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MODERNIZATION OF THE WARSAW SYSTEM— MONTREAL 1999

J. C. BATRA*

EVER SINCE the 1929 Warsaw Convention came into force on February 13, 1933,¹ it has been a subject of criticism and amendments. Undoubtedly the Warsaw Convention is widely accepted as a private international law treaty, with 147 states party to it as of June 30, 1999.² The primary objective of the Warsaw Convention was to establish uniform rules governing the rights and responsibilities of international air carriers on the one hand, and of passengers, consignors and consignees of goods on the other, in countries party to the Convention.³

I. THE 1929 WARSAW CONVENTION

A. MONETARY LIMITATION

The Warsaw Convention has been best known for its imposition of severe monetary limitations on the amount of the carrier's liability⁴ in order to help the international civil aviation industry grow. If a passenger's dies or is injured, the liability limit is 125,000 gold francs (about US\$83,000) except where a special contract fixes a higher liability.⁵ For loss or damage to registered baggage or cargo, the liability is 250 gold francs per kilogram, except where a special declared value is made at the time of consigning and a supplementary sum is paid as required

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¹ 137 WTS 11, 3145. Also referred Treaty Series No.11 (1933). 4284.

² See *Status of Certain International Air Law Instruments*, ICAO JOURNAL, July-August 1999, at 33.

³ See H. DRION, *LIMITATION OF LIABILITIES IN INTERNATIONAL AIR LAW* 33 (1954).

⁴ See L.C. HARRIS, *LIABILITY IN INTERNATIONAL CARRIERS BY AIR* 2 (1989).

⁵ See Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 12, 1929, art. 22(1) [hereinafter *The Warsaw Convention*].

by the carrier.⁶ With regard to personal hand baggage, the limit is 5,000 gold francs per passenger.⁷

If the carrier accepts a passenger without a passenger ticket, or accepts baggage or cargo without issuing a baggage check or airway bill, the Carrier is not entitled to avail itself of the provision, which excludes or limits its liability.⁸ The carrier will be subject to full liability if the damage was caused by the 'wilful misconduct' of the Carrier or its servants and agents.

The limited liability provisions of the Warsaw Convention, while one of its best strengths, have also been its greatest weakness. The Warsaw Convention has been the subject of severe criticism due to its liability "cap," and the United States government was not satisfied with the low liability limits.

B. THE HAGUE PROTOCOL

After the Second World War the European nations also began criticizing the Convention. Consequently, the International Civil Aviation Organization⁹ ("ICAO") convened a Diplomatic Conference in 1955 at The Hague to amend and increase the liability limits. The 1955 Hague Protocol increased the liability limit to 250,000 gold francs for the carriage of persons and to 250 gold francs per kilogramme of registered baggage and of cargo, and retained the 5,000 gold francs per passenger limit for personal handbag.¹⁰

The new Article 25A stipulated that this limitation on liability will not apply, if the damage resulted from an act or omission of a carrier's servant or agent done with intent to cause damage or recklessly and with knowledge that damage would practically result.¹¹ Article 22(G) also was amended whereby it was provided that the Plaintiff may recover costs toward litigation expenses. The 1955 Hague Protocol was the first amendment to the Warsaw Convention dealing with legal and practical problems and had become necessary due to the development and expansion of air travel industry.

⁶ See *id.*, art. 22(2).

⁷ See *id.*, art. 22(3).

⁸ See *id.*, art. 3(2), 4, and 9.

⁹ Established under the Convention on International Civil Aviation, Signed at Chicago, Dec. 7, 1944.

¹⁰ See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, Sept. 28, 1955, art. X, XI [hereinafter The Hague Protocol].

¹¹ See *id.*, art. XIV.

C. THE MONTREAL AGREEMENT OF 1966

The United States was not satisfied with the 1955 Hague Protocol and refused to ratify it because of its very low liability limit. The U.S. said the increase in compensation still fell short because of increased litigation costs, attorney fees, and inflation. They gave notice to denunciate the Warsaw Convention on December 15, 1965 and to opt out of it as is provided under the Convention.¹² But within six months, when the denunciation would have taken effect, the Director General of the International Air Transport Association, Sir William Heldred, took immediate action and persuaded IATA carriers to enter into bilateral agreements with the United States Civil Aeronautic Board to raise the liability limits to US\$75,000 for American citizens. Because of the concerted efforts of IATA and Air Carrier operators, the American threat of boycott ended. The airlines operating to and from the U.S. entered into voluntary agreements with the U.S. Civil Aeronautical Board at Montreal in May 1966 and formally increased the liability limits to US\$75,000, including the legal cost for death or injury to a passenger. It also waived the Article 29 defense and accepted the concept of absolute liability. The Montreal Agreement is neither a Convention nor a Protocol to the Warsaw Convention, linking it with the international private air law. Instead, it is a bilateral agreement between the United States and international Air Carriers operating from or via the United States and concerns only passengers who are U.S. citizens.

D. THE GUATEMALA CITY PROTOCOL OF 1971

Although the 1966 Montreal Agreement kept the United States within the Warsaw Convention system, it was not considered the ideal international law solution to the problems of private air law. On the ICAO's initiative, the Warsaw Convention was amended once again in 1971 by the Guatemala City Protocol.¹³ It has, however, failed to muster the thirteen votes required to put it into force. The Guatemala City Protocol of 1971 also seeks to increase the liability limit for a passenger's injury or death to 1,500,000 gold francs or to US\$100,000, and for delays

¹² See The Warsaw Convention, art. 39.

¹³ See Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage By Air, as Amended, Mar. 8, 1971, art. XX. (Guatemala City Protocol).

to 62,500 gold francs.¹⁴ The liability limit for damage to baggage is fixed at 15,000 gold franc for each passengers.

E. THE FOUR ADDITIONAL MONTREAL PROTOCOLS, 1975

Due to serious monetary repercussions and unstable gold prices associated with the International Monetary Fund's fixing of gold prices in US dollars, the revision of the liability limits and further amendments to the 1929 Warsaw Convention became necessary. The Franc Poincare, which was the currency of the Warsaw Convention in 1929, was abandoned as a currency in France in 1937,¹⁵ but the two Protocol's amending the Warsaw Convention retained it as the measure of damages. Then, in 1944, the relationship between the national currencies and gold was altered by the Bretton Woods Conference,¹⁶ which created the International Monetary Fund and established Special Drawing Rights as a unit of exchange.¹⁷ So it became necessary to amend the Warsaw Convention again, this time by Four Additional Protocols in 1975, which incorporated Special Drawing Rights as a unit of exchange for the Poincare Franc.

The last decade of the twentieth century witnessed several attempts to modernize the Warsaw System and the air carriers liability. National level initiatives, coupled with regional and international initiatives, helped modernize the Warsaw system. Japan, Australia, and Italy took unilateral measures to make the air carrier fully liable in international transportation in the equal footing of their respective domestic carriers. All Nippon Airways voluntary declared that from November 1992 on the Warsaw System limits would be waived. The Australian Government also increased the statutory liability levels in its domestic, as well as international, carriers to A\$500,000 per passenger. The Commission of European Union (EU) presented a proposal in March 1996 for a Council Regulation on Air Carrier liability. It suggested a strict liability of 100,00 ECU and removal of any liability limits with regard to fault based liability.¹⁸

¹⁴ See *id.*, art. VIII.

¹⁵ See GEORGETTE MILLER, LIABILITY IN INTERNATIONAL AIR TRANSPORT 177 (1977).

¹⁶ See *id.*

¹⁷ See LLOYD'S ANALIA LAW, March 4, 1996.

¹⁸ See Harold Caplan, *The European Proposal on Compensation for Airline Passenger Death and Injury—Bold, Imaginative, and Flawed*, LLOYD'S AVIATION LAW, March 1, 1996, at 5.

The IATA adopted an Inter-Carrier Agreement (ICA) at its 51st Annual General Meeting held on October 30, 1995, at Kuala Lumpur. The ICA provided for a single universally applicable scheme with specific limits of liability and standards for the recovery of actual proven damages in accordance with the law of the passenger's domicile. It also suggested the waiver of the Article 21 defenses. But these initiatives are not an all-encompassing solution to the dilemma of modernizing the Warsaw system,¹⁹ so the ICAO now has the task of modernizing the Warsaw System on Air Carrier liability.

The ICAO Council "established a Secretariat Study Group to assist ICAO's Legal Bureau in developing a framework for a modernized regime of air carrier liability."²⁰ The ICAO Council requested that the Study Group carry out a socio-economic analysis on Air Carrier liability limits in coordination with the IATA. On November 26, 1997, the ICAO also established a special group headed by Vijay Ponuswamy (Mauritius) on the modernization and consolidation of the Warsaw System. The group submitted the Draft Convention before the Diplomatic Conference held in Montreal in May 1999.

The Convention for the Unification of Certain Rules for International Carriage by Air, signed at Montreal on May 28, 1999,²¹ is a new, comprehensive international treaty of private international air law that replaces the seventy year old Warsaw Convention. It is designed to meet the challenges of the advancement of international air law at the dawn of the new millennium as visualized by Assad Kotaite, President of the International Civil Aviation Organization Council (ICAO).²²

II. ICAO'S INITIATIVES

A. SOCIO-ECONOMIC STUDY

In view of the rapid changes in the world's socio-economic conditions since the Warsaw Convention was first enacted, and the unsatisfactory situation that subsisted with regard to liability limits of the air carrier, the ICAO Council requested the Secretariat to carry out a socio-economic analysis on Air Carrier liability.

¹⁹ See Ludwig Welier and Arie Jakob, *Reforming the Warsaw System*, 21 AIR AND SPACE LAW 175 (1996).

²⁰ See ICAO, Doc 9693-LC/190 (1997), at 1 [hereinafter Doc 9693-LC].

²¹ See ICAO DC W Doc. No.57 (May 28, 1999).

²² See Doc 9693-LC, *supra* note 20, at 1 (Opening Address, Dr. Assad Kotaite, ICAO Legal Committee 30th Session).

ity limits with the International Air Transport Association (IATA) in June 1994.²³ The ICAO Assembly directed the Council to take steps to modernize the "Warsaw System." Accordingly, the Secretariat Study Group was established to assist ICAO's Legal Bureau in developing a framework for a modernized regime of air carrier liability.

The primary objective of the study was to evaluate critically the present problems associated with the current air carrier liability regime. The study primarily focused on determining the adequacy of the current liability limits and of proposed limits, as well as the costs providing higher limits would have for all air carriers.²⁴ A questionnaire was sent to each of the scheduled Air Carrier members of IATA. The questionnaire asked their view about the adequacy of the current liability limits applicable to passenger baggage and cargo. Seventy-two out of 184 Contracting States of the ICAO, or forty per cent, replied to the questionnaire. Seventy two percent, 52 states, expressed their dissatisfaction with the liability limits. These 28 states represent 80 per cent of the total international scheduled passengers and passenger kilometres during the year 1994.²⁵ The study also revealed that the provision requiring increased insurance coverage would most likely be under US\$2 per round trip to the Air Carrier if the liability limits are revised. Forty-four states favored the adoption of a new instrument, as opposed to a supplemental compensation scheme or Inter-Carrier arrangement, as the preferred mechanism for achieving any new limits.²⁶ The Study Group included renowned experts in the field of private international air law from all the four continents. But these experts represented developed countries such as Germany, the United States, Canada, New Zealand, and France, and not developing countries. In fact, only two experts from developing countries, one from Asia and one from Africa, were included. No Latin American countries were represented in the Study Group. Instead, the Study Group used the results of the ICAO's socio-economic analysis; the Air Transport Committee's (ATC) comments on it; and related work undertaken by IATA, including the IATA Intercarrier Agreement Passengers' Liability, as the basis for their discussions and decisions.²⁷ The group con-

²³ See *id.*

²⁴ See Weber and Jakob, *supra* note 19, at 175-181.

²⁵ See *id.* at 178.

²⁶ See ICAO, Doc.AT-WP/1769-1995.

²⁷ See Weber and Jakob, *supra* note 19, at 179.

cluded that the current Warsaw liability limits are not acceptable worldwide because of the diversity of socio-economic circumstances and variance in the cost of living in different parts of the world. Any internationally mandated limit would almost certainly encourage prospective claimants to attempt to circumvent and break these limits through judicial proceedings. The group decided that the following steps would alleviate these problems:

- (a) a two-tier system with respect to death and injury of passengers' liability limit should be instituted. The mechanism would provide for strict liability of the Air carrier up to 100,000 SDR (Special Drawing Rights—monetary unit fixed by IMF) in the first tier, and for fault-based liability without limitation in the second tier;
- (b) with regard to damage to baggage and cargo, the liability suggested was per passenger instead of per kilogram. The question of 'hardship payment' was left to legislative action if the individual states;
- (c) the addition of an "escalator clause" to update the mechanism for the limits of liability in the future to offset the effect of inflation and other changes of economic nature; and
- (d) a "fifth jurisdiction" should be created.

This additional forum would be based on the passenger's domicile. The Study Group unanimously favored the adoption of a new legal instrument that should consolidate all provisions and useful elements of the Warsaw System in order to modernize the regime encompassing liability for passengers, baggage, and cargo. It developed an Action Plan²⁸ as follows:

1. The action should be taken to develop a new international instrument to consolidate and modernize the Warsaw Convention system.
2. That such a new instrument should in particular provide for:
 - (a) a two tier liability regime for recoverable compensatory damage in case of injury or death of passenger comprising:
 - i. Liability of the Air Carrier up to 100,000 SDR irrespective of Carrier's fault.

²⁸ See ICAO, Doc. C-WP/10688 (1997), at 4-92.

- 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) Review 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 and Montreal Protocol, 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 new instrument be developed by the Legal Bureau with the assistance of the Study Group and that a Reporter be appointed by the Chairman of the Legal Committee to review and revise the draft and present a report therein.
 5. That the draft instrument together with the Reporter'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 possible 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 urges the states that have not done so to ratify the Montreal Protocol 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.

The Council considered the recommendations of the Secretariat on March 14, 1996, and endorsed the procedural recommendations. Then they referred the matter to the legal committee as recommended.

The Legal Bureau responded to the Council's request and presented a draft of the new instrument to the Secretariat Study Group at its second meeting held on June 10-12, 1996, in Mon-

treating. The Group reviewed and revised the draft and presented it to the Council at its 149th Session, Autumn 1996. The Council forwarded it to the ICAO Legal Committee, which approved the text of the draft in its 30th session Montreal during April 28 – May 9, 1997.²⁹ On November 26, 1997, the ICAO Council decided to establish the Special Group for the modernization and consolidation of the Warsaw System to supplement the work of Legal Committee. The Special Group, chaired by Vijay Poonosamy (Mauritius), met on April 14-18, 1998, in Montreal and submitted its report to the President of ICAO Council.³⁰ The “Draft Convention for the Unification of Certain Rules for International Carriage by Air” was placed before the Diplomatic Conference held in Montreal during May 10-28, 1999. This resulted in the historic “Montreal Convention for the Unification of Certain Rules for International Carriage by Air,” which was signed on May 28, 1999.³¹ The following highlights the salient features of this new international treaty with regard to the private international air law appreciable to the international air transportation.

III. 1999 MONTREAL CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR

A. RETENTION OF STRUCTURE OF THE WARSAW CONVENTION

The Convention preserves the structure of the ‘Warsaw Convention’ while consolidating the provisions of existing legal instruments. The preamble to the Convention stipulates:

- 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

²⁹ See ICAO, Annual Report to the Council 1996 (1997), at 11 (ICAO Doc 9685).

³⁰ See SGMW1/1A 5-1/1998.

³¹ See ICAO, DCW Doc.577 (May 28, 1999).

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; in accordance with the principles and objections of the Convention on International Civil Aviation done at Chicago on 7 December 1944.
- 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 interests. . . .³²

B. TWO-TIER LIABILITY SYSTEM

The Convention creates a two-tier liability system. The compensation in case of death or injury of a passenger for damages arising under paragraph 1 of Article 17 not exceeding 100,000 SDR is strictly payable by the air carriers.³³ If the claimant proves that the damages caused are due to the negligence or other wrongful act or omission of the carrier or its servants/agents, then the air carrier is liable to make full compensation without any limitation (i.e., exceeding 100,000 SDR).³⁴ Under the Warsaw Convention it was limited only if 125,000 gold francs (i.e., US\$8,200).³⁵

C. LIMITS OF LIABILITY IN RELATION TO DELAY, BAGGAGE AND CARGO

The Convention fixed a limit for compensation in the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 SDR.³⁶ In cases involving the carriage of baggage, the liability of the carrier for destruction, loss, damage, or delay is limited to 1,000 SDR for each passenger, unless the passenger has made a special declaration at the time when the checked baggage was handed over to the carrier. This special declaration requires the passenger to request delivery at the destination and pay a supplementary sum in the amount required. In that case

³² Montreal Convention for the Unification of Certain Rules for International Carriage, May 28, 1999, Preamble [hereinafter *The Montreal Convention*].

³³ *See id.*, art. 17(1), 21.

³⁴ *See id.*, art. 21.

³⁵ *See* The Warsaw Convention, art. 22(1).

³⁶ *See* The Montreal Convention, art. 22(1).

the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passengers' actual interest in delivery at destination.³⁷

In cases involving the carriages of cargo, the liability of the carrier in the case of destruction, loss, damage, or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor made a special declaration of interest when the package was handed over to the carrier, requesting delivery at destination and paid a supplementary sum in the amount required. 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 consigners actual interest in delivery at destination.³⁸

D. EXONERATION OF LIABILITY

If the carrier proves that the damage was caused or contributed by the negligence or other wrongful act or omission of the person claiming compensation, or the person from where he or she desires his or her rights, the carrier shall be wholly or partly exonerated from its liability 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 is also 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.³⁹

E. REVIEW OF LIMITS

The Convention presents a built-in mechanism to renew the limits with an escalation clause. The procedure is designed to ensure that the liability limits are revised automatically due to changes in economic condition and devaluation, due to inflation, etc., at five-year intervals. The first renewal will take place at the end of the fifth year following the date the Convention is entered into force.⁴⁰ If the Convention does not enter into force within five years of the date that it was first open for signature, the renewal will take place within the first year it is entered into

³⁷ *See id.*, art. 22(2).

³⁸ *See id.*, art. 22(3).

³⁹ *See id.*, art. 20.

⁴⁰ *See id.*, art. 24.

force, and calculated by reference to an inflation factor that 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 weighted with the average of the annual rates of increase or decrease in the Consumer Price Indices of the states whose currencies comprise the SDR. Subsequent reviews will take place at five-year intervals at the end of the fifth year following the date of the review.⁴¹

F. OPTIONAL CLAUSE

The Convention provides an option to the air carrier. It stipulates 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."⁴²

G. JURISDICTION – THE "FIFTH FORUM"

The Convention has provided an additional fifth forum for damages resulting from the death or injury of a passenger.⁴³ Besides the court of domicile of the carrier, its principle place of business, a place of business through which the contract had been made, or before the court at the place of destination, an action for damages may be brought in the territory of a state in which at the time of the accident the passenger has his or her principal and permanent residence, and to or from which the carrier operates services for the carriage by air, either on its own aircraft, or on another carrier's aircraft pursuant to a communal agreement. This additional forum may prove a gold mine for the lawyers rather than for the claimants, because a court that is the least concerned with the cause of action, or even where no evidence, witness, or record relating the passenger's transportation, accidental injury, or death etc., is available in that forum, may ultimately decline to entertain the clauses as forum non-convenience. This provision is contrary to the usual procedural law in determining the jurisdiction of a court in a compensation case.

⁴¹ See *id.*

⁴² See The Montreal Convention, art. 25.

⁴³ See *id.*, art. 33.

IV. SUMMARY

The Montreal Convention is a historic private international air law treaty, which has replaced six different legal instruments collectively known as the Warsaw System into a single legal instrument.⁴⁴ According to Dr. Kenneth Rattray (Jamaica), President of the Conference, "The Convention will contribute immensely to rationalize what had become a fragmented and ineffective method of dealing globally with liability proceedings in cases of accidents. In developing this new Montreal Convention, we are able to reach a delicate balance between the needs and interests of all partners in international civil aviation States, the travelling public, Air Carriers and the transport industry."⁴⁵

The major feature of the new legal instrument is the concept of unlimited liability. The Warsaw Convention set a limit of 125,000 gold francs (approximately US\$8,300) in case of death or injury to passengers. The Montreal Convention, however, introduces a two-tier system. The first tier includes strict liability up to 100,000 Special Drawing Rights (SDR) (approximately US\$135,000) irrespective of a carrier's fault. The second tier is based on principles of fault of a carrier and has no limit of liability. The Montreal Convention also includes the following new elements:⁴⁶

1. In cases of aircraft accidents, air carriers are called upon to provide advance payments without delay to assist entitled persons in meeting immediate economic needs with the amount of this initial payment subject to natural law and deductible from the final settlement;
2. The air carriers must submit proof of insurance, thereby ensuring the availability of financial resources in cases of automatic payments or litigation;
3. Legal action for damages resulting from the death or injury of a passenger may be filed in the country where, at the time of the accident, the passenger had his or her principal and permanent residence, subject to certain conditions;
4. Facilitation in the recovery of damages without the need for lengthy litigation; and

⁴⁴ See ICAO, Doc. P10-05/99.

⁴⁵ *Id.*

⁴⁶ See ICAO, Doc.P10 06/99.

5. Simplification and modernization of documentation related to passengers, baggage, and cargo.

V. OUTSTANDING ISSUES

A. BURDEN OF PROOF

The 1999 Montreal Convention signed at Montreal on May 28, 1999, has still left many outstanding issues unanswered. The question as to who will have the burden of proving the air carrier's negligence, which is necessary to claim full compensation without any limitation, has not been properly answered. It is impossible for the passenger or the claimants beneficiaries to discharge this burden, especially in case of air disasters because the inquiry reports with regard to accidents takes some time and are not available to the claimants. For example, in India, the final report of the inquiry committee is not accessible to the public even after being tabled in the Parliament. Also, the requirement of proof of Air Carrier's negligence is mandatory in the case of second tier liability. No such proof is required under domestic air transport law in the U.S. Moreover, under tortious liability cases, it is not necessary for the claimant to prove fault. As a result, the family members of the passenger may not be in a position to discharge the onerous responsibility of proving negligence.

B. BURDEN OF COSTS

The question as to who shall bear the burden of costs due to the increased liability limit of Air Carrier is still to be seen. Air carriers are allowed to pass on their increased insurance costs to the consumer, i.e. the passenger and/or consigner, through an increase in air ticket or freight charges.

C. EARLY SETTLEMENT OF CLAIMS

The Warsaw Regime has been under genuine criticism for delays in the settlement of claims. The new Convention does not seem to solve this very important issue. The courts are likely to take more time due to the additional fifth forum. Furthermore, there is no provision of a specialized Air Accident Claims Tribunal either at national level or international level similar to Motor Accident Claims Tribunal or Maritime Law Claims Tribunal.

D. CONSUMER PROTECTION

Although the preamble to the Montreal Convention recognizes the importance of ensuring protection of the interests of consumers in international air carriage and the need for equitable compensation based on the principle of restriction,⁴⁷ the new Convention does not provide any representation either—ICAO or IATA deliberations. These two organizations are the backbones of the industry, but represent the industry's interest. The real consumers (i.e. the passengers and consigners) do not have an organization to protect and further their interests. Consumers' interests should be pled by organizations such as the International Air Transport Consumer Association. Without this, the ideals of the Convention cannot be achieved.

VI. CONCLUSION

According to Dr. Assad Kotaite, President of the Council of ICAO, the modernization and consolidation of the Warsaw System into a new legal instrument called the Montreal Convention will fulfill the future requirements of states and members of the world aviation community, the travelling public, air carriers, and the air transport industry in the third millennium. The Montreal Convention's unlimited liability provisions may appear to be an eyewash, however, because the limitation caps still exists. The Warsaw System has been retained in the Montreal Convention. It is old wine presented in a new bottle. In the world of free trade and freedom of contract, globalization and liberalization, the freedom to claim full compensation without any limitation would be an ideal situation. There is no limitation of liability in domestic air travel in most of the states, but it has still been retained in the Montreal Convention.

Universalism is suffocating. Pluralism allows adaptations. Civil aviation is an expanding industry. It is impossible to reach a consensus on universally acceptable limits or an absolute measure of damages for death or personal injury. Even as the new convention has yet to be ratified by the U.S. and other countries, there is already a suggestion to increase the limit of liability to 200,000 SDR as the amount of compensation for strict liability in the case of a passenger's injury or death. The socio-economic conditions of each contracting states are different. There are

⁴⁷ See the Montreal Convention, Preamble.

difficult legal cultures in each country. The desired goal of unification is different to achieve.

India provides an example of the difficulty of legislating one uniform civil code. One of the Directive Principles of the Indian Constitution states "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India."⁴⁸ Nevertheless, India has not been able to attain this goal even after 50 years. Given this, one can imagine the difficulty in achieving the goal of unified civil aviation code for the whole world in the field of liability of the air carrier in international air transportation. The ICAO and all those concerned with the drafting a preparation of the new Montreal Convention in the field of private international law of transportation deserve all the credit in contributing to its evolution. Even otherwise it is too early to analyze critically whether it is working. Let it first be ratified by all the contracting states.

⁴⁸ INDIA CONST., art. 44.