should be based upon the presumed fault of the carrier or upon fault of the carrier to be proved by the claimant; and

2) the second view was that there should continue to be limits of liability, adjusted upwards from what currently prevailed, leaving open for the time being whether this should be based on strict liability up to a certain limit or remaining with the present system of presumed fault liability found in the Warsaw Convention.

6.12 Some Members of the Group called attention to the fact that there could be a misconception about the term "unlimited liability" since even under this regime the amount of compensation would be limited to the extent of proven, recoverable damages. Further, a liability limit did not mean an automatic recovery of that amount but was rather a ceiling not to be exceeded.

6.13 The possibility was explored of finding a compromise in providing for a limit of liability with an "optional ceiling", which would be set by governments by legislation with respect to their own flag carriers or their territory. Such instrument would have the advantage of maintaining a limit without precluding the adoption of a higher limit or no limit at all. In this context, the Group then examined solutions in legal instruments dealing with other modes of transportation, in particular the *Convention on the Contract for the International Carriage of Passengers and Luggage by Road* (Geneva, 1 March 1973). In this instrument, a liability limit was set, with the possibility for a Contracting State, at its discretion, to set a higher limit by legislation or no limit at all. However, the Group felt that such a system would sacrifice uniformity.

6.14 One Member was of the opinion that to have a universally acceptable system, certain compromises should be made. Some States would champion the cause of the consumer, others the air carriers. He suggested a two-tier system of liability:

1) up to 100,000 SDR, the carrier would be presumed to be liable (presumption of fault);

2) beyond that limit, the carrier would be liable on the basis of fault (negligence of the carrier would suffice).

6.15 In discussing the question of punitive damages within the above framework, there was a general consensus that the award of punitive damages should not be part of any new regime to be developed. One Member observed that in practice, the award of punitive damages was in fact not currently a big concern of airlines; he was of the view that the wording of the Warsaw Convention did not sanction the award of punitive damages.

6.16 On this basis, there was general support within the Group for the two-tier framework set out above. However, one Member of the Group expressed his concern that Additional Protocol No. 3 of 1975 had a system of strict liability for 100,000 SDR, and that the current proposal was a step backwards in that the award of the first 100,000 SDR would be on the basis of the presumed fault of the carrier. He proposed that the limit of 100,000 SDR should be on the basis of the strict liability of the carrier (irrespective of the carrier's fault), in line with the Protocol. There was a general agreement within the Group with this proposal.

6.17 The question was raised whether certain States, especially developing States, should be able to choose a lower threshold of liability within the first tier since the majority of claims handled in these countries would generally fall below the amount of 100,000 SDR. It was noted that this mechanism is foreseen in Article II(2) of the Agreement Implementing the IATA Intercarrier Agreement, and that the matter could be further pursued in future ICAO deliberations.

6.18 As to awards beyond 100,000 SDR which would be subject to the fault or negligence of the carrier, the Group examined the question of the applicable law to determine negligence and the related question whether the concept was easily understood world-wide. It was stressed that for the sake of uniformity, certain concepts in the Warsaw Convention should be retained since these had been subjected to decades of judicial interpretation. The Group felt, however, that the matter of defining the concept of fault or negligence would be better handled at a later stage in ICAO's work and that it should concentrate for the time being on broad principles only.

6.19 In relation to awards over 100,000 SDR, three Members preferred that the carrier should be liable on the basis of presumed fault rather than on mere fault to be proved by the passenger or claimant. To support this position, it was mentioned that carriers had made clear statements that the passenger should be protected, and to require the passenger to prove fault of the carrier was less consumer friendly; it was preferable for the carrier to be put to prove its absence of fault. On the other hand, one Member felt that this would be akin to imposing strict liability on carriers for damages exceeding 100,000 SDR, and could not agree with this suggestion. The Group therefore agreed to the two-tier system, leaving the question unsettled of who should have the burden of proof in the second-tier. It also agreed that the figure of 100,000 SDR as the threshold for the application of the second tier was tentative. It further agreed, without extensive debate, that the defence of contributory negligence as set out in Article 21 of the Warsaw Convention, should continue to be available to the carrier in respect of both tiers.

d) Possible revision of baggage and/or cargo liability limits

6.20 The Study Group decided that issues of baggage and cargo should be dealt with separately.

i) Baggage

6.21 Most Members felt that the current liability regime for baggage was unsatisfactory as the courts were finding ways to break the limits and the settlement of baggage claims were costly and occupied much of the carriers' time. General consensus prevailed that any new instrument should revise the existing limit of liability for damage to, or loss or delay of, baggage. One Member proposed that the existing limits should be substantially increased; some Members believed that at this stage it would

be premature to opt for any specific limit. Many Members stressed that any new system should be as simple as possible. Several Members therefore preferred a limit per passenger (to encompass checked and unchecked baggage) as opposed to weight or pieces of baggage. However, it would be left for future work of ICAO to decide on these questions.

ii) Cargo

6.22 The Group was unanimous that ICAO should continue to encourage ratification of Montreal Protocol No. 4 (MP 4), which could rapidly come into force, the number of ratifications necessary having almost been reached. One Member was of the view that in the context of liability, cargo was not of much concern as consignors and air carriers were in a more equal commercial relationship than was the case between passengers and carriers. Another Member pointed out that it was possible for the consignor to obtain higher coverage by making a special declaration and paying a supplementary sum. Another Member believed that the limits for cargo should be raised, and that consideration should be given to setting limits in respect of containers or some other unit as opposed to weight, this latter point being supported by another Member. One Member believed that a periodic adjustment mechanism was necessary in any new cargo liability regime.

6.23 The general sentiment among the Members of the Group was that any impediment to the entry into force of Montreal Protocol No. 4 should be avoided. This Protocol was useful in itself and a step forward; its provisions could, *inter alia*, be incorporated into additional improvements to be achieved in the future. The Council should therefore urge States not yet having done so to ratify Montreal Protocol No. 4 without delay.

e) Other points

i) Compulsory up-front payments

6.24 The Group further reviewed current proposals by the European Union and ECAC providing for a compulsory up-front payment mechanism in cases of accidental death or injury of a passenger. One Member of the Group expressed support for this idea as it would guarantee the quick payment of funds required to cover expenses, e.g. for hospitalization or funeral costs. The Group sympathised with the principle that was sought to be achieved by such mechanism. However, the majority of Members were reluctant to endorse any proposal which would mandatorily require the air carrier to pay out a specified amount within a predetermined period of time. It was believed that such a general obligation would not appropriately take into consideration the diversity of facts of each case and would not be responsive to the variety of local customs associated with the actual settlement of the claims. For instance, it was argued that it is not always possible for the air carrier to easily determine the beneficiary or recipient. Some Members of the Group indicated that it was already a common voluntary practice among air carriers to provide for such financial assistance where circumstances so warranted, and this flexible approach should be maintained. One Member stated that IATA was developing a Code of Recommended Settlement Practices for air carriers, and he would prefer to see the subject covered in the Code rather than in a new binding international legal instrument. Several Members believed that the European proposals ought to be seen in light of the current deficiencies of the Warsaw System. Some Members suggested that any new instrument should contain some general principles on the subject to recognize the existing practice, but that such payments should not be made mandatory and the carrier

should be left with discretion to deal with cases as they arose. One Member expressed concern that any general principle could result in concrete obligations through judicial interpretation.

6.25 After further discussion, the Group concluded that in view of its proposals on limits and regime of liability set out above, this area of concern would lose some of its significance and no specific recommendation for compulsory up-front payment clause should be made at this time. However, the Group believed that this issue could be revisited in the future work on the modernization of the Warsaw System.

ii) Speedy settlement of uncontested part of claim

6.26 The Group viewed this issue as being closely connected to the previous item and thought that the carriers needed flexibility to deal with cases as they arose. Consequently, the Group believed that no binding provisions on this subject should be recommended.

iii) Fifth jurisdiction

6.27 The Group then debated whether a new instrument should contain a provision for a fifth jurisdiction under which an additional forum, namely the place of the domicile or permanent residence of the passenger, would be available to claimants. It was noted that such a provision was already included in Additional Protocol No. 3 (incorporating the Guatemala City Protocol) which allows a claim to be brought before the court of the domicile or permanent residence of the passenger provided that the carrier has an establishment there. The Group further acknowledged that the United States Government demanded such additional forum; similarly, current proposals of the European Union also included such a provision. The views on this matter were divided.

6.28 One Member clearly supported the notion of a fifth jurisdiction and stated that every passenger should have the right to sue the air carrier in his own State, provided the air carrier was engaged in doing business there.

6.29 Another Member did not in principle reject the notion of a fifth jurisdiction but cautioned that some European States might have difficulties in agreeing to such a proposal, being particularly concerned that a United States resident could resort to United States courts even in the case of an accident occurring between two points outside of the United States and on a non-United States carrier.

6.30 Several Members opposed the notion, one believing that this would create an undue additional burden on foreign air carriers and would have an impact on insurance premiums. He believed that any such proposal went beyond modernization of the Warsaw System and changed some fundamental rules. He did not view a fifth jurisdiction as being necessary, and was of the opinion that carriers would strongly oppose its introduction. He suggested that States which had ratified Additional Protocol No. 3, which contains a fifth jurisdiction, did so because of the unbreakability of the limit under that Protocol. However, the incorporation of the fifth jurisdiction coupled with the recommendations on the limits and regime of liability adopted by this Group significantly increased the level of risk for air carriers.

6.31 Finally, another Member cautioned that concentration of efforts on the concept of a fifth jurisdiction might delay or stop progress on the main purpose of the modernization process, which was a re-examination of Articles 22 and 25 of the Warsaw Convention. It was therefore decided not to include this matter in the recommendations of the Group.

iv) Update mechanism

6.32 The Group discussed whether to recommend an update mechanism which could be used to adjust the limit of the first tier to reflect inflation or changes in other economic factors. The predominant opinion in the Group was not to include such a mechanism. It was observed that previous proposals for an update mechanism were predicated upon the continued existence of the concept of limited liability. Some Members believed that the Group's proposals were already far-reaching and innovative; any further extension of liability in the first tier could jeopardize acceptability to States. Furthermore, one Member of the Group believed that a retention of the special contract provision in the Warsaw Convention could be used to accommodate the adjustment of the first tier, if required.

6.33 One Member, however, was in favour of such a mechanism in relation to the first tier to take into account changes in economic factors. Another Member felt that if such a mechanism was necessary, ICAO or IATA should be involved in the process of periodic review.

v) Ticket and other documentary requirements

6.34 It was pointed out by the Moderator that under the present System, there existed a number of rules on the passenger ticket and baggage check. He inquired whether the Group felt that these needed to be modernized. The Group unanimously agreed that these rules should be modernized and that the opportunity should be taken to study the subject. One Member stated that the documentary requirements should be overhauled, particularly with the aim of achieving simplicity, and should be fully compatible with modern technologies in order to accommodate features like "ticketless travel". It was also pointed out by this Member that essential information (i.e. place of departure/destination) would still be required to be shown on the ticket since those elements have implications for the application of the Warsaw Convention (i.e. Article 28). It was decided to recommend that the rules on tickets and other documentary requirements be modernized.

vi) Code sharing

6.35 The Group further discussed whether a new instrument should also address matters related to liability in cases of code sharing, franchising and other forms of airline cooperation. The general agreement was that this matter did not require high priority at the present stage of the work of the Group. Some Members believed, however, that this area should be further studied. One Member stated that the concept of the actual carrier already accommodated certain aspects of the problem and that the crucial question was whether the passenger had been notified of the carrier he or she would be travelling on. Another Member believed that code sharing became important in this respect only if a fragmented liability system existed and that once uniformity was achieved, the problem would lose some of its significance. It was agreed not to include this matter in the Group's recommendations.

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vii) Point of reference for revision

6.36 The Moderator invited views on the question of the point of reference to be used as the basis for the revision and modernization of the Warsaw System. Most Members favoured the use of the original 1929 Convention, one reason being that its provisions have been subjected to decades of judicial interpretation; one Member believed that the Hague Protocol should be used. However,the consensus was that the overriding objective should be the adoption of a single, consolidated legal instrument and that although the original Convention could be used as a starting point, useful elements of other instruments of the System should be taken into account where they were consistent and compatible with the other recommendations of this Group.

viii) Liability insurance

6.37 The Group then examined the question whether any new instrument should require the carrier to carry sufficient insurance to cover liabilities which may be imposed upon it. The majority of the Group believed that this was a subject best left to governments to deal with in their relationship with carriers and not embodied in a new instrument, one Member stating that it should be dealt with as a requirement to be fulfilled before a license is granted by the government. One Member, believing that the carrier should be able to meet its liabilities, was doubtful whether insurance was the only solution; he took the view that incorporating such a requirement into an international legal instrument would make the airline industry a captive market for insurers, and that guarantees might be more appropriate. It was agreed not to issue a recommendation at this point; however, the Group was of the opinion that the matter of adequate insurance cover and effective verification thereof deserved further study in the work to be carried out.

ix) Article 29 of the Warsaw Convention

6.38 One Member of the Group submitted for consideration that Article 29 should be redrafted since this provision has been the subject of conflicting jurisprudence particularly, as to whether tolling of the two-year period was permitted, e.g. in case the plaintiff is an infant. Another Member supported this idea. The general belief among the Members of the Group was that this article, along with others, should be carefully re-examined when ICAO's work progressed further.

x) Position statement

6.39 One Member suggested that ICAO should pronounce itself on some of the principles agreed to by the carriers, as well as promote knowledge on certain aspects (e.g. level of increase of insurance costs) associated with the implementation of a modernized legal framework. To this effect, another Member suggested to consider the holding of regional workshops in which interested parties could be educated on the Warsaw System as a whole and the latest developments connected thereto. This would not only increase awareness of the participants but also promote informed discussion in the appropriate fora.

7. RECOMMENDED ACTION

7.1 After further discussion, including as regards the steps to be taken within ICAO to elaborate a new instrument, the Group adopted the recommendations reflected in paragraph 9 below.

8. ANY OTHER BUSINESS

8.1 There being no other business, the Moderator thanked the Members of the Group for their participation and contributions, indicating that it would depend on the decisions of the Council and the Secretary General whether further meetings of the Study Group were required. The Group thanked Dr. Weber for organizing and offering this forum and expressed its readiness to participate in any subsequent work, and the meeting was declared adjourned.

9. RECOMMENDATIONS OF THE STUDY GROUP

9.1 As a result of its discussions at the meeting of 12-13 February 1996 which took into account, as mandated by the Council, the results of the socio-economic analysis of the limits of liability under the Warsaw System undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Intercarrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995),

the Study Group recommends:

1. that action should be taken to develop a new international instrument to consolidate and modernize the Warsaw Convention System and bring it in line with present-day requirements;

2. that such new instrument should, in particular:

   a) provide for a two-tier liability regime for recoverable compensatory damages in case of injury or death of passengers, comprising:

      i) liability of the air carrier up to [100,000 SDR] irrespective of the carrier's fault;

      ii) liability of the air carrier in excess of [100,000 SDR] on the basis of the carrier's negligence,

      the defence of contributory negligence of the passenger or claimant being available in both instances;

   b) revise the limit of liability for checked and unchecked baggage;

   c) modernize the provisions regarding the ticket and other documentary requirements;

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d) include elements of the Warsaw Convention, the Hague, Guatemala City, and Montreal Protocols as well as the Guadalajara Convention, to the extent that they are appropriate, give effect to, and are consistent with the foregoing.

3. that such action be commenced without delay;

4. that a first draft for the new instrument be developed by the Legal Bureau, with the assistance of the Study Group; that a Rapporteur be appointed by the Chairman of the Legal Committee to review and revise the draft and present a report thereon;

5. that the draft instrument, together with the Rapporteur's report, be submitted to a Sub-Committee of the Legal Committee, which should be convened for this purpose as early as possible;

6. that as early as practicable thereafter, the matter be reported to the Legal Committee;

7. that upon approval of the draft instrument by the Legal Committee, the Council convene a Diplomatic Conference as soon as possible for the formal adoption of the instrument;

8. that the Council urge States which have not done so, to ratify Montreal Protocol No. 4, relating to cargo liability;

9. that the Secretary General be requested to take all necessary measures for the early implementation of this action plan.

ATTACHMENT A

ICAO STUDY GROUP ON THE WARSAW CONVENTION

Attendance

Mr. R. Farhat
Professor of Law, Solicitor
Former Director General of Civil Aviation
(Lebanon)

Mr. E.A. Frietsch
Counsellor
Federal Ministry of Justice
(Germany)

Mr. G. Lauzon, Q.C.
General Counsel
Constitutional and International Law
Department of Justice
(Canada)

Mr. A.G. Mercer
Company Solicitor
Air New Zealand Limited
(New Zealand)

Mr. V. Poonoosamy
Director Legal and International Affairs
Air Mauritius
(Mauritius)

Mr. G.N. Tompkins, Jr.
Attorney at Law
Tompkins, Harakas, Elsasser & Tompkins
(United States)

Mr. K.J.M. Walder
Legal Director
British Airways Plc
(United Kingdom)

Non-attending Member

Judge G. Guillaume *
International Court of Justice
(France)

* Judge G. Guillaume agreed to be a Member of the Group but was unable to attend the meeting.

ATTACHMENT B

LIST OF DOCUMENTS

1. Socio-economic analysis of air carrier liability limits (AT-WP/1769), dated 4 January 1996.

2. Socio-economic analysis of air carrier liability limits, 1) air carrier input on insurance cover and costs; and 2) IATA Intercarrier Agreement (AT-WP/1773), dated 27 December 1995.

3. ICAO State Letter EC 2/73-95/7 of 24 February 1995 and IATA questionnaires forming the basis of the above study.

4. Council decision 146/3 of 15 November 1995.

5. Report of the Working Group "II" on Intra-European Air Transport Policy (ECAC), dated 9 November 1995.

6. EU Commission Proposal for a Council Regulation on air carrier liability in cases of air accidents, dated 20 December 1995, including explanatory memorandum.

7. ICAO State Letter LE 3/27, 3/28-91/3, dated 16 January 1991.

8. Agreement Implementing the IATA Intercarrier Agreement, dated 1 February 1996.

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ATTACHMENT C

AGENDA

1. Opening statement - Mandate and Working Methods of the Study Group

2. Approval of the agenda

3. Discussion of issues relevant to modernize the Warsaw System

   (a) Revision of passenger liability limits

   (b) Revision of liability regime (strict *vs* fault liability; breakable limits, etc.) (Art. 20, Art. 25)

   (c) Implications of current other initiatives, including the IATA Intercarrier Agreement

   (d) Possible revision of baggage and/or cargo liability limits

   (e) Other points which may be considered:

   - update mechanism
   - compulsory up-front payments
   - point of reference for revision (WC, HP, GCP, MAP3)

4. Recommended action (Recommendations to ICAO Council)

5. Any other business

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WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

COUNCIL – 148th SESSION

INTERNATIONAL INSTRUMENT TO MODERNIZE THE LEGAL FRAMEWORK FOR AIR CARRIER LIABILITY

Subject No. 16: **Legal Work of the Organization**
Subject No. 16.3: **International Air Law Conventions**

(Presented by the Secretary General)

SUMMARY

This paper summarizes for Council's information the current status of the work on the modernization of the "Warsaw System" and outlines the progress being made with respect to the preparation of a new draft international instrument.

REFERENCES

C-WP/10381
C-DEC 147/15

1. INTRODUCTION

1.1 The Council, on 15 November 1995 during its 146th Session, decided to establish a Secretariat Study Group to assist the Legal Bureau in developing a mechanism within ICAO to accelerate the modernization of the "Warsaw System". The Study Group held its first meeting at ICAO Headquarters in Montreal on 12-13 February 1996. The results of the Study Group's deliberations and a set of ensuing recommendations were submitted to the Council during its 147th Session on 14 March 1996 on the basis of C-WP/10381, presented by the Secretary General. The recommendations called, *inter alia*, for the adoption of a new international legal instrument which would consolidate and modernize the "Warsaw System".

1.2. Having considered the matter, the ICAO Council decided, in accordance with the recommendations, to refer this matter to the Legal Committee and to request the Legal Bureau, assisted by the Study Group, to present a first draft for the new instrument for information to the Council, either during its current (148th) Session or early in the 149th Session (C-DEC 147/15).

(4 pages)
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2. NEW DRAFT INSTRUMENT

2.1 Pursuant to the Council's request, a first draft for the new instrument developed by the Legal Bureau was presented to the Secretariat Study Group at its second meeting which was held at ICAO Headquarters in Montreal on 10-12 June 1996. The members of the Study Group reviewed and revised the draft. A verbal report on the results of the discussions in the Study Group will be presented to the Council. A written report will follow in due course.

3. MAIN ELEMENTS OF NEW DRAFT CONVENTION

3.1 In accordance with the above mentioned Study Group recommendations and the Council decision of 14 March 1996, the draft features a single, consolidated legal instrument with the following elements:

a) Consolidation

i) The new draft instrument is essentially a composite text retaining the framework of the Warsaw Convention while concurrently containing some elements of the Hague Protocol. Apart from minor editorial amendments, the draft fully incorporates the provisions of Montreal Protocol No. 4 while featuring, where appropriate, certain elements of the Guatemala City Protocol and Additional Protocol No. 3 of Montreal to the extent they are compatible with the framework. Furthermore, the provisions of the Guadalajara Convention have been incorporated as a separate Chapter in the draft instrument.

ii) The draft instrument is intended to replace the current complex system of Conventions, Protocols and Protocol Amendments of the Warsaw System so as to promote legal clarity and transparency.

b) Liability Regime For Passengers

The proposed instrument introduces a two-tier liability system in case of accidental death or injury of passengers:

i) in the first tier, a regime of strict liability of up to 100,000 SDR[1], irrespective of the carrier's fault;

ii) in the second tier, a regime of fault-based liability without numerical liability limits.

In both tiers, only actual compensatory damages are recoverable and must be proven by the plaintiff. With respect to claims arising out of death or injury of passengers, as well as claims relating to baggage, the notion of "wilful misconduct" is no longer used, but has been maintained with respect to cargo.

[1] This figure was set tentatively for purposes of presentation of this draft.

c) **Passenger Liability Limits**

The draft provides for the removal of specified numerical limits of liability in case of accidental death or injury of the passenger attributed to fault or neglect of the air carrier. Irrespective of the carrier's fault, the claimant may recover up to 100,000 SDR in the first tier of liability, on proof of actual damages only.

d) **Liability Limits for Baggage and Cargo**

The limits of liability for baggage and cargo have been retained, but the amounts of limits are to be revised. The possibility of making a declaration of value for baggage and cargo has also been retained, raising the limit of liability to the value declared.

e) **Documentary Requirements**

Documentary requirements have been modified in order to facilitate the smooth flow of passengers, baggage and cargo, and to accommodate the use of new technologies in the issuance of documents of carriage.

f) **Jurisdiction**

The available fora to adjudicate claims under the proposed new Convention follow the framework established by the Warsaw Convention. The possibility of introducing an additional jurisdiction as provided for in the Guatemala City Protocol may have to be further considered as the draft matures.

g) **Notice requirement**

The notice requirement, informing passengers about the possible application of the draft Convention to their contract of carriage, has been retained along the lines of The Hague Protocol version.

h) **Notion of damages**

The concept of damages, to be awarded in accordance with the law of the forum, has been left unchanged. However, for purposes of clarification, the Preamble of the draft instrument contains a specific reference to the notion of restitution.

4. STATE OF WORK

4.1 Following the deliberations in the Study Group, it is now envisaged that a Rapporteur, appointed by the Chairman of the Legal Committee, will review and revise the draft. The Rapporteur would present a report thereon to the Legal Committee. A possible date for a meeting of the Committee could be envisaged for the first half of 1997. The Council could convene a Diplomatic Conference as soon as practicable thereafter with a view to the formal adoption of the new instrument.

5. ACTION BY THE COUNCIL

5.1 The Council is invited to note this paper.

- END -

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

C-WP/10470
20/9/96

COUNCIL – 149th SESSION

PROGRESS REPORT ON MODERNIZATION OF THE "WARSAW SYSTEM"

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Conventions

(Presented by the Secretary General)

SUMMARY

This paper supplements the information provided in C-WP/10420 outlining the main features of the new draft instrument for the modernized legal framework for air carrier liability and presents the draft instrument for information to the Council.

REFERENCES

C-WP/10381
C-DEC 147/15
C-WP/10420
C-DEC 148/16

1. INTRODUCTION

1.1 The ICAO Secretariat Study Group on the modernization of the "Warsaw System" held its second meeting at ICAO Headquarters in Montreal on June 10-12, 1996. It had for review a draft text developed by the Legal Bureau in accordance with the recommendations previously adopted during the first meeting of the Study Group, as approved by the Council on 14 March 1996 (C-DEC 147/15). The recommendations called, *inter alia*, for the adoption of a new international legal instrument which would consolidate and modernize the "Warsaw System".

2. MAIN ELEMENTS OF NEW DRAFT INSTRUMENT

2.1 The main structure and elements of the new draft instrument were reported in C-WP/10420 and accompanied by a verbal report, both of which were presented to the Council on 25 June 1996.

2.2 In light of the discussions during the second meeting of the Study Group and further to the verbal report, the following additional points warrant to be mentioned in particular.

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3. SPECIAL CONTRACT

3.1 Similar to a concept provided for in the Warsaw Convention, the new draft instrument facilitates the possibility of offering higher limits of liability than prescribed by the Convention by means of a special contract, provided that such special contract is entered voluntarily between the air carrier and the passenger. The freedom of action of States shall not be affected regarding any action considered desirable with respect to such special contract. This approach accommodates possible voluntary action by air carriers and can serve as a legal basis for the IATA Intercarrier Agreement, once it comes into force.

4. ESCALATOR CLAUSE-UPDATE MECHANISM

4.1 In order to maintain a certain degree of flexibility within the new instrument, it is envisaged to incorporate an "escalator clause" (update mechanism) into the draft Convention so as to be able to counterbalance the effects of inflation on the respective limits of liability for passengers, baggage and cargo. Details are presently elaborated within the Legal Bureau in consultation with the Air Transport Bureau.

5. JURISDICTION

5.1 The draft text contains several alternative wordings for the inclusion of an additional fifth jurisdiction. Accordingly, an additional forum shall only be available upon fulfilment of restrictive conditions, requiring the carrier's commercial and/or operational presence instead of mere agency representation, in the passenger's home State.

6. ARBITRATION

6.1 It is intended to widen the scope for arbitration as alternative means for the settlement of disputes arising out of the new instrument so that arbitration will no longer be limited to disputes arising out of the carriage of cargo.

7. UPFRONT-PAYMENT CLAUSE

7.1 The new instrument does not make upfront payments mandatory. However, the new instrument does not preclude the possibility for States to legislate on this matter, or act on it through a code of conduct.

8. ADOPTED DRAFT TEXT

8.1 The new draft instrument, which was adopted at the end of the second meeting of the Secretariat Study Group, is presented in the **Attachment**. The attached draft reflects the views of the Secretariat Study Group and of the Legal Bureau. The Secretariat Study Group worked on the basis of consensus. In those cases where a consensus could not be reached on particular issues, or opinions differed widely, the draft text denotes the relevant passages/items by use of square brackets. In a number of

instances, this method was also used to indicate that certain issues warranted further dedicated discussion and study by the Legal Committee.

9. STATUS OF WORK

9.1 A Rapporteur, appointed by the Chairman of the Legal Committee, is to review and revise the draft and report thereon to the Legal Committee which is planned to be convened from 28 April - 9 May 1997. The Council could convene a Diplomatic Conference as soon as practicable thereafter with a view to the formal adoption of the new instrument. Specific details will be set out in a paper from the Secretary General on legal meetings (Item No. 12, Programme of Meetings).

10. ACTION BY THE COUNCIL

10.1 The Council is invited to note this paper and the draft instrument presented in the Attachment.

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20 September 1996

Secretariat Study Group on the "Warsaw System"

Draft New Warsaw Instrument

[ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air]

Clean Text

(Drafted pursuant to Council Decision C-DEC 147/15 of 14 March 1996)

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[ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air]

THE STATES PARTIES TO THIS CONVENTION,

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929 and other related instruments to the harmonization of private international air law,

DESIROUS to modernize and consolidate the Warsaw Convention and related instruments in order to bring them in line with modern day requirements,

RECOGNIZING the importance of ensuring protection of the consumer in international air transport and equitable compensation based on the principle of restitution,

REAFFIRMING the desirability of an orderly development of modern international air transport operations and the smooth flow of passengers, baggage and cargo,

CONVINCED that collective State action for a progressive consolidation and further harmonization of uniform rules is the most adequate means of achieving an equitable balance of interests,

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 - Scope of Application - Definitions

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for remuneration. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. 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 international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose

its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 - Passengers and Baggage

1. In respect of the carriage of passengers and checked baggage an individual or collective document of carriage and baggage check 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.

2. Any other means which preserves a record of the information indicated in a) and b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph. If such other means are used, the carrier shall, if so requested by the passenger, deliver to the passenger a written statement of such information referred to in the foregoing sentence and preserved by such other means. The carrier shall deliver to the passenger a baggage identification record for each piece of checked baggage.

3. The passenger shall be given notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, loss of or damage to baggage, and delay.

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

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4 - Cargo

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. Any other means which preserves a record of the carriage to be performed may, with the consent of the consignor, 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 receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

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

Article 5 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and handed by him to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 6 - Documentation of Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 4 are used.

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Article 7 - Contents of Air Waybill and Receipt for the Cargo

The air waybill and the receipt for the cargo shall contain:

(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 weight of the consignment.

Article 8 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

Article 9 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4.

2. The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on his behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by him, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 10 - Evidentiary Value of Documentation

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence

against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 11 - Right of Disposal of Cargo

1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the receipt for the cargo delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the receipt for the cargo.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

Article 12 - Delivery of the Cargo

1. Except when the consignor has exercised his right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to him, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given them by Articles 11 and 12, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract of carriage.

Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties - Negotiable Air Waybill

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the receipt for the cargo.

Article 15 - Formalities of Customs, Octroi or Police

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, his servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury to Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or [personal] [bodily] injury of a passenger upon condition only that the event [accident] which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted [solely] from the state of health of the passenger, [or from the normal operation of the aircraft, or both].

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event [accident] which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage [or from the normal operation of the aircraft, or both].

3. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and objects carried by the passenger.

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Article 17 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, *the* cargo resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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 18 - Delay

1. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures.

2. *[For the purpose of this Convention, delay means (definition to be inserted).]*

Article 19 - Reduction of Recovery

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall

likewise be wholly or partly exonerated from his liability to the extent that he proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

Article 20 - Extent of Carrier Liability in Case of Death or Injury

The liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights[1] [unless the damage so sustained was due to the fault or neglect of the carrier or of his servants or agents acting within their scope of employment.] [and the air carrier shall not be liable for damages exceeding this amount if he proves that he and his servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures.]

Article 21 - Limits of Liability - Conversion of Monetary Units

1. (a) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to 4 150[2] Special Drawing Rights.

(b) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000[2] Special Drawing Rights for each passenger unless the passenger has made, at the time when the baggage 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 the sum is greater than the passenger's actual interest in delivery at destination.

2. (a) In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17[3] Special Drawing Rights per kilogramme, unless the 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 the sum is greater than the consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining 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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other

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[1] This amount was set as a tentative figure by the Study Group.

[2] This figure is taken from Addtional Protocol No. 3 and is used for illustrative purposes only.

[3] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(c) The foregoing provisions of paragraphs 1(a) and 2(a) of this Article 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.

3. The limits prescribed in Article 20 and 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.

4. (a) The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

(b) Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 4(a) of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of 1 500 000[4] monetary units per passenger with respect to Article 20; 62 500[4] monetary units per passenger with respect to paragraph 1(a) of this Article; 15 000[4] monetary units per passenger with respect to paragraph 1(b) of this Article; and 250[4] monetary units per kilogramme with respect to paragraph 2(a) of this Article. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

(c) The calculation mentioned in the last sentence of paragraph 4(a) of this Article and the conversion method mentioned in paragraph 4(b) of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value

[4] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

for the amounts in Articles 20 and 21 as would result from the application of the first three sentences of paragraph 4(a) of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 4(a) of this Article, or the result of the conversion in paragraph 4(b) of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

5. *[A provision for periodic updating of the limits of liability mentioned in Articles 20 and 21 to take into account of inflation ("escalator clause") to be inserted.]*

6. By agreement between the parties to the contract of carriage, higher limits of liability than those provided for in this Convention may be stipulated.

Article 22 - Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 23 - Basis of Claims

In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

Article 24 - Servants, Agents - Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the 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 the carrier himself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, his servants and 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.

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Article 25 - Timely Notice of Complaints

1. Receipt by the person entitled to delivery of baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his disposal.

3. Every complaint must be made in writing upon the document of carriage or by separate notice in writing despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 26 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. In respect of damage resulting from the death, injury or delay of a passenger or the destruction, loss, damage or delay of baggage, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article, or in the territory of one of the States Parties, before the Court in the jurisdiction in which the carrier [has a commercial presence] [has an establishment] [operates a service] if the passenger has his domicile or permanent residence in the territory of the same State Party.

3. Questions of procedure shall be governed by the law of the Court seised of the case.

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Article 28 - Arbitration

[1. Subject to the provisions of this Article, the parties to the contract of carriage may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. In the case of carriage of passengers, such agreement, in order to be valid, shall require the passenger's individual written consent or individual written confirmation after the event giving rise to the claim has occurred.

3. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

4. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

5. The provisions of paragraphs 2, 3 and 4 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.]

Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or cargo is subjected to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

2. In the case of carriage of this nature, the passenger [or his representative] [or any person entitled to compensation in respect of him], can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the

destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 31 - Liability of Third Parties - Indemnification

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Provisions Relating to Combined Carriage

Article 32 - Intermodal Transport

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Supplementary Provisions Relating to Carriage by Air Performed by a Person other than the Contracting Carrier

Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes an agreement for carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier ") performs , by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall,

except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.

Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier , be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20 and 21 of this Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 21 of this Convention, shall not affect the actual carrier unless agreed to by him.

Article 36 - Addressee of Complaints and Orders

Any complaint to be made or order to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, orders referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

Article 37 - Servants and Agents of Actual Carrier

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he is, unless it is proved that he acted in a manner that prevents the limits of liability from being invoked in accordance with Articles 20 and 21 of this Convention.

Article 38 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention [Chapter], but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

Article 39 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or

separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has his principal place of business.

Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the two carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Final Provisions

Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 44 - Freedom to Contract

Except as provided in Article 3, paragraph 4 and Article 4, paragraph 3, nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

Article 45 - Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 46 - Definition of Days

The expression "days" when used in this Convention means calendar days not working days.

[Final clauses to be inserted]

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WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

C-WP/10576
7/3/97

COUNCIL – 150TH SESSION

Subject No. 12.5: Plans for Legal Meetings
Subject No. 16: Legal Work of the Organization

MODERNIZATION OF THE "WARSAW SYSTEM" - RAPPORTEUR'S REPORT AND MATTERS RELATING TO THE 30TH SESSION OF THE LEGAL COMMITTEE

(Presented by the Secretary General)

REFERENCES

Doc 7669-LC/139/4, *Constitution and Rules of Procedure of the Legal Committee*
C-WP/10381
C-DEC 147/15
C-WP/10470
C-DEC 149/2
C-WP/10493
C-WP/10529
C-DEC 149/14
LC/30-WP/4-1

1. INTRODUCTION

1.1 The Council, on 15 November 1995 during its 146th Session, decided to establish a Secretariat Study Group to assist the Legal Bureau in developing a mechanism within ICAO to accelerate the modernization of the "Warsaw System". The Study Group held two meetings; during the first one, which was held from 12-13 February 1996, the Study Group agreed upon a set of recommendations, which called, *inter alia*, for the development of a new international instrument which would modernize the "Warsaw System" (C-WP/10381).

1.2 Having considered the matter, the Council decided to refer this matter to the Legal Committee and requested the Legal Bureau, assisted by the Study Group, to present a first draft for the new instrument for information to the Council. It was also decided that a Rapporteur be appointed who would review and revise the draft instrument and to report thereon to the Legal Committee. It was further agreed upon that the Rapporteur's report be presented to the Council, with a view of convening a meeting of the Legal Committee at an early date in 1997, provided the matter had received a sufficient degree of maturity (C-DEC 147/15).

1.3 The draft instrument, which was adopted at the end of the second meeting of the Study Group (10-12 June 1996), was presented for Council's information on 2 October 1996 on the basis of Council Working Paper C-WP/10470. In considering the draft, the Council placed special emphasis on the need for the Legal Committee to finalize work on the new instrument by the close of its 30th Session to be held from 28 April to 9 May 1997 so that a Diplomatic Conference could be convened as soon as possible thereafter to formally adopt the new instrument (C-DEC 149/2).

1.4 On 19 September 1996, the Acting Chairman of the Legal Committee appointed a Rapporteur (Mr. V. Poonoosamy, Mauritius) to carry out a study on the subject "The modernization and consolidation of the Warsaw System", taking into account the draft instrument and providing comments and recommendations on it. The Report of the Rapporteur is presented in **Attachment A** to this paper.

2. 30th SESSION OF THE LEGAL COMMITTEE

2.1 According to the Constitution of the Legal Committee and Rule 3 of the Rules of Procedure, the sessions of the Legal Committee "should be convened at such times and places as may be directed or approved by the Council".

2.2 In consideration of the subject "Programme of Meetings for 1997", the Council on 4 December 1996 reviewed, *inter alia*, a report by the Secretary General on meetings in the legal field (C-WP/10493) and a report by the Council Working Group on Meetings (C-WP/10529) and decided to convene the 30th Session of the Legal Committee from 28 April to 9 May 1997 at ICAO Headquarters in Montreal (C-DEC 149/14).

2.3 The Provisional Agenda of the 30th Session of the Legal Committee is attached hereto **(Attachment B)**. According to Rule 10(c) of the Rules of Procedure of the Legal Committee, the provisional agenda is subject to the approval of the Council. Items 1, 2, 3, 6 and 7 are standard subjects included in the agenda of each session. To take into account the decision of the Council outlined in paragraph 1.3 above, the main item for consideration by the Legal Committee will be agenda item 4, "The modernization of the 'Warsaw System' and review of the question of international air law instruments. Item 5 will cover other items on the General Work Programme of the Legal Committee, and the Committee will be requested to merely note the information provided in the Working Papers relating to item 5.

3. INVITATIONS TO OBSERVERS TO ATTEND THE 30TH SESSION OF THE LEGAL COMMITTEE

3.1 As has been the practice of the Organization, and in accordance with Rule 5 of the Rules of Procedure of the Legal Committee, "non-Contracting States and international organizations as are duly authorized by the Council may be represented at sessions of the Committee by one or more observers". In line with previous practice, it is suggested that all non-Contracting States of ICAO be invited to attend the 30th Session of the Legal Committee. It is also recommended to extend an invitation to the international organizations appearing on the list set out in **Attachment C** of this Working Paper.

4. ACTION BY THE COUNCIL

4.1 The Council is invited :

a) to note the Rapporteur's report in **Attachment A**;

b) to approve the Provisional Agenda for the 30th Session of the Legal Committee as set out in **Attachment B**;

c) to agree that an invitation to attend the 30th Session of the Legal Committee be extended to all non-Contracting States as well as those international organizations set out in **Attachment C.**

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**Report of the Rapporteur on
the Modernization and Consolidation of the Warsaw System**

presented by

Vijay Poonoosamy
(Mauritius)

1. INTRODUCTION

1.1 The purpose of this report is to provide a study on the subject of the modernization and consolidation of the Warsaw System and in particular to review and comment on the new draft instrument (*ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air*) developed by the Legal Bureau of ICAO with the assistance of the ICAO Secretariat Study Group on the Modernization of the Warsaw System.

2. THE WARSAW FAMILY

2.1 Signed on behalf of 23 countries on 12 October 1929 the *Convention for the Unification of Certain Rules Relating to International Transportation by Air*[1] ("the Warsaw Convention") came into force on 13 February 1933. With its 127 parties today, the Warsaw Convention is undoubtedly the most widely ratified private international law treaty.

2.2 By providing a set of uniform rules, the Warsaw Convention eliminated many of the difficult conflict of laws questions, resolved jurisdictional questions, prescribed a limitation period and created a uniform set of documentation. In the liability area the Convention reversed the burden of proof by providing that the carrier's liability would be established on mere proof of damage unless the carrier discharged the burden of establishing available defences. As a *quid pro quo* for this reversal of the burden of proof, the liability of the carrier was limited to 125,000 gold francs (about US $ 10,000) per passenger, except when the plaintiff proved wilful misconduct on the part of the carrier.

2.3 Discussions and studies by the Legal Committee of ICAO and by IATA led to the adoption by the Hague Conference on 28 September 1955 of the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*[2] ("the Hague Protocol"). The Protocol, which entered into force on 1 August 1963 and currently has 113 parties, doubled the liability limit for passenger injury or death to 250,000 gold francs (about US $ 20,000), modernized and simplified the provision on documents of carriage and clarified the concept of wilful misconduct.

2.4 The Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol permit the carrier and the passenger to agree to a limit of liability higher than that specified in the respective instrument.

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[1] Reprinted as ICAO Doc 7838 in 1957

[2] ICAO Doc 7632

2.5 The 1961 *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*[3] ("the Guadalajara Convention"), which is in force since 1964, clarified that the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol applied even where the 'contracting' and 'actual' carriers were different.

2.6 In 1965, the United States concluded that the liability limits were too low and not only refused to ratify the Hague Protocol but also gave notice of denunciation of the Warsaw Convention. The notice was, however, withdrawn when the carriers operating to, from and via the US developed, under the auspices of IATA, the 1966 Montreal Agreement, a contractual arrangement between carriers to increase their liability limit for injury or death to passengers to US $ 75,000 inclusive of legal fees and costs, or to US $ 58,000 exclusive of legal fees and costs, and to accept the concept of strict liability for this new limit.

2.7 As a result of further work in ICAO on the revision of the Warsaw Convention, a 1971 Diplomatic Conference adopted the *Protocol to Amend the Warsaw Convention as amended by the Hague Protocol*[4] ("the Guatemala City Protocol"). The Protocol set an unbreakable liability limit in respect of passengers to about 1,500,000 gold francs (US $ 100,000), simplified and updated the documents of carriage, adopted the regime of strict liability and included a provision permitting States to adopt national supplementary compensation systems to cater for the interest of citizens of States with a high standard of living. The Protocol has so far been ratified by 11 States only and is unlikely ever to come into force.

2.8 The sums mentioned above in gold francs are deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of millesimal fineness nine hundred and which may be converted into any national currency. The fact that some Courts used the official price of gold whilst others used its market price for such conversions evidently led to significant disuniformity, inequity and confusion. Moreover, the member States of the International Monetary Fund ("IMF") decided, by the Second Amendment of the IMF Articles of Agreement of 1975, to eliminate gold as the basis of the international monetary system.

2.9 In 1975, the Diplomatic Conference held at Montreal adopted four Protocols for the amendment of the instruments of the Warsaw System.

2.10 The sole purpose of Additional Protocols Nos. 1[5], 2[6] and 3[7] of Montreal is to introduce in the Warsaw Convention, that Convention as amended at The Hague and as amended at Guatemala City, respectively, the concept of Special Drawing Rights (SDRs). The SDR is as defined by the IMF and its value in terms of national currencies varies. Montreal Protocol No. 4[8] amends the Warsaw Convention as amended by the Hague Protocol in respect to the international carriage of cargo and postal items.

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[3] ICAO Doc 8181

[4] ICAO Doc 8932/2

[5] ICAO Doc 9145

[6] ICAO Doc 9146

[7] ICAO Doc 9147

[8] ICAO Doc 9148

2.11 The Diplomatic Conference of 1975 also adopted a Resolution calling for the consolidation of the instruments of the Warsaw System into a single Convention.

2.12 In 1976, a number of European countries belonging to the so-called "Malta Group" took the initiative of making it a condition of national air transport licensing systems that their respective carriers include in their conditions of carriage a provision to the effect that their liability limit be raised to 80,000 or 100,000 SDRs. The Malta Group example has been followed by various other governments and sometimes spontaneously by carriers of other nationalities. In some cases the Warsaw System defence was waived; in others not. Fragmentation had begun.

2.13 In May 1985 the Constitutional Court of Italy held[9] that the provisions of Italian law which gave effect to Article 22(1) of the Warsaw Convention as amended by the Hague Protocol were anticonstitutional. Italian Law 274 of 07 July 1988, however, imposed a new limit of 100,000 SDRs and compulsory insurance.

2.14 In October 1987, the Fourth Lloyd's of London Press International Aviation Law Seminar, held at Alvor in Portugal, devised, on the basis of proposals first made by Professor Bin Cheng and Mr. Peter Martin ("Alvor I"), the Alvor Draft Convention Relating to International Carriage by Air ("Alvor II"). In respect to liability for death or personal injury of passengers, Alvor II adopted a two-tier system: absolute liability up to 100,000 SDRs, with an optional second tier based on proved fault which contracting States were, under conditions, entitled individually to establish by domestic legislation carrying either a raised limit or no limit at all. Alvor II is a comprehensive text reunifying the Warsaw System, with detailed commentary attached to each provision and should be read together with my report. A copy will be made available as an Information Paper to the Legal Committee.

2.15 In November 1992, the Japanese carriers amended their respective Conditions of Carriage, in order to waive liability limits for passenger injury or death in international carriage by air governed by the Warsaw Convention or the Hague Protocol. In addition, for claims up to 100,000 SDRs, the Japanese carriers also waived their rights to invoke Article 20(1) of the Warsaw Convention.

2.16 In June 1994, the Sixteenth Plenary Session of the European Civil Aviation Conference adopted Recommendation 16/1, providing for a substantial increase of the limits prescribed by the Warsaw/Hague regime to at least 250,000 SDRs. This recommendation urged carriers to enter into an intercarrier agreement along the lines of the Montreal Agreement of 1966.

2.17 In 1995, the Civil Aviation (Carriers' Liability) Act 1959 of Australia was amended to provide for an increase of liability limits in respect of passengers to the amount of 260,000 SDRs in international carriage by Australian carriers.

2.18 In June 1995, IATA convened an Airline Liability Conference in Washington. The Conference concluded that the Warsaw System must be preserved although its liability limits were grossly inadequate and should be revised as a matter of urgency. The Washington Conference eventually led to the IATA Intercarrier Agreement on Passenger Liability ("IIA") which was adopted by the 51st IATA

[9] Coccia v Turkish Airlines (1985) 1 Shawcross & Beaumont Aviation Report VII/175

Annual General Meeting in Kuala Lumpur on 31 October 1995 for implementation by signatories on 1 November 1996, subject to any necessary Governmental approval.

2.19 The IATA Intercarrier Agreement is stated to be an "umbrella accord" which adopts a universal approach to waiver of limits in respect of passenger liability so as to allow for full compensatory recoverable damages, in respect of death or injury to passengers. As of 30 January 1997, it had been signed by 80 carriers.

2.20 In January 1996, the IATA Legal Advisory Sub-Committee on Passenger Liability drafted the Agreement on Measures to implement the IATA Intercarrier Agreement ("MIA"), an agreement which has been signed by 47 carriers as at 30 January 1997.

2.21 A carrier signing the MIA undertakes (just as the Japanese carriers have done since November 1992 under the Japanese Initiative) not to invoke the limitation of liability in Article 22(1) of the Warsaw Convention as to any claim for recoverable compensatory damages arising under Article 17 of the Convention and not to avail itself of any defence under Article 20(1) of the Convention with respect to that portion of such claim which does not exceed 100,000 SDRs.

2.22 At its sole option, the carrier may under the MIA also agree that, subject to applicable law, recoverable compensatory damages for such claims may be determined by reference to the law of the domicile or permanent residence of the passenger.

2.23 Moreover, because it was recognized that on some routes claims are normally not for more than 100,000 SDRs, a carrier may also under the MIA specify a lower limit for the waiver of Article 20(1) defence on specified routes as may be authorized by Governments concerned with the transportation involved.

2.24 On 15 February 1996, the Commission of the European Union presented a proposal for a Council Regulation on air carrier liability which provides for a removal of any limit of liability with regard to fault-based liability. It also introduces the principle of strict liability up to 100,000 ECU (approximately 100,000 SDRs).

2.25 On 12 November 1996, the United States Department of Transportation ("US DOT") issued its Interim Order 96-11-6 approving the IIA and MIA Agreements filed by IATA subject to the conditions which included the following:

a) the MIA's optional application of the law of the domicile provision would be required for operations to, from, or with a connection or stopping place in the United States; and

b) the MIA's optional provision for less than 100,000 SDRs strict liability on particular routes could not apply for any operations to, from or with a connection or stopping place in the United States.

2.26 On 20 December 1996 IATA requested the US DOT to reconsider parts of its Interim Order. In response the US DOT modified its Order of 12 November 1996 by its Order 97-1-2 issued on 8 January 1997 and deleted the condition applied to the original approval of the MIA which would require the application of the law of the domicile.

2.27 The 8 January 1997 Order is also an interim one and the US DOT will issue a "Final Order" on or before 30 June 1998.

2.28 Self-evidently, a major shortcoming of the Warsaw System, which ironically was designed for the unification of certain rules relating to carriage by air, is now its very lack of uniformity on a most crucial point of the system. With the various permutations within the Warsaw System (including the instruments which are not yet in force), national laws and special contracts, it is estimated that there are potentially some 44 different combinations of liability regimes.

2.29 As Professor Bin Cheng, Emeritus Professor of Air & Space Law in the University of London, pointed out more than 20 years ago:

"The resultant situation is, therefore, one of utter chaos. Not even an expert in the field is always able to tell which regime a particular carriage comes under unless he is armed with a multitude of reference data, not all of which are always readily available. Even legal advisers and judges are confused. This possibility is in itself prejudicial to the interests of the public. But apart from the confusion and consequential prejudice which this multiplicity of liability regimes creates, the present system or rather lack of system breeds inevitable discrimination among users of air transport."[10]

2.30 Undoubtedly, the current disuniformity of the Warsaw System carries the seeds of its destruction. Yet the disintegration of the Warsaw System will not be to the advantage of either passengers or carriers since its benefits, for example, in removing choice of law and choice of jurisdiction conflicts outweigh its disadvantages which arise primarily from limitation of liability.

3. WARSAW: THE GLOBAL RESPONSE

3.1 Recent *ad hoc* initiatives, which may be useful as proposals for interim industry or regional measures, should not prejudice the objective of a long overdue global and uniform solution to the problems (which are no longer limited to the liability issues) affecting the Warsaw System. The global problems of the Warsaw System require global solutions. An all-encompassing, world-wide, unified and modernized framework must therefore be promoted at the level of Governments and in accordance with the international law of treaties. Concerted action is essential since only such a framework will serve the objective interests of the international community and avoid further fragmentation, disuniformity, inequity, outdating and confusion.

3.2 The 1995 IATA Airline Liability Conference properly concluded that it was for Governments to act urgently, through ICAO, to update the Warsaw System and to address liability issues.

3.3 As part of a comprehensive effort to accelerate the modernization of the Warsaw System, the Council of ICAO established in December 1994 the parameters of a socio-economic analysis of the limits applying to carrier liability to be carried out by the ICAO Secretariat in co-ordination with IATA.

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[10] International Law Association, Report of the 57th Conference (Madrid) 1976, pgs 48-49

3.4 Of the 72 States which replied to the ICAO questionnaire, 52 (72 percent) expressed dissatisfaction with the level of the limits applying to carrier liability for accidental death or personal injury to passengers under the Warsaw System. It should be noted that carriers registered in those 52 States produced in 1994 almost 80 percent of total international scheduled passengers carried and passenger-kilometres performed.

3.5 The response was broadly similar among the replies received by IATA to its questionnaire to carriers. Of the 53 carriers which replied, 38 (72 percent) expressed dissatisfaction with the adequacy of the limits in force in their countries.

3.6 Relative to the liability limits for death or personal injury, there was a broad range of responses from both States and carriers varying from a low of 20,000 SDRs through to unlimited liability.

3.7 With regard to the limits for the destruction, loss, damage or delay of baggage, 41 States expressed dissatisfaction with the current situation while 26 States wished to retain the *status quo*. In the case of carriers, only 17 (out of 53) expressed dissatisfaction with the current limits.

3.8 On the issue of the limits for the destruction, loss, damage or delay of cargo, opinions were evenly split: 35 States expressed a need to update the current limits, while another 35 States were satisfied with the *status quo*. Only 12 (out of 53) carriers expressed dissatisfaction with the current limits.

3.9 The various responses to the ICAO and IATA questionnaires reflected a wide spectrum of socio-economic expectations and standards regarding liability limits; thus it must be recognized from the outset that it will not be possible to meet all such expectations and standards in any new international instrument and that compromise is inevitable. However, such compromise must be progressive, as fair and equitable to all parties as possible and duly ratified by the largest number of States possible.

3.10 In October 1995, the 31st Session of the ICAO Assembly mandated the Council to continue its efforts to modernize the Warsaw System as expeditiously as possible.

3.11 In November 1995, the Council of ICAO agreed that a Study Group be established to assist the Legal Bureau of ICAO in developing a mechanism to accelerate the modernization of the Warsaw System.

3.12 In January 1996, the ICAO Study Group on the Warsaw Convention, composed of legal experts from various backgrounds, including Government, private legal practice, airline industry and academia, was set up and had its first meeting in February. The Group was of the unanimous view that urgent ICAO action was required to redress the major shortcomings of the present system of liability and to develop a new international instrument to consolidate and modernize the Warsaw System.

3.13 After considerable discussion, the Group recommended the adoption of a two-tier liability regime providing for full compensatory recoverable damages in case of accidental death or injury of passengers: up to the amount of 100,000 SDRs irrespective of the carrier's fault, and for amounts exceeding 100,000 SDRs on the basis of the carrier's fault.

3.14 In March 1996, the ICAO Council considered the first report of the Study Group and requested the Legal Bureau to prepare a draft new instrument with the assistance of the Group.

3.15 In line with this schedule, a second meeting of the Study Group was held in June 1996 in Montreal to work on the draft new instrument. On 25 June 1996 the main structure and elements of the draft new instrument on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air accompanied by a verbal report were presented to the Council.

3.16 After consultations with Dr. A. Kotaite, President of the Council, Dr. P. Rochat, the Secretary General, and Dr. L. Weber, the Secretary of the Legal Committee, Mr. G. Lauzon, the Acting Chairman of the Legal Committee, acting under Rules 6 and 17 of the Rules of Procedure of the Legal Committee, appointed me your Rapporteur on 19 September 1996 to carry out a study on the subject of "The modernization and consolidation of the Warsaw System". The text of the draft new instrument prepared by the ICAO Legal Bureau was received by me on 14 October 1996 and the deadline for the submission of my report was set at 20 January 1997.

4. WARSAW: THE NEED FOR A NEW DEAL

4.1 The provisions of the Warsaw Convention on liability were drafted in the light of a set of circumstances and objectives, in particular, the recognized difficulty faced by a plaintiff in proving negligence because of the novelty and highly technical nature of the evidence required and the accepted need to protect an international air transport industry still in its infancy.

4.2 A deal was therefore struck to meet these objectives: the burden of proof was reversed - the carrier's fault would be assumed on proof of damage unless the carrier could prove that he, his servants or agents, had taken all necessary measures to avoid the damage. To balance this reversal of the burden of proof, as a *quid pro quo*, the carrier's liability in terms of the amount of damages was limited unless the plaintiff was able to prove "wilful misconduct" on the part of the carrier, his servants or agents.

4.3 However, the circumstances and objectives which led to this deal and the international community's approach to the international air transport industry have somewhat changed:

- the need to protect the international air transport industry as an infant industry can no longer be justified;

- the need to discriminate in favour of the plaintiff, as regards the burden of proof, is reduced by the improvement of both aircraft safety and understanding of aircraft technology and also by use of the *res ipsa loquitur* maxim; and

- the applicable Warsaw liability limits are indefensibly low in many jurisdictions.

4.4 Moreover, time is of the essence because, over and above the self-evident socio-economic and political pressures on the liability limits there are also increasing technological pressures (e.g. electronic ticketing) on the documentary aspects of the ageing Warsaw System.

4.5 Change is therefore overdue. But moving from one unacceptable extreme to another must be resisted. The necessary change cannot be based on a selective approach to the original Warsaw deal but must be based on a new deal - one which furthers the reasonable interests of both the carriers and their customers.

4.6 A new self-standing Convention (which nevertheless would incorporate **as far as possible** the existing language of the Warsaw System so as to preserve the necessary judicial precedents) is therefore required.

4.7 However, the provisions of any new instrument must not only be desirable (i.e. simple, workable, equitable and reasonable in the light of all relevant circumstances) but also universally acceptable to the international community. Provided that the provisions of a new instrument can judiciously combine desirability and acceptability and that the necessary preparatory work is done thoroughly, it is not unrealistic to expect its adoption and rapid entry into force.

5. WARSAW: THE NEXT GENERATION

5.1 The *ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air* uses as its basis essentially the composite text of the Warsaw Convention along with the major elements of the Hague Protocol. It fully incorporates Montreal Protocol No. 4 and contains certain elements of the Guatemala City Protocol and Additional Protocol No. 3 where appropriate. In addition, the provisions of the Guadalajara Convention have been incorporated as a separate Chapter in the draft instrument.

5.2 The draft Convention purports to significantly revise, modernize and consolidate the Warsaw System with the objective of achieving simplicity, fairness, flexibility and compatibility with modern technology.

5.3 The self-contained clean text of the draft prepared by the ICAO Legal Bureau was set out as the **Attachment** to C-WP/10470. The very useful reference text, which indicates in its right-hand margin the source of each provision and also prepared by the ICAO Legal Bureau, is set out as supporting document LC/30-WP/4-1. Extreme care must, of course, be taken when examining the draft instrument in the official ICAO languages other than English.

5.4 Whenever necessary, I comment below on the articles of the clean text of the draft new Convention. To avoid any unnecessary complications I propose to refer most of my drafting suggestions to the Drafting Committee of the Legal Committee.

5.4.1 CHAPTER I
Article 1 - Scope of application - Definitions
Paragraph 4

For the sake of convenience and comprehensiveness, I suggest the following be substituted: "Carriage performed wholly or partly by a person acting on the authority of another person who as principal concludes an agreement with a passenger or consignor shall, subject to the terms set out in Chapter V, be deemed to be international carriage under this Convention".

5.4.2 **CHAPTER II**
General comment

For the sake of convenience and clarity I suggest that cargo be dealt with under a separate section.

5.4.3 **Article 3 - Passengers and Baggage**

To respond to the concerns of the consumer, having due regard to operational and commercial realities the requirements of the carrier and to avoid inhibiting technological developments, I submit the following:

There should be a single document of carriage for the passenger only.

In order to allow for electronic ticketing, "any other means" may be used to preserve the document of carriage. If "any other means" is used the passenger must be offered the delivery of a written statement of the information contained in the document of carriage and stored by "any other means". Such a statement must be meaningful and useful, for example, to meet the requirements of immigration authorities.

(3) Since passengers will need to have some evidence of delivery to support a claim, the carrier must issue and deliver a receipt and identification record (i.e. a personalized and numbered baggage tag/receipt which may also incorporate the relevant notice as per paragraph (4) below) for each piece of checked baggage delivered for carriage, irrespective whether a document of carriage is delivered or "any other means" used.

(4) Carriers must give notice to the passenger about the possible application of the limitation of carrier liability contained in the new Convention.

In its September 1989 report, the International Foundation of Airline Passenger Associations (IFAPA), states that:

"....we consider it imperative that if the airline is to be given the benefit of a liability limitation then it has a duty to provide adequate notice, so that the passenger in turn can decide whether he wants to take other insurance measures. This duty should be clearly codified in the Warsaw instruments."[11]

Adequate notice (i.e. clear, short, easily understood and delivered in a timely manner) to the passenger that the carrier's liability is or may be limited is a fundamental safeguard of the rights of the consumer. Since it is proposed that there should be no predetermined limit on the carrier's liability in respect of the death or injury of passengers, notice should only be given in respect of delay and baggage. Failure to comply should not entitle the carrier to rely on the limits set out in Article 21.1.

Articles 3.1, 3.2 and 3.3 could therefore be redrafted to convey the foregoing submissions as follows:

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[11] Fair Compensation for Passengers in Aircraft Accidents: Actions for the 90s (IFAPA, 1989), pg 37

"1. In respect of carriage of passengers an individual or collective document of carriage shall be delivered containing:

an indication of places of departure and destination;

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.

Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to 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.

3. The carrier shall deliver to the passenger a receipt and identification record for each piece of checked baggage.

The carrier shall ensure that the passenger is given notice to the effect that this Convention may be applicable and that this Convention limits the liability of carriers for loss of, or damage to, baggage and delay.

5. A carrier which fails to comply with paragraph 4 shall not be entitled to avail himself of the provisions of Article 21, paragraph 1.

Paragraph 5

Further to my comments under paragraph 3: "...which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability." must be deleted.

5.4.4 **Article 4 - Cargo**

Same comments as for Article 3. In addition I suggest that Article 7 be integrated with Article 4.1, 4.2 and 4.3.

5.4.5 **Article 7 - Contents of Air Waybill and Receipt for the Cargo**

Contrary to Article 8(g) of the Warsaw Convention and standard airline practice, this Article does not require that the nature of the goods be indicated on the air waybill. In the light of the indemnity contained in Article 9.2 below, that there should be such a requirement.

5.4.6 **Article 8 - Non-compliance with Documentary Requirements**

My comments in respect of notice under Article 3 apply to cargo and "...which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability." must therefore be deleted.

5.4.7 **Article 9 - Responsibility for Particulars of Documentation**
Paragraph 3

For the sake of completeness, the following should be added at the end of the paragraph: "... unless the particulars and statements were provided by or on behalf of the consignor".

5.4.8 **Article 10 - Evidentiary Value of Documentation**

Reference should be made to "any other means" as per Article 4.2.

5.4.9 **Article 11 - Right of Disposal of Cargo**
Title

For the sake of consistency with Article 11.1 and 11.3, the title should read "The Right of Disposition of Cargo".

Paragraph 3

Reference should be made to "any other means" as per Article 4.2.

5.4.10 **Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties - Negotiable Air Waybill**

Reference should be made to "any other means" as per Article 4.2.

5.4.11 **Article 15 - Formalities of Customs, Octroi or Police**

Is still any justification for the reference to "...octroi..." or is it an anachronism only?

5.4.12 **CHAPTER III**

We must recognize that the most criticized provisions of the Warsaw System are those relating to the liability of the carrier. We must also recall that the liability provisions were built on a *quid pro quo* basis and a (then) carefully balanced compromise between the interests of the customers and the carriers. Neither those provisions nor the compromise are universally acceptable today. To enable us to formulate new provisions which would be both desirable and acceptable world-wide we must first offer the fresh compromise or New Deal I have advocated above.

I submit that the fundamental issue is that of the measure of damages as determined by the law applicable to the determination of compensation. Once this issue can be resolved to the satisfaction of most, I am confident that the other related issues such as the basis of the liability, applicable defences and jurisdictions would be capable of being addressed practically. The measure of damages is the most fundamental issue because of the evident lack of uniformity in the award of damages in different jurisdictions. Some jurisdictions are more generous (or excessive) than others. In some jurisdictions the awards are made by juries, in others by judges and the measure of damages varies extensively from one jurisdiction to another. That is perhaps why the application of the law of domicile of the passenger has become such a sensitive issue for both those in favour and those against.

Bearing in mind that the Preamble to the draft Convention provides for both "equitable compensation based on the principle of restitution" and "an equitable balance of interests", and in order to promote uniformity, predictability and universality, it is critical for the Legal Committee to devise and agree on a common method for determining the amount of compensation. The aim would not be that everyone gets the same amount of damages but that a uniform set of rules for assessing integral restitution be applied. In this context, the possibility of determining compensation in accordance with international law and the principles of justice and equity, irrespective of the competent jurisdiction before which an action is brought, should be canvassed.

Such a solution has been advocated by Professor Bin Cheng and has also been adopted by the 1972 *Convention on International Liability for Damage Caused by Space Objects*. Article XII of the 1972 Convention provides that:

"The compensation which the launching State shall be liable to pay for damage under this Convention shall be determined in accordance with international law and the principles of justice and equity, in order to provide such reparation in respect of the damage as will restore the person, natural or juridical, State or international organization on whose behalf the claim is presented to the condition which would have existed if the damage had not occurred."

Though public international law addresses rights and obligations of subjects of international law, damages are often assessed according to injuries suffered by their nationals. Indeed when it comes to cases before international courts and tribunals, most of the awards on compensation relate to injury to persons or damage to property.

I am, however, not referring to the settlement of international disputes as such, but solely the principle applied in international law to assess compensation for personal injuries and deaths, and possibly damage to property.

Such a solution has the merit of cutting through arguments over the choice of various systems of domestic law and provides for a just and equitable solution as stated in the Preamble. I therefore submit that it deserves close examination by the Legal Committee.

Once the principle of full compensation under international law is accepted, a proper institutional set up may be adopted to ensure uniformity and consistency. In this regard it is interesting to note that the First International Conference on Private Air Law held under the auspices of ICAO in 1952 in Rome recommended in its Final Act that the Council of ICAO initiate a study on the possibility of having an international jurisdiction in private law disputes arising out of international air law Conventions.

The comments that follow are therefore based on an assumption that a universally acceptable method of calculating fair, equitable and predictable compensation can and will be agreed upon.

5.4.13 **Article 16 - Death of and Injury to Passenger - Damage to Baggage**
Paragraph 1

[personal] [bodily] injury

The expression "personal injury" would open the door to non-physical personal injuries such as slander, libel, discrimination, fear, fright and apprehension and this would clearly be neither desirable nor acceptable. Use of "bodily injury" would be more acceptable but would exclude mental injuries such as shock. Recent Court decisions in the US demonstrate how difficult an area this is and a clear statement must be agreed upon which is not limitless in scope. Since it would be clearly fair and equitable to compensate for impairment of health (i.e. both physical and mental/psychic injuries) it may be preferable to define personal injury as such.

event [accident]

So as not to lose the considerable precedent developed over many years upon the scope of liability created by Article 17 of the Warsaw Convention, and bearing in mind the absence of any predetermined limits of the carrier's liability in respect of the death or injury of passengers, I suggest that the term "accident" be retained.

[solely]

To prevent the carrier from avoiding liability because the passenger's state of health was merely a contributing factor, I suggest that "solely" be retained. The words "...or from the normal operation of the aircraft, or both" should also be retained.

Paragraph 2

Same comments as under [solely] above.

Moreover, the carrier should properly be liable for damage, destruction or loss of checked baggage whilst the checked baggage is in the custody and in the charge or possession of the carrier and should not be premised upon an accident or event. I would therefore suggest that the following be deleted "...upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or...".

Paragraph 3

Since checked baggage is in the charge of the carrier and carry-on baggage (a term I would suggest be used in the new draft since it is well recognized and accepted by the industry) is not, I believe that there should equally be a distinction in the applicable regimes. The exclusion in the last sentence of 16.2 should, however, apply to both checked and carry-on baggage. I therefore suggest that this paragraph reads as follows: "Unless otherwise specified, in this Convention the term 'baggage' means checked baggage only."

5.4.14 **Article 17 - Damage to Cargo**
Paragraph 3

To make it clear that the Convention applies whenever and wherever the cargo is in the possession, custody or charge of the carrier, whether on or off airport premises, I suggest that the following be deleted: "...whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever".

Paragraph 4

To ensure that the **unilateral** decision of the carrier to substitute part of the carriage by air with carriage by another mode of transport does not exclude application of the Convention, I suggest that the following from Alvor II be added to this paragraph:

"But, if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of carriage is deemed to be within the period of carriage by air."

5.4.15 **Article 18 - Delay**

I suggest that "its" be inserted between "by" and "delay" in line 1 to ensure a causal link.

Replacement of "all necessary measures" by "all measures that could reasonably be required" is appropriate and takes account of various court decisions that have employed that language. This terminology is also used in the 1980 *United Nations Convention on International Multimodal Transport of Goods* and in the 1991 *United Nations Convention on the Liability of Operators of Transport Terminals in International Trade*.

Paragraph 2

If a definition of delay is deemed useful the following could be considered: "Compensable delay occurs when passengers and their carry-on baggage have not been carried to their immediate or final destination or when checked baggage or cargo has not been delivered within the time which it would be reasonable to require of a diligent carrier, having regard to all relevant circumstances and damage or loss is proved to have been suffered."

New Paragraph 3?

Alvor II, in effect, gives the claimant the option to treat the baggage or cargo as lost after the specified period by providing that the person entitled to make a claim for the loss of checked baggage or of cargo may treat the checked baggage or cargo as lost if it has not been delivered within 30 consecutive days following the date of delivery determined according to paragraph 2 of this Article.

5.4.16 **Article 20 - Extent of Carrier Liability in Case of Death or Injury**
Title

For completeness I suggest that "of Passengers" be added to the title.

General comment

Recalling that the Preamble calls not only for "equitable compensation based on the principle of restitution" but also for "an equitable balance of interests", it follows that we must, as I have stated above, formulate a new deal, a new *quid pro quo*, which will marry desirability and acceptability. The guiding principle must be fairness, not only to consumers but also as between them and the carriers and the Governments which will be called upon to endorse any new Convention.

Subject to the assumption I have already made on the applicable law for determining the quantum of damages, I submit that:

- it would not be fair to limit the liability of the carrier even if the basis of such a liability were to be strict or absolute;

- it would not be fair to provide for unlimited liability on an absolute, strict or even presumed fault basis; and

- unlimited liability on the single basis of proved fault even for claims under 100,000 SDRs would undoubtedly not receive wide support in the light of recent developments in connection with the Japanese Initiative and the IIA/MIA.

By way of background information it is important to note that there are international Conventions which establish liability limits for accidental death or personal injury of passengers on international journeys with other modes of transport, such as rail, road, sea and inland waterways.

The passenger liability limit in force under the *Convention Relating to the Carriage of Passengers and their Luggage by Sea* (Athens, 1974) is 46,666 SDRs; 70,000 SDRs under the *Convention Concerning International Carriage by Rail* (Berne, 1980) and 250,000 gold francs (a gold franc corresponding in this case to 10/31 grammes of gold of 900 millesimal fineness) under the *Convention on the Contract for International Carriage of Passengers and Luggage by Road*. The limit of 66,667 SDRs under the *Protocol to the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Waterways* (Geneva, 1978) is not yet in force.

It is also important here to note that 28 out of the 50 carriers (56 per cent) which responded to the IATA questionnaire regarding insurance cover and costs believed that an update of the passenger limit would require an increase in their present insurance coverage regarding liability.

The nature of the insurance market (underwriters charge premiums relative to estimated future exposure to claims costs and not reactively when claims costs are known) makes it difficult, if not impossible, to quantify premium increases which will always be subject to market conditions the airline industry risk profile and the particular carrier risk profile and bargaining strength.

Carriers which already fly to the US, Japan and other high damage-award countries would probably see very little increase, if any, as their premiums already take into account the high levels of awards in those countries for personal injury/death; other carriers might see a relatively large increase.

Beyond the important issue of commercially acceptable insurance premiums, however, there is also the critical issue of the very availability of insurance cover for some carriers under an unlimited strict liability regime.

In these circumstances, and in the light of the objectives and circumstances I have set out earlier, I propose that the carrier liability regime in respect of passengers should be two-tiered:

The **first tier** shall not exceed 100,000 SDRs and, bearing in mind (as the IIA/MIA have expressly recognized) that most claims against carriers operating to and from "low award" jurisdictions are currently unlikely to exceed 100,000 SDRs (strict liability would effectively expose these carriers to unlimited and strict liability), I suggest that the basis of the liability for that first tier should be presumed fault.

To take account of this proposal, the first part of Article 20 of the draft new Convention would redrafted to read:

"The carrier, pursuant to Article 16 paragraph 1 shall be liable for damages not exceeding 100,000 SDRs unless he proves that he, his servants or agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for him or them to take such measures."

The **second tier** shall have no predetermined limits whatsoever and shall therefore provide for full compensatory damages whenever the first tier has failed to do so. To obtain full compensatory damages the passenger would only have to prove negligence on the part of the carrier, his servants or agents.

To take account of the second tier, the second part of Article 20 would read:

"The carrier shall not be liable for damages exceeding 100,000 SDRs unless the damage so sustained was due to the fault or neglect of the carrier or of his servants or agents acting within their scope of employment."

The terminology "due to fault or neglect" is taken from Article 3 of the Athens' *Convention Relating to the Carriage of Passengers and their Luggage by Sea* (13 December 1974) and can also be found in the *United Nations Convention on International Multimodal Transport of Goods* (24 May 1980).

I submit further that the foregoing proposal should encourage speedy settlement of claims, particularly in respect of the first 100,000 SDRs, and thus obviate the need to provide for any mandatory upfront payment or to address the significant practical difficulties for the making of such payments.

5.4.17 **Article 21 - Limits of Liability - Conversion of Monetary Units**

I would change the title to "Carrier Liability in respect of Delay and the Carriage of Baggage and Cargo".

Paragraph 1(b)

It is to be noted that in order to curb exaggerated or unfounded claims for valuables when baggage has been lost, a limit of 250 SDRs per item therein was introduced in Alvor II in addition to the limit of 1 000 SDRs per passenger.

If this is to be adopted then it should, of course, be made subject to any special declaration.

New Paragraph 1(c)

In the light of my comments under Article 16.3 above, the basis of the carrier's liability for destruction or loss of, or damage to "carry-on" baggage must be proved fault with a limit of 1,000 SDRs per passenger.

Paragraph 3

I suggest that this appears as a new draft Article 23 entitled "Carrier Liability - Litigation Costs" and that "...Article 20 and in this Article..." be thus replaced by "Articles 20 and 21".

To allow Courts which may not otherwise be able to do so to award the costs of the action, including lawyers' fees, over and above the Convention limits, I suggest that "..and the laws of the Court seized of the case..." should be inserted before "...shall not prevent..." in line 1 and that "...in accordance with its own law..." in line 2 should be deleted. The new deal being proposed should make this acceptable.

New paragraph 3(b)

To ensure that the second part of this paragraph also applies to States whose Courts are permitted to award costs and thereby discourage frivolous claims which could be funded by payments under the first tier liability regime, I suggest that "The foregoing provision shall not apply..." should read "The Court shall nevertheless not award the whole or part of the Court costs and the other expenses of the litigation incurred by the plaintiff...".

Paragraph 4

There should be a new Article 24 entitled "Carrier Liability - Conversion of Monetary Units".

Paragraph 5

There should be a new Article 25 entitled "Carrier Liability - Updating of the limits".

The credibility and therefore acceptability of any proposed limits will depend on the built-in adjustment mechanism. Since the Convention is being drafted under the auspices of ICAO, I propose that responsibility for any periodic updating of the limits of liability be that of the Council of ICAO (possibly under Article 55 (c) and (d) of the 1944 *Convention on International Civil Aviation*) in consultation with the IMF. The Council of ICAO, being an elected body which is representative of the international aviation community, masters the necessary authority and respect whereas the IMF has the necessary technical expertise.

Paragraph 6

This special contract is understood to be a voluntary arrangement by the carrier for the benefit of the passenger and should also allow for the removal of liability limits.

I therefore suggest that this paragraph be redrafted as follows and be moved to Chapter VI.

"A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided by for in this Convention or to no limits of liability whatsoever."

5.4.18 **Article 22 - Invalidity of Contractual Provisions**

I suggest that this Article be moved to Chapter VI.

5.4.19 **Article 24 - Servants, Agents - Aggregation of Claims**
Paragraph 1

To remove unnecessary restrictions, "...limits of liability which the carrier himself is entitled to invoke under..." should be replaced by " ...provisions of...".

Paragraph 2

The expression "....said limits..." should be replaced by "....limits of liability which the carrier is entitled to invoke under this Convention."

Paragraph 3

"The provisions of paragraphs 1 and 2 of this article..." should be replaced by "The said limits...".

5.4.20 **Article 25 - Timely Notice of Complaints**

General Comment

In the light of my comments on Article 3 there should be an obligation on the part of the carrier to give the customer notice of the provisions of this Article.

Paragraph 2

I suggest that "...twenty-one..." in line 4 be replaced by "...fourteen...".

5.4.21 **Article 27 - Jurisdiction**
Paragraph 1

Use of "domicile" or "ordinary residence" of the carrier should be further examined by the Legal Committee. Where the authentic text of the Warsaw Convention uses the expression "domicile du transporteur" it has been translated as "...where the carrier is ordinarily resident..." in the UK whilst the American translation is "domicile of the carrier". In the Guatemala City Protocol the French wording

"si le passager a son domicile" appears as "if the passenger has his domicile" in the authentic English version. Alvor II, however, uses "domicile" in English in respect of **both** the carrier and the passenger. This is a delicate area requiring detailed consideration and, possibly, new definitions for the avoidance of doubt and dispute.

Paragraph 2

Subject to the assumption I have already made on the law applicable to the determination of compensation, it would be fair and convenient to the passenger to provide for a fifth jurisdiction. However, in fairness to the carrier, availability of such a fifth jurisdiction should be restricted to claims in respect of passenger injury or death and be subject to the condition that the carrier should have a place of business (i.e. at least a sales or ticketing office) in that jurisdiction. Subject to what I have said under paragraph 1 above, this paragraph could thus read:

"In addition to the jurisdictions mentioned in paragraph 1 of this Article, any action for damages for the injury or death of a passenger, subject to the provisions of this Convention, may also be brought in the State Party of the domicile or place of permanent residence of the passenger, provided that the carrier has a sales or ticketing office in that State Party."

5.4.22 **Article 28 - Arbitration**
Paragraph 2

Arbitration will therefore not be available in respect of the carrier's liability for the death of a passenger.

5.4.23 **Article 29 - Limitation of Actions**
Paragraph 2

To avoid different interpretations, it may be appropriate to clarify that this provision does not entitle a Court in any circumstances to interrupt or suspend the two-year period.

5.4.24 **Article 30 - Successive Carriage**
Paragraph 2

The term "[or his representative]" should be deleted in the first line and square brackets to be deleted from the option which follows since "representative" has a narrower connotation than "ayant droit" in the original French text of the Warsaw Convention.

5.4.25 **CHAPTER IV**
Article 32 - Intermodal Transport
Paragraph 1

In addition to combined carriage performed, this paragraph should also cover the combined carriage to be performed.

5.4.26 **CHAPTER V**
General comment

Code-sharing is becoming an increasingly relevant operational reality and since many, but not all, problems related to code-sharing can be resolved within the framework of Chapter V, the issue of liability in code-shared operations warrants examination by the Legal Committee.

5.4.27 **Article 38 - Aggregation of Damages**

"[Chapter]" in line 4 to be deleted.

5.4.28 **Article 40 - Additional Jurisdiction**

See comments on Article 27.

5.4.29 **Article 41 - Invalidity of Contractual Provisions**

See comments on Article 22.

To avoid unnecessary duplication and confusion, it may be possible to delete Articles 40 and 41 if it were made clear that all provisions of the Convention apply to both the contracting carrier and the actual carrier except as modified and supplemented in this Chapter V.

5.4.30 **CHAPTER VI**
Article 43 - Mandatory Application

In the light of recent experience, it may be useful to revisit use of "...infringe..." and "...altering..." to ensure that they are not interpreted to preclude enhancement of customers' rights.

5.4.31 **New Article - Insurance**

States impose under national laws and regulations insurance requirements on their carriers whereas some States impose under bilateral air services agreements insurance requirements on carriers from other States operating into their territories. It is interesting to note that Article 35B of Alvor II provides that:

"Every carrier is required to maintain insurance or other form of financial security, including guarantee, covering his liability for such damage as may arise under this Convention in such amount, of such type and in such terms as the national State of the carrier may specify. The carrier may be required by the State into which he operates to provide evidence that this condition has been fulfilled by producing appropriate certificate or certificates from the State concerned."

5.4.32 **FINAL CLAUSES**
Reservations

Article XXVI of the Hague Protocol has been retained successively by the Guatemala City Protocol (Article XXIII), Montreal Additional Protocol No. 3 (Article XI) and Montreal Protocol No. 4 (Article XXI) and I would therefore suggest the inclusion of the following Article in the new draft Convention:

"No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Government of .... that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities."

Date Of Entry Into Force

A smooth transition between this new draft Convention and the instruments of the Warsaw System which are in force should be ensured.

In the light of the evident fragmentation of the Warsaw System it is critical to ensure that the adoption of this draft Convention does not further confuse and complicate matters.

Universality being a guiding principle, it is essential that the adoption of the new draft Convention should be swiftly followed by its entry into force amongst the largest possible number of States, with a concurrent termination of their international obligations under the instruments of the Warsaw System.

A mechanism should therefore be developed to provide that a State which becomes party to the new Convention automatically abandons all the other instruments of the Warsaw System to which it is party.

Parties to the new Convention

Article 11 of the *Vienna Convention on the Law of Treaties* provides that: "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."

As lengthy constitutional procedures are normally associated with the foregoing provisions, States must be prepared to accept to have in the new Convention the simplest and most expedient provision for expressing their consent to be bound.

6. WARSAW: THE SPIRIT OF COMPROMISE

6.1 To promote the progressive development of international air law and to ensure that the new Convention does not suffer the fate of the 1971 Guatemala City Protocol and the 1975 Montreal Additional Protocols 1, 2 and 3 and Montreal Protocol No. 4, it will be crucial for ICAO to patiently develop a consensus on as much of this new draft Convention as possible (for example by organizing regional workshops) and then to promote and look out for the propitious psychological moment to achieve the breakthrough on the outstanding issues. Only then will the new Convention have some guarantee of success.

6.2 The following self-evident truths must, however, be borne in mind when revisiting the Warsaw System and reviewing the draft new Convention:

a) we cannot unmake past failures but we can help make future successes;

b) we cannot meet all the expectations of all the relevant parties;

c) the more universal we want the new system to be, the more compromise we must all be willing and able to make; and

d) responsibility for consolidating and modernizing the Warsaw System rests with Governments acting with care and wisdom through ICAO.

6.3 ICAO is the most appropriate forum because it is the global organization responsible for international civil aviation; a global forum in which the views of all interested parties are listened to and debated in an atmosphere of mutual respect.

6.4 That is why we must all demonstrate a formidable spirit of dialogue, ingenuity and compromise (particularly in respect to such fundamental issues as the measure of damages and the basis and extent of liability) in order to enable the law diligently, fairly, equitably and uniformly to do justice to the consumers and carriers of today and tomorrow.

Acknowledgements

I wish to express my profound gratitude to those distinguished international lawyers whose invaluable advice and assistance was kindly and generously given me in my study of the subject.

I also wish to thank the Government of the Republic of Mauritius and Air Mauritius.

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LEGAL COMMITTEE - 30TH SESSION

(Montreal, 28 April - 9 May 1997)

PROVISIONAL AGENDA OF THE 30TH SESSION OF THE LEGAL COMMITTEE

Item 1: Adoption of the final agenda of the Session

Note: Rule 11(a) of the Rules of Procedure of the Legal Committee (Doc 7669) provides: "The Committee shall fix the final agenda of the session at its first meeting."

Item 2: Report of the Secretariat

Note: All documents relating to this Agenda Item will be issued as subdivisions of LC/30-WP/2.

Item 3: Review of the General Work Programme of the Legal Committee

Note: See LC/30-WP/3.

Item 4: Modernization of the "Warsaw System" and review of the question of the ratification of international air law instruments

Note: This is the main item to be considered by the Legal Committee in view of the decision of the ICAO Council of 2 October 1996; the Committee will study this item on the basis of the Rapporteur's Report, the Report of the Secretariat Study Group and other related documents. All documents relating to the modernization of the "Warsaw System" will be issued as subdivisions of LC/30-WP/4. A further document relating to the ratification of international air law instruments will be issued as LC/30-WP/4-5.

Item 5: Consideration of other items on the General Work Programme of the Legal Committee

Note: The Committee will consider reports on the following items in its General Work Programme which it will be requested to merely note:

- Consideration, with regard to global navigation satellite systems (GNSS), of the establishment of a legal framework: LC/30-WP/5-1.

- Liability rules which might be applicable to air traffic services (ATS) providers as well as to other potentially liable parties - Liability of air traffic control agencies: LC/30-WP/5-2.

- United Nations Convention on the Law of the Sea - Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments: LC/30-WP/5-3.

- Acts or offences of concern to the international aviation community and not covered by existing air law instruments: LC/30-WP/5-4.

Item 6: **Date, place and agenda of the 31st Session of the Legal Committee**

Note: See LC/30-WP/6.

Item 7: **Report on work done at the Session**

List of international organizations to be invited to participate in the 30th Session of the Legal Committee.

- United Nations (UN);
- International Maritime Organization (IMO);
- International Maritime Satellite Organization (INMARSAT);
- International Telecommunication Union (ITU);
- International Air Transport Association (IATA);
- International Federation of Air Line Pilots' Associations (IFALPA);
- International Law Association (ILA);
- Société international de Télécommunication aéronautique (SITA);
- Asociación Latino Americana de Derecho Aeronáutico y Espacial (ALADA).

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C-WP/10613
2/6/97

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

COUNCIL – 151st SESSION

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Conventions

MODERNIZATION OF THE "WARSAW SYSTEM"

(Presented by the Secretary General)

SUMMARY

This Working Paper summarizes the results of the 30th Session of the Legal Committee on the subject "modernization of the 'Warsaw System'" and presents the text of the Draft Convention as approved by the Legal Committee.

REFERENCES*

C-WP/10420
C-WP/10470
C-WP/10576
C-DEC 149/2
Doc 7669-LC/139/4 (Rules of Procedure of the Legal Committee; Procedure for Approval of Draft Conventions - Resolution A7-6)

* Principal references only

1. INTRODUCTION

1.1 The 30th Session of the Legal Committee convened in Montreal from 28 April to 9 May 1997 under the Chairmanship of Dr. K. El Hussainy (Egypt). It considered, *inter alia*, the agenda item "The modernization of the 'Warsaw System' and review of the question of ratification of international air law instruments". In relation thereto, the Legal Committee reviewed and revised the new draft instrument which is to modernize and consolidate the "Warsaw System" by means of a self-standing Convention.

1.2 The draft text had been developed by the Legal Bureau with the assistance of a Secretariat Study Group and was presented for Council's information on 2 October 1996 on the basis of C-WP/10470.

(23 pages)

1.3 As a further basis of its discussions the Legal Committee considered the Report of the Rapporteur (Mr. V. Poonoosamy, Mauritius), which contained comments and a detailed review of the above-mentioned text. The Report of the Rapporteur is set out in Attachment A to C-WP/10576. The full report on the proceedings of the Committee will be transmitted separately in due course. In those cases where the Legal Committee could not reach a consensus, or where dedicated consideration by the Diplomatic Conference was deemed necessary, the draft denotes the relevant passages/items by the use of square brackets.

1.4 In order to facilitate the work of the Committee with regard to the draft instrument, a Drafting Group was established. This Drafting Group was chaired by Mr. V. Poonoosamy (Mauritius) and comprised the following delegations: Canada, Chile, China, Cuba, Cote d'Ivoire, France, Germany, India, Japan, Lebanon, Nigeria, Russian Federation, Saudi Arabia, United Kingdom and United States of America. At the end of its Session, the Legal Committee approved the text of the new draft instrument as set out in the Attachment to this Working Paper.

2. MAIN ELEMENTS OF DRAFT CONVENTION APPROVED BY THE LEGAL COMMITTEE

2.1 The structure and the main elements of the new draft instrument are reported in C-WP/10420 and C-WP/10470. In light of the deliberations on this matter by the Legal Committee, attention is drawn to the following points:

a) Liability Regime For Passengers

The Legal Committee expressed its support for the two-tier liability system in case of accidental death or injuries to passengers as set out in the draft text. In the first tier, for claims of up to 100,000 SDR, the liability of the air carrier would be based on the principle of strict liability. For claims exceeding this amount (second tier), liability of the air carrier would be based on fault, without numerical limits of liability.

Concerning the second tier of liability, however, no consensus could be reached as to who shall bear the burden of proof. While some delegations preferred that the burden should be on the plaintiff to prove fault of the air carrier, others favoured the approach that it should be for the air carrier to prove that it had taken all reasonable measures to avoid the damage or that it was impossible for it to do so. The latter concept is provided for in the IATA Intercarrier Agreements and is also featured in the common position adopted within the framework of the Member States of the European Union (EU). In light of this divergence of opinion, the Legal Committee attempted to find a compromise solution which would take into account both positions.

In this respect the draft instrument presently contains in its Article 20 three alternatives. In Alternative 1, each State party shall, upon ratification, notify which regime shall be applicable to its carriers. Such a declaration would be binding on all other States parties. Under Alternative 2, each State party would have the possibility of "opting-out" of the liability regime, which provides for the air carrier's presumed fault, in favour of the regime which places the burden of proof on the claimant. Alternative 3 establishes a three-tier regime, with liability in the first tier as above, with a second tier on the basis of presumed fault of the carrier, and with the burden of proof on the claimant in the third tier.

The Legal Committee, unable to reach consensus on the question of the burden of proof for claims exceeding the first tier, decided to refer the above alternative proposals for final consideration to the Diplomatic Conference.

b) Liability Limits

The Legal Committee decided not to make specific recommendations as to the actual amount concerning the ceiling of liability provided for in the first tier, it also left for final determination by the Diplomatic Conference the establishment of the applicable limits of liability in case of delay, damage or loss of baggage, and damage or loss of cargo.

c) Documentary Requirements

In addition to the modifications introduced through the provisions contained in Montreal Protocol No.4, the draft Convention opens the possibility of the use of electronic ticketing procedures in relation to passengers.

d) Compensatory Damages

In order to further clarify the type of damages which will be compensable under the new instrument, Article 23 paragraph 2 of the draft specifically excludes punitive, exemplary and other non-compensatory damages. This provision will therefore remove legal uncertainty regarding recovery of these types of damages under the new Convention.

e) Jurisdiction

With respect to the question whether to provide for an additional forum in which claims could be adjudicated, namely that of the passenger's domicile or permanent residence, (so-called "fifth jurisdiction") the discussion in the Legal Committee revealed a divergence of opinions. In order to increase the overall acceptability of the new draft Convention for all States and in the spirit of compromise, the Legal Committee, assisted by the Drafting Group, developed a text which clarifies the specific conditions under which the additional jurisdiction would be available to the claimant. The respective provisions, which are placed in square brackets, can be found in Article 27 paragraphs 2 and 3.

f) Arbitration

The Legal Committee discussed extensively the possibility of applying arbitration for cases of passenger injury or death as an alternative mechanism for the settlement of disputes. Some delegates welcomed this possibility which, in their view, would further promote the interest of the consumer who then would not necessarily have to resort to lengthy court proceedings. Others were of the view that arbitration is primarily appropriate for the settlement of disputes between two commercial entities and not suitable in matters involving a passenger on one side and the air carrier on the other. In light of the above, the draft contains in Article 28 paragraph 2 a clause which enables a claimant, subject to applicable national law, and subject to appropriate safeguards, to choose arbitration if he or she wishes to do so. The Legal Committee left this clause for final assessment by the Diplomatic Conference.

g) **Escalator Clause**

The draft contains in Article 21 paragraph 5 a provision allowing for an adjustment of the limits of liability provided for in the draft Convention. This built-in adjustment mechanism takes into account inflation/deflation and seeks to ensure that the limits retain their value with the passage of time once the draft Convention has come into force. The provision appears in square brackets to indicate the necessity of further consideration of this matter by the Diplomatic Conference.

h) **Liability Insurance**

The draft instrument contains in Article 45 a provision which seeks to ensure that the carrier's liabilities under the Convention will be met. It is left to the discretion of the State of the carrier to specify the amount, type and terms of the financial security to be provided. This provision also will require further consideration by the Diplomatic Conference.

3. DRAFT CONVENTION - DECISIONS TO BE TAKEN BY THE COUNCIL

3.1 Subject to some re-arranging of Articles as a matter of presentation, which the Legal Committee delegated to the Secretariat, the approved text of the draft Convention can be considered to be a "final draft" under the terms of Assembly Resolution A7-6. Having received the text prepared by the Legal Committee, the Council may wish, under the terms of Assembly Resolution A7-6, to "take such action as it deems fit, including the circulation of the draft to the Contracting States and to such other States and international organizations as it may determine". In circulating the draft, the Council may add comments and afford States and international organizations the opportunity to submit comments within a period of not less than four months. It is therefore **recommended** that the Council request the Secretary General to circulate the draft, with the minor changes of presentation to be made by the Secretariat, to all Contracting States, to non-Contracting States and to those international organizations which were invited to attend as observers the 30th Session of the Legal Committee, and to invite them to submit comments by the end of October 1997.

3.2 In light of C-DEC 149/2, the Council may also wish to take action under paragraph 4 of Assembly Resolution A7-6 and convene an International Conference of Plenipotentiaries ("Diplomatic Conference"). Such a Conference could meet as soon as practicable in the first half of 1998, the exact date and place thereof to be determined. In the programme of meetings for 1998 included in the Programme Budget, there is provision for a meeting of the Legal Committee or a Diplomatic Conference, or both (C-DEC 149/14, paragraph 14, refers).

4. ACTION BY THE COUNCIL

4.1 The Council is invited:

a) to note this paper, including the draft Convention approved by the Legal Committee as set out in the Attachment;

b) to request the Secretary General to circulate by State Letter the draft prepared by the Legal Committee together with the Report thereon to Contracting States,

non-Contracting States and those international organizations which were invited to attend the 30th Session of the Legal Committee, requesting comments by the end of October 1997; if it so wishes, to formulate any comments to be communicated along with the State Letter;

c) to decide to convene a Diplomatic Conference as soon as practicable in the first half of 1998, the date and place thereof to be determined.

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DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

[TEXT APPROVED BY THE LEGAL COMMITTEE]

THE STATES PARTIES TO THIS CONVENTION;

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention," and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING 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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo;

CONVINCED 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;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. 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 international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage 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.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to 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.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, destruction or loss of, or damage to baggage, and delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonethless, be subject to the rules of this Convention [including those relating to limitation of liability.]

Article 4 - Cargo

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. 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 receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 - Contents of Air Waybill and Cargo Receipt

The air waybill and the cargo receipt shall include:

(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 of the consignment.

Article 6 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7 - Documentation of Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 8 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

Article 9 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 10 - Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the nature, weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 11 - Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 12 - Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 11 and 12, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the cargo receipt.

Article 15 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

[3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.]

[4.] Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 17 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if it proves that the destruction, or loss of, or damage to, the cargo resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 18 - Delay

1. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[2. For the purpose of this Convention, delay means the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to expect from a diligent carrier to do so, having regard to all the relevant circumstances.]

Article 19 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

Article 20 - Compensation in Case of Death or Injury of Passengers

Alternative 1

[1. Subject to paragraph 2, the carrier shall not be liable for damages arising under Article 16, paragraph 1 which exceed 100,000 Special Drawing Rights:

(a) if the carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for it or them to take such measures; or

(b) unless the damage so sustained was due to the fault or neglect of the carrier or of its servants or agents acting within their scope of employment or agency.

2. At the time of ratification, adherence or accession, each State Party shall declare which of either subparagraph (a) or subparagraph (b) of the preceding paragraph shall be applicable to it and its carriers. A State Party which has declared that subparagraph (b) shall be applicable to it, may later make such a declaration in respect of subparagraph (a) instead. All declarations made under this paragraph shall be binding on all other States Parties and the Depositary shall notify all States Parties of such declarations.]

Alternative 2

[1. The liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. Notwithstanding paragraph 1 of this Article, any State Party may by notification to the Depositary at the time of ratification or acceptance, or thereafter, declare, that in any action brought before a Court within its territory, the liability of the carrier for damages arising under Article 16, paragraph 1 shall be limited to 100,000 Special Drawing Rights, unless the damage so sustained was due to the fault or neglect of carrier or of its servants or agents acting within their scope of employment. The Depositary shall inform all other States Parties accordingly and shall keep current a list of States Parties having made such declaration.]

Alternative 3

[1. Subject to paragraph 2 of this Article, the liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100,000 Special Drawing Rights if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. The liability of the carrier above an amount of [ ][1] Special Drawing Rights shall be subject to proof that the damage sustained by the passenger was due to the fault or neglect of the carrier or its servants or agents acting within their scope of employment.]

Article 21 - Limits of Liability - Conversion of Monetary Units

1. (a) In the case of damage caused by delay as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][2] Special Drawing Rights.

(b) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][2] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage 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 it proves that the sum is greater than the passenger's actual interest in delivery at destination.

2. (a) In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][3] Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining 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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such

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[1] No amount was set.

[2] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

[3] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

package or packages shall also be taken into consideration in determining the limit of liability.

(c) The foregoing provisions of paragraphs 1(a), 1(b) and 2(a) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.

3. The limits prescribed in Article 20 and 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, including interest. 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.

4. (a) The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

(b) Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 4(a) of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of [1 500 000][4] monetary units per passenger with respect to Article 20; [62 500][4] monetary units per passenger with respect to paragraph 1(a) of this Article; [15 000][4] monetary units per passenger with respect to paragraph 1(b) of this Article; and [250][4] monetary units per kilogramme with respect to paragraph 2(a) of this Article. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

(c) The calculation mentioned in the last sentence of paragraph 4(a) of this Article and the conversion method mentioned in paragraph 4(b) of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the

[4] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

same real value for the amounts in Articles 20 and 21 as would result from the application of the first three sentences of paragraph 4(a) of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 4(a) of this Article, or the result of the conversion in paragraph 4(b) of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

[5. (a) Without prejudice to the provisions of Article 21 paragraph 6 of this Convention and subject to sub-paragraph (b) below, the limits of liability established under this Convention shall be reviewed at five year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention, upon condition that this inflation factor has exceeded 10 per cent. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 4(a) of this Article.

(b) The adoption of the revision shall require the vote of two-thirds of the ICAO Council at a meeting called for that purpose and shall then be submitted by the Council to each State Party. Any such revision provided for under this Article shall become effective six months after its submission to the States Parties, unless within three months a majority of the States Parties register their disapproval with the Council. The Council shall immediately notify all States Parties of the coming into force of the revision so adopted.

(c) Notwithstanding sub-paragraph (a) of this paragraph, the procedure referred to in sub-paragraph (b) of this paragraph shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in sub-paragraph (a) has exceeded 30 per cent since the date of entry into force of this Convention or since the date of the previous revision. Subsequent reviews using the procedure described in sub-paragraph (a) of this paragraph will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present sub-paragraph.]

6. A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 22 - Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 23 - Basis of Claims

1. In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. For the purposes of this Convention the term "damages" does not include any punitive, exemplary or other non-compensatory damages.

Article 24 - Servants, Agents - Aggregation of Claims

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

2. The aggregate of the amounts recoverable from the carrier, its servants and 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.

Article 25 - Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 26 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

[2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to and from which the carrier operates services for the carriage by air [and] [or] in which the carrier has an establishment.]

[3. For the purposes of paragraph 2 of this Article, "establishment" means premises leased or owned by the carrier concerned from which, [through its own managerial and administrative employees,] it conducts its business of carriage by air.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 28 - Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

[2. Subject to applicable laws, nothing in this Convention shall preclude a passenger or a person who derives his or her rights from a passenger from agreeing with the carrier that any dispute between them relating to the liability of the carrier under this Convention for death of or injury to the passenger shall be settled by arbitration. However in such a case the agreement, in order to be valid, shall require the claimant's individual written consent or confirmation after the event giving rise to the dispute has occurred].

3. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

4. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

5. The provisions of paragraphs 3 and 4 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 31 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 32 - Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes an agreement for carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier ") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier , be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20 and 21 of this Convention. [Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 21 of this Convention, shall also affect the actual carrier.]

Article 36 - Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

Article 37 - Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he or she proves that he or she acted within the scope of his or her employment, be entitled to avail himself or herself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he or she is, unless it is proved that he or she acted in a manner that prevents the limits of liability from being invoked in accordance with Articles 20 and 21 of this Convention.

Article 38 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to the carrier concerned.

Article 39 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business.

Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this

Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Final Provisions

Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 44 - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents, from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

[Article 45 - Insurance]

[Every carrier is required to maintain insurance or other form of financial security, including guarantee, covering its liability for such damage as may arise under this Convention in such amount, of such type and in such terms as the national State of the carrier may specify. The carrier may be required by the State into which it operates to provide evidence that this condition has been fulfilled.]

Article 46 - Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 47 - Definition of Days

The expression "days" when used in this Convention means calendar days not working days.

Article 48 - Reservations

[No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.]

[Final clauses to be inserted.]

- END -

C-WP/10688
24/11/97

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

COUNCIL – 152ND SESSION

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Convention

MODERNIZATION OF THE "WARSAW SYSTEM"

(Presented by the Secretary General)

SUMMARY

This Working Paper provides an update on the subject of "Modernization of the 'Warsaw System'" and outlines the possible further courses of action on this matter for consideration by the Council.

REFERENCES

C-WP/10613
C/DEC 151/5
State letter LE 4/51-97/65
Doc 9693-LC/190 (Legal Committee 30th Session-Report)

Action by the Council: see paragraph 5.

1. INTRODUCTION

1.1 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* (C-WP/10613 refers). This draft instrument is intended to modernize and consolidate the "Warsaw System" by means of a self-standing Convention. Pursuant to the decision of the Council, the draft document was transmitted under cover of State letter LE 4/51-97/65 dated 27 June 1997 for comment to Contracting States, non-Contracting States and those international organizations which were invited to attend as Observers the 30th Session of the Legal Committee. The State letter indicated 31 October 1997 as the deadline for comments.

1.2 In its consideration of this item, the Council also requested the Secretary General to present a progress report on the subject based, *inter alia*, on an analysis by the Secretariat Study Group of the comments received, in order to enable the Council to reach a definitive decision as to whether the preparatory work on the instrument had reached a level which would warrant the convening of a Diplomatic Conference (C-DEC 151/5).

(3 pages)

1.3 As of 31 October 1997, comments were received from 18 Contracting States and three international organizations. A number of States have informally indicated that due to the complexity of the subject matter, the submission of comments might be slightly delayed, as a result of necessary internal consultations and preparations.

1.4 In light of the circumstances referred to in 1.3 above, the third meeting of the Secretariat Study Group, originally envisaged to take place on 3-4 November 1997, was postponed and it is now envisaged to be held on 4-5 December 1997 at ICAO Headquarters in Montreal, on the understanding that the Secretariat has received a sufficient number of comments by that date.

2. FURTHER COURSES OF ACTION

2.1 It should be recalled that, in its present format, the text of the draft instrument contains a number of square brackets on certain important questions, on which no consensus had been found in the Legal Committee. An initial review of the comments submitted thus far suggests that the majority of replies focuses on these issues, i.e. the liability regime for passengers, the introduction of an additional, so-called fifth jurisdiction for claims etc. The Council, in its consideration of the matter, during the 151st Session, expressed the desire to consolidate the possible alternatives so that an appropriate solution to the different legal points of view could be found. In this way, it would be possible to present to the Diplomatic Conference a refined draft text that would have a better chance of being adopted and ratified.

2.2 One way of pursuing this objective could be through further meetings of the Secretariat Study Group. However, it is clear that a substantial part of the yet unresolved questions in the draft text reflect not only legal but also policy issues. It may thus be appropriate to complement the further work of the Secretariat Study Group by the input of another entity, which may add an element of governmental representation to the process, without unduly delaying the completion of a refined draft. To this end, a special group, such as a legal Panel, could be set up for this purpose. Such a Panel could comprise approximately 20 States, which could nominate a legal expert each, who could be accompanied by advisers.

3. ESTABLISHMENT AND CONVENING OF A PANEL

3.1 The Council may wish to establish a Panel of Legal Experts on the Modernization and Consolidation of the Warsaw System and convene its meeting in Montreal no later than April 1998. In accordance with past practice, the Council could delegate the authority to appoint the members of the Panel to the President of the Council. The estimated costs of holding the meeting in Montreal would be approximately U.S.$ 7,000. The timing of the Panel's meeting would ensure that the participants benefit from the conclusions and proposals emanating from the third meeting of the Study Group. It is further suggested that the members of the Secretariat Study Group be present at the meeting of the Panel in order to optimize the necessary input and in order to facilitate that a refined draft is finalized by the end of this meeting.

4. TERMS OF REFERENCE

4.1 Taking into account the considerations reflected in paragraphs 2.1, 2.2 and 3.1 above, it is suggested to set up the Panel with the following terms of reference:

1) to supplement the work already 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;

2) if appropriate, to elaborate on possible drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing.

4.2 In the performance of the tasks set out in the preceding paragraph, the Panel shall avail itself of:

a) The draft text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, contained in Attachment D to Doc 9693-LC/190;

b) the comments of States on the draft text mentioned in the preceding para.(a), in reply to State Letter LE 4/51-97/65;

c) the Report of the third meeting of the Secretariat Study Group, including the analysis of the comments received from States;

d) any other relevant documents.

5. ACTION BY THE COUNCIL

5.1 The Council is invited:

a) to note this report;

b) to take any action it may deem necessary, including establishing and convening of a Panel of Legal Experts on the Modernization and Consolidation of the "Warsaw System" under the terms of reference set out in paragraphs 3 and 4 above, and delegating the appointment of the members of the Panel to the President of the Council; and

c) to request the Secretary General to present the report of the Panel to the 154th Session of the Council.

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C-WP/10862
27/5/98

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

COUNCIL - 154th SESSION

Subject No. 16: Legal Work of the Organization
Subject No. 16.3: International Air Law Conventions
Subject No. 12.5: Plans for Legal Meetings

MODERNIZATION OF THE "WARSAW SYSTEM"

(Presented by the Secretary General)

SUMMARY

This working paper provides a report on the outcome of the Meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System", with a view to enabling the Council to decide whether to convene a Diplomatic Conference for the adoption of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air.*

REFERENCES*

C-WP/10613
C-DEC 151/5
C-WP/10688
C-DEC 152/8
C-DEC 152/12
State letter LE 4/51-97/65
Doc 9693-LC/190 (Legal Committee 30th Session-Report)
SGMW/1 Report

* Principal references only

1. INTRODUCTION

1.1 During its 152nd Session, on 26 November 1997, the Council decided to establish the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW) with the Terms of Reference set out in paragraph 4 of C-WP/10688 and with a view of supplementing the work of the 30th Session of the ICAO Legal Committee, which had earlier approved the text of a draft Convention aimed at the modernization of the "Warsaw System". To this end, it should be recalled from the Council's earlier consideration of this item (C-DEC 151/5) that the text of the draft instrument approved by the Legal Committee had not entirely resolved a number of elements, notably the provisions relating to the liability regime for passengers, the availability of an additional, fifth jurisdiction and the inclusion of an escalator clause.

(20 pages)

1.2 In considering the establishment of the Special Group, the Council expressed the understanding that the Special Group had the flexibility to consider the political, economic and legal aspects of the problems at hand. It was also the understanding of the Council that the Special Group would not take final decisions regarding the text of the draft Convention but would instead present its recommendations and/or conclusions thereon to the Council for its consideration (C-DEC 152/8, paragraph 4). This would allow the Council to take a final decision on the subject. In accordance with past practice, the Council delegated to the President of the Council the authority to appoint the members of the Special Group.

1.3 The Special Group convened from 14 to 18 April 1998 at ICAO Headquarters in Montreal. The meeting was attended by 39 delegates from 18 Contracting Sates, five members of the Secretariat Study Group, who acted as advisers, and seven observers from four Contracting States and three international organizations. Mr. Vijay Poonoosamy (Mauritius) was elected Chairman of the meeting and Mr. A. Jones (United Kingdom) was elected Vice-Chairman. The report of the meeting is set out in SGMW/1 Report and is listed as reference material on the first page of this working paper.

2. RESULTS OF THE MEETING OF THE SPECIAL GROUP

2.1 The Special Group refined the text approved by the Legal Committee on a number of points particularly, but not exclusively confined to, those which the Legal Committee had left in square brackets. A brief review of the conclusions on the most salient provisions of the revised draft is set out below:

- With respect to the liability regime set out in Article 20 concerning a passenger's injury or death, the Special Group confirmed the two-tier liability regime, comprising a first tier of strict liability up to 100 000 SDR and a second tier based on fault liability without pre-specified limits. As regards the burden of proof in the second tier the Special Group, after lengthy discussions, agreed on a single text, which is to replace the three options of Article 20 of the Legal Committee text, and in which the burden of proof is placed on the air carrier subject however to the availability of an additional defence for the air carrier (Attachment, Article 20 sub-paragraph c).

- The reference to "mental injury" was removed from Article 16, paragraph 1, which provides for the types of damage giving rise to the liability of the carrier; it was also agreed to better clarify the liability of the air carrier if and to the extent the injury or death resulted from the state of health of the passenger (Attachment, Article 16 paragraph 1 last sentence refers).

- The Special Group further specified the conditions under which an additional, fifth jurisdiction would be available to the claimant. In this respect, the Special Group modified the provisions, which were previously featured in square brackets around paragraph 2 and paragraph 3 of Article 27 of the Legal Committee text. As a consequence, the text approved by the Special Group no longer contains square brackets around these provisions. Given the strong preference expressed by one delegation to provide for a clause enabling a State to opt out of the fifth jurisdiction, the Group decided to accommodate this view by inserting paragraph 3 *bis*, which is featured in square brackets.

- The so-called "escalator clause", which provides for the periodic revision of the remaining limits in the Convention, was refined and modified, with a view to providing a near-automatic mechanism for updating in line with inflation (Attachment, Article 21 C refers).

- The "insurance clause", providing for a requirement to ensure that all air carriers are covered by adequate insurance with respect to their liabilities under the Convention, was strengthened (Attachment, Article 45 refers).

- The Special Group also strengthened Article 23 of the Legal Committee text on the common understanding that punitive, exemplary or any other form of non-compensatory damages shall not be recoverable in respect to any claim arising out of the international carriage by air as defined by the new Convention (Attachment, Article 23 refers).

2.2 The Special Group moreover reached a consensus on other outstanding questions emanating from the Legal Committee draft, notably, on Articles 3, Paragraph 5 (non-compliance with documentary requirements), Article 28 (arbitration) and Article 35, paragraph 2 (relationship of the actual and contractual carrier). Furthermore, the Special Group adopted several improvements of linguistic and editorial nature. As a result of its deliberations, the Special Group approved a draft text which is set out in the Attachment to this Working Paper.

2.3 The Special Group acknowledged that its task was not to solve all problems to finality but rather to formulate a proposal which would be submitted, through the ICAO Council, to a Diplomatic Conference which would carefully review the entire text. The Group shared the common sentiment that it had discharged its duties under the Terms of Reference to the extent possible. Although not all elements of the proposal had found unanimous support, the Group believed that particularly, with respect to the most difficult elements of the draft (Articles 16, 20 and 27), the Group made considerable progress towards the final resolution of the matter. The Group unanimously shared the conviction that these provisions of Article 16, 20 and 27 as redrafted, should be considered as a "package" within which a viable compromise could be found in the forum of the Diplomatic Conference.

3. FURTHER COURSE OF ACTION

3.1 In its previous consideration of this matter the Council had expressed the view that notwithstanding the urgency which was attached to this subject, a Diplomatic Conference should only be convened if it could be expected that such a Conference could achieve its objectives (C-DEC 151/5, paragraph 7 refers). While the Council already had taken a decision in principle to convene a Diplomatic Conference, the understanding was reached that the Council shall take a final decision on the subject only after some more work had been carried out (C-DEC 151/5, paragraph 9 refers).

3.2 In light of the observations referred to in paragraphs 2.3 and 3.1 above, the Council may now wish to take a decision regarding the convening of the Diplomatic Conference. Such a Diplomatic Conference could take place from 10 to 21 May 1999 in Montreal, unless an invitation is received from a Contracting State to host the Conference, in which case such invitation shall be submitted to the Council for consideration.

3.3 To this end, it should be recalled that for budgetary purposes provisions regarding the convening of a Diplomatic Conference in the year 1999 have been made in the draft programme budget of the organization for 1999-2000-2001, which is due to be submitted to the forthcoming 32nd Session of the Assembly. Also, provisions regarding the convening of a Diplomatic Conference have been made in the schedule for legal meetings for 1999-2000-2001, which had been considered by the Council during its 152nd Session (C-DEC 152/12 refers).

4. ACTION BY THE COUNCIL

4.1 The Council is invited:

a) to note this working paper, in light of the report of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW/1);

b) to note the text of the Draft Convention as revised by the Special Group, set out in the Attachment to this Working Paper;

c) to decide to convene a Diplomatic Conference to be held from 10 to 21 May 1999 in Montreal, unless an invitation is received from a Contracting State to host the Conference, in which case such invitation shall be submitted to the Council for consideration.

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DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

[TEXT APPROVED BY SGMW]

THE STATES PARTIES TO THIS CONVENTION;

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING 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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo;

CONVINCED 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;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. 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 international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage 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.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to 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.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, destruction or loss of, or damage to baggage, and delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4 - Cargo

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. 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 receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 - Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(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 of the consignment.

Article 6 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7 - Documentation of Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 8 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

Article 9 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 10 - Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the nature, quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 11 - Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 12 - Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 11 and 12, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the cargo receipt.

Article 15 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality, or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 17 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 18 - Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 19 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

Article 20 - Compensation in Case of Death or Injury of Passengers

The carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds for each passenger 100 000 SDR if the carrier proves that:

(a) the carrier and its servants and agents had taken all necessary measures to avoid the damage; or

(b) it was impossible for the carrier or them to take such measures; or

(c) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 21 A - Limits of Liability

1. In the case of damage caused by delay as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][1] Special Drawing Rights.

2. In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][1] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage 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 it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][2] Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining 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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1, 2 and 3 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.

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[1] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

[2] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

6. The limits prescribed in Article 20 and 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, including interest. 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.

Article 21 B - Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 20 is fixed at a sum of [1 500 000][3] monetary units per passenger in judicial proceedings in their territories: [62 500][3] monetary units per passenger with respect to paragraph 1 of Article 21 A; [15 000][3] monetary units per passenger with respect to paragraph 2 of Article 21 A; and [250][3] monetary units per kilogramme with respect to paragraph 3 of Article 21 A. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 20, 21 A, 21 B and 21 C as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

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[3] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

Article 21 C - Review of Limits

1. Without prejudice to the provisions of Article 21 D of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Article 20 and Articles 21 A and B shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 21 B.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 21 D - Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 22 - Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 22 A - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents, from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

Article 23 - Basis of Claims

In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 24 - Servants, Agents - Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he or she proves that he or she acted within the scope of his or her employment, shall be entitled to avail himself or herself of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and 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.

Article 25 - Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 26 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

(a) in which at the time of the accident the passenger has his or her principal and permanent residence; and

(b) to or from which the carrier actually or contractually operates services for the carriage by air; and

(c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. In this Article, "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air.

[3 *bis*. At the time of ratification, adherence or accession, each State Party shall declare whether the preceding paragraph 2 shall be applicable to it and its carriers. All declarations made under this paragraph shall be binding on all other States Parties and the depositary shall notify all States Parties of such declarations.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 28 - Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 31 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 32 - Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 17, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20, 21 A, 21 B and 21 C of this Convention.

Article 36 - Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

Article 37 - Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he or she proves that he or she acted within the scope of his or her employment, be entitled to avail himself or herself of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent he or she is, unless it is proved that he or she acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 38 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 39 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business.

Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Final Provisions

Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 44 – repositioned and renumbered as Article 22 A

Article 45 - Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 46 - Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 47 - Definition of Days

The expression "days" when used in this Convention means calendar days not working days.

Article 48 - Reservations[4]

No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

[Final clauses to be inserted – see Appendix 6]

– END –

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[4] This Article is without prejudice to any other reservation which the Diplomatic Conference might wish to consider.

C-DEC 146/3
15/11/95

COUNCIL - 146TH SESSION

THIRD MEETING

(THE COUNCIL CHAMBER, WEDNESDAY, 15 NOVEMBER 1995 AT 1000 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

General Work Programme of the Legal Committee (Subject Nos. 16 and 12.5)

2. The Council considered the above subject on the basis of C-WP/10289, presented by the Secretary General.

3. In reviewing the priorities accorded the various items of the General Work Programme of the Legal Committee as set forth in paragraph 2.3, several Representatives highlighted the importance of modernizing the "Warsaw System". In light of the views expressed, and on the suggestion of the President of the Council, it was agreed to amend the second item of the General Work Programme to add: "*The modernization of the 'Warsaw System' and* review of the question of the ratification of international air law instruments". The Council further agreed that a Secretariat study group be established to assist the Legal Bureau in developing a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System". The results of the socio-economic analysis of the limits of liability under the "Warsaw System" undertaken by the Air Transport Bureau in conjunction with the International Air Transport Association (IATA), the comments thereon by the Air Transport Committee (ATC), and other related work undertaken by IATA, including the Inter-carrier Agreement on Passenger Liability (Kuala Lumpur, 31 October 1995), would serve as a basis for the study. The Legal Bureau was requested to present its report to the Council on this matter during its next (147th) Session, at which time consideration would be given to the appropriate forum, *i.e.* the Legal Committee or a conference, for further deliberation on the modernization of the "Warsaw System". The Council requested the Secretary General to take the necessary measures to establish this study group as soon as possible.

4. A number of comments were made concerning the staffing of the Legal Bureau. To a suggestion that a panel be created to support the activities of that Bureau, the President indicated that the staffing level would be reviewed by the Secretary General in light of the current financial situation and that the Council would be informed of any possible measures which could be taken to strengthen the Legal Bureau. This matter would be further discussed during the Council's review of C-WP/10290 *(Legal Meetings in 1996 and for 1997-1999)* in connection with the creation of a panel of legal and technical experts to consider, with regard to global navigation satellite systems (GNSS), the establishment of a legal framework.

5. In taking the action outlined in paragraph 4.1 of C-WP/10289, the Council noted the decisions of the 31st Session of the Assembly as set out in paragraphs 2.3, 3.1.2, 3.2.3 and 3.2.7 thereof, as well as the recommended action set out in paragraph 3.2.8, and approved the General Work Programme of the Legal Committee as presented in paragraph 2.3 and as amended during the debate.

(...)

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COUNCIL - 147TH SESSION

FIFTEENTH MEETING

(THE COUNCIL CHAMBER, THURSDAY, 14 MARCH 1996 AT 1430 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

Report on Modernization of the "Warsaw System" (Subject Nos. 16 & 16.3)

5. The Council considered this subject on the basis of a paper presented by the Secretary General (C-WP/10381), which set forth the results of the deliberations of the Secretariat Study Group on the "Warsaw System" and the latter's recommendations concerning the adoption of a new international instrument to modernize the legal framework for air carrier liability. In elaborating on the recommendations, the Director of the Legal Bureau noted that, as suggested, the French text of Recommendation 2, sub-paragraph a), contained in paragraph 9.2 of C-WP/10381 would be revised to properly distinguish between the concepts of fault, negligence and contributory negligence.

6. Responding to points raised during the debate, the Secretary General indicated that the composition of the Secretariat Study Group could be expanded, in a limited fashion, to ensure representation of the various schools of thought regarding the modernization of the "Warsaw System".

7. In taking the action proposed by the President of the Council in light of views expressed, the Council noted C-WP/10381 and the Report of the Secretariat Study Group attached thereto and agreed to refer the matter to the Legal Committee. The Legal Bureau was requested to prepare a draft instrument with the assistance of the Secretariat Study Group (either as it was currently composed or with an enlarged membership), as necessary. It was understood that the draft instrument would be presented to the Council for information either during the next (148th) Session, if possible, or early in the 149th Session. The Chairman of the Legal Committee would be contacted with regard to the appointment of a Rapporteur to review and revise the draft instrument and to report thereon to the Legal Committee. The Report of the Rapporteur on the draft instrument would then be presented to the Council, with the view of convening a meeting of the Legal Committee at an early date, possibly in the first quarter of 1997, if the matter had achieved a sufficient degree of maturity. The Secretary General was requested to inform Contracting States of progress made in the modernization of the "Warsaw System".

8. The Council concluded its consideration of this item by expressing its appreciation for the excellent work of the Secretariat Study Group.

(...)

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C-DEC 148/16
27/6/96

COUNCIL - 148TH SESSION

SIXTEENTH MEETING

(THE COUNCIL CHAMBER, TUESDAY, 25 JUNE 1996 AT 1430 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

International instrument to modernize the legal framework for air carrier liability
(Subject Nos. 16 & 16.3)

10. The Council had for review a paper presented by the Secretary General (C-WP/10420) which reported on the current status of the work undertaken for the modernization of the "Warsaw System" and on the progress being made with respect to the preparation of a new draft international instrument. Additional information was provided concerning two new points which had emerged from the recently-held second meeting of the Secretariat Study Group: the creation of a more practical baggage identification record and the inclusion, in the draft instrument, of a new fifth jurisdiction provision that was narrower in scope than the one originally proposed. The possible referral of the draft text of the instrument to the Legal Sub-Committee was also elaborated upon.

11. An editorial amendment to the French text of paragraph 3.1 b) was noted, whereby the expression "faute intentionnelle" ("wilful misconduct") would be replaced with the word "dol" used in Article 25 of authentic French text of the original 1929 Warsaw Convention. Further to another linguistic point raised, it was agreed that the work "notion" used in paragraph 3.1 h) would be replaced with the word "concept" in the English text and that all other language versions would be revised accordingly.

12. The Council then took action based on paragraph 5.1 of C-WP/10420 and noted the working paper and the comments made in the course of the debate.

13. It was understood that a working paper would be presented during the 149th Session setting forth the revised draft text of the new international instrument as approved by the Secretariat Study Group, as well as the views of the latter and the Secretariat thereon, and subsequent action to be taken with regard to the possible referral of the draft text to the Legal Sub-Committee, for later consideration by the Legal Committee. It was agreed that this working paper would be circulated as soon as possible after its completion in order to facilitate the requisite preparatory work on the part of the Representatives and their national administrations.

(...)

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COUNCIL - 149TH SESSION

SECOND MEETING

(CONFERENCE ROOM 5, WEDNESDAY, 2 OCTOBER 1996 AT 1000 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

Progress report on modernization of the "Warsaw System" (Subject Nos. 16 & 16.3)

11. The Council reviewed C-WP/10470, in which the Secretary General presented a progress report on modernization of the "Warsaw System". The paper supplemented the information provided in an earlier report (C-WP/10420) outlining the main features of the new draft instrument for the modernized legal framework for air carrier liability and presented the draft instrument for information to the Council.

12. A number of views were expressed and clarifications provided during the Council's review of the progress report in C-WP/10470. In summarizing the Council's debate, the President concurred with the emphasis which had been placed on the urgency of the subject, an urgency which had already been highlighted by the Council when it had decided that an ICAO Secretariat Study Group on the "Warsaw System" should be established. That Study Group had since met twice, in February and in June of 1996; the Secretary General had reported to the Council on both of the Group's meetings; and the Secretariat, with the assistance of the Study Group, had produced the draft new Warsaw Instrument attached to C-WP/10470. A Rapporteur had, moreover, been appointed to review and revise that draft.

13. The President suggested that the Council place special emphasis on the need for the Legal Committee to finalize work on the new instrument by the close of its next meeting in April/May 1997 so that a Diplomatic Conference could be convened around the end of 1997 to formally adopt the new instrument. When convening the next meeting of the Legal Committee, the President of the Council would highlight this point. The urgency of the situation would also be brought to the attention of the Rapporteur, and the Secretariat would be instructed to provide the Rapporteur with the records of this meeting's discussion.

14. In taking action on the subject, the Council noted C-WP/10470 and the draft instrument presented in the attachment to the paper, together with the President's summary of the discussion.

(...)

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C-DEC 150/15
20/3/97

COUNCIL - 150TH SESSION

FIFTEENTH MEETING

(THE COUNCIL CHAMBER, TUESDAY, 18 MARCH 1997 AT 1430 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

Modernization of the "Warsaw System" — Rapporteur's Report and matters relating to the 30th Session of the Legal Committee (Subject Nos. 12.5 and 16)

2. The Council resumed (150/14) and completed its consideration of C–WP/10576 [with Corrigendum (English only), Corrigendum No. 2 (Spanish only) and revised Arabic version], a paper presented by the Secretary General which contained the Report of the Rapporteur on the Modernization and Consolidation of the "Warsaw System" (Attachment A) and which set forth a provisional agenda for the 30th Session of the Legal Committee (Attachment B), as well as a list of international organizations to be invited to participate in that meeting (Attachment C).

3. A number of comments were made in the course of the debate, with clarifications being provided by the Director of the Legal Bureau. Certain of the points raised were retained and would be brought to the attention of the Legal Committee. A request for the timely issuance of visas to participants in the meeting was noted by the Secretariat and the Representative of the host country.

4. In light of concerns expressed during the review of the provisional agenda for the 30th Session of the Legal Committee, it was agreed that the word "merely" would be deleted from the last line of the Note to Item 5: Consideration of other items on the General Work Programme of the Legal Committee.

5. To queries regarding attendance at the meeting of the Legal Committee by organizations other than those enumerated in Attachment C, the President affirmed that requests from other organizations to participate in that meeting as observers would receive due consideration.

6. In taking the action proposed at paragraph 4.1 of C-WP/10576, the Council:

a) noted the Rapporteur's Report contained in Attachment A thereto;

b) approved the provisional agenda for the 30th Session of the Legal Committee as set out in Attachment B to the paper, as modified in paragraph 4 above; and

c) agreed that an invitation to attend the 30th Session of the Legal Committee be extended to all non-Contracting States, as well as to those international organizations set out in Attachment C to the paper.

(...)

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COUNCIL - 151ST SESSION

FIFTH MEETING

(THE COUNCIL CHAMBER, WEDNESDAY, 4 JUNE 1997 AT 1000 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

Modernization of the "Warsaw System"
(Subject Nos. 16 & 16.3)

4. The Council considered the above subject on the basis of C-WP/10613, presented by the Secretary General. The paper summarized the results of the 30th Session of the Legal Committee on the subject "modernization of the Warsaw System" and presented the text of the Draft Convention as approved by the Legal Committee.

5. A number of views were expressed during the debate, particularly in connection with the proposal to convene a Diplomatic Conference in the first half of 1998. A summary of the debate, taking into account these views, was offered by the President of the Council, who first requested that in C-WP/10613, any references in section 3 (Draft Convention — Decisions to be taken by the Council) to Assembly Resolution A7-6 be replaced by Resolution A31-15 (*Consolidated Statement of Continuing ICAO Policies in the Legal Field*), Appendix B (*Procedure for approval of draft conventions on international air law*).

6. The President recalled that the Assembly, at its 31st Session, had placed special emphasis on the urgency of the modernization of the Warsaw System. The Council and the Secretary General had responded immediately to this urgency: a Secretariat Study Group had been established and had met twice in 1996. The Study Group's report to the Secretariat had been presented, in turn, to the Council as a report of the Secretary General, and the Council had been very satisfied with the work carried out. The Council had then requested the Secretary General to prepare, for its review, a draft Convention which would place special emphasis on the urgency of the subject. The Council had not requested the Legal Committee to establish a sub-committee; it had, rather, convened the Legal Committee directly in order for it to consider the draft Convention, taking into account the work of the Study Group and the Secretariat, and to consider the modernization of the Warsaw Convention. The Legal Committee, at its 30th Session, had produced the report now before the Council. Thus, in less than two years, every possible measure had been taken to meet the concerns of the international civil aviation community with respect to the Warsaw Convention, a document which dated back to 1929 and which, over the years, had been the subject of different amendments in the form of protocols. The Assembly, the Council, and the Legal Committee had all agreed that the tasks of consolidating and modernizing the Warsaw Convention should be carried out within the context of a single legal framework, that being the modernization of the "Warsaw System".

7. The Council would have to decide whether the product of this work had reached a level which would warrant the convening of an International Conference of Plenipotentiaries, *i.e.* a "Diplomatic Conference". This decision required of the Council was part of the procedure for approval of a draft convention on international air law, as outlined in the above-mentioned Appendix B to Resolution A31-15. In this respect, the President acknowledged that many elements, including the liability regime for passengers, liability limits, arbitration,

escalator clause, and liability insurance, had not been the subject of a consensus in the forum of the Legal Committee and were therefore being referred to the Diplomatic Conference. Although it was possible that some details had not been finalized because of time constraints, the fact remained that much work remained. Notwithstanding the urgency which was attached to this subject, the Council would have to exercise prudence in convening a Diplomatic Conference only when it was realistic to expect that such a Conference could achieve its objectives.

8. Taking into account the above, and following the procedure for approval of draft conventions on international air law, the President of the Council observed that the first step of the procedure, *i.e.* the transmittal of the draft document to the Council, had been completed. The Council now had some flexibility, under the second step of the procedure, to take such action as it deemed fit. If the Council was satisfied with the document, it could circulate the draft to Contracting States, with or without comment. If, however, the Council wished to see more refinement in terms of the text, and wished to have more views regarding the substance, it could request the Secretary General to send the draft Convention to the States, accompanied by the Council's comments, and could at the same time take some parallel action. In this respect, the President suggested that the Council request the Secretary General to send the draft Convention to States in accordance with the above-mentioned procedure for approval, requesting comments by the end of October 1997. These comments from States would be analyzed by the Secretariat Study Group, and the Secretary General would present a report on the subject to the Council during its next (152nd) Session.

9. As regards the question of convening a Diplomatic Conference, the President suggested that the Council could, for the time being, decide in principle to convene the Conference, with the understanding that it would, during its 152nd Session, be in a better position to take a final decision on the subject, taking into account the comments received from States, their analysis by the Secretariat Study Group, and the confirmation or otherwise of the decision in principle regarding the convening of the Conference. At the same time, the Secretariat should prepare a text which, from the point of view of format, would highlight the differences regarding the legal views on different points mentioned, consolidating the possible alternatives. In this way, it would be possible to arrive at an appropriate solution to the different legal points of view, and to present, to the Diplomatic Conference, a draft Convention that could be accepted, adopted for signing, signed and ratified.

10. The President further clarified that the drafting group which had been established by the Legal Committee had comprised many members who were also members of the Secretariat Study Group. Whereas the drafting group was subordinate to the Legal Committee and could only act on decisions taken by the Committee, putting such decisions in the proper legal terms, the Study Group had been established to take account of the conclusions of the Council, and had more flexibility for making suggestions and presenting alternatives with a view to avoiding procedural problems. The President indicated that he would review the composition of the Study Group, if necessary; the participation of observers would be welcome.

11. The Council accepted the President's summary as its decision on this subject, and expressed its appreciation to the Rapporteur and to the Legal Committee for the excellent work which had been carried out.

— END —

COUNCIL - 152ND SESSION

EIGHTH MEETING

(THE COUNCIL CHAMBER, WEDNESDAY, 26 NOVEMBER 1997, AT 1000 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

(...)

Modernization of the "Warsaw System" (Subject Nos. 16 and 16.3)

2. Tabled for consideration under this item was a paper presented by the Secretary General (C-WP/10688) which outlined recent developments regarding the *Draft Convention for the Unification of Certain Rules for International Carriage by Air* and set forth a proposal for the establishment and convening of a Panel of Legal Experts on the Modernization and Consolidation of the "Warsaw System" for the completion of the refined text of the Convention prior to a Diplomatic Conference.

3. In summarizing the debate, the President of the Council indicated that, despite the many changes which had occurred in the years following the adoption, in 1929, of the Warsaw Convention, that Convention and the amendments thereto remained the basic system with regard to the liability of the air carrier. Emphasizing the pressing nature of the problem facing ICAO of modernizing this "Warsaw System", he averred that the Organization should continue to do everything possible to find a proper solution. The President recalled from the Council's earlier consideration (C 151/5) of this item that a number of elements, notably the liability régime for passengers, liability limits, arbitration, an escalator clause and liability insurance, had not been the subject of consensus in the forum of the 30th Session of the Legal Committee and remained open questions. The Council had, at that time, recognized that, "notwithstanding the urgency which was attached to this subject, [it] would have to exercise prudence in convening a Diplomatic Conference only when it was realistic to expect that such a Conference could achieve its objectives" (*cf.* C-DEC 151/5, paragraph 7). The President thus was of the opinion that it was premature to consider the convening of a Diplomatic Conference, maintaining that all possible steps should be taken beforehand to ensure a reasonable prospect of success for the Diplomatic Conference. To do otherwise would not be productive.

4. Noting that the majority of Council Representatives had spoken in favour of the creation of a group to finalize the draft Convention, the President indicated that the penultimate sentence of paragraph 2.2 of the paper called for the establishment of a "special group", of which the proposed Panel of Legal Experts was only one possible form. In advocating the creation of a Special Group on the Modernization and Consolidation of the "Warsaw System", he asserted that it would have more flexibility to consider the political, economic and legal aspects of the problem. The President underscored that the Special Group would not take final decisions regarding the text of the draft Convention but would instead present its recommendations and/or conclusions thereon to the Council for its consideration. He affirmed the continued validity of the terms of reference set forth in paragraph 4 of the paper, subject to the replacement of the word "Panel" by "Special Group". The President indicated that, as suggested by the Representative of France, this Special Group would not be limited in its consideration to the options emanating from the 30th Session of the Legal Committee but would have the flexibility to supplement the latter with alternative options, in accordance with the said terms of reference.

5. Referring to paragraph 3.1 of the paper, the President proposed that, in accordance with past practice, he be delegated the authority to appoint the members of the Special Group, affirming that he would exert all possible prudence and wisdom in establishing its composition. He noted, from paragraph 2.2, that the Special Group would comprise members from approximately twenty States — there was a degree of flexibility in its size to accommodate prevailing circumstances. The President deemed it advisable for the Chairman and Vice-Chairmen of the Legal Committee, as well as the Rapporteur for this item, to be considered *ex officio* members. He indicated that the Special Group could present its report to the Council during the 154th Session.

6. The Council accepted the above summary by the President as its decision. It was understood that members of the Secretariat Study Group would be invited to take part in the meeting of the Special Group. It was likewise noted that the views of regional airline associations would be taken into account, whether communicated to the Secretariat directly or through the International Air Transport Association (IATA).

(...)

- END -

COUNCIL - 154TH SESSION

SEVENTH MEETING

(THE COUNCIL CHAMBER, WEDNESDAY, 3 JUNE 1998, AT 1000 HOURS)

SUMMARY OF DECISIONS

OPEN MEETING

Modernization of the "Warsaw System" (Subject Nos. 16, 16.3 and 12.5)

1. Tabled for consideration was C-WP/10862, in which the Secretary General reported on the outcome of the meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" (Montreal, 14 to 18 April 1998). The Attachment to that paper set forth the revised text of the draft *Convention for the Unification of Certain Rules for International Carriage by Air* as approved by the Special Group. Further to linguistic points raised by the Representative of France, it was agreed that the word "préjudiciable" appearing in the French text of Article 20, sub-paragraph (c), of the draft Convention would be replaced with the word "fautif" and that the phrase "ou la commercialisation conjointe" would be added to the French text of Article 27, paragraph 3, after the word "fourniture" in order to be aligned with the English text thereof.

2. In offering a summary of the debate, the President noted that a large majority of Representatives had spoken in favour of convening a Diplomatic Conference for the adoption of the draft *Convention for the Unification of Certain Rules for International Carriage by Air*, with only a few having expressed other views. In his summary, the President noted, in this regard, that the Representative of the United States, in expressing reservations, had averred that it was premature to submit the draft Convention to a Diplomatic Conference. That Representative had, *inter alia*, voiced concern that if square-bracketed paragraph 3 *bis* of Article 27 enabling States to opt out of the fifth jurisdiction were adopted by the Diplomatic Conference it would undermine the mechanism set out in that Article. The Representative of Pakistan had advocated the prior review of the draft Convention by the Legal Commission of the 32nd Session of the Assembly, while the Representative of Italy had suggested its prior consideration by the Legal Committee. The Representative of the Russian Federation had underscored the desirability of explanatory material on certain unresolved issues being provided to States prior to the Diplomatic Conference.

3. In recalling the Council's decision of 4 June 1997 regarding the draft Convention as adopted by the 30th Session of the Legal Committee (*cf.* C-DEC 151/5, paragraph 7), the President noted that the Council had felt that "notwithstanding the urgency which was attached to this subject, the Council would have to exercise prudence in convening a Diplomatic Conference only when it was realistic to expect that such a Conference could achieve its objectives". In paragraph 9 of its decision, the Council had agreed in principle to the convening of a Diplomatic Conference while requesting that further work be done with regard to the draft Convention. In citing the sequence of events leading up to the present consideration of C-WP/10862 and the draft Convention as approved by the Special Group, the President highlighted the previous consideration of the draft Convention by States, the Council, the Secretariat Study Group and the Legal Committee. He underscored the high importance of the subject to passengers, airlines, courts and governments. Asserting that governments were the sole entity which could protect public interest, the President noted that it would be the governments which would ratify the Convention following its formal conclusion and which would pass the necessary national legislation for the implementation of its provisions.

4. Referring to paragraph 3 *bis* of Article 27 of the draft Convention, the President clarified that its square brackets only signified that it was to be considered by the Diplomatic Conference. Noting from paragraph 2.1 of C–WP/10862 that that paragraph had been inserted in view of the strong preference therefor expressed by one delegation taking part in SGMW/1, he emphasized that such action was not to be taken as a recommendation by the Special Group for the approval of paragraph 3 *bis* by the Diplomatic Conference. In underscoring the importance and delicate nature of Article 27, the President affirmed that every effort would be made to ensure that no State made a reservation regarding the applicability of paragraph 2 of Article 27 to it and to its carriers.

5. Referring to the proposed dates for the Diplomatic Conference indicated in paragraph 3.2 of C–WP/10862, 10 to 21 May 1999, the President suggested, in light of comments made and the importance of the subject matter, that the duration of the Conference be extended to 29 May 1999, so as to allow sufficient time for in-depth consideration of the draft Convention, both in formal and in informal meetings, and for a rapprochement between the differing views. In noting that the draft Programme Budget for the 1999-2000-2001 triennium under consideration by the Finance Committee contained an allocation of US $10 000 for a Diplomatic Conference convened in Montreal for the duration originally envisaged, he indicated that an extension to 29 May 1999 would entail additional costs of not more that US $5 000.

6. To a suggestion made that the Organization adopt a new policy based on the presumption that major meetings should be held in Montreal unless exceptional circumstances warranted their convening in another venue and that action paragraph 4.1 c) of the paper be amended accordingly by deleting the last two phrases thereof ", unless an invitation is received ... consideration", the President affirmed that the current policy and the said standard phrasing should be retained. He underscored, in this regard, the impossibility, from the point of view of diplomacy, of closing the door on States which might have an interest in hosting a given regional or international meeting. While recognizing the financial savings which could be achieved through the convening of such meetings at ICAO Headquarters and the ready availability of facilities, services and documentation, the President noted that in some instances there were other aspects of importance which the Council should consider in determining the venue for a meeting.

7. Taking into account the above summary, the Council took the action set forth in paragraph 4.1 of C–WP/10862, as amended by the President in light of the debate, and:

a) noted that paper, in light of the report of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW/1);

b) noted the text of the draft Convention as revised by the Special Group, set forth in the Attachment to C–WP/10862; and

c) decided to convene a Diplomatic Conference for the adoption of the said draft Convention, to be held from 10 to 29 May 1999 in Montreal unless an invitation were received from a Contracting State to host the Conference, in which case such invitation would be submitted to the Council for consideration.

8. It was noted by the President that the Government of Poland had expressed an interest in hosting the Diplomatic Conference for historical reasons.

- END -

Doc 9693-LC/190

International Civil Aviation Organization

LEGAL COMMITTEE
30th SESSION

Montreal, 28 April — 9 May 1997

REPORT

Published by authority of the Secretary General

1997

Montreal **Canada**

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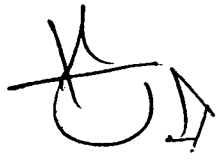
REPORT OF THE 30TH SESSION OF THE LEGAL COMMITTEE

Letter of Transmittal

To: President of the Council

From: Chairman of the Legal Committee

I have the honour to submit, in accordance with Rule 46 of the Rules of Procedure of the Legal Committee, the Report of the 30th Session of the Legal Committee.



K. El Hussainy

Montreal, 9 May 1997

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LEGAL COMMITTEE - 30TH SESSION

(Montreal, 28 April – 9 May 1997)

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Corrigendum
(E, F, S, R, A)
11/9/98

LEGAL COMMITTEE

30TH SESSION

Montreal, 28 April - 9 May 1997

CORRIGENDUM NO. 1

1. Please *replace* on page 2, in paragraph 4.1: "14" with "15".

2. Please *replace* on page 4-20, in paragraph 4:177, in the second line: "20" with "22".

3. Please *replace* on page 4-21, in paragraph 4:184, in the penultimate line: "6" with "none" and "no abstention" with "6 abstentions".

4. Please *replace* on page 4-23, in paragraph 4:198, in the sixth line: "10" with "12".

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1. Place and Duration

1.1 The 30th Session of the Legal Committee was held at Montreal from 28 April to 9 May 1997. The Chairman of the Legal Committee, Dr. Khairy El Hussainy (Egypt), presided over the Session.

2. Opening addresses

2.1 The meeting was declared open by the **Chairman of the Legal Committee**. He noted in his opening remarks that this was the first session of the Legal Committee since the Arabic language became an official language of ICAO in 1995. Referring to the main item on the agenda of the meeting, namely "*Modernization of the 'Warsaw System' and review of the question of the ratification of international air law instruments*", he was confident that the new draft instrument on this item would be completed by the close of the current session in order to be submitted for the adoption by a Diplomatic Conference.

2.2 The **President of the Council**, Dr. Assad Kotaite, welcomed delegates and observers to the 30th Session of the Legal Committee and expressed the view that the task assigned to the Committee represented one of the most pressing challenges for the advancement of international air law at the dawn of the new millennium. He recalled that the reform of the "Warsaw System" had been on the agenda of the Committee for a significant number of years. While some instruments with positive elements were adopted after the Hague Protocol in 1955, States were reluctant to put them into operation, primarily because of the notion of unbreakable limits of liability and the difficulties associated with the establishment of supplementary compensation schemes. In view of this, the Council decided in June 1994 that a socio-economic analysis of the limits of liability should he undertaken by ICAO in co-ordination with the International Air Transport Association (IATA). The 31st Session of the Assembly decided to direct the Council to continue its efforts to modernize the "Warsaw System" as expeditiously as possible. Accordingly, the Council had established a Secretariat Study Group to assist ICAO's Legal Bureau in developing a framework for a modernized regime of air carrier liability. The results of the Study Group had been submitted to the Council during its 147th Session, and the Council had decided to refer the matter to the Legal Committee. The Committee had therefore appointed Mr. Vijay Poonoosamy (Mauritius) its Rapporteur on this subject, who had submitted a report containing a detailed review of the text of the draft instrument, including suggestions for modifications. The President of the Council expressed his gratitude to the Rapporteur and believed that the draft text together with his report would form an excellent basis on which the Committee could work towards a new chapter in the history of the "Warsaw System". He concluded by expressing high expectations that the Committee would, under the able guidance of its Chairman, fully reach its objectives in its task to develop a new draft convention for the modernization of the "Warsaw System".

2.3 The **Secretary General**, Dr. Philippe Rochat, associated himself with the President in extending his welcome to all participants. After introducing the members of the Secretariat serving the Committee, he wished the Committee every success in its work.

3. Agenda and Working Arrangements

3.1 The final agenda of the Session adopted at the First Meeting is presented in **Attachment A** to this Report.

3.2 One delegation drew the Committee's attention to Rule 44 of its Rules of Procedure dealing with the languages used in the Committee, and requested that the Committee take the necessary action to ensure that the Arabic language be now included in the list of languages specified therein. The Chairman reminded the Committee that he had earlier pointed out that Arabic was an official language of ICAO and was being used for the first time in a session of the Legal Committee. In accordance with Rule 47, paragraphs (a) and (b), the Committee unanimously agreed to an amendment to Rule 44, paragraphs (a) and (b), so as to include an appropriate reference to the Arabic language.

3.3 The working papers considered by the Committee are listed by agenda items in **Attachment B** to this Report.

3.4 The action taken by the Committee in respect of each item is reported on separately in the Report. The material is arranged according to the numerical sequence of the agenda items considered by the Committee.

4. Meetings

4.1 The Committee held 14 Meetings; all Meetings were held in open session.

4.2 The Secretary of the Committee was Dr. L. Weber, Director of the Legal Bureau of ICAO, the Deputy Secretary was Mr. S.A.A. Espínola, Principal Legal Officer, and the Assistant Secretary was Mr. J.V. Augustin, Legal Officer. Messrs. B. Verhaegen and J. Huang, Legal Officers, Mr. A. Jakob, Associated Expert, and other officials of the Organization also provided services for the Committee.

5. Representation of States and International Organizations

5.1 Sixty-one Contracting States and four international organizations were represented by 182 representatives and observers at this Session of the Legal Committee. The names of the representatives and observers appear in **Attachment C** to this Report.

6. Records of Proceedings

6.1 The Committee **decided** that in application of Rule 45 of its Rules of Procedures, the minutes of the 30th Session need not be prepared, except those for Agenda Item 4.

Agenda Item 2: Report of the Secretariat

2:1 The Secretary presented LC/30-WP/2 which was noted by the Committee. The main purpose of this paper was to draw the attention of the Committee to the relevant developments in the legal work of ICAO since the 29th Session of the Committee.

2:2 The Committee noted that the 31st Session of the Assembly, after a review of the programme in the legal field by the Legal Commission, endorsed the General Work Programme of the Legal Committee as amended by the Council at its 145th Session on 7 June 1995.

2:3 It was further noted that the Assembly decided to direct the Council to continue its efforts to modernize the "Warsaw System" as expeditiously as possible, taking into account initiatives such as the ICAO socio-economic study, issues relating to insurance, and the proposed IATA Intercarrier Agreement. This decision was taken in light of discussions in the Legal Commission on the subject of the modernization of the "Warsaw System", which, *inter alia*, indicated that there was general agreement that the present liability limits under the "Warsaw System" were inadequate and that there was a need to modernize the system. The Council decided on 15 November 1995 at its 146th Session to amend the second item on the Work Programme of the Legal Committee to read: "*The modernization of the 'Warsaw System' and review of the question of the ratification of international air law instruments*". The Council placed special emphasis on the urgency of modernizing the "Warsaw System" and the need for the Legal Committee to finalize work on the new instrument by the close of its 30th Session, so that a Diplomatic Conference could be convened as soon as possible thereafter to formally adopt the new instrument.

2:4 As regards the subject of slow progress in the ratification of international air law instruments, the Committee noted that the Council decided on 5 June 1996 at its 148th Session to refer to the Legal Committee for consideration certain proposals aimed at accelerating the rate of ratification and entry into force of international air law instruments, other than amendments to the Chicago Convention. Furthermore, on 12 November 1996 at its 149th Session, the Council examined specifically options to accelerate the entry into force of amendments to the Chicago Convention and decided that the matter should be documented for consideration by the Legal Commission of the next ordinary Session of the Assembly in 1998.

2:5 With respect to the item "*Consideration, with regard to global navigation satellite systems (GNSS), of the establishment of a legal framework*", the Committee noted that the Council decided on 6 December 1995 at its 146th Session to establish the Panel of Legal and Technical Experts on the Establishment of the Legal Framework with Regard to GNSS (LTEP). It also decided that the Panel should have the terms of reference as recommended by the 29th Session of the Legal Committee, and endorsed by the 31st Session of the Assembly. The Panel held its first meeting from 25 to 30 November 1996 and decided to set up two working groups, one being mandated to develop provisions of a Charter formulating the fundamental principles for GNSS, and the second being tasked to consider issues related to certification, liability, administration, finance and cost recovery, and future operating structures. The first Working Group met from 10 to 12 March 1997 and had already forwarded its report to the Chairman of the Panel. The second Working Group held its first meeting from 22 to 25 April 1997. The full Panel would hold its second meeting in the last quarter of 1997, at which time both Working Groups would present their reports.

2:6 The Committee further noted that the Council on 3 June 1996 at its 148th Session decided to include the new item "*Acts or offences of concern to the international aviation community and not covered by existing air law instruments*" in the General Work Programme of the Legal Committee. This item concerned acts or offences committed on board aircraft which were of a less serious nature than acts of highjacking, sabotage or other acts of unlawful interference, but which nevertheless constituted offences or crimes which should be prosecuted and which were not covered by existing air law instruments. The priority of this item in the General Work Programme remained to be determined.

Agenda Item 3: Review of the General Work Programme of the Legal Committee

3:1 In accordance with Rule 8 of its Rules of Procedure, the Committee proceeded to review its General Work Programme. It noted, as indicated in LC/30-WP/3, that the General Work Programme as amended by the Council on 15 November 1995 and 3 June 1996 were as follows:

1) Consideration, with regard to global navigation satellite systems (GNSS), of the establishment of a legal framework;

2) The modernization of the "Warsaw System" and review of the question of the ratification of international air law instruments;

3) Liability rules which might be applicable to air traffic services (ATS) providers as well as to other potentially liable parties – Liability of air traffic control agencies;

4) United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments; and

5) Acts or offences of concern to the international aviation community and not covered by existing air law instruments.

3:2 It was also noted that item 5 was included in the Programme by the Council without indication of its priority. The Committee decided to retain the General Work Programme of the Legal Committee as mentioned above.

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Agenda Item 4: Modernization of the "Warsaw System" and review of the question of the ratification of international air law instruments

4:1 The Chairman explained the procedure he intended to follow in dealing with the item. The procedure would consist of the presentation by the Secretary of WP/4 "Introductory Note" followed by the Rapporteur to introduce his report, to be followed by general statements by delegations. The Committee would then consider the text of the draft new Warsaw instrument article by article.

4:2 The Secretary presented WP/4 "Introductory Note", which provided background information related to this item and outlined the major elements of the "ICAO Draft Convention on the Liability of the Air Carrier and Other Rules Relating to International Carriage by Air" set out in Appendix B to WP/4. The Chairman then invited the Rapporteur, Mr. V. Poonoosamy, to introduce his report set out in Appendix A to WP/4.

4:3 The Rapporteur stated that the global problems of the "Warsaw System" required a global solution. An all-encompassing, worldwide, unified and modernized framework should therefore be promoted at the level of governments and in accordance with the international law of treaties. Concerted action was essential in order to achieve this objective.

4:4 The Rapporteur pointed out that a major shortcoming of the "Warsaw System", which, ironically, was designed for the unification of certain rules, was its very lack of uniformity on a most crucial point of the system, namely, the regime of limitation of liability. With potentially 44 different combinations of liability regimes, the current disuniformity of the "System" carried the seed of its destruction. The disintegration of the "Warsaw System" would not be to the advantage of either passengers or carriers, since its benefits clearly outweighed its disadvantages.

4:5 While recognizing the necessity for change, the Rapporteur cautioned that moving from one unacceptable extreme to another should, however, be resisted. The necessary change could not be based on a piecemeal approach, but should be based on a new self-standing Convention which would modernize the liability regime, while incorporating as far as possible the existing instruments of the "Warsaw System". The new instrument should not only be adequate and desirable (i.e. simple, workable, equitable and reasonable in the light of all relevant circumstances), but also acceptable to 185 Contracting States of ICAO. In view of the wide spectrum of socio-economic expectations and standards regarding the liability limit, it would not be possible to meet all expectations and standards of all States. Compromise was therefore inevitable, and a balance between desirability and acceptability should be struck.

4:6 The Rapporteur pointed out that the most criticized provisions of the "Warsaw System" were those relating to the liability of the carrier. He recalled that the provisions of the Warsaw Convention on liability were drafted in the light of a set of circumstances and objectives, in particular, the recognized difficulty faced by a plaintiff in proving negligence because of the novelty and highly technical nature of the evidence required and the accepted need to protect an international air transport industry still in its infancy. Circumstances and objectives had changed and the applicable Warsaw liability limits were indefensibly low in many jurisdictions.

4:7 He therefore submitted that the fundamental issue was that of the measure of damages as determined by the law applicable to the determination of compensation. Once this issue was resolved to the satisfaction of most, other related issues such as the basis of the liability, applicable defences and

jurisdictions would be capable of being addressed practically. The measure of damages was the most fundamental issue because of the evident lack of uniformity in the award of damages in different jurisdictions. Some jurisdictions were more generous (or excessive) than others. In some jurisdictions the awards were made by juries, in others by judges, and the measure of damages varied extensively from one jurisdiction to another.

4:8 Emphasizing the objectives of "equitable compensation based on the principle of restitution" and "an equitable balance of interests" in the preamble of the draft instrument, and the importance of uniformity, predictability and universality, the Rapporteur believed that it was crucial for the Legal Committee to devise and agree on a common method for determining the amount of compensation. The aim would not be that everyone received the same amount of damages, but that a uniform set of rules for assessing integral restitution be applied. In this context, the possibility of determining compensation in accordance with international law and the principles of justice and equity, irrespective of the competent jurisdiction before which an action is brought, should be canvassed.

4:9 Based on the assumption that a universally acceptable method of calculating fair, equitable and predictable compensation could and would be agreed upon, the Rapporteur submitted that:

- it would not be fair to limit the liability of the carrier even if the basis of such a liability were to be strict or absolute;

- it would not be fair to provide for unlimited liability on an absolute, strict or even presumed fault basis; and

- unlimited liability on the single basis of proved fault even for claims under 100 000 SDR would undoubtedly not receive wide support in the light of recent developments in connection with the Japanese Initiative, the IATA Intercarrier Agreement on Passenger Liability, which as of 7 April 1997 had been endorsed by 85 Carriers, and the Agreement on Measures to Implement the IATA Intercarrier Agreement, which as of 17 April 1997 had been endorsed by 53 Carriers.

4:10 On the basis of the foregoing, the Rapporteur proposed that the carrier liability regime in respect of passengers should be two-tiered: the **first tier** should not exceed 100 000 SDR and the basis of the liability for the first tier should be presumed fault. The **second tier** should have no predetermined limits whatsoever and should therefore provide for full compensatory damages whenever the first tier has failed to do so. To obtain full compensatory damages, the passenger would only have to prove negligence on the part of the carrier, his servants or agents.

4:11 In his concluding remarks, the Rapporteur observed that in order to ensure that the new Convention did not suffer the fate of the 1971 Guatemala City Protocol and the 1975 Montreal Additional Protocols 1, 2 and 3 and Montreal Protocol No. 4, it would be crucial for ICAO to patiently develop a consensus on as much of this new draft Convention as possible, and then to promote and look out for the propitious psychological moment to achieve the breakthrough on the outstanding issues. Only then would the new Convention have some guarantee of success.

4:12 The Committee noted the Rapporteur's Report which would serve as a basis for discussion, together with the new draft instrument as the Committee would progress its review of this item.

4:13 Following the presentation by the Rapporteur of his report, a number of general statements were made.

4:14 All delegations who spoke expressed support, in some cases strong support, for the initiative taken for the modernization and consolidation of the Warsaw System and praised the Legal Bureau, the Study Group and the Rapporteur for their excellent work.

4:15 Most delegations stated that the liability limits, especially in relation to passenger death and injury, were outdated and needed reform. Some delegations believed that it was proper and equitable to eliminate such limits in case of passenger death or injury. One delegation expressly endorsed the two-tier concept. Some delegations expressed the view that the protection of the consumer should be paramount in any effort to modernize the Warsaw System. One delegation believed that the Committee should keep in mind the interests not only of large carriers, but also of small carriers, and also the cost factor for additional insurance coverage. Another delegation said that in examining the limits of liability, the Committee should give due consideration to the economic conditions of developing States.

4:16 Two delegations expressly stated that the Committee should aim at reaching the text of a self-standing Convention to replace the existing instruments; several delegations said that any new instrument should be as widely acceptable as possible. One delegation was of the opinion that a Diplomatic Conference should be convened only when a clear perspective for a new instrument supported by States was established.

4:17 One delegation stated that in developing the new instrument, elements of the Warsaw Convention (1929), The Hague Protocol (1955), the Guatemala City Protocol (1971) and Additional Protocol No. 3 and Montreal Protocol No. 4 of 1975, as well as the IATA Intercarrier Agreements, should be taken into account.

4:18 One delegation pointed out that the Rapporteur had on a number of issues expressed different ideas from the Secretariat text of a draft Convention in Appendix B to WP/4; that delegation believed that the Secretariat text should be taken as the basis for the Committee's discussions.

4:19 The observer from IATA stated that the Committee should recall the history of the Warsaw System so as to avoid a repetition of mistakes. ICAO and States had been unable to modernize the Warsaw System because of the refusal of one State to become party to certain instruments, and the absence of support by that State for the new instrument was likely to lead to its failure. He referred the Committee to IP/5 which, *inter alia*, described the background to the IATA Intercarrier Agreement and the Implementing Agreement and their main elements, and asked the Committee to take into account the work done by IATA in this field. In the long term, it was necessary to have a binding international legal instrument agreed upon by Governments, not merely one based on contract among airlines which could serve in the short or medium term. Any proposal before the Committee should be analysed with the question in mind whether it will substantially benefit the travelling public, whether it will move governments quickly to bring it into effect, and whether it will permit speedy recovery of damages and lead to less litigation. He also expressed the opinion that a "mere" amendment of the Warsaw System was unlikely to achieve the desired results.

4:20 Following these general observations, the Committee considered in detail the draft new Warsaw instrument (hereinafter referred to as the "Clean Text") in Appendix B to WP/4.

4:21 The meeting first considered the **title** in the Clean Text of the proposed instrument. The Chairman was of the view that the word "ICAO" should be deleted. One delegation, supported by others, pointed out that the proposed title was different from that of the Warsaw Convention (1929). In its opinion, liability was not the main issue dealt with in the Warsaw Convention; he stated that the proposed new convention covered 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.

4:22 The Committee then considered the draft **Preamble**.

4:23 The **chapeau** was agreed without comment.

4:24 Draft preambular **paragraph 1** was also agreed without comment.

4:25 With respect to draft preambular **paragraph 2**, the Chairman expressed difficulties with the words "modern day" in the last phrase. The Rapporteur stated that it was redundant to keep the last phrase and suggested the deletion of the words "in order to bring them in line with the modern day requirements". This was agreed by the Committee.

4:26 Another delegation stated that the main reason for the current exercise was the modernization and consolidation of the system, and it was not merely one of being desirous to do so; the delegation therefore proposed that the draft paragraph should begin as follows: "Recognizing the need to modernize...". This was agreed by the Committee.

4:27 One delegation suggested to delete the words "and consolidate" because it believed that the aim of the instrument was one of modernization, not consolidation. There was some support for this suggestion. Other delegations pointed out that the proper word for "consolidate" in the French language was "codifier", and not "récapituler" as contained in the Clean Text. One delegation felt that in the English language, the world "consolidate" was appropriate in this context; the Rapporteur supported this, pointing out that the idea was to unify the system which currently comprised several component instruments. The Chairman concluded the discussion.on this point by requesting the Secretariat to align the (ideas) (wording) in the different languages.

4:28 In relation to the **third draft preambular paragraph**, one delegation stated that it was the rights of the consumer which were being protected. Another delegation referred the Committee to paragraph 3, subparagraph (g) of WP/4, where it is stated that the notion of restitution was meant to clarify the concept of damages; that delegation was of the opinion that such clarification could in fact not be derived from this notion.

4:29 One delegation proposed that the word "restitution" be replaced by "fullest compensation", but this did not receive the support of the Committee.

4:30 One delegation proposed the following wording: "Recognizing the importance of ensuring the protection of the rights of the consumer in international air transport and the need for equitable compensation...". Another delegation wished to modify the paragraph so as to refer to "ensuring more adequate protection of consumers rights". Both these proposals were agreed to by the Committee.

4:31 The **fourth draft preambular paragraph** was agreed without comment.

4:32 The **fifth draft preambular paragraph** was agreed subject to the observation that consequential to the discussion in paragraph 4:27 above, a necessary amendment would have to be made in the French language text.

4:33 The Committee thus concluded its first discussion on the draft preamble.

4:34 The Committee proceeded to a discussion of **Chapter I** of the draft text for the new instrument as set out in LC/30-WP/4, Appendix B.

4:35 As regards **Article 1, paragraph 1**, one delegation questioned the appropriateness of the term "remuneration" as opposed to the term "reward" in the original official United Kingdom translation of the 1929 Warsaw Convention. His delegation would prefer to retain the term "reward", since this reflected better the idea that some form of consideration, not necessarily payment, would be required for the Convention to be applicable as a consequence of Article 1, paragraph 1. This was supported by several other delegations.

4:36 One other delegation mentioned that in the Spanish version the term "remuneration" was fully acceptable. Another delegation took the view that this matter should be referred to a drafting group, which was supported by several other delegations.

4:37 One delegation took the view that it would be useful to include definitions into the text of the draft. He suggested that definitions such as the one provided for the term "international carriage" in different languages should also be included for terms such as "baggage", "personal items", and other terms which required such definition. The Chairman referred to the fact that some international conventions provide such definitions. However, at this point in time, there were no other delegations supporting the proposal.

4:38 This same delegation also remarked that in order to avoid that the Legal Committee would sit as a drafting group, a special drafting or working group should be set up to discuss drafting matters. This was supported by five other delegations.

4:39 The Chairman announced that a drafting or working group would therefore be set up in due course.

4:40 With these clarifications, Article 1, paragraph 1 was tentatively accepted by the Committee, bearing in mind that the Drafting Group would need to look at this provision in the light of the discussion above.

4:41 **Article 1, paragraphs 2 and 3** were accepted without discussion.

4:42 As regards **Article 1, paragraph 4**, the Rapporteur suggested that Article 1, paragraph 4 should be reviewed by the Drafting Group and that the modifications suggested in his report to Article 1, paragraph 4 should be taken into account. This was supported by one delegation.

4:43 Another delegation could not agree with the modifications suggested by the Rapporteur in his report, in particular with the words "acting on the authority of another person".

4:44 Another delegation referred to the important practice of code-sharing and suggested to defer discussion of this paragraph until the Committee had reached Chapter V dealing with the provisions of the Guadalajara Convention (Articles 33 to 42 of the draft text of the new instrument).

4:45 It was therefore agreed that these points should be reviewed by the Drafting Group.

4:46 The Legal Committee then considered **Article 2, paragraph 1** of the draft text. One delegation observed that there was a disparity between the English and the Arabic versions of the draft text and suggested that the Arabic version should be aligned with the English text. Another delegation noted that in the Russian language version the word "legally" should be added. Another delegation reminded the Committee that certain States had made reservations as to the applicability of the Convention for the transport of military personnel in state aircraft. This delegation therefore had no objections to the text of the draft, provided that the final clauses would provide the possibility of making a reservation to this effect.

4:47 It was agreed that Article 2, paragraph 1 was therefore accepted in principle; however, in light of the comments made by one delegation, this paragraph was referred to the Drafting Group in order to align the Arabic and English versions.

4:48 **Article 2, paragraphs 2 and 3** were approved without discussion.

4:49 The Committee then proceeded to examine **Chapter II** of the draft text of the new instrument.

4:50 One delegation considered that the title of the Chapter did not sufficiently reflect its contents, and that the terms "duties of the parties" should be added in order to reflect Articles 11 through 15 of this Chapter. This was supported by two other delegations. One of these delegations also wished to modify **Article 3, paragraph 1** so as to make mention of "tickets" and "baggage checks". Another delegation expressed its preference for a different term in the Arabic language instead of the present one used for "departure" in Article 3, paragraph 1, subparagraph (a). Similarly, another delegation preferred, in paragraph 1, subparagraph (b), different words in the Russian language for the terms "departure and destination".

4:51 In light of these comments, it was agreed to refer Article 3, paragraph 1 to the Drafting Group, and that the points raised in the Rapporteur's report on this paragraph should be taken into account by the Drafting Group.

4:52 In consideration of **Article 3, paragraph 2**, one delegate voiced his concern about the number of particulars which were to be provided for in the new document of carriage; he suggested to add to the particulars mentioned in subparagraphs (a) and (b) of this provision the name or the code of the air carrier, and the date and place of issue of the document of carriage.

4:53 This was supported by another delegate who observed that the information mentioned above might be relevant so as to establish jurisdiction of the draft instrument. In consideration of this matter, the Rapporteur gave some explanations concerning this point. In addition, the Secretary gave some further explanations as to why a reduced number of particulars was provided in the draft text.

4:54 Another delegation suggested to delete the wording "if so requested by the passenger" in the third line of paragraph 2; this comment was supported by several other delegations. One

delegation, however, preferred to retain this wording and suggested, for the purposes of discussion, to put square brackets around these words. This delegation was concerned that the new instrument should not prevent modern booking and ticketing procedures.

4:55 Another delegation suggested to insert the words "at least" after "shall be delivered" in Article 3, paragraph 1, line 2 to take account of the suggestions made. Another delegation expressed the view that the particulars which had existed in the Warsaw Convention, but had not been included in the draft text, should be clearly shown so as to make delegations aware of what had been left out.

4:56 In light of these comments, it was agreed to refer Article 3, paragraph 2 to the Drafting Group.

4:57 The Committee then examined **Article 3, paragraph 3**. One delegation took the view that reference should be made to a notice to be given "on the ticket". This was supported by another delegation. One delegation could not agree with this suggestion, since, as had been expressed by the Rapporteur, the modernization of the documentary requirements might make it necessary to separate the notice from the ticket.

4:58 In light of this discussion, a compromise was suggested, namely, to insert the word "written" before notice, so that written notice would need to be given, not necessarily in conjunction with the ticket. This compromise was supported and was agreed to by the Committee.

4:59 One delegation pointed out that the term "destruction" should be added to this paragraph in order to align it with the text in Chapter III. It was agreed to refer this matter to the Drafting Group.

4:60 On this basis, Article 3, paragraph 3 was accepted by the Committee.

4:61 The Committee then proceeded to examine **Article 3, paragraph 4**. One delegation, supported by another, pointed out that the language in this paragraph was somewhat confusing and suggested its review. The Secretary explained the objective of this paragraph. Given these explanations, it was agreed to review this paragraph through the Drafting Group.

4:62 In examining **Article 3, paragraph 5**, one delegation suggested that this paragraph should be combined with Article 8. Another delegation considered that this paragraph was a substantial departure from the present system. The question was also raised how the passenger would have access to the information contained in the ticket. Another delegation pointed to the Rapporteur's view that a difference should be made between passengers and baggage. As regards passengers, it would be to their advantage to have the contract applicable so that no limits would apply. As regards baggage, the situation was different, since the limits were still in place. In this case, the approach of the original Warsaw Convention should apply. Therefore, in view of this delegation, paragraph 5 should be split accordingly between passengers and baggage.

4:63 The Rapporteur supported the views expressed by these delegations.

4:64 Consequently, Article 3, paragraph 5 was accepted in principle, but was referred to the Drafting Group for further review of all the issues raised in the discussion.

4:65 As regards **Article 4, paragraph 1**, one delegation suggested to replace "delivered" by "issued". It was agreed that this matter would be referred to the Drafting Group.

4:66 As regards **Article 4, paragraph 2**, one delegation had the same comments as on Article 3, paragraph 2, and wished to delete the words "if so requested by the consignor". In considering this matter, one delegation suggested that the carrier should be obligated to make an offer of delivery of the receipt for the cargo, so that the consignor could then choose to either accept or refuse such offer. This delegation did not agree to the deletion of the words "if so requested by the consignor".

4:67 It was therefore agreed that Article 4, paragraph 2 would be reviewed by the Drafting Group.

4:68 In considering **Article 4, paragraph 3**, one delegation referred to the need of clarifying this paragraph in the same way as Article 3, paragraph 4 should be clarified. The Secretary gave some further explanations on this matter. The Rapporteur supported these suggestions to review both articles in parallel. Taking into account the comments of another delegation to combine Article 7 and Article 4, paragraph 3, it was agreed to refer this matter to the Drafting Group.

4:69 **Article 5, paragraphs 1 through 3** were adopted without discussion. As regards **paragraph 4** of this Article, one delegation preferred to replace "he" by "the carrier". Save for this minor drafting matter, this paragraph 4 was accepted.

4:70 **Article 6** was accepted without discussion save for minor inconsistency in the reference to Article 4, paragraph 2 in the French version which would be taken care of by the Secretariat.

4:71 In discussing **Article 7**, one delegation considered that a number of particulars which were not contained in the new draft, should figure as requirements of the contents of the air waybill, namely, the name of the consignor, the name of the consignee, the place and date of the contract, and the notice regarding the limitation of the liability. This was supported by several other delegations. One delegation could not agree with this position, since, in its view, no changes should be made to the language of Montreal Protocol No. 4 which had been incorporated into Chapter II of the new draft text almost without changes. This was strongly supported by several other delegations and one observer.

4:72 One delegation also believed that the nature of the cargo should figure among the particulars in Article 7 to be listed as a requirement. It was pointed out that in such instances as transportation of dangerous goods and other types of unusual cargo, it was necessary, for safety purposes as well as purposes of public security, to have this information stated on the air waybill. This position was strongly supported by a number of other delegations as well as by the Rapporteur. One delegation suggested as a compromise to indicate in the title of Article 7 that the particulars were "minimum contents" and to amend the title of Article 7 accordingly.

4:73 This was agreed, and Article 7 was accepted on this basis. As regards the question of the minimum particulars to be included in Article 7, this matter should be reviewed by the Drafting Group.

4:74 The Committee then examined **Article 8**. One delegation recalled the similarity of Article 8 and Article 3, paragraph 5. Reference was made to the decision of the Committee on Article 3, paragraph 5 to refer this matter to the Drafting Group. The Rapporteur, supported by one delegation, suggested to delete the reference to Article 7 contained in Article 8. It was agreed that this matter would also be studied by the Drafting Group.

4:75 In examining **Article 9**, one delegation referred to the earlier discussion regarding the nature of the cargo and believed that in light of Article 9, **paragraph 1**, the nature of the cargo would necessarily have to figure as a particular on the air waybill to be mentioned in Article 7. This position was supported by two other delegations and the Rapporteur. It was therefore decided to refer this matter to the Drafting Group.

4:76 **Paragraphs 2 and 3 of Article 9** were accepted without discussion.

4:77 In examining **Article 10**, the Committee accepted **paragraph 1** of this Article without discussion. As regards **paragraph 2**, one delegation, supported by two other delegations, observed an inconsistency between this provision and Article 7; additionally, this delegation suggested to have the term "consignor" defined in Article 1. It was decided to refer this matter to the Drafting Group.

4:78 **Articles 11, 12 and 13** were accepted without discussion.

4:79 Upon consideration of **Article 14**, one delegation, supported by two other delegations, suggested to delete the term "negotiable air waybill" from the title of the said Article. One delegation also wished to have the title better aligned in the French language with the other language versions with respect to the term "third parties". With these suggested changes, **Article 14, paragraph 1** was accepted.

4:80 As regards **Article 14, paragraph 2**, one delegation suggested that in its review of this paragraph, the Drafting Group should take the remarks of the Rapporteur's report into account. This was accepted by the Committee.

4:81 In examining **Article 15**, one delegation referred to the suggestion of the Rapporteur to remove the term "octroi" from the title as well as from the text. This delegation also wished to have a clarification of the terms "servants and agents". Another delegation considered it important to ensure compatibility of the new text with the legal requirements imposed by the Chicago Convention and its Annexes and therefore had some hesitation in agreeing with the foregoing suggestion to delete the term "octroi". This delegation, supported by two other delegations, also had some doubts about the compatibility of the second paragraph of Article 15 with the requirements of the Chicago Convention, which imposed certain requirements in the interest of public security. It was therefore necessary that the Drafting Group should closely review this matter.

4:82 On the basis of these considerations the Committee accepted Article 15, paragraphs 1 and 2 in principle and referred them to the Drafting Group.

4:83 The Chairman announced the composition of the Drafting Group which comprised the following delegations: Canada, Chile, China, Cuba, Côte d'Ivoire, France, Germany, India, Japan, Lebanon, Nigeria, Russian Federation, Saudi Arabia, United Kingdom, and United States, as well as the Rapporteur. He reminded the Drafting Group of the working method that had been used for the Legal Committee which was not to change the wording of provisions of existing instruments, particularly the Warsaw Convention, unless there was a need to do so for purposes of modernization and consolidation. As was the practice in the Legal Committee, the Drafting Group was instructed to also work by consensus and resort to voting only if circumstances so warranted.

4:84 In turning to **Chapter III** of the draft Convention, the Chairman clarified some points regarding the regime of liability and liability limits by stating that the system of liability in the Warsaw

Convention of 1929 was based on presumed fault with liability limits for passengers amounting to 125 000 Gold Francs equivalent to 10 000 US$ with unlimited liability in case of wilful misconduct of the carrier. The Hague Protocol of 1955 doubled the limits of liability in case of passengers to 250 000 Gold Francs amounting to 20 000 US$. The Guadalajara Convention of 1961 extended the scope of application of the Warsaw Convention to include the actual carrier. The Guatemala City Protocol of 1971, amending Warsaw and The Hague, introduced the system of strict liability irrespective of fault with liability limit in the case of passengers amounting to 1 500 000 Gold Francs equivalent to approximately 100 000 US$. The Montreal Additional Protocols Nos. 1-3 of 1975 introduced the Special Drawing Rights instead of Gold Francs as a basis for evaluating the limits. It was generally agreed that the major stumbling block in all the efforts to modernize the Warsaw System had been the low level of the passenger liability limit. Moreover, such limits had eroded due to inflation and to the fact that the standard of living had gone up substantially. Hence, the increase of such limits was a must if the Legal Committee decided to draw limits, and a mechanism of updating the limits was essential as well. The liability limits were a controversial issue and a compromise was imperative. Such compromise should be progressive, should be as fair and equitable to all parties as possible, and acceptable to the largest number of States. In this spirit the draft adopts a two-tier liability regime providing for a limit amounting to 100 000 SDR equivalent to approximately 150 000 US$ irrespective of the carrier's fault based on strict liability, and for amounts exceeding this limit on the basis of carrier's fault as a second tier. Taking this as a basis for the discussion, the Chairman was looking forward to the Committee's discussions and he hoped it would be successful in reaching a workable compromise reflecting the interests of all parties concerned.

4:85 One delegation noted that **Article 16, paragraph 1** of the draft contained the concept of strict liability for passenger injury or death, which this delegation supported strongly in view of the common position adopted by the Council of the European Union (EU). This delegation, in respect of injury, also expressed preference for the use of the term "personal" as opposed to "bodily" in the text of Article 16, paragraph 1, referring to existing international conventions. This was supported by several other delegations.

4:86 One delegation suggested replacing the terms "bodily injury" with the wording "impairment of life and health of the passenger" in Article 16, paragraph 1, for further consideration by the Drafting Group. Another delegation had no objection to the use of "personal" injury, but cautioned that this wording should not be limitless in scope and reminded that the Rapporteur's report contained several comments regarding this issue. Another delegation preferred the use of the term "bodily injury" but would also accept "bodily and mental" injury. Finally, one delegation declared its preference for the term "physical", which would encompass both bodily and psychological injuries.

4:87 One delegation further believed that there should be a distinction between the liability regime for passengers, baggage, and cargo respectively. It suggested that the Committee should consider these three items separately, beginning with liability concerning damage to passengers.

4:88 In continuation of the general discussion, one delegation stated that its State had abolished numerical limits of liability and could therefore support the suggested two-tier regime, for which other delegations also expressed support. At this juncture of the discussion, one delegation expressed the desire to obtain an overview of the various practices currently prevailing, for example, with respect to the Japanese initiative, the EU position and the IATA agreements. This delegate believed that analysing these trends and tendencies would help the Legal Committee in its considerations.

4:89 In light of the previous comments made, one delegation observed that several delegations had expressed support for a two-tier liability regime but that some clarification on the square brackets in the current draft text contained in Article 20 was desirable. In relation to this, one delegation explained the use of the square brackets in Article 20, namely that the two square brackets represented two alternative regimes, and observed that the Secretariat Study Group had deliberately left this issue open for further consideration by this Committee. He noted that under the IATA Intercarrier Agreements the air carriers had accepted a liability regime which contained the same presumption of fault as in the second tier. His delegation would therefore accept this regime. Finally, he indicated strong support for the inclusion of an additional fifth jurisdiction as included in the Guatemala City Protocol.

4:90 One observer noted that the IATA Intercarrier Agreement had been signed by many air carriers, representing 80 per cent of the world's scheduled airline traffic and invited the Legal Committee to consider putting that agreement into the form of a binding treaty.

4:91 In further consideration of Chapter III, one delegate mentioned that the Drafting Group should take into account doctrine, jurisprudence and current practices, notably of insurers. He also indicated his support for the two-tier regime contained in the draft text. Two additional delegations supported the two-tier system. Another delegation supported the two-tier regime, provided that some sort of exoneration of the carrier remained available.

4:92 With respect to the proposed ceiling of the first tier of liability, one delegation suggested indicating a range within which a limit could be set for small or medium carriers at one end and large carriers at the other. He further cautioned as to the use of an automatic increase of liability limits.

4:93 In the subsequent discussion, a number of delegations expressed their support for a two-tier regime as indicated in the second alternative contained in Article 20. One of these delegations further supported the position that both "bodily" as well as "mental" injuries be compensable and suggested that the Drafting Group find a suitable definition for these terms, the latter point being supported by several other delegations. One delegation expressed its support for "bodily" injury as regards the type of injuries mentioned in Article 16, paragraph 1.

4:94 In consideration of the terms "event" or "accident", one delegation expressed a preference for the term "accident" and suggested that this term could be defined for the purposes of this Convention. This preference for the term "accident" was shared by a great number of other delegations. Concerning the last line of Article 16, paragraph 1, several delegations expressed their preference to delete "or from the normal operation of the aircraft, or both" which appears in square brackets.

4:95 At this point the Chairman summarized the discussion thus far and noted the large consensus for a two-tier regime and the general preference for the liability regime established in accordance with the second alternative of Article 20, although this preference was not entirely unanimous. The Chairman also noted a considerable degree of preference for the use of the term "accident" and noted the suggestion made by a number of delegates to define this term in the Drafting Group.

4:96 The Legal Committee then proceeded with a review of **Article 16, paragraph 1**, in detail.

4:97 One delegation was of the view that the proposed new two-tier liability regime would expand the scope of the liability of the carrier, and thus the narrower term "bodily" injury should be used. In further consideration of this matter, another delegation was of the view that the term "personal"

injury would expand the scope of the air carrier liability and also noted that some domestic laws did not provide for the recovery of mental injuries, thus it would be inequitable to provide for recovery for this type of damage in this Convention.

4:98 However, another delegation suggested the use of the terms "bodily or psychic" injuries and further proposed to add the word "pre-existing" before the term "state of health" in the penultimate line of Article 16, paragraph 1, which was supported by several delegations. The same delegation also pointed out that the second sentence of the paragraph is an exonerating clause, to be distinguished from the principle as set up in the first sentence. It was therefore proposed to join the second sentence of Article 16, paragraph 2, with Article 19 of the new instrument.

4:99 No clear consensus was found as to the use of either "personal", or "bodily", or "bodily and psychic" injury. As a matter of clarification in this regard, the Secretary mentioned that "mental" injury may be difficult to prove and that may have been one of the reasons why a number of courts have decided that mental injuries were recoverable under the present "Warsaw System" only in the presence of physical manifestations.

4:100 In considering the use of the term "accident" or "event", one delegation observed that the term "accident" had been the object of a number of judicial decisions and that this body of case law could be used to clarify the meaning of this term. Another delegate stated that the term "accident" could be defined as a sudden, unpredictable event or occurrence. The subsequent discussion revealed a clear preference for the use of the term "accident".

4:101 As regards the term "solely" from the penultimate line, one delegation suggested to delete it, which was supported by several other delegations. However, another delegate had considerable hesitations to delete the word "solely" as it would place the carrier in a very favourable position. In the same vein, another delegation suggested not to delete this term as the carriers would be tempted to exonerate themselves. This opinion was supported by several delegations. Finally, one delegation recommended to substitute "solely" by "predominantly".

4:102 In the subsequent discussion a substantial number of delegations suggested to delete the term "or from the normal operation of the aircraft, or both", which appears in square brackets at the end of the paragraph.

4:103 In light of the previous discussions on the subject, the Chairman then summarized the views expressed on Article 16, paragraph 1.

4:104 As regards passenger injury, the Chairman stated that there was a clear majority of the Legal Committee in favour of the term "personal", rather than "bodily", subject to further definition of this particular term as proposed by one delegation. This would be brought to the attention of the Drafting Group.

4:105 With respect to the terms "event" and "accident", there was an overwhelming majority in favour of "accident".

4:106 Concerning the term "solely" in the penultimate line of this paragraph, there were two divergent points of view: some delegations supported its deletion, while others declared that it should be retained. One delegation then proposed a compromise solution which consisted of referring to death or injury resulting solely or partially from the pre-existing state of health of a passenger. This issue was

referred to the Drafting Group. As far as the last part of Article 16, paragraph 1 was concerned, there was a clear majority for the deletion of the words "or from the normal operation of the aircraft, or both".

4:107 As regards the first point, two delegations took the view that there was no majority in favour of the term "personal". It was recalled that the proposal which was made to clearly spell out the types of injuries to be encompassed, i.e. "bodily and psychic", would be a compromise, as an alternative to defining the term "personal".

4:108 Two other delegations supported the summary of the Chairman. Another delegation drew attention to the fact that, while the term "personal" could easily be used in common-law States, it could entail some difficulties in other States where the Convention would have to be applied. It therefore supported the proposal mentioned in the foregoing point.

4:109 The Chairman then decided to resort to a vote by show of hands: 33 votes in favour of the proposal referred to in paragraph 4:107, i.e. "bodily and psychic"; one vote for the term "personal"; and 4 abstentions.

4:110 In view of the results of the vote, one delegation pointed out that the title of the Article being discussed should be modified by putting the term "injury" in the plural form, i.e. "injuries". Therefore, this matter was referred to the Drafting Group.

4:111 The Committee then examined **Article 16, paragraph 2**. One delegation proposed that the conclusions reached in the framework of the discussion of paragraph 1 on the terms "accident" and "solely", as well as regarding the end of the provision, i.e. from "or from ...", be retained the same way for paragraph 2. This was supported by another delegation. These issues were consequently referred to the Drafting Group. The former delegation further supported inclusion of the word "the" at the end of the first sentence, before "charge".

4:112 One delegation proposed to insert "total or partial" before "loss" in the first line of this provision.

4:113 Two delegations maintained that, in the first sentence of paragraph 2, the portion "on board the aircraft or in the course of any of the operations of embarking or disembarking or" should be deleted as it was redundant in view of the end of this sentence, which referred to "any period within which the baggage was in the charge of the carrier". This was supported by seven other delegations. However, one delegation reminded the Committee of the scope of "baggage", which encompassed both checked and carry-on baggage. If the proposed deletion was accepted, hand baggage would not be covered by paragraph 2. This opinion, leading to retention of the above-mentioned portion of the sentence, was supported by nine delegations.

4:114 Another delegation stated that hand baggage should not be under the responsibility of the carrier in case of damage caused by the passenger himself or third parties, unless an amendment was introduced in paragraph 3. The view was expressed, supported by five other delegations, that the carrier should not be liable for hand baggage unless its negligence was proven by the passenger concerned. The former delegation further proposed that mention be made in the second line of the provision that the "accident" should be caused by the carrier or his agent.

4:115 The Secretary was then requested to comment on the meaning of "embarkation and disembarkation", as well as on possible damages to both types of baggage and the related responsibility

of the carrier. He explained that the terms "embarkation" or "disembarkation" were interpreted by many courts to mean the period when the passenger enters the boarding area, until he leaves the care of the carrier upon arrival. Furthermore, while hand baggage was not usually under the responsibility of the carrier, this might be the case if bulky pieces were handed over to flight attendants upon their request.

4:116 In connection with the above, one delegation proposed to split paragraph 2 of Article 16 into two separate subparagraphs, dealing respectively with each type of baggage, i.e. checked baggage and hand baggage. This was supported by two delegations. The Chairman requested the proposing delegation to provide the Secretariat with a tentative draft.

4:117 Two delegations pointed out that damage to baggage might result from events and not necessarily from accidents only. This was supported by another delegation, which underlined the fact that passengers and baggage should benefit from different liability regimes, where the use of "accident" was appropriate for passengers, and "event" in case of baggage. Reference was made in this regard to Article 4 of the Guatemala City Protocol. Seventeen delegations further supported adoption of the term "event".

4:118 One delegation stated that the issue of different treatment between both types of baggage should be considered while discussing the limitations of liability and the fault of the passenger contributing to the damage, with reference to Article 22 of the Warsaw Convention and related decisions of jurisprudence. One should speak in terms of difference of liability limitations, not of liability regimes. Consequently, this aspect of the problem should be contemplated under paragraph 3 of Article 16 and the following provisions of the draft instrument.

4:119 The Chairman then summarized the discussions of the Committee in respect of Article 16, paragraph 2. There was general agreement to adopt the term "event" instead of "accident" in the second line of the paragraph. Taking into account the already-agreed deletion of the last phrase of this provision (beginning "or from ..."), there was a majority in favour of maintaining the remainder of the provision as it was, even though subdivision of this paragraph was proposed by one delegation, which would be discussed by the Drafting Group.

4:120 One delegation made a last comment on this item, drawing attention to the need for an exclusion clause in case of nuclear damage, involving passengers or cargo.

4:121 India presented WP/4-24, which proposed to amend paragraph 2 of Article 16 to include different regimes for checked baggage and hand baggage. Two delegations supported the proposal. One delegation believed that the earlier proposal made on this subject referred to in paragraph 4:116 more precisely represented what the Committee tried to accomplish. The majority of speakers felt that both proposals should be considered by the Drafting Group, and it was so decided. One delegation mentioned that when the Drafting Group would consider these proposals, it would be useful to define the phrase "operations of embarking or disembarking".

4:122 In consideration of **Article 16, paragraph 3**, one delegation proposed to delete it because it was not necessary. Another delegation could agree to its deletion but proposed to define it in the definition clause at the beginning of the draft Convention. In response to the suggestion by the Chairman to refer this matter to the Drafting Group, one delegation, supported by two other delegations, expressed the view that the Drafting Group should only deal with non-substantive issues. Paragraph 3 had both substantive and procedural aspects. The substantive aspect was whether this provision should be included in the instrument. The procedural aspect was where it should be put, i.e. in Article 1 or Article 16. One

delegation reminded the Committee that it had previously reached a decision that any definition would be included in Article 1 of the draft instrument. The Chairman stated that the Committee would reexamine this issue after the Drafting Group considered this matter.

4:123 The Committee then examined **Article 17**. Upon the proposal by one delegation, supported by two other delegations, it was decided that the word "occurrence" in the second line of **paragraph 1** of Article 17 be replaced by "event" in order to standardize the terms used.

4:124 With respect to **Article 17, paragraph 2**, some delegations proposed to delete the word "solely"; others had difficulty with such deletion because it may open the door for reducing carrier liability. A vote was taken on the proposal to delete the term "solely", with the following result: 17 votes in favour, 24 votes against, and 4 abstentions. The word "solely" was therefore retained.

4:125 As regards **Article 17, paragraph 2, subparagraph (a)**, one delegation, supported by two other delegations, proposed that it should be amended to read "inherent defect, quality, or vice of that cargo as described in the air waybill". Another delegation did not see the logic to include the reference to the air waybill, particularly with respect to "inherent defect".

4:126 One delegation proposed that a new subparagraph (e) be added to read: "non-compliance with the national or international rules by the consignor". Two delegations believed that there was no need for this addition because Article 19 addressed the issue adequately. The former delegation agreed that if Article 19 was clarified to that effect, it would meet its concern.

4:127 With respect to **Article 17, paragraph 3**, one delegation proposed to replace "preceding paragraph" with "paragraph 1", and the matter was referred to the Drafting Group.

4:128 The delegation of the Russian Federation presented WP/4-15 which proposed to delete the phrase "whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever" in paragraph 3. Three delegations supported the deletion but preferred to maintain "in any place whatsoever". A vote was taken on the proposal, with the following result: 23 votes in favour, 1 vote against, 17 abstentions. The phrase was therefore deleted on the understanding that the Drafting Group would consider whether "in any place whatsoever" should be retained.

4:129 With respect to **Article 17, paragraph 4**, one delegation stated that the text omitted carriage by rail and therefore suggested to mention transportation by rail in the text. Another delegation proposed to merge paragraphs 3 and 4. It was decided that these matters be referred to the Drafting Group.

4:130 One delegation expressed its concern that a carrier might subcontract its duties to other entities. This should be kept in mind in understanding paragraph 4 of Article 17.

4:131 Referring to paragraph 5.4.14 of the Rapporteur's Report, one delegation proposed to include the following subparagraph in paragraph 4:

> "But, if a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of carriage is deemed to be within the period of carriage by air".

The Committee agreed with this proposal.

4:132 The Committee then considered **Article 18**. Working Paper WP/4-16 was presented by the Russian Federation. The wording proposed in this Working Paper was referred to the Drafting Group.

4:133 With respect to **Article 18, paragraph 2**, a vote was taken to decide whether or not a definition for delay was needed, with the following result: 23 votes in favour, 12 votes against, 6 abstentions. The Drafting Group was therefore tasked with the drafting of a definition for delay taking into account the definition proposed by the Rapporteur in paragraph 5.4.14 of his report.

4:134 One delegation, supported by another, observed that a "normal" burden of proof should apply to hand baggage. It was decided to refer this matter to the Drafting Group.

4:135 WP/4-17 was presented by the Russian Federation, which proposed to amend the title in **Article 19** to read "Reduction of Recovery **for Damage**". One delegation, supported by another, considered that the title did not adequately reflect the concept of exoneration in the text. The Committee decided that the Drafting Group should consider the title.

4:136 One delegation recalled the previous discussion of the proposal to add a new subparagraph to paragraph 2 of Article 17. In its view, the current text of Article 19 was not sufficiently clear with respect to that issue.

4:137 One delegation observed that Article 21 of the Warsaw Convention referred to the provisions of the law of forum, whereas the current draft Article 19 did not make such reference. The Secretary explained that it might be a difference in drafting but not a difference in substance. In the absence of a specific reference, the law of forum would apply. The Committee decided to refer this matter to the Drafting Group.

4:138 **Article 20** of the Clean Text was considered on the basis on WP/4, WP/4-6 (presented by the United States), WP/4-7 and Discussion Paper No. 1 (presented by the Kingdom of the Netherlands), WP/4-21 (presented by Japan) and WP/4-23 (presented by the Hellenic Republic).

4:139 With respect to the **title**, the view was expressed that Article 20 dealt primarily with compensation and that this should be reflected in the title. After discussion, it was agreed that Article 20 should be headed "Compensation in case of death or injury of passengers".

4:140 The Committee expressed general agreement to the two-tier system proposed in Article 20. There was also general agreement on the **first tier** for the strict liability of the carrier up to 100 000 SDR, although one delegation expressed a preference for the Rapporteur's suggestion that the first tier should be based on the presumed fault of the carrier.

4:141 One delegation proposed that the words "not exceed" be replaced by "be limited to" on the basis that this was the terminology used in the existing Warsaw instruments. This suggestion was agreed to by the Committee.

4:142 With respect to the **second tier**, a few delegations proposed that there should be a numerical limit, with the possibility of an updating mechanism. It was stated that developing States would, because of insurance costs, find it difficult to accept a regime of unlimited liability. Many other

delegations were of the view that the liability for the second tier should not be limited. It was stated, *inter alia*, that limits were related to the concept of strict liability and that limits were not necessary or desirable in the case of a fault-based regime. The opinion was also expressed that concerns were related to extraordinary awards in certain States, mostly relating to punitive damages; however, the proposed new instrument limited recovery to compensatory damages only.

4:143 With respect to the second tier, different views were expressed on the **burden of proof**. Some delegations preferred the first option, namely that the burden would be on the plaintiff to prove fault or neglect of the carrier, in line with the views of the Rapporteur. The opinion was expressed that a regime of presumed fault of the carrier without liability limits would be tantamount to unlimited strict liability of the carrier. It was also stated that even with the burden on the claimant, this was an improvement over the current system in that there would no longer be any need for him to prove wilful misconduct on the part of the carrier. On the other hand, most delegations preferred the second option, namely, that it would be for the carrier to prove that he had taken all reasonable measures to avoid the damage or that it was impossible for him to do so. It was stated that this was the regime adopted by the IATA Intercarrier Agreements on which the ICAO Council had favourably commented, and that therefore the Committee should accept no less.

4:144 One delegation suggested that a possible way forward might be to have a very high numerical limit in the second tier with the burden of proof on the carrier. There could be a third tier without limits of liability and with the burden of proof on the claimant.

4:145 As a result of the discussion, the Chairman proposed that further consultations should be held in a working group to attempt to reconcile the divergent views, specifically in relation to the burden of proof in the second tier, and also as regards a limitation of liability in that tier.

4:146 With respect to **Article 21**, the Committee considered WP/4-18 presented by the Russian Federation. This delegation was of the view that Article 21 should be divided into several stand-alone articles because as presented in the Clean Text, it was difficult to follow. The meeting agreed to refer this issue to the Drafting Group.

4:147 One delegation supported by another proposed the deletion of **Article 21, paragraph 1, subparagraph (a)** on the basis that there may be certain cases where delay could cause significant damage and where a limit of liability would prevent full compensation. This proposal was put to a vote with the result of 10 votes in favour, 16 votes against, and 15 abstentions. The meeting however agreed to modify the subparagraph to read: "In the case of damage resulting from delay as specified in Article 18, in the carriage of persons the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights". One delegation pointed out that without a definition of "delay", it would be difficult to deal with matters arising under Article 21.

4:148 With respect to **Article 21, paragraph 1, subparagraph (b)**, one delegation would prefer having different limits for destruction and loss of baggage as opposed to delay in the carriage of such baggage, on the basis that destruction or loss of baggage was more serious than delay of such baggage. Another delegation wanted different ceilings with regard to checked baggage and unchecked baggage. This delegation also wished to include the obligation of the carrier to give notice that the passenger has the option to declare the value of his checked baggage. Another delegation stated that if checked baggage was considered separately from unchecked baggage, compensation should not be based on weight. One delegation believed that the limit proposed of 1 000 SDR was insufficient; the minimum should be at least 2 500 SDR. The meeting agreed to refer these issues to the Drafting Group.

4:149 **Article 21, paragraph 2, subparagraphs (a) and (b)** were accepted by the Committee without discussion.

4:150 With reference to **Article 21, paragraph 2, subparagraph (c)**, one delegation wished to have clarification why reference was made to subparagraphs 1 (a) and 2 (a), but not to subparagraph 1 (b). The Secretary explained that this had been a drafting error. He recommended to correct this by inserting a reference to subparagraph 1 (b). It was agreed to refer the matter to the Drafting Group for review.

4:151 In consideration of **Article 21, paragraph 3**, one delegation suggested to insert "including interest" after the words "other expenses of litigation" in both sentences of this paragraph. Article 21, paragraph 3 was approved with this amendment.

4:152 **Article 21, paragraph 4, subparagraphs (a), (b) and (c)** were approved without discussion.

4:153 As regards **Article 21, paragraph 5**, the Secretary informed that a working paper with a draft for this paragraph was in preparation to be distributed shortly, for discussion in the Committee.

4:154 In examining **Article 21, paragraph 6**, the Secretary explained the objective of this paragraph and underlined that similar provisions already existed in other instruments. One delegation, supported by another, was of the opinion that if the parties could agree upon higher limits they should also be able to agree upon unlimited liability. One delegation pointed out that the Russian version of this paragraph would need to be reviewed.

4:155 In view of these comments, it was agreed to accept this paragraph in the language version provided in the Rapporteur's Report and to refer Article 21, paragraph 6 to the Drafting Group.

4:156 The delegation of the Netherlands wondered whether it would be appropriate to refer to the contents of its Information Paper 6 (IP/6) in the context of Article 21. The Chairman suggested that it would be more appropriate to deal with this matter in a separate Article, to be considered within the Drafting Group.

4:157 In consideration of **Article 22**, one delegation expressed the view that the Committee should wait for the drafting of the second part of Article 20 which was under review of the Drafting Group. The Secretary explained that the provision of Article 22 is absolute, not pending on burden of proof, and could, therefore, be discussed independently of the outcome of the second part of Article 20. That delegation agreed with these explanations, and Article 22 was approved without further discussion.

4:158 **Articles 23 and 24** were accepted without discussion.

4:159 In examining **Article 25**, the Committee accepted **paragraph 1** without discussion.

4:160 As regards **paragraph 2**, one Delegation, supported by two other delegations, considered that it would be appropriate to add the words "or destruction" after the word "damage". Another delegation, supported by one other delegation, was of the opinion that a duty to make a complaint should also be introduced for cases of personal injury. It was agreed that these matters would be referred to the Drafting Group.

4:161 In consideration of **Article 25, paragraph 3**, one delegation pointed out that the term "aforesaid" in the Spanish version would need to be reviewed. Another delegation took the view that the wording of this provision should be adapted to a situation where a document of carriage might not exist. The Secretary suggested that this could be done by deleting the words "upon the document of carriage or by separate notice in writing". It was decided to refer this paragraph to the Drafting Group.

4:162 **Article 25, paragraph 4** was accepted without discussion.

4:163 In light of a comment made by one delegation on the way that **Article 26** was drafted in the Russian language, it was agreed to review this Article in the Drafting Group.

4:164 In examining **Article 27**, one delegation suggested that the draft of **paragraph 1** in the Russian version should be improved.

4:165 The Rapporteur, referring to his report, voiced concern with the need for a detailed consideration and, possibly, new definition of the notion of the terms "domicile" or "residence". He also pointed out that it might be convenient and fair to the passenger to provide for an additional jurisdiction, and if such a fifth jurisdiction was made available, there should be a link to the commercial presence of the carrier in that jurisdiction, in fairness to the latter.

4:166 One delegation, referring to WP/4-6, considered it essential to provide for a fifth jurisdiction for passengers with a domicile or permanent place of residence, as it was in Guatemala City Protocol and Montreal Protocol No. 3. This delegation claimed that such jurisdiction would be limited to situations where the carrier had a place of business in the State of the passenger's domicile or permanent residence; would not allow a court to create jurisdiction; there would not be many cases where it would be used; and, from a litigation point of view, it would be a considerable improvement.

4:167 Another delegation, in support of the Rapporteur's comments, expressed the view that the establishment of the fifth jurisdiction would be fair for passengers, on the understanding that there should be an effective presence of the carrier in the place of the passenger's domicile.

4:168 One delegation, supported by another, voiced concern with the establishment of the fifth jurisdiction, fearing that it would raise many problems, especially when the notions of "domicile" and "commercial presence" were not yet clear.

4:169 One delegation, pointing out that the European Union proposed regulation did not provide for a fifth jurisdiction, stated that the request for the fifth jurisdiction arose from the inadequacy of the limits provided by the present "Warsaw System" and that now, with the quite high limits under consideration in this new Convention, the idea of a fifth jurisdiction did not make sense any more. In the opinion of the same delegation, Article 27, paragraph 2, should therefore be deleted.

4:170 This proposal was supported by a large number of delegations.

4:171 Another delegation stated that in its country it had not been easy to deal with this question because, on the one hand, carriers were not in favour of it and, on the other hand, consumers wanted to have such jurisdiction. In the opinion of this delegation, if a fifth jurisdiction was going to be provided for, there should be a link between the operation of the carrier and that jurisdiction. The same delegation also expressed the view that if Article 20 was going to provide for unlimited liability, it would not matter where one obtained the compensation. Therefore, in its opinion, Article 27, paragraph 2 depended very

much on the outcome of Article 20 which was still under consideration in the Drafting Group. Many other delegations supported this idea and it was agreed to defer Article 27, paragraph 2 to be reconsidered together with Article 20.

4:172 In view of these comments and proposals, Article 27, paragraphs 1 and 2 were referred to the Drafting Group.

4:173 **Article 27, paragraph 3** was accepted without discussion.

4:174 The Committee then examined **Article 28**. One delegation expressed the view that arbitration should be reserved to cargo only. In arbitration proceedings, it was important that there was no significant disparity in the economic power of the parties. While in the cargo field the parties were in virtually all cases commercial companies, disparity existed in the field of passenger transportation. This delegation therefore did not wish to extend the option of arbitration to passengers.

4:175 This view was shared by another delegation which therefore suggested to make some changes to the wording of this Article accordingly. This view was also supported by ten other delegations.

4:176 One observer pointed out that **Article 28, paragraph 1** in its present draft provided an option for the passenger who could elect to either bring action in the courts, or to resort to arbitration. It offered additional rights to the passenger, and, he believed therefore that Article 28, paragraph 1 should be supported. One delegation took a similar view, supporting the present draft of Article 28, paragraph 1 as an option for the passenger. This view was supported by five other delegations.

4:177 The Chairman then put the proposal to modify Article 28 so as to limit arbitration to cargo to a vote. The proposal was carried, with 20 votes in favour, 12 votes against and 14 abstentions. The Committee therefore decided that Article 28 as a whole should be reviewed by the Drafting Group in light of the decision just taken.

4:178 **Article 29, paragraphs 1 and 2, and Article 30, paragraph 1** were accepted without discussion. One delegation pointed out that the proposal made in respect to Article 25 to introduce a duty to complain within a certain time period also in case of personal injury, would have implications for the drafting of Article 29. Therefore, this delegation proposed that Article 29 should be referred to the Drafting Group, along with Article 25. The Committee therefore agreed to refer Article 29 to the Drafting Group.

4:179 As regards **Article 30, paragraph 2**, the Secretary clarified at the request of the Chairman the difference between the two square brackets, indicating that the second square bracket was wider than the first one, including those cases where members of a deceased passenger's family brought action. One delegation expressed its clear preference for the second square bracket, since the wording in the first square bracket might raise issues relating to the representation of parties by lawyers. He therefore took the view that Article 30, paragraph 2 should be referred to the Drafting Group. It was therefore agreed that, while in principle retaining the second square bracket, the Drafting Group should review this subparagraph. **Paragraph 3** was accepted without discussion.

4:180 The Russian Federation presented WP/4-19, which proposed that a new paragraph 4 be added to the present wording of Article 30 of the draft text.

4:181 One observer indicated that the sharing of loss or damage to baggage or cargo between two or more successive carriers was regulated by applicable agreements between air carriers, in particular the Multilateral Interline Traffic Agreements (MITA) and the related Pro-rate agreements. In his view, there was therefore no need to regulate this matter in the Convention. This view was supported by one other delegation. The proposal in WP/4-19 having found no support in the Committee, was not retained.

4:182 **Article 31** was approved without discussion.

4:183 The Committee then considered WP/4-26, which contained a proposed draft for **Article 21, paragraph 5**. The Secretary explained that this draft clause took into account the results of the 1994 ICAO/IATA socio-economic study. In particular, the comments received from States in reply to the questionnaire indicated that most States were in favour of the inclusion of an escalator clause, the draft of which was prepared in co-ordination with economists of the ICAO Air Transport Bureau (ATB). A number of States had also expressed their preference for a clause which was not automatic but contained a reference to an international body, such as the ICAO Council, charged to proceed with the necessary adjustments. In this vein, as reflected in subparagraph (b), the Council would decide by a procedure similar to the one applicable to amending Annexes under Article 90 of the Chicago Convention; there would be a period of 6 months during which States could register their disapproval with the Council's decision. Subparagraph (c) offered to States the possibility of triggering themselves a meeting of the ICAO Council for the purpose of adjusting the liability limits if the inflation factor exceeded 30 per cent.

4:184 As regards **subparagraph (a)**, one delegation proposed to amend the wording to read "revisions" instead of "increases"; subparagraph (c) should be amended the same way. Another delegation supported this latter view: as inflation and deflation respectively referred to increases and decreases, both situations should be contemplated in the said clause, through the use of a more generic term. While one delegation then proposed to define the word "inflation" as including both inflation and deflation, the proposal of the former delegation received the support from two additional delegates. The Chairman consequently proceeded to voting by show of hands with the following result: 33 votes in favour, 6 votes against the concept of "revision"; and no abstention. The Committee therefore referred this issue to the Drafting Group.

4:185 The Committee then proceeded to **subparagraph (b)**. One delegation had serious reservations with respect to this provision, as it did not provide for approval by the majority of States parties, but use was rather made of a disapproval formula. While the revisions would be decided by a restricted number of States, i.e. the Council members, the procedure should ultimately show that the majority of States parties to the new instrument expressly approved the revisions. Furthermore, another delegation expressed doubts regarding the case that some Council members would not be parties to the new Convention. In this vein, as not all States were in the same economic situation and since some of them might not be sufficiently represented in the Council, one delegation proposed to provide for final approval by the Assembly.

4:186 One delegation supported the procedure as it stood in the proposed draft. Nevertheless, it was pointed out that, further to the notification by the Council of the non-disapproval of the revision, States would need some time to inform their respective airlines accordingly, which would also need preliminary notice to make necessary changes to their relevant documents. Therefore, subsequent to the said notification by the Council to States, subparagraph (b) should provide an additional period of time (3 months), after which the revisions would enter into force. These opinions were supported by another delegation.

4:187 With reference to the procedure followed by the Council for amending Annexes, one delegation questioned whether there would be a possibility of filing differences to revisions decided by the Council. Furthermore, it raised the question of the legal relationship between disapproving and accepting States, once the revision would enter into force.

4:188 The Chairman then resorted to a vote by show of hands with the following result: 19 votes in favour of the drafted text of subparagraph (b), 2 votes against and 17 abstentions. The matter was referred to the Drafting Group, which needed to take into account the Committee's agreement in principle.

4:189 As regards **subparagraph (c)**, further to a request from one delegation, the Secretary clarified that, once convened, the Council of ICAO would follow the same procedure as put forward in subparagraph (b).

4:190 As there was no further comment on Article 21, paragraph 5, the Committee decided to refer this provision as a whole to the Drafting Group.

4:191 The Committee then proceeded to **Chapter IV**. One delegation emphasized that this Chapter contained only one provision, i.e. **Article 32**, and that both had a title, which might be superfluous. Another delegation noted in this connection that the said titles referred to different concepts: while intermodal transport addressed two types of transport covered by the same contract, combined transport referred to two or more contracts relating to several means of transportation. One delegation then proposed to amend the title of the Chapter to read: "Provisions Relating to International Multimodal Transport".

4:192 One delegation proposed that **Article 32, paragraph 1** should be aligned with paragraphs 3 and 4 of Article 17, in order to avoid problems of interpretation regarding the period during which the air carrier is liable.

4:193 As there was no further discussion on Article 32, the Committee referred the entire Chapter IV to the Drafting Group.

4:194 The Committee then commenced consideration of **Chapter V**. In respect of the title, one delegation was of the opinion that the word "supplementary" was no more necessary since the Convention would be a new, self-standing instrument. Another delegation proposed the following shortened heading: "Carriage by Air Performed by a Person other than the Contracting Carrier". This was accepted, subject to review by the Drafting Group.

4:195 In response to a question from one delegation in relation to **Article 33**, the Secretary explained that agents and forwarders were normally not to be considered as actual carriers, since they did not contract in their own name. However, this issue may be more complex as regards cargo, and should deserve more consideration. One delegation proposed that the new Convention should incorporate the definitions of "contracting carrier" and "actual carrier" and another one was of the opinion that the Convention should incorporate in Article 1 a definition of the "carrier" as such. The matter was referred to the Secretariat and to the Drafting Group as there was no specific text proposed for these definitions. One delegation emphasized the fact that national jurisprudence, with reference to the Guadalajara Convention, already developed interpretations of the notions of actual and contracting carrier. Adoption of definitions which would be at variance would therefore create problems.

4:196 One delegation then stated that Article 33 is not in line with practice of the day, where code-sharing is often resorted to; the difference made between actual and contracting carrier in the way referred to in Article 33 might not be adequate in this respect. Another delegation supported this view and suggested that new subparagraphs respectively should reflect situations proper to today's practices in passenger and cargo transportation. Another delegation reminded the Committee of the conclusions of the Rapporteur's Report and of the Study Group, which recommended thorough study by the Legal Committee of code-sharing and blocked space agreements. The Chairman then referred the matter to the Secretariat and the Drafting Group, as there was no specific proposal to amend Article 33 in this regard. In addition, the Chairman was of the opinion that code-sharing and other similar commercial arrangements dealt more with the issue of traffic rights and should perhaps not be contemplated in detail in the new Convention.

4:197 **Articles 34 and 35, paragraph 1** were adopted without discussion.

4:198 As regards **Article 35, paragraph 2**, one delegation proposed to replace the last phrase, i.e. "... shall not affect the actual carrier unless agreed to by him", by "shall affect the actual carrier irrespective of whether he has agreed to it." Indeed, the carriage should be carried out under the conditions preliminarily agreed upon in any case, in the interest of the consumers. This was supported by two other delegations. A vote by show of hands resulted in the rejection of the proposal, with 9 votes in favour, 10 votes against and 23 abstentions. However, as requested by one delegation, the matter was finally referred to the Drafting Group for further consideration, taking into account the adoption in principle of paragraph 2. The delegation which made the discussed proposal was then invited to prepare a draft text and to join the Drafting Group as observer.

4:199 **Article 36** was adopted without discussion. **Article 37** was adopted as well, but it was nevertheless referred to the Drafting Group, to reconcile the title, which contained reference to the actual carrier only, with the text of the provision, which also dealt with the contracting carrier. **Articles 38 and 39** were adopted without discussion.

4:200 As regards **Article 40**, which referred to Article 27, one delegation pointed out that the substance of the text should be discussed parallel to the question of the fifth jurisdiction. This was supported by another delegation. Article 40 was therefore adopted in principle and referred to the Drafting Group for consideration in relation to Article 27.

4:201 Regarding **Article 41**, one delegation suggested to refer to contractual "clauses" instead of "provisions", and to align Article 22 accordingly.

4:202 Two delegations pointed out that **paragraph 2** of this Article should be removed, as it was inconsistent with Article 17, paragraph 2, which provided additional cases where the carrier was not liable in case of destruction, loss of, or damage to, the cargo. The Chairman decided to refer this issue to the Drafting Group, taking into account that this provision originated from the Guadalajara Convention.

4:203 As regards **Article 42**, one delegation recommended the deletion of the word "two" in the second line. This was accepted, subject to review by the Drafting Group.

4:204 The Committee then proceeded to **Chapter VI**. One delegation pointed out that the Final Provisions did not contain any provision dealing with the relationship between the new Convention and the existing instruments of the Warsaw system. It was not clear whether the entry into force of the new Convention would abrogate the provisions of previous instruments for those which would be parties to

both. One delegation then recommended that use be made of a clause similar to the one in Article 80 of the Chicago Convention. The Chairman recognized the importance of the subject and was of the opinion that it should be taken care of by the Diplomatic Conference leading to the signature of the Final Act of the Convention. Notwithstanding the latter point, two delegations suggested reflecting in the Report relevant opinions expressed by delegates, which was finally endorsed.

4:205 **Articles 43, 44, 45 and 46** were adopted without discussion.

4:206 The Kingdom of the Netherlands then introduced **WP/4-7**, which proposed on **page 3** the adoption of a "nuclear provision" allowing a reservation with regard to the applicability of the new Convention in case of nuclear damage. This was felt necessary as some States already were parties to the Convention on liability for nuclear damage, the terms of which could potentially be inconsistent with the new Convention, since under the former, it would be the operator of the nuclear installation, and not the carrier of the nuclear material, which would be liable in case of damage. The Chairman then explained that this matter could fall within the scope of the Vienna Convention on the Law of Treaties, Article 30, subparagraph 4 (b). Nevertheless, as the proposal contained in the discussed working paper received support from two delegations, it was decided to refer it to the Drafting Group.

4:207 The Chairman then called for general comments. One delegate made reference to previous statements on the relationship between States in relation to the existing instruments of the Warsaw system and the new Convention. As conditions for its entry into force, he said that the Diplomatic Conference could either require a small number of ratifications, or a large one. In the latter case, the new Convention could easier prevail over the existing ones. It was accepted by the Committee that this would be brought to the attention of the Diplomatic Conference.

4:208 Another delegation was favourable to a final clause allowing States to make a reservation in respect of **Article 2** of the new Convention, as raised in the Rapporteur's Report.

4:209 As regards the **title** of the new Convention, as some delegations expressed their wish to retain the original title of the Warsaw Convention, while others preferred to modify it to take into account new realities, it was decided to refer the matter to the Drafting Group.

4:210 The Committee continued its discussion of **Article 20** on the basis of LC/30 – Flimsy No.1 presented by the United Kingdom. The Chairman recalled that the overwhelming majority of the Committee supported the regime related to the first tier of liability. Opinions differed with regard to the burden of proof for the second tier. Some preferred that the passenger should prove the fault or neglect of the carrier, others preferred to reverse the burden to the carrier so that the carrier would have to prove that he and his servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for him or them to take such measures. An attempt to form a special working group with a limited number of States to deal with this issue had not been successful. In order to achieve a compromise, the United Kingdom proposed in Flimsy No. 1 that States would be permitted to opt for one format or the other concerning the burden of proof in the second tier. The delegation of the United Kingdom, supported by another delegation, further explained that the proposal in Flimsy No. 1 was made in the spirit of compromise. It would give each State an opportunity to choose one of the two regimes concerning the burden of proof.

4:211 One delegation underlined the need to consider Article 20 and Article 27 together, since the limit of liability was closely related to the issue of jurisdiction. It proposed that the Drafting Group should consider the two articles together with a view to seeking a global compromise.

4:212 A number of delegations emphasized the importance of maintaining universality and harmonization of the system and believed that the issues under Articles 20 and 27 were interrelated. While it was regrettable that a special working group could not be formed, it might be necessary at this stage to utilize the framework of the Drafting Group to consider these issues. One delegation expressed concern about giving two options to States, considering the adoption of two opposing regimes as a less than desirable compromise. Another delegation recalled its suggestion to establish three tiers of liability system with the burden of proof on the carrier in the second tier, and on the passenger in the third tier. This proposal was supported by several delegations.

4:213 In conclusion, the Committee decided that the matter should be referred to the Drafting Group for detailed consideration with a view to achieving a compromise.

4:214 The delegation of the Kingdom of the Netherlands presented its WP/4-27, proposing the addition of a new **Article 20 *bis*** regarding an upfront payment mechanism, which had been introduced in the common position adopted by the Council of the European Union on a regulation on air carrier liability in the event of accidents.

4:215 One delegation, remarking on the similitude of the text of the proposed new Article to the text of the EU common position, suggested the insertion of the words "in case of death or injury of a passenger" in the very beginning of paragraph 1 of the proposed Article. The proponent agreed to this suggestion.

4:216 A vote was taken on the admission of the proposal with the following result: 26 votes in favour, 3 votes against, 15 abstentions. The proposed draft Article was therefore adopted for discussion.

4:217 One delegation pointed out that there were questions in the proposed Article which needed clarification and had to be addressed, such as the definition of immediate economic needs and the amount of payment to be advanced. The proponent remarked that those were questions for the judges to decide. However, the former delegation felt that it would be better to clarify these questions in advance rather than to wait for court decisions.

4:218 Another delegation stated that it had abstained in the voting exactly for considering that it was premature to discuss this matter before a clear understanding of the wording of the proposed Article. This consideration was shared by another delegation.

4:219 Several other delegations also expressed the view that this Article was drafted in a rather vague way, requiring an extensive clarification in order to evaluate its implications.

4:220 Some other delegations considered that the idea of upfront payment might be meritorious but should not be made mandatory. In their opinion, upfront payment was already practised by air carriers on a voluntary basis and should not be changed.

4:221 The Chairman asked if there were any proposals to modify the draft Article under consideration. None was made and it was agreed to refer the draft Article 20 *bis* to the Drafting Group.

4:222 The Committee then proceeded to examining the **review of the question of the ratification of international air law instruments**. The Secretary announced that meetings between ICAO officials and an official of the Ministry of Foreign Affairs of Poland had been held

on 8 and 10 April 1997 regarding the current situation on the Protocols relating to the Warsaw Convention. The government of that State, as Depositary, had informed ICAO, for the time being unofficially, that the Montreal Additional Protocols Nos. 1 and 2 had entered into force on 15 February 1996 and that Additional Protocol No. 3 and Montreal Protocol No. 4 had 22 and 28 ratifications respectively.

4:223 The Secretary then introduced **WP/4-5**, which dealt with possible measures to stimulate and expedite the ratification of international air law instruments.

4:224 Drawing the attention of the Committee to the actions referred to in paragraph 4 of WP/4-5, the Chairman invited the delegations to comment thereon.

4:225 A large number of delegations congratulated the Secretariat for the presentation of this working paper. Many of these delegations expressed the feeling that the principal motivation for a State to become bound by an international instrument was the interest in the matter, while some other delegations felt that States might have the political will to become parties to a treaty and still face difficulties to follow the procedures thereto, requiring therefore assistance to expedite the process. These same delegations suggested that practical measures, as indicated in paragraph 3.4, were preferable to the measures in paragraphs 3.1.2 and 3.2.4 of the paper.

4:226 Several delegations were of the opinion that the possibility of a treaty entering into force by signature would not help much, due to the fact that ratification was still required by constitutional law of many States.

4:227 Some other delegations considered that the most useful and far-reaching part of WP/4-5 was that regarding proposed administrative actions as set out in paragraph 3.4 of the paper.

4:228 The possibility of an international instrument entering into force by signature or provisional application might nevertheless be useful for those States whose domestic law did not preclude such a possibility.

4:229 The Secretary expressed the Secretariat's gratitude for the comments made on WP/4-5, since the discussions had now clarified that solutions of legal nature were less likely to be effective means of expediting the ratification of international air law instruments than measures of practical nature relating to administrative action. The Secretariat would be guided by the views of the Committee in its further action regarding this matter.

4:230 In returning to the **Modernization of the "Warsaw System"**, the Committee then proceeded to examine and discuss the report of the Drafting Group. It was presented in the form of the ***Text of the Draft Convention Approved by the Drafting Group*** (LC/30 Drafting Group Report dated 9/5/97).

4:231 The Chairman of the Drafting Group, Mr. V. Poonoosamy (Mauritius), presented the Report of the Drafting Group. In this regard, he stated that it had been the understanding of the Drafting Group that, where appropriate, the Secretariat would provide linguistic embellishments to the text, without touching its substance. He emphasized the need for adopting a draft text likely to accommodate the interests of all relevant parties, i.e. States, carriers and users, in order to reach universal acceptance. He then proceeded with the presentation and the explanation of individual articles.

4:232 Concerning **Article 3, paragraph 5** and **Article 8**, he explained that in light of the commercial relationship between the consignor and the air carrier, the latter would still be able to rely on the limits of liability even in cases of non-compliance with documentary requirements. Whether this should also be the case in passenger-related claims, remained open and the text reflected this.

4:233 He further stated that, in the opinion of the Group, an appropriate solution regarding **Article 20** should take into account the question of "compensatory damages" as well as the fifth jurisdiction issue (Article 27 refers). These provisions were closely connected and should be considered as a package. In relation hereto, the Chairman of the Group noted that **Article 23, paragraph 2** now specifically reflected the notion of "restitution" mentioned in the Preamble. Further, **Article 27, paragraphs 2 and 3**, set out, in a more restrictive manner, under which conditions the additional jurisdiction may be available. He then proceeded to explain the various alternatives contained in **Article 20** of the draft and took the view that since these alternatives raised political as well as legal questions, they may best be considered by the Diplomatic Conference.

4:234 With respect to the type of injuries mentioned in **Article 16, paragraph 1**, the inclusion of the term "mental injury" was intended to confirm the right of recovery for such injuries, to the extent it was already recognized by the courts in a number of countries.

4:235 As regards **Article 18, paragraph 2**, the Chairman of the Group explained that the definition of "delay", which should be reviewed by the Diplomatic Conference, simply confirmed judicial precedent in relation to the concept of reasonableness.

4:236 As regards **Article 43**, the term "infringe" should not be construed so as to preclude any improvement of the conditions set out in the draft Convention.

4:237 With respect to **Article 45**, the Chairman of the Drafting Group explained the view of the Group which had felt that this Article should be considered by the Diplomatic Conference, as should **Article 48**.

4:238 In relation to the issue of "nuclear damage", the Chairman stated that it would be appropriate to refer this matter to the Secretariat which should produce an Information Paper on this subject to be presented to the Diplomatic Conference.

4:239 It was also noted that the English text of the draft Convention was not intended to indicate any substantive change to the existing wording as it appeared in the British and the American translations of the Warsaw instruments.

4:240 Based on the above comments, the Chairman of the Drafting Group submitted the draft for consideration by the Legal Committee.

4:241 Before commenting on the substance, one delegation observed that the Arabic text needed to be revised. Another delegation, supported by a further delegation, believed that the text needed to be thoroughly reviewed and noted that the Committee should have had more time to do this. This delegation, supported by another, also believed that the Spanish version required a number of revisions as far as grammar and syntax were concerned. After these comments, the Legal Committee proceeded to review the draft, article by article.

4:242 One delegation expressed the view that **Article 1** should contain all relevant definitions. The Chairman stated that the issue of definitions would be referred to the Diplomatic Conference.

4:243 Concerning **Article 18, paragraph 2**, several delegations discussed the wording "immediate or final destination" and its practical implications for the actual claim. However, since it had already been decided to put the entire paragraph 2 in square brackets, it was decided that the present wording would remain unchanged.

4:244 One delegation questioned whether **Article 20,** Alternative 1, was workable in case of a contract of carriage involving two or more carriers with varying regimes of liability applicable to them. The same delegation, in relation to Alternative 2, raised the question as to the enforceability of judgements with respect to two States with differing procedures concerning the burden of proof. In relation to these two points, one delegate reminded the Legal Committee that all alternatives of Article 20 would still have to be thoroughly considered by the Diplomatic Conference.

4:245 The Committee then proceeded to discuss the text of **Article 21**. Concerning **Article 21, paragraph 5**, one delegation, supported by two others, insisted, and the Committee agreed, that this provision should remain in square brackets. The same delegation also wished to retain Article 48 in square brackets. This was endorsed by the Committee.

4:246 With respect to the Spanish version of **Article 25**, two delegations suggested to use the term "reclamación" or "protesta" as translation for the English term "complaint".

4:247 As regards **Article 26**, one delegation stated that the term "person" should encompass both legal and natural persons.

4:248 In relation to **Article 28**, the Committee considered WP/4-30 presented by the United Kingdom, Canada and Saudi Arabia.

4:249 Referring to the initial discussion on this topic in the Committee, the delegation which presented this paper verbally conceded that arbitration should be allowed only to the extent that national laws would provide for such an option. One delegation, supported by another, did not endorse the proposal contained in the working paper. It argued that the provision should be put in square brackets. In addition to the required compatibility with national laws the proposal should be amended so as to contain additional safeguards for the passenger. Another delegation suggested to amend the proposal and to indicate that the passenger or its representative as well as the air carrier would have the opportunity to resort to arbitration.

4:250 In light of these comments, the Committee agreed to retain the proposal in WP/4-30, as amended, in square brackets for further consideration by the Diplomatic Conference.

4:251 With respect to **Article 35, paragraph 2**, two delegations suggested to put the last sentence in square brackets. This was endorsed by the Committee.

4:252 One delegation stated that attention of the Diplomatic Conference should be drawn to **Article 40** which, in conjunction with Article 27, would further expand the available fora for filing legal actions.

4:253 The draft Convention was thereafter adopted by the Committee, with a few minor editorial changes, as reflected in the text shown in **Attachment D**. The Chairman of the Committee stated that a number of substantive issues would still have to be dealt with by the Diplomatic Conference, after some polishing of the text by the Secretariat.

4:254 In conclusion, many delegations expressly agreed that the draft Convention was mature enough to be forwarded to a Diplomatic Conference. However, since a number of substantive questions still had to be resolved, one delegation proposed that another session of the Legal Committee was convened before the Diplomatic Conference took place. This view was not shared by the other delegations who spoke on this subject. They considered that the Council should decide on this question.

4:255 With these remarks, the Committee concluded its consideration of Item 4.

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Agenda Item 5: Consideration of other items on the General Work Programme of the Legal Committee

5:1 The Secretary presented WP/5-1 "**Consideration, with regard to global navigation satellite systems (GNSS), of the establishment of a legal framework**", which provided information related to the development of a legal framework for GNSS since the 29th Session of the Committee. The Committee noted the content of this working paper, in particular the work of the Panel of Legal and Technical Experts on the Establishment of a Legal Framework with Regard to GNSS (LTEP). One delegation wished to have some clarification on what action this Committee should take at this stage, as there was some concern that the instrument prepared by the LTEP or its working groups might not have enough legal force. While the lengthy delay in the entry into force of the Montreal Protocol of 1975 had often been cited as a reason for not creating a new Convention, the Committee had nevertheless now embarked on the process of drafting a new Warsaw Convention. The same approach should be adopted for GNSS in order to have a binding instrument.

5:2 The Chairman and the Secretary respectively explained that the issues related to GNSS were pending and that this Committee would have an opportunity to continue its task in this respect. One delegation expressed the view that the purpose of WP/5-1 was to prepare an intellectual climate for this Committee to make it aware that there was a subject that needed to be dealt with intensively, profoundly and seriously.

5:3 The Committee then noted WP/5-2 "**Liability rules which might be applicable to air traffic services (ATS) providers as well as to other potentially liable parties – Liability of air traffic control agencies**", presented by the Secretary. One delegation noted that this item had been on the Work Programme of the Committee for 37 years and it expressed concern for the lack of progress. Another delegation considered that this item was closely related to the liability aspects of GNSS and therefore deserved further attention by the Committee in due course.

5:4 The subject "**United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments**" was considered by the Committee on the basis of WP/5-3 presented by the Secretary. The Secretary informed the Committee that since the United Nations Convention on the Law of the Sea (UNCLOS) entered into force on 16 November 1994, some issues had been brought to the attention of ICAO, particularly the designation of air routes through archipelagic waters under Article 53(9) of UNCLOS and the jurisdiction of the International Tribunal for the Law of the Sea on overflight issues. Two delegations stated that ICAO should closely follow the development with respect to the two issues identified above in liaison with the International Maritime Organization and the above-mentioned Tribunal. Supporting this proposal, another delegation believed that due to the entry into force of UNCLOS, further studies of its implications on aviation related matters were warranted. The delegation of Turkey brought to the attention of the Committee that the comments made by its Government in document LC/26-WP/5-32 remained fully valid. It also reminded the Committee that Turkey was not a party to UNCLOS and therefore was not bound by it.

5:5 In summary of the discussion, the Chairman stated that the Secretariat would continue to study this matter and the Council would be informed of any new development. It was then up to the Council to direct this Committee what course of action should be taken.

5:6 With respect to the item "**Acts or offences of concern to the international aviation community and not covered by existing air law instruments**", two working papers, WP/5-4 by the Secretariat and WP/5-5 by the Hellenic Republic, were presented. The Secretary informed the Committee that this was a new item which the Council had decided to include in the General Work Programme of the Committee in view of the increasing number of "less serious offences" on board aircraft which were not directed against the safety of international civil aviation, but nevertheless had safety and security implications. Since the primary purpose of existing aviation security conventions was to prevent and deter serious offences endangering the safety of aviation, there was a gap of jurisdiction over these "less serious offences". The paper of the Hellenic Republic proposed to fill in this gap by a new additional protocol. A number of delegations expressed their support for further studies on this subject. One delegation proposed that, if necessary, a working group could be established through the Chairman of the Committee, and that other relevant organizations should be asked to comment and provide information. One delegation noted that it would be necessary to determine the priority of this item within the General Work Programme of the Committee. Another delegation informed the Committee of the recent legislation by its State extending the jurisdiction of its domestic courts to cover such "less serious offences" on foreign aircraft.

5:7 In conclusion, the Committee recommended to the Council that the priority of the item be determined and that a working group be established if the Council deemed appropriate.

Agenda Item 6: Date, place and agenda of the 31st Session of the Legal Committee

6:1 With respect to this agenda item, the Committee took the view that the Council would be in the best position to determine the date, place and agenda of the 31st Session of the Legal Committee, after its consideration of the General Work Programme.

6:2 In expressing his gratitude to all delegations for their constructive and co-operative attitude throughout the meeting, and to the Secretariat for its support, the Chairman closed the 30th Session of the Legal Committee.

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AGENDA FOR THE 30TH SESSION OF THE LEGAL COMMITTEE

Item 1: Adoption of the final agenda of the Session

Item 2: Report of the Secretariat

Item 3: Review of the General Work Programme of the Legal Committee

Item 4: Modernization of the "Warsaw System" and review of the question of the ratification of international air law instruments

Item 5: Consideration of other items on the General Work Programme of the Legal Committee

Item 6: Date, place and agenda of the 31st Session of the Legal Committee

Item 7: Report on work done at the Session

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LIST OF WORKING PAPERS

WORKING PAPER	TITLE
LC/30-WP/GEN	Organization of Meetings
Agenda Item 1	
LC/30-WP/1 Revised	Provisional agenda of the 30th Session of the Legal Committee
Agenda Item 2	
LC/30-WP/2	Report of the Secretariat
Agenda Item 3	
LC/30-WP/3	Review of the General Work Programme of the Committee
Agenda Item 4	
LC/30-WP/4	The modernization of the "Warsaw System" and review of the question of the ratification of international air law instruments – Introductory Note
Discussion Paper No. 1	Presented by the Kingdom of the Netherlands
LC/30-WP/4-1	Reference Text
LC/30-WP/4-2	Report of the Secretariat Study Group on the modernization of the Warsaw Convention System (Montreal, 12-13 February 1996)
LC/30-WP/4-3	C-WP/10381 – Report on modernization of the "Warsaw System" C-WP/10470 – Progress report on modernization of the "Warsaw System"
LC/30-WP/4-4	AT-WP/1769 – Socio-economic analysis of air carrier liability limits; AT-WP/1773 – Socio-economic analysis of air carrier liability limits 1) Air carrier input on insurance covers and cost; and 2) IATA Intercarrier Agreement
LC/30-WP/4-5	Review of the question of the ratification of international air law instruments

LC/30-WP/4-6	Comments on the report of the Rapporteur on the modernization and consolidation of the Warsaw System (Presented by the United States)
LC/30-WP/4-7	Comments of the Netherlands on the items of the Provisional Agenda of the 30th Session of the Legal Committee (Presented by the Kingdom of the Netherlands)
LC/30-WP/4-8*	Contribution on international legal framework on air carrier liability (Presented by Asociación Latino Americana de Derecho Aeronáutico y Espacial (ALADA))
LC/30-WP/4-9	Name of the Convention (Presented by the Russian Federation)
LC/30-WP/4-10	Preamble to the Convention (Presented by the Russian Federation)
LC/30-WP/4-11	Comments on Article 1 – Scope of Application – Definitions (Presented by the Russian Federation)
LC/30-WP/4-12	Comments on Article 3 – Passengers and Baggage (Presented by the Russian Federation)
LC/30-WP/4-13	Comments on Article 7 – Contents of Air Waybill and Receipt for the Cargo – and Article 9 – Responsibility for Particulars of Documentation (Presented by the Russian Federation)
LC/30-WP/4-14	Comments on Article 16 – Death and Injury to Passengers – Damage to Baggage (Presented by the Russian Federation)
LC/30-WP/4-15	Comments on Article 17 – Damage to Cargo (Presented by the Russian Federation)
LC/30-WP/4-16	Comments on Article 18 – Delay (Presented by the Russian Federation)
LC/30-WP/4-17	Comments on Article 19 – Reduction of Recovery (Presented by the Russian Federation)
LC/30-WP/4-18	Comments on Article 21 – Limits of Liability – Conversion of Monetary Units (Presented by the Russian Federation)

* English and Spanish only

LC/30-WP/4-19	Comments on Article 30 – Successive Carriage (Presented by the Russian Federation)
LC/30-WP/4-20	Comments on Chapter V – Supplementary Provisions Relating to Carriage by Air Performed by a Person Other than the Contracting Carrier (Presented by the Russian Federation)
LC/30-WP/4-21	Comments on Article 20 (Presented by Japan)
LC/30-WP/4-22	Presented by France
LC/30-WP/4-23	Presented by Hellenic Republic
LC/30-WP/4-24	Article 16 (Presented by India)
LC/30-WP/4-25	Comments on Article 20 – Extent of Carrier Liability in Case of Death or Injury (Presented by Viet Nam)
LC/30-WP/4-26	Article 21 paragraph 5 – Revision of limits of liability
LC/30-WP/4-27	Presented by the Kingdom of the Netherlands
LC/30-WP/4-28	Comments on Chapter V (Presented by Sri Lanka)
LC/30-WP/4-29	Proposal concerning the wording of Article 20 (Presented by Romania)
LC/30-WP/4-30	Comments on Article 28 – Arbitration (Presented by UK, Canada and Saudi Arabia)

INFORMATION PAPERS

LC/30-IP/1*	Report of the second meeting of the Secretariat Study Group on the modernization of the Warsaw Convention System
LC/30-IP/2*	IATA Intercarrier Agreement on Passenger Liability and Agreement on Measures to Implement the IATA Intercarrier Agreement

* English only

LC/30-IP/3*	The Alvor Draft Convention relating to International Carriage by Air
LC/30-IP/4*	Common position of the Council of the European Community on air carrier liability (Presented by the Kingdom of the Netherlands)
LC/30-IP/5*	The new IATA international passenger liability regime (Presented by International Air Transport Association (IATA))
LC/30-IP/6*	(Presented by the Kingdom of the Netherlands)

Agenda Item 5

LC/30-WP/5-1	Consideration, with regard to global navigation satellite systems (GNSS), of the establishment of a legal framework
LC/30-WP/5-2	Liability rules which might be applicable to air traffic services (ATS) providers as well as to other potentially liable parties – Liability of air traffic control agencies
LC/30-WP/5-3	United Nations Convention on the Law of the Sea – Implications, if any, for the application of the Chicago Convention, its Annexes and other international air law instruments
LC/30-WP/5-4	Acts or offences of concern to the international aviation community and not covered by existing air law instruments
LC/30-WP/5-5	Acts or offences of concern to the international aviation community and not covered by existing air law instruments (Presented by the Hellenic Republic)

Agenda Item 6

LC/30-WP/6	Date, place and agenda of the 31st Session of the Legal Committee

Agenda Item 7

LC/30-WP/7	Draft Report of the Legal Committee on the Organization of the Meeting and on Agenda Item 2
LC/30-WP/7-1	Draft Report of the Legal Committee on Agenda Item 4 (Introductory Note)

* English only

LC/30-WP/7-2	Draft Report of the Legal Committee on Agenda Item 4 (Article 1 through Article 15)
LC/30-WP/7-3	Draft Report of the Legal Committee on Agenda Item 4 (Article 16, paragraphs 1 and 2)
LC/30-WP/7-4	Draft Report of the Legal Committee on Agenda Item 4 (Article 16, paragraph 2 through Article 21, paragraph 2)
LC/30-WP/7-5	Draft Report of the Legal Committee on Agenda Item 4 (Article 21, paragraph 3 through Article 31)
LC/30-WP/7-6	Draft Report of the Legal Committee on Agenda Item 4 (Article 32 through Article 46)
LC/30-WP/7-7	Draft Report of the Legal Committee on Agenda Item 4 (Article 20 and Review of the question of the ratification of international air law instruments)
LC/30-WP/7-8	Draft Report of the Legal Committee on Agenda Item 5

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LIST OF PARTICIPANTS

Angola	Preza, H.
Australia	Wolfe, J. Manning, J.
Austria	Prachner, K. Fröschl, S. Kräftner, R.
Belgium	Van Bunnen, M.
Bolivia	Borda, M. Bustos, P. Schulz, G. Sisto, F.
Brazil	Godoy, G.M.C. Salgado, A.L.P.B. Andrade, A.A.L.
Cameroon	Tekou, T.
Canada	Lauzon, G. Jacques, C. MacNab, E. Richard, G. Appleby-Ostroff, S. Boodhoo, I. Green, I. Pigeon, J.E.
Chile	Ansted, J. Valdes Garcia, A. Urrutia Moya, M.C.
China	Wang, X. Wang, X. Luo, S. Wang, D. Jin, F. Zhang, X. Nie, Y. Wu, J. Shao, H. Zhang, W.

Côte d'Ivoire	Abonouan, K.J.
Cuba	Rodriguez Rodriguez, J.L. Arango Rodriguez, A.J.
Czech Republic	Zbiralová, J. Dokládal, P. Záruba, P.
Denmark	Skovsted, H. Theil, K. Lien, A.
Egypt	El Hussainy, K. Allam, A.M. Abadir, R. Abdelrahman, A. Fahmi, H.S.
El Salvador	Martinez, J.F.
Finland	Tupamäki, M.A.
France	Daussun, A. Bugnet, J.-C. Tell, O. Veillard, A. Videau, D. Folliot, M.G.
Gabon	Oligui, C. Bemengue, S.
Germany	Frietsch, E.A. Stiehl, U.M.
Greece	Giokaris, A. Andreades, I.
Haiti	Theramene, B.
India	Madan, V.S. Singh, R. Sadhu, V.K.
Indonesia	Silooy, E.A.
Iran, Islamic Republic of	Torkan, A.

Israel	Braun, D. Rosen-Berman, G. Keinan, E. Zussman, E.A.
Italy	Leanza, U. Chiavarelli, E. Palma, C.
Japan	Fujii, N. Horie, N. Ishiya, T. Takano, S. Kobayashi, T. Ochiai, S.
Jordan	Salaytah, B. El-Zubi, Y.M. Al-Hijazi, Y. Baqain, H. Qaddourah, N.A.R.
Kuwait	Al-Qudabi, I.
Lebanon	Eid, S.
Mauritius	Poonoosamy, V.
Mexico	Sanchez-Gutiérrez, J. Mendez-Mayora, D. Rangel-Gomez, H.A. Christlieb-Morales, J.
Morocco	Yaalaoui, A.
Nepal	Shrestha, H.B.
Netherlands, Kingdom of the	Bertens, F.J.M. Kuiper, C.J. Evertsz, M.M. Kraan, M.A. Vrolijk, A. Nathan I.M.
New Zealand	Talbot, H.L.
Niger	Toure Alzouma, M.

Nigeria	Akerele, T.R. Achebe, N.L. Kalango, A. Kalejaiye, N.N.
Norway	Johansen, T. Wister, F.A.
Portugal	Rodrigues, G.A.
Republic of Korea	Lee, Y.-I.
Romania	Voicu, I. Tanase, I. Ciobotaru, G. Galos, V.
Russian Federation	Valov, I.I. Pozdnyakov, V.Y. Bavykine, A. Bordounov, V.D. Bourkhanova, N.N. Brylov, A.N. Griaznov, V.S. Romanenko, Y.F. Romanov, I.K. Korovkin, V.I.
Saudi Arabia	Al-Ghamdi, S. Nadhrah, E. Arab, S. Siddiqui, R.
Senegal	Diop, C.M. Kébé, M. Coulibaly, S.
Spain	De Peña, J.M. Quirós Badillo, S. Fernandez Rodriguez, R.
Sri Lanka	Liyanage, S.D.
Sweden	Gradin, N.A. Nordlander, K. Malmberg, L.-G.
Switzerland	Buchmüller, B. Ryff, M.

Thailand	Chantranon, S. Sucharitkul, U. Tongbai, C. Tontapanish, T.
Togo	Tigoue, Z.I.
Trinidad and Tobago	Seignoret, G.
Tunisia	Mougaïda, H.
Turkey	Ülgen, T. Ügdül, A. Albayrak, Ü. Baykal, Y. Günes, A. Saldiraner, Y.
United Kingdom	Jones, A.G.
United States	Horn, D. Newman, D. Jennison, M.B. Klang, J. Schwarzkopf, P.B.
Uzbekistan	Kasimov, A.V. Saidkhanova, G.M.
Venezuela	Requena, M. Fraino Lander, C. Lameda, L.
Viet Nam	Lai, X.T. Ngo, H.W. Nguyen Van, D.
Yemen	Al-Yousefi, M.M. Camel, N.A. Moharram, N.J.

OBSERVERS

African Civil Aviation Commission (AFCAC)	Makonnen, A.
European Union (EU)	Marinho de Bastos, J. Muschel, L.
International Air Transport Association (IATA)	Clark, L.S. Besse, G. Comber, M. Donald, R. Weinstein, M.
International Law Association	Milde, M.

DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

[TEXT APPROVED BY THE LEGAL COMMITTEE]

THE STATES PARTIES TO THIS CONVENTION;

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING 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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo;

CONVINCED 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;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. 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 international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage 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.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to 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.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, destruction or loss of, or damage to baggage, and delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention [including those relating to limitation of liability.]

Article 4 - Cargo

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. 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 receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 - Contents of Air Waybill and Cargo Receipt

The air waybill and the cargo receipt shall include:

(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 of the consignment.

Article 6 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7 - Documentation of Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 8 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

Article 9 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 10 - Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the nature, weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air

waybill to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 11 - Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 12 - Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 11 and 12, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the cargo receipt.

Article 15 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily or mental injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

[3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.]

[4.] Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 17 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if it proves that the destruction, or loss of, or damage to, the cargo resulted solely from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 18 - Delay

1. The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[2. For the purpose of this Convention, delay means the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to expect from a diligent carrier to do so, having regard to all the relevant circumstances.]

Article 19 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

Article 20 - Compensation in Case of Death or Injury of Passengers

Alternative 1

[1. Subject to paragraph 2, the carrier shall not be liable for damages arising under Article 16, paragraph 1 which exceed 100 000 Special Drawing Rights:

(a) if the carrier proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage, or that it was impossible for it or them to take such measures; or

(b) unless the damage so sustained was due to the fault or neglect of the carrier or of its servants or agents acting within their scope of employment or agency.

2. At the time of ratification, adherence or accession, each State Party shall declare which of either subparagraph (a) or subparagraph (b) of the preceding paragraph shall be applicable to it and its carriers. A State Party which has declared that subparagraph (b) shall be applicable to it, may later make such a declaration in respect of subparagraph (a) instead. All declarations made under this paragraph shall be binding on all other States Parties and the Depositary shall notify all States Parties of such declarations.]

Alternative 2

[1. The liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100 000 Special Drawing Rights if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. Notwithstanding paragraph 1 of this Article, any State Party may by notification to the Depositary at the time of ratification or acceptance, or thereafter, declare, that in any action brought before a Court within its territory, the liability of the carrier for damages arising under Article 16, paragraph 1 shall be limited to 100 000 Special Drawing Rights, unless the damage so sustained was due

to the fault or neglect of carrier or of its servants or agents acting within their scope of employment. The Depositary shall inform all other States Parties accordingly and shall keep current a list of States Parties having made such declaration.]

Alternative 3

[1. Subject to paragraph 2 of this Article, the liability of the carrier for damages arising under Article 16, paragraph 1, shall not exceed 100 000 Special Drawing Rights if the carrier proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

2. The liability of the carrier above an amount of [ ][1] Special Drawing Rights shall be subject to proof that the damage sustained by the passenger was due to the fault or neglect of the carrier or its servants or agents acting within their scope of employment.]

Article 21 - Limits of Liability - Conversion of Monetary Units

1. (a) In the case of damage caused by delay as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][2] Special Drawing Rights.

(b) In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][2] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage 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 it proves that the sum is greater than the passenger's actual interest in delivery at destination.

2. (a) In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][3] Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

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

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[1] No amount was set.

[2] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

[3] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(c) The foregoing provisions of paragraphs 1(a), 1(b) and 2(a) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.

3. The limits prescribed in Article 20 and 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, including interest. 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.

4. (a) The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

(b) Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 4(a) of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier in judicial proceedings in their territories is fixed at a sum of [1 500 000][4] monetary units per passenger with respect to Article 20; [62 500][4] monetary units per passenger with respect to paragraph 1(a) of this Article; [15 000][4] monetary units per passenger with respect to paragraph 1(b) of this Article; and [250][4] monetary units per kilogramme with respect to paragraph 2(a) of this Article. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal

[4] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

(c) The calculation mentioned in the last sentence of paragraph 4(a) of this Article and the conversion method mentioned in paragraph 4(b) of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 20 and 21 as would result from the application of the first three sentences of paragraph 4(a) of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 4(a) of this Article, or the result of the conversion in paragraph 4(b) of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

[5. (a) Without prejudice to the provisions of Article 21 paragraph 6 of this Convention and subject to sub-paragraph (b) below, the limits of liability established under this Convention shall be reviewed at five year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention, upon condition that this inflation factor has exceeded 10 per cent. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 4(a) of this Article.

(b) The adoption of the revision shall require the vote of two-thirds of the ICAO Council at a meeting called for that purpose and shall then be submitted by the Council to each State Party. Any such revision provided for under this Article shall become effective six months after its submission to the States Parties, unless within three months a majority of the States Parties register their disapproval with the Council. The Council shall immediately notify all States Parties of the coming into force of the revision so adopted.

(c) Notwithstanding sub-paragraph (a) of this paragraph, the procedure referred to in sub-paragraph (b) of this paragraph shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in sub-paragraph (a) has exceeded 30 per cent since the date of entry into force of this Convention or since the date of the previous revision. Subsequent reviews using the procedure described in sub-paragraph (a) of this paragraph will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present sub-paragraph.]

6. A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 22 - Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 23 - Basis of Claims

1. In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

2. For the purposes of this Convention the term "damages" does not include any punitive, exemplary or other non-compensatory damages.

Article 24 - Servants, Agents - Aggregation of Claims

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

2. The aggregate of the amounts recoverable from the carrier, its servants and 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.

Article 25 - Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 26 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

[2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to and from which the carrier operates services for the carriage by air [and] [or] in which the carrier has an establishment.]

[3. For the purposes of paragraph 2 of this Article, "establishment" means premises leased or owned by the carrier concerned from which, [through its own managerial and administrative employees,] it conducts its business of carriage by air.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 28 - Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

[2. Subject to applicable laws, nothing in this Convention shall preclude a passenger or a person who derives his or her rights from a passenger from agreeing with the carrier that any dispute between them relating to the liability of the carrier under this Convention for death of or injury to the passenger shall be settled by arbitration. However in such a case the agreement, in order to be valid, shall require the claimant's individual written consent or confirmation after the event giving rise to the dispute has occurred].

3. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

4. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

5. The provisions of paragraphs 3 and 4 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 31 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 32 - Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes an agreement for carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier , be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20 and 21 of this Convention. [Any special agreement under which the contracting carrier assumes obligations not imposed by this Convention or any waiver of rights conferred by this Convention or any special declaration of interest in delivery at destination contemplated in Article 21 of this Convention, shall also affect the actual carrier.]

Article 36 - Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

Article 37 - Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he or she proves that he or she acted within the scope of his or her employment, be entitled to avail himself or herself of the limits of liability which are applicable under this Convention to the carrier whose servant or agent he or she is, unless it is proved that he or she acted in a manner that prevents the limits of liability from being invoked in accordance with Articles 20 and 21 of this Convention.

Article 38 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier,, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to the carrier concerned.

Article 39 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business.

Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Final Provisions

Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 44 - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents, from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

[Article 45 - Insurance]

[Every carrier is required to maintain insurance or other form of financial security, including guarantee, covering its liability for such damage as may arise under this Convention in such amount, of such type and in such terms as the national State of the carrier may specify. The carrier may be required by the State into which it operates to provide evidence that this condition has been fulfilled.]

Article 46 - Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 47 - Definition of Days

The expression "days" when used in this Convention means calendar days not working days.

Article 48 - Reservations

[No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.]

[Final clauses to be inserted.]

SGMW/1
27/5/98

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW/1)

FIRST MEETING

(Montreal, 14 - 18 April 1998)

FINAL REPORT

The attached constitutes the Final Report and should replace the Draft Report in the yellow report folder.

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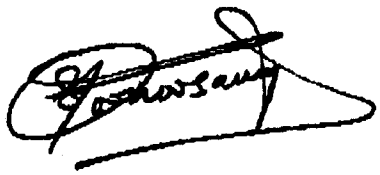
LETTER OF TRANSMITTAL

To: President of the Council

From: Chairman, Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW)

I have the honour to submit herewith the Report of the Meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW), held in Montreal from 14 to 18 April 1998.



Vijay Poonoosamy

Montreal, 18 April 1998

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TERMS OF REFERENCE

1. On 26 November 1997, the Council decided to establish the Special Group on the Modernization and Consolidation of the "Warsaw System". The terms of reference of the Special Group, as outlined in paragraph 4.1 of C-WP/10688, shall be:

1) to supplement the work already 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 to consider where appropriate, alternative options; and

2) if appropriate, to elaborate on possible drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing.

2. For its work, the Special Group should take into account:

1) the draft text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, contained in Attachment D to Doc 9693-LC/190;

2) the comments of States on the draft text mentioned in the preceding paragraph 1), in reply to State letter LE 4/51-97/65;

3) the Report of the third meeting of the Secretariat Study Group, including the analysis of the comments received from States; and

4) any other relevant documents.

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REPORT OF THE MEETING OF THE SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW/1)

1. Place and Duration

1.1 The meeting of the Special Group was held at the Headquarters of the International Civil Aviation Organization in Montreal from 14 to 18 April 1998.

2. Opening Addresses

2.1 The **President of the Council, Dr. Assad Kotaite**, opened the meeting by extending a warm welcome to all delegations and observers attending this meeting. He also welcomed the members of the Secretariat Study Group who had been invited to attend this meeting of the Special Group.

2.2 He referred to the results reached at the 30th Session of the Legal Committee, namely the text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*. He recalled that the draft Convention retained a number of provisions in brackets, notably, those relating to the liability regime for passengers and the availability of a fifth jurisdiction.

2.3 He further referred to the comments received from States with respect to the draft instrument and noted that these comments were examined by the Secretariat Study Group which had held two meetings since the conclusion of the 30th Session of the Legal Committee and had adopted several recommendations.

2.4 He stated his view that this preparatory work by the Secretariat Study Group would prove to be of great value to the meeting. Referring to the comments from States received by ICAO, the President noted a high level of willingness to successfully resolve the outstanding matters as well as a strong commitment towards the swift finalization of the new instrument. He expressed his conviction that the Special Group would be inspired by this significant momentum and would seize this historic opportunity. He explained that the Report of the meeting of the Special Group will be presented to the ICAO Council during its 154th Session with a view to permitting the Council to decide on the convening of a Diplomatic Conference.

2.5 The President concluded by wishing the Special Group every success in its endeavours.

2.6 The **Secretary General, Mr. Renato Cláudio Costa Pereira**, and the Director of the Legal Bureau, Dr. Ludwig Weber, also welcomed the participants to the meeting.

3. Attendance

3.1 The meeting was attended by 39 delegates from 18 Contracting States, 5 members of the Secretariat Study Group, who acted as advisers, and 7 observers from 4 Contracting States and 3 international organizations. The names of the participants and observers appear in **Appendix 1.**

4. Agenda of the Meeting

4.1 The provisional agenda as set out in **Appendix 2** was approved by the meeting.

5. Officers

5.1 Mr. Vijay Poonoosamy (Mauritius) was elected Chairman of the meeting and Mr. A. Jones (United Kingdom) was elected Vice-Chairman. The Secretary of the meeting was Dr. L. Weber, Director, Legal Bureau; the Deputy Secretary was Mr. S. Espínola, Principal Legal Officer; the Assistant Secretary was Mr. A. Jakob, Associate Expert, Legal Bureau.

6. Languages and Documentation

6.1 Translation and interpretation services in English, French, Russian and Spanish were provided by the Language and Publications Branch under the direction of Mr. Y. Beliaev. A list of documentation prepared or made available for the meeting appears in **Appendix 3**.

Agenda Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

1:1 The Secretary recalled that the text adopted by the Legal Committee had been sent out to States and international organizations for comments by State letter dated 27 June 1997. He referred the Group to WP/3 which summarized the comments received in response to the State letter. He further recalled that the ICAO Council, at its meeting on 26 November 1997 had decided to establish the Special Group with the Terms of Reference as set out in WP/2, with a view to refining the text of the Legal Committee.

1:2 The Secretary further referred to the two additional meetings the Secretariat Study Group held after the conclusion of the 30th Session of the Legal Committee. He explained that during the third meeting of the Secretariat Study Group in December 1997, the Group had focused its discussion on the problems relating to Article 20 and specifically to the question of the burden of proof in the second tier, above the financial threshold of 100 000 SDR. The Study Group had adopted a draft recommendation concerning this Article, which provided a uniform regime instead of a provision containing various options as presently set out in the Legal Committee draft. In the view of the Study Group, this approach was considered more conducive to the overriding objectives of uniformity and ratifiability of the new text.

1:3 Referring to the fourth meeting of the Secretariat Study Group held in January 1998, the Secretary reported on the deliberations of the Study Group on the additional, fifth jurisdiction (Article 27). The Secretary advised that the Study Group had for review various proposals in relation to this Article as set out in paragraphs 4.2 to 4.6 of WP/5. Referring to the draft recommendation adopted by the Study Group at the conclusion of the fourth meeting, the Secretary highlighted its contents and explained that it was a further refinement of the text adopted by the Legal Committee in which, *inter alia*, the requirements for the "operation of services" had been expanded upon.

1:4 In addition, the Secretary reported that the Study Group had also reached recommendations on other Articles appearing in square brackets, notably, Article 3 paragraph 5, Article 18 paragraph 2, Article 21 paragraph 5, Article 28 paragraph 2, and Article 35 paragraph 2. As well, the Study Group had developed some guiding thoughts with respect to Article 16. He commended these conclusions of the Study Group as material to be taken into account by this Group for its work.

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Agenda Item 2: Elaboration on drafting suggestions on the outstanding questions in the draft text

2:1 Referring thereafter to the Terms of Reference of the Special Group, as set out in WP/2, the Chairman suggested and the Group agreed, that the Special Group would primarily focus on the unfinished matters of the draft text appearing in square brackets. Once these issues had been successfully resolved, the Group would be able to discuss further drafting suggestions, linguistic improvements and other editorial matters as set out in paragraph 1(2) of the Terms of Reference. It was also decided to handle the subjects appearing in square brackets in the order of their appearance in the draft text.

2:2 The Group first examined draft **Article 3, paragraph 5**, and the related issue of non-compliance by the air carrier with the documentary requirements.

2:3 One delegation expressed the view that irrespective of whether the sentence in brackets would be retained or not, the wording already suggested that it remained possible for the air carrier to rely on the remaining limits of liability provided for in the Convention. At most, it believed, the retention of the words appearing in square brackets would merely clarify this understanding. However, with reference to the wording of Article 8 of the draft, this delegation alerted the Group to the need for consistency with respect to these two Articles. A member of the Secretariat Study Group pointed out that this would create a change to the present system, and the wording presently in square brackets may be useful to clarify this. Another delegation believed that the consideration of this matter was closely related to the outcome of the discussions on the proposed liability regime. Should it be decided to retain options (as presently contained in the Legal Committee draft), this delegation believed that the carrier should not be able to rely on the limits of liability if it contravenes the documentary requirements. Should a uniform solution be adopted, the situation could be different.

2:4 Referring to these comments, the Chairman suggested, and it was agreed, to delete the square brackets so as to align the wording with the wording contained in Article 8 of the draft text, on the understanding that the Special Group might have to review the issue in particular should the discussion on Article 20 so warrant.

2:5 The Group went on to examine **Article 16, paragraph 3,** dealing with delay and loss of baggage upon expiry of a certain time period. While there was a common sentiment within the Group to delete the square brackets, views varied as to the appropriate time period after the termination of which baggage could be treated as lost. Responding to an observation by one delegation, the Chairman pointed out that it would remain possible for the air carrier to voluntarily admit the loss of baggage prior to the indicated period. Several delegations initially favoured shortening the time period to 14 days, particularly given the ability of most airlines to trace nearly 100 per cent of misloaded baggage within 14 days. It was, however, indicated that the actual delivery back to the passenger would take some additional time, in which case, the 21-day period appeared to be reasonable. One delegation wondered about the relevance of the proposed shortening of the time period given the fact that a legal action would likely consume a considerable amount of time. One observer indicated that since it was the passenger's primary interest to retrieve his or her baggage, it might not be useful to shorten the time period unduly after which his or her baggage would be treated as lost. Another delegation had a query about the reference to the term "from the contract of carriage" and wondered whether these words referred to the local law of contract or the carrier's condition of carriage. As a consequence, this delegation preferred a simpler wording which would take the form of a deeming provision. This view was also endorsed by another delegation.

2:6 Several delegations observed the differing time periods mentioned in Article 12, paragraph 3, Article 16, paragraph 3, and Article 25, paragraph 2. They wondered if the period mentioned in Article 16, paragraph 3, should be adjusted accordingly. In this connection it was observed that with respect to cargo

(Article 12, paragraph 3) the time period of 7 days appeared to be reasonable, whereas it could not be considered so in cases involving baggage. After a further exchange of views, it was **decided to delete the square brackets around Article 16, paragraph 3**. As a consequence, the square brackets around the number preceding **Article 16, paragraph 4** would also be deleted. Concerning the time period, the Group decided to retain the reference to the 21-day period. Further, in relation to this Article, the general sentiment prevailed that the rights flowing from this provision could be invoked by the passenger as an option, a notion which the Group considered would be more adequately reflected in the French version of Article 12, paragraph 3, by using the term "autorisé" instead of "fondé" as presently contained in Article 16. The French translation of Article 16, paragraph 3, should therefore be aligned accordingly.

2:7 The Group then reviewed **Article 18, paragraph 2**, which sets out a definition of delay. The discussion revealed that the vast majority of delegations preferred not to retain a definition for the notion of "delay". Explaining these views, one delegation expressed the fear that any attempted definition was likely to create new litigation as to its meaning. Considering that circumstances giving rise to delay appear to be plentiful, this delegation did not consider the proposed definition as helpful or workable. This sentiment was shared by numerous other delegations who believed that the terms "reasonable to expect" and "regard to all the relevant circumstances" were too vague. Another delegation, referring to the availability of judicial precedents, believed that the courts would have no difficulty in deciding the issues at hand on a case-by-case approach.

2:8 Responding to the clear preference expressed by the Group with respect to Article 18, paragraph 2, the Chairman stated that it would be prudent to delete Article 18, paragraph 2, leaving it for the courts concerned to decide whether there was an actionable delay giving rise to compensation for a passenger. This was **agreed**.

2:9 The Group then examined **Article 20**. Referring to the outcome of the discussion on this Article in the forum of the Legal Committee, the Chairman recalled that the Legal Committee had adopted three alternatives. He reiterated that the main concern in relation to this Article remained ratifiability on a global level. Referring further to the comments received by States in relation to this Article, the Chairman observed that States were apparently reluctant to recommend for adoption by a Diplomatic Conference an instrument that contained various options on such a crucial and fundamental issue. He stated that the objective therefore should be to attempt to devise a uniform proposal regarding Article 20.

2:10 Responding to a query by a delegation, the Secretary explained the background behind the draft recommendation developed by the Study Group (Attachment D of WP/4). This recommendation departed from the text considered by the Legal Committee in several ways, notably as it no longer contained options from which States could choose. Also, the draft recommendation made it clear that the burden of proof with respect to the second tier rested with the air carrier. However, as a balancing measure, (*quid pro quo*), the recommendation contained an express reference to an additional defence, set out in paragraph c) of said draft recommendation. With respect to this defence, the Secretary stated that although this defence may have already been implicitly available to the carrier, the Study Group decided to include it explicitly. Commenting on the draft recommendation, one delegation found it superior to the option approach. Another delegation believed that the optional system had been accepted in principle by the majority of States. This delegation, who preferred a solution along with lines of Alternative 1a) of Article 20, wondered whether the recommendation developed by the Study Group in fact accorded less protection to the passenger. Referring to this comment, another delegation believed that the option approach would likely not be easily ratifiable and, as a consequence, the Study Group recommendation had to be seen as a viable working solution. All delegations who spoke, with the exception of two, shared this view.

2:11 The ensuing discussion focused on the consequences of the inclusion of the additional defence contained in sub-paragraph (c) of Article 20 of the draft recommendation referred to above as well as to the proper meaning of the term "third parties" in this sub-paragraph. Several delegations wondered whether it was necessary to retain the reference to Article 35 in this sub-paragraph. As to this last point, the discussion revealed a divergence of opinion, although there was a general understanding that the actual and contractual carriers should not be considered as a "third party" in terms of this provision.

2:12 While one delegation endorsed the proposal by the Study Group in its entirety, several others suggested amending the proposal in several aspects. Referring to these comments, the Chairman pointed out to the Group that WP/13 already contained a proposal for such amended version. Upon the invitation of the Chairman, the proposing delegation introduced this working paper.

2:13 With respect to the latter proposal, several delegations expressed their endorsement of the incorporation of the term "servants and agents", which is not featured in the Study Group recommendation, in sub-paragraph (a) of Article 20. Further, the Group unanimously endorsed the clarification contained in the chapeau of Article 20 as set out in WP/13 starting with the terms "For each passenger". Referring to earlier comments which had expressed concern in relation to the inclusion of an additional defence, the delegation presenting WP/13 believed that the inclusion appeared to be necessary in order to attract sufficient support. In relation to this point, one member of the Secretariat Study Group stated that thus far the absence of such defence in the wording of the Warsaw Convention had not prevented air carriers from successfully seeking recourse against third parties. He therefore believed that air carriers would not be in a worse position if such defence did not appear in the future convention. A question was raised as to whether the passenger would have to initiate a legal action against a third party (for example, a manufacturer) in addition to the one against the air carrier. To this end, it was explained that in some legal systems the responsibility of a third party could be established at the initial trial initiated by the passenger against the air carrier.

2:14 In the ensuing discussion several delegations expressed a preference for a shortened sub-paragraph (c) in the draft recommendation concerning Article 20, as set out in WP/13, and to refer only to "acts or omissions of a third party". In the same vein, one delegation suggested to add the term "unforeseeable" before "acts or omissions of a third party." However this view was not shared by all, and the opinion was expressed that the air carrier may be tempted to assert this defence too easily, with the undesired effect that the passenger may have to await the outcome of the legal action between the air carrier and the third party. In this connection, the concern was also raised that in the case of a terrorist attack the passenger might be left without an effective remedy in certain instances.

2:15 One delegation recalled that during the last session of the Legal Committee there was a split of views on whether the burden of proof, in the second tier, should be on the carrier or on the passenger, and suggested that the Special Group should indicate its preference with regard to this issue and leave the door open for the Diplomatic Conference to opt for any of the solutions.

2:16 The Chairman invited the participants to express their preferences with regard to the issue of the burden of proof.

2:17 The observer for the International Union of Aviation Insurers (IUAI) stated that while the IUAI would co-operate to make any of the two regimes work, it would prefer that clear limits of liability be established. If this was not possible and it had to be decided who should bear the burden of proof, the carrier or the passenger, the IUAI would prefer that it lay on the passenger. He agreed, however, with the proposal presented by the United Kingdom in WP/13, including sub-paragraph (c).

2:18 One delegation acknowledged that the Secretariat Study Group had taken the right course in presenting a uniform solution rather than different options and expressed the view that the burden of proof should lie on the carrier rather than on the passenger, who would be in a position of disadvantage in relation to the carrier. The same delegation, considering that sub-paragraph (c) does not add much to Article 20, would not oppose its deletion, although it could have the effect of rendering Article 20 more ratifiable.

2:19 One member of the Study Group, supported by another, showed his preference for the burden of proof lying on the passenger, but expressed concern that this would be a step back in the protection of the consumer, which had to be taken into account in the perspective of adopting a solution capable of enhancing the ratifiability of the draft Convention.

2:20 One delegation, agreeing that acceptance of the draft Convention by States and uniformity of solutions are fundamental objectives in the process of modernization and consolidation of the Warsaw System, also advocated that the burden of proof should rest with the carrier. Another delegation, supporting the previous one, added that carriers seemed to be satisfied in implementing the IATA Intercarrier Agreements which provide for the burden of proof on the carrier, a solution which should not be a major concern for carriers in terms of insurance costs.

2:21 One delegation expressed the view that the burden of proof in the second tier is a crucial issue and should lie on the claimant. While accepting that consumer protection is of paramount importance, the same delegation voiced concern that the interest of the carrier could not be neglected and pointed out that the IATA Intercarrier Agreements have not been accepted by a majority of IATA members. With unspecified limits in the second tier, airlines would face increases of insurance costs and be compelled to pass them on to the passenger. In the same vein, another delegation considered that the interests of all States, with different economic levels, had to be taken into account. If liability in the second tier was to be unlimited, the burden of proof should lie on the passenger.

2:22 Another delegation, remarking that the carriers which have so far accepted the IATA Intercarrier Agreements represent 85% of the air traffic, was of the opinion that if the burden of proof was set back from the carrier to the passenger, this would make it difficult for States to ratify the draft Convention.

2:23 One delegation showed understanding for carriers from developing countries, for which the impact of insurance may be a significant question and the prospect of claims may raise concern, because insurance has to cover any such liability.

2:24 One delegation remarked that it would not be accurate to state that there is no limit of liability in the second tier and indicated that Article 23 clarifies the notion of such limitation. The same delegation pointed out that the carrier's liability, as provided by Articles 16 and 23 of the new Convention, will be the only course of action by which passengers can recover from an accident. In the opinion of this delegation, there was in fact a fair and substantial *quid pro quo* under the draft Convention.

2:25 One delegation indicated that the European Union Regulation provided for the burden of proof on the carrier and that it would not be accepted to reverse it on the passenger. Another delegation endorsed the statement of the previous delegation and added that Article 20, as it stands, was a compromise solution and should not be changed.

2:26 One delegation, emphasizing that it would have a negative impact to retreat from a situation now accepted by the industry, expressed the view that the Special Group should look into the linkage between this Article 20 and other Articles of the draft Convention in order to ensure an accurate and balanced understanding of the whole system.

2:27 One delegation remarked that the Special Group was faced with a situation where airlines themselves had adopted a system more protective of the passenger. This delegation would favour to place the burden of proof on the passenger, but suggested that the text should be refined in a way which could cover all concerns expressed.

2:28 The Chairman considered that Article 20 was a critical element of this draft Convention and remarked that persuasive arguments of legal, political and economical nature had been put forth in favour of both solutions, but the Special Group had to find a way of reaching consensus as to who should bear the burden of proof. He recalled that Article 20 was related to other Articles in the draft Convention, namely Article 16, and that the Preamble called for the balance of interests of the parties concerned. Bearing in mind that Article 20 in the Legal Committee draft provided for different alternatives, he invited the participants to indicate how this Article should stand.

2:29 Several delegations expressed the view that the United Kingdom's proposal on Article 20 was acceptable, as far as the chapeau and sub-paragraphs (a) and (b) were concerned. Sub-paragraph (c) would not help reaching a consensus and should therefore be deleted. If sub-paragraph (c) was not deleted, the same delegations would turn to the Recommendation made by the Secretariat Study Group. In the same vein, two members of the Study Group considered that sub-paragraph (c) gave rise to many problems and should be deleted if some compromise could not be reached.

2:30 The Chairman indicated that the Group would use Article 20 as recommended by the Study Group and amended by the United Kingdom. The Group agreed, however, to leave discussions on the issue of the burden of proof open for the moment and move to the next set of square brackets, in Article 21, paragraph 5.

2:31 Invited to comment on the Recommendation made by the Study Group, the Secretary, referring to paragraph 7 of WP/5, explained that two issues had emerged during the discussions in the Group in relation to **Article 21**. One was of a substantial nature, namely, the review mechanism, and the other was of a formal nature, namely, the matter of splitting this Article up into several articles. The Study Group had recommended to follow the original format in order to keep the same numbering and to avoid reference confusion, but headings should be added to paragraphs to make the format clearer. As regards the inclusion of the escalator clause of paragraph 5 of Article 21, it was meant to remedy the present situation, where limits had been eroded by inflation and were out of date and every attempt made to update them had been unsuccessful. Therefore the inclusion of an escalator clause in the new instrument would be the most appropriate solution.

2:32 The United Kingdom delegation presented its WP/14 on Article 21 and announced that the proposed amended text would be added as an addendum.

2:33 One delegation agreed with the principle set out in WP/14, while suggesting that the Article should be divided into several Articles and the text could be improved. Another delegation, although agreeing with the review mechanism, raised the question as to whether a State could be bound against its will by a decision taken by the ICAO Council. Another delegation expressed the opinion that the ICAO Council would be acting as a ministerial body in the system established under this paragraph, and that it seemed clear that if it would be adopted, the States in minority would be bound by the decision taken, if there is no reservation clause as in the process of approval of the Annexes.

2:34 One delegation had difficulty in accepting the proposed mechanism, because it deviated from the conventional practice. The ICAO Council, which may have members who are not parties to the new Convention, should not be entrusted to deal with this matter and a majority disapproval would be difficult to

reach. In the same vein, another delegation had difficulty with this mechanism and suggested its revision to replace the ICAO Council by another body.

2:35 Three delegations and one member of the Study Group expressed the view that this mechanism was workable and could well fit the ICAO Council powers and procedures, following a process similar to that used for approval of Annexes and their amendments. One of these delegations, while considering that the Council in its wisdom would seek the views of the Assembly whenever deemed appropriate, suggested that reference be made to the Council or the Assembly, in brackets, if consensus was not possible on this issue at this stage.

2:36 Following a question raised by an observer, discussion arose whether paragraph 5 was intended to apply to all tiers, including the threshold of 100 000 SDR established in Article 20. The majority of the views expressed was that paragraph 5 was meant to apply to such limit as well. In this regard, a member of the Study Group suggested that, if the limit in question was deemed to be included in the scope of application of this provision, it should be clearly stated therein.

2:37 The Secretary, answering a question put by one delegation, confirmed that the mechanism set up in paragraph 5 (b) was taken from the process for amendment of the Annexes to the Chicago Convention, established in Article 90 of the same Convention. It could be envisaged to resort to the Assembly for approval of revision of liability limits, instead of consulting Contracting States individually. He further explained that Article 38, relating to notification of differences with regard to Standards of the Annexes, had not been included in the mechanism under discussion, since it may not be appropriate to provide for the filing of differences in relation to updated liability limits.

2:38 One delegation remarked that the accumulated rate of inflation may affect States in very different ways, and therefore this did not seem to be an appropriate solution. The same delegation further expressed the opinion that the interval of five years seemed too short and that each Contracting State must have the opportunity of participating in the process of revision of the limits established in the draft Convention.

2:39 The Chairman, summarizing the discussions, pointed out that it should be noted that paragraph 5 of Article 21 provides for revision of the limits of liability only, i.e. the figures; this provision clearly applies to the limit of 100 000 SDR of Article 20 plus the various limits established in Article 21; wording used in paragraph 5 (a) would be amended in accordance with the wording of paragraph 3; the issue of the mechanism established in paragraph 5 (b) was addressed when the Convention on Marking Plastic Explosives was adopted; this mechanism could, if necessary, be aligned with that Convention; this mechanism would avoid convening a Diplomatic Conference for adopting minor adjustments; the ICAO Council should be able to conduct the process, its decisions going to States for approval; reservations are not to be treated under the mechanism established in Article 38 of the Chicago Convention. The Chairman asked the Secretary to revise and redraft paragraphs 5 (a) and (b) to be later submitted to the Group for consideration, together with the United Kingdom's proposal.

2:40 It was decided to move, meanwhile, to the discussion of **Article 27, paragraphs 2 and 3**, on the jurisdiction issue.

2:41 Five delegations expressed disagreement with the introduction of a fifth jurisdiction concept in the draft Convention based merely on the domicile of the passenger. These delegations believed that the existing four jurisdictions are appropriate and the introduction of a fifth one would bring into the system more complications than benefits and would not promote the necessary consensus.

2:42 One member of the Study Group suggested that the concepts of domicile and residence as used in this Article should be rendered more precise and defined to avoid confusion which might arise from different perceptions of these terms.

2:43 Three delegations and two members of the Study Group advocated the introduction of a fifth jurisdiction based on the domicile of the passenger, considering that such jurisdiction would be the most appropriate to decide upon the right compensation to be awarded to the victim, in accordance with his or her specific conditions. They considered that the envisaged fifth jurisdiction would not necessarily lead to an increase of forum shopping. One of these delegations stated that it should be borne in mind that in absence of the fifth jurisdiction, the United States would not ratify the new Convention.

2:44 The delegation of the United Kingdom presented WP/17 relating to Article 27.

2:45 The Group continued its examination of **Article 27, paragraph 2**. One member of the Secretariat Study Group who supported the inclusion of a fifth jurisdiction mentioned that it should preferably only be available in cases of major disasters involving a passenger's death or serious injury. It should not be available in cases involving minor injuries such as slipping or falling during embarking or disembarking or in other cases in which the first threshold of liability would not be exceeded. He conceded that the present jurisdictional choices contained in the text of the Warsaw Convention already provided in 95 per cent of cases the possibility for a passenger to bring legal action in his or her home State. The remaining cases, however, must also be covered. One delegation, though opposed in principle to the inclusion of a fifth jurisdiction, expressed the view that it would be able to reassess its position once a suitable solution regarding Article 20 was found.

2:46 A member of the Secretariat Study Group stated his concerns with respect to the inclusion of a fifth jurisdiction and believed that it would not be compatible with prevailing doctrine of private international law which required a clear nexus between the contractual relationship in question and the chosen jurisdiction. Referring to the Guatemala City Protocol in which a fifth jurisdiction is incorporated, he remarked that it had foreseen unbreakable limits of liability. As the new proposed convention substantially departed from this concept, the incorporation of a fifth jurisdiction in the Guatemala City Protocol could not be regarded as a convincing argument for the inclusion of the additional jurisdiction in the new convention. Referring to an earlier comment, he also believed that the court of the proposed fifth jurisdiction would not, as previously suggested, only be concerned with the calculation of a passenger's damages, but also with issues related to an assessment of fault, contributory negligence and other matters related to Article 20. While for the former issue the court would likely apply the law of the forum, this might not be the case for the latter. In his view, this posed a problem. He also cautioned against the use of the term "ordinary residence" as this term amounted to a criterion of nationality, a concern which was also raised by one delegation. He suggested to attempt to find a solution to the question of "residence" in line with considerations contained in existing tax law legislation.

2:47 Referring to this point, another delegation also expressed the view that an attempt should be made to properly define "domicile" or "residence" for purposes of this convention. This delegation also suggested to limit the fifth jurisdiction to cases governed by the first tier of liability only. Referring to the overriding consideration of ratifiability, another delegation cautioned against the attempt to limit access to the fifth jurisdiction by virtue of a monetary limit. It emphasized the need for a compromise which could be found by attempting to devise a generic, universally applicable term such as "permanent home" that would adequately capture the concepts presently denoted by the terms "domicile", "permanent residence," or "ordinary residence". This approach was supported by a large number of delegations. Acknowledging the need for a compromise solution, one observer reminded the Group that any expansion of jurisdictional choices would lead, over the long term, to an increase in insurance costs for the air carrier.

2:48 The Chairman, summarizing the discussion up to this point, noted the scope of opinions which were expressed by the advocates as well as by the opponents of a fifth jurisdiction. He noted, however, the prevailing sentiment within the Group for a compromise solution. To this end, a compromise solution should be guided by the overriding consideration of devising adequate and acceptable connecting criteria between the passenger and the State of the jurisdiction before which the claim is brought as well as an effective nexus between the air carrier's commercial presence and the chosen jurisdiction. The Chairman invited the Group to examine the draft proposal contained in Attachment E of WP/5.

2:49 Elaborating on its earlier proposal which was concerned with the replacement of certain terms appearing in sub-paragraph (a) of Article 27, one delegation provided a definition for the term "permanent home" which read:

> "[P]ermanent home means a passenger's fixed, permanent and principal abode adopted for settled purposes as part of his or her regular, normal or customary order of his or her life to which, if absent, for less than three years, he or she intends to return."

2:50 Referring to the fact that the proposed definition no longer contained the term "domicile," one member of the Study Group remarked that for several Latin American States this proposed definition may give rise to difficulties as it no longer contained the term mentioned above even though "domicile" is a frequently used word throughout Latin American codes and legislation. One delegation considered that the proposed definition still provided for a fairly tenuous connection between the passenger and the jurisdiction; it therefore preferred to use the notion of "habitual residence" which also would have the advantage of clearly indicating that only one place of residence is meant.

2:51 Referring to this comment, another delegation proposed the following definition as a solution, which combined some of the previously mentioned elements and which provided for the term "permanent home":

> "A passenger's fixed, principal place of abode adopted for settled purposes as his or her habitual residence."

2:52 Another delegation proposed a similar definition which read:

> "A passenger's fixed abode adopted for settled purposes for his or her principal residence."

2:53 The ensuing discussion revealed a clear preference not to retain any reference to the phrase "to which, if absent, for less than three years, he or she intends to return" as it was believed that the element of "intent" opened the door to too many subjective criteria. Furthermore, any attempt to devise a determinative time period during which the passenger had to return was considered to be controversial. Following a proposal by one delegation, a consensus was reached within the Group to indicate that in any future definition the criterion to be used for the determination of the passenger's home be considered on the basis of the facts existing at the time of the accident.

2:54 Noting that two of the above proposals used the term "principal residence", one delegation reiterated its preference for the use of the term "habitual residence". In its view, this term would already encompass the previously mentioned notions of "fixed abode" and "settled purposes". This delegation also suggested to include as an additional criterion that a passenger ought to have been residing in the State concerned for more than six months of any given year. However, this proposal was not supported by the Group. With respect to the term "habitual residence" several delegations observed that this term had no particular meaning in the legal system of their respective States.

2:55 The Group thereafter considered various other terms such as "permanent residence" and "principal residence." At this point in the discussion one delegation and one member of the Study Group wondered whether the acceptability of any proposed definition could be enhanced by providing for a definition which contained the two apparently preferred terms "principal" and "habitual". The delegation in question also wondered whether it would be advisable to merely refer to "permanent home" without an attempt to define it conclusively. The Group agreed to revert to this matter at a later stage.

2:56 The Chairman thereafter invited the views of the Group with respect to **Article 27, paragraph 2, sub-paragraph (b)**. In relation to Article 27, paragraph 2, one delegation observed that in the French translation of WP/5 the word "and" had apparently been inadvertently omitted in both instances between the sub-paragraphs. This delegation also believed that in sub-paragraph (b) it would suffice to retain only the first line ending with the terms "carriage by air." This proposal was supported by another delegation who believed that the phrase appearing in the second line starting with the term "either in its own right" would have no added value and that the deletion of this phrase would preclude any controversy as to the scope and meaning of the term "commercial arrangement" mentioned in that sentence. This delegation however believed that the term "commercial arrangement" ought to be featured in sub-paragraph (c); this sub-paragraph should also be amended by including the term "defendant" before to the word "actual" appearing in the first line of sub-paragraph (c). Another delegation believed that the necessary connecting factors with respect to the carrier were already sufficiently established in sub-paragraphs (a) and (b) and, as a consequence, proposed the deletion of sub-paragraph (c).

2:57 One delegation had difficulty in accepting this proposal. It believed that sub-paragraph (c) contained a useful requirement in that it established that the carrier would have to have a solid base in the jurisdiction concerned, allowing it to raise a proper defence. This delegation, however, further believed that sub-paragraph (c) should be shortened, ending with the terms "by the carrier itself." Responding to a question by another delegation who had expressed concern with the above proposal, the delegation confirmed its understanding that for the purposes of sub-paragraph (c) it remained sufficient that the actual carrier (or the contracting carrier in question) had premises leased or owned in the jurisdiction in question. In relation to this point, one delegation queried whether without sub-paragraph (c) the provisions in this article would not also encompass occasional wet lease arrangements.

2:58 Another delegation preferred to retain sub-paragraph (c) and wondered whether it would be useful to add after the term "commercial arrangement" the term "such as code-sharing or alliance" in order to somewhat clarify the understanding of the term "commercial arrangement." Another delegation also supported to retain sub-paragraph (c), but reminded that the technicalities of commercial arrangements changed over time.

2:59 Responding to a query raised by one delegation, the Chairman explained the intent behind sub-paragraph (c) and confirmed that this sub-paragraph was incorporated in order to restrict the availability of a fifth jurisdiction, requiring that the air carrier concerned, either by itself or through the actual carrier, occupied or leased premises in the jurisdiction concerned. Taking into account the previous contributions on the subject of Articles 20 and 27, the Chairman proposed and the Group agreed that the Chairman, with the assistance of the Secretariat, would attempt to develop a working paper on these Articles for further consideration by the Group.

2:60 The Group thereafter re-examined **Article 21, paragraph 5**, on the basis of WP/25 which was presented by the Secretary. Referring to the previous discussion on this matter, the Secretary explained the changes which had been made to the text prepared by the Legal Committee. Given the understanding of the Group that the financial threshold of 100 000 SDR should also fall into the ambit of the adjustment mechanism, the Secretary explained that in sub-paragraph (a), lines 2 and 3, the term "under this Convention" had been

replaced by the term "prescribed by Article 20 and in this Article." He provided further explanation as to additional changes contained in this paragraph.

2:61 With respect to sub-paragraph (b), the Secretary explained that, to the extent possible, the approval mechanism had been aligned with the one provided for in the *Convention on the Marking of Plastic Explosives for the Purpose of Detection* (ICAO Doc 9571). Recalling the concerns raised by some delegations (see paragraph 2:33 and 2:34 above), the Secretary explained that under the new proposal, the ICAO Council would propose rather than adopt the adjustment of limits. The proposal for revision of limits would come into effect unless five or more States parties submitted in writing to ICAO within 90 days their objection to the proposal. In the event five or more such States would notify ICAO, a meeting of the States parties to the new convention was necessary in order to adopt the adjustment. One delegation observed that WP/25 no longer contained a reference to the Council of ICAO. It was agreed that the text be amended accordingly as it was clearly understood that the ICAO Council would act. It was also proposed to replace the term "may" by "shall" in the third line of sub-paragraph (b).

2:62 Several delegations expressed their concern regarding the substance of the new proposal. These delegations believed that the apparent intent behind the previous proposal had been to provide for a simple and routine updating procedure, established merely to adjust any limits of liability to the rate of inflation. They considered that the new mechanism could be rendered virtually ineffective by the provision contained in sub-paragraph (b). Although several delegations recognized the sensitivities of adopting adjusted liability limits even without the consent of some States parties, the veto right established under the newly developed sub-paragraph (b) was not considered appropriate. To this end several delegations expressed the view that as an act of sovereignty the States parties to the new convention could implicitly acknowledge the establishment of an automatic adjustment.

2:63 Given the views expressed on this matter, the Chairman proposed and the Group agreed, that the Secretariat would present a modified draft proposal in relation to Article 21, paragraph 5.

2:64 The Group proceeded with a review of **Article 28, paragraph 2**, dealing with arbitration in passenger cases involving injury or death. Referring to WP/3 and the comments received from States, the Chairman invited views on this article. The ensuing discussion revealed that five delegations supported the deletion of Article 28, paragraph 2. Two delegations explained their preference to retain Article 28, paragraph 2, whereas two other delegations had no strong view on the matter. One of these delegations, however, emphasized its understanding that even without paragraph 2 arbitration remained possible if permitted by the national law of the State concerned. This understanding was shared by the Group. In light of the foregoing, it was **decided to delete Article 28, paragraph 2**.

2:65 The Group thereafter examined **Article 35, paragraph 2**, which is concerned with the question of whether the contracting carrier can bind the actual carrier with obligations it chooses to accept without the knowledge and consent of the actual carrier. Five delegations supported the Study Group recommendation and suggested to delete the square brackets while retaining the language with an appropriate amendment as set out in paragraph 9.3 of WP/5. They believed that the actual and contractual carriers would be in a better position to handle questions of possible recourse or indemnity. One delegation expressed its concern that the draft departed from the key provision of the Guadalajara Convention, an instrument that has been ratified by 75 States. They strongly preferred to retain the language as contained in this instrument. This view was also supported by one member of the Study Group as well as by an observer. Another delegation preferred to delete the words in square brackets. Two other delegations expressed a preference that the actual carrier should not be bound by the obligations assumed by the contracting carrier unless the former had consented to these obligations.

2:66 Summarizing the discussion above, the Chairman acknowledged the fairly evenly balanced scope of opinions. Recalling that the new draft convention already no longer contained the principle of prespecified limits of liability in passenger injury and death cases, he felt that the scope of any "special agreement" referred to in Article 35 would be fairly limited in any event. He believed that the passenger would thus not be unnecessarily penalized if it were to be decided not to incorporate the wording contained in the Legal Committee draft. Responding to this comment, three delegations suggested to **delete the words in square brackets in Article 35, paragraph 2**. This proposal was **accepted** by the Group.

2:67 The Group then moved to the review of **Article 45**, which imposes on the carrier an obligation to contract insurance or arrange for any other form of security to guarantee its liability. There followed a broad discussion as to whether this provision should be maintained or deleted. Some participants were of the opinion that it should be maintained and the square brackets removed, because its aim was the protection of the passenger which is a fundamental feature of the envisaged modernized instrument. Some other participants expressed the view that this provision should be deleted, because it did not bring anything new into the current practice, which has worked very well, and could be more harmful than beneficial.

2:68 One delegation raised the question whether this provision would prevent a foreign State from requiring that the carrier complied with the applicable rules of that State. In response, the Chairman explained that Article 45 would not exclude any State from applying its own rules.

2:69 Some delegations sought clarification on the meaning of "national State of the carrier", doubting whether this referred to the State of Registry or to the State of the Operator. The Secretary explained that this reference should be considered linked to the State of the Operator rather than to the State of Registry, and therefore the word "national" should be deleted for purposes of clarity.

2:70 Some participants, considering that uniformity was another of the fundamental features of the draft Convention, wished to have this provision amended by fixing a precise reference figure, such as the amount of 100 000 SDR, whose guarantee could be universally accepted as fulfilling the requirement of Article 45. One delegation recalled that such a solution was envisaged in carriage by sea with regard to passengers.

2:71 One observer reminded that insurance is a complicated matter in which the amounts are not the only aspects to be taken into consideration. He informed that there are associated conditions which should also be taken into account.

2:72 In view of the merits that many participants recognized in this provision and the several attempts made to improve its text in order to make it acceptable, the Chairman proposed to entrust the Secretary with its redrafting, in accordance with the views expressed during the discussion. This was agreed.

2:73 In examining **Article 48**, which relates to reservations, one delegation suggested that the Special Group should not deal with this question. It should rather be left, as it stands, for the Diplomatic Conference which may wish to consider other types of reservations. Another delegation suggested that it should be made clear that this provision refers to the use of aircraft in transportation for military purposes, while another delegation suggested to add the word "civil" to aircraft. It was also suggested that a reference to military aircraft should be included in this provision, considering that they can be engaged in transportation of civilians.

2:74 One delegation asked for clarification on the intent of this provision. The Chairman explained that it had been taken without change from the Hague Protocol and had later been reproduced in the Guatemala City Protocol and in Montreal Protocols Nos. 2, 3 and 4. The Secretary recalled that the Legal Committee had

left it in square brackets for lack of time to go into its review. The primary situation to be covered by this provision was that of hiring civil aircraft for transportation on behalf of military authorities, and that its main objective was to establish this reservation as the only one permissible under the draft Convention.

2:75 One member of the Study Group proposed that this Article be submitted to the Diplomatic Conference as it stands, with a note explaining that it should not prejudice any other reservation which the Diplomatic Conference might wish to consider. This proposal was **accepted** by the Group and the Secretary was entrusted with the preparation of the note.

2:76 Moving to the "**Final clauses to be inserted**", the Chairman mentioned that while this was a matter for the Diplomatic Conference, the Group could nevertheless make suggestions. He then invited the delegation of the United Kingdom to introduce its WP/23.

2:77 In presenting WP/23, the delegation explained that the main objective of this proposal was to put forward some ideas for the Diplomatic Conference as to the need to provide for early coming into force of the instrument and, in a second stage, when a large number of States parties have ratified the new instrument, for the denunciation of the present "Warsaw System" by way of an automatic mechanism. The delegation further explained that the clauses suggested were not meant to be exhaustive and could be developed by the Group; in particular it was noted that the instrument may need to have provision for bodies such as the European Union to become a party.

2:78 One member of the Study Group voiced concern about the automatic denunciation provision of the proposed Article 51, paragraph 2, considering that it could create serious consequences, and advocated that if there would be authentic texts in different languages, the text in the French language, in which the original Warsaw Convention of 1929 was drawn up, should prevail in the case of any inconsistency, as it has been established in all instruments related to that Convention.

2:79 Many delegations stated that they were not prepared to discuss the matter of the final clauses and suggested that, even if there were legal issues which could eventually be addressed by the Group, this should be left entirely to the Diplomatic Conference. In view of this overwhelming position, the Chairman suggested that the United Kingdom's proposal be noted with appreciation and attached to the Report as reference material for the Council and the Diplomatic Conference. This suggestion was **approved**.

2:80 After announcing that new drafts of Articles 16, 20, 21 and 27 had been prepared and would be distributed later, the Chairman invited the French delegation to introduce its WP/24 on Article 27 relating to jurisdiction.

2:81 In presenting its paper, the French delegation pointed out that no consensus had yet been reached on the introduction of a fifth jurisdiction into the draft Convention. Neither was there a consensus on the concept of domicile related thereto, and this paper had not taken into account the discussions which had taken place on this question the day before. The delegation emphasized that its proposal for Article 27 in paragraph 3 contained a provision which would allow States to opt in to the fifth jurisdiction, as a compromise solution to be submitted to the Diplomatic Conference.

2:82 Following the presentation of WP/24, a number of statements were made, particularly on paragraph 3 of the text of Article 27 as it appeared in WP/24. The proposal in WP/24 was acceptable to one delegation and two members of the Study Group. One delegation believed it was an improvement but did not wish to express a position on Article 27 taken in isolation from Article 20. In its view, these two articles were closely linked. It expressed its opposition to the introduction of a fifth jurisdiction. However, the delegation

would be willing to reconsider its position if a general consensus emerged on the draft Convention and on Article 20 in particular.

2:83 Three delegations believed that the proposal in paragraph 3 of the WP/24 would lead to disunification of the law on jurisdiction and would go against the spirit of uniformity which underpinned the work to modernize the "Warsaw System". One of these delegations expressed the opinion that its State would not ratify a convention containing such a provision as paragraph 3 since that State's legislation already permitted a fifth jurisdiction. Further, it believed that problems of execution of judgments given in States with a fifth jurisdiction could arise in the case of States which had opted out of the fifth jurisdiction.

2:84 Another delegation agreed that the proposal promoted a lack of uniformity, stating that the elements of non-uniformity in WP/24 could jeopardize the ratifiability of the convention; its State would not ratify a convention which contained paragraph 3 of Article 27 as found in WP/24. That delegation believed that the proposal impinged on the sovereignty of other States by allowing the unilateral action of one State to impact upon the operation of the legal system of other States in a manner which these States had not consented to. It suggested amending paragraph 3 of Article 27 as contained in WP/24 to read:

> "At the time of ratification, adherence or accession, each State Party shall declare whether the preceding paragraph 2 shall be applicable in its courts. All declarations made under this paragraph shall be binding on all other State Parties and the Depositary shall notify all States Parties of such declarations."

2:85 The delegation having presented WP/24 responded to some of the comments which had been made by stating that currently, there was no uniformity regarding the courts to which a claimant may resort, and that therefore four possible jurisdictions existed; further, there was no infringement of State sovereignty in the proposal presented in WP/24. This delegation also stated that the proposed amendment in the previous paragraph 2:84 would render pointless the proposal contained in WP/24.

2:86 The Chairman observed that there was a difference between the English and French language versions of Article 27, paragraph 3. He believed that in the English language, the intent was to have the first sentence read:

> "At the time of ratification, adherence or accession, each State Party shall declare if the preceding paragraph 2 is applicable to it."

2:87 One delegation suggested that the word "if" be replaced by "whether". It also had certain questions concerning the phrase "applicable to it". It believed that although WP/24 was a laudable attempt to find a compromise, it may not present a ratifiable compromise.

2:88 The Chairman summed up the discussion on WP/24 by stating that the proposals contained therein did not go far enough to meet the concerns of those States which wanted a fifth jurisdiction, and that other approaches should be examined. The meeting should recognize that the issue of a fifth jurisdiction was linked to the liability provisions of the convention, and both these matters should be examined together.

2:89 He then introduced **WP/26**, stating that this paper was an effort to set out together all the critical issues in the hope of achieving a workable compromise. There was an obvious conflict between the meeting's desire for a universally acceptable system and its wish to promote uniformity.

2:90 In relation to draft **Article 16** as contained in WP/26, he explained that it focused on some of the issues which had caused difficulties but which were amenable to further negotiation. However, there were

certain parameters which had been met and which could not be ignored. He had tried to make draft Article 16 easier to accept when examined in the context of draft Article 20 which provided in the second tier for unlimited liability. After the joint consideration of draft Articles 16 and 20 as contained in WP/26, he would suggest that the meeting then discuss draft Article 27.

2:91 One delegation explained what it perceived to be the main changes in draft Articles 16 and 20 contained in WP/26 as compared to Article 16 and Article 20 of the text prepared by the Legal Committee and the Secretariat Study Group, respectively. Firstly, Article 16(1) in WP/26 no longer had a reference to the carrier being liable for mental injury. The proposal to omit this reference would represent a significant saving for the carrier. Secondly, the last sentence of Article 16 as found in the Legal Committee's text had been changed from: "However, the carrier is not liable if the death or injury resulted solely from the state of health of the passenger" to: "However, the carrier is not liable to the extent the death or injury resulted from the state of health of the passenger." The delegation drew particular attention to the deletion of the word "solely" from the Legal Committee's text. It believed that this change was also of benefit to the carrier. Article 20(c) of the Study Group read: "such damage was solely due to the negligence or other wrongful act or omission of a third party, subject to Article 35 of this Convention." This had been changed to: "such damage was solely due to an act or omission of a third party."

2:92 The same delegation expressed certain problems with this last change, relating to difficulties claimants would face in legal proceedings where the third party did not appear as a joint defendant and would possibly not be held liable. If sub-paragraph (c) was to be retained, the delegation would prefer the reference to "the negligence or other wrongful act or omission of the third party".

2:93 The Chairman stated that while these changes were made as part of a package to facilitate acceptance of draft Article 27 (fifth jurisdiction), their main objective was to promote the acceptability of a new Article 20 with a two-tier liability system as opposed to the three alternatives retained by the Legal Committee. The changes were made to draft Article 16, paragraph 1 to help States which had difficulty in agreeing to unlimited liability with the burden of proof on the carrier.

2:94 With respect to the deletion of a reference to "mental injury" in paragraph 1, many delegations and Study Group members favoured the text presented by the Chairman. One delegation and one Study Group member believed that retention of the concept of purely mental injury would lead to unforeseeable risks to the carrier in the United States, because there was no standard measurement to assess the damages for pure mental injury which would have to be assessed by juries. In the context of the package presented, it was necessary to refer only to bodily injury. Another delegation saw the need for the deletion in light of the unlimited liability which the carrier would face under this Article. A few delegations, while expressing a preference for retaining the words "mental injury", would nevertheless accept in a spirit of compromise the text proposed by the Chairman in WP/26.

2:95 One delegation observed that many jurisdictions recognized just and appropriate compensation for mental injury. It did not interpret the language proposed by the Chairman as excluding this possibility. If the mental injury was linked to bodily injury, the courts would find a proper basis to make an award for the former type of injury. It would not want the *travaux preparatoires* to show that this meeting was of the view that there was a sustainable distinction between the two types of injury.

2:96 A similar view was expressed by a member of the Study Group, who stated that serious mental injury would likely be interpreted in certain jurisdictions as bodily injury.

2:97 One delegation expressed its strong disagreement with the deletion of the words. Compensation for such injury was becoming more and more acceptable to the courts, and deletion of the words

would constitute a step backwards. However, in a spirit of compromise, it could accept a qualification of mental injury as "serious" to distinguish between real and fictitious claims. One other delegation and one Study Group member would also favour a qualification of the term if it was decided to include it.

2:98 With respect to the **last sentence of draft paragraph 1 of Article 16** concerning the state of health of the passenger and the deletion of the world "solely" from the Legal Committee text, some delegations and Study Group members, and an observer agreed with the text presented by the Chairman. One delegation, while stating a preference for the retention of the word "solely", nevertheless would accept its deletion in a spirit of compromise.

2:99 Some other delegations wanted to keep the word "solely". One of these delegations stated that the text presented by the Chairman would present difficulties under the law of its State. Another delegation believed that the deletion of the word resulted in comparative, not contributory negligence, the concept of comparative negligence was found in some jurisdictions, but not in others.

2:100 With respect to the Chairman's draft of **Article 20(c)**, one delegation and one Study Group member would accept it without change; the delegation was of the opinion that the burden on the carrier would be too heavy if it also had to show negligence or other wrongful act or omission of the third party.

2:101 Many delegations, however, had a different viewpoint and preferred to revert to the text developed by the Study Group and to refer to the "negligence or other wrongful act or omission" of the third party. The fundamental concern was that under the Chairman's draft, there could be situations where a claimant would be left without remedy or compensation. If the phrase was excluded, the claimant may in some cases not be able to join the third party in the proceedings against the air carrier and it would in such cases also not be possible to commence separate proceedings against the third party. The Chairman's draft could lead to the situation where the carrier could exonerate itself by indicating that it was due to the act or omission of the third party, but such an act or omission may not in fact be a wrongful act. It was therefore agreed to revert to the language of Article 20(c) as developed by the Study Group.

2:102 One delegation and several Study Group members preferred for editorial reasons to rearrange the **chapeau** of draft Article 20 to read, and it was so **agreed**:

> "The carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds for each passenger 100 000 SDR if the carrier proves that...".

2:103 With respect to draft **Article 27** as presented by the Chairman, several comments were made specifically in relation to paragraph 3. One delegation queried the definition of "commercial agreement," expressing a concern that, as drafted, it could encompass ground-handling services; in such a case, the definition would be too wide. This viewpoint was supported by another delegation which stated that there had been a consensus that, for example, general sales agents or IATA agents were meant to be excluded. It suggested that reference be made to the provision or marketing of joint services since the definition was intended to cover code-sharing and alliance partners.

2:104 One delegation was unconvinced of the need for paragraph 3 or a definition of "commercial agreement", but would not oppose a consensus of the meeting.

2:105 One delegation raised a question concerning the use of the term "principal residence" in Article 27 paragraph 2 of the Chairman's text; it referred to Article 12 of the Guatemala City Protocol where the expression "permanent residence" was used instead. Another delegation and a Study Group member favoured the latter expression.

2:106 However, two Study Group members would accept the Chairman's text.

2:107 The Group continued its discussion with the consideration of **WP/27**, which contained a proposal for a revised Article 21. Referring to the earlier discussions concerning this matter (see 2:33 to 2:39), the Chairman explained that this proposal sought to accommodate the two distinct concerns which had been raised, notably, the need to present this Article in a more acceptable fashion and the desire to effectively protect the limits of liability against the effects of inflation. He pointed to the two substantive issues of the proposal, firstly, the revised escalator clause (Article 21 C) and, secondly, the clarification (Article 21 B, paragraph 2) which confirmed the understanding that the threshold of 100 000 SDR should also be considered a "limit" for the purposes of this provision.

2:108 Presenting WP/27, the Secretary recalled the concerns which had been previously raised within the Group on the occasion of the discussion of WP/25. Taking these concerns into account, the Secretary explained that the new proposal reinstated the idea that the ICAO Council would have the authority to adopt rather than only propose the revisions contemplated by this provision. However, States parties to the new convention which would disagree could do so by notifying the ICAO Council accordingly. Commenting on the new proposal contained in WP/27, one delegation expressed some disappointment and preferred a more automatic mechanism in which no formal vote by the Council was required. It also had some problems with the fact that States could simply opt not to adjust the limits. However, in a spirit of compromise, it could support this provision. Recalling the sentiments voiced during the earlier discussions on this matter, the Chairman believed that it appeared that certain States had more concerns about the automatic nature of the adjustment than about the adjustment itself.

2:109 One delegation, supported by two others, expressed its view that this solution did not sufficiently cater for the principle of uniformity which was one of the objectives underpinning the new convention. This delegation, supported by another, also proposed that the word "may" appearing in the second line of Article 21 C, paragraph 2, be replaced by the word "shall" so as to indicate the mandatory nature of the contemplated revision. One of these delegations foresaw that the proposed mechanism might lead to a plethora of limits of liability in the years following the coming into force of the convention; the very situation the new convention should be attempting to prevent. It preferred an automatic adjustment mechanism.

2:110 In light of the above discussion, the Chairman believed that the issue remained whether States parties who wished not to adjust the limits should be bound by a revision even in the event that the majority of States had not registered their disapproval with ICAO. The Group would revert to this matter.

2:111 The Chairman then summarized the earlier discussion on WP/26 by thanking all delegations having spoken for their contributions, which had given him sufficient elements to submit to the Group a certain number of proposals. He reminded the meeting that the main objective was to reach a text which would secure uniformity, ratifiability and equitableness. The realities of the situation should be taken into account, namely that there was a variety of positions which needed to be considered in finalizing the text. A balance of interests needed to be found which reasonably satisfied these various positions.

2:112 On the other hand, he also reminded the meeting that its task was not to solve all problems to finality. It should be borne in mind that this text would be submitted, through the Council, to a Diplomatic Conference which would carefully review the entire text. The need to ensure ratifiability of the new convention should be borne in mind at all times. The objective of consumer protection, which figured in the Preamble, had been given the necessary attention and therefore the passenger would greatly benefit from the new text, including in particular from Article 20, the two-tier liability system, and the unlimited liability in the second tier. On the other hand, it should be borne in mind that the passenger would still need to prove that there was an accident, that the damages suffered were the result of the accident, and the amount of damages which under

Article 23 were restricted to compensatory damages only. Article 23 expressly excluded recovery of punitive and other non-compensatory damages. Punitive, exemplary or any other form of non-compensatory damages shall not be recoverable in respect to any claim arising out of the international carriage by air as defined by the new convention. This should be borne in mind when considering the question of the burden of proof in Article 20 and of the fifth jurisdiction as set out in Article 27 of WP/26.

2:113 As a result of the comments made on WP/26, and calling on all delegations to consider his remarks in a spirit of mutual compromise necessary to arrive at an acceptable solution, he suggested the following **modifications to WP/26**:

- **Article 16, paragraph 2, second sentence** to read: "However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage."

- **Article 20, chapeau clause** to read: "The carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds for each passenger 100 000 SDR if the carrier proves that:"

- **Article 20, sub-paragraph c)** to read: "such damage was solely due to the negligence or other wrongful act or omission of a third party."

- **Article 27, paragraph 2, sub-paragraph a)** to read: "in which at the time of the accident the passenger has his or her principal and permanent residence; and"

- **Article 27, paragraph 3** to read: "In this Article, 'commercial agreement' means an agreement other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air."

2:114 As regards **Article 27, paragraph 2, sub-paragraph a)**, it was the understanding of the Group that the term "principal and permanent residence" referred to the one factual place where the passenger has his or her fixed and permanent abode. As regards **Article 27, paragraph 3**, it was the understanding of the Group that the term "agency agreement" excluded ancillary services and agreements such as ground-handling agreements, interline agreements and general sales agency agreements.

2:115 One delegation indicated that while it was willing to compromise, there were still elements in the proposals which created difficulties. While this delegation welcomed modification of Article 16, the new version of Article 20 was not acceptable. It could only support the two-tier liability concept in Article 20 on condition that the claimant had the burden of proof in respect of amounts exceeding 100 000 SDR. This was duly noted.

2:116 The delegation which had presented WP/24 believed that its proposal for an optional fifth jurisdiction should also be put forward in the text and be submitted to the Diplomatic Conference. Another delegation considered that it would be unfortunate if the text which would go to the Diplomatic Conference would still contain square brackets. Another delegation commended the Chairman for the excellent proposals which had been presented. Another delegation also supported the package but believed that the expressions of disagreement should also be adequately reflected in the report.

2:117 One delegation suggested by way of compromise to put the third paragraph of Article 27 as set out in WP/24 submitted by France, which contained the opt-in clause for the fifth jurisdiction, in square brackets and include it in the text to be forwarded through the Council to the Diplomatic Conference. This was

accepted by the delegation having proposed WP/24. The Group therefore **agreed**, by way of compromise, upon this course of action.

2:118 **The amended and modified version of WP/26** as agreed upon by the Special Group, noting the comments in paragraph 2:84 and subject to the comments in paragraphs 2:115 and 2:116, is set out in **Appendix 4**.

2:119 Revisiting the subject of the **escalator clause**, the Group examined this matter on the basis of a proposal which was verbally presented by the Secretary. The proposal followed the wording as set out in **Article 21 C** of WP/27 with the exception that in line 4 of paragraph 2 the words "for States Parties not having registered their disapproval with the Council" had been deleted. Reporting on this modification, the Secretary explained that this wording took into account previous concerns which had been raised and which were related to the binding effect of revisions on all States Parties and its perceived impact on the concept of State sovereignty. Accordingly, the revision adopted by the ICAO Council was to be binding on all States Parties unless the majority of States had registered their disapproval within the time limits prescribed. Referring to an earlier proposal to replace the word "may" by "shall" in line 2 of paragraph 2, the Secretary explained that the text which provided for a vote of the Council, should not prescribe the outcome of the vote in advance. Otherwise, a vote was superfluous. As to this point, one delegation maintained its preference for the said change and proposed to delete the reference to the terms "by a two-thirds majority at a meeting called for that purpose" in line 2 of paragraph 2.

2:120 One delegation, supported by another, though favouring an automatic revision still expressed some concerns as it believed that the proposed mechanism was not compatible with the principle of sovereign equality of States. It also wondered whether the proposed adjustment mechanism, as far as the authority of the Council is concerned, was reconcilable with the provisions of the Chicago Convention. As to the former point, several delegations expressed the opinion that State sovereignty is exercised by virtue of ratification of the new instrument; and if this instrument provided for an automatic revision mechanism intended to keep the SDR at constant, relevant and uniform levels, the proposed procedure appeared not to be objectionable.

2:121 Bearing in mind the undisputed intent behind the escalator clause, several delegations supported a proposal which was to entrust the revision to one person, i.e. the Secretary General of ICAO in his function as Depositary of the instrument. Accordingly, the Depositary would discharge its authority and responsibility by calculating the rate of inflation and notifying States Parties as to the results and consequences of these calculations. After a short discussion, this concept was unanimously supported. Based on the proposal contained in WP/14 presented by the United Kingdom, it was also agreed to modify paragraph 3. It was the understanding of the Group that States would exercise their sovereignty by giving authority to a body to adjust the limits of liability by an agreed formula under a procedure which must be complied with. As a result, the Group **approved** the following text with respect to the escalator clause on the understanding that reference to the duties of the Depositary in this clause should be made in the final clauses:

> "1. Without prejudice to the provisions of Article 21 D of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Article 20 and Articles 21 A and B shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 21 B.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph."

2:122 The Group returned to the subject of **insurance, Article 45**, and considered WP/28 presented by the Secretariat. Referring to the earlier discussions on this matter (see paragraphs 2:67-2:72), the Secretary noted that the new proposal took into account the views expressed during the earlier discussions. Recalling that the vast majority of the States who submitted written comments on the Legal Committee text had expressed support for a clause relating to insurance, the Secretary emphasized that the Group should bear in mind this level of support in its consideration of its WP/28. One of the foremost reasons for the inclusion of such clause was to ensure that claimants were sufficiently protected against bankruptcy of the carrier and similar situations, and could enforce the rights accorded to them under the new instrument. There were also safety considerations, since insurance companies exercised vigilance in safety matters. This matter was therefore regarded as important by the Secretariat.

2:123 Expressing support for the rationale behind such clause, one delegation, supported by another, reiterated its concerns and wondered whether the proposed wording of the second sentence of **Article 45** could have the effect of curtailing a State's right to set out insurance requirements for carriers operating into that State. These two delegations therefore preferred to retain only the first sentence of Article 45 as it was felt that the terms "evidence that this requirement has been met" could be construed as referring to evidence that appropriate legislation existed. Two other delegations expressed their preference to retain the second sentence as they believed that the deletion would lessen the significance of the provision. Taking these views into account, the Group agreed on the following rewording of the second sentence of the wording as set out in WP/28:

> "A carrier may be required by the State into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention."

With this amendment, the Group **approved** Article 45.

2:124 Returning to the discussion on **Article 3 paragraph 5** (see paragraphs 2:2 to 2:4), the Group **decided** to delete the square brackets in Article 3 paragraph 5 and to align the text of this Article with the wording of Article 8.

2:125 Having dealt with this point, the Chairman observed that the Group had completed all the matters relating to paragraph 1(1) of the Terms of Reference. The Group thereafter proceeded with the

consideration of drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing, set out in paragraph 1(2) of the Terms of Reference.

Agenda Item 3: Preparation of draft text(s) for consideration by the ICAO Council

3:1 With respect to **Article 5**, the Group considered WP/6 presented by the United Kingdom which contained a proposal to replace the word "and" in both the title and line 1 of this Article by the word "or". This change was **agreed** upon without discussion so as to adequately indicate that the air waybill and the cargo receipt represented alternative documents.

3:2 On the basis of WP/7 presented by the United Kingdom, the Group reviewed the proposed amendments in relation to **Article 7**. The Group **agreed** to insert in paragraph (b) the word "cargo" before the word "receipt". The proposal to replace, in the same paragraph, the word "are" by "is" was not accepted, as there could be more than one means.

3:3 The Group considered WP/8 presented by the United Kingdom which contained a proposal for an amendment to **Article 9**. One delegation, supported by another, expressed the view that this modification was not necessary as it was already commonly understood that the consignor bears the responsibility with respect to the completeness of the particulars and statements relating to the cargo. The Group also noted that no such modification was contained in Montreal Protocol No. 4 and it was felt that an inclusion of said amendment in the new instrument would inadvertently imply that as far as the Montreal Protocol No. 4 is concerned, the air carrier would bear the responsibility mentioned above. It was therefore decided to maintain the wording of Article 9 as approved by the Legal Committee without change.

3:4 The Group then considered WP/9 presented by the United Kingdom relating to **Article 10**. It was proposed that the word "nature" in line 1 of paragraph 2 be repositioned before the word "quantity" in line 3. This delegation felt that the current wording may place an unreasonable obligation on the carrier to check the contents of the cargo. This view was supported by another delegation. Another delegation preferred not to amend this provision as Montreal Protocol No. 4 did not contain such amendment. The Chairman observed, however, that Montreal Protocol No. 4 did not include the term "nature", whereas Article 10 of the draft adopted by the Legal Committee did contain the reference to the term "nature", but perhaps not in the right place. In light of this observation, the Group **agreed** to the change as proposed in WP/9.

3:5 The Group then considered WP/10 presented by the United Kingdom relating to **Article 16**. This working paper contained a proposal for the addition of the term "checked" before the term "baggage" in the second line of paragraph 2 of **Article 16**. It also contained a proposal to reintroduce for the air carrier the defence established under Article 20 of the Warsaw Convention with respect to checked baggage. This latter point was also supported by another delegation who preferred that this defence be available in cargo cases. Concerning these points, the Chairman observed that these proposals represented substantive changes to the text, whereas the Group was now examining linguistic improvements. The Group, mindful of the Terms of Reference mentioned above, therefore **agreed** to solely adopt the modification with respect to the addition of the word "checked".

3:6 Upon consideration of WP/11 presented by the United Kingdom, the Group **agreed**, in light of the changes made to Article 16, paragraph 2, to modify the first two lines of **paragraph 2 of Article 17** to read:

> "However, the carrier is not liable if and to the extent that it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:".

3:7 With respect to WP/12 presented by the United Kingdom, the Group also **agreed** to add in the third line of **Article 18** the words "and agents" after the term "servants".

3:8 One delegation suggested to replace in the third line of **Article 18** the word "damage" by "delay". However, it was observed that this amendment would constitute a substantive change. In relation to this, one delegation referred to cases involving perishable cargo whose delivery has been delayed. In these cases, the carrier should be able to exonerate itself under Article 18 if it took measures to avoid the damage, for example, by refrigerating the items concerned. It was therefore decided to maintain the word "damage" in Article 18.

3:9 The Group then considered WP/14 presented by the United Kingdom which, *inter alia,* contained the proposal for revised SDR amounts as limits of liability for baggage and cargo under the Convention. As explained by the United Kingdom, the amounts took into account the effect of inflation since 1975. This delegation, supported by another delegation, also proposed that liability for checked baggage should be calculated on a per kilogramme instead of a per passenger basis. With respect to the latter issue, one delegation emphasized its strong preference for a per passenger compensation as contained in the draft text. As the proposal was for a substantive change, it was decided to leave the text unchanged on this point. Concerning the issue of revised SDR amounts, the Group requested the Secretariat to produce an Information Paper on this subject for consideration by the Diplomatic Conference, but decided to leave the amounts presently in square brackets unchanged.

3:10 The Group considered WP/15 presented by the United Kingdom. After a brief discussion, it was **agreed** to delete paragraph 2 of **Article 23** and to add to the remaining paragraph the following modified version of the former paragraph 2:

> "In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable".

3:11 It was also **agreed** to substitute the word "it" in the second line of paragraph 1 of Article 24 with the words "he or she" and to add in the third line of paragraph 1 before the words "limits of liability" the words "conditions and", in line with the proposal contained in WP/16 presented by the United Kingdom.

3:12 Upon consideration of WP/18 presented by the United Kingdom the Group also **agreed** to substitute in line 2 of paragraph 1 of **Article 32** the word "shall" with "shall, subject to paragraph 4 of Article 17". The reason for this amendment was to clarify the relationship between Article 32 and Article 17, paragraph 4 of the draft.

3:13 Upon consideration of WP/19 presented by the United Kingdom and in order to maintain consistency of language, it was also **agreed** to replace in line 2 of **Article 33** the words "an agreement for carriage" by "a contract of carriage".

3:14 It was also **agreed** to omit in **Article 37, last line**, the reference to the words "Article 20 and 21 of" and to add in line 3 before the words "limits of liability" the words "conditions and" in line with the proposal contained in WP/21 presented by the United Kingdom.

3:15 The Group considered thereafter WP/22 presented by the United Kingdom which contained a proposal to amend **Article 38** and to replace the terms "the carrier concerned" with the terms "that person" in the last line of this Article. One delegation queried whether this amendment inadvertently would change the substance of this Article. After a brief discussion, however, it was **agreed** to adopt the proposed amendment

on the understanding that this provision encompasses servants and agents of the actual and of the contractual carrier, and that the limits of liability in respect of them are governed by the limits applicable to their respective carrier.

3:16 It was also **agreed** to reposition **Article 44** to Chapter III of the text.

3:17 Taking into account the amendments referred to above, **Appendix 5** contains the amended text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air* as agreed by the Group.

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Agenda Item 4: Any other business

4:1 Having concluded the work on the draft text, the Chairman thanked all participants for their contributions and noted that the report of this meeting will be submitted to the ICAO Council during its forthcoming 154th Session. One delegation speaking on behalf of the entire Group congratulated the Chairman for the able manner in which he conducted the meeting. This delegation also thanked the Secretariat including the interpreters for their efficient support.

4:2 The Group then discussed and approved the report of the first four days, delegated authority to the Chairman to approve the report relating to the last day of the meeting, and the Chairman thereupon adjourned the meeting.

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LIST OF PARTICIPANTS

Australia	Boughton, C. Manning, J.
Canada	Lauzon, G. MacNab, E.A.
Chile	Ansted, J. Valdes, A.
China	Ren, C. Zhang, X.
Egypt	El Hussainy, K. Elafifi, B.
Ethiopia	Alemseged, A.
France	Daussun, A. Tell, O. Videau, D. Bugnet, J.-C. Folliot, M. Veillard, A.
Germany	Frietsch, E.A. Von Elm, D.
India	Baijal, A. Madan, V.S. Singh, R.
Italy	Chiavarelli, E.
Jamaica	Rattray, K.O.
Japan	Aoki, A. Horie, N. Kobayashi, T. Ochiai, S.
Mauritius	Poonoosamy, V.
Russian Federation	Bavykin, A. Ostroumov, N.N.

Saudi Arabia	Al-Ghamdi, S.
Sweden	Gradin, N.A. Kjellin, K.L.M. Malmberg, L.-G.
United Kingdom	Jones, A.G. Smith, P.
United States	Horn, D. Schwarzkopf, P.B.

OBSERVERS

Greece	Andreades, I.
Indonesia	Silooy, E.A.
Mexico	Rangel Gomez, H.A.
Switzerland	Wilhelmy van Hasselt, L.T.
European Commission (EC)	Colucci, A.
International Air Transport Association (IATA)	Donald, R.
International Union of Aviation Insurers (IUAI)	Harris, R.

SECRETARIAT STUDY GROUP

Farhat, R.A. Professor of Law, Solicitor; Former Director General of Civil Aviation (Lebanon)	Advisor
Folchi, M.O. President, Asociación Latino Americana de Derecho Aeronáutico y Espacial (ALADA) (Argentina)	Advisor
Guillaume, G. Judge, International Court of Justice (France)	Advisor
Mercer, A.G. Company Solicitor, Air New Zealand Ltd. (New Zealand)	Advisor
Tompkins Jr., G.N. Rosenman & Colin LLP (USA)	Advisor

AGENDA OF THE MEETING

Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

Item 2: Elaboration on drafting suggestions on the outstanding questions in the draft text

Item 3: Preparation of draft text(s) for consideration by the ICAO Council

Item 4: Any other business

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LIST OF DOCUMENTATION

WORKING PAPER No.	AGENDA ITEM	SUBJECT	PRESENTED BY
1		Provisional Agenda	Secretariat
2	1	Terms of Reference	Secretariat
3	1	Review of comments received in response to State letter LE 4/51-97/65 dated 27 June 1997	Secretariat
4	1	Report of the Third Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System"	Secretariat
5	1	Report of the Fourth Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System"	Secretariat
6 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 5	United Kingdom
7 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 7	United Kingdom
8 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 9	United Kingdom
9 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 10	United Kingdom
10 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 16	United Kingdom
11 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 17	United Kingdom
12 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 18	United Kingdom
13 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 20	United Kingdom
14 and Add. No. 1 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 21	United Kingdom

WORKING PAPER No.	AGENDA ITEM	SUBJECT	PRESENTED BY
15 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 23	United Kingdom
16 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 24	United Kingdom
17 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 27	United Kingdom
18 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 32	United Kingdom
19 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 33	United Kingdom
20 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 35	United Kingdom
21 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 37	United Kingdom
22 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Article 38	United Kingdom
23 (English only)	2	Comments on the draft text approved by the 30th Session of the ICAO Legal Committee – Final clauses	United Kingdom
24 (English and French only)	2	Article 27	France
25	2	Revised draft of Article 21 paragraphs 5 and 6	Secretariat
26	2	Revised draft of Articles 16, 20 and 27	Chairman
27	2	Revised draft Article 21	Secretariat
28	2	Revised draft of Article 45	Secretariat

REVISED DRAFT OF ARTICLES 16, 20 AND 27

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 20 - Compensation in Case of Death or Injury of Passengers

The carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds for each passenger 100 000 SDR if the carrier proves that:

(a) the carrier and its servants and agents had taken all necessary measures to avoid the damage; or

(b) it was impossible for the carrier or them to take such measures; or

(c) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

(a) in which at the time of the accident the passenger has his or her principal and permanent residence; and

(b) to or from which the carrier actually or contractually operates services for the carriage by air; and

(c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. In this Article, "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air.

[3 *bis*. At the time of ratification, adherence or accession, each State Party shall declare whether the preceding paragraph 2 shall be applicable to it and its carriers. All declarations made under this paragraph shall be binding on all other States Parties and the depositary shall notify all States Parties of such declarations.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

DRAFT CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

[TEXT APPROVED BY SGMW]

THE STATES PARTIES TO THIS CONVENTION;

RECOGNIZING the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the "Warsaw Convention", and other related instruments to the harmonization of private international air law;

RECOGNIZING the need to modernize and consolidate the Warsaw Convention and related instruments;

RECOGNIZING 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;

REAFFIRMING the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo;

CONVINCED 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;

HAVE AGREED AS FOLLOWS:

Chapter I

General Provisions

Article 1 - Scope of Application

1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

2. For the purposes of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. 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 international carriage for the purposes of this Convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether

it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.

4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.

Article 2 - Carriage Performed by State - Postal Items

1. This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2. In the carriage of postal items the carrier shall be liable only to the relevant postal administration in accordance with the rules applicable to the relationship between the carriers and the postal administrations.

3. Except as provided in paragraph 2 of this Article, the provisions of this Convention shall not apply to the carriage of postal items.

Chapter II

Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo

Article 3 - Passengers and Baggage

1. In respect of carriage of passengers an individual or collective document of carriage 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.

2. Any other means which preserves the information indicated in paragraph 1 may be substituted for the delivery of the document referred to 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.

3. The carrier shall deliver to the passenger a baggage identification tag for each piece of checked baggage.

4. The passenger shall be given written notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, this Convention may be applicable and that the Convention governs and in some cases limits the liability of carriers for death or injury, destruction or loss of, or damage to baggage, and delay.

5. Non-compliance with the provisions of the foregoing paragraphs shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Article 4 - Cargo

1. In respect of the carriage of cargo an air waybill shall be delivered.

2. 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 receipt for the cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

Article 5 - Contents of Air Waybill or Cargo Receipt

The air waybill or the cargo receipt shall include:

(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 of the consignment.

Article 6 - Description of Air Waybill

1. The air waybill shall be made out by the consignor in three original parts.

2. The first part shall be marked "for the carrier"; it shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier who shall hand it to the consignor after the cargo has been accepted.

3. The signature of the carrier and that of the consignor may be printed or stamped.

4. If, at the request of the consignor, the carrier makes out the air waybill, the carrier shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7 - Documentation of Multiple Packages

When there is more than one package:

(a) the carrier of cargo has the right to require the consignor to make out separate air waybills;

(b) the consignor has the right to require the carrier to deliver separate cargo receipts when the other means referred to in paragraph 2 of Article 4 are used.

Article 8 - Non-compliance with Documentary Requirements

Non-compliance with the provisions of Articles 4 to 7 shall not affect the existence or the validity of the contract of carriage, which shall, none the less, be subject to the rules of this Convention including those relating to limitation of liability.

Article 9 - Responsibility for Particulars of Documentation

1. The consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by it or on its behalf in the air waybill or furnished by it or on its behalf to the carrier for insertion in the cargo receipt or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 4. The foregoing shall also apply where the person acting on behalf of the consignor is also the agent of the carrier.

2. The consignor shall indemnify the carrier against all damage suffered by it, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor or on its behalf.

3. Subject to the provisions of paragraphs 1 and 2 of this Article, the carrier shall indemnify the consignor against all damage suffered by it, or by any other person to whom the consignor is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements inserted by the carrier or on its behalf in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4.

Article 10 - Evidentiary Value of Documentation

1. The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage mentioned therein.

2. Any statements in the air waybill or the cargo receipt relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the nature, quantity, volume and condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by it in the presence of the consignor, or relate to the apparent condition of the cargo.

Article 11 - Right of Disposition of Cargo

1. Subject to its liability to carry out all its obligations under the contract of carriage, the consignor has the right to dispose of the cargo by withdrawing it at the airport of departure or destination, or by stopping it in the course of the journey on any landing, or by calling for it to be delivered at the place of destination or in the course of the journey to a person other than the consignee originally designated, or by requiring it to be returned to the airport of departure. The consignor must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and must reimburse any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the instructions of the consignor the carrier must so inform the consignor forthwith.

3. If the carrier carries out the instructions of the consignor for the disposition of the cargo without requiring the production of the part of the air waybill or the cargo receipt delivered to the latter, the carrier will be liable, without prejudice to its right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill or the cargo receipt.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 12. Nevertheless, if the consignee declines to accept the cargo, or cannot be communicated with, the consignor resumes its right of disposition.

Article 12 - Delivery of the Cargo

1. Except when the consignor has exercised its right under Article 11, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to deliver the cargo to it, on payment of the charges due and on complying with the conditions of carriage.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the cargo arrives.

3. If the carrier admits the loss of the cargo, or if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee or consignor is entitled to enforce against the carrier the rights which flow from the contract of carriage.

Article 13 - Enforcement of the Rights of Consignor and Consignee

The consignor and the consignee can respectively enforce all the rights given to them by Articles 11 and 12, each in its own name, whether it is acting in its own interest or in the interest of another, provided that it carries out the obligations imposed by the contract of carriage.

Article 14 - Relations of Consignor and Consignee or Mutual Relations of Third Parties

1. Articles 11, 12 and 13 do not affect either the relations of the consignor and the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2. The provisions of Articles 11, 12 and 13 can only be varied by express provision in the air waybill or the cargo receipt.

Article 15 - Formalities of Customs, Police or Other Public Authorities

1. The consignor must furnish such information and such documents as are necessary to meet the formalities of customs, police and any other public authorities before the cargo can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier, its servants or agents.

2. The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Chapter III

Liability of the Carrier and Extent of Compensation for Damage

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 17 - Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(a) inherent defect, quality or vice of that cargo;

(b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(c) an act of war or an armed conflict;

(d) an act of public authority carried out in connexion with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, 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. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Article 18 - Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage, or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 19 - Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger.

Article 20 - Compensation in Case of Death or Injury of Passengers

The carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds for each passenger 100 000 SDR if the carrier proves that:

(a) the carrier and its servants and agents had taken all necessary measures to avoid the damage; or

(b) it was impossible for the carrier or them to take such measures; or

(c) such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 21 A - Limits of Liability

1. In the case of damage caused by delay as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][1] Special Drawing Rights.

[1] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

2. In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][1] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage 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 it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][2] Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining 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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1, 2 and 3 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 20 and 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, including interest. 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.

Article 21 B - Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

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[2] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 20 is fixed at a sum of [1 500 000][3] monetary units per passenger in judicial proceedings in their territories: [62 500][3] monetary units per passenger with respect to paragraph 1 of Article 21 A; [15 000][3] monetary units per passenger with respect to paragraph 2 of Article 21 A; and [250][3] monetary units per kilogramme with respect to paragraph 3 of Article 21 A. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 20, 21 A, 21 B and 21 C as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

Article 21 C - Review of Limits

1. Without prejudice to the provisions of Article 21 D of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Article 20 and Articles 21 A and B shall be reviewed by the Depositary at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by reference to an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 21 B.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Depositary shall notify States Parties of a revision of the limits of liability. Any such revision shall become effective six months after its notification to the States Parties. If within three months after its notification to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Depositary shall refer the matter to a meeting of the States Parties. The Depositary shall immediately notify all States Parties of the coming into force of any revision.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

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[3] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

Article 21 D - Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

Article 22 - Invalidity of Contractual Provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Article 22 A - Freedom to Contract

Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents, from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention.

Article 23 - Basis of Claims

In the carriage of passengers, baggage, and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

Article 24 - Servants, Agents - Aggregation of Claims

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if he or she proves that he or she acted within the scope of his or her employment, shall be entitled to avail himself or herself of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention.

2. The aggregate of the amounts recoverable from the carrier, its servants and 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.

Article 25 - Timely Notice of Complaints

1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document

of carriage or with the record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or despatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part.

Article 26 - Death of Person Liable

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his or her estate.

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

(a) in which at the time of the accident the passenger has his or her principal and permanent residence; and

(b) to or from which the carrier actually or contractually operates services for the carriage by air; and

(c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. In this Article, "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air.

[3 *bis*. At the time of ratification, adherence or accession, each State Party shall declare whether the preceding paragraph 2 shall be applicable to it and its carriers. All declarations made under this paragraph shall be binding on all other States Parties and the depositary shall notify all States Parties of such declarations.]

4. Questions of procedure shall be governed by the law of the Court seised of the case.

Article 28 - Arbitration

1. Subject to the provisions of this Article, the parties to the contract of carriage for cargo may stipulate that any dispute relating to the liability of the carrier under this Convention shall be settled by arbitration. Such agreement shall be in writing.

2. The arbitration proceedings shall, at the option of the claimant, take place within one of the jurisdictions referred to in Article 27.

3. The arbitrator or arbitration tribunal shall apply the provisions of this Convention.

4. The provisions of paragraphs 2 and 3 of this Article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

Article 29 - Limitation of Actions

1. The right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

2. The method of calculating that period shall be determined by the law of the Court seised of the case.

Article 30 - Successive Carriage

1. In the case of carriage to be performed by various successive carriers and falling within the definition set out in paragraph 3 of Article 1, each carrier who accepts passengers, baggage or cargo is subject to the rules set out in this Convention, and is deemed to be one of the parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under its supervision.

2. In the case of carriage of this nature, the passenger or any person entitled to compensation in respect of him or her, can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3. As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 31 - Right of Recourse against Third Parties

Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

Chapter IV

Combined Carriage

Article 32 - Combined Carriage

1. In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention shall, subject to paragraph 4 of Article 17, apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

2. Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Convention are observed as regards the carriage by air.

Chapter V

Carriage by Air Performed by a Person other than the Contracting Carrier

Article 33 - Contracting Carrier - Actual Carrier

The provisions of this Chapter apply when a person (hereinafter referred to as "the contracting carrier") as a principal makes a contract of carriage governed by this Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor, and another person (hereinafter referred to as "the actual carrier") performs, by virtue of authority from the contracting carrier, the whole or part of the carriage, but is not with respect to such part a successive carrier within the meaning of this Convention. Such authority shall be presumed in the absence of proof to the contrary.

Article 34 - Respective Liability of Contracting and Actual Carriers

If an actual carrier performs the whole or part of carriage which, according to the agreement referred to in Article 33, is governed by this Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Chapter, be subject to the rules of this Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which it performs.

Article 35 - Mutual Liability

1. The acts and omissions of the actual carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of its servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the amounts referred to in Articles 20, 21 A, 21 B and 21 C of this Convention.

Article 36 - Addressee of Complaints and Instructions

Any complaint to be made or instruction to be given under this Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier. Nevertheless, instructions referred to in Article 11 of this Convention shall only be effective if addressed to the contracting carrier.

Article 37 - Servants and Agents

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he or she proves that he or she acted within the scope of his or her employment, be entitled to avail himself or herself of the conditions and limits of liability which are applicable under this Convention to the carrier whose servant or agent he or she is, unless it is proved that he or she acted in a manner that prevents the limits of liability from being invoked in accordance with this Convention.

Article 38 - Aggregation of Damages

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within their scope of employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under this Convention, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to that person.

Article 39 - Addressee of Claims

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier, or against both together or separately. If the action is brought against only one of those carriers, that carrier shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the law of the Court seised of the case.

Article 40 - Additional Jurisdiction

Any action for damages contemplated in Article 39 must be brought, at the option of the plaintiff, either before a court in which an action may be brought against the contracting carrier, as provided in Article 27 of this Convention, or before the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business.

Article 41 - Invalidity of Contractual Provisions

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under this Chapter or to fix a lower limit than that which is applicable according to this Chapter shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of this Chapter.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 42 - Mutual Relations of Contracting and Actual Carriers

Except as provided in Article 39, nothing in this Chapter shall affect the rights and obligations of the carriers between themselves, including any right of recourse or indemnification.

Chapter VI

Final Provisions

Article 43 - Mandatory Application

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Article 44 – repositioned and renumbered as Article 22 A

Article 45 - Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State into which it operates to furnish evidence that it maintains adequate insurance covering its liability under this Convention.

Article 46 - Carriage Performed in Extraordinary Circumstances

The provisions of Articles 3 to 7 inclusive relating to the documentation of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of a carrier's business.

Article 47 - Definition of Days

The expression "days" when used in this Convention means calendar days not working days.

Article 48 - Reservations[4]

No reservation may be made to this Convention except that a State may at any time declare by a notification addressed to the Depositary that this Convention shall not apply to the carriage of persons, cargo and baggage for its military authorities on aircraft registered in that State, the whole capacity of which has been reserved by or on behalf of such authorities.

[Final clauses to be inserted – see Appendix 6]

[4]This Article is without prejudice to any other reservation which the Diplomatic Conference might wish to consider.

Note: The present text is based on the proposal by the United Kingdom contained in WP/23. The Group noted this proposal and decided to attach it to the report as reference material for further consideration by the Council and the Diplomatic Conference (see paragraphs 2:76 to 2:79 of the Report).

Chapter VII

Final Clauses

Article 49 - Ratification

1. This Convention shall be open for signature in Montreal on xxxx (*insert end date of conference*) by States participating in the International Diplomatic Conference on Air Carrier Liability (*or insert other title of the intended diplomatic conference*) held at Montreal from xxxx (*insert first date of conference*) to xxxx (*insert end date of conference*). After (*insert end date of conference*), the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organization in Montreal until it enters into force in accordance with paragraph 3 of this Article. Any State which does not sign this Convention may accept, approve of or accede to it at any time.

2. This Convention shall be subject to ratification, acceptance, approval or accession by States. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary General of the International Civil Aviation Organization, who is hereby designated the Depositary.

3. This Convention shall enter into force on the sixtieth day following the date of deposit of the fifteenth instrument of ratification, acceptance, approval or accession with the Depositary.

4. For other States, this Convention shall enter into force sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession provided that the Depositary shall not accept the deposit of such an instrument from any State referred to in paragraph 4 of Article 51 unless he is satisfied that that State has given the requisite notices of denunciation referred to in that paragraph.

5. The Depositary shall promptly notify all signatories and States Parties of:

(a) each signature of this Convention and date thereof;

(b) each deposit of an instrument of ratification, acceptance, approval or accession and date thereof;

(c) the date of entry into force of this Convention;

(d) the date of the coming into force of any revision of the limits of liability established under this Convention;

(e) any denunciation under Article 50;

(f) the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession;

(g) the date when the States Parties to this Convention comprise not less than [40%] of the total scheduled air traffic of the airlines of the Member States of the International Civil Aviation Organization for the year 1998; and

(h) the date he gives the notices of denunciation referred to in paragraph 3 of Article 51.

Article 50 - Denunciation

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

Article 51 - Relationship with other Warsaw Convention Instruments

1. This Convention shall prevail over any rules which apply to international carriage by air between States Parties to this Convention or within the territory of any single State Party to this Convention if there is an agreed stopping place within the territory of another State by virtue of those States commonly being Party to:

(a) the *Convention for the Unification of Certain Rules Relating to International Carriage by Air* signed at Warsaw on 12 October 1929 (hereinafter called the Warsaw Convention);

(b) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929* signed at The Hague on 28 September 1955 (hereinafter called the Hague Protocol);

(c) the *Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier* signed at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention);

(d) the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* signed at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol);

(e) *Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929* signed at Montreal on 25 September 1975 (hereinafter called the Montreal Additional Protocol No. 1);

(f) *Additional Protocol No. 2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* signed at Montreal on 25 September 1975 (hereinafter called the Montreal Additional Protocol No. 2);

(g) *Additional Protocol No. 3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as*

Amended by the Protocols Done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971 signed at Montreal on 25 September 1975 (hereinafter called the Montreal Additional Protocol No. 3); and

(h) *Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955* signed at Montreal on 25 September 1975 (hereinafter called Montreal Protocol No. 4).

Provided that nothing in this paragraph shall apply where, in the case of international carriage by air within the territory of a State Party to this Convention if there is an agreed stopping place in the territory of another State, that other State is not a Party to this Convention but in common with that State Party to this Convention is a Party to one or more of the instruments referred to in sub-paragraphs (a) to (h) above.

2. No less than sixty days after the deposit of the [fortieth] instrument of ratification, acceptance, approval or accession or such greater number of States Parties as is necessary to ensure that the States Parties represent at least [40%] of the total international scheduled air traffic of the airlines of the Member States of the International Civil Aviation Organization in the year 1998, each of the States Parties shall give the requisite notice to denounce the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and each of the Montreal Additional Protocols insofar as it is a Party to one or more of those instruments.

3. The Depositary is hereby deemed to be authorized to act on behalf of the States Parties referred to in paragraph 2 of this Article to serve the notices of denunciation there referred to.

4. Any State wishing to become a Party to this Convention after the date of service of the notices of denunciation referred to in paragraph 2 or 3 of this Article shall first give the requisite notice to denounce the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and each of the Montreal Additional Protocols and Montreal Protocol No. 4 insofar as it is a Party to one or more of those instruments, and shall demonstrate to the Depositary that it has done so when depositing its instrument of ratification, acceptance or approval of, or accession to, this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorized, have signed this Convention.

DONE at Montreal on the xx day of xxxx of the year one thousand nine hundred and xxxx in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic. This Convention shall remain deposited in the archives of the International Civil Aviation Organization, and certified copies thereof shall be transmitted by the Depositary to all States Parties to the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol, the Montreal Additional Protocols and Montreal Protocol No. 4.

SIGNATURES

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WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/1
10/3/98

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

PROVISIONAL AGENDA

(Presented by the Secretariat)

Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

The Special Group will be invited to note an oral Report by the Secretariat which will outline the conclusions and/or recommendations of the Secretariat Study Group

Item 2: Elaboration on drafting suggestions on the outstanding questions in the draft text

Item 3: Preparation of draft text(s) for consideration by the ICAO Council

Item 4: Any other business

– END –

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SGMW/1-WP/2
10/3/98

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

TERMS OF REFERENCE

(Presented by the Secretariat)

REFERENCES

C-WP/10688
C-DEC 152/8

1. On 26 November 1997, the Council decided to establish the Special Group on the Modernization and Consolidation of the "Warsaw System". The terms of reference of the Special Group, as outlined in paragraph 4.1 of C-WP/10688 shall be:

1) to supplement the work already 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 to consider where appropriate, alternative options; and

2) if appropriate, to elaborate on possible drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing.

For its work, the Special Group should take into account:

a) The draft text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, contained in Attachment D to Doc 9693-LC/190;

b) the comments of States on the draft text mentioned in the preceding para.a), in reply to State Letter LE 4/51-97/65;

c) the Report of the third meeting of the Secretariat Study Group, including the analysis of the comments received from States; and

d) any other relevant documents.

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WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

REVIEW OF COMMENTS RECEIVED IN RESPONSE TO STATE LETTER LE 4/51-97/65 DATED 27 JUNE 1997

(Presented by the Secretariat)

1. INTRODUCTION

1.1 Following the adoption by the 30th Session of the Legal Committee of a draft instrument for the modernization and consolidation of the "Warsaw System", the Secretary General circulated the text of the draft instrument to all Contracting States and international organizations by State Letter LE 4/51-97/65 dated 27 June 1997 and invited comments within six months' time. As of this day, 46 Contracting States and seven international organizations have submitted comments on the draft instrument; this number includes interim replies which have been received from two States. The comments are provided as reference material in the language version in which they were originally received, as well as in an English translation.

1.2 In order to facilitate the work of the Special Group, a summary of the comments is presented below. This information is not intended to be an exhaustive account of each individual comment. It is suggested that this information be considered in conjunction with the summary table which is set out in the Attachment.

2. SUMMARY OF COMMENTS RECEIVED

2.1 Two States (Ethiopia and the Russian Federation) made specific comments with respect to the **Preamble**.

2.2 The Russian Federation suggested to incorporate into **Article 1** definitions of certain terms featured in the draft Convention. Similarly, Ethiopia proposed that the term "passenger" be defined. The desirability of including definitions is also mentioned by the African Airlines Association. Germany raised a query as to whether the proposed instrument also applied in case of carriage by air performed exclusively on the basis of an employment relationship or on the basis of an individual economic interest.

2.3 The Russian Federation sought clarification of the term "carriage performed by the State or by legally constituted public bodies" mentioned in **Article 2, paragraph 1**.

(8 pages)

2.4 Two States (Ecuador and Vietnam) suggested that the passenger ticket mentioned in **Article 3, paragraph 1** should include additional information, such as the name of the air carrier.

2.5 France requested clarification as to the format of the "notice" referred to in **Article 3, paragraph 4** in case a collective ticket is used. With respect to the same Article, Switzerland believed that the air carrier should not be able to rely on the liability limitations in case of non-compliance with the notice requirement. The majority of responding States wished to retain the present text of **Article 3, paragraph 5** whilst deleting the square brackets around the text.

2.6 Two States (the Russian Federation and Switzerland) suggested to modify **Article 5** and to insert a clause similar to the one contained in Article 3, paragraph 4.

2.7 Germany suggested to clarify in **Article 9** that the carrier's liability shall only apply when the carrier was not provided with particulars and statements by the consignor.

2.8 Several States (the Czech Republic, Ethiopia, the Slovak Republic) preferred to delete the reference to "mental injury" in **Article 16, paragraph 1.** Germany requested that the term be reconsidered. Other States (e.g. Austria, Monaco, the Russian Federation) considered it necessary to properly define the term "mental injury". China suggested to qualify the term by the word "significant". Concerns about the use of the term "mental injury" were also voiced by the International Union of Aviation Insurers. France proposed a linguistic amendment to the French language version. Further, a number of States (e.g. Ethiopia, Germany, France) as well as the African Airlines Association requested to reconsider the term "solely" in the last line of paragraph 1 and to replace it by a term such as "predominantly".

2.9 The majority of responding States supported the inclusion of **Article 16, paragraph 3,** which is currently in square brackets. A shortening of the time period was proposed by France.

2.10 France and Norway had specific comments on the proposed liability regime for unchecked baggage. The Netherlands suggested a modification to the existing wording.

2.11 Japan sought clarification as to the relationship between **Article 17, paragraph 2** and **Article 41, paragraph 2.**

2.12 The definition of "delay" as set out in **Article 18, paragraph 2** was supported by some Arab States (e.g. Bahrain, Oman, Saudi-Arabia), China and Vietnam. A number of European States (e.g. France, Netherlands, Norway and the United Kingdom) preferred to delete paragraph 2; other States (Denmark, Germany, the Russian Federation) requested a clearer, more precise definition of the term.

2.13 Japan and Norway preferred to modify the wording of **Article 19** and leave to the discretion of the court the possibility of taking into account contributory negligence on the part of the passenger.

2.14 With respect to **Article 20** of the draft, the comments indicated that the two-tier liability concept was supported in principle. Concerning the issue of the burden of proof in the second tier, the comments revealed a wide scope of opinions. Most European States, Japan and the United States preferred a solution along the lines of the EU Council Regulation and the IATA Intercarrier Agreement. Though this

approach is compatible with Alternative 1(a), many of these States indicated a clear preference for a uniform solution. Alternative 2 of Article 20 has not been completely excluded by a number of European States (e.g. Belgium, Italy), Japan and the Air Transport Users Council (AUC); Japan and the AUC supported Alternative 2, on condition, however, that a fifth jurisdiction be adopted. Alternative 3, which promotes a uniform solution, was preferred by Arab States as well as by some East-European States and Brazil. These States proposed a liability limit of 250,000-400,000 SDR for the second tier. The Rapporteur's proposal was supported by Cuba.

2.15 A number of States (e.g. Germany, Lebanon, the Russian Federation) expressed their desire to split **Article 21** into several separate Articles. Other States (e.g. Denmark, France, the Netherlands, Norway) considered it necessary to revise the limits of liability. The so-called escalator clause, **Article 21, paragraph 5**, currently in square brackets, was accepted in principle by the majority of responding States (with the exception of Cuba). Some European States wondered if the approval procedure for revising the limits could be simplified.

2.16 With respect to **Article 23**, Germany preferred to define the term "consequential damages" as a type of damage which should not be recoverable. Two States (France, the United Kingdom) observed that the drafting of this provision could be improved so as to unequivocally confirm that "punitive damages" shall not be awarded under any circumstances.

2.17 With respect to the question of the fifth jurisdiction, **Article 27**, the comments indicated that the present wording of paragraphs 2 and 3 of this Article was not acceptable to many States. While the concept of a fifth jurisdiction was supported by Brazil, Japan and the United States, no such support could be found within the European or Arab States. The main arguments against the fifth jurisdiction in Europe were articulated in the comments submitted by France. Other States (e.g. the Arab States) who earlier had indicated their preference for Alternative 3 of Article 20, did not see the necessity for a fifth jurisdiction. Several States (e.g. the Netherlands, New Zealand and the United Kingdom) specifically mentioned the need to find a suitable compromise on this matter, a sentiment which was also reflected in the comments submitted by the African Airlines Association. Some States (e.g. the Russian Federation) apparently believed that a compromise solution could be found within the present wording of paragraphs 2 and 3.

2.18 As far as **Article 28, paragraph 2** is concerned, views in favour of and against the possibility of arbitration in passenger cases were about evenly divided. The proponents (Arab States) argued that arbitration would facilitate speedy settlement of claims. Other States (such as some of the European States) argued that arbitration between private persons (passengers) and commercial entities (airlines) was not suitable.

2.19 With respect to **Article 35, paragraph 2,** the comments revealed a reluctance to retain, without suitable modification, the sentence presently appearing in square brackets. The concern was expressed that special agreements offered by the contracting carrier should not be imposed to the detriment, and without the knowledge, of the actual carrier.

2.20 The comments indicated near unanimous support for inclusion of the provision of **Article 44.**

2.21 Similarly, the incorporation of **Article 45** was supported virtually without opposition. Two comments (Germany, Japan) were concerned about some practical aspects of the proposed Article.

ATTACHMENT

REVIEW OF REPLIES TO STATE LETTER LE 4/51-97/65

Article 1:	Query as to applicability to General Aviation (Germany)
	Definition of "passenger" requested (Ethiopia)
	Definitions for certain terms requested (Russian Federation)
Article 2:	Explanation of the term"legally constituted public bodies" requested (Russian Federation)
Article 3:	More particulars for passenger ticket in Paragraph 1 demanded (Ecuador, Vietnam)
	Clarification as to notice requirement (Paragraph 4) requested (France)
	Retention of text appearing in square brackets in Paragraph 5 supported by a majority of States
	Unlimited liability for non-compliance with Paragraph 4 proposed (Switzerland)
	Proposal for new Paragraph 6 (Ethiopia)
Article 5:	Airway bill or cargo receipt should contain notice regarding limited liability (Russian Federation, Switzerland)
Article 9:	Clarification requested (Germany)
Article 16:	Paragraph 1: opposition to inclusion of "mental injury" expressed by several States (e.g. Czech Republic, Ethiopia, Slovak Republic) clarification/reconsideration of the term "mental injury" requested (e.g. China, Germany), definition of "mental injury" requested (e.g. Austria, Monaco, Portugal, Russian Federation); linguistic amendment proposed (France)
	Reconsideration of the use of the term "solely" requested (Ethiopia, France, Germany)
	Regime of presumed fault regarding unchecked baggage proposed (France)
	Paragraph 3: by in large accepted; shortening of time period mentioned (France)
Article 17:	Clarification as to interrelationship of Articles 17 paragraph 2 and 41 paragraph 2 requested (Japan)

Article 18:	Inclusion of Paragraph 2 controversial: support expressed by several States (e.g. Bahrain, China, Oman, Saudi Arabia); deletion of Paragraph 2 requested by a number of European States (e.g. France, Netherlands, Norway, United Kingdom); clearer definition of "delay" requested by several States (e.g. Brazil, Denmark, Germany, Russian Federation)
Article 19:	Concept of mandatory exoneration questioned (Norway, Japan)
	Drafting amendment suggested (France)
Article 20:	Two-tier concept supported in principle
	Preference for first Alternative, in line with European Union Council Regulation, IATA Agreements expressed by several States (European Union States, Japan, United States); (Second Alternative not completely excluded by a number of European States and Japan). Many of these States, nevertheless, prefer a uniform solution
	Two comments (Japan, AUC) revealed support for Alternative 2 if tied to inclusion of additional jurisdiction
	Third Alternative favoured by several States (e.g. Bahrain, Brazil, Czech Republic, Jordan, Republic of Moldova, Saudi Arabia); main argument: promotion of uniformity (limit mentioned 250.000-400.000 SDR)
	Rapporteur's initial proposal supported (Cuba)
Article 21:	A number of States expressed their desire to split this article into several Articles (e.g. Germany, Lebanon, Russian Federation)
	Several States mentioned the need to revise the limits of liability (e.g. Denmark, France, Netherlands, Norway)
	Adjustment clause accepted in principle by majority of States (with the exception of Cuba); however, approval mechanism may have to be reconsidered (European States seem to have preference for simpler procedure)
Article 23:	Reference to "consequential damages" in Paragraph 2 requested (Germany)
	Two States (France, United Kingdom) suggest that drafting could be improved, particularly as to unavailability of punitive damages

Article 24:	Query as to interrelationship of Paragraph 3 and the provision of Article 21 Paragraph 2(c) (Japan); drafting may suggest that wilful misconduct of agents/servants has impact on claims concerning injury or death
Article 25:	Notice of complaints should also be introduced in other type of damages (Germany)
	Drafting modification/clarifications suggested (Russian Federation)
Article 27:	Present draft text of Paragraph 2 and Paragraph 3 not acceptable to the many States (main arguments against 5th jurisdiction articulated by France)
	States who support Alternative 3 of Article 20 see no need for additional Jurisdiction
	Need for compromise specifically mentioned (United Kingdom, Netherlands, New Zealand)
Article 28:	Opinion as to inclusion/deletion of arbitration-clause divided: support expressed by a number of States (e.g. China, New Zealand, Switzerland and some Arab States, such as Jordan, Qatar, Saudi Arabia, in line with recommendation adopted by ACAC,); several other States did not support the inclusion of Paragraph 2 (e.g. Brazil, France, Germany, Norway)
Article 29:	Clarification requested (Germany)
	Interruption of prescription period proposed along the lines of 1974 Athens Convention (Switzerland)
Article 31:	Introduction of this provision expressly welcomed (Belgium, Italy, European Union)
Article 35:	Majority of responding States does not support Paragraph 2 in its present form
Article 40:	Introduction of additional venue questioned (Japan)
	Interrelationship between Articles 40 and 27 questioned (Germany)
Article 44:	Almost unanimous support for this provision
	Clarification requested (Russian Federation)
	Re-positioning of Article proposed (France)

Article 45:	No opposition to include this provision
	Clarification requested (Japan)
	Criteria in relation to adequacy and verification of insurance mentioned (Germany)
Article 48:	No objections to this provision, clarification requested (United Kingdom)
Final Clauses:	Careful consideration required (particularly mentioned by United Kingdom)
Additional Point:	Adoption of authentic Chinese Text proposed (China)
Note:	**This summary is not intended to be an exhaustive account of each individual comment. Comments regarding specific linguistic proposals have been partially included. Specific proposals regarding editing and presentation of the draft have not been incorporated in their entirety.**

- END -

SGMW/1-WP/4
10/3/98

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

REPORT OF THE THIRD MEETING OF THE SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE "WARSAW SYSTEM"

(Presented by the Secretariat)

The attached constitutes the report of the Third Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System".

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REPORT OF THE THIRD MEETING OF THE SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE "WARSAW SYSTEM"

(Montreal, 4-5 December 1997)

1. INTRODUCTION - OPENING OF MEETING

1.1 The meeting was opened by the President of the Council, Dr. Assad Kotaite. On behalf of the Council he expressed the Council's appreciation for the work of the Study Group, which had permitted ICAO to document the 30th Session of the Legal Committee. He noted that certain points in the draft Convention had not yet been subject to consensus, notably the question of the liability regime of passengers. He further informed the Members that the ICAO Council had decided to establish a "Special Group on the Modernization of the Warsaw System", which is scheduled to convene for a joint meeting with the Study Group from 14 to 18 April 1998, with a view to presenting recommendations and/or conclusions to the Council in May or June of 1998. He considered the Study Group's input as essential for the development of proper solutions to the outstanding issues, and in order to accelerate ICAO's efforts regarding the convening of the Diplomatic Conference for adoption of a new instrument.

1.2 Thanking the President of the Council, Dr. L. Weber welcomed the Members and noted that the Study Group was meeting for the first time since the conclusion of the 30th Session of the Legal Committee. He stated that the comments received by States and international organizations had been made available to the Members of the Study Group together with a table summarizing the main thrust of the comments.

1.3 The Members of the Study Group attending the meeting are listed in Attachment A. One Member, who was unable to attend the meeting, submitted written comments which were made available to the other Members. The Members participated in the meeting in their personal capacity; their views ought not to be attributed to their Government or other institutions with whom they may be affiliated. Dr. L. Weber, Director of the Legal Bureau, was the Moderator of the Study Group. He was assisted by Mr. A. Jakob, Associate Expert, Mr. J. V. Augustin, Legal Officer, and Mr. J. Huang, Legal Officer.

2. APPROVAL OF AGENDA

2.1 The Study Group adopted the agenda of the meeting set out in Attachment B.

3. FOCUS OF THE MEETING

3.1 The Moderator proposed and the Group agreed to focus the discussion primarily on the two most crucial outstanding issues of the draft instrument, namely the questions relating to the burden of proof in the second tier (Article 20) and the so-called fifth jurisdiction (Article 27). The Study Group identified six other issues which would have to be addressed by the Group, but which were of lesser importance than the previous two. These other issues are related to the following Articles of the draft:

Article 3: Notice requirement; particulars of passenger tickets

Article 16: Question of the inclusion of the term "mental injury"

Article 18 paragraph 2: Definition of "delay"

Article 21: Periodic adjustment of limits of liability (escalator clause)

Article 28: Arbitration clause

Article 35 paragraph 2: Relationship between actual/contractual carrier in code-share situations

4. GENERAL DISCUSSION

4.1 Prior to the discussion in relation to Articles 20 and 27, the Moderator invited general views of the Members on the Legal Committee Draft Convention in light of the comments received by States.

4.2 One Member was of the view that in passenger cases the notion of unlimited liability appeared to have become acceptable to States. He originally favoured the two-tier solution but would now prefer to merely remove the limits of liability while retaining the burden of proof requirement as contained in the Warsaw Convention. Another Member supported the three-tier concept, with a limit of liability in the second tier of 200,000 - 250,000 SDR. Another Member felt that both solutions may not be practically achievable and preferred a solution as provided by alternative 1(a) of Article 20 of the draft. This view was supported by another Member who recalled that both the IATA Agreements and the EU Council Regulation have already embodied the two-tier liability regime and placed the presumption of fault on the air carrier with respect to the second tier. He strongly believed that any solution which would be perceived as retreating from this principle will not be ratifiable. He reported that the airlines in his State do not support any solution which is not uniform and added that the third alternative would also not be acceptable to his State. He took the view that changes to the Convention should be kept to a minimum in order to prevent litigation over the meaning of new terms featured in the new Convention. This latter aspect was also supported by another Member who advocated retaining the original language of the Warsaw Convention as much as possible.

4.3 While supporting the notion of modernization, for example in the field of ticketing, this Member expressed his concerns in relation to change in a broader sense. Responding to this comment, the Moderator recalled the 30th Session of the Legal Committee in which there was prevailing sentiment in favour of a comprehensive modernization of the Warsaw System. Referring to the discussion in the Council, the Moderator also explained that the Study Group did not have to restrict itself to the alternatives as set out in square brackets of the present draft in order to find adequate drafting solutions.

4.4 Another Member felt encouraged by the number of substantive comments which were received and agreed that the Study Group should primarily focus on the most contentious issues, particularly Articles 20 and 27 of the draft, and examine thereafter other points of the draft in light of the comments. He reiterated the overriding principle which should guide the Study Group in its further work namely, the notion of uniformity, simplicity and ratifiability. He believed that presently, no alternative mentioned in Article 20 of the draft fulfilled these criteria. Referring to the comments received, this Member was of the view that there was no fundamental disagreement with the notion of a two-tier liability regime, comprising a strict liability portion (100,000 SDR). He also felt that with respect to the second tier, the notion of unspecified limits was close to general acceptance, leaving out one issue to be resolved, that of the burden of proof in the second tier. This Member believed that placing the burden of proof on the passenger would not be globally accepted. He

suggested to place the burden of proof on the air carrier, but to ease to some extent the carrier's burden of proof.

4.5 The Moderator suggested that this idea be further pursued, particularly in light of the existing alternatives 1 and 2 of Article 20, neither of which promoted a uniform solution. A Member pointed out the crucial relationship between legal desirability and political acceptability. He believed that the two major issues, Articles 20 and 27, could be resolved by means of innovative solutions. Referring to this comment, the Moderator recalled that the criterion of ratifiability had been specifically acknowledged by the Legal Committee and the Council. He explained that the results of this meeting would be further elaborated upon by the Special Group, with a view to reaching consensus on the open questions in the draft instrument.

5. BURDEN OF PROOF (ARTICLE 20)

5.1 The Moderator invited the Members to express their views on the issue of Article 20, in particular the suggestion to develop a less onerous burden of disproving fault on the part of the air carrier. The Moderator also mentioned the possibility of attempting to find a solution in which the burden of proof remained unchanged but which included a restriction as to the type of recoverable damages.

5.2 Referring to these two approaches one Member agreed that the solution could be found along these lines. He believed that it was undisputedly understood that the liability regime in the second tier should be one of fault liability. States may therefore be willing to accept the air carrier's presumption of fault once the notion of "fault" is captured in a more adequate terminology. He argued whether the terms "all measures" and "impossible" truly equated to fault or whether they would not slightly exceed this requirement. For the purpose of discussion he proposed the following wording;

> "The carrier shall not be liable for damages arising under Article 16 paragraph 1, which exceed 100,000 SDR if the carrier proves that the damage so sustained was not due to its fault or neglect or that of its servants or agents acting within the scope of their employment or agency".

5.3 Commenting on this proposal, one Member observed that the carrier will not be liable if the servants or agents were not acting within their scope of employment or agency. Another Member suggested not to retain the reference to the scope of employment; however, the Group was not certain about all possible legal consequences such omission would entail and requested the Secretariat to review this matter.

5.4 The Moderator explained that whereas the term "servant and agents" refers to all persons who helped the carrier to fulfil its obligation under the contract of carriage, the term "servants" only refers to those who had to obey instructions from the air carrier. One Member expressed his concern that the term "scope of employment" may give rise to litigation.

5.5 The Group thereafter engaged in a discussion whether to retain this reference in the proposal above. In relation to this issue, the Members observed that Article 20 of the original Warsaw Convention did not contain such reference, whereas it existed in Article 25 of the original and amended version. After further discussion and subsequent review by the Secretariat, including academic publications on which the Secretariat reported, the Study Group decided not to retain the reference to "scope of employment" on the understanding that the agent must act within its scope of employment or agency in order to be considered an "agent" in terms of the Warsaw Convention.

5.6 The Study Group subsequently examined whether the substitution of the term "all necessary measures" by "all reasonable measures" as contained in the present draft of Article 20, could already be seen as easing the requirements for the air carrier to disprove fault. It was further queried whether the term "all" could be deleted. At this point, one Member requested a clarification as to whether the Study Group would have the mandate to change the wording of the draft adopted by the Legal Committee. The Moderator explained that the drafting suggestions elaborated within the Study Group as well as those developed by the Special Group will be presented in conjunction with the text adopted by the Legal Committee.

5.7 One Member believed that the term "all measures that could reasonably be required" could already be seen as a less onerous burden of proof if compared with the existing term "all necessary measures". He cautioned against any new wording which could be perceived as a shift of balance in favour of the air carrier. This Member further believed that the draftsmen of the Warsaw Convention intentionally did not attempt to define "necessary measures" so as to preserve a certain degree of flexibility in light of the changing technological circumstances. He therefore preferred the present wording. The Study Group then discussed the problem how to make the presumption of fault placed on the air carrier more acceptable to States which have not yet expressed their support for this concept. The Moderator enquired whether the Members of the Group had a particular preference for the so-called "positive wording" as contained in alternative 1(a) in Article 20 or the so-called the "negative wording" which was contained in alternative 1(b) of Article 20 as well as in the proposal mentioned in paragraph 5.2.

5.8 The ensuing discussion revealed a preference for the "negative wording". The discussion also revealed that the term "all" should be retained. One of the Members reiterated his concern that any departure from the existing wording of the draft, even if it were to be perceived as beneficial to the airlines, would likely not be welcomed by the air carriers of his State because of the fear of having to face a new wave of litigation as a result of the changed terminology. This Study Group Member was asked whether the terms "fault" and "neglect" were being used synonymously in the legal system of his State. He responded that the term "fault" would be equated to "negligence".

5.9 Summarizing this point of the deliberations, the Moderator concluded that there was a preference for the version based on Article 20 alternative 1(b), as amended. All Members nevertheless agreed that the issue at hand is one of form rather than of substance because both wordings, the "positive" as well as the "negative", were describing the same legal concepts.

5.10 Two Study Group Members reminded that the term "negligence" simply forms part of what is considered to be the notion of "fault" in the civil law system. These Members also believed that the term "reasonable" will be construed broader than the term "necessary". Referring to the term "fault" another Member observed that in the European continental legal system, this term encompasses conduct which ranges from slightest negligence to gross negligence; he thus believed that the negative formula would lead in Europe to a regime of virtual strict liability in the second tier. The Moderator acknowledged that while in the common law system the term "fault" would be equated to "negligence", the former term described a variety of conduct in the civil law system. He suggested that the Group endeavoured to find a common formula which would describe the notion of "negligence" in the understanding of all legal systems. The Study Group decided to revisit this issue, including the possibility of a combination of the "positive" and "negative" formulation.

5.11 Referring to a previous suggestion, the Moderator invited views on whether a possible limitation as to the types of compensable damages could be envisaged. This approach could be seen as a method to restore a certain degree of balance with regard to the interests of the air carrier and passengers respectively. The Moderator acknowledged that the term "mental injury" did not appear in square brackets;

however, the present wording of the draft suggests a very broad extension of air carrier liability, the effect of which may not have been fully appreciated by the Legal Committee. He recalled that this issue has also been the subject of numerous comments by States.

5.12 One Member expressed his reluctance to re-open this discussion and preferred the inclusion of this term unchanged. Another Member cautioned that air carriers may not tolerate this extension of liability and firmly believed that the inclusion of "mental injury" did not meet the criterion of modernization, but rather represented a change. This Member also referred to the written comment of the absent Study Group Member, who strongly warned against the inclusion of this term.

5.13 Two Members suggested to qualify the term by using words such as "significant" or "serious". Another Member referred to the discussion of the subject in the Legal Committee and recalled the Legal Committee's intention behind the reference to "mental injury" as a mere confirmation of existing jurisprudence which allowed for compensation of mental injuries in certain circumstances, particularly when such injury was suffered concomitantly with bodily injuries. This point was supported by another Member. It was therefore suggested to add the term "and" between the terms "bodily" and "mental injury". Summarizing the discussion the Moderator observed that the inclusion of the term "mental injury" in Article 16 could be achieved by either qualifying the term or by linking it to the term "bodily injury". Two Members observed that mental injuries may not in all cases be accompanied by a bodily component and believed that the passenger should not be left without a remedy in these cases. Both Members believed that a term such as "significant" could protect the air carrier against frivolous claims, which were seen by all Members of the Study Group as a legitimate concern. The Members also agreed that sheer apprehension should not be compensable. Taking into account the discussion on this matter, the Moderator summarized that the Group had reached a common understanding as to what shall fall within the ambit of "mental injury" and concluded that words such as "significant mental injury" or "serious mental injury" would adequately reflect the results of this discussion, and that these should be suggested as additions to the text.

5.14 On the basis of Attachment C, which lists five drafting suggestions for Article 20, the Study Group resumed its examination of drafting suggestions with respect to this Article. Referring to the previous discussion on the use of the term "fault or neglect", one Member suggested to replace this term by the wording contained in Article 19 of the draft, namely, "negligence or other wrongful act or omission". This Member believed that this wording would be acceptable from a civil law viewpoint. Another Member concurred that this wording would be also acceptable from a common law viewpoint. The Members agreed that this approach would also have the benefit of using the language of an existing legal instrument, in this case Article VII of the Guatemala City Protocol. The Members therefore agreed to replace the reference to "fault or neglect" in Article 20 alternative 1(b) as amended, by the term "negligence or other wrongful act or omission".

5.15 The Moderator briefly explained the differences among the five drafting proposals, including proposal number 5, which featured a combined approach, in which the defences available to the air carrier were listed. The Moderator also explained that paragraph 2 of version 5 was merely added for purposes of clarification, as Article 19 of the draft already dealt with the problem of contributory negligence.

5.16 The combined language met with unanimous approval. It was however suggested to add the term "solely" to paragraph 1(c). With respect to paragraph 1(c) there was common understanding that the actual carrier should not be considered to be a "third party" in terms of this provision. As to this point it was further decided to add the term "subject to Article 35 of this Convention". The Group also decided not to retain the reference to "act of God", partly because of the difficulties in defining this concept and also

because paragraphs 1(a) and 1(b) already encompassed this notion. Further, not all cases of "acts of God" could automatically be considered as valid defences, as exemplified in a case when a pilot attempts to fly through a thunderstorm against better judgement and, as a result, causes the plane to crash. In concluding its deliberations on Article 20, the Study Group adopted a recommendation for the wording of this Article which reads as follows (see Attachment D):

> " The carrier shall not be liable for damage arising under Article 16 paragraph 1 which exceeds 100,000 SDR if the carrier proves that
>
> (a) the carrier had taken all necessary measures to avoid the damage; or
> (b) it was impossible for the carrier to take such measures; or
> (c) such damage was solely due to the negligence or other wrongful act or omission of a third party, subject to Article 35 of this Convention."

6. FIFTH JURISDICTION (ARTICLE 27)

6.1 The Group went on to examine Article 27 of the draft text. The Members were unanimously of the view that the issue of a fifth jurisdiction is a crucial issue. The States' comments had revealed that the present wording of Article 27 was not supported by a large majority of States (particularly in Europe); on the other hand it was acknowledged that some States did not object to the inclusion of a fifth jurisdiction; and lastly, the comments revealed that its non-inclusion would make ratification by the United States of the new instrument highly unlikely.

6.2 One Member feared that the current drafting of paragraph 2 and paragraph 3 could leave a loophole, particularly in situations of large-scale code-sharing agreements or alliances in which the foreign partner did not use its own staff or premises. Referring to the conclusion reached with respect to Article 20, several Members felt that the fifth jurisdiction ought to be restrictive in nature in order not to further burden the air carriers. Taking into account the comments with respect to code-share situations, one Member suggested to define the term "operates services" in paragraph 2 of Article 27 and to include in such definition operations like code-sharing and partnership alliances. It was also suggested to retain the word "and" in the last line of paragraph 2 while deleting the reference to "through its own managerial and administrative employees". It was further considered to replace the terms "having his domicile or permanent residence" by "being ordinarily resident".

6.3 Another Study Group Member was strongly opposed to the introduction of the fifth jurisdiction particularly in a scenario in which limits of liability in passenger cases no longer prevailed. Another Group Member illustrated what he perceived to be an inequity of the current situation and gave the example of an American student who studied in the United Kingdom and who purchased a return ticket for a trip from London to New York. In case of an accident occurring during the New York-London leg of the trip, he presently could not sue in the United States whereas a fellow American student, residing in the US and holding a New York-London return ticket, could do so. This Member firmly believed that it would be unfair to deprive any claimant of the right to bring a legal action in his home State. This Member also had some concerns as to the suitability of the term "ordinarily resident". He believed this term may cause problems in cases involving government officials who rotate their residence on a regular basis.

6.4 Following another train of thought, one Member explained that in his country, for all practical purposes, the fifth jurisdiction already existed, as every licensed foreign air carrier was required to register a domicile (through a local agent or representative) in that State and, that for purposes of Article 28 of the Warsaw Convention, such carrier is deemed to have a domicile in that State. As to the latter point, another Member wondered whether a new convention could facilitate such interpretation by means of an appropriate proviso. Referring to this point, the Moderator indicated that such mechanism could be created through regulatory action, but that it could be only envisaged if the courts accepted it, not only nationally, but also internationally with respect to enforcement of foreign decisions.

6.5 Regarding the issue of enforcement, another Member explained that no such enforcement would be possible within Europe as the courts do not recognize multiple domiciles of companies, which the above-mentioned suggestion would imply.

6.6 Two Members also had difficulties with the proposal and they warned about the effect of the proposed solution which would practically result in multiple domiciles for the air carrier. One of the Members wondered whether the creation of such functional fifth jurisdiction would be less objectionable than the proposal contained in Article 27 of the draft.

6.7 Due to the legal uncertainties of the proposal, another Member proposed the notion of a subsidiary fifth jurisdiction which should only be available if the current four jurisdictions did not suffice. This notion attracted support by two other Members one of whom believed that the fifth jurisdiction should only come into play in cases where the existing jurisdictions would not provide the claimant with what could be regarded as "reasonable compensation". To this end, he suggested, an adequately worded clause should be introduced in the draft.

6.8 At this point of the discussion the Moderator gave a summary of the proposals emanating from the discussion and concluded that there are four trains of thought:

1. A proposal revolving around a further refinement of the present wording of draft Article 27 paragraph 2 and paragraph 3. (see Attachment E Proposal 1)

2. A proposal in which the term "ordinarily resident" would be used and in which the term "operate services" would be defined. (see Attachment E Proposal 2)

3. A proposal concerning a subsidiary fifth jurisdiction. (see Attachment E Proposal 3)

4. A proposal dealing with the carrier's election of a domicile for the purpose of jurisdiction. (see Attachment E Proposal 4).

6.9 The Group thereafter considered the various drafting proposals as set out in Attachment E.

6.10 Referring to the proposals contained in this Attachment, the Moderator explained that proposal number 3 should merely be seen as a preliminary attempt to define a subsidiary jurisdiction; he believed that the drafting of this provision would have to be improved in order to aptly convey the notion of subsidiarity. He further explained that proposal number 5 had been added, but that it had not yet been subject to any discussion in the Group.

6.11 The Members continued their deliberations with an examination of the different drafting proposals. Several Members commented positively on the concept of a subsidiary fifth jurisdiction whilst acknowledging that the present drafting of proposal number 3 would have to be improved. Another Member believed that it remained unclear whether any kind of fifth jurisdiction would be acceptable and added that the proponents of the fifth jurisdiction would only be willing to embrace a solution which they considered to be meaningful. In relation to this point, one Member explained that in his view the fifth jurisdiction should ensure that every passenger will have the right to bring a legal action in his or her State. Several Members expressed interest in proposal number 4 which had been developed by one Member of the Study Group, but agreed that it must not result in the creation of a multitude of jurisdictions. The Study Group continued its discussion by examining a refined draft proposal along the lines of proposal number 4 which read:

> "Where by virtue of the laws of a contracting State a carrier is subject to [personal] jurisdiction in that State nothing herein shall prevent that State from declaring that carrier as having its domicile in that State for the purposes of paragraph 1 of this Article."

6.12 To this end it was the understanding of all Members that in order for the fifth jurisdiction to be available, the passenger domicile must be in the same State as the elected domicile of the carrier, with a result that for each individual passenger only one fifth jurisdiction will be available. One Member insisted that this solution would still lead to a plethora of new jurisdictions, an extension that was never contemplated.

6.13 The latter view was supported by another Member who felt that the other restrictive proposals appeared to be less problematic. Another Member expressed the view that proposal number 4 would not promote the precept of uniformity and would negate the very principles behind Article 28 of the original Warsaw Convention. He also firmly believed that a solution along the line of proposal number 4 had a much wider effect than any other proposal discussed during the Legal Committee Session.

6.14 Given that the discussion on the different proposals had mainly focused on proposals numbers 3 and 4, the Moderator suggested to further focus on these two proposals, without disregarding the other options. He then invited the Members to indicate their preference towards either proposal. The comments revealed a slight majority for the reasoning that was embodied in proposal number 3. The Group, however, unanimously agreed that neither proposal could be considered viable at this point. It was the common assessment that the discussions in relation to the fifth jurisdiction would have to be continued and that no conclusive decision could be taken at this meeting. Nevertheless, the Moderator was encouraged by the new ideas and suggested that these points be further discussed within the Study Group.

6.15 The Study Group expressed its desire to hold another meeting prior to the joint meeting of the Special Group in order to further elaborate on the issue of Article 27, as well as to advance proposals in relation to the other Articles mentioned earlier in paragraph 3.1. The Study Group also expressed the common sentiment that the discussion regarding Article 20 had been conclusive and agreed to transmit a recommendation concerning this Article to the Special Group for further consideration. The recommendation is set out in Attachment D. It was agreed to hold the fourth meeting of the Study Group on 26 - 27 January 1998 at ICAO Headquarters in Montreal.

ATTACHMENT A

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

(Montreal, 4-5 December 1997)

Attendance

Mr. R. Farhat
Professor of Law, Solicitor
Former Director General of Civil Aviation
(Lebanon)

Dr. M.O. Folchi
President
Asociación Latino Americana de Derecho
Aeronáutico y Espacial (ALADA)
(Argentina)

Mr. E.A. Frietsch
Counsellor
Federal Ministry of Justice
(Germany)

Mr. K.J.M. Walder
Legal Director
British Airways Plc
(United Kingdom)

Mr. A.G. Mercer
Company Solicitor
Air New Zealand Limited
(New Zealand)

Mr. V. Poonoosamy
Director Legal and International Affairs
Air Mauritius
(Mauritius)

Mr. D. Horn
Assistant General Counsel
for International Law
Department of Transportation
(USA)

ICAO Secretariat

Dr. L. Weber (Moderator)
Director, Legal Bureau

Mr. A. Jakob
Associate Expert, Legal Bureau

Mr. John V. Augustin
Legal Officer, Legal Bureau

Mr. J. Huang
Legal Officer, Legal Bureau

Non-attending Members

Judge G. Guillaume
International Court of Justice
(France)

Mr. G.N. Tompkins, Jr.
Rosenman & Colin LLP
(New York)

Mr. G. Lauzon
General Counsel
Constitutional and International Law
Department of Justice
(Canada)

ATTACHMENT B

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

(Montreal, 4 - 5 December 1997)

AGENDA

1. Opening of meeting
2. Approval of Agenda
3. Review of responses to State letter LE 4/51-97/65
4. Any other business

ATTACHMENT C

Discussion Material for Article 20 (Not Adopted)

I. "Negative Language", based on Article 20(1)(b) LC Draft

Version 1

The Carrier shall not be liable for damage arising under Article 16, paragraph 1 which exceeds 100,000 SDR's if it proves that such damage was not due to its fault or neglect or of its servants or agents.

Version 2

The Carrier shall not be liable for damage arising under Article 16 paragraph 1 which exceeds 100,000 SDR's if it proves that such damage was due to circumstances other than its fault or neglect, or of its servants or agents.

II. "Positive Language", based on Article 20 (1)(a), LC Draft

Version 3

The Carrier shall not be liable for damage arising under Article 16, paragraph 1 which exceeds 100,000 SDR if it proves that it and its servants or agents took all reasonable measures to avoid the damage or that it was impossible for it or them to take such measures.

Version 4

The Carrier shall not be liable for damage arising under Article 16 paragraph 1 which exceeds 100,000 SDR if it proves that it and its servants or agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

III. "Combined Language"

Version 5

1. The Carrier shall not be liable for damage arising under Article 16 paragraph 1 which exceeds 100,000 SDR's if the Carrier proves that

   (a) the Carrier had taken all necessary measures to avoid the damage; or
   (b) it had been impossible for the carrier to take such measures; or
   (c) such damage was due to the fault or neglect of a third party; or
   (d) such damage was due to an Act of God.

[2. The Carrier shall not be liable for damage arising under Article 16 paragraph 1 to the extent that the Carrier proves that the passenger contributed to such damage through its own fault or neglect.]

ATTACHMENT D

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

Montreal, 4 - 5 December 1997

Draft Recommendations of the Study Group

As a result of its discussions at the meeting of 4-5 December 1997 which took into account, as mandated by the Council, the Draft Convention for the Unification of Certain Rules for International Carriage by Air as prepared by the 30th Session of the Legal Committee (Report, 30th Session, Attachment D), the comments of States and international organizations thereon in response to State Letter LE 4/51 - 97/65, and other relevant materials, the Study Group **considers**

(1) that the draft text of the Convention should be fully consistent with the objectives of unification, simplicity and ratifiability;

(2) that none of the three options presently set out in Article 20 of the draft Convention fully meets these requirements;

(3) that it would therefore be advisable to consider alternative possibilities;

(4) that account should be taken of the fact that a majority in the Legal Committee had spoken in favour of placing the burden of proof on the carrier in the second tier of liability;

(5) that, similarly, a majority of States having commented spoke in favour of this solution;

the Study Group therefore **recommends** to consider the following wording for Article 20:

Article 20

The carrier shall not be liable for damage arising under Article 16 paragraph 1 which exceeds 100,000 SDR if the carrier proves that

(a) the carrier had taken all necessary measures to avoid the damage; or
(b) it was impossible for the carrier to take such measures; or
(c) such damage was solely due to the negligence or other wrongful act or omission of a third party, subject to Article 35 of this Convention.

ATTACHMENT E

DISCUSSION MATERIAL

Article 27

Regarding Article 27:

Draft Proposal Number 1:

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to and from which the carrier operates services for the carriage by air and in which the carrier has an establishment.

3. For the purposes of paragraph 2 of this Article, "establishment" means premises leased or owned by the carrier concerned from which it conducts its business of carriage by air.

(Further refinement of the present wording)

Draft Proposal Number 2

1. Article 27(1) Jurisdiction (as is)

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her **ordinary residence** and to and from which the carrier operates services for the carriage by air.

3. For the purposes of paragraph 2 of this Article, "Services for the carriage by air" refers to services operated by the carrier itself or through a code share or alliance partner.

Draft Proposal Number 3:

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may, by way of exception, be brought before one of the Courts in the territory of a State Party in which the passenger has his or her domicile or permanent residence, provided, in the light of the circumstances as a whole, the [damage sustained] [contract] is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraph 1 of this Article.

(Idea of a subsidiary 5th jurisdiction)

Draft proposal Number 4

Article 27 - Jurisdiction

1. Article 27(1) Jurisdiction (as is)

2. Nothing prevents Contracting States to [consider][regulate] the foreign airlines operating services to or opening agencies in their countries, as having elected domicile in these countries [in the sense][for the application] of this Article.

Draft Proposal Number 5:

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may also be brought before one of the Courts in the territory of a State Party in which the passenger has his or her domicile or permanent residence, if the defendant has a place of business and is subject to jurisdiction in that State.

(Modification to the present wording)

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SGMW/1-WP/5
10/3/98

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

Item 1: Review of the work after the conclusion of the 30th Session of the Legal Committee

REPORT OF THE FOURTH MEETING OF THE SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE "WARSAW SYSTEM"

(Presented by the Secretariat)

The attached constitutes the report of the Fourth Meeting of the Secretariat Study Group on the Modernization of the "Warsaw System".

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(17 pages)

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REPORT OF THE FOURTH MEETING OF THE SECRETARIAT STUDY GROUP ON THE MODERNIZATION OF THE "WARSAW SYSTEM"

(Montreal, 26-27 January 1998)

1. INTRODUCTION - OPENING OF MEETING

1.1 The meeting was opened by the President of the Council, Dr. Assad Kotaite. He extended a warm welcome to the Members of the Group and recalled that during the third meeting of the Study Group the discussions had mainly focussed on the questions relating to the burden of proof in the second tier (Article 20) as well as on the so-called fifth jurisdiction (Article 27). The President was pleased to note that the Group had concluded its discussions on Article 20 and that it had reached consensus on a draft recommendation concerning this Article. He expressed his confidence that the Study Group would further develop new ideas and proposals regarding the problems relating to Article 27 as well as the six additional areas identified by the Group during its third meeting (see paragraph 3.1 of the Report of the Third Meeting). He further stated that the proposals developed by the Study Group would be submitted to the upcoming meeting of the Special Group on the Modernization of the "Warsaw System", which would meet jointly with the Study Group. He mentioned that the Council would consider the report of the joint meeting during its 154th Session in May/June 1998 with a view to convening a Diplomatic Conference as early as possible.

1.2 Thanking the President of the Council for his opening remarks, Dr. L. Weber welcomed the Members. He especially welcomed Mr. Olivier Tell who had been invited to participate in this meeting in order to benefit from the views of a French legal expert.

1.3 The Members of the Study Group attending the meeting are listed in Attachment A. Four Members, who were unable to attend the meeting, submitted written comments which were made available to the other Members. The Members participated in the meeting in their personal capacity; their views ought not to be attributed to their Government or other institutions with whom they may be affiliated. Dr. L. Weber, Director of the Legal Bureau, was the Moderator of the Study Group. He was assisted by Mr. A. Jakob, Associate Expert, and Mr. J. V. Augustin, Legal Officer.

2. APPROVAL OF AGENDA

2.1 The Study Group adopted the agenda of the meeting set out in Attachment B.

3. GENERAL DISCUSSION

3.1 The Moderator briefly recalled the outcome of the Third Meeting of the Study Group which, *inter alia,* resulted in the adoption of a draft single text for Article 20, as set out in the draft recommendation of the Third Meeting (see Attachment D of the Report on the Third Meeting), which would be submitted for consideration to the Special Group and was intended to replace the various options presently contained in Article 20 of the draft.

3.2 Turning thereafter to the discussion on the fifth jurisdiction, no conclusion had been reached by the Group at its third meeting. Therefore, the main objective of the fourth meeting would be primarily to seek a compromise on this matter as well as on the other six Articles mentioned in paragraph 3.1 of the Report

on the Third Meeting, namely Article 3, Article 16, Article 18 paragraph 2, Article 21, Article 28 paragraph 2 and Article 35 paragraph 2.

4. ARTICLE 27 - FIFTH JURISDICTION

4.1 The Group considered the question of a fifth jurisdiction by re-examining the proposals developed during the last meeting (see Attachment E to the Report on the Third Meeting).

4.2 The Moderator briefly recalled the background of the various proposals and explained that **Draft Proposal Number 1** was built on the wording developed by the Legal Committee, which contained the word "and" instead of "or" in the last line of Article 27 paragraph 2, indicating that the requirements for the operation of services and the presence of an "establishment" would have to be fulfilled cumulatively. Further, in paragraph 3, the reference to "through its own managerial and administrative employees" had been deleted.

4.3 With respect to **Draft Proposal Number 2** the Moderator explained that the words "domicile or permanent residence" in paragraph 2 have been replaced by the term "ordinary residence" and that the terms "services for the carriage by air" had been defined to include code share or alliance partnerships.

4.4 **Draft Proposal Number 3** represented a proposed wording for a subsidiary fifth jurisdiction which would be available only on an exceptional basis.

4.5 **Draft Proposal Number 4** allowed for the possibility for States to pass legislation or regulations to the effect that a foreign air carrier would be deemed to be domiciled in that State, for example at its address for service for legal documents, with the result that the passenger would then sue in his home jurisdiction under the traditional four Warsaw jurisdictions. If several States exercised such an option, the carrier would be deemed to be domiciled in each of these jurisdictions.

4.6 **Draft Proposal Number 5** featured a wording similar to the one to be found in the *Athens Convention relating to the Carriage of Passengers and their Luggage by Sea* (1974).

4.7 One proponent of Draft Proposal Number 4 wished to clarify that this proposal should be considered on the basis of the official United States' translation of Article 28 of the Warsaw Convention, which differed in wording from the translation provided by the United Kingdom in that the latter translation used the term "ordinarily resident" while the former translation used the term "domicile"; such difference in wording could have legal consequences. Another Member expressed his concern about the term "ordinary residence" as this term is not clearly defined in United States jurisprudence, whereas the term "domicile" is. This Member acquainted the Group with a British Court decision in which three different definitions for the term "ordinary residence" had been provided. He therefore favoured the use of the term "domicile", which could be defined along the lines of the following:

> "where a person has his true fixed and permanent home, and to which, whenever the person is absent, he has the intention of returning".

4.8 Another Member reiterated his concern expressed at the previous meeting that the concept of a fifth jurisdiction had found no support in many States. He believed that the idea of a subsidiary jurisdiction still warranted further consideration. Nevertheless, the wording of Draft Proposal Number 3 could not be considered suitable, a view which was also shared by other Members of the Study Group.

4.9 Another Member strongly supported the introduction of a fifth jurisdiction since he believed that every passenger should be able to bring an action in his own State, providing the air carrier had a presence in such State. Referring to existing case law, this Member firmly believed that the fifth jurisdiction would only lead to a marginal increase in court actions in *fora* which were currently not available in application of the present Article 28 of the Warsaw Convention. This Member also believed that the introduction of an additional jurisdiction would not lead to an increase in "forum shopping" due to the fact that courts, for example in the United States, would continue to apply the rule of *forum non conveniens*.

4.10 Another Member was strongly against the introduction of a fifth jurisdiction. He believed that such expansion of *fora* was not necessary in a regime which no longer provided pre-specified limits of liability. He cautioned that although the United States had translated the French term "domicile" by "domicile" in Article 28 of the Warsaw Convention, these terms did not have exactly the same meaning because they were based on different concepts. He considered it important to ensure that a uniform concept be adopted under the new convention. This Member was also concerned about some other wording featured in the United States' translation. He preferred that, with respect to natural persons, the term "habitual residence" be used. Referring to the written contribution of an absent Study Group Member, he reiterated his view that a jurisdiction established merely on a passenger's domicile would not be compatible with current principles of private international law and that a jurisdiction established on this basis also raised some concerns with respect to extraterritoriality.

4.11 At this point the Moderator clarified that the English language text considered by the Legal Committee was based on the United Kingdom's translation of the Warsaw Convention and that for this reason, the term "ordinarily resident" was featured in Article 27 paragraph 1 of the present draft text. The Group acknowledged that there was a difference in many jurisdictions between the terms "domicile" and "ordinary residence".

4.12 One Member felt that the Study Group should attempt to find a pragmatic yet innovative solution and believed that once the Convention spelled out the requirements for a fifth jurisdiction, the above-mentioned concerns about extraterritoriality would be adequately dealt with. In some common law States, including his own, a passenger could have one and only one domicile. This Member also wondered whether a solution could be to provide States with the option not to enforce a foreign judgement rendered in the new forum. On this last point, another Member felt that to the greatest extent possible, a uniform solution should be found. This view was also shared by another Member who did not support the idea of optional enforcement of judgements.

4.13 The Moderator reminded that as far as Draft Proposal Number 4 is concerned, two main concerns had been voiced: the possibility of multiple domiciles, which may not be compatible with the prevailing understanding of this term in the common law system (which necessarily implied only one particular geographic location), and the problems regarding the execution of judgements in cases where the air carrier had no assets in the passenger's domicile, and where foreign courts may not recognize multiple domiciles of the carrier.

4.14 At this point the Group acknowledged that its efforts had to be inspired by the overriding objective of ratifiability of the new instrument, and given the comments received by States, the differing positions would have to be reconciled. Several Members expressed their view that the present wording of Draft Proposal Number 3 was not appropriate as it combined issues related to jurisdiction with that related to applicable law. Nevertheless, in the view of some Members, the concept of a subsidiary fifth jurisdiction was not to be discarded.

4.15 Two Members believed that a solution could be found along the lines of Draft Proposal Number 1, with a further refinement so as to encompass code-shared operations.

4.16 Regarding Draft Proposal Number 1, one Member observed that the term "establishment" was only defined for purposes of paragraph 2 of Article 27 whereas it remained undefined in paragraph 1; he would prefer the definition to apply to both paragraphs 1 and 2. In relation to this he was concerned about the very broad meaning United States' courts have attributed to the term "establishment". Moreover, this term had different meanings in the United States and in the United Kingdom. He also considered the reference to code share operations and alliance partnerships as being too broad and preferred to emphasize the physical exploitation of traffic rights.

4.17 Another Member considered Draft Proposal Number 1 as being too narrow because the requirements of operation of traffic rights were tied to a narrowly defined notion of "establishment". Concerning Draft Proposal Number 2, this Member reiterated his concerns about the use of the term "ordinary residence" in paragraph 1. This concern was shared by another Member who also cautioned against the attempt to specifically spell out any type of commercial arrangement, i.e. code sharing, because the nature of these arrangements could change over time. This Member expressed interest in Draft Proposal Number 5.

4.18 With respect to Draft Proposal Number 5, one Member expressed concerns about the term "is subject to jurisdiction" and felt that this concept was unclear. He reminded that although Draft Proposal Number 5 was a modification of the wording of the Athens Convention, the latter provided for a maximum limit of liability of only 46,000 SDR.

4.19 The Study Group examined a new proposal, **Draft Proposal 3*bis***, (see Attachment C) which was also based on the principle of subsidiarity and presented certain variations to the original Proposal Number 3. However, after a brief discussion, this proposal was not considered viable as it may imply that the claimant would have to initiate separate legal proceedings in order to prove to the court of his domicile that sufficient compensation could not be obtained in any of the other courts before bringing his action in the fifth jurisdiction. The Moderator summarized the discussion up until this point and noted that neither Draft Proposal Number 3 nor 4 had found sufficient support. Further, though the concept behind Proposal Numbers 3 and 3*bis* had found some support, the particular wording was still not considered appropriate. The Group then proceeded to focus on Draft Proposal Numbers 1 and 5.

4.20 At this point the Moderator suggested, and the Group agreed, to proceed with the discussion on the working hypothesis that paragraph 1 of Draft Proposal Number 1 would be considered on the basis of the United States' translation of Article 28 paragraph 1 of the Warsaw Convention.

4.21 Two Members believed that a solution could be found along the lines of Draft Proposal Number 1 provided that the idea presently contained in paragraph 3 of Draft Proposal Number 2, amended as appropriate, was to be included. Concerning this latter issue, one Member reiterated his preference for a narrower wording emphasizing the physical exploitation of services. Following up on this point, the Moderator acknowledged that several Members had mentioned that any reference to a particular commercial arrangement (code sharing, alliance partnership) may be problematic. He therefore requested two Members of the Group attempt to draft a suitably modified provision based on Draft Proposal Number 1 .

4.22 Based on the working hypothesis mentioned in paragraph 4.20 above, the Group examined the modified draft proposal based on Draft Proposal Number 1 which had been developed by two Members. The text proposed reproduced both the United Kingdom's and United States' versions of Article 28, paragraph 1,

of the Warsaw Convention as paragraph 1 for purposes of presentation (see Attachment D). After some discussion on editorial points, the Moderator asked the Group to consider the substance of this proposal and explained that it differed from Draft Proposal Number 1 in that it no longer contained a definition of the term "establishment"; rather the concept of "establishment" was incorporated in the text of paragraph 2 of the new proposal.

4.23 One Member supported this proposal in principle. Another Member, referring to the written comments received by an absent Member, reiterated his preference for use of the term "habitual residence" instead of "domicile". He believed that there should be an effort to limit the number of connecting factors; the phrase "domicile or permanent residence" could be interpreted as two different places. This Member still favoured the notion of a subsidiary fifth jurisdiction and also observed a potential inconsistency in the new proposal due to the use of a wide connecting factor (commercial arrangement) and a narrow factor (premises). One Member who supported the proposal in principle expressed the same concern about the wording "domicile or permanent residence" which in his view could be construed as meaning more than one particular geographic location, although he recognized that the intent was to accommodate those States which did not the concept of "domicile" as understood in the common law. Another Member who co-developed the proposal expressed the hope that it might be more acceptable to European States than previous proposals as it contained a number of cumulative requirements.

4.24 Another Member supported the proposal in principle but expressed some concern with respect to the use of the term "premises" in paragraph 2. He also acknowledged that although generally understood throughout the world, the term "domicile" had different connotations even within the jurisdictions of the common law systems. Ideally, he preferred the development of a generic term for the purposes of the Convention, however, he also acknowledged that existing case law had developed around the term "domicile" which would make it difficult to depart from this concept as far as the United States is concerned.

4.25 There was a common understanding within the Group that with respect to the term "domicile", only one particular geographic location should be described by that term.

4.26 In order to clearly emphasize that all three requirements provided in this proposal would have to be fulfilled cumulatively and that all connecting factors would have to coincide within the same State Party, the Group agreed to further modify the proposal and to enumerate the requirements accordingly.

4.27 The Moderator acknowledged that this Group could not take a definitive decision on the use of the terms "domicile", "ordinary residence", and "permanent residence" and stated that this issue would have to be further considered by the Special Group. Nevertheless, the Moderator requested the Study Group Members to express their views as to whether, for the purposes of the newly developed proposal of Article 27, the United States' or the United Kingdom's translation of the English version of paragraph 1 should be recommended.

4.28 One Member strongly recommended the use of the United States' translation particularly in light of the potentially broad interpretation of "ordinary residence" in American courts which would lead to increased forum shopping. Another Member felt that no decision on paragraph 1 of the new proposal should be taken at this point as the issues at hand would likely have to be taken up by the Special Group. Another Member recognized that with respect to Article 27, the two differing English language versions posed a particular problem. He wondered how to transform the notion of "domicile", as interpreted in the United States, into other legal systems. He nevertheless favoured not to use the term "ordinary residence" (as presently contained in the United Kingdom's translation). Though preferring the use of the term "domicile", one Member also would not

like to use the term "place of business" (featured in the United States' translation) instead of the term "establishment" (as provided in the United Kingdom's translation). Commenting on the latter point another Member cautioned not to circumscribe the notion of "place of business" (which is used in the United States' translation instead of the term "establishment").

4.29 The Moderator summarized the discussion by indicating that the modified Draft Proposal Number 1 had found support with a majority of Members. He believed that there was a general consensus that leaving the term "ordinarily resident" in the text would cause major problems in the United States. He acknowledged the scope of opinions expressed by the Members on the notion of "domicile", "ordinary residence", and "permanent residence". He noted the general sentiment of the Group that the use of the word "or" could prove to be problematic if the term "domicile" (as understood in the United States) were featured alongside another term such as "permanent residence". The discussion had clearly shown that any inadvertent choice of terms could have an impact on the potential acceptability of this provision to States. The Moderator stated that the Special Group would have to be made aware of the fact that the current United States English version posed some difficulties in Europe and conversely, the United Kingdom English translation posed some difficulties with respect to the United States. He noted, however, that there was a preference to use the United States text. The Study Group thereafter concluded its deliberation on Article 27 and adopted the draft recommendation as set out in Attachment E which featured the United States' translation of Article 28 paragraph 1 of the Warsaw Convention.

5. ARTICLE 3

5.1 With respect to Article 3 of the draft, the Study Group expressed the view that the issue of non-compliance with certain documentary requirements would likely lose much of its significance given the departure from the concept of pre-specified limits of liability in passenger cases. Taking into account the comments submitted by two States, one Member could not support the view that new requirements to the ones presently contained in Article 3 paragraph 1 of the draft should be added. He supported the deletion of the square brackets in the last line of Article 3 paragraph 5, but considered it to be a mere clarification. This view was shared by three other Members of the Group.

5.2 The Group went on to briefly discuss the term "written notice" mentioned in Article 3 paragraph 4. One Member wondered whether there is still need for such notice as no other mode of transport required a similar record. Two Members pointed out that in practice airlines would likely continue to provide the written notice in physical conjunction with a ticket. However, it was the common understanding of the Group that it should suffice for the air carrier to provide a written notice which did not need to be physically attached to the ticket. Further, there was consensus within the Group that the term "given" appearing in Article 3 paragraph 4 line 1, should not be construed so as to indicate actual physical handing over of a written notice. Instead the airline industry should not be precluded from adopting other appropriate methods of informing the passenger.

5.3 In summary, it was agreed to recommend to retain the text presently contained in Article 3 Paragraph 5 whilst deleting the square brackets, on the understanding that there shall be no distinction between non-compliance with a "written notice" and non-compliance with other requirements mentioned in this Article.

6. ARTICLE 18

6.1 The Group then discussed Article 18; a considerable number of State comments had suggested to delete the definition of delay in paragraph 2 of Article 18, which was in square brackets. Two Members expressed support for the definition in paragraph 2 and argued that a definition was useful in order to discourage airlines from continuing their practice of stating in their conditions of carriage that their schedule as set out in timetables was not guaranteed. Another Member believed that the absence of a definition had thus far not caused major difficulties and that in each case the facts would simply have to be evaluated by the courts in order to determine whether there was an actionable delay. This Member also wondered about the appropriateness of the terms "reasonable" and "diligent carrier" both of which appeared hard to determine. Another member who also did not favour the proposed definition pointed out that the notion of "reasonableness" can already be found in paragraph 1 of Article 18; thus there was no need for paragraph 2. In his opinion certain undesirable airline practices should be discouraged by regulatory actions rather than by the draft convention itself.

6.2 The Moderator summarized the discussion by pointing out that the sentiment prevailed within the Group to delete the definition. Further, there was an understanding that if a definition was to be considered, a reference would have to be made to the carrier schedule or timetable mentioned in the conditions of contract of the carrier. One Member believed that the Special Group should consider replacing the terms "measures that could reasonably be required" in Article 18 paragraph 1 by "necessary measures" so as to align the language with that found in the recommendation concerning Article 20.

7. ARTICLE 21

7.1 The Moderator recalled that two points had been made in connection with Article 21: firstly, whether paragraph 5 could be simplified; and secondly, whether the presentation of the Article could be improved. The Study Group reviewed draft Article 21 in light of the comments received. The Members concurred with the Moderator that the comments suggested that the substance of the Article appeared to be generally acceptable, with some questions as to the proposed procedure for revision of limits. The Moderator explained that the revision procedure had been based on the one for formal adoption of Annexes to the Chicago Convention and that, in comparison to corresponding provisions in other transport conventions, the proposal was considered relatively simple.

7.2 Responding to a query from a Member, the Moderator explained that the "review" referred to in Article 21 paragraph 5 a) would be administered by the Organization under the mandate of the ICAO Council. Several Members found the provision acceptable in principle; one Member wondered whether the use of SDR might provide a safeguard against inflation. To this end the Moderator explained that the use of SDR only provided a limited protection against inflation, and only with respect to the five currencies which form part of the SDR currency basket. In light of the above, the Group agreed to keep paragraph 5 as drafted by the Legal Committee.

7.3 The Study Group further examined the possibility of splitting Article 21 into several Articles, a suggestion mentioned in many of the comments which had been received from States. To this end the Moderator recalled that the Legal Committee had mandated the Secretariat to embellish the text for the purpose of editorial presentation. He explained that a meaningful splitting of Article 21 would have necessitated the renumbering of all Articles with the undesired effect that the records of previous proceedings, i.e. the Legal Committee, would no longer be useful as they indicated a different numbering of Articles. This was considered

to be a disadvantage. The Study Group shared this concern. As a result, the Group suggested the use of appropriate sub-headings for the different parts of Article 21, for further consideration by the Special Group.

8. ARTICLE 28

8.1 The Study Group turned its attention thereafter to Article 28 paragraph 2 which the Legal Committee had placed in square brackets and on which a number of States' comments had been divided on the question whether arbitration should be retained as an option in passenger cases. One Member considered paragraph 2 useful as it facilitated the use of alternative dispute settlement. Nevertheless, several Members noted that each State already had the option, subject to its national law, to permit arbitration in passenger cases even without the proposed provision. Given this premise and the current wording of the proposal, the Moderator observed that the legal situation would appear to remain unchanged irrespective of whether or not paragraph 2 was included. As a consequence, and in light of the diversions of opinions expressed by States, the Group decided to recommend to delete paragraph 2 of Article 28 on the understanding that arbitration in passenger cases (cases concerning the death or injury of a passenger) was allowed where permitted by local law.

9. ARTICLE 35 PARAGRAPH 2

9.1 In relation to this provision the Moderator recalled that the current wording departed from the original text contained in the Guadalajara Convention, with the effect that passengers were protected in the event that the actual carrier offered less favourable conditions than the contractual carrier.

9.2 One Member expressed a clear preference for the Guadalajara Convention wording over the new modified wording of the Legal Committee draft. Another Member believed that the present draft remained unproblematic as long as it was clearly understood that nothing in the draft convention prevented the carriers in question from seeking appropriate indemnification amongst themselves. In relation to this point he shared the view of another Member who had observed that Article 42 already accommodated this concern. He nevertheless would not oppose spelling out this possibility so as to alleviate any remaining concern with respect to the draft Article.

9.3 The Member who had not been in favour of the provision also had some concerns with respect to the wording "shall also affect the actual carrier", which in his view appeared to be all but clear. The Moderator suggested to replace this wording by "shall also be binding upon". The Group thereafter agreed to recommend deletion of the square brackets in paragraph 2 of Article 35, retaining the wording, as amended, with the understanding that the Special Group should consider whether a separate clause concerning a reference to indemnification among carriers should be added, bearing in mind Article 42 of the Draft Convention.

10. ARTICLE 16

10.1 The Group went on to examine Article 16 of the draft. It started its discussion with paragraph 3, a clause which had its origin in a proposal made by the Rapporteur, and which would clarify the point in time when baggage would be considered as being lost. One Member wondered about the compatibility of this provision with Article 25 paragraph 2. He and another Member believed that paragraph 3 in fact curtailed the rights of passengers, and therefore it should be deleted. Another Member stated that some carriers had

difficulties in retrieving misloaded baggage immediately; he suggested to retain the paragraph whilst shortening the time period from 21 days to 14 days. Another Member observed that the majority of States had commented positively on this provision and that therefore this paragraph should be retained, but he also supported shortening the time period as earlier suggested. This opinion was also shared by another Member. One Member was reluctant to endorse the paragraph; he saw no need for its inclusion. He believed that if this provision were to be considered, the time period should be shortened to seven days. The Study Group agreed that the Special Group should consider this matter further taking into account the views expressed, namely, that if such a clause were to be retained, the time period should be shortened.

10.2 The Group thereafter turned its attention to the problem of "mental injury" referred to in Article 16 paragraph 1 of the draft. The Moderator recalled that although this paragraph did not appear in square brackets, a large number of States and several Study Group Members had suggested that the provision be reconsidered; others recommended a clearer definition of the term, and one State wanted a linguistic change. This made it necessary for the Study Group to consider the matter.

10.3 One Member, referring to the discussion in the Legal Committee, noted that the term "mental injury" was predicated on the understanding of a recognition of existing case law, which had awarded compensation for "mental injury", when the injury was connected to a bodily injury. He feared however, that the notion was now being considered on a wider level. He suggested to consider "mental injury" only if it amounted to an illness. The Moderator briefly summarized the written contribution of another Study Group Member in which a definition of the term "mental injury" was provided as follows: "'Mental injury' means a clinically significant behavioural, psychological or cognitive dysfunction".

10.4 One Member was opposed to the inclusion of the term "mental injury". He anticipated an avalanche of new litigation, particularly in the United States, and believed that due to the technicalities of the U.S. legal system, compensation for "mental injury" likely would be possible to a much wider extent that at present in many cases. He expressed great concern, referring also to the proposed regime of strict liability for up to 100,000 SDR. Another Member referred to the original French version which used the term "lésion corporelle" which in his view also encompassed some psychic elements. He believed that "mental injury" should be compensable but that the Convention should clearly spell out what falls within and what falls outside the ambit of the term.

10.5 The Moderator observed that compensation for "mental injury" had been awarded in some jurisdictions, whereas in others it had been recognized only to some extent, if at all. He believed that any wording which intended to promote a uniform solution would be considered too far reaching for some jurisdictions whilst not sufficient for others. The comments by States indicated that an undue expansion of liability would have to be prevented. The Moderator summarized that there appeared to be three approaches; firstly, a retention of the original Warsaw Convention wording; secondly, the inclusion of the term "mental injury"; and lastly the inclusion of the term qualified by an adjective such as "serious", "provable" or "significant". The ensuing discussion revealed a variety of views within the Group. Several Members preferred not to retain a reference to "mental injury" and feared an expansion of liability absent an adequate safeguard against frivolous or non-meritorious claims. One Member wished to maintain the present wording of the draft and put forward the argument that if "mental injury" had already been considered compensable back in 1929, as far as the French understanding of the term "lésion corporelle" was concerned, a modern Convention should not preclude recovery for such injuries. He also believed that developments in modern medicine would enable to determine whether such injury had been sustained by the claimant. Another Member favoured the inclusion of the term provided it is understood that the injury had manifested itself. This Member believed that an adequate wording would have to be developed. Another Member preferred to retain the

reference to "mental injury" as long as it is medically measurable and qualifiable. He further supported the incorporation of the definition proposed by the other Study Group Member (see 10.3) .

10.6 The Moderator summarized the discussion on this point by stating that the majority of Members was of the opinion that as currently drafted, the term "mental injury" was too wide; on the other hand, if a proper way could be found to circumscribe by qualification or definition, then it might be acceptable to retain the concept. On the other hand, some Members would prefer an outright deletion of the term; one Member would leave it as drafted. The Group acknowledged that no consensus could be found on this point, and suggested that the Special Group consider the matter further, taking the above views into account.

10.7 At the end of its discussion the Study Group agreed to present the recommendation concerning Article 27 separately from the other recommendations because of the importance of this provision.

11. MEETING OF THE SPECIAL GROUP

11.1 The Moderator informed the Members that a meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System" is envisaged to take place from 14 to 18 April 1998 in Montreal and confirmed that the Study Group Members would be invited to attend this meeting. The Moderator thanked the Members for their participation and their excellent contributions. Thereafter the meeting was adjourned.

ATTACHMENT A

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

(Montreal, 26-27 January 1998)

Attendance

Dr. M.O. Folchi
President
Asociación Latino Americana de Derecho
Aeronáutico y Espacial (ALADA)
(Argentina)

Mr. G. Lauzon
General Counsel
Constitutional and International Law
Department of Justice
(Canada)

Mr. E.A. Frietsch
Counsellor
Federal Ministry of Justice
(Germany)

Mr. Olivier Tell
Chef du Bureau de Droit européen et
international en matière civile et commerciale
Ministère de la Justice
(France)

Mr. D. Horn
Assistant General Counsel
for International Law
Department of Transportation
(USA)

Mr. G.N. Tompkins, Jr.
Rosenman & Colin LLP
(New York)

ICAO Secretariat

Dr. L. Weber (Moderator)
Director, Legal Bureau

Mr. John V. Augustin
Legal Officer, Legal Bureau

Mr. A. Jakob
Associate Expert, Legal Bureau

Non-attending Members

Mr. R. Farhat
Professor of Law, Solicitor
Former Director General of Civil Aviation
(Lebanon)

Judge G. Guillaume
International Court of Justice
(France)

Mr. A.G. Mercer
Company Solicitor
Air New Zealand Limited
(New Zealand)

Mr. V. Poonoosamy
Director Legal and International Affairs
Air Mauritius
(Mauritius)

Mr. K.J.M. Walder
Legal Director
British Airways Plc
(United Kingdom)

ATTACHMENT B

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

(Montreal, 26 - 27 January 1998)

AGENDA

1. Opening of meeting
2. Approval of Agenda
3. Review of responses to State letter LE 4/51-97/65 (Continuation)
4. Any other business

ATTACHMENT C

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principle place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may, by way of exception, also be brought before one of the Courts in the territory of a State Party in which the passenger has his or her domicile or permanent residence, if the defendant has a place of business and is subject to jurisdiction in that State, provided that the claimant can show that the damage he or she sustained would not be adequately compensated in any of the four jurisdictions referred to in paragraph 1.

ATTACHMENT D

Article 27 - Jurisdiction

[UK version of para. 1

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination.]

[US version of para. 1

1. An action for damages must be brought, at the option of the plaintiff, in the teritory of one of the States Parties, either before the Court of the domicile of the carrier or of his principal 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.]

Para. 2

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which the passenger has his or her domicile or permanent residence and to or from which the actual or contractual carrier operates services for the carriage by air, either in its own right or by means of a commercial arrangement with another carrier and in which the actual or contracting carrier has premises leased or owned by the carrier itself or another carrier with which it has a commercial arrangement and from which its business of carriage by air is conducted.

ATTACHMENT E

SECRETARIAT STUDY GROUP ON THE "WARSAW SYSTEM"

(Montreal, 26 - 27 January 1998)

Draft Recommendation of the Study Group - Draft Proposal 3*bis*

As a result of its discussions at the meeting of 26-27 January 1998 which took into account, as mandated by the Council, the Draft Convention for the Unification of Certain Rules for International Carriage by Air as prepared by the 30th Session of the Legal Committee (Report, 30th Session, Attachment D), the comments of States and international organizations thereon in response to State Letter LE 4/51 - 97/65, and other relevant materials, the Study Group **considers**

(1) that the draft text of the Convention should be fully consistent with the objectives of unification, simplicity and ratifiability;

(2) that none of the options presently set out in Article 27 of the draft Convention fully meets these requirements;

(3) that it would therefore be advisable to consider alternative possibilities;

(4) that account should be taken of the fact that a majority in the Legal Committee had doubts as to the usefulness of the introduction of an additional jurisdiction and, consequently, only a narrow and conditional version of a clause for a fifth jurisdiction would have a chance of being acceptable;

the Study Group therefore **recommends** to consider the following wording for Article 27:

Article 27

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

a) in which the passenger has his or her domicile or permanent residence; and

l) to or from which the actual or contracting carrier operates services for the carriage by air, either in its own right or by means of commercial arrangement with another carrier; and

m) in which the actual or contracting carrier has premises leased or owned by the carrier itself or another carrier with which it has a commercial arrangement and from which its business of carriage by air is conducted.

3. Questions of procedure shall be governed by the law of the Court seised of the case.

– END –

WORKING PAPER

INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/6
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 5

PROPOSAL

It is proposed that for the word "and" in both the Title and line 1 of this article the word "or" should be substituted.

REASON

The reason for this proposal is that the air waybill and the cargo receipt are alternative documents. Article 4 of the draft text provides that the cargo receipt is only delivered if that delivery is requested because another means of preserving a record of the carriage to be performed is substituted for the air waybill.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/7
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 7

PROPOSAL

It is proposed that in paragraph (b) the word "cargo" shall be inserted before the word "receipts".

It is also proposed that the penultimate word "are" should be substituted by the word "is".

REASONS

The reason for the first proposal is that the reference to receipt is plainly intended to be a reference to the cargo receipt referred to in article 5 of the draft text and that expression is used elsewhere in the draft text - see for example articles 9 and 10.

The reason for the second proposal is that this word is the singular form of the verb and the reference to "the other means" earlier in the text is to a situation where one alternative means of preserving a record of the carriage by air is used.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/8
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 9

PROPOSAL

It is proposed that at the end of paragraph 3 of Article 9 there should be added -

> "It shall be the responsibility of the consignor to prove that particulars and statements relating to the cargo not appearing in the cargo receipt or in the record preserved by the other means referred to in paragraph 2 of Article 4 were communicated to the carrier."

REASON

The reason for this proposal is that imposing this burden of proof on the consignor avoids undue prejudice to carriers with respect to information not on the record.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/9
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 10

PROPOSAL

It is proposed that the word "nature" in line 1 of paragraph 2 should be moved to appear before the word "quality" in line 3.

REASON

The reason for this proposal is that in its present position there is created an unreasonable obligation on the carrier to check the contents of cargo.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/10
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 16

PROPOSAL

It is proposed that the last sentence in paragraph 1 be omitted.

It is proposed that for paragraph 2 the following should be substituted -

> "The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. Howver the carrier shall not be liable if it proves that it and its servants and agents had taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures. The carrier is also liable for damage sustained in case of destruction or loss of, or damage to, unchecked baggage, including personal items, if the damage resulted from its fault. However, in either case, the carrier is not liable if and to the extent that the damage is caused or contributed to by the inherent defect, quality or vice of the baggage."

(2 pages)

REASONS

The reason for the first proposal is that the introduction of this saving appeared in article 17.1 of the Guatemala City Protocol (1971) as a necessary counter balance for the introduction of the replacement of the basis for recovery from it being the result of an "accident" to it being the result of an "event"; a much wider expression. Whilst it is the case this draft text retains the notion that the liability of the carrier should be constricted to damage resulting from an accident it is not consistent to contemplate damage solely attributable the existing state of health of a passenger.

The reason for the second proposal is to -

a) make clearer the basis for liability as between checked and unchecked baggage and to restore the carriers defence as regards checked baggage which appears in article 20 of the Warsaw Convention, that Convention as amended at the Hague and in article V of Montreal Additional Protocol No 4, and

b) make it plain that no distinction is intended by providing for the necessary measures defence to include reference to servants and agents consistent with language in the Warsaw Convention, Guatemala City Protocol and Montreal Protocol No 4 (Article 20) and Article 18 of this draft Convention.

- END -

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/11
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 17

PROPOSAL

It is proposed that for the first two lines of paragraph 2 there is substituted the following -

> "However, the carrier is not liable if and to the extent that it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:"

REASON

The reason for this proposal is that it is unreasonable for the carrier to be burdened with liability for damage to cargo to the extent it is attributable to any of the listed causes.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/12
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 18

PROPOSAL

It is proposed that paragraph 2 be omitted and in paragraph 1 after the words "its servants" there shall be inserted the words "and agents".

REASON

The reason for the first proposal is that it is unnecessary to define "delay" given the body of precedent that already exists. In any event the definition is unsatisfactory in not meeting competing expectations from both carrier and passenger lobbies and in its reference to what is reasonable creates a problem of interpretation when compared with the saving relating to reasonableness which is already in paragraph 1.

The reason for the second proposal is that it would be consistent with other parts of the draft text that there is recognition the carrier may engage both agents as well as servants.

– END –

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SGMW/1-WP/13
7/4/98
ENGLISH ONLY

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 20

PROPOSALS

It is proposed that Article 20 be formulated in accordance with the recommendation of the Study Group as shown in attachment D to SGMW/1-WP/4 with amendments to include at the beginning -

For each passenger

and to omit from "subject to" to the end in paragraph c).

It is further proposed that there be amendment to include reference to servants and agents if such reference is retained in articles 16 and 18 of the draft Convention.

The full text therefore should appear as follows -

Revised Article 20 - Compensation in case of Death or Injury of Passengers

For each passenger the carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds 100,000 SDR if the carrier proves that

a) the carrier and his servants and agents had taken all necessary measures to avoid the damage; or

b) it was impossible for the carrier or them to take such measures; or

c) such damage was solely due to the negligence or other wrongful act or omission of a third party.

(2 pages)

REASONS

The reason for this proposal is to establish a single text which recognises advances already made by the European Community and by IATA and which eliminates options that might otherwise lead to disharmony and so enable a simpler text to be presented to a Diplomatic Conference.

The first amendment seeks to make it plain the 100 000 SDR strict liability limit is a per passenger limit.

The second amendment omits the reference to Article 35 on the basis such a reference is unnecessary.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 21

PROPOSALS

It is proposed that this article be reduced in size by the creation of a number of smaller articles. It is proposed there be articles as indicated by the following table -

Number of article	Title of article	Part of article 21 to be incorporated
21A	Liability limits	Paragraphs 1 and 2
21B	Special Drawing Right	Paragraph 4
21C	Disregard of limits by contract	Paragraph 6
21D	Court costs and expenses	Paragraph 3
21E	Review of limits	Paragraph 5

A text of articles 21A, 21B, 21C, 21D and 21E is attached for ease of reference. It is expected that a final draft of the Convention would renumber these articles sequentially and consequential renumbering for the draft Convention would be done by the ICAO Secretariat together with any consequential renumbering of references within the text of the draft Convention.

(3 pages)

It is further proposed that the liability limits of 4 150 and 17 Special Drawing Rights which have so far been left for consideration by the Diplomatic Conference should be uprated at least to take into account the effect of inflation during the years since those figures were first established, whilst leaving final determination to the Conference. Figures approximately 2.5 times higher are proposed instead, namely 10 000 and 50 Special Drawing Rights respectively.

It is proposed that the basis for liability for baggage should vary according to whether it is checked baggage or unchecked baggage. Checked baggage should revert to the per kilo basis and other baggage to the per passenger basis as established by the Warsaw Convention and that Convention as amended at the Hague. The limits should be set at 100 Special Drawing Rights per kilo for checked baggage and 1 000 Special Drawing Rights for other baggage.

The attached Clause 21A incorporates these amendments in paragraphs 2 and 3 with consequential change in paragraph 5 and 6 and in Article 21B.

It is proposed that the review of limits provision (now in clause 21E attached) should be amended so that in line 3 of paragraph 1 after "reviewed" there is added the words "by the International Civil Aviation Organisation".

Also lines 4 and 5 of paragraph (c) (now 3) of that provision should read as follows -

> "factor referred to in paragraph 1 has exceeded 30 per cent since the previous revision or since the date of entry into force of this Convention if there has been no previous revision.".

REASONS

The reason for the first proposal is that the present article 21 is too long and encompasses different ideas which can more conveniently be shown in a revised format.

The reason for the second proposal is that it is considered that a better service can be done for the Diplomatic Conference if we suggest new figures for maximum liability which at least reflect the effect of inflation over the intervening years.

The reason for the third proposal is that the UK has received representations from both an airline passengers association and from an airline that checked baggage liability should revert to a per kilo basis as per the original Warsaw Convention and that Convention as amended at the Hague. Anomalies can occur where families travel together and check a number of bags.

The reason for the fourth proposal is to make plain early on that it is ICAO which undertakes the review.

The reason for the fifth proposal is to clarify the wording at the end of the first sentence of paragraph (c) of clause 21E to make it plain that the date of entry into force of the Convention operates as a trigger for revision once only and once used can not be the trigger for a subsequent revision which must await a further 30 per cent inflation factor.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 23

PROPOSAL

It is proposed that paragraph 2 be revised to read -

> 2. No action may be brought for punitive, exemplary or other non-compensatory damages.

REASONS

The reason for this proposal is that the intention behind this paragraph to exclude non-compensatory damages claims is not fully achieved by the present text. The reference to "any action for damages" in paragraph 1 of this article is, by virtue of the present paragraph 2, to be construed as not embracing any action for non-compensatory damages and so leaves open the prospect that such claims may be brought outside the scope of the Convention.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 24

PROPOSALS

It is proposed that in line 2 of paragraph 1 the word "it" should be substituted by the words "he or she".

It is also proposed that in line 3 of paragraph 1 before the words "limits of liability" there shall be inserted the words "conditions and"

REASONS

The reason for the first proposal is that in endeavouring to provide a text with gender specific terms omitted an imbalance has been created in the use of the word "it" and the later words "he or she" and a lack of clarity whether the intention behind this paragraph to exclude non-compensatory damages claims is not fully achieved by the present text.

The reason for the second proposal is to take into account the fact that article 20 now introduces not merely a limit on liability but the conditions under which that limit might be exceeded. (See also UK comments on article 37).

– END –

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 27

PROPOSALS

It is proposed that in paragraph 2 the words "domicile or" should be omitted.

It is proposed that "ordinarily resident" be substituted for "permanent residence" and the term defined.

It is also proposed that in that paragraph the word "or" in the last line should be omitted.

It is proposed that after paragraph 3 a paragraph be added to limit liability.

The result of the above is a paragraph 2 as follows -

> 2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:
>
> a) in which the passenger is ordinarily resident, and
>
> b) to or from which the carrier operates services for the carriage by air, and
>
> c) in which the carrier has premises leased or owned by itself and from which its business of carriage by air is conducted

Provided that the maximum liability of the carrier in an action brought in a jurisdiction by virtue of this paragraph shall, notwithstanding Article 20, not exceed 250,000 Special Drawing Rights.

For the purpose of this paragraph the expression "ordinarily resident" refers to a person's lawful abode in a particular country which he or she has adopted voluntarily and for settled purposes as part of the regular normal or customary order of his or her life for the time being whether of short or long duration.

REASONS

The reason for the first proposal is that the reference to domicile introduces a concept which is capable of unacceptably wide meaning. A more realistic association with a State for the purpose of determining the value of damages must be residence.

The reason for the second proposal is to produce a criteria more capable of appreciation.

The reason for the third proposal is that mere operation by a carrier to and from a State does not justify subjecting that carrier to jurisdiction in that State. More is required and that must be the existence of a meaningful establishment.

The reason for the fourth proposal is that with the increase in the potential liability of carriers introduced by Article 20 and the creation of a fifth jurisdiction in this clause it is fair to ensure that the carrier is not exposed to an unduly high level of damages which may occur in jury award damages cases notwithstanding Article 23. The limit of 250 000 Special Drawing Rights represents the inflation adjusted limit applicable to the fifth jurisdiction provided for in the Guatemala City Protocol.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 32

PROPOSAL

It is proposed that in line 2 of paragraph 1 for the word "shall" there shall be substituted the words "shall, subject to paragraph 4 of Article 17".

REASON

The reason for this proposal is to clarify the relationship between this article and article 17(4).

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 33

PROPOSAL

It is proposed that in line 2 for the words "an agreement for carriage" there shall be substituted the words "a contract of carriage".

REASON

The reason for this proposal is to establish a consistency of language with the rest of the Convention where the term used is "contract of carriage"; see for example articles 3(5), 8 and 43.

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(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 35

PROPOSAL

It is proposed that the words in square brackets at the end of paragraph 2 be omitted.

REASON

The reason for this proposal is to avoid the development of a situation where a charterer might impose liability on an operating carrier without the agreement or knowledge of that carrier. It is anticipated that the inclusion of such a provision might inhibit carriers assisting the passengers of other carriers, even in an emergency, for fear of accepting unknown liabilities.

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(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 37

PROPOSAL

It is proposed that the words "Articles 20 and 21 of" be omitted.

It is also proposed that in line 3 before the words "limits of liability" there shall be inserted the words "conditions and".

REASON

The reason for the first proposal is that it is suggested these references are not correct and, in any event, it is appropriate to avoid any uncertainty as to the relationship between this Article and Article 24 in their application to servants and agents.

The reason for the second proposal is to take into account the fact that article 20 now introduces not merely a limit on liability but the conditions under which a limit might be exceeded.

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COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

ARTICLE 38

PROPOSAL

It is proposed that for the words "the carrier concerned" at the end of the article there shall be substituted the words "that person".

REASON

The reason for this is that in adopting language to eliminate gender references this article now refers only to limits applicable to the carriers and fails to address adequately limits applicable to servants or agents. The use of the term "person" would match the use of that term in line 4.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

COMMENTS ON THE DRAFT TEXT APPROVED BY THE 30TH SESSION OF THE ICAO LEGAL COMMITTEE

(Presented by the U.K.)

FINAL CLAUSES

PROPOSAL

It is proposed that the attached shall comprise the final clauses to the draft Convention.

(1 page)

CHAPTER VII

FINAL CLAUSES

ARTICLE 49 - RATIFICATION

1. This Convention shall be open for signature in Montreal on xxxx *(insert end date of conference)* by States participating in the International Diplomatic Conference on Air Carrier Liability *(or insert other title of the intended diplomatic conference)* held at Montreal from xxxx *(insert first date of conference)* to xxxx *(insert end date of conference)*. After *(insert end date of conference)* the Convention shall be open to all States for signature at the Headquarters of the International Civil Aviation Organisation in Montreal until it enters into force in accordance with paragraph 3 of this Article. Any State which does not sign this Convention may accept, approve of or accede to it at any time.

2. This Convention shall be subject to ratification, acceptance, approval or accession by States. Instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General to the International Civil Aviation Organisation, who is hereby designated the Depositary.

4. For other States, this Convention shall enter into force sixty days following the date of deposit of the instrument of ratification, acceptance, approval or accession PROVIDED THAT the Depositary shall not accept the deposit of such an instrument from any State referred to in paragraph 4 of Article 51 unless he is satisfied that State has given the requisite notices of denunciation referred to in that paragraph.

5. The Depositary shall promptly notify all signatories and States parties of -

a. each signature of this Convention and date thereof,

b. each deposit of an instrument of ratification, acceptance, approval or accession and date thereof,

c. the date of entry into force of this Convention,

d. any denunciation under Article 50,

e. the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession,

f. the date when the State Parties to this Convention comprise not less than [40%] of the total scheduled air traffic of the airlines of the member States of the International Civil Aviation Organisation for the year 1998,

g. the date he gives the notice of denunciation referred to in paragraph 2 of Article 51.

ARTICLE 50 - DENUNCIATION

1. Any State Party may denounce this Convention by written notification to the Depositary.

2. Denunciation shall take effect one hundred and eighty days following the date on which notification is received by the Depositary.

ARTICLE 51 - RELATIONSHIP WITH OTHER WARSAW CONVENTION INSTRUMENTS

1. This Convention shall prevail over any rules which apply to international carriage between States Parties to this Convention or within the territory of any single State Party to this Convention where there is an agreed stopping place within the territory of another State by virtue of those States commonly being Party to -

a) the International Convention for the Unification of certain rules relating to International Carriage by Air done at Warsaw on October 12 1929 (hereinafter called the Warsaw Convention),

b) the Protocol to amend the Warsaw Convention done at the Hague on 28 September 1955 (hereinafter called the Hague Protocol),

c) the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier done at Guadalajara on 18 September 1961 (hereinafter called the Guadalajara Convention),

d) the Protocol to amend the Warsaw Convention as amended by the Hague Protocol done at Guatemala City on 8 March 1971 (hereinafter called the Guatemala City Protocol),

e) Additional Protocols Nos. 1 to 4 to amend the Warsaw Convention, the Warsaw Convention as amended by the Hague Protocol or the Warsaw Convention as amended by both the Hague Protocol and the Guatemala City Protocol done at Montreal on 25 September 1975 (hereinafter called the Montreal Additional Protocols),

Provided that nothing in this paragraph shall apply where, in the case of international carriage within the territory of a State Party to this Convention where there is an agreed stopping place in the territory of another State, that other State is not a Party to this Convention but in common with that State Party to this Convention is a Party to one or more of the instruments referred to in sub-paragraphs (a) to (e) above.

2. No less than sixty days after the deposit of the [fortieth] instrument of ratification, acceptance, approval or accession or such greater number of State Parties as is necessary to ensure that the State Parties represent at least [40%] of the total international scheduled air traffic of the airlines of the member States of the International Civil Aviation Organisation in the year 1998, each of the State Parties shall give the requisite notice to denounce the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and each of the Montreal Additional Protocols insofar as it is a Party to one or more of those instruments.

3. The Depositary is hereby deemed to be authorised to act on behalf of the State Parties referred to in paragraph 2 of this Article to serve the notices of denunciation there referred to.

4. Any State wishing to become a party to this Convention after the date of service of the notices of denunciation referred to in paragraph 2 of this Article shall first give the requisite notice to denounce the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and each of the Montreal Additional Protocols insofar as it is a Party to one or more of those instruments, and shall demonstrate to the Depositary that it has done so when depositing its instrument of ratification, acceptance or approval of, or accession to, this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, having been duly authorised, have signed this Convention.

DONE at Montreal on the xx day of xxxx of the year One thousand nine hundred and xxxx in four authentic texts in English, French, Russian and Spanish languages. In the case of inconsistency, the text in the English language shall prevail. This Convention shall remain deposited in the archives of the International Civil Aviation Organisation, and certified copies thereof shall be transmitted by the Depositary to all States Parties to the Warsaw Convention, the Hague Protocol, the Guadalajara Convention, the Guatemala City Protocol and the Montreal Additional Protocols.

SIGNATURES

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

(Presented by France)

ARTICLE 27

It is proposed that in Article 27, an optional clause would be inserted for States which would like to adopt it. This alternative would apply to air carriers for the State Party and might be binding on other States Parties.

The States which consider that they could benefit from the introduction of this option and of the fifth jurisdiction could accept it, and the other States which do not accept it, would be able to avoid it for their air carriers.

This proposal intends to constitute an acceptable compromise.

The full article should appear as follows :

Article 27 - Competent jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has its principal place of business, or has an establishment by which the contract has been made, or before the Court having jurisdiction at the place of destination.

2. **Subject to the provision of paragraph 3,** in respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentionned in paragraph 1 of this Article or in the territory of a State Party :

a) in which the passenger has his or her domicile; and

b) to or from which the actual or contracting carrier operates services for the carriage by air; and

(2 pages)

c) in which the actual or contracting carrier has premises leased or owned by the carrier itself and from which its business of carriage by air is conducted.

3. At the time of ratification, adherence or accession, each State Party shall declare which the proceeding paragraph 2 shall be applicable to it and its carrier. All declaration made under this paragraph shall be binding on all other States Parties and the depositary shall notify all State Parties of such declarations.

4. Questions of procedure shall be governed by the law of the Court seized of the case.

– END –

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

REVISED DRAFT OF ARTICLE 21 PARAGRAPHS 5 AND 6

(Presented by the Secretariat)

Article 21

5. (a) Without prejudice to the provisions of Article 21 paragraph 6 of this Convention and subject to sub-paragraph (b) below, the limits of liability prescribed in Article 20 and in this Article shall be reviewed by the International Civil Aviation Organization at five year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 4(a) of this Article.

(b) If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, such conclusion shall be transmitted to the Council of ICAO, together with a report on the review. The Council, after consideration of the report and conclusions, may propose a revision of the limits of liability prescribed in Article 20 and in this Article to all States Parties for adoption. If a proposed revision has not been objected to by five or more States Parties by means of written notification to the Council within ninety days from the date of notification of the revision by the Council, it shall be deemed to have been adopted, and shall enter into force six months thereafter for States Parties not having expressly objected thereto. States Parties having expressly objected thereto may subsequently express their consent to be bound. The Council shall immediately notify all States Parties of the coming into force of the revision.

(c) (unchanged)

6. A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those prescribed in Article 20 and in this Article, or to no limits of liability whatsoever.

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SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

REVISED DRAFT OF ARTICLES 16, 20 AND 27

(Presented by the Chairman)

Article 16 - Death and Injury of Passengers - Damage to Baggage

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable to the extent the death or injury resulted from the state of health of the passenger.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking or during any period within which the baggage was in the charge of the carrier. However, the carrier is not liable if the damage resulted solely from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

Article 20 - Compensation in case of Death or Injury of Passengers

For each passenger the carrier shall not be liable for damage arising under paragraph 1 of Article 16 which exceeds 100,000 SDR if the carrier proves that:

a) the carrier and his servants and agents had taken all necessary measures to avoid the damage; or

b) it was impossible for the carrier or them to take such measures; or

c) such damage was solely due to an act or omission of a third party.

(2 pages)

Article 27 - Jurisdiction

1. An action for damages must be brought, at the option of the plaintiff, in the territory of one of the States Parties, either before the Court of the domicile of the carrier or of its principal place of business, or where it has a place of business through which the contract has been made or before the Court at the place of destination.

2. In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party:

a) in which at the time of the accident the passenger has his or her principal residence; and

b) to or from which the carrier actually or contractually operates services for the carriage by air; and

c) in which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement.

3. In this Article, "commercial agreement" means an agreement, other than an agency agreement, made between carriers and relating to the provision of their services for carriage by air.

4. Questions of procedure shall be governed by the law of the Court seised of the case.

– END –

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

REVISED DRAFT ARTICLE 21

(Presented by the Secretariat)

Article 21 A - Limits of Liability

1. In the case of damage caused by delay as specified in Article 18 in the carriage of persons the liability of the carrier for each passenger is limited to [4 150][1] Special Drawing Rights.

2. In the carriage of baggage the liability of the carrier in the case of destruction, loss, damage or delay is limited to [1 000][1] Special Drawing Rights for each passenger unless the passenger has made, at the time when checked baggage 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 it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of [17][2] Special Drawing Rights per kilogramme, unless the 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 it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining 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 cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1, 2 and 3 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the

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[1] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

[2] This figure is taken from Montreal Protocol No. 4 and is used for illustrative purposes only.

(3 pages)

case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 20 and 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, including interest. 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.

Article 21 B - Conversion of Monetary Units

1. The sums mentioned in terms of Special Drawing Right in this Convention shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of valuation applied by the International Monetary Fund, in effect at the date of the judgment, for its operations and transactions. The value of a national currency, in terms of the Special Drawing Right, of a State Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that State.

2. Nevertheless, those States which are not Members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this Article may, at the time of ratification or accession or at any time thereafter, declare that the limit of liability of the carrier prescribed in Article 20 is fixed at a sum of [1 500 000][3] monetary units per passenger in judicial proceedings in their territories: [62 500][3] monetary units per passenger with respect to paragraph 1 of Article 21 A; [15 000][3] monetary units per passenger with respect to paragraph 2 of Article 21 A; and [250][3] monetary units per kilogramme with respect to paragraph 3 of Article 21 A. This monetary unit corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. These sums may be converted into the national currency concerned in round figures. The conversion of these sums into national currency shall be made according to the law of the State concerned.

3. The calculation mentioned in the last sentence of paragraph 1 of this Article and the conversion method mentioned in paragraph 2 of this Article shall be made in such manner as to express in the national currency of the State Party as far as possible the same real value for the amounts in Articles 20 and 21 as would result from the application of the first three sentences of paragraph 1 of this Article. States Parties shall communicate to the depositary the manner of calculation pursuant to paragraph 1 of this Article, or the result of the conversion in paragraph 2 of this Article as the case may be, when depositing an instrument of ratification, acceptance, approval of or accession to this Convention and whenever there is a change in either.

[3] This figure is taken from Additional Protocol No. 3 and is used for illustrative purposes only.

Article 21 C - Review of Limits

1. Without prejudice to the provisions of Article 21 D of this Convention and subject to paragraph 2 below, the limits of liability prescribed in Article 20 and in this Article shall be reviewed by the Council of the International Civil Aviation Organization at five-year intervals, the first such review to take place at the end of the fifth year following the date of entry into force of this Convention, by an inflation factor which corresponds to the accumulated rate of inflation since the previous revision or in the first instance since the date of entry into force of the Convention. The measure of the rate of inflation to be used in determining the inflation factor shall be the weighted average of the annual rates of increase or decrease in the Consumer Price Indices of the States whose currencies comprise the Special Drawing Right mentioned in paragraph 1 of Article 21 B.

2. If the review referred to in the preceding paragraph concludes that the inflation factor has exceeded 10 per cent, the Council may, by a two-thirds majority at a meeting called for that purpose, adopt a revision of the limits of liability. Any such revision shall become effective six months after its submission to the States Parties, for States Parties not having registered their disapproval with the Council. The Council shall immediately notify all States Parties of the coming into force of the revision. If within three months after its submission to the States Parties a majority of the States Parties register their disapproval, the revision shall not become effective and the Council may refer the matter to a meeting of the States Parties.

3. Notwithstanding paragraph 1 of this Article, the procedure referred to in paragraph 2 of this Article shall be applied at any time provided that one-third of the States Parties express a desire to that effect and upon condition that the inflation factor referred to in paragraph 1 has exceeded 30 per cent since the date of entry into force of this Convention or since the date of the previous revision. Subsequent reviews using the procedure described in paragraph 1 of this Article will take place at five-year intervals starting at the end of the fifth year following the date of the reviews under the present paragraph.

Article 21 D - Stipulation on Limits

A carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever.

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INTERNATIONAL CIVIL AVIATION ORGANIZATION

SPECIAL GROUP ON THE MODERNIZATION AND CONSOLIDATION OF THE "WARSAW SYSTEM" (SGMW)

(Montreal, 14 - 18 April 1998)

REVISED DRAFT OF ARTICLE 45

(Presented by the Secretariat)

Article 45 – Insurance

States Parties shall require their carriers to maintain adequate insurance covering their liability under this Convention. A carrier may be required by the State into which it operates to furnish evidence that this requirement has been met.

– END –

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