New Work in UNCITRAL on Stable, Inflation-Proof Liability Limits

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INTRODUCTION

NEGOTIATIONS TO UPDATE many of the transportation conventions have been conducted recently by specialized United Nations (U.N.) agencies such as the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), and the United Commission on International Trade Laws (UNCITRAL). The ICAO provides the forum for amendment of the Warsaw Convention on the liability of air carriers, and the Rome Convention on surface damage. The IMO is the forum for amendment of several maritime liability treaties. The UNCITRAL is known for its revision of the maritime bill of lading which led to the 1978 U.N. Convention on the Carriage of Goods by Sea (Hamburg Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, October 12, 1929, 49 Stat. 3000, T.S. 876, 137 L.N.T.S. 11 [hereinafter cited as Warsaw Convention]. Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, October 7, 1952 [hereinafter cited as Rome Convention].


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In 1982, UNCITRAL convened a working group to consider the establishment of constant liability limits for all the international conventions on liability, including the air law conventions. This author was the United States representative to the negotiations, which reached a conclusion at the plenary meeting of UNCITRAL during July and August of 1982, at the United Nations in New York. UNCITRAL is singularly suited to resolve international trade problems that cut across the various modes of transportation. It was created in 1966 by U.N. General Assembly Resolution 2205 (XXI) for the specific purpose of unifying and harmonizing international trade law, thereby facilitating international trade. The General Assembly gave UNCITRAL the task of promoting uniformity of law among the nations. One of the main purposes of transportation conventions, such as the Warsaw Convention and the

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The Commission shall further the progressive harmonization and unification of the law of international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them; (b) Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws; (c) Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practices, in collaboration, where appropriate, with the organizations operating in this field; (d) Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade...

Id.
7 See Annex A.
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Hamburg Rules, is to unify laws. Therefore, UNCITRAL was a likely forum for resolving problems of inflation which are common to all transportation liability conventions.

Because UNCITRAL is one of the least known of the U.N. bodies, a brief description of its operating format is in order. The thirty-six member countries of UNCITRAL are elected by the General Assembly. They represent all geographic regions. A large number of other states, however, participate as observers. In addition, intergovernmental and non-governmental organizations send observers to UNCITRAL meetings to participate in the discussions. Recently, the headquarters of UNCITRAL was moved to Vienna, Austria. UNCITRAL accomplishes its work by establishing working groups to focus on particular topics proposed and approved by the Commission. All of the members convene annually to consider the work of these groups and to plan new work. UNCITRAL's work product appears in one of three forms: (1) draft conventions for which the U.N. General Assembly is asked to convene diplomatic conferences; (2) models for international or national legislation; or (3) arbitration and conciliation rules intended for use by private parties.


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10 Hamburg Rules, supra note 3.


12 Convention on Contracts for the International Sale of Goods, [1982], XI V.B.
CITRAL is currently working on conventions, international bills of exchange, promissory notes, international checks, and a review of electronic transfer of funds. The Commission is also working on a legal guide on contractual provisions for supply and construction of large industrial works, and model laws and guidelines on international commercial arbitration.\(^1\)

At its eleventh session UNCITRAL adopted a French proposal to "study ways of establishing a system for determining a universal unit of constant value which would serve as a point of reference in international (transport and liability) conventions for expressing amounts in monetary terms."\(^2\) The proposal was assigned to UNCITRAL's Working Group on International Negotiable Instruments (the Working Group) which most recently met in Vienna, Austria, during January of 1982.\(^3\) The Group was composed of representatives from Chile, Egypt, France, India, Nigeria, the United Soviet Socialist Republic (USSR), the United Kingdom and the United States of America. The unit of account clauses in private international law treaties,\(^4\) (including the Warsaw Convention, Hamburg Rules, and the Multimodal Convention), were examined by the Group. A significant development at the meeting was a stated shift in position by the USSR, which opened the way for amendment of the unit of account clauses by eliminating the current system of calculating liability in both Special Drawing Rights (SDR), and in gold.\(^5\) This shift ena-

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\(^3\) Plenary Report, supra note 5.


\(^6\) See Annex A.

\(^7\) Working Group Report, supra note 4, at Annex. The SDR is based on a weighted average of five currencies (dollar, yen, pound sterling, Franc franc, and DM). The SDR has considerable stability. To a limited extent the five currencies in the "basket" counteract inflation of any one of the currencies. The general world inflation, however, erodes all five currencies and, therefore, also erodes the SDR. Unit of Account of Constant Value, Report of the UNCITRAL Secretary General, A/ CN.9WG.IV/WP.27 (Nov. 23, 1981).
bled the Group to recommend adoption of SDRs as its sole unit of calculation. Alternative ways of preventing erosion of the liability limits in the transportation conventions were also recommended.\(^7\) After considering these recommendations at its July-August meeting in New York, UNCITRAL adopted a new SDR unit of account treaty article and two alternative provisions for adjusting liability limits.\(^8\) These provisions may benefit air law conventions, such as the Warsaw and Rome Conventions, as well as other private international law treaties.\(^9\) This paper describes these recommendations with particular emphasis on their significance to air law.

I. UNIT OF ACCOUNT CLAUSE

A. Recent Problems of Denoting Liability Limits in Gold and Special Drawing Rights

Courts in the U.S. and many other countries disagree as to whether limits on liability for transportation are to be determined according to the market value of gold or the old official value of gold.\(^10\) Because there is no international agreement on official gold value in force today, and gold is generally not considered to be an acceptable international unit of account, the controversy persists. Although states may place an official value on gold under national law such values do not have binding international effect.

Because of the uncertainty surrounding computation of liability limits, the Court of Appeals for the Second Circuit completely removed the limitation on liability in international air carriage in a recently issued decision, Frankfurt Mint Corp. v. Trans World Airlines, Inc..\(^{21}\) The case involved a claim by Franklin Mint against Trans World Airlines (TWA) for dam-

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\(^{18}\) Id. at paras. 54 and 90.

\(^{19}\) Plenary Report, supra note 5, at 13-17.

\(^{21}\) See Rome Convention, supra, note 1.


\(^{23}\) 690 F.2d 303 (2d Cir. 1982), cert. granted, 50 U.S.L.W. 3883 (June 13, 1983).
ages resulting from the loss of crates containing numismatic materials weighing 714 pounds. TWA argued that its liability was limited by Article 22 of the Warsaw Convention to 250 Poincare gold francs per kilogram.24 Previously, that limit had been upheld by the United States.25

When the United States joined the Warsaw Convention in 1934, the gold franc was converted into dollars at $35 per ounce of gold. That conversion rate was then required by the United States Gold Reserve Act of 1934.26 The United States continued to maintain the value of United States dollars in terms of gold until it abolished the official price of gold by repealing the 1972 Par Value Modification Act, effective April 1, 1978.27

In Franklin Mint, the Second Circuit held that repeal of the Act terminated an official value of gold and thus the Warsaw $20 limit.28 The court permitted TWA to be governed by this limit because the carrier had relied on the limit when purchasing insurance. The court further stated, however, that events occurring sixty days from the date the decision became final would not be subject to this or any other limit.29

At trial, Franklin Mint had argued that the market value of gold should be used to compute the Warsaw Convention liability limits.30 Its argument was that the drafters of Warsaw intended to base the Convention on the most stable currency measure in existence when the Convention was negotiated in 1929-gold. The United States conversion at $35 an ounce of

24 Id. at 305. The Warsaw Convention, supra note 1, Article 22, provides that the carrier's liability for carriage of goods is limited to the sum of 250 francs per kilogram. A franc is defined as consisting of 65 1/2 milligram gold of millesimal fineness 900. Id. The limitation of liability for carriage of passengers is limited to the sum of 125,000 francs for each passenger. Id.
28 Franklin Mint, 690 F. 2d at 308.
29 Id. at 311-12.
gold into dollars was a subsequent monetary development unrelated to the treaty. At that market value of gold, the liability limit would be approximately $220 per kilogram under Franklin Mint's argument. The court rejected this argument, reasoning that demonetization of gold had eliminated gold as an effective currency measure. The market value of gold was thought by the court to be too "gross" a departure from the intended purpose of Warsaw.

The court briefly considered use of the current French franc to express liability limits, but quickly rejected this alternative because the drafters of the Warsaw Convention had rejected a tie-in with any national currency. Such a tie-in would have made the Convention dependent on the French national economy. The Warsaw diplomatic conference explicitly selected a gold-based currency, the Poincare gold franc, which is a different currency unit than the French franc.

As an alternative to using the official price of gold, TWA had argued that the liability limits be expressed according to SDR's, the monetary unit of the International Monetary Fund (IMF). There is precedent for this in air law. In 1975, the Montreal Protocols to the Warsaw Convention converted the liability limits into SDRs.

The SDR limits of the Montreal Protocols, however, are not yet in force. Although they were approved by the Senate Foreign Relations Committee, the Protocols did not receive the necessary two-thirds vote and were defeated in the full Senate by a vote of 50-42 in their favor on March 28, 1983.

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81 Franklin Mint, 690 F.2d at 307.
82 Id.
83 Id. at 310.
84 Id. at 309.
85 Id. at 310.
87 Franklin Mint, 690 F.2d at 310.
88 See Montreal Protocol No.4, ICAO Doc. 9148 at E-3-4 (1975). Four Protocols to the Warsaw Convention were adopted by the 1975 Montreal diplomatic conference.
89 Only Protocols Nos. 3 and 4 were submitted for Senate approval. Ratification of Montreal Protocols Nos. 3 and 4 is supported by air carriers and shippers. The Amer-
tion by thirty countries is necessary before the Montreal Protocols enter into force.40

Although the Protocols are not in force, some foreign courts have already made a judicial conversion of gold francs into SDR’s.41 The Second Circuit, however, declined to adopt the SDR limits by judicial fiat.42 The court attributed the “international disarray as to the proper unit of conversion under the Convention” to the repeal of the 1972 Par Value Modification Act and the abolition of the official value of gold by the United States.43 By implication, the court concluded that Congress had intended to abandon the Convention’s system of conversion into dollars, and thus render “the Convention’s limits on liability for loss of cargo... unenforceable in the United States Courts.”44

The Franklin Mint decision has a number of important consequences: (1) the immediate effect is that the limits on liability for carriage under the Convention have been judicially removed in at least the Second Circuit;46 (2) the Franklin Mint decision may channel Warsaw claims into the Second Circuit thus resulting in forum shopping; (3) the decision has significantly increased the pressure on the Montreal Protocols;46 (4) the decision exposes the airlines to additional risk against of carriage because it creates uncertainty about the nature of the risk against which airlines should insure. Their only recourse is to insure against unlimited liability.47

40 Montreal Protocol No. 4, ICAO Doc. 9148 at E-3-4 (1975), supra note 38, Article 18, requires 30 ratifications for entry into force.
42 Franklin Mint, 690 F.2d at 310-11.
43 Id. at 311.
44 Id.
45 Id. 311-12.
47 Martin, The Franklin Mint Case - A European Viewpoint, Lloyd’s Aviation Law 3 (1982). Mr. Martin states that the Franklin Mint decision has caused such
The continuing disparity between the market and the official price of gold heightens the necessity of establishing effective uniform international units of account. *Franklin Mint* provides a dramatic backdrop for the work of UNCITRAL on a new unit of account treaty article. A stable, uniform measurement of liability is badly needed. UNCITRAL has developed such a measurement.

Anticipating the demonetization of gold, the 1975 diplomatic conference on the Warsaw Convention adopted four protocols that expressed liability limits in SDR’s for the first time. Subsequently, other transportation conventions were amended to express liability limits in units of account identical to SDR’s. A special monetary unit equivalence to gold was retained for the countries which are not members of the IMF, namely the USSR and most other communist nations. Several new conventions incorporated the unit of account clause that appears in Article 26 of the Hamburg Rules, which is a modified version of the Unit of Account Clause found in the four Warsaw protocols. Therefore, the Working Group began its discussion by focusing on Article 26.

Article 26(1) of the Hamburg Rules provides that SDR’s are the unit of account used to express liability limits. Limitations expressed in a national currency are calculated according to a valuation by the IMF. As previously noted, an alternative conversion is allowed for states which are not members of the IMF. Articles 26(2) and (3) establish a gold equivalency for uncertainty about liability limits in international air carriage that he would not advise any airline or insurer to rely on established limitations of liability for either cargo or passengers. He believes that contractual limits established pursuant to CAB Order 74-1-16 could be interpreted as a contractual provision tending to lower liability limits fixed by the Warsaw Convention. Such a reduction of limits could be found to violate Article 23 which declares null and void any provision tending to lower the Convention’s limits.

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47 See Annex A.
48 Id.
49 Id.
50 Id.
51 See Annex B.
the liability limits of such non-member states. Limits are expressed in monetary units which are equivalent to the gold content of the old Poincare gold franc. Monetary units are converted into the non-member national currency according to the national law of the non-member states. Article 26(4) does provide, however, that the conversion "be made in such a manner as to express in the national currency of the contracting state as far as possible the same real value . . . " as expressed in SDR's. States must inform the United Nations of the manner used to calculate their national currency equivalency in monetary units. Subsequent changes must also be reported. Non-members of the IMF, such as the USSR, who might otherwise resist calculating their currencies to resemble the value of the SDR, have come to acquiesce in the dual system of calculating liability limits in the transportation area, because they fear that if they decline to do so, courts may use the market value of gold to estimate liability limits.

The dual system of calculating limits in Article 26 is imperfect because it undercuts the desirable goals of predictability and uniformity. The liability limits of the non-IMF members are not perfectly predictable because when SDR's are converted into a national currency according to national law, the currency values can be influenced by the economic policy of a particular country. It is sometimes possible to purchase such currencies on the free market for less than the official value of currency stated by countries. A single system of calculating liability limits would reduce the magnitude of these problems by providing uniformity.

Transported goods are generally insured under two separate insurance systems. The carriers purchase liability insurance and the shippers acquire cargo insurance to cover the risk assigned to them by various transportation conventions. The

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63 Hamburg Rules, supra note 3, Art. 26(4).
64 Id.
65 Id.
66 As reflected in the United States Delegation Report, supra note 48, the USSR was concerned with the currency conversion process in the United States.
two concurrent insurance systems compliment each other when the liability limits are clearly defined. Effective co-existence, however, will be upset if the market value of gold is used to measure liability. For carriers, the resultant higher cost of insurance may cause higher transportation costs. While it would appear that higher carrier insurance would result in lower shipping cargo insurance costs, that is not necessarily the case. Insurance companies may adjust their rates to protect themselves against the uncertainty of the liability limits. Consequently, carriers and shippers may overinsure. Once the market adjusts to the new liability computation regime, large carriers may continue to negotiate reasonable rates with insurance companies, which will reduce the need for cargo insurance and result in an overall rate reduction for shippers.

B. USSR Statement in the UNCITRAL Working Group in January, 1982

Historically, the USSR has objected to the shift toward use of SDR's as a unit of account in private law conventions. At the 1975 Montreal Conference on the Warsaw Convention, the USSR objected to the dual system for expressing liability limits and voted against the unit of account provisions of the Montreal Protocols.57 At the 1978 Hamburg Conference, the USSR abstained from voting on Article 26, the unit of account clause. In 1982, however, the USSR announced to the Working Group that it was prepared to abandon the dual system of Article 26 and perhaps to accept the sole use of the SDR.58 The USSR was apparently troubled by the imperfection of the dual system of calculating limits.

The Statement of the Delegation of the Soviet Union:

Guided by the task which the Commission entrusted to this Working Group - namely, “establishing a system for determining a universal unit of constant value which would serve as a point of reference in international [transport and liability] conventions for expressing amounts in monetary terms” -

57 Hamburg Rules, supra note 3, Art. 26(4).
the Soviet Union is prepared to agree to the use for these purposes of the SDR as a unit of account calculated by the International Monetary Fund on the basis of a "basket" of the principal currencies of the capitalist countries. The Soviet Union assumes, in this connection, that the limits of liability fixed in these units will, for practical purposes, be converted into the national currencies of the countries participating in the conventions, on the basis of their published currency exchange rates.

In taking this step, the Soviet Union hopes that it will help to eliminate the dualism in the methods of calculating liability under international conventions, a dualism which has persisted until recently since the time when the major capitalist currencies were backed by gold. This step does not imply any changes in the Soviet Union's position vis-a-vis IMF, but is an indication of its desire to find constructive approaches to the solution of existing international problems in keeping with the traditions of cooperation which have been established in the climate of international detente. In the view of the Soviet Union, the use of the SDR unit of account to express the limit of liability in international conventions must not encroach on the basic provisions in the currency legislation of those countries which are not members of the IMF and which, consequently, do not recognize the SDR as a medium of international payments.

One implication that may be drawn from this statement is that if it were adopted by other non-IMF states, those states would not rely on the IMF to place a value on their national currencies. Although they would be prepared to accept international expression of liability limits in SDR's and would no longer require a separate system for calculation of liability limits in monetary units equivalent to specific gold content, they would continue to require a conversion of SDR's into national currencies for domestic purposes. Therefore, in its report the Working Group recommended to UNCITRAL that Article 26 be modified to reflect deletion of sections (2) and

**Id.**
(3) which set up the alternative method of calculation for non-
IMF states.60

C. UNCITRAL’s Action on its Working Group’s
Recommendation

Recognizing that elimination of the dual system of calculat-
ing liability limits and adoption of a single measurement, the
SDR, would greatly facilitate and stabilize the liability con-
ventions, UNCITRAL acted swiftly on this issue at its July-
August, 1982 meeting.61 The discussion in UNCITRAL con-
firmed that the “preferred unit of account for international
transport and liability conventions, particularly those for
global application, should be the SDR.”62 Thus, UNCITRAL
decided to accept the recommendation of the Working Group
and proceeded to draft the following new unit of account pro-
vision for the private international law conventions:

UNIVERSAL UNIT OF ACCOUNT

1. The unit of account referred to in article [ ] of this Con-
vention is the Special Drawing Right as defined by the Inter-
national Monetary Fund. The amounts mentioned in article [ ]
are to be expressed in the national currency of a State accord-
ing to the value of such currency at the date of judgment or on
the date agreed upon by the parties. The equivalence between
the national currency of a Contracting State which is not a
member of the International Monetary Fund and the Special
Drawing Right is to be calculated in a manner determined by
that State.

2. The calculation mentioned in the last sentence of paragraph
1 is to be made in such a manner as to express in the national
currency of the Contracting State as far as possible the same
real value for amounts in article [ ] as is expressed there in

60 Id. at 18. “The Working Group decided to recommend to the Commission that it
recommend that in the preparation of future international conventions containing
limitation of liability provisions or in the revision of existing conventions the unit of
account article be substantially in the form of Articie 26, paragraph 1 of the Hamburg
Rules and of paragraph 4, as modified to the extent necessary by the deletions of
paragraphs 2 and 3.”


62 Id. at 15.
units of account. Contracting States must communicate to the
Depositary the manner of calculation at the time of signature
or when depositing their instrument of ratification, acceptance,
approval or accession and whenever there is a change in the
manner of such calculation.\textsuperscript{43}

The simplicity of stating that the SDR is the measurement
of liability is appealing. It is additionally important, however,
to require, as paragraph 2 detailed above does, that non-mem-
bers of the IMF express their national currencies in the same
real value as that of SDRs. Otherwise, it would be possible for
such countries to convert their liability limits into a different
national value. The great variety in liability limits under the
Warsaw Convention provides a good example of how conver-
sion into national currencies can differ.

A District of Columbia Circuit case illustrates the stability
that using SDR's affords. In \textit{Tramontana v. Varig Airlines},\textsuperscript{44}
Brazil had converted the Warsaw limits into national cur-
rency. Subsequently, to the detriment of U.S. claimants, infla-
tion in Brazil reduced the limit for loss of life down to $170.
The requirement that calculations of local currencies be in a
manner so as to express national currencies in the same real
value as the SDR would prevent a \textit{Tramonta} deflation of
value from occurring.\textsuperscript{45}

II. Remedies for Inflation Erosion of the Liability
Limits

Although liability limits stated in SDR's are not inflation
proof, there is some counter-inflationary effect within the IMF
basket of currencies because the currencies in the basket do
not all inflate at the same time or rate. Varying methods for
remedying the effects of inflation on the limits are found in
transportation conventions. For example, the 1971 Guatemala
Protocol to the Warsaw Convention provides for automatic es-
calation of the liability limits unless contracting states decide

\textsuperscript{43} Plenary Report, \textit{supra} note 5, Annex I, at 15.
\textsuperscript{44} 350 F.2d 468 (D.C. Cir. 1965).
\textsuperscript{45} Hamburg Rules, \textit{supra} note 3, Art. 26(4). Plenary Report, \textit{supra} note 5, Annex I,
at 15.
differently at a conference.\textsuperscript{66} Other conventions require convening of special review conferences to decide on new limits.\textsuperscript{67}

In preparing for the Working Group's meeting in January, 1982, the UNCITRAL Secretariat described various ways of countering the effects of inflation.\textsuperscript{68} One suggestion was to key the liability limits to the value of one or more baskets of goods. The limits would vary depending on the values of the baskets. Thereafter, an international organization such as UNCITRAL would administer the adjustments effected by changes in these basket values. Alternatively, the IMF proposed that the liability limits be expressed in SDR's and be adjusted periodically according to a suitable SDR or other price index. The IMF suggested that it calculate the monthly price index, possibly in conjunction with the preparation of statistics compiled in the IMF publication, \textit{International Financial Statistics}.\textsuperscript{69}

Another means of adjusting the limits would be to have treaty amendment conferences triggered by an inflation index. This adjustment mechanism has the advantage of providing objective structural means of revising liability limits while avoiding automatic adjustments. Although indexation might appear acceptable in transportation conventions, it could be damaging in other contexts. The U.S. delegate opposed indexation because it contributes to inflation and distorts commodity factor prices. Additionally, if the United States were to acquiesce to the indexation concept, it might be interpreted by other U.N. bodies as a shift in U.S. policy on indexation.

An alternative to indexation would be to set a regular schedule of liability adjustment conferences. These conferences would permit periodic review of the effect of inflation on the liability limits. Changes in the design of ships and the na-


\textsuperscript{68} Unit of Account of Constant Value, Report of the UNCITRAL Secretary General, \textit{supra} note 18, at 5-8.

\textsuperscript{69} \textit{Id.} See also note by the IMF staff in A/CN.9/200, 12 May, 1981.
ture of cargo and carriers could also be examined.

The Working Group agreed that inflation had caused serious erosion of the liability limits and that such erosion was a continuing problem. Erosion of the liability limits caused by inflation, undermines the goal of unification of law. The unfavorable effect of inflation has caused courts to find ways to circumvent eroded limits. The Working Group noted that insurance companies meet this ever increasing risk by charging higher premiums which the carriers in turn pass on to shippers and passengers in the form of higher charges.

Varying solutions to these problems were presented by the delegations to the UNCITRAL Working Group. The United States favored adjustment conferences over approaches that would link the liability limits to the consumer price index or other indices and sought to persuade the Working Group to consider only approaches which did not involve indexation. Because of the support for alternative approaches, the Working Group drafted several samples that reflected the major proposed approaches.

A. Indexation Sample

The Working Group discussed the indexation approach first. The IMF observer reiterated that the IMF was willing to calculate a monthly price index on the basis of which the liability limits could be adjusted automatically. Underlying this approach is concern over the effect that changes by the IMF in its monthly price index might have on liability limits. The additional issue of whether one general consumer

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70 Working Group Report, supra note 4, at 3.
71 Id. at 4.
72 Id. at 4-5. Some liability limits were established a long time ago, for example, the Warsaw limits of 1929. These limits have been severely affected by inflation. The Working Group could not produce a formula for indexation of such ancient limits to compensate for erosion.
73 Working Group Report, supra note 4, at 4.
74 Id. at 5.
75 Id. at 14-17.
76 Id. at 6.
77 In Franklin Mint, the Second Circuit stated that liability limits should not be made dependent on "the whim of an international body distinct from the parties to
price index or different indices tailored to the individual convention's subject matter should be used was also raised. As a non-member of the IMF, the USSR wanted to permit use of different indices than the one prepared by the IMF. The IMF observer stated that a specialized index founded on primary commodities, would probably fluctuate more than a general consumer index. He believed, however, that an index could be formed for "a particular convention dealing with particular primary commodities." A separate basket consisting of those commodities would form the basis for such an index.

The Working Group recognized that an index could also be used to convene states to revise conventions if inflation were to increase by an agreed amount. The amount of any increase in the liability limits would then be determined by the participating states. The Working Group further concluded that liability limits should not fluctuate with changes in an index but should remain stable for one year periods. Such stability would enable parties governed by a particular convention to rely on established limits. Otherwise, insurance companies would be unable to identify the amount of risk against which they were being asked to insure.

The Group presented a text on indexing to UNCITRAL as one alternative way of adjusting the liability limits for erosion by inflation. The text was adopted by UNCITRAL as one of two alternative provisions for adjusting liability limits. In the discussion preceding adoption of the text, the view was stated that indexing would in and of itself contribute to infla-

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78 Working Group Report, supra note 4, at 5.
79 Id.
80 Id. at 10.
81 Id at 9-10.
82 Id.
83 Plenary Report, supra note 5, at 16.
States were asked to consider what institution should be charged with preparation, revision and calculation of such an index. Some states announced that they would not ratify a convention containing an indexation provision. Other states indicated that there might be some conventions for which the indexation approach would be desirable, and for that reason UNCITRAL should prepare a sample price index. Consequently, the following text was adopted:

**SAMPLE PRICE INDEX**

1. The amounts set forth in article [ ] shall be linked to [a specific price index which might be considered appropriate for a particular convention]. On coming into force of this [Protocol-Convention], the amounts set forth in article [ ] shall be adjusted by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the index for the year ending on the last day of December prior to which this [Protocol-Convention] came into force over its level for the year ending on the last day of December [of the year in which the Protocol or Convention was opened for signature]. Thereafter, they shall be adjusted on the first day of July of each year by an amount, rounded to the nearest whole number, corresponding in percentage to the increase or decrease in the level in the index for the year ending on the last day of the previous December over its level for the prior year.

2. The amounts set forth in article [ ] shall not, however, be increased or decreased if the ratio of increase or decrease in the index does not exceed [ ] per cent. Where no adjustment was made in the previous year because the change was less than [ ] per cent, the comparison shall be made with the level for the last year on the basis of which an adjustment was made.

3. By the first day of April of each year the Depositary shall notify each Contracting State and each State which has signed the [Protocol-Convention] of the amounts to be in force as of the first day of July following. Changes in the amounts shall be registered with the Secretariat of the United Nations in accordance with the General Assembly regulations to give effect to

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**Footnotes:**

84 *Id.* at 14.
85 *Id.*
86 *Id.*
B. Revision Committee Sample

Adjustment of liability limits by the use of a revision committee was considered next by the Working Group. The U.S. delegate suggested that a revision committee be convened at regular intervals. Provision for emergency meetings that might be necessitated by sudden changes such as the oil pollution catastrophes of the 1960's and 1970's would be established. Both of these ideas were incorporated into the revision committee sample amendment, which provided that the depositary would convene a revision committee within five years after a convention was opened for signature or since the revision committee last met. The committee could also be activated any time upon the request of a specified number of states.

The Working Group believed that convening revision committees would be simpler than convening formal conferences because liability conventions historically have had such large participation. A uniform revision procedure for all the transportation conventions was suggested within the Working Group, because it was thought that a standard revision clause would promote unification of law. Other Working Group members favored revision clauses tailored to the specific needs of each convention. One view was that all contracting States should have the opportunity to participate in the revision committee's meetings. In view of Working Group discussion, the following text was adopted by UNCITRAL as an alternative way of adjusting the liability limits:

SAMPLE AMENDMENT PROCEDURE FOR LIMIT OF LIABILITY

1. The Depositary shall convene a meeting of a Committee

Id. at 16.
* Working Group Report, supra note 4, at 10.
* Id. at 14.
* Id. at 11.
* Id.
composed of a representative from each Contracting State to consider increasing or decreasing the amounts in article [ ] (a) upon the request of at least [ ] Contracting States, or (b) when five years have passed since the [Protocol-Convention] was opened for signature or since the Committee last met.

2. If the present [Protocol-Convention] comes into force more than five years after it was opened for signature, the Depositary shall convene a meeting of the Committee within the first year after it comes into force.

3. Amendments shall be adopted by the Committee by a [ ] majority of its members present and voting.82

4. Any amendment adopted in accordance with paragraph 3 of this article shall be notified by the Depositary to all Contracting States. The Amendment shall be deemed to have been accepted at the end of a period of [6] months after it has been notified, unless within that period not less than [one-third] of the States that were Contracting States at the time of the adoption of the amendment by the Committee have communicated to the Depositary that they do not accept the amendment. An amendent deemed to have been accepted in accordance with this paragraph shall enter into force for all Contracting States [12] months after its acceptance.

5. A Contracting State which has not accepted an amendment shall nevertheless be bound by it, unless such State denounces the present Convention at least one month before the amendment has entered into force. Such denunciation shall take effect when the amendment enters into force.

6. When an amendment has been adopted by the Committee but the [6] month period for its acceptance has not yet expired, a State which becomes a Contracting State to this Convention during that period shall be bound by the amendment if it comes into force. A State which becomes a Contracting State to this Convention after that period shall be bound by any amendment which has been accepted in accordance with paragraph 4.83


The sample amendment procedure for liability limits depends on rapid and universal adoption for its success. The expedited adoption procedures in paragraphs four through six are based on similar amendment procedures found in the 1980 Convention Concerning International Transport by Rail (COTIF). This amendment procedure assures universal adoption of the adjusted liability limits. As illustrated in paragraph five, it provides for denunciation by any state which cannot accept a new liability limit which has been adopted under the amendment procedure of the new clause. This amendment procedure raises the issue of tacit amendment of conventions. For example, action by the U.S. Congress on each specific amendment would not be required. Under this procedure the amendment committee will be convened every five years or upon the request of a certain number of states. Amendments deemed to have been accepted enter into force for all contracting states within (12) months after their acceptance. States which have not accepted an amendment are bound by it unless they denounce the convention at least one month before the amendment is scheduled to enter into force. Consequently, some states anticipate that they can be bound by the adjusted liability limits by treaty law regardless of their national constitutional requirements for treaty adoption and implementation. Recognizing the need for speedy universal adoption of the adjusted limits, states should be allowed sufficient time to complete their constitutionally required process. The time allowance, however, should not be long enough to permit states to be dilatory.

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84 Convention Concerning International Carriage by Rail (COTIF), Berne, 1980 (Cmd. 8535). Art. 8 creates the revision commission. The commission’s authority to review proposed amendments is stated in Art. 19. Procedure is provided in Art. 21. After the revision commission has decided on an amendment, it enters into force for all contracting states one year after it has been sent to them, unless one third of the contracting states object within four months after the amendment was sent. However, it is possible for the contracting states to denounce the convention and thereby avoid being subject to the amendment.

85 Id.

The 1977 Oil Pollution Convention \(^9^7\) contains certain criteria for consideration by a revision committee. The Convention provides that the Committee shall take into account:

(a) any information concerning events causing or likely to cause pollution damage having a bearing on the objects of this Convention;
(b) any information on increases and decreases occurring after the entry into force of this Convention in the costs of goods and services of the kinds involved in the treatment and remedying of marine oil spillages;
(c) the availability of reliable insurance coverage against the risk of liability for pollution damage.\(^9^8\)

In view of this precedent, the Working Group suggested that similar criteria might be established for the guidance of a revision committee.\(^9^9\) Application of such criteria could be required or, alternatively, simply supplied as a guide for use by the revision committee.

### III. Conclusion

UNCITRAL's decision to recommend adoption of the unit of account provision and the two alternative clauses on erosion of liability limits by inflation was submitted to the United Nations General Assembly in UNCITRAL's annual report required by General Assembly Resolution 2205 (XXI) of 17 December, 1966. The General Assembly in turn adopted a resolution\(^1^0^0\) recommending to all U.N. member states that


\(^9^8\) Id.

\(^9^9\) See supra note 92.

\(^1^0^0\) Provisions for a unit of account and adjustment of limitations of liability adopted by the United Nations Commission on International Trade Law:

The General Assembly,

Recognizing that many international transport and liability conventions of both a global and a regional character contain limitation of liability provisions, wherein the limitation of liability is expressed in a unit of account,

Noting that the amount fixed in such a convention as the limitation of liability may become seriously affected over time by changes in monetary values, thereby destroying the intended balance of the convention as adopted,

Believing that a preferred unit of account for many conventions, particularly for
they adopt the new unit of account provision and the alternative provisions for adjusting liability limits for inflation erosion in future liability conventions or in revision of the existing conventions.

Still at issue is whether states will accept the UNCITRAL and General Assembly recommendations. The first opportunity to react to these recommendations was at the October, 1982 meeting of the Legal Committee of the International Maritime Organization (IMO), which has several maritime conventions under consideration.\(^\text{101}\) The IMO Legal Committee concluded that the indexation system would not be suitable for amendment of the 1969 Civil Liability Convention or for the 1971 Fund Convention.\(^\text{102}\) The Legal Committee observed that it would be difficult to agree upon an appropriate index which would be suitable for both of these conventions.\(^\text{103}\) Furthermore, it was noted that an inflation index would be limited to changes in inflation and could not be used to make other needed adjustments; such a system could not

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\(^{101}\) See supra note 95.


\(^{103}\) Report of the Legal Committee of the International Maritime Organization, supra note 96 at 10.
be controlled by the contracting states.\textsuperscript{104}

The amendment procedure presented by UNCITRAL was strongly supported by several delegations that noted the need for swift updating and for achievement of complete uniformity among all contracting states regarding amounts of the amended liability limits.\textsuperscript{105} These delegations noted that failure to obtain universal application of amended limits would encourage forum shopping for jurisdictions with the lowest limitation amounts.\textsuperscript{106} Generally they approved of the UNCITRAL proposal for adoption or denunciation of new limits.\textsuperscript{107} One delegation stated that problems with obtaining parliamentary approval of new limits could be mitigated if a sufficiently long time between adoption and implementation were provided.\textsuperscript{108} Finally, the IMO Legal Committee supported use of SDR's to express limitation amounts.\textsuperscript{109}

Action on implementation of the UNCITRAL recommendations affecting air liability conventions normally takes place in ICAO, where amendments to aviation treaties are prepared.\textsuperscript{110} As of this writing, the issue has not been raised in ICAO. When the issue is considered, ICAO will probably look to the discussion concerning the UNCITRAL recommendations by the IMO Legal Committee and by other organizations which are responsible for treaties with monetary limits. Certainly, the UNCITRAL recommendations would stabilize the measurement of limits and counter erosion to the liability limits in the Warsaw Convention caused by inflation. These recommendations would remedy the maladies in the private international law conventions, as discussed in Franklin Mint.\textsuperscript{111}

The UNCITRAL recommendations for amendments would resolve problems that are common to many transportation

\textsuperscript{104} Id.
\textsuperscript{105} Id. at 11.
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 12.
\textsuperscript{109} Id.
\textsuperscript{110} See supra note 21.
\textsuperscript{111} See supra note 47.
conventions. Although these treaties establish limits, there have been problems in defining these limits, and the limits have been eroded by inflation. UNCITRAL’s concern with facilitating international trade law in general might make it the best forum for providing a common solution to these problems in all these treaties. The unique subject matter of each treaty would require some modification, and possibly not all treaties would fit comfortably into a common UNCITRAL solution. This is the juncture, however, at which UNCITRAL should decide whether to draft a separate convention on units of account and inflation erosion. A separate convention would have the following advantages:

1. It generally would insure against re-opening private international law treaties for renegotiation.
2. An UNCITRAL convention would establish uniformity of law in an important international trade area.
3. An UNCITRAL solution could be drafted quickly because UNCITRAL has done the preparatory work in the recommendations.
4. An UNCITRAL solution would be more cost effective because it would not involve convening the legal committees of the many specialized agencies separately.

Whether specialized U.N. agencies, such as ICAO and IMO, consider the U.N. General Assembly recommendations piecemeal or UNCITRAL itself undertakes a common treaty solution, it is important that the UNCITRAL recommendations be implemented as soon as possible.

ANNEX A.

Transport and Liability Conventions and Protocols to such Conventions which use the SDR for the Unit of

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112 See Annex A.
114 See supra note 99.
115 Supra note 99.
ACCOUNT

Conventions

Convention Relative aux Transports Internationaux Ferroviaires (COTIF), Berne, 9 May 1980.

Protocols

Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, Montreal, 25 September 1975 (Protocols No. 2 and 3 introduced the SDR as the unit of account into the Convention as amended by the Protocol done at The Hague on 28 September 1955 and at Guatemala City on 8 March 1971. Protocol No. 4 made substantive amendments to the Convention as amended by the Protocol done at The Hague and also introduced the use of the SDR).
Protocol to the Convention on the Contract for the International Carriage of Passengers and Luggage by Inland Wa-
ANNEX B.

Article 26. Unit of Account

1. The unit of account referred to in article 6 of this Convention is the Special Drawing Right as defined by the International Monetary Fund. The amounts mentioned in article 6 are to be converted into the national currency of a State according to the value of such currency at the date of judgment or the date agreed upon by the parties. The value of a national currency, in terms of the Special Drawing Right, of a Contracting State which is a member of the International Monetary Fund is to be calculated in accordance with the method of valuation applied by the International Monetary Fund in effect at the date in question for its operations and transactions. The value of a national currency in terms of the Special Drawing Right of a Contracting State which is not a member of the International Monetary Fund is to be
calculated in a manner determined by that State.

2. Nevertheless, those States which are not members of the International Monetary Fund and whose law does not permit the application of the provisions of paragraph 1 of this article may, at the time of signature, or at the time of ratification, acceptance, approval or accession or at any time thereafter, declare that the limits of liability provided for in this Convention to be applied in their territories shall be fixed as: 12,500 monetary units per package or other shipping unit or 37.5 monetary units per kilogramme of gross weight of the goods.

3. The monetary unit referred to in paragraph 2 of this article corresponds to sixty-five and a half milligrammes of gold of millesimal fineness nine hundred. The conversion of the amounts referred to in paragraph 2 into the national currency is to be made according to the law of the State concerned.

4. The calculation mentioned in the last sentence of paragraph 1 and the conversion mentioned in paragraph 3 of this article are to be made in such a manner as to express in the national currency of the Contracting State as far as possible the same real value for the amounts in article 6 as is expressed there in units of account. Contracting States must communicate to the depository the manner of calculation pursuant to paragraph 1 of this article or the result of the conversion mentioned in paragraph 3 of this article as the case may be at the time of signature or when depositing their instruments of ratification, acceptance, approval or accession, or when availing themselves of the option provided for in paragraph 2 of this article and whenever there is a change in the manner of such calculation or in the result of such conversion.