The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air

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THE FOUR MONTREAL PROTOCOLS TO AMEND THE WARSAW CONVENTION REGIME GOVERNING INTERNATIONAL CARRIAGE BY AIR

GERALD F. FITZGERALD*

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I. INTRODUCTION

The International Conference on Air Law, convened under the auspices of the International Civil Aviation Organization (ICAO), met in Montreal during the period September 3 to 25, 1975. The conference adopted four protocols pertaining to the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on October 12, 1929, previously amended by the Hague Protocol of 1955 and the Guatemala City Protocol of 1971 and supplemented by the Guadalajara

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1 a) Additional Protocol No. 1, ICAO Doc. 9145 (1975).


Convention of 1961. The four protocols adopted at Montreal all but replaced the Poincaré gold franc as the unit of account in the Warsaw system (whether in its original form or as amended) by the Special Drawing Right of the International Monetary Fund. Curiously enough, ICAO had not convened the conference for this purpose, but rather for the specific and limited purpose of revising the Warsaw/Hague provisions on the carriage of cargo and mail, the revised provisions being found in Montreal Protocol No. 4.

The conference was attended by delegates from sixty-six states.

For the text of the Guadalajara Convention, see ICAO Doc. 8181 (1961) [hereinafter Guadalajara Convention]. As of December 31, 1975, 50 states were parties to the Convention.

This is an artificial unit of account contained in the Warsaw Convention and is described in Art. 22 of that Convention as "... the French franc consisting of 65½ milligrams of gold of millesimal fineness 900."

The Special Drawing Right is described and discussed under Heading VII infra.

The conference was attended by the following states: Algeria, Argentina, Australia, Barbados, Belgium, Brazil, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chili, China, Cuba, Czechoslovak Socialist Republic, Denmark, Dominican Republic, Arab Republic of Egypt, El Salvador, Finland, France, German Democratic Republic, The Federal Republic of Germany, Ghana, Guatemala, Hungary, India, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, The Republic of Korea, Mauritania, Morocco, The Kingdom of the Netherlands, New Zealand, Nigeria, Norway, Oman, Pakistan, Paraguay, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Spain, Sudan, Sweden, Switzerland, Tanzania, Trinidad and Tobago, Tunisia, Turkey, Uganda, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United Republic of Cameroon, United States of America, Venezuela, Yugoslavia and Republic of Zaire.

The conference did most of its work in the Commission of the Whole which held thirty-one meetings. There were also thirteen plenary meetings of the conference, some of them being of relatively short duration. Decisions in the Commission of the Whole required only a simple majority of votes cast, while those in plenary meetings required a two-thirds majority of votes cast. The minutes of these meetings were not available at the time of writing, although summaries of decisions were available as follows: W/H-CM-SRP/1-13 [Warsaw/Hague—Conference Montreal—Summary Record Plenary] and W/H-CM-SRC/1-31 (1975) [Warsaw/Hague—Conference Montreal—Summary Record: Commission of the Whole]. Basic documents available to the conference were ICAO Doc. 9131—LC/173-2 (1975), the draft minutes of the 21st session of Legal Committee and the documents of the conference W/H-CM Doc. Nos. 1-77. The documents of the Conference have been included with their original reference number in ICAO Doc. 9154-LC/174-2 (1975). ICAO Doc. 9131-LC/173-2 contains in pages 1-64, the Summary Report of the work of the Legal Committee during its 21st session. At that session the Committee prepared draft revised articles on documentation (Art. 5-16) and draft articles on liability (Art. A-2(2); B-18; C-19 and 20; D-21; E-24 and F-30A). For convenience, when later in this article there is a discussion of the liability provisions of the Montreal draft articles, reference will be made to the numbered Articles rather than to the lettered ones;
and observers from eight international organizations and had before it draft articles prepared by the ICAO Legal Committee at Montreal in 1974. Earlier work on the cargo and mail provisions had been carried out by an ICAO legal subcommittee in 1972 and by the ICAO Legal Committee in 1974. All four protocols were opened for signature at Montreal on September 25, 1975.

The purpose of this article is to examine the development of the four protocols adopted by the Montreal Conference with particular emphasis on the treatment of the Warsaw regime; ICAO preparatory work during the period 1972-1974; documentation relating to cargo; the system of liability in relation to cargo; air mail; the unit of account—the shift from the Poincaré gold franc to the Special Drawing Right of the International Monetary Fund; the form of the new instrument; avoidance of conflict between the Montreal Protocol No. 4 (cargo provisions) and a possible Convention on the International Combined Transport of Cargo as well as conventions on liability in respect to the carriage of nuclear

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International organizations represented at the conference were International Air Carrier Association (IACA), International Air Transport Association (IATA), International Chamber of Commerce (ICC), International Federation of Air Line Pilots' Associations (IFALPA), International Law Association (ILA), Office central des Transports internationaux par Chemins de Fer (OCTI) and Universal Postal Union (UPU).


For report of Legal Committee, see ICAO Doc. 9131-LC/173-2 at 1-64 (1975).

As of December 31, 1975, the protocols had been signed by relatively few states: Protocol No. 1 by 12; Protocol No. 2 by 13; Protocol No. 3 by 11, and Protocol No. 4 by 15.
substances and final clauses. Some remarks will then be made by way of conclusion.

As the conference is one of the most important during the long and controversial history of the evolution of the Warsaw system, this article contains a detailed presentation of the main proposals made at the conference along with a summary of the discussions at the preparatory ICAO Legal Committee meetings.

II. THE WARSAW REGIME

Briefly, the original Warsaw Convention of 1929 provides for the presumed liability of the air carrier when, during international carriage by air, a passenger is killed or injured or there is loss or delay of, or damage to, cargo and baggage. The carrier may invoke the defenses (i) that he and his agents had taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures,13 or (ii) that there was contributory negligence of the victim.14 The carrier's liability to passengers is limited to 125,000 gold francs ($10,000 U.S.). The limitation for checked baggage and cargo is 250 gold francs ($20 U.S.) per kilogram. For any possessions which the passenger carries with him, liability is restricted to 5,000 gold francs ($400 U.S.).15 Under specified circumstances the carrier may lose the benefit of limited liability.

The Hague Protocol of 1955 doubled the passenger limit to 250,000 gold francs ($20,000 U.S.) and modified the circumstances under which a carrier would lose the protection of liability limitations. It also simplified the provisions on documents of carriage, but retained the prior limits for baggage and cargo and for any possessions carried by the passenger.16

The Guatemala City Protocol of 1971, not yet in force, is intended to amend the Warsaw regime by subjecting the carriage of

13 Warsaw Convention, Art. 20.

14 Id., Art. 21.

15 Id., Art. 22(1), (2) and (3). The figures given in United States dollars are approximate and are based on the hypothesis of gold having a value of $42.22 U.S. per troy ounce.

16 However, while 83 states have become parties to the Hague Protocol, its effect has been weakened due to non participation of the United States of America.
passengers and baggage to the principle of absolute liability" coupled, however, with the defense of contributory negligence of the person claiming compensation. The Protocol provides for an unbreakable limit of 1,500,000 gold francs ($120,000 U.S.) for each passenger. The amendment further provides for diplomatic conferences to be convened during the fifth year after the date of entry into force of the Protocol, to decide whether to amend this arrangement, and during the tenth year to decide whether it should be continued. In addition, there is a provision for a "domestic supplement," proposed by the United States, whereby states which are parties to the Protocol would have the right to adopt supplemental systems to provide compensation to the victims of international aviation accidents in addition to any recoveries available against the carrier within the liability limits recommended by the ICAO Legal Committee. The carrier would be reimbursed for the financial burden of the increase in liability.

The liability provided in the case of delay of passengers is established at 62,500 gold francs ($5,000 U.S.) and, in the case of the carriage of checked baggage, liability for destruction, loss, damage or delay is limited to 15,000 gold francs ($1,200 U.S.) per pas-

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17 Warsaw Convention Art. 17(1) as amended by the Guatemala City Protocol. Indeed, United States dissatisfaction with the outdated Warsaw-Hague provisions relating to the carriage of passengers had earlier brought about a de facto amendment of those provisions. Thus, the Montreal Agreement of 1966 provides, with respect to the carriage of passengers, that airlines whose flights touch United States territory are subject to absolute liability with limited defenses and that the limit of liability for each passenger (for death or personal injury) is $75,000, inclusive of legal fees and costs, or, where appropriate, $58,000, exclusive of legal fees and costs. The Montreal Agreement also requires that the passenger be given a notice, in large type, concerning the limitation of liability. See CAB Agreement 18900 (May 13, 1966).

18 Warsaw Convention Art. 21 as amended by the Guatemala City Protocol.

19 Warsaw Convention Art. 22 as amended by the Guatemala City Protocol.


21 Warsaw Convention Art. 35A, included in Art. XIV of the Guatemala City Protocol. This concept was put forward at the Guatemala City Conference (1971) by the United States. Since that time United States authorities have been working out a plan for the national supplement in consultation with insurance interests and, at the time of writing, it was expected that the plan would shortly be submitted to the appropriate legislative bodies in the United States of America for approval. According to the Supplemental Plan, an insurance company would provide compensation for proven damages in excess of the Guatemala City Protocol limit per person.
senger. These limits too are unbreakable. The Protocol eliminates the former provisions for loss of limited liability for the carrier's non-compliance with certain requirements concerning passenger and baggage documentation or for the carrier's "wilful misconduct" during carriage of passengers and baggage. In addition, the Guatemala Protocol, recognizing the high degree of automation that is now available, provides that passenger tickets and baggage checks may be replaced by any other means which would preserve a record of the information concerning place of departure and destination and agreed stopping places.

The Guadalajara Convention of 1961 supplements the Warsaw regime by stipulating that the regime applies to international carriage by air performed by a person other than the contracting carrier.

It may be recalled that during the Guatemala City Conference certain delegations proposed that the conference not adopt a protocol; rather, a new convention was proposed, which would contain the Warsaw provisions as amended by the Hague and Guatemala City Protocols. The remaining unamended provisions of the Warsaw Convention, the Hague Protocol, and the substantive provisions of the Guadalajara Convention would also have been included. This proposal was rejected. Later in this article reference will be made to a similar proposal made during the Montreal Conference.

III. ICAO Preparatory Work During the Period 1972-1975

The Montreal Conference was preceded by preparatory work at the ICAO legal meetings. The ICAO Subcommittee on Revision

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22 Warsaw Convention Art. 22 included in Art. VIII of the Guatemala City Protocol.

23 Warsaw Convention Arts. 3 & 4 as amended by the Guatemala City Protocol: failure to issue documents of carriage or defects in the documents of carriage will not cause the carrier to lose the benefit of his limitation of liability; Warsaw Convention Art. 25 as amended by the Guatemala City Protocol: the so-called "wilful misconduct" of the carrier will cause the limits to be reached only in the case of the carriage of cargo.

24 Warsaw Convention Art. 3 as amended by the Guatemala City Protocol concerning the document of carriage for passengers contemplates the use of electronic data processing (EDP) as a substitute for the ticket and provides for the use of any other means which would preserve a record of specified information.

25 See FitzGerald, supra note 4, at 245-47.
of the Warsaw Convention of 1929 as Amended by the Hague Protocol of 1955: (a) Cargo; (b) Mail; and (c) Automatic Insurance, established by the 19th session of the ICAO Legal Committee in May 1972, met in Montreal during the period of September 20-October 4, 1972. The subcommittee noted that the reports of the rapporteur on automatic insurance had been presented in 1968 and 1969 as an aid to seeking a solution for a specific problem relating to passenger carriage, but because of the later adoption of the Guatemala City Protocol, the problem no longer existed. The subcommittee recommended that no study of automatic insurance be undertaken. As will be seen later, the subcommittee was unable to chose between a system of strict liability and presumed liability in respect to cargo, and left it to the Legal Committee to make the choice.

At its 21st Session, held in Montreal during October 3-22, 1974, the Legal Committee took up the question of the revision of the cargo and mail provisions of the Warsaw Convention of 1929 as amended by the Hague Protocol of 1955. The Committee considered such topics as documentation, principles of the system of liability, air mail and the form of the new instrument. The Committee prepared draft articles which incorporated a system of strict liability, and these were presented to the conference as the basis for its work.

The Legal Committee was concerned about the potential conflict between the new instrument relating to cargo and the Guatemala City Protocol, which also reproduced some provisions of the Warsaw Convention, as amended by the Hague Protocol, relating to cargo. Later, the ICAO Council appointed a Working Group to consider the matter and that body, which met from April 24-29, 1975, prepared a report which was placed before the conference.

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28 ICAO Doc. 9096-LC/171-2 (1974); the Subcommittee had earlier been established at the 17th Session of the Legal Committee, but had not in fact met.
28 For the first report (1968) of the rapporteur in which the question of compulsory insurance is raised, see ICAO Doc. 8839-LC/158-1 at 95-103 (1975).
The main elements of the reports of the bodies mentioned above will be woven into the discussion below.

IV. DOCUMENTATION RELATING TO CARGO

A. Introduction

The story of the modification of the Warsaw/Hague documentation provisions (Articles 5-16) as they passed through the subcommittee, the Legal Committee and the Montreal Conference is that of a struggle between those who wished to simplify the provisions to adapt them to the introduction of electronic data processing (EDP) for air cargo and those who wished to retain the relatively cumbersome documentation requirements. It is against this background that the main changes in the documentation provisions will be examined.

Although there was general agreement in the subcommittee that the basic framework of the Warsaw Convention on the air waybill should be retained, the main thrust of the discussion concerned the appropriateness of using electronic data processing (EDP) for cargo in a provision similar to that contained in Article 3(2) of the Guatemala City Protocol for passengers.

The International Air Transport Association (IATA) proposed deletion of Warsaw/Hague Articles 5-11 (which are concerned with the air waybill) and Article 34 (which is concerned with carriage performed in extraordinary circumstances) and the amendment of other articles to delete the reference to air waybills. Thus, cargo documentation would no longer be regulated by the Warsaw Convention, but left for regulation by commercial interests and governments. IATA asserted that elimination of the documentation requirements would effect economies which would be passed on to the consumers with a result that more cargo would be carried by air. In opposition to the IATA proposal, it was noted that if the provisions on cargo documents were eliminated, uniformity of law would not be promoted and there could be a regime of conflicting

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[29] This approach was reflected in the Swedish proposal discussed below. See ICAO Doc. 9131-LC/173-2 at 123-29 & 147-49 (1975).

national laws. The subcommittee did not accept the IATA\textsuperscript{39} proposal.

The subcommittee had before it a Swedish proposal\textsuperscript{39} for certain amendments to Articles 5-16 which would permit the use of EDP for cargo handling and at the same time provide for the issuing of a goods receipt. The proposed amendments permitted use of the air waybill as before, but would also permit the use of modern data processing systems as an alternative.

During discussion of the Swedish proposal the multi-purpose role of the air waybill was emphasized: the air waybill was used as a traffic document and contained an indication of the consignee and destination; it was a rating document which recorded the freight charges; it was an accounting document, which served as a financial record between the parties to the contract; and, lastly, it was an insurance document which enabled the parties to obtain insurance. It was submitted that the only difference between the air waybill and the goods receipt was that the Warsaw/Hague provisions required the waybill to indicate the places of departure and destination or a stopping place if the places of departure and destination were in the territory of one state which was a party to the Convention, while the Swedish proposal did not require the inclusion of such indications in the goods receipt. The above comments will be of interest when an examination is made of later efforts, both in the Legal Committee and the Montreal Conference, to incorporate into the goods receipt the same indications as those in the air waybill.

The subcommittee took the Swedish proposal as the basis for future work, although it noted that many questions had been raised for which it had found no answers. In the subcommittee's view the great virtue of the Swedish proposal was that it permitted retention, in principle, of the present regime of documentation for the carriage of cargo by air under the Warsaw Convention, while opening the door to the introduction of a system of electronic data recording. The subcommittee included the Swedish proposal in its report and sent it to the Legal Committee together with a record of comments made on the proposal.

The Swedish proposal was submitted to the Legal Committee

\textsuperscript{39} ICAO Doc. 9131-LC/173-2 at 123-29 & 147-49 (1975).
and much the same arguments in its favor were adduced by Sweden, but then a note of caution was sounded. It was explained that all rules relating to documentation could not be eliminated from the revised instrument since automation and computerization would be introduced only gradually on some air routes and in some parts of the world, while on other routes and in other parts of the world the old system of documentation might have to be retained. Hence, the new instrument should provide for a coexistence of the new simplified system and the old system. The Swedish proposal continued to provide for a goods receipt to be delivered to the shipper; it was envisioned that the receipt could be prima facie evidence of the conclusion of the contract and of receipt of the cargo.\footnote{Id. at 18.}

IATA pointed out to the Legal Committee that present air cargo documentation was complicated and prohibitively expensive since it accounted for over 50\% of the total ground handling costs. Accordingly, IATA’s preference was to eliminate from the Warsaw/Hague system all reference to documentation; it believed that the continued existence of the air waybill did not depend upon retention of the Warsaw/Hague documentation provisions. Nevertheless, if many delegations were not prepared to accept total elimination of those provisions, IATA considered the proposal for the co-existence of the new automated computer system and the old regime to be an acceptable solution.\footnote{Id.}

Among the points raised in the Legal Committee during the discussion on documentation were the necessity for definition of the contents of the goods receipt; the clarification of the evidentiary value of the goods receipt; the necessity of having a flexible enough system of documentation to encompass the present system of documentation and the automated data processing system; the cost implications of the introduction of the automated data processing system for many countries; the necessity of having a simplified air cargo document which would maintain the basic purpose of the Warsaw Convention, unification of law, without sacrificing the benefits flowing from the use of electronic equipment; the fact that only a few airlines were at present prepared for an automated data
processing system; the necessity of simplifying the IATA standard form of air waybill; and the necessity of having the evidentiary value of the goods receipt prevail over the electronic record in case of discrepancy between the electronic record and the contents of the goods receipt. Subsequently, the Legal Committee approved a series of draft articles (hereinafter sometimes called The Montreal draft)38 for submission to an international conference on air law in accordance with the usual procedure.39

B. Article 5—Delivery of the waybill and receipt for the cargo—

Electronic data processing and air cargo

Warsaw/Hague Article 5(1) provides that the carrier of cargo has the right to require the consignor to prepare and deliver a document called an air waybill and that every consignor has the right to require the carrier to accept this document. In addition Warsaw/Hague Article 5(2) provides that the absence, irregularity or loss of the air waybill does not affect the existence or the validity of the contract of carriage which, subject to certain exceptions, is none the less governed by rules of the Convention. All of the foregoing has been reduced to one sentence in Montreal Protocol No. 4, Article 5(1), which reads: "In respect to the carriage of cargo an air waybill shall be delivered."40

Article 5(2) of Montreal Protocol No. 4, and Article 3 of the Guatemala City Protocol, provide for the use of other means of preserving the record of the carriage to be performed:

Any other means which would preserve 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.

38 For the sequence of articles in the Montreal draft, see note 8 supra.
39 This procedure is set forth in ICAO Assembly Resolution A7-6 which is concerned with the approval of final draft conventions prepared by the ICAO Legal Committee. Resolution A7-6 provides for the ICAO Council, under specified circumstances, to convene an international conference on air law for the approval of a convention. For the text of Resolution A7-6, see ICAO Doc. 7669-LC/139/2 at 3 (1974).
40 The same text is found in the Montreal draft placed before the Conference.
This provision was thoroughly discussed at the Montreal Conference. Since it is the key provision concerning the use of EDP in substitution for older procedures, it deserves careful examination.41 In the Commission of the Whole there was a French proposal to delete the words "with the consent of the consignor" in the first sentence.42 A second French proposal was to add the word "Nevertheless" at the beginning of the second sentence of Article 5(2) of the Montreal draft and to replace the words "if so requested by the consignor" in the second sentence by "unless the consignor has waived the right."43 During the discussion the Netherlands proposed that the words "with consent of the consignor" be replaced by "unless the consignor objects"44 or "in the absence of objection of the consignor," and that the words "if so requested by the consignor" be deleted. This would have the effect of making the delivery of a receipt for the cargo mandatory when an air waybill was delivered.45 There was considerable opposition to the French proposal because it could have the effect of converting the receipt for the cargo into an air waybill, a problem which recurred consistently throughout the discussion on documentation. It was pointed out that in certain countries the consignor is required by law to ask for an air waybill; it could not be left up to the carrier to decide whether or not there should be one. Moreover, if the words "if so permitted by the consignor" were used, a new paper would be required, a waiver by the consignor.

The Netherlands also proposed to amend the second sentence in Article 5(2) to read: "If such other means are used, the consignor is entitled to a receipt for the cargo permitting identification of the consignment."46 It was submitted that the use of other means of preserving a record of the carriage to be performed, especially in the case of EDP, should be conditioned upon the existence of the necessary facilities at all the airports involved in the carriage. Also the receipt for the cargo would, as indicated later in Article 11, have

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41 The Commission of the Whole considered Art. 5, on first reading, at its first, third, fourth and fifth meetings.
43 Id.
44 Id.
45 W/H-CM-SRC/1, ¶ 2 (1975).
an important evidentiary role; hence there should be provisions about the contents of the receipt just as there were with respect to the contents of the air waybill.

In an attempt to meet some of the concerns that had been expressed, Canada proposed inclusion of the following substitution for Article 5(2):

Notwithstanding the provisions of paragraph 1 of this Article, where any other means that would preserve a record of the carriage to be performed are available to all parties, such means may be substituted for the delivery of an air waybill. In such a case the carrier shall, if requested, make available evidence of the preservation of the record of the said carriage by the other means, such as a receipt for cargo.47

This proposal was withdrawn in favor of one by the United Kingdom to add “and access to the other means” after the words “identification of the consignment” in Article 5(2).48 The main thrust of the second sentence of the Canadian proposal, as reflected in the United Kingdom proposal, was to ensure that the receipt for the cargo would be a key to the information stored in the computer.

At the fourth meeting of the Commission of the Whole the French and Netherlands proposals were both rejected and the United Kingdom proposal was adopted.49 The ninth plenary meeting rejected a French proposal to replace the words “if so requested by the consignor” in Article 5(2) with “unless waived by the latter.”50

Article 5(3) reads: “The impossibility of using, at points of transit and destination, the other means which would preserve 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.” This provision was adopted as a result of a Soviet Union proposal51 to the third meeting of the Commission of the Whole that the

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49 These votes took place at the fourth meeting of the Commission of the Whole and, on first reading, Art. 5(2) as thus amended was approved by 46 votes in favor and none against, with 3 abstentions.
carrier not be allowed to decline acceptance of the cargo on the ground that the other means which preserve a record referred to in Article 5(2) are not used at the place of destination. A Netherlands proposal to replace the words "authorized the carrier" in Article 5(3) with "entitle the carrier" was approved at the ninth plenary meeting.\(^5\)

C. Article 6—Description of air waybill

The form of the air waybill is dealt with in Article 6. The main change in this provision has been the omission of Article 6(3) of the Warsaw/Hague text which read: "The carrier shall sign prior to the loading of the cargo on board the aircraft." This paragraph had already been deleted by the Legal Committee.\(^5\) Article 6, as included in Montreal Protocol No. 4, reads as follows:

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.

D. Article 7—Documentation when there is more than one package

Article 7 in Montreal Protocol No. 4 reads:

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 5 are used.

The only difference between this Article and the Warsaw/Hague Article is its provision, in accordance with a Swiss proposal,\(^4\) for

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\(^6\) The vote was thirty-six in favor with none opposed and one abstention. ICAO Doc. 9131-LC/173-2 at 30 (1975).

delivery of separate receipts for the cargo when there is more than one package and the other means referred to in Article 5(2) are used.

E. Article 8—Contents of air waybill and receipt for the cargo

Article 8 in Montreal Protocol No. 4 reads:

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 High Contracting 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.

The new Article 8 differs from the Warsaw/Hague provision regarding the contents of documentation by including not only the air waybill, but also the receipt for the cargo. Further, the new Article also stipulates that both documents must contain an indication of the weight of the consignment. This change originated in a French proposal, at the fifth and sixth meetings of the Commission of the Whole, which specified that a receipt should make it possible to identify the consignment and should contain an indication of its weight and the places of departure and destination.

During the discussion in the sixth meeting of the Commission of the Whole Tunisia and Belgium proposed the following text:

If the other means referred to in Article 5(2) is used, it shall record at least the indications provided for in Article 8 as well as an indication of the weight of the consignment. The said other means shall ensure that these indications are preserved for a period equal at least to the period prescribed in Article 29.

This proposal was not put to a vote. The French proposal was adopted, resulting in a requirement that the cargo receipt, at least for the purposes of the minimum contents specified by the Convention, should contain the same number of details as the air waybill.

56 The proposal was for the introduction of Art. 8 reading as follows:
"The receipt shall permit the identification of the consignment and indicate the weight and the points of departure and destination." W/H-CM Doc. No. 31, ICAO Doc. 9154-LC/174-2 at 146 (1975).

58 W/H-CM-SRC/6, § 2 (1975). See also W/H-CM Doc. No. 33, ICAO Doc. 9154-LC-174-2 at 148 (1975) which adds at the end of the above text: "... when action against the carrier is allowable under the terms of Article 26."
Another important difference between the new Article 8 and the Warsaw/Hague provision is the omission of the requirement that the air waybill (and, for that matter, the receipt for the cargo) should include the Warsaw/Hague notice concerning the possible applicability of the Convention to cargo carriage. This deletion had already been made by the Legal Committee when it recommended adoption of the system of strict liability coupled with unbreakability of the limit for cargo. Similar action on the notice on passenger tickets had already been taken at the Guatemala City Conference in 1971.

At the fifteenth meeting of the Commission of the Whole Poland explained that a large number of contracts for carriage were entered into by shippers who were not familiar with the provisions of the Warsaw Convention and noted that, after the Commission's acceptance of a system of absolute liability, it seemed even more important that consignors be given the notice required in Article 8(c) as amended at the Hague. The Polish proposal to this effect was rejected by a narrow vote.

The text of Article 8, as it emerged from the Commission of the Whole, contained two paragraphs. As in the Warsaw/Hague text paragraph (1) provided for the contents of the air waybill with an indication of the places of departure and destination, and the agreed stopping place in specified circumstances. The well-known Warsaw/Hague notice provision was omitted. Paragraph (2) referring to the receipt of the cargo, incorporated by reference the contents of paragraph (1) and also required that an indication of the weight of the consignment be included in the receipt for the cargo. At the ninth plenary meeting the Federal Republic of Germany, supported by the United Kingdom, proposed that an indication of consignment weight be made a requirement of the air way-
bill as it was for the cargo receipt. By converting Article 8 into a single paragraph requiring that both the air waybill and the receipt for the cargo contain an indication of consignment weight,61 the intended simplification of the air waybill and the receipt for the cargo was indirectly eroded.

F. Article 9—Elimination of penalty for lack of notice in documentation

Warsaw/Hague Article 9 provides that if, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Warsaw/Hague Article 8(c), the carrier shall not be entitled to avail himself of the limit on cargo liability. Since Montreal Protocol No. 4 omits the notice requirement from Article 8 and the new system of strict liability is coupled with an unbreakable limit, Article 9 no longer contains a penalty. It merely states that: “Non-compliance with the provisions of Articles 5 to 8 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.”

G. Article 10—Responsibility in case of irregularity, incorrectness or incompleteness of documentation or record preserved by other means

Warsaw/Hague Article 10(1) has been considerably amended. It originally provided that: “The consignor is responsible for the correctness of the particulars and statements relating to cargo which he inserts in the air waybill.” Article 10(1) in Montreal Protocol No. 4 reads:

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 5.

The amended provision includes a reference to the receipt for the cargo. Also, the wording has been changed to include the particulars and statements relating to the cargo inserted by the consignor

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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 EDP record. In particular, the words "on his behalf" reflect that, in reality, it is not always the consignor himself who acts on particulars and statements; he may also act through an agent. The consignor is now fully responsible for the correctness of the particulars and statements.

During the presentation of Article 10(1), as prepared by the Drafting Committee, to the twenty-fourth meeting of the Commission of the Whole,² the Chairman of the Drafting Committee explained that the words "or for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5" had been inserted to cover a point which the Drafting Committee thought the Commission had overlooked when considering the Legal Committee's text. The United States said that if these words were to be included, it would propose the insertion of the words "by him" after "or" because, without that phrase, the new words might imply that the carrier could, on behalf of the consignor, place information in the record which the consignor would have no opportunity to examine. The United States believed it to be unfair that the consignor be held responsible for the correctness of such information. The United States proposal was rejected.³ The words to which the Chairman of the Drafting Committee had referred were also the subject of a close vote but were approved.⁴ The Commission also approved the Drafting Committee's text of Article 10(1).⁵

When the text of the Commission of the Whole emerged in the ninth plenary meeting, Egypt, seconded by the United States, proposed the deletion from Article 10(1) of the words "for insertion in the record preserved by the other means referred to in paragraph 2 of Article 5,"⁶ to be consistent with Article 11, under which only the air waybill or the receipt for the cargo, and not the EDP record, was prima facie evidence of the conclusion of the

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³ The rejection was by a very small vote of six in favor and nine opposed, with eight abstentions.
⁴ By a vote of twenty-two to seventeen, with five abstentions.
⁵ By a vote of thirty-eight to three, with seven abstentions.
contract, acceptance of the cargo and the conditions of the carriage. This proposal was rejected."  

The new Article 10(2) reads: "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."

Warsaw/Hague Article 10(2) has been only slightly amended: the words "or on his behalf" have been added at the end of the provision. This addition lines up Article 10(2) with Article 10(1). A Brazilian proposal to restrict the scope of Article 10(2) by adding the words "and inserted in the air waybill" at the end of the paragraph was rejected by the Commission of the Whole at its twenty-fifth meeting.

Article 10(3) in Montreal Protocol No. 4 reads:

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 5.

This provision resulted from a proposal of the Czechoslovak Socialist Republic, seconded by the Soviet Union, to add a paragraph requiring the carrier to indemnify the consignor against all damage suffered by him, or by any person to whom the consignor is liable, by reason of the irregularity of the receipt for the cargo delivered by the carrier. This paragraph brought a new element to Article 10 because it was intended to deal with particulars and statements furnished by the carrier, not those furnished by the consignor. The Commission of the Whole approved the proposal at its seventh meeting. As reported by the Drafting Committee to the twenty-fifth meeting of the Commission of the Whole, the text of Article 10(3) read:

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67 By a vote of sixteen to nine with seven abstentions.
69 By a vote of twenty-six to four, with six abstentions.
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 and incompleteness of the particulars and statements inserted by the carrier or on his behalf in the receipt for the cargo.

In this meeting of the Commission of the Whole the words "Subject to the provisions of paragraphs 1 and 2 of this Article," were inserted at the beginning of Article 10(3). Also, the Commission adopted a Brazilian proposal to add at the end of Article 10(3) the words "or in the record preserved by the other means referred to in paragraph (2) of Article 5." This later addition gave a great measure of protection to the consignor, who could be exposed to damage (as described in Article 10(3)) by the carrier or on the carrier's behalf by reason of the irregularity, incorrectness or incompleteness of the particulars.

H. Article 11—Evidentiary value of air waybill or receipt for the cargo

Article 11(1) in Montreal Protocol No. 4 reads as follows: "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."

The only difference between the Warsaw/Hague Article 11(1) and the new provision is the insertion of the reference to the receipt for the cargo. There was, however, difficulty concerning this provision during the seventh and eighth meetings of the Commission of the Whole. Initially, Australia proposed to include after "receipt for the cargo" the words "or the other means contemplated by Article 5, paragraph (2)." The proposal was intended to cover the case in which there was neither an air waybill, nor a receipt for the cargo because EDP had been used and the consignor had waived his right to a receipt for the cargo. Australia accepted a Brazilian amendment which would have inserted after "receipt for the cargo" the words "or in the absence of the receipt, the other means

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13 Id.
14 For a discussion of evidentiary issues arising out of computerized records, see Freed, Mock Trial—Admissibility of Computerized Business Records, 15 Jurimetrics J. 206-46 (1975).
contemplated by Article 5, paragraph (2)." The Australian, Brazilian and French proposals were withdrawn in favor of a Norwegian proposal to insert the following new sentence in Article 11(1): "In the absence of an air waybill and a receipt for the cargo the same applies to the record referred to in Article 5(2) if such record is invoked by a party who is not keeping the record."

The proposal was defeated and Article 11(1) was accepted by the Commission of the Whole in its present form.

The new Article 11(2) reads:

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.

While a reference to the receipt for the cargo has been included in the first part of Article 11(2) a Brazilian proposal to include a reference to the receipt for the cargo following the words "air waybill" in the second part of Article 11(2) was defeated during the eighth meeting of the Commission of the Whole.

At the same meeting, Sweden proposed, and the United States seconded, the addition of a second sentence to Article 11(2): "The receipt for the cargo shall be prima facie evidence of the weight of the cargo." After the Commission had voted on the Brazilian proposal, the Swedish proposal was withdrawn.

At the ninth plenary meeting, Norway and the United Kingdom stated that they had voted in favor of Article 11(2) on the understanding that the exception in the last part would apply not

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75 W/H-CM-SRC/7, ¶ 6 (1975).
76 Id.
77 W/H-CM-SRC 18, ¶ 1 (1975).
78 By a vote of thirty-three to seven with twelve abstentions.
80 By a vote of twenty-two to seventeen, with nine abstentions.
only when the facts had been checked by the carrier and consignor personally, but also when they had been checked by a person acting on behalf of the carrier and consignor. In other words, checking by the carrier's servants or agents would satisfy the requirement inherent in the words "checked by him" in Article 11(2).

I. Article 12—Right of disposal of cargo

The new text of Article 12 reads:

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 13. Nevertheless, if the consignee declines to accept the cargo, or if he cannot be communicated with, the consignor resumes his right of disposition.

The words "to a person other than the consignee named in the air waybill" in Article 12(1) of the Warsaw/Hague text have been replaced by "to a person other than the consignee originally designated." This change reflects the possibility, already inherent in Article 5(2), that if EDP is used for the movement of cargo, no documentation may be issued and the consignee may be "designated" in the computer only.

The Commission of the Whole referred two suggestions to the Drafting Committee: (1) Nigeria: In Article 12(3), delete the
phrase "he will be liable" and insert it immediately preceding the words "for any damage";\textsuperscript{82} (2) Norway: Rephrase the first sentence of Article 12(4) to read: "The right conferred on the consignor ceases at the moment when the consignee exercises his right in accordance with Article." and delete the word "Nevertheless" at the beginning of the second sentence.\textsuperscript{83} None of these changes were made. Thus, Article 12 of the Warsaw/Hague text survived with minor changes to paragraphs 1 and 2.

J. Article 13—Delivery of the cargo

Article 13 in Montreal Protocol No. 4 reads as follows:

1. Except when the consignor has exercised his right under Article 12, 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(1) of the Warsaw/Hague text has been amended to delete reference to the air waybill. Since there may be no documentation issued where EDP is used for the carriage of cargo, no reference to its being handed over at the point of delivery or embodying the conditions of carriage was deemed necessary.

There are no other substantive changes in Article 13. During the ninth and tenth meetings of the Commission of the Whole, however, there was a lengthy discussion of a Polish proposal to introduce in Article 13 the following new paragraph:

Upon request by the consignee, the carrier shall, at the place of destination, hand over to him a copy of an air waybill. If other means which preserve a record referred to in Article 5(2) are used, the consignee is entitled to request the carrier to provide him with a copy of the receipt containing the particulars mentioned in

\textsuperscript{82} W/H-CM-SRC/8, \textsection 10 (1975).

\textsuperscript{83} Id. \textsection 12.
Article 8\textit{(bis)} and permitting access to the other means which preserve a record.\footnote{W/H-CM Doc. No. 34, ICAO Doc. 9154-LC/174-2 at 149 (1975); W/H CM-SRC/9, § 1 (1975); W/H-CM-SRC/10, § 2 (1975).}

"Article 8\textit{(bis)}" should now be read as referring to "Article 8" in its new form.

The argument given in support of the proposal was that the consignee may, under some legal systems, have certain obligations imposed on him and, therefore, there should be some method of informing him of the contract of carriage if EDP had been used and no receipt for the cargo had been issued to the consignor. Unlike the consignor, the consignee would not know what contractual data had been included in the computer. The proposal was objected to as contrary to the philosophy of the convention, since a computer print-out would not be available in multiple copies. Also, the Polish proposal reopened debate on Article 6, which concerned the air waybill. Poland explained that in the original Warsaw Convention there had been a reference to the right of the consignee to the air waybill. Hence, the consignee should be entitled to ask for a receipt for the cargo even if the consignor had not asked for it. The consignee should be given information which would enable him to take action against the carrier. In Article 30(3) of the Convention there was reference to an action being brought against the last carrier in the case of successive carriers. The view was expressed that the first sentence of the Polish proposal was unnecessary since there was no longer a need for the air waybill to travel with the cargo and that, in any event, Article 13(2) obliged the carrier to give notice to the consignee as soon as the consignment arrived. It was also submitted that the second sentence of the Polish proposal was totally unnecessary in the context of the totally computerized system to which the consignee would be linked. Moreover, it was asserted that the contemplated access should not be to "the other means" but to the "record."

At this stage a compromise suggestion was put forward by the United States to the effect that the consignee would be entitled to request the carrier to provide him with a "document" containing the particulars mentioned in Article 8 in the event that an air waybill is issued or, if "the other means" which preserve a record
are used, a "document" containing the particulars in Article 8 and permitting access to the record which is preserved by the other means. But Poland did not like the United States suggestion because the consignee always had the chance to obtain the air waybill if one were issued. Moreover, the use of the word "document" in case EDP were used was inappropriate since a "document" did not constitute prima facie evidence as did the receipt for the cargo. The United States’ suggestion was eventually withdrawn. The Polish proposal was rejected. A proposal of Cameroon to extend the time limit in Article 13(3) to 15 days was withdrawn after a brief discussion during the ninth meeting of the Commission of the Whole.

K. Article 14—Enforcement of rights of consignor and consignee

The Warsaw/Hague text of Article 14 remains unchanged in Montreal Protocol No. 4 which reads: The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, 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.

L. Article 15—Relations of consignor and consignee or mutual relations of third parties—Negotiable air waybill

Article 15 in Montreal Protocol No. 4 reads:

1. Articles 12, 13 and 14 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 12, 13 and 14 can only be varied by express provision in the air waybill or the receipt for the cargo.

Paragraphs 1 and 2 of Article 15 of the Warsaw/Hague text remain substantially unchanged in Montreal Protocol No. 4. During the ninth meeting of the Commission of the Whole, however, there was a lengthy discussion whether Article 15(3), which had been inserted in the Hague Protocol, should be retained. The Article dealt with the question of negotiability in a somewhat passive way. "Nothing in this Convention prevents the issue of a negotiable air

By a vote of thirty-two to eighteen, with two abstentions.

The debate revolved around a Swiss proposal to provide that Article 15(3) be amended to read: "Nothing in this Convention prevents the issue of a negotiable air waybill or goods receipt." When introducing this proposal, Switzerland noted that Article 12(3), as adopted by the Commission of the Whole, made no distinction between the air waybill and the receipt for the cargo. There should be no difference between the two documents. Moreover, the receipt for the cargo might play an important banking role in the future. Three broad positions were advanced during the ensuing discussion: (a) Adoption of the Swiss proposal in order to preserve the possibility of a negotiable receipt for the cargo as an aid to trade; (b) Rejection of the Swiss proposal because there was a danger of elevating the receipt for the cargo to the status of an air waybill (recalling that the receipt for the cargo should perform a significantly different function from that of the air waybill); and (c) Elimination of Article 15(3) since the question of the negotiability of cargo documents should be settled by national law.

There were two votes on the Swiss proposal. The first vote was 22 in favour and 22 against with 5 abstentions. On the second vote, the proposal was lost by 23 in favour and 29 against with 5 abstentions. When Article 15(3) in its original Hague form was put to vote, it failed, receiving 17 votes in favour and 22 against, with 14 abstentions.

At the ninth plenary meeting Article 15(1) was adopted, but the word "or" before "the consignor" was replaced by "and." No further change was made in the Article.

M. Article 16—Formalities of customs, octroi or police

Article 16 in Montreal Protocol No. 4 reads:

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

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87 An ICAO Subcommittee on the negotiability of the Air Waybill met at Madrid in April 1955, a few months prior to the Hague Conference, and concluded that the proposed instrument to amend the Warsaw Convention should merely contain a statement that the Convention should not be read to prohibit the issuance of negotiable air waybills. For report of the subcommittee, see ICAO Doc. 7686-LC/140 at 106-14 (1956).

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.

Since the use of EDP could preclude the issuance of documentation to which information and documents could be attached, the new text of Article 16 omits the requirement that information and documents be attached to the air waybill. Further changes suggested to Article 16 were rejected.

When the Drafting Committee's text was under examination at the twenty-fifth meeting of the Commission of the Whole, New Zealand proposed replacement of Article 16(1) with the following modernized text found in a footnote to the Drafting Committee's report: "The consignor must furnish such information and such documents required in connection with the entry, exit or transshipment of the cargo before the cargo can be delivered to the consignee." 8

Norway was prepared to support this text with the insertion of the words "as are necessary to meet the formalities" after the words "such documents." However, the New Zealand proposal was rejected, 9 and the Commission adopted the original text of Article 16(1).

At the ninth plenary meeting, Cameroon, seconded by France, proposed deletion of the word "octroi" in the first sentence of Article 16(1), no doubt on the ground that the word was out of date and had no place in a modern convention. The proposal was rejected by a vote of 9 to 8 with 6 abstentions. The plenary meeting then adopted a Kenyan proposal to insert a comma instead of the word "or" after "carrier" in the second sentence of Article 16(1).

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8 W/H-CM Doc. No. 57 at 6, ICAO Doc. 9154 LC-174-2 at 188 (1975).
9 By a vote of seventeen to sixteen, with eight abstentions.
1 The word "octroi" is an anachronism in that its dictionary meaning is a duty levied in some continental countries on goods entering town. 1 THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY 1973 (1971).
V. System of Liability in Relation to Cargo

A. Introduction—Principles of the system of liability

At the outset of ICAO work on the system of liability applicable to cargo, there were conflicting opinions as to whether the revised cargo provisions should provide for a system of strict liability, as had been put forward to ICAO by IATA, or whether they should preserve the existing system based on a rebuttable presumption of carrier fault. According to IATA, the system of strict liability would guarantee a speedy and easy method of settlement which would lead to a substantial reduction of insurance costs and consequent savings for the consignor. Accordingly, the subcommittee considered revision of the cargo provisions on the basis of two hypotheses: a system of strict liability and a system of subjective liability, although the latter system was given relatively little attention.

At the beginning of its twenty-first session the Legal Committee considered two concepts of liability: one favoring the system of strict liability with a limited number of defenses and with an unbreakable limit, and the opposing view favoring retention of the Warsaw/Hague system of a rebuttable presumption of fault. The Committee agreed that the final selection of the system would depend on the number of defenses available to the carrier under strict liability and also on a decision whether the limit would be breakable or unbreakable. After examining these matters the Committee decided, by a vote of 25 against 10 with 4 abstentions, in favor of a system of strict liability in the case of loss or damage.

92 In the subcommittee, there was a discussion of the terminology to be used for the IATA proposal that the liability of the carrier in respect of cargo not be based on fault, and it was decided to use the term "strict liability" rather than "absolute liability." ICAO Doc. 9131-LC/173-2 at 110 (1975).

93 The IATA submission is found in LC/SC Warsaw (1972) WD/7 and is described in the report of the subcommittee. ICAO Doc. 9131-LC/173-2 at 111 (1975). IATA returned to the question of liability for cargo at the Twenty-first Session of the Legal Committee, and again pressed for strict liability except in the case of delay. In the latter regard, IATA argued that liability for delay could not be treated in the same way as liability for loss of or damage to goods, because a main cause of delay is adherence to safety requirements, in particular, observance of weather minima, maintenance schedules and crew rest provisions. It considered that, in this context, strict liability for delay would be inappropriate and indeed harmful. ICAO Doc. 9131-LC/173-2 at 213 (1975).

94 Id. at 20.
to cargo." The Committee retained the present Warsaw/Hague system in the case of delay to cargo."

There were conflicting positions at the eleventh meeting of the Commission of the Whole concerning the adoption of the principle of strict liability. In particular, those opposed to the principle found little difference between the concept of strict liability, as spelled out in the Montreal draft, along with its accompanying defenses, and the concept of presumed liability found in the existing Warsaw/Hague cargo provisions. It was also argued that since all of the existing transport conventions were based on the concept of carrier fault, providing for strict liability only for the air carriers could seriously inconvenience the preparation of a convention on the multimodal carriage of cargo since there would be no unified liability regime. Moreover, strict liability would not speed up the settlement of claims, since they were generally settled by the claims departments of the airlines. The opponents argued that fault liability did not constitute an excessive burden for airlines, while strict liability with the defenses now stipulated could lead to increased insurance costs and give rise to prolonged litigation.

IATA noted that conference was considering a package consisting of three elements: (1) strict liability; (2) an unbreakable limit on liability; and (3) detachment of the cargo documents from their relationship to the limits of liability or removal of penalty for lack of notice. If the concept of strict liability were not adopt-

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85 Id. at 25.
86 Id. at 26.
87 This convention has been under study for many years successively in the International Institute for the Unification of Private Law (UNIDROIT), the Economic Commission for Europe (ECE) and the Intergovernmental Maritime Consultative Organization (IMCO) (the last two having had an active joint committee which met in 1970-1971 and prepared a draft Convention on the International Combined Transport of Goods, known as the TCM Convention). However, a conference convened in November-December 1972 did not adopt the convention. Later, the United Nations Conference on Trade and Development (UNCTAD) took up the task of preparing a multimodal convention, and studies are currently under way in the Intergovernmental Preparatory Group on International Intermodal Transport (IPG) which, meeting under the auspices of UNCTAD, has held three sessions, the third one in February-March 1976. See, FitzGerald, Proposed Convention on the International Combined Transport of Goods: Implications for International Civil Aviation, 11 CAN. Y.B. INT'L L. 166 (1973); Mankabady, Some Legal Aspects of the Carriage of Goods by Container, 23 INT'L COMP. L.Q. 317 (1974).
88 The removal of the penalty for lack of notice was to be accomplished by elimination of the requirement found in Warsaw Convention Art. 8(c) that the
ed, the other parts of the package might fail. IATA did not agree that the defenses stipulated in the Montreal draft were untried, since courts were already familiar with common-law defenses. The carriers believed that costs would be reduced with strict liability and also hoped that the method would expedite the handling of claims. An important indicative vote was taken at the eleventh meeting of the Commission of the Whole and 35 states favored the new system of strict liability based on the Montreal draft, while 19 states favored retention of the concept of presumed liability described in Articles 18(1) and 20 of the Warsaw/Hague text. Nevertheless, the subcommittee, the Legal Committee and conference all decided that the system of rebuttable presumption of carrier fault should apply in the case of delay of cargo. The question of delay will be examined in more detail below.

B. Article 18(1) and (2)—Strict Liability

The basic statement of the strict liability of the carrier in the carriage of cargo was achieved by deleting the reference to cargo in Warsaw/Hague Article 18(1) and inserting a new Article 18(2) in Montreal Protocol No. 4. The new provisions read:

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.
2. 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.

Article 18(2) was discussed at the conference as Article 18(1) of the Legal Committee’s draft. The provision survived a Swedish proposal to replace the key words “upon condition only that” by the word “if” and was adopted without change.

C. Defenses

1. General provisions (Article 18(3))

Article 18(2) of the Legal Committee’s draft (renumbered in consignor be given notice of the possible application of the Warsaw limit to the carriage of the cargo and the amendment of Art. 9, to eliminate the penalty for lack of such notice.

§ W/H-CM-SRC/12, § 1 (1975).
Montreal Protocol No. 4 as Article 18(3) gave rise to a lengthy discussion on many points.\textsuperscript{100} The Legal Committee's draft read:

(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, an armed conflict, or civil disturbance;
(d) an act of public authority carried out in connection with the entry, exit or transhipment of the cargo.

The carrier may not avail himself of the exoneration of liability mentioned in this paragraph if the person claiming compensation proves that there was negligence on the part of the carrier, his servants or agents, and such negligence caused or contributed to the destruction, loss or damage of the cargo.\textsuperscript{101}

The initial discussion at the twelfth meeting of the Commission of the Whole concerned the introductory part of the first subparagraph in Article 18(2). A Norwegian proposal read: “The carrier shall, however, be exonerated from liability if he proves that the cause, occurrence and extent of the damage were beyond his [fault and] control and that of any person for whom he is responsible and that the damage was [solely and directly] caused by one or more of the following:”\textsuperscript{102}

In addition, the Netherlands proposed to delete the word “solely” from the introductory portion.\textsuperscript{103}

India proposed that the introductory portion read: “However, the carrier is not liable if he proves that the destruction or loss of, or damage to, the cargo resulted not from negligence on the part of the carrier, his servants or agents, but solely from one or more of the following: ...”\textsuperscript{104} and that the second subparagraph be deleted. Norway indicated that it could second that proposal provided the

\textsuperscript{100} For a summary of the discussions on defenses in the Subcommittee and Legal Committee, see ICAO Doc. 9131-LC/173-2 at 114-17 (subcommittee) and 20-23 (Legal Committee) (1975).
\textsuperscript{101} W/H-CM Doc. No. 4, at 6, ICAO Doc. 9154-LC/174-2 at 18 (1975).
\textsuperscript{103} W/H-CM Doc. No. 28, at 1, ICAO Doc. 9154-LC/174-2 at 143 (1975).
\textsuperscript{104} W/H-CM-SRC 12, ¶ 3 (1975).
word "negligence" was replaced by "fault" and the word "solely" by "directly."

A Swedish amendment to the second subparagraph of Article 18(2) stated: "Nevertheless, the carrier shall be wholly or partly liable to the extent that it is proved by the person claiming compensation that negligence on the part of the carrier, his servants or agents caused or contributed to the destruction, loss or damage of the cargo."

The proposal was intended to weaken the Legal Committee’s text which would totally deprive the carrier of the defenses in the first paragraph of Article 18(2) even if the person claiming compensation proved mere contributory negligence on the part of the carrier.

None of the foregoing proposals was adopted, although the Netherlands proposal, calling for the deletion of the word "solely" from the introductory part of the paragraph was rejected by a close vote. The last part of the paragraph was approved.

The Drafting Committee’s text, discussed by the tenth plenary meeting, contained the old Article 18(2) renumbered as Article 18(3). After further discussion in the plenary session, the second part of Article 18(3), the subparagraph following the list of defenses which had been so much discussed in the Commission of the Whole, was deleted.

2. Special suggestion of the International Federation of Airline Pilots’ Associations (IFALPA)

At its eleventh and fourteenth meetings the Commission of the Whole had before it a suggestion of the IFALPA Observer to add to the second sentence of Article 18(2) of the Montreal draft the words: "That the carrier, his servants or agents, having been informed of the contents of the consignment, failed to ensure that the stowing of the cargo was performed adequately for the purpose of transportation by air or in accordance with the applicable regulations for transportation of cargo by air." The suggestion was

106 By a vote of twenty-five to twenty-three, with 1 abstention.
107 By a vote of nineteen to fourteen.
supported for purposes of discussion by Canada, Trinidad, and Tobago.

After some opposing statements had been made, Canada, with the consent of Trinidad and Tobago, withdrew the proposal, expressing the hope and belief that a more effective solution for the problem of carriage of dangerous goods would be found in ICAO bodies where technical matters were discussed. The whole of Article 18(2), later renumbered as Article 18(3), was then approved by the Commission of the Whole.

3. Article 18(3)—List of defenses

Discussion of the detailed list of defenses available to the carrier under the system of strict liability followed much the same pattern in the subcommittee, Legal Committee and conference.

The subcommittee accepted the defenses of inherent defect, quality or vice of the cargo; defective packing of the cargo (although it believed that this latter defense could be subsumed under the former); riots, acts of war and civil commotion; and damage resulting from official or judicial actions. The subcommittee rejected the defenses of acts of unlawful seizure of aircraft; acts of unlawful interference with international civil aviation; force majeure and grave natural disaster of an exceptional character; and strikes and lockouts. The Committee accepted substantially the same defenses as those put forward by the subcommittee with differences in wording in some cases.

At its thirteenth meeting, the Commission of the Whole considered the defenses available to the carrier listed in subparagraphs (a)-(d) of Article 18(2) as accepted by the subcommittee. A Netherlands proposal to replace the English text of item (a) by the words "nature or inherent defect of that cargo" was not supported and an Israeli suggestion that "nature" should be inserted after "defect" was referred to the Drafting Committee. Item (a) was then approved.

Item (b) was approved without change after the Commission had rejected a Portuguese proposal for addition of the words "or inappropriate" after the word "defective."

Item (c) gave rise to four proposals for amendment:

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108 See W/H-CM-SRC/13 (1975) for the various proposals on defenses.
(1) To replace the Montreal text by the words "an act of war or an act of armed conflict, whether of an internal or international character" (Egypt);

(2) Replacement of the Montreal text by the words "an act of armed conflict, whether or not of an international character" (France);

(3) To replace the Montreal text by "armed conflict, hostilities, civil war or insurrection" (Netherlands);

(4) The deletion of item (c) (Israel).

The first two proposals failed; the last two were not seconded. The Montreal text was adopted. Subparagraph (d) was approved without change.

As in the case of the subcommittee and Legal Committee the thirteen meeting of the Commission of the Whole of the conference witnessed rejection of proposals by the Soviet Union to add the two further defenses of grave natural disaster and acts of unlawful interference with civil aviation.

The defenses listed in items (a), (b) and (d) survived the voting in the tenth plenary meeting, but the defense of "civil disturbance," found in item (c) along with the defenses of "act of war" and "armed conflict," was deleted.\textsuperscript{109} The deletion resulted from the provision's failure to gain the two-thirds vote required by the conference rules of procedure.

Accordingly, the text of Article 18(3) as adopted by the Conference reads:

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.

4. Article 21—Contributory negligence

The subcommittee retained the defenses of contributory negligence in Article 21 but expanded its availability to include not only the contributory negligence of the person claiming compen-

\textsuperscript{109} By a vote of twenty-five to twenty, with four abstentions.
sation, but also that of the consignor or consignee. The Legal Committee decided that the defense of contributory negligence should be framed in terms of the negligence or other wrongful act or omission of the claimant or the person from whom the claimant derives his rights.\(^{110}\) The Conference adopted the following text of Article 21:

1. In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.
2. In the carriage of cargo, if the carrier proves that the damage was caused by 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.

D. Article 18(4) and (5)—Meaning of “carriage by air”

Article 18(3) and (4), later renumbered as Article 18(4) and (5), in the Montreal draft were adopted without change:

4. The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or 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.
5. 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.

E. Article 22—Limit of liability

1. *Principles for determination of the limit*

During the subcommittee's discussion of this point it was indicated that the necessity of change should be established before a

\(^{110}\) For a summary of the discussions on contributory negligence in the subcommittee and Legal Committee, see ICAO Doc. 9131-LC/173-2 at 117 (subcommittee) and 23 (Legal Committee) (1975).
change was made; some believed that it was possible to live with the present limit even if unbreakable, since the Convention provided that the shipper, unlike the passenger, could make a special declaration of interest in delivery at destination under Article 22(2)(a) and normally took out insurance. A sudden increase in the amount of the limit would go against the trend in air cargo, since, with the availability of larger aircraft, the average value of items carried was decreasing. It was necessary to ascertain the proportion of claims covered by the present limit before deciding whether a change in the limit was justified. It was believed that any new figure must be used world-wide, although it was recognized that delays in acceptance of the instrument would prohibit its coming into force for all states at the same time. Following this discussion, the subcommittee prepared a questionnaire on economic data and recommended that it be forwarded to the states.\footnote{For questionnaire, see ICAO Doc. 9131-LC/173-2 at 144 (1975). The information received from states and international organizations in response to the questionnaire was analyzed by the ICAO Air Transport Committee and forwarded to the Legal Committee along with information presented by the ICAO Secretariat. \textit{Id.} at 157-86.}

2. \textit{Amount of the limit}

In the Legal Committee it was pointed out that the amount of the limit must be realistic and cover in full the vast majority of claims. In addition, the economic position of the shipper and carrier as well as the costs of insurance should be considered. With the increase of the value of the Poincaré franc from $16 U.S. to $20 U.S. per kilogram, the limit had already changed. The Committee was unable to make a decision on the limit and requested the ICAO Council to make available to the proposed conference up-to-date economic data relevant to determination of the amount of the limit.\footnote{As a result of this request, the conference had before it W/H-CM Doc. No. 19—Information Submitted by the Air Transport Bureau Concerning the Value and Weight of Goods Carried by Air in International Trade, ICAO Doc. 9154-LC/174-2 at 117 (1975).}

After a brief discussion at the conference, the fourteenth meeting of the Commission of the Whole rejected a United States proposal that the limit of liability should be increased to $12 U.S. per pound (approximately $27 or 333 Poincaré gold francs per kilo-
Thus, no change was made in the limit of liability applicable to the carriage of cargo. However, discussion of whether the gold franc should be replaced as a unit of account was deferred to another time.

3. Unbreakability of the limit

A substantial majority of the subcommittee favored an unbreakable limit within the system of strict liability, it being understood that, as a consequential action, Articles 9 and 25 would have to be deleted, although the consignor would still have the possibility of making a special declaration of interest in delivery at destination under Article 22. Both the Legal Committee and the conference decided in favor of an unbreakable limit on liability and therefore recommended that Articles 9 and 25 should be deleted. In particular, the deletion of Article 9 would mean that liability limits could not be broken for absence or irregularity of the document of carriage.\[114\]

4. Method of calculating the limit

The subcommittee discussed whether the basis for calculation of the limit should be the weight of the package or the weight of the entire shipment. It was pointed out that there were certain disadvantages in the Warsaw/Hague rule of relating the limit to the package, rather than to the shipment. For example, in the case of a shipment which included packages of mixed values, in order to protect himself the carrier would have to insure for the highest value per kilogram which could lead to duplicate insurance. On the other hand, in the case of a mixed shipment, the procedure was too complicated to single out individual packages for special declarations. Moreover, a shipment containing packages of mixed values was necessary if a shipper was to get favorable freight rates. As it was obvious that the matter required further study, the subcommittee took no specific position on the matter. The Legal Committee rejected a United States proposal to compute the limit on the basis of the weight of the total shipment.\[115\]

At the seventeenth meeting of the Commission of the Whole,

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113 By a vote of twenty-eight to four with eleven abstentions.
114 See § V(H) infra.
115 By a vote of thirty-three to two, with two abstentions.
Qatar and the United Kingdom proposed the addition of a paragraph to Warsaw/Hague Article 22 providing that when a container or similar article of transport was used by or on behalf of the consignor to consolidate cargo, it was to be considered as the package for the purpose of the Article, unless the air waybill or other record mentioned in Article 5(2) specified the contents as separate packages. The proposal was rejected.

F. Article 23(2)—Circumstances under which the carrier may be relieved of liability for fixing a lower limit

Article 23(2) was discussed at length during the Montreal Conference, and, in order that the summary given below may be understood, it is necessary to reproduce the Warsaw/Hague text of Article 23. It reads:

(1) 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 in this Convention.

(2) Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

At the fourteenth and fifteenth meetings of the Commission of the Whole there were several proposals concerning Article 23(2). The Netherlands proposed replacing Article 23(2) of the Warsaw/Hague text by the following text: “Paragraph 1 of this Article shall not apply to the provisions which relieve the carrier of the obligation to take special measures to avoid damage resulting from the nature or defect of the cargo carried.” This proposal was rejected.

IATA then presented a suggestion to extend the coverage of Article 23(2) to the carriage of livestock or perishable cargo, thus permitting the carrier and shipper to enter into a special con-

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117 By a vote of twenty-two to nine, with eleven abstentions.
118 For a discussion of problems arising out of Warsaw Convention Art. 23(2), see Drion, Exemption Clauses Governing Loss or Damage Resulting from the Inherent Defect, Quality or Vice of the Cargo, 28 J. AIR L. & COM. 329 (1962).
tract covering this type of cargo and relieving the carrier of liability under Article 23(1) for fixing a lower limit than that specified in the convention. This suggestion was rejected. Some of the speakers found that the amendment was unnecessary since Article 23(2) already covered the idea; others maintained that it went too far and would permit the carrier to escape liability even if the damage had been caused by his negligence. The United States then suggested removing the doubt about the interpretation of Article 23(2) that had prompted the IATA amendment by introducing the word "solely" after "resulting" in the Warsaw/Hague text. The provision would then read: "Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting solely from the inherent defect, quality or vice of the cargo carrier." A motion to reopen the debate on Article 23(2) failed.

G. Article 24—Conditions under which action may be brought

The Legal Committee's text of Article 24 read:

In the carriage of 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 limits of liability 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. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.\footnote{W/H-CM-SRC/15, ¶ 2 (1975).}

At the fifteenth meeting of the Commission of the Whole France stated that since it had been decided to maintain the present low limit of liability for cargo, the maintenance of Article 25 of the Warsaw/Hague text was necessary to preserve a balance between the legitimate rights of the shipper and the carrier. France requested separate votes on the two sentences in Article 24 of the Legal Committee's text with a view to voting against the second which was concerned with unbreakability of the limit.

Israel proposed the introduction of the words "in quasi-contracts" after "in contract" in the first sentence and addition of a third sentence reading: "Action for damages for the purpose of this Article shall include any action for restitution of the goods in

\footnote{W/H-CM Doc. No. 4, at 7, ICAO Doc. 9154-LC/174-2 at 19 (1975).}
kind or for the restitution of the value of the goods, restitution of freight or any unlawful enrichment."^{123}

However, this proposal was not seconded. The Czechoslovak Socialist Republic proposed the deletion of the words "in tort or otherwise" in the first sentence and of "whatever the circumstances which gave rise to the liability" in the second. It was explained that the consignor and consignee were more interested in having the cargo reach its destination in good order than in receiving compensation for it. Hence, if the carrier committed an illegal act which caused damage to, destruction, or loss of cargo, he should not escape with paying compensation within the limit provided in the Convention."^{124} None of the proposals amending Article 24 were accepted, and it was noted that acceptance of Article 24 of the Montreal text meant deletion of Articles 25 and 25A of the Warsaw/Hague text insofar as they applied to cargo.

At the tenth plenary meeting, there were two proposals for amending the replacement for Article 24 prepared by the Commission of the Whole. The first was a Netherlands proposal to delete the words "without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights" from paragraph 2 of Article 24."^{125} This proposal was rejected. The second proposal, made by Brazil, to introduce at the beginning of the second sentence of the same paragraph the words "Subject to the provisions of paragraph (2)(1) of Article 22"^{126} also was rejected.

Article 24 of Montreal Protocol No. 4 as finally adopted, reads:

1. In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits 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. In the carriage of 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 limits of liability set out in this Convention without prejudice to the

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\(^{123}\)W/H-CM-SRC/15, § 3.2 (1975).

\(^{124}\)Id. § 3.3 (1975).


question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability.

H. Articles 25 and 25A—Elimination of unlimited liability of the carrier, his servants or agents in the case of certain behaviour

Following the adoption of the principle of unbreakability of the limit in the carriage of cargo, Warsaw/Hague Articles 25 and 25A were amended to restrict breakability of the limit to cases of the carriage of passengers and baggage. The new provisions in Montreal Protocol No. 4 read as follows:

Article 25

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

Article 25 A

3. In the carriage of passengers and baggage, 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.

At the tenth plenary meeting the United Kingdom proposed to add to the revised text of Article 25 another paragraph reading: "In the carriage of cargo, the limits of liability specified in Article 22 shall not apply if it is proved by criminal conviction that the cargo was stolen by the carrier, his servants, or agents." The proposal did not obtain the two-thirds majority required for adoption and the United Kingdom also failed to achieve support for a similar addition made to the new Article 25A(3).

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127 Id. § 6.
128 Id. § 7.
I. Article 26(2)—Time-limit for complaints for non-delivery of cargo

Warsaw/Hague Article 26(2) reads:

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.

In the Legal Committee the Soviet Union proposed to add to Article 26(2) a provision that in case of total loss of goods, the person entitled to delivery must complain within thirty days from the date of the issuing of the air waybill. Article 26 did not mention any time within which a complaint must be lodged in the case of the total loss of goods. The proposal was rejected.

At the conference the subject of time limitations was discussed during the seventeenth, eighteenth and nineteenth meetings of the Commission of the Whole. Nigeria proposed a new paragraph 2 in Article 29 of the Warsaw/Hague text providing that where the "other means" for the preservation of the record of the contract of carriage mentioned in Article 5(2) had been used, a person who wished to bring action for damage must give notice to the carrier of his intention to do so no later than six months from the date of arrival at the destination, from the date on which the aircraft ought to have arrived, or from the date on which carriage stopped. Nigeria explained that it would discourage the use of "other means" if the taped record had to be preserved for the two-year period referred to in Article 29(1). During the discussion it was pointed out that the two-year limit in Article 29(1) applied to the institution of an action and that the Nigerian proposal introduced a new idea: notice of action. It was further suggested that Article 26 would be a more appropriate place for the proposed provision or that a sentence could be inserted in Article 5(2) providing for the length of time during which the record should be preserved when "other means" were used. Nigeria and the United

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Kingdom then presented a joint proposal130 for the addition of a provision to Article 26 giving the consignor, in the event of non-delivery or loss of the cargo, six months from the date on which the cargo was consigned to file a complaint with the carrier. This proposal also suggested the introduction of a new article or paragraph specifying how long the record of carriage referred to in Article 5(2) should be preserved.

Meanwhile the Soviet Union proposed131 supplementing Article 26(2) by providing that, in the event of total loss of cargo, the claim shall be made by the person entitled to delivery within 120 days of the issuance of the air waybill or the recording of the particulars of the carriage using any “other means” as provided in Article 5(2). It was then suggested that there might be an advantage in considering the new Soviet Union proposal in connection with the revised Nigerian proposal, as they were somewhat related.

Nigeria next suggested that the Commission of the Whole vote on the principle of time limitations instead of voting on the Nigerian and Soviet Union proposals and leave the preparation of the consolidated text to the Drafting Committee. The Soviet Union indicated that this would be acceptable if the Nigerian-United Kingdom proposal were to include a period of 120 days instead of a time-limit of six months. This was agreed. The United States then proposed an amendment extending the period to one year, explaining that even a six-months period was too short when a small consignor, a long distance, and more than one carrier were involved.132 This amendment was rejected, however. The Nigerian-Soviet Union-United Kingdom principle of a 120-day period from the date of consignment for the filing of a complaint of non-delivery or loss was also rejected, as well as the second part of the Nigerian-United Kingdom proposal concerning the preservation of the records referred to in Article 5(2). Thus, Article 26(2) of the Warsaw/Hague regime remained unmodified.

J. Article 30A—Right of recourse

The new Article 30A, adopted by the Conference without dis-

discussion, includes the following provision on the right of recourse: "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."\textsuperscript{133}

K. Article 33—Refusal to enter into a contract of carriage and making of regulations

The revised Article 33 reads: "Except as provided in paragraph 3 of Article 5, nothing 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." In accordance with a Nigerian proposal considered at the fifteenth meeting of the Commission of the Whole Article 33 has been amended to avoid any possible or apparent conflict with the new Article 5(3). The latter provision prohibits a carrier from refusing to accept cargo for carriage where it is impossible to use, at points of transit and destination, an electronic data processing system which would preserve the record of the carriage.

L. Article 34—Carriage performed in extraordinary circumstances

The new text of Article 34 changes Warsaw/Hague Article 34 to refer to the non-application of "Articles 3 to 8" and not of "Articles 3 to 9" in the following circumstances: "The provisions of Articles 3 to 8 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business." The reference to Article 9 is no longer appropriate because of the new drafting and the marked change in its role.\textsuperscript{134}

M. Article 20—Delay

In the subcommittee it was agreed that the liability of the carrier for damage occasioned by delay of cargo should be based on a rebuttable presumption of fault on his part, as in the case of Guatemala City Protocol with respect to delay of passengers.\textsuperscript{135}

\textsuperscript{133} This provision which is found in Art. 10 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Oct. 7, 1952, 310 U.N.T.S. 181, 186, was also included in the Guatemala City Protocol.

\textsuperscript{134} See § IV(F) supra.

\textsuperscript{135} This is similar to the rebuttable presumption of fault established by the Guatemala City Protocol with respect to delay of passengers.
The subcommittee agreed that economic data would be needed before a decision could be made regarding the limit applicable to damage caused by delay of cargo. It also agreed that there was no need for a separate limit or different method of calculating the limit in the case of delay unless the need was clearly demonstrated by subsequently supplied economic data. No decision was reached on the question of whether the limit should be unbreakable in the case of delay.

The subcommittee also examined, but reached no decision on the interpretational question of the “special declaration of interest in delivery at destination,” contemplated by Article 22(2)(a). One interpretation of these words was that they contemplated only a voluntary agreement about higher value between the shipper and the carrier, while another interpretation was that the words gave the shipper a right to make unilaterally a special declaration of interest in delivery at destination and that the carrier must accept the declaration, although he could require the shipper to pay a supplementary sum. There was also a difference of opinion on whether the words in question were restricted to a special declaration of “value” or whether they could include an interest in the timely delivery of the cargo in addition to its safe arrival. After further inconclusive discussion on the matter the subcommittee decided that the differing views on the interpretation of Article 22(2)(a) should merely be recorded.

There was a clear majority opinion in the subcommittee favoring the system of unbreakability of the limit for delay of cargo, necessitating the deletion of Warsaw/Hague Articles 9 and 25.

The Legal Committee decided to accept the recommendation of the subcommittee that the carriers’ liability for damage caused by delay should be based on a rebuttable presumption of fault on his part and that the limit of liability should be unbreakable.¹⁰⁸ No decision on the amount of the limit was taken by the Committee. The conference followed the same line. Thus, Warsaw/Hague Article 9 was left unchanged and Article 20 was changed to read: “In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants

¹⁰⁸ By a vote of forty-three to zero, with one abstention.
and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.” Moreover, revised Articles 2 and 25 provide no penalty in the case of delay of cargo; hence, the limit of liability in the case of delay is unbreakable.

VI. ARTICLE 2—AIRMAIL

Warsaw/Hague Article 2(2) provides that the convention does not apply to carriage of mail and postal packages. In 1967 there was a case in the United Kingdom where a claimant successfully recovered damages from an air carrier in excess of the Warsaw cargo limitation for a postal article. IATA brought this matter to the attention of the Universal Postal Union (UPU) which in 1969 adopted a resolution leaving the matter unresolved.

At the ICAO subcommittee session in 1972, the United Kingdom explained that according to the domestic law of several countries, the sender of the mail or the addressee might have the right to sue the air carrier in tort regarding a postal article. In such a case, the carrier might be held liable without any limit whatsoever. The United Kingdom proposed that the carrier would be liable only and exclusively to a postal administration and that the addressee or sender of the mail would not have a right of action against the air carrier. In considering the possible liability of carriers in the carriage of postal items, it is necessary to bear in mind that they could not be expected, as in the case of cargo, to have opportunity to gain knowledge of the contents of postal items, some of which could be of great value. On the question of having the United Kingdom proposal refer to the Acts of the UPU, it was indicated that some international carriage of mail by air was not regu-

137 For a summary of the discussions on mail in the subcommittee and Legal Committee, see ICAO Doc. 9131-LC/173-2 at 135-37 (subcommittee), 28-29, 51 (Legal Committee) (1975).


139 ICAO Doc. 8878-LC/162 at 335 (1970).


141 Art. 22 of the UPU Constitution lists Acts and Regulations which supplement and complement the Constitution and together regulate all international postal relations. For the text of the Constitution, which was adopted in 1964 and came into force on January 1, 1966, see H. Van Panhays, L. Brinkhorst, & H. Maas, International Organization and Integration 412-18 (1968).
lated by these Acts and that, moreover, the Acts covered only the question of liability among postal administrations and did not refer to the liability of the carrier.\textsuperscript{142}

The only result of the discussion was that the subcommittee forwarded the following text of an Article A to the Legal Committee for discussion:

In the carriage of mail and postal packages, the carrier shall be liable only to \{the\} \{a\} postal administration \{with which the carrier has concluded a contract\}. \{The carrier's liability shall be determined in accordance with the regulations or contractual provisions applicable to the relations between the carrier and the postal administration\}.\textsuperscript{143}

The subcommittee also agreed that Article 2(2) should be replaced by the statement: "Except for the provisions of Article A, this convention shall not apply to the carriage of mail or postal packages."\textsuperscript{144}

In the Legal Committee in 1974 the United Kingdom once more raised the air mail question. In its view, exposure of the carrier to suit in tort without limitation of liability was unjust because the carrier has no control over the contents of the mail bags and hence cannot determine the value of the individual shipments and take out the necessary insurance.\textsuperscript{145} Part of the United Kingdom's proposal before the Legal Committee was that the carrier's liability \textit{vis-à-vis} the postal administration should be determined in accordance with the contract between the carrier and the administration, or in accordance with the statutory regulations governing the relations of the carrier with the postal authority. One further suggestion was that, with respect to insured or registered mail, the carrier's liability should be limited to the amount of the statutory liability of the postal administration, as determined in statutory regulations or by contractual arrangements applicable between the carrier and the postal administration for non-registered mail. The Legal Committee approved in principle the proposal that the carrier should be liable only and exclusively to the postal adminis-

\textsuperscript{142} ICAO Doc. 9131-LC/173-2 at 135 (1975).
\textsuperscript{143} \textit{Id.} at 137.
\textsuperscript{144} \textit{Id.}
\textsuperscript{145} \textit{Id.} at 28.
tration with which he is dealing.\textsuperscript{146} It was decided that the new instrument should not contain any specific rules as to the system of liability applicable to the air carrier in its relations with the postal administration.\textsuperscript{147}

The draft provisions prepared by the Legal Committee on this topic emerged as Article 2(2) and read:

\begin{quote}
(2) In the carriage of mail and postal packages, the carrier shall be liable only to the postal administration from which he received such mail and packages. This liability shall be governed by the rules applicable to the relationship between the carrier and the postal administration.

(3) Except as provided in paragraph (2) of this Article, the provisions of this Convention shall not apply to the carriage of mail and postal packages.
\end{quote}

At its ninth meeting, the Commission of the Whole referred to the Drafting Committee the suggestion of the UPU\textsuperscript{148} that the expression "mail and postal packages" be replaced by "postal articles". The proposed amendment would conform more closely to relevant UPU terminology.

The Commission then discussed a United Kingdom proposal amending the first sentence of the Montreal draft of Article 2(2) by replacing the words "the postal administration from which he has received such mail and packages" with "the postal administration of the country in which mail and packages originated".\textsuperscript{150}

The UPU explained that there were three possible modes of operation in the dispatch of mail involving transhipment: (1) Transhipment of mail from administration to administration where, at each transhipment point, the carrier hands the mail over to a postal administration which redispaches it; (2) carrier-to-carrier transfer of mail, with the paper work being handled by the postal administration; and (3) carrier-to-carrier transhipment without actual intervention of the postal administration, although the immediate postal administration must always give its consent for such transfer.

\textsuperscript{146} Id. The approval vote was forty to zero, with one abstention.
\textsuperscript{147} Id. at 29.
\textsuperscript{148} W/H-CM Doc. No. 4, at 6, ICAO Doc. 9154-LC/174-2 at 18 (1975).
\textsuperscript{149} W/H-CM Doc. 9, ICAO Doc. 9154-LC/174-2 at 73 (1975).
\textsuperscript{150} W/H-CM-SRC/9, ¶ 7 (1975).
The United Kingdom withdrew its proposal at the tenth meeting of the Commission of the Whole and it was replaced by a joint proposal of India and the United Kingdom to have paragraph 2 read: "In the carriage of mail and postal packages, the carrier shall be liable only to postal administrations in accordance with the rules applicable to the relationship between the carriers and the postal administrations."\(^{151}\) This amendment was carried at the same meeting. Paragraph 3 was approved without discussion. Thereafter, the only changes made in the provisions were the insertion of the expression "postal items" in two places to replace the expression "mail and postal packages" and the insertion in paragraph 2 of the word "relevant" before the word "postal administration".

The texts on air mail, as found in Montreal Protocol No. 4, are as follows:

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.

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

At the ninth plenary meeting, a proposal by the Norwegian delegation to eliminate the definite article before "carriers" in the last line of paragraph (2) was withdrawn after some adverse comments\(^{155}\) and the provisions concerning postal items were adopted by a vote of 47 to 1. The new provision, although couched in somewhat general terms, does achieve the purpose of the amendment: in the case of loss, damage or delay in the carriage of postal items, the carriers would no longer be liable to persons who mailed the items, but only to postal administrations.

VII. Article 22—The Unit of Account: The Shift from the Poincaré Gold Franc to the Special Drawing Right of the International Monetary Fund

A. Conversion of the Poincaré franc into national currencies

At the Legal Committee in 1974 there was considerable discus-

\(^{151}\) W/H-CM-SRC/10, 5 1 (1975).

\(^{155}\) While the Norwegian proposal made sense, it should logically have also provided for the deletion of the definite article before the words "postal admin-
sion about the conversion of the Poincaré franc into national currencies. Since 1968 the free market price of gold no longer necessarily has corresponded to the price calculated for the official rates; moreover, the price of gold on the free market of certain countries was subject to significant variations at different times and places. Denmark, France, Norway, the Netherlands, Sweden, Switzerland, the United Kingdom and the United States therefore presented a resolution which was subsequently adopted. According to the resolution, the Committee expressed the opinion that, for the application of the various Warsaw instruments, the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome 1952), and in particular the Guatemala City Protocol, the conversion of the sums fixed in Poincaré francs into national currencies other than gold should not be made on the basis of the price of gold on the free market.

Obviously, since the resolution received so few affirmative votes, it could not be relied upon to afford a solution for problems caused by the two-tier gold regime. Thus, it is not surprising that emphasis was later given to finding a more certain unit of account for use in the Warsaw system.

B. The Special Drawing Right

Following a recommendation by the Legal Committee, the ICAO Council established a working group to consider potential conflicts between cargo provisions of the new instrument and those of the

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153 By a low vote of seventeen to zero, with twenty abstentions.

154 See note 133 supra.

Guatemala City Protocol. During the session of the working group in April 1975 the United States drew attention to an IATA letter which noted that the Poincaré gold franc was no longer an adequate method for expressing limits of liability. A United States paper appended to the working group’s report referred to that letter and stated that whatever method was used to express the limits for cargo would also be suitable for the Guatemala City Protocol; changing the “gold franc” clause of all the Warsaw instruments at the same time in Montreal would avoid conflicts about the applicable limit of liability resulting from different methods of expressing the limits.

The United States submitted that expressing the limits of liability in Special Drawing Rights (SDRs) of the International Monetary Fund (IMF) would be a possible alternative. Although the United States did not make a formal proposal at the time, it did point out the necessity of some preparatory work if the coming Montreal Conference was to take action on the matter. The working group, however, considered the matter to be beyond its scope.

One of the documents before the conference was a proposal by Norway to amend Warsaw/Hague Article 22, paragraphs 2(a) and 5 in the new instrument on cargo in order to substitute the Special Drawing Right as the unit of account in place of the Poincaré gold franc. At the same time, Norway proposed to include in the agenda of the Conference the question of amending the Warsaw Convention, the Hague Protocol and the Guatemala City Protocol to substitute the SDR as the unit of account for the Poincaré gold franc. In support of the proposal it was noted that the SDR is a unit of account established by the International Monetary Fund which has 126 member states and that IATA had

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158 The Guatemala City Protocol also reproduces some cargo provisions of the Warsaw Convention as amended by the Hague Protocol.


160 The agenda was initially limited to revision of the cargo provisions in the Warsaw Convention as amended by the Hague Protocol.
already adopted in principle the SDR for determining air fares and for accounting purposes.

According to the Norwegian paper, the value of the SDR was originally calculated on the basis of one SDR being equal to 0.888671 grams of fine gold and this was still the basic value of the SDR. On July 1, 1974, however, the IMF had introduced an SDR calculated on the basis of the value of sixteen national currencies which constituted a "basket". In the basket the currencies had different weights. Norway intended the "basket SDR" to be utilized as the unit of account in the air law conventions. The value of one U.S. dollar was equivalent to SDR 0.809985 on July 1, 1975.

C. Inclusion of the Special Drawing Right in Montreal Protocol No. 4 (Cargo provisions)

Meanwhile, a detailed proposal, presented to the conference by Denmark, Egypt, Japan, the Netherlands, Norway, Qatar, Sweden, the United Kingdom and the United States,\(^1\) recommended that Article 22, paragraph (2)(a) of the Warsaw Convention as amended by the Hague Protocol should be amended to read: "In the carriage of cargo, the liability of the carrier is limited to a sum of Special Drawing Right . . . per kilogram, . . . ."

Further, paragraph 5 should read:

The sums mentioned in terms of the Special Drawing Right in this Article 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 judgment. The value of a national currency, in terms of the Special Drawing Right, of a Party which is a Member of the International Monetary Fund, shall be calculated in accordance with the method of evaluation 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, which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that Party.

The Soviet Union, which was opposed to adoption of the SDR, put forward this proposal:

Conversion of the sums into the national currency of the State, the Court of which is seized of the case, shall be made according to the official gold parity of the franc and the national currency of that State at the date of judgment or at the date agreed upon by the parties. Conversion of the francs into national currencies, of which the official gold content is unknown, shall be made according to the relationship between the currencies established by the legislation of the respective States. 168

The Soviet Union proposal was supported by the Czechoslovak Socialist Republic and Poland.

After a lengthy discussion the proposal for the adoption of the SDR as the unit of account in the cargo instrument was carried at the eighteenth meeting of the Commission of the Whole by a vote of 39 in favor and 9 against, with 5 abstentions. 169

When, at its twenty-sixth meeting, the Commission of the Whole turned to consideration of the Drafting Committee's proposal which ultimately became Montreal Protocol No. 4 dealing with cargo, it had before it a text 164 which called for replacement of paragraph 2(a) of Article 22 of the Warsaw/Hague text by a paragraph 2(a)(i) which dealt with the limit of liability for registered baggage, reproducing paragraph 2(a) of the Warsaw/Hague text without the phrase "and of cargo" and referring to a limit of 250 francs per kilogram. In addition, the text contained a paragraph 2(a)(ii) on the limit of liability for cargo expressed in terms of the SDR. The Commission decided to change the presentation of the provision and merely to state that paragraph 2(a) of the Warsaw/Hague text was amended by the deletion of the words


169 In view of the importance of this decision which was taken on a roll-call vote (one of the few such votes during the Montreal Conference), the detailed record of the vote is given herewith: In favor: Algeria, Argentina, Australia, Belgium, Canada, Chile, Denmark, Arab Republic of Egypt, Finland, France, Federal Republic of Germany, Guatemala, India, Iraq, Ireland, Israel, Italy, Japan, Kenya, Republic of Korea, Kingdom of the Netherlands, New Zealand, Nigeria, Norway, The Philippines, Portugal, Qatar, Spain, Sudan, Sweden, Switzerland, Tanzania, Tunisia, Uganda, United Kingdom, United Republic of Cameroon, United States of America, Venezuela, Yugoslavia (39).

Opposed: Bulgaria, Byelorussian Soviet Socialist Republic, Cuba, Czechoslovak Socialist Republic, German Democratic Republic, Hungary, Poland, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics (9).

Abstentions: Brazil, People's Republic of China, Ghana, Turkey, Zaire (5).

"and of cargo" and to insert after paragraph 2(a) the following:

b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 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.

The present paragraph 2(b) was designated as paragraph 2(c). In subparagraph (b) the Commission chose the whole figure "17" instead of the alternative figure "16.58" to express the number of Special Drawing Rights. Later, at the tenth plenary meeting, Kenya and Tanzania attempted to have the amount of 17 Special Drawing Rights in the proposed paragraph 2(b) of Article 22 replaced by 16.58 which, in their view, was a closer approximation to the existing limit of 250 francs. Their proposal was rejected.

The second part of the Drafting Committee provisions on the SDR called for introduction, after Article 22(5) of the Warsaw/Hague text, of paragraph 6 on the conversion of sums expressed in terms of the Special Drawing Right into national currencies. The text of this provision was adopted at the twenty-sixth meeting of the Commission.

The sums mentioned in terms of the Special Drawing Right in this Article 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 High Contracting 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 High Contracting Party which is not a Member of the International Monetary Fund, shall be calculated in a manner determined by that High Contracting Party.

166 By a vote of twenty to seven, with two abstentions.
Belgium noted that some formula should also be included which would be acceptable to states that were not members of the International Monetary Fund as well as to member states. Later, at the eleventh plenary meeting, the Conference adopted the following provision as a second subparagraph in Article 22(6):

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 2(b) of Article 22 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 two hundred and fifty monetary units per kilogramme. This monetary unit corresponds to sixty-five and a half miligrammes of gold of millesimal fineness nine hundred. This sum may be converted into the national currency concerned in round figures. The conversion of this sum into the national currency shall be made according to the law of the State concerned.

D. Inclusion of the Special Drawing Right in Additional Protocols Nos. 1, 2 and 3

Since the question of including the SDR in the Warsaw Convention, the Hague Protocol and the Guatemala City Protocol (as distinct from the instrument containing the amended cargo provisions) required amendment of the agenda, this matter was discussed and voted on in the sixth plenary meeting. That session considered two proposals:107 (a) A United States proposal to add the sub-item “Consideration of possible protocol to the Guatemala City Protocol (1) replacing the gold franc by the Special Drawing Right in the provisions relating to the limits of the carrier’s liability and (2) resolving the conflict between its cargo provisions and those adopted by this Conference”; and (b) A Norwegian proposal for a sub-item “Replacement of the gold franc by the Special Drawing Right in the provisions of the Warsaw Convention, the Hague Protocol and the Guatemala City Protocol relating to the limits of the carrier’s liability.” Both the United States and Norwegian proposals were adopted.

The SDR question was then debated at the twenty-first meeting of the Commission of the Whole; it came before the Commission

in a Norwegian proposal, as amended by the multipartite proposal. The Commission then decided to replace the gold franc with the SDR in the Warsaw regime by the following series of historic votes:

- Guatemala City Protocol: 30 to 10, with 6 abstentions,
- The Hague Protocol: 36 to 10, with 6 abstentions, and
- Warsaw Convention: 36 to 11, with 4 abstentions.

Thus, Additional Protocols Nos. 1, 2 and 3 respectively amend (a) The Warsaw Convention, (b) The Warsaw Convention as amended at the Hague, 1955, and (c) The Warsaw Convention as amended at the Hague 1955 and at Guatemala City, 1971, to contain provisions revising the monetary unit. Except for the inclusion of appropriate limits, these Protocols are textually the same as those found in Montreal Protocol No. 4.

VIII. Form of the New Instrument

A. Avoidance of conflict between Montreal Protocol No. 4 and the Guatemala City Protocol

In the Legal Committee several delegations noted a potential conflict between the cargo provisions of the proposed new instrument and those of the Guatemala City Protocol, which also reproduced some provisions of the Warsaw Convention as amended by the Hague Protocol relating to cargo. Pursuant to a recommendation of the Committee to the ICAO Council, the Council decided to appoint a small working group to present an analysis and possible solutions to the problem of potential conflict at the Montreal Conference. The working group met in April 1975 and agreed that a clause of the type given below would resolve the conflict between the Guatemala City Protocol and the new protocol.

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170 The votes took place between 1715 and 1730 hours on September 17, 1975, and were such as to indicate that a two-thirds majority of the conference, meeting in plenary, would be available, thus opening the door to United States acceptance of the Guatemala City Protocol provisions, although, as will be seen later, by a somewhat complicated procedure. The votes were as follows: First half of United States proposal: 38 for, 10 against and 2 abstentions; second part of United States proposal: 28 for, 13 against and 5 abstentions; Norwegian proposal: 31 for, 10 against and 2 abstentions.
relating to cargo for states which are parties to both instruments:

**ARTICLE X**

If two or more states are Parties both to the present Protocol and to the Guatemala City Protocol of 8 March, 1971, the following rules shall apply between them:

a) The provisions resulting from the system established by the present Protocol, concerning cargo and mail, shall prevail over the provisions resulting from the system established by the Guatemala City Protocol;

b) The provisions resulting from the system established by the Guatemala City Protocol, concerning passengers and baggage, shall prevail over the provisions resulting from the system established by the present Protocol.

This was not a specific text and there was a division of opinion in the working group as to the best answer to the conflicts problem. Sweden suggested a consolidated instrument relating to the carriage by air of passengers, baggage and cargo, but the working group found the proposal outside its terms of reference. That the proposal had some merit is seen in the adoption by the conference of a resolution on the preparation of a consolidated text.

At the nineteenth meeting of the Commission of the Whole there were three proposals before the Conference:

1. A proposal by Poland and the Soviet Union which was in accord with the Legal Committee's recommendation, that the new instrument should be a protocol to the Warsaw Convention as amended by the Hague;

2. A proposal by the United States that the cargo and mail provisions adopted by the Conference should become amendments to the Guatemala City Protocol as well as the Hague Protocol and further, that the former, after amendment, might be adopted as an independent new instrument entitled "The Warsaw Convention as amended at the Hague, Guatemala City and Montreal";

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174 See § VIII (B) infra.


3. The multipartite proposal of Denmark, Federal Republic of Germany, France, Japan, Norway, Sweden, Switzerland and the United Kingdom that a new consolidated instrument should be prepared, entitled "The Warsaw Convention as amended at the Hague and at Guatemala City and as amended and consolidated at Montreal 1975."

Since the question was raised whether the second and third proposals could be discussed before a decision by the conference to add them to its agenda, the conference then met in its fifth plenary meeting to discuss the matter. After an extensive discussion on procedure during the fifth and sixth plenary meetings, the conference decided that the multipartite proposal fell within the agenda. More of this proposal will be discussed later in this article.

By a much wider majority, the conference also decided to include in the agenda the following sub-item proposed by the United States: "Consideration of a possible protocol to the Guatemala City Protocol (1) replacing the gold franc by the Special Drawing Right in the provisions relating to the limits of the carrier's liability and (2) resolving the conflict between its cargo provisions and those adopted by this conference."

The conference then reverted to the Commission of the Whole and discussed the form of the new instrument. The multipartite proposal for a consolidated convention was rejected.

The conference then took up the United States proposal to resolve the potential conflict between the cargo provisions in Guatemala City Protocol and those adopted by the Montreal Conference. At the twenty-second meeting of the Commission of the Whole, the United States announced that it would submit a proposal for the inclusion of two paragraphs in the final clauses of the instrument under consideration. The proposal was intended, in combination with Article X, to resolve the problem of con-

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178 By a vote of twenty-one to twenty with five abstentions.
179 See § VIII (B) infra.
181 By a vote of thirty-six to seventeen, with three abstentions.
182 For considerations of simplicity, it is not proposed that the complete evolution of this discussion be traced.
183 See § VIII(A) supra.
flicts. The first paragraph would permit termination of the provisions of the Hague Protocol relating to passengers and baggage, while the second paragraph would terminate the cargo provisions of the Guatemala City Protocol.

The United States proposal was discussed at the twenty-third meeting of the Commission of the Whole. The United States delegation explained that its proposal was based on two assumptions: (1) that the conference could adopt two protocols: the Hague Protocol as amended by the Montreal Protocol of 1975, containing new cargo provisions, as well as the unamended Hague (passenger and baggage) provisions, and the Guatemala City Protocol as amended at Montreal in 1975, with the unamended Guatemala City (passenger and cargo) provisions remaining; and (2) that the final clauses for both new protocols would follow the same pattern. The United States pointed out that its proposal did not affect states which were parties to both the Guatemala City Protocol, concerning passengers and baggage, and the Montreal Protocol, concerning cargo and mail, since Article X prepared by the Council working group resolved that case. Rather, the problem occurred where a state was a party to one protocol but not to the other. It was well known that the United States could not ratify the Hague Protocol. Hence, if the cargo provisions in the Montreal Protocol were attached to the Hague Protocol, including the passenger provisions of the latter, the United States would not accept that package.

As a result of discussions in the Commission of the Whole, the Committee on Final Clauses, and the plenary meetings of the Conference, the following key Final Clauses were adopted:

A. For inclusion, Additional Protocol No. 3 has been expanded through some of the Final Causes quoted below to give life to the Guatemala City Protocol:

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185 A primary reason for United States inability to ratify the Hague Protocol was that the passenger liability limitation was too low.
186 Additional Protocol No. 3, ICAO Doc. No. 9147 (1975), was originally intended to provide for the inclusion of the Special Drawing Right of the International Monetary Fund in the Guatemala City Protocol. The importance of Additional Protocol No. 3, including this particular provision, is such that there was a roll-call vote on the Final Causes in the Commission of the Whole:

*In favor:* Argentina, Australia, Barbados, Belgium, Brazil, Canada, Chile,
Article VII(2):

Ratification of this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, and at Guatemala City, 1971, shall have the effect of accession to the *Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975*.187

Article VIII(1):

As soon as thirty signatory States have deposited their instruments of ratification of this Protocol, it shall come into force between them on the ninetieth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

Article X(3):

As between the Parties to this Protocol, denunciation by any of them of the Warsaw Convention in accordance with Article 39 thereof or of The Hague Protocol in accordance with Article XXIV thereof or of the Guatemala City Protocol in accordance with Article XXII thereof shall not be construed in any way as a denunciation of the *Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975*.

Article XI(1)(c):

Any State may declare at the time of ratification of or accession to the Montreal Protocol No. 4 of 1975, or at any time thereafter, that it is not bound by the provisions of the *Warsaw Convention as amended at The Hague, 1955, at Guatemala City, 1971, and*

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187 Montreal Protocol No. 4, ICAO Doc. 9148 (1975) is concerned with the amendment of the cargo and mail provisions of the Warsaw Convention as amended at the Hague, as well as the inclusion of the Special Drawing Right of the International Monetary Fund in the new provisions.
by the Additional Protocol No. 3 of Montreal, 1975, in so far as they relate to the carriage of cargo, mail and postal packages. Such declaration shall have effect ninety days after the date of receipt by the Government of the Polish People's Republic of the declaration.

B. For inclusion in Montreal Protocol No. 4:

Article XVII(2)

Ratification of this Protocol by any State which is not a Party to the Warsaw Convention or by any State which is not a Party to the Warsaw Convention as amended at The Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975.

Article XVIII(1)

As soon as thirty signatory States have deposited their instruments of ratification of this Protocol, it shall come into force between them on the ninetieth day after the deposit of the thirtieth instrument of ratification. It shall come into force for each State ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification.

Article XX(3)

As between the Parties to this Protocol, denunciation by any of them of the Warsaw Convention in accordance with Article 39 thereof or of The Hague Protocol in accordance with Article XXIV thereof shall not be construed in any way as a denunciation of the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975.

Article XXI(1)(b)

Any State may declare at the time of ratification of or accession to the Additional Protocol No. 3 of Montreal, 1975, or at any time thereafter, that it is not bound by the provisions of the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975, in so far as they relate to the carriage of passengers and baggage. Such declaration shall have effect ninety days after the date of receipt of the declaration by the Government of the Polish People's Republic.

In the case of Additional Protocol No. 3, the combined effect of Articles VII(2) and VIII(1) is to revise Article XX(1) of the Guatemala City Protocol. That article provides that the Guatemala City Protocol will enter into force on the ninetieth day after the
deposit of the thirtieth instrument of ratification, subject to the following weighted formula:\textsuperscript{188}:

On condition, however, that the total international scheduled air traffic expressed in passenger-kilometers according to the statistics for the year 1970 published by the International Civil Aviation Organization, of the airlines of five states which have ratified this Protocol, represents at least 40\% of the total international scheduled air traffic of the airlines of the member states of the International Civil Aviation Organization.

This weighted formula may be avoided through the use of the Final Clauses of Additional Protocol No. 3, instead of the Final Clauses of the Guatemala City Protocol. Additional Protocol No. 3 provides in Article VIII(1) that it shall come into force on the ninetieth day after the deposit of the thirtieth instrument of ratification since no weighted formula is applicable. This paves the way for earlier implementation of the substantive provisions of the Guatemala City Protocol.

Article X(3) of Additional Protocol No. 3, with its special provision on denunciation, enables a state, without having to be a party to the original Warsaw Convention or to the Hague Protocol, to be tied into the provisions of the Warsaw regime if the state ratifies or adheres to Additional Protocol No. 3.

Finally, through the mechanism of a declaration, Article XI(1)(c) enables a state to be a party to Montreal Protocol No. 4 without being bound by the Warsaw provisions as amended by the various protocols up to and including Additional Protocol No. 3, as those provisions relate to carriage of cargo, mail and postal packages.

The effect of these various provisions may be illustrated by examining their impact on the United States. The United States is a party to the original Warsaw Convention, but is not, and does not wish to become, a party to The Hague Protocol. Even if it denounced the Warsaw Convention and refused to become a party to The Hague Protocol, it can nevertheless be tied into the Guatemala City provisions on passengers and baggage by ratifying Addi-

\textsuperscript{188} The formula was really aimed at insuring that the Protocol would not enter into force without the participation of the United States, which, as compared with other states, has a high amount of scheduled air traffic expressed in terms of passenger-kilometers.
tional Protocol No. 3. Should the United States wish to become a party to Montreal Protocol No. 4, it can avoid applying the Guatemala City provisions relating to the carriage of cargo, mail and postal packages through the declaration mechanism of Article XI(1)(e). It would then only apply the relevant provisions of Montreal Protocol No. 4.

The most important effect of the Final Clauses in Additional Protocol No. 3 is that the United States, without whose participation the Warsaw regime would lose much of its importance, can be kept in the Warsaw regime and tied into the passenger and baggage provisions of the Guatemala City Protocol without having to ratify that Protocol. It is also conceivable that other states which are already parties to the original Warsaw Convention or to The Hague Protocol may wish to retain their treaty relationships under those instruments and at the same time become parties to Additional Protocol No. 3.

Before the Final Clauses of Additional Protocol No. 3 are left aside, attention should be drawn to a further problem. Additional Protocol No. 3, in dealing with The Special Drawing Right, includes a revised version of Article 22 of the Guatemala City Protocol, giving rise to two questions: (1) Can the Guatemala City Protocol, if not yet in force, in fact be amended by the later Additional Protocol No. 3? (2) If so, can Additional Protocol No. 3 enter into force before the Guatemala City Protocol?

The Montreal Conference in effect gave an affirmative answer to the first question by adopting Additional Protocol No. 3. The second question caused the expression of differing views. Although one view asserts that Additional Protocol No. 3 could not enter into force before the Guatemala City Protocol which it seeks to amend, it may be observed that Articles VII(2) and VIII (1) of Additional Protocol No. 3 provide machinery for giving life to the substantive provisions of the Guatemala City Protocol without the necessity of its ratification. Thus, it may be argued that Additional Protocol No. 3, which in effect incorporates by reference the substantive provisions of the Guatemala City Protocol, is independent of the Guatemala City Protocol and that the existence and

189 Which are now outstepped by Montreal Protocol No. 4, ICAO Doc. 9148 (1975).
entry into force of Additional Protocol No. 3 does not depend on the entry into force of the Guatemala City Protocol.

As in the case of Additional Protocol No. 3, the Final Clauses of Montreal Protocol No. 4 permit a state which is not a party to the Warsaw Convention or to that convention as amended at The Hague to be tied into the provisions of the *Warsaw Convention as amended at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975* merely by ratifying Montreal Protocol No. 4. Through the denunciation provisions in Montreal Protocol No. 4, a state is free to sever its treaty relationships with states that are parties only to the original Warsaw Convention or The Hague Protocol. Moreover, the Final Clauses in Montreal Protocol No. 4 provide that when a state ratifies or accedes to Additional Protocol No. 3, or at any time thereafter, it may declare that it is not bound by the provisions on the carriage of passengers and baggage as found in the *Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975*. The declarations are permitted because the provisions relating to the carriage of passengers and baggage are found in their most up-to-date form in the combination of the Guatemala City Protocol and Additional Protocol No. 3, and not in the combination of The Hague Protocol and Montreal Protocol No. 4.

It remains to be seen whether states will be able to sort out the extraordinarily complicated Final Clauses discussed above and prepare the rational legislation necessary to give effect to the new Warsaw regime. The legislation must preserve orderly relationships with other states within the regime despite its multiplicity of protocols and lack of uniform participation.\(^{199}\)

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\(^{199}\) The importance of Additional Protocol No. 3, ICAO Doc. 9147 (1975), was such that a roll-call vote on the Final Clauses was called in the Commission of the Whole:

*In favor:* Argentina, Australia, Barbados, Belgium, Brazil, Canada, Chile, Denmark, Finland, France, Federal Republic of Germany, Guatemala, India, Ireland, Israel, Italy, Japan, Republic of Korea, Netherlands, New Zealand, Norway, Philippines, Portugal, Spain, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, United States of America (29).


*Abstentions:* Algeria, People's Republic of China, Arab Republic of Egypt,
B. Proposals for the preparation of a consolidated convention

There was the general preference in the subcommittee that the amendment to the cargo and mail provisions of the Warsaw Convention as amended by the Hague Protocol should be made in the form of a protocol and that no new convention should be drafted. In the Legal Committee most delegations held the same view. It was argued that drafting a new convention at that stage in four languages (English, French, Russian and Spanish) would cause considerable practical difficulties because of the language variations in the existing Warsaw/Hague text. Some provisions were authentic only in the French language while other provisions were authentic in English, French and Spanish, the text in French prevailing in case of any inconsistency. Also, the Warsaw/Hague text contained provisions that had common application to passengers, baggage and cargo; it would be difficult to divide the text and prepare a new convention for cargo and mail only. Adherents to the other school of thought supported such a convention and considered the present plurality of instruments (original Warsaw Convention, the Hague Protocol, Guadalajara Convention and Guatemala City Protocol) to be confusing. They asserted that to add still a further protocol would give rise to greater confusion.

In reply, it was stated that in other fields the amendment by a series of successive protocols had worked well. Some delegations took a middle position that for the present the amendment should be made in the form of a protocol, but that at some other stage the Legal Committee should study the possible consolidation of all the texts into a new instrument relating to passengers, baggage, cargo and mail.

At the end of the discussion in the Legal Committee twenty-eight delegations expressed a preference for the new instrument in

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the form of a protocol; five delegations were in favor of the new convention, and five abstained. It was understood that this vote would not prevent further study of a possible future consolidation of all existing instruments and that the new protocol would be independent of the Guatemala City Protocol in the sense that states could be parties to the new instrument without being or becoming parties to the Guatemala City Protocol.\(^{195}\)

As mentioned earlier in this article, at the Montreal Conference Denmark, the Federal Republic of Germany, France, Japan, Norway, Sweden, Switzerland and the United Kingdom in the Commission of the Whole proposed a consolidated new convention.\(^{196}\)

It should be recalled here that, during the meetings of the ICAO Council working group on the question of potential conflicts between the new instrument on cargo and the Guatemala City Protocol, Sweden had presented a proposal for a consolidated new instrument on the carriage by air of passengers, baggage and cargo. The sponsors of the consolidation proposal in the conference believed that the new convention could be prepared along the lines proposed by Sweden. They proposed that the convention contain these seven chapters: I. General definitions and the rules regarding the scope of the convention; II. The Guatemala City passenger and baggage provisions; III. The new cargo rules; IV. The new provision on the carriage of mail; V. and VI. The provisions of a general character in the Warsaw Convention as amended at the Hague, and VII. Final clauses. The consolidated convention would not include any material concerning passengers and baggage not found in the Warsaw Convention as amended by the Guatemala City Protocol.

The sponsors of the proposal pointed out that it was necessary to bear in mind while drafting the new convention that some states were not prepared to accept both the Guatemala City passenger and baggage provisions and the proposed new provisions relating to cargo. A draft final clause would make it possible for states to become parties to the new cargo provisions without being or becoming parties to the Guatemala City Protocol passenger and baggage provisions and vice versa. States which did not ad-

\(^{195}\) Id.

here to the Guatemala City passenger and baggage provisions thus would continue to be bound by the old passenger and baggage provisions in relation to all states which had not renounced the older instruments. States which did not adhere to the new cargo provisions would continue to be bound by the old provisions in relation to states which had not denounced those instruments. Also, states which adhered to the whole or part of the new instrument could continue to be bound by the provisions contained in the Warsaw Convention or the Warsaw Convention as amended at the Hague in relation to states which were not parties to the new instrument.

When the proposal for a consolidated convention was before the Commission of the Whole at its nineteenth meeting, Venezuela proposed a resolution requesting the ICAO Legal Committee to prepare a consolidated text for submission to the next session of the ICAO assembly or some other appropriate meeting. Kenya then raised the procedural question whether the Commission could discuss the matter before a conference decision amending the agenda. The conference convened its fifth plenary meeting to consider the question. During that meeting the President expressed the opinion that the multipartite proposal for a consolidated instrument fell within the agenda, but said that he would prefer to leave the decision to the conference. As already seen earlier in this article, the Conference in its sixth plenary meeting indicated that it considered the proposal for a consolidated convention to be within the agenda. During the twentieth and twenty-first meetings the Commission of the Whole discussed the multipartite proposal for a consolidated Convention as well as the Polish and the Soviet Union proposal that the new instrument take the form of a protocol. At the twenty-first meeting of the Commission of the Whole, the Conference rejected the multipartite proposal.

Later, at the twenty-seventh meeting of the Commission of the

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188 See § VIII(A), supra.
189 By a vote of twenty-one to twenty with five abstentions.
201 By a vote of thirty-six to seventeen with three abstentions.
Whole, the Venezuelan proposal\textsuperscript{203} was given detailed examination and, after amendments,\textsuperscript{204} was adopted.\textsuperscript{205} The resolution in its definitive form is found in the Final Act of the Conference\textsuperscript{206} which was adopted at the twelfth plenary meeting.\textsuperscript{207} The resolution provides, in accordance with the established procedure, that the necessary measures be taken for the ICAO Legal Committee to study and prepare a draft of a consolidated text. This new text would make no substantive change in existing instruments pertaining to the Warsaw Convention itself or as amended or supplemented, except as such change is necessary to maintain consistency within the consolidated text. It also provides that the draft of the consolidated text be examined at a conference to be convened by the ICAO Council in accordance with the established procedure as soon as possible. In November 1975 the ICAO Council decided that a subcommittee of the ICAO Legal Committee would meet in May 1976 to prepare a draft consolidated text. The decision to proceed with the work of consolidation could give rise to some difficulties since work on the preparation of a consolidated text could deter states from taking the necessary steps to become parties to instruments adopted during the Montreal Conference. The project is going forward; it is left to the various states to decide whether a mere consolidation of existing instruments, as distinct from preparation of a new convention, would have the effect of deterring participation in the Montreal instruments.

IX. AVOIDANCE OF CONFLICT BETWEEN MONTREAL PROTOCOL NO. 4 (CARGO PROVISIONS) AND A POSSIBLE CONVENTION ON INTERNATIONAL COMBINED TRANSPORT OF GOODS

In September and October 1972 the subcommittee decided that it was futile to discuss possible conflicts between the Warsaw/Hague system cargo provisions and the possible Convention on


\textsuperscript{204} \textit{Inter alia}, the amendment provided for: (1) action to be taken pursuant to established ICAO procedures; (2) No substantive changes to be made in the existing Warsaw Instruments by the draft consolidated text; and (3) Placement of the draft text before an ICAO-convened conference as soon as possible.

\textsuperscript{205} By a vote of thirty to eight with ten abstentions.

\textsuperscript{206} ICAO Doc. 9144 (1975).

\textsuperscript{207} By a vote of forty-eight to zero, with five abstentions.
International Combined Transport of Goods because at the UN/IMCO Conference on International Container Traffic (then scheduled to be held in November 1972), there would be merely an exchange of views on a draft convention.\textsuperscript{297}

At the subcommittee meeting, the United States proposed extension of the air carrier's liability to the surface portion of an intermodal journey. This proposal is not without interest because of the increased intermodality of carriage. Although Warsaw/Hague Articles 31 and 18 restrict the rebuttable presumption of the carrier's liability under the Warsaw Convention to damage occurring during the course of the air transportation, that liability regime is extended to what are essentially surface operations such as loading, delivery and transshipment (Article 18(3)). Building on this base, the United States suggested extending the liability of the air carrier so that he would be liable for damage occurring on an intermodal shipment. A reason given in support of this proposal was that it was already common practice for airlines, by contract, to assume through-liability for intermodal journeys involving truck transport. Proration of the loss or damage payments was settled later between the carriers or their insurance companies. This suggested extension of the air carrier's liability would be in addition to the remedies the consignor or consignee might have against any other person or carrier involved in the intermodal transportation.

When the same proposal was made to the Legal Committee in 1974, it was pointed out that since problems of intermodal transport were under active study in the United Nations Conference on Trade and Development (UNCTAD), it would not be proper to make any decision for air carriage. The only committee action taken on the United States suggestion was a request to the ICAO Secretariat to follow the progress of work in the UNCTAD on intermodal transport of cargo and to present an up-to-date report to the Montreal Conference of 1975.\textsuperscript{298}

\textsuperscript{297} ICAO Doc. 9131-LC/173-2 at 130 (1975). Previously, at its Nineteenth Session (Montreal, May 22-June 21, 1972), the Legal Committee when engaging in a detailed examination of the implications for international civil aviation of the proposed Convention on the International Combined Transport of Goods, agreed that its task was not to make recommendations for amendment of the air law conventions included in the Warsaw system so as to accommodate the TCM Convention. ICAO Doc. 9096-LC/171-2 at 15 (1974).

\textsuperscript{298} ICAO Doc. 9131-LC/173-2 at 27 (1975).
The Montreal Conference had before it an Austrian paper proposing that, with respect to the proposed combined transport convention, the difficulties resulting from Article 31 should be eliminated by the Conference. It was proposed that Article 31(2) be eliminated and that the words "apply only to the carriage by air" in Article 31(1) should be replaced by "apply only to the contract concluded with respect to the air transport." The conference took no action on the question of combined transport, however.

V. CONFLICT BETWEEN MONTREAL PROTOCOL NO. 4 AND CONVENTIONS ON LIABILITY IN RESPECT TO THE CARRIAGE OF NUCLEAR SUBSTANCES

In 1972 the subcommittee reached no decision on a solution for the possible conflict between the Warsaw/Hague cargo provisions and such conventions as the convention on Third Party Liability in the Field of Nuclear Energy (Paris, July 29, 1960) and the Convention on Civil Liability for Nuclear Damage (Vienna, May 21, 1963). In 1974 the Legal Committee's attention was again drawn to the same question. Both these conventions impose exclusive liability on the operator of a nuclear installation, although both contain a clause that they shall not affect the application of any international convention in the field of transport in force or open for signature, ratification or accession at the date when the convention is opened for signature. The view was expressed that the conflict of the nuclear liability conventions with the Warsaw/Hague cargo provisions might expose air carriers to liability of unacceptable and uninsurable magnitude. It was therefore suggested that the new instrument on cargo provide that the air carrier would not be liable if the operator of the nuclear installation is liable under the Paris and Vienna conventions. The opposition argued that the limit of liability stipulated in the new instrument on the carriage of cargo by air would be unbreakable under any circumstances; furthermore, the carrier would have the right of recourse against the operator of the nuclear installation.

211 2 INT'L LEG. MAT. 727 (1963).
212 Paris Convention, Art. 6(b); Vienna Convention, Art. II(5).
The Committee disposed of this matter by asking the ICAO Secretariat to seek relevant information from the International Atomic Energy Agency (IAEA) for presentation to the Montreal Conference.\textsuperscript{113}

At the Montreal Conference the Commission of the Whole, at its seventeenth meeting, had before it a Swedish proposal to include in the new instrument the following provisions\textsuperscript{114} taken from Article 20 of the Convention relating to the Carriage of Passengers and Their Luggage by Sea:

No liability shall arise under this Convention for damage caused by a nuclear incident:

(a) if the operator of a nuclear installation is liable for such damage under the Paris Convention of 29 July, 1960 on Third Party Liability in the Field of Nuclear Energy as amended by its Additional Protocol of 28 January, 1964, or the Vienna Convention of 21 May, 1963, on Civil Liability for Nuclear Damage, or

(b) if the operator of a nuclear installation is liable for such damage by virtue of a national law governing the liability for such damage, provided that such law is in all respects as favourable to persons who may suffer damage as either the Paris or the Vienna Conventions.\textsuperscript{115}

As a number of difficulties concerning the Swedish proposal arose during the initial debate, the Australian delegation proposed that the text read:

No liability shall arise under this Convention for damage to cargo caused by a nuclear incident, if the operator of a nuclear installation is liable for such damage under an international convention or national law governing liability for nuclear damage which is applicable and is in all respects as favourable to persons who suffer damage as the provisions of the Warsaw Convention as amended by this protocol.\textsuperscript{116}

At the nineteenth meeting of the Commission of the Whole, Italy proposed to add to the Australian text the clause "to which the parties to the present instrument are also parties" after "intern-

\textsuperscript{113} ICAO Doc. 9131-LC/173-2 at 27-28 (1975).
\textsuperscript{115} Athens, December 1974.
\textsuperscript{116} W/H-CM-SRC/17, § 3 (1975).
tional convention". This proposal was not seconded. During the ensuing discussion, the Australian text was criticized by some as being too general; however, others defended it as more specific than the Swedish text because the Australian text referred to damage "to cargo." It was stated that the Australian text had the advantage of avoiding a reference to the Paris and Vienna Conventions on liability for nuclear damage to which many states represented at the Conference were not parties. The Commission of the Whole rejected both the Swedish and Australian proposals.

Sweden raised the matter again at the thirty-first session of the Commission of the Whole, proposing inclusion of the following reservation clause in Article XX(1) of Montreal Protocol No. 4:

A State which is a Party to the Paris Convention of 29 July, 1960 on Third Party Liability in the Field of Nuclear Energy or the Vienna Convention of 21 May 1963 on Civil Liability for Nuclear Damage may at any time of its ratification of or accession to this Protocol or at any time thereafter declare by a notification addressed to the Government of the Polish People's Republic that it shall not be bound by the Warsaw Convention as amended at The Hague, 1955, and at Montreal, 1975 by Protocol No. 4, in respect of nuclear damage if the operator of a nuclear installation is liable for the damage under the Paris or Vienna Convention as the case may be.

This proposal was not adopted, however.

XI. Final Clauses

Reference has already been made to the provision for reservations to the respective instruments to avoid conflicts between Montreal Protocol No. 4 (which contains the cargo and mail provisions, as well as provisions on the Special Drawing Right) and Additional Protocol No. 3 (which is primarily concerned with inclusion of the Special Drawing Right in the Guatemala City Protocol provisions relating to passengers and baggage). There are, however, other interesting final clauses contained in the four protocols. Because of space restrictions, it is impossible to cover each in de-

219 See § VIII(A), supra.
tail; however, a brief examination may be made of most of these provisions in the context of Montreal Protocol No. 4.

Each of the protocols will come into force on the ninetieth day after the deposit of the thirtieth instrument of ratification and will come into force for each state ratifying thereafter on the ninetieth day after the deposit of its instrument of ratification. As between the parties to Protocol No. 4, the Warsaw Convention as amended at the Hague in 1955 and the new protocol shall be read and interpreted together as one single instrument and known as the *Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 of Montreal, 1975.* A similar provision is found in the other three protocols.

After Montreal Protocol No. 4 has come into force it will be open for accession by any non-signatory state. Accession to the Protocol by any state which is not a party to the Warsaw Convention or by any state which is not a party to the Warsaw Convention as amended by the Hague, 1955, shall have the effect of accession to the *Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 Montreal, 1975.* Similar provisions are found in the other three protocols.

There is, of course, provision for denunciation of Montreal Protocol No. 4. In particular, it is specified that as between the parties to the Protocol, denunciation by any of them of the Warsaw Convention in accordance with Article 39 thereof or of the Hague Protocol in accordance with Article XXIV thereof shall not be construed in any way as a denunciation of the *Warsaw Convention as amended at The Hague, 1955 and by Protocol No. 4 of Montreal, 1975.* A similar provision is found in the three other protocols.

Besides the very special provisions concerning reservations there is also a provision which permits a state at any time to declare

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221 Id. at Art. XV, ICAO Doc. 9148 at E-4 (1975).
222 Id. at Art. XIX(1) & (2), ICAO Doc. 9148 at E-5 (1975).
223 Id. at Art. XX, ICAO Doc. 9148 at E-5 (1975).
224 These have already been mentioned in connection with the issue of potential conflicts between Montreal Protocol No. 4 and Additional Protocol No. 3.
by notification addressed to the Polish Government\footnote{225} that the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 Montreal, 1975 shall not apply to the carriage of persons, baggage and cargo 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.\footnote{225} The reservation may be withdrawn at any time.\footnote{225} Similar provisions are found in Additional Protocols Nos. 2 and 3; however, no reservation may be made to Additional Protocol No. 1.

As between the parties to Montreal Protocol No. 4 which are also Parties to 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 (Guadalajara September 18, 1961), any reference to the “Warsaw Convention” contained in the Guadalajara Convention shall include reference to the Warsaw Convention as amended at The Hague, 1955, and by Protocol No. 4 Montreal, 1975, in cases where the carriage under the agreement referred to in Article 1, paragraph (b) of the Guadalajara Convention is governed by Montreal Protocol No. 4.\footnote{226}

\textbf{XII. CONCLUSION}

Although the Montreal Conference started out with the relatively modest aim of revising the cargo provisions of the Warsaw system, it wound up by effecting far-reaching changes in the whole system. In particular, the replacement of the Poincaré gold franc as the unit of account in the Warsaw system by the Special Drawing Right will, when the relevant protocols come into force, remove the uncertainty that has existed in recent years because of the two-tiered regime for the value of gold.

\footnote{225} The Polish Government is the depository of Montreal Protocol No. 4.
\footnote{226} Montreal Protocol No. 4, Art. XXI(1)(a), ICAO Doc. 9148 at E-5 (1975).
\footnote{227} Id. at Art. XXI(2), ICAO Doc. 9148 at E-5 (1975).
\footnote{228} Id. at Art. XXIII, ICAO Doc. 9148 at E-5 (1975). Art. 1(b) of the Guadalajara Convention provides:
'the contracting carrier' means a person who, as a principal, makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor with a person acting on behalf of the passenger of consignor.
Another important result of the conference is that Additional Protocol No. 3, which is intended to provide for the incorporation of the Special Drawing Right into the Guatemala City Protocol, in reality enables a state to become a party to the Guatemala City provisions merely by ratifying Additional Protocol No. 3 without the necessity of ratifying the Guatemala City Protocol itself. Ratification is coupled with the complex system of denunciations of older Warsaw instruments described earlier in this article. One effect of the machinery included in the Final Clauses of Additional Protocol No. 3 is removal of the condition stipulated in Article XX of the Guatemala City Protocol. Thus, failure of the total international scheduled air traffic of the airlines of five states which have ratified the Guatemala City Protocol to represent at least forty percent of the total international scheduled air traffic of the airlines of the ICAO member states in that year will not prevent the Protocol's entry into force on the ninetieth day after the deposit of the thirtieth instrument of ratification.

Upon their entry into force, the revision of the cargo provisions of the Warsaw system, while not simplifying the requirements for documentation to the extent hoped for prior to the Conference, will have the virtue of not hindering the use of electronic data processing in the movement of air cargo, resulting in savings of paper work and related costs.

Although the debate will no doubt continue as whether the strict liability regime is really more onerous than the present regime of presumed liability, it can be argued that the existence of the new regime may promote settlements without claimants and carriers having recourse to litigation, which could result in reduced insurance costs.

Finally, the adoption of the resolution concerning preparation of a consolidation of all of the Warsaw instruments, with the exception of the Guadalajara Convention, could cause some uneasiness among those states which are desirous of ratifying some of the four protocols adopted at Montreal. They may now hesitate to

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209 See § VIII(A), supra.
209 As expressed in passenger-kilometers, according to ICAO statistics published for the year 1920.
21 Which will become applicable to cargo when Montreal Protocol No. 4, ICAO Doc. 9148 (1975), enters into force.
do so pending the preparation of the consolidated convention. Nevertheless, it is fair to predict that the decisions taken at the Montreal Conference constitute a watershed in the long and controversial history of the Warsaw Convention.