SESSION TWO

LIMITATION OF LIABILITY BY TREATY AND STATUTE

By George N. Tompkins, Jr.†

I. INTRODUCTION

My subject deals with limitation of liability by treaty and statute, a subject which may be regarded by some as of more historic than current interest, at least so far as the United States is concerned. I wish to assure you that the subject is a very timely one and urgently needs a practical solution. The subject is timely because the Boeing 747 is here; the airbuses will soon be with us; and the parties to the Warsaw Convention¹ (Convention) are currently considering substantial revisions to the Convention's system of liability, including the limitation of liability.

The problem of fairly and reasonably compensating all of the victims of a crash of one of these huge aircraft is enormous. It is one which I do not believe can be dealt with adequately within the present legal system applicable to such accidents, whether domestic or international. A new system of liability and limitation is required now. Time is running out.

The first disaster involving one of these aircraft could very well result in emergency remedial legislation in the United States. Such legislation in almost all cases is the product of fear, however unjustified. The crash of a fully-loaded Boeing 747 at a time when damage awards in death cases are approaching an average of $250,000 per passenger in the United States is certain to create substantial fear in the minds of many legislators and members of the executive branch of the government, however unfounded, as to whether the existing aviation insurance market is capable of meeting the financial aftermath of such a disaster. Of even greater concern will be the question of whether the air transport industry is economically sound enough to withstand such a disaster. With an average of $250,000 per award, an airline flying a Boeing 747 with 400 passengers is exposed to a passenger liability risk of $100,000,000. The thought of just one accident is alarming. What if there are 2 or 3 in the first year or so of operation, as has been predicted by some?

Too often in the past, the aviation bar has been content to sit on the sidelines while the debates go on as to whether liability should be limited and if so in what manner. Any proposals which are reached as a result of such conferences then become the subject of seemingly endless pro and

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con debate, usually with those who represent plaintiffs supporting the “con” and those who represent defendants supporting the “pro”. This is an easy road for the bar to take. Unfortunately, it is not very constructive or helpful to the participants in the conferences where solutions are sought to be achieved. The delegates at these conferences, including those representing the United States, have not, to my knowledge, had the benefit of any practical experience in the day to day handling of aviation accident litigation, whether for plaintiffs or defendants. You have that practical experience and it is from you that constructive proposals on this vital subject must and should come if we are ever to achieve a workable compromise acceptable to the many interests involved.

My remarks will focus on the liability for personal injury to or death of passengers. I do not intend to cover in this paper liabilities relating to third persons, property damage, whether baggage, cargo or other. It is in the area of personal injury and death of passengers that the most difficult problems arise and where practical solutions are urgently needed.

What I propose to cover in this paper is the following:

1. The present statutory and treaty provisions which serve to limit liability in aviation accidents for personal injury and death of passengers;

2. Recent efforts to bring about a more permanent revision of the Warsaw Convention system of liability and limitation on recoverable damages;

3. An examination of the question whether there is any justification for the United States to remain or become a party to any international agreement which is designed to limit liability in aviation accidents; and,

4. Finally, I would like to leave with you a suggestion as to how this subject of limitation of liability could be dealt with in the future. This suggested system has, at least to me, many practical advantages which would seem to be more adaptable to the era of the superjet than any existing or presently proposed system.

My hope in placing this suggestion before you is that you will find in it, if not the nucleus of a new regime for limitation of liability, then at least the incentive to study the problem in depth and come up with an even better proposal.

II. Present Treaty and Statutory Provisions Limiting Liability

Any discussion of the subject of limitation of liability necessarily involves a consideration of the Warsaw Convention. Three years ago the symposium was devoted entirely to the Warsaw Convention as modified by the 1966 Montreal Agreement. In the preparation of this paper, I have endeavored to avoid rehashing what was discussed in 1967. This has been a difficult task in view of the very thorough discussion and consideration given to the Warsaw Convention and its system of liability at

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the symposium in 1967. There has been considerable activity in this area since that time, both in the courts in this country and at the diplomatic level. Unfortunately, not all motion is progress.

Before commenting further on the Warsaw Convention and its limitation of liability system, allow me to refer first to statutory limitations of liability. This is a subject that can be dealt with relatively quickly.

A. Limitation Of Liability By Statute.

There are no federal statutes which limit the liability of an air carrier in the event of personal injury to or death of passengers in an aviation accident. To my knowledge there are none presently under consideration at any legislative level.

There are no state statutes which specifically limit the liability of air carriers in the event of personal injury to or death of passengers. A number of state death statutes still contain limitations on recoverable damages; the number of states retaining such limitations is dwindling. Within the past couple of years Illinois\(^3\) and South Dakota\(^4\) have joined the ranks of the unlimited; and Colorado\(^5\) have recently restricted the applicability of its limitation (\$45,000) to those situations where the decedent leaves surviving neither spouse, minor children nor dependent parent.

Those states which still retain a limitation on recoverable damages under their respective death statutes are as follows:

- Kansas\(^6\) .......... \$35,000.
- Massachusetts\(^7\) .... \$3,000 minimum to \$30,000 maximum, according to the culpability of the defendant. \$5,000 minimum to \$50,000 maximum if the defendant is a common carrier, again according to the degree of culpability.
- Minnesota\(^8\) .......... \$35,000.
- Missouri\(^9\) .......... \$50,000.
- New Hampshire\(^10\) .... \$20,000, unless the decedent leaves a spouse, minor children or dependent parent, in which case the limit is increased to \$60,000.
- Virginia\(^11\) .......... \$75,000.
- West Virginia\(^12\) .... \$10,000 where there is no showing of a pecuniary loss and a maximum of an additional \$100,000 if there is evidence of pecuniary loss.
- Wisconsin\(^13\) ......... \$35,000, in addition to which \$3,000 may be awarded to parents, spouse, emancipated or dependent children for loss of society; also, where the decedent leaves dependent children under

\(^{3}\) ILL. ANN. STAT. ch. 70, § 2 (Smith-Hurd 1967).
\(^{4}\) S.D. CODE, ch. 21-1, § 7 (1967).
\(^{6}\) KAN. STAT. ANN. § 60-1903 (Supp. 1969).
\(^{7}\) MASS. GEN. LAWS ANN. ch. 229 (Supp. 1968).
\(^{8}\) MINN. STAT. 573.02 (Supp. 1967).
18, the maximum limit is increased $2,000 for each child but not exceeding a total increase of $10,000.

The application of these limitations to aviation claims is very rare these days. Almost all of the states where aviation litigation is concentrated have abandoned the traditional conflicts rule that the law of the place of the accident determines, not only the right of action, but the amount of recoverable damages.14

There are no statutes of any state which limit recoverable damages in personal injury cases.

Now, let us consider limitation of liability by treaty. This brings us inevitably to our “fallen comrade,”15 the Warsaw Convention.

B. Limitation Of Liability By Treaty.

The Warsaw Convention applies only to the passenger-carrier relationship and does not limit the liability of the carrier in the event of injury to or death of persons other than passengers.16

The system of liability established by the Warsaw Convention is liability for fault; however, the traditional burden of proof is shifted. Article 17 creates liability on the part of the carrier for damages in the event of the death or wounding of a passenger.17 Article 20 furnishes the carrier with an opportunity of avoiding this liability by proving that it, the carrier, took all necessary measures to avoid the damage or that it was impossible to do so.18 Proof by the carrier of contributory negligence on the part of the passenger bars or lessens the recovery, depending upon the law of the forum.19 If the liability created by Article 17 withstands the defenses of Articles 20 and 21, the damages which may be recovered are limited to $8,291.87.20

According to the Convention, this limitation can be exceeded only if the passenger proves willful misconduct within the meaning of Article 25, or that he was accepted as a passenger without a passenger ticket having been delivered.21 According to the courts of the United States, however, this limitation can also be exceeded if the delivered passenger ticket does not notify the passenger “that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially.”22

The fundamental purpose of the Convention was to establish uniform liability rules applicable to international air transportation with the ob-

17 49 Stat. 3018.
18 49 Stat. 3019.
19 Id.
20 Id.
21 49 Stat. 3020, 3015.
jective of minimizing conflict of laws problems. Today, we have anything but uniformity in the application of the limitation of liability rule contained in the Convention. There are now several limitations of liability which can apply in an accident arising out of the same domestic or international flight.

The application of the Convention to any case depends solely upon the routing set forth in the passenger ticket. For example, you can be flying from Dallas to New York and be subject to the Warsaw Convention if your ticket includes a stop in another Warsaw Convention country or, if it is a round trip ticket with Dallas as the originating point, so long as it includes a stop in any other country, whether or not a party to the Warsaw Convention. A journey Dallas/New York/London would be Warsaw transportation since the United States and Great Britain are both parties to the Convention. However, a ticket providing for transportation Dallas/New York/London/Istanbul would not be subject to the Warsaw Convention since Turkey is not a party. On the other hand, if the ticket read Dallas/New York/London/Istanbul/Dallas, the transportation would be subject to the Warsaw Convention since it would originate and end in a Warsaw country, the United States, and would involve stops in other countries even though one of them is not a party. Finally, if the journey were reversed and the ticket provided for transportation Istanbul/London/New York/Dallas/Istanbul, the transportation would not be subject to the Warsaw Convention, since neither the origin nor the destination is in a Warsaw country.

For basic Warsaw transportation, a ticket reading Dallas/New York/London/Istanbul/Dallas, the limitation of liability applicable in the event of an accident is $8,291.87 per passenger. Unless, of course, you happen to be traveling on an aircraft at the time of the accident operated by a carrier which has filed with the Civil Aeronautics Board (CAB) of the United States the CAB 18900 approved form of "Agreement," in which event the limitation would be $75,000. Of course, if you elect to sue this CAB 18900 carrier in a country which awards attorney's fees as part of the costs to the successful party, the limitation of liability would be $58,000, plus whatever attorney's fees may be awarded.

If you reverse the routing, however, and originate the transportation in Istanbul, there would be no limitation applicable under the Warsaw Convention, even though the ticket included stops in New York and Dallas, since the basic transportation is not between two Warsaw countries and does not originate and terminate in a Warsaw country. If you originate the transportation in London, however, and travel London/Istanbul/New York/Dallas/London, the limitation of liability would be $16,600, the Warsaw limitation as amended by the Hague Protocol in 1955, again subject to the CAB 18900 modifications.

23 49 Stat. 3014.
24 49 Stat. 3019.
26 Id.
27 The Hague Protocol has never been ratified by the United States and is not in force as to the
Finally, if you can convince an American court, which should not prove too difficult, that you did not receive adequate notice of the application of the limitation of liability which the court ultimately determines was applicable to your transportation, the court will probably rule that the limitation does not apply to you. Or, a passenger faced with the CAB 18900 limitation of liability defense might be able to convince an American court that this is not a binding agreement on the passenger, since it constitutes nothing more than a unilateral declaration by the CAB 18900 carrier that he will accept liability up to a limit of $75,000 per passenger. Having thus eliminated the Warsaw/Hague/CAB 18900 limitation of liability, the court will undoubtedly go on to rule that the carrier is deprived of an opportunity of overcoming the liability created by Article 17 of the Warsaw Convention. The situation in this case is that the carrier is absolutely liable for damages unlimited in amount, which, of course, is the net result of the *Lisi* case.\(^2\)

Thus, you can see, that in an accident involving a flight leaving from Dallas and destined for New Orleans, we could have several limitations of liability applicable to the passengers depending upon their individual tickets.

This, then, is the uncertain and non-uniform limitation of liability situation after forty years of operation of the Warsaw Convention. Some say that life begins at forty. Others that forty is the dangerous age, for various reasons. Regardless, the Warsaw Convention has reached this age in a rather shattered condition with little resemblance to the original mold, due almost entirely, to developments in the United States in aviation law generally over the last forty years. It remains to be seen whether the Warsaw Convention will survive this dangerous age. I have serious doubts in my mind as to whether it is capable of existing as presently constructed in today's environment.

The principal problem, of course, is the limitation of liability. Efforts are still being made to revise the limitation of liability upwards. The United States continues to spearhead these efforts. In a spirit of compromise, which is the essence of international agreement, the United States has indicated that it would be agreeable to other major revisions of the Warsaw Convention, some of which substantially change the original basic system of liability established by the Convention. The system presently under consideration represents a substantial departure from the basic Warsaw rules relating to liability of the air carrier. Perhaps what is needed is an entirely new system based, not upon the framework which remains of the Warsaw Convention, but rather upon the principles which motivated the drafters of the original Convention and the lessons we have learned through experience over the past forty years in attempting to make these principles and rules work in a constantly changing world community.

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III. Recent Efforts to Amend the Warsaw Convention System of Liability

The action of the United States in serving notice of denunciation of the Warsaw Convention in 1965 "was taken solely because of dissatisfaction with the low limits of liability for death or personal injury provided in the Convention," even as increased by the 1955 Hague Protocol. The Montreal arrangement agreed to by most of the major carriers of the world substantially changed the conditions which had caused the United States to serve notice of denunciation. In formally withdrawing the notice of denunciation, the United States did so upon the belief that:

[1] Its continuing objectives of uniformity of international law and adequate protection for international air travelers will best be assured within the framework of the Warsaw Convention.

The Montreal arrangement was regarded as provisional by the Government of the United States and it has been the hope of the United States that a more permanent international agreement on the important issues dealt with in the Warsaw Convention could be reached in the near future as a result of continued discussions among the parties to the Convention.

These discussions on the diplomatic level have continued since 1966 at various levels and most recently culminated in a meeting of the Legal Committee of the International Civil Aviation Organization in Montreal. The question dealt with by the Legal Committee at its session in February and March of 1970 was the revision of the Warsaw Convention upon the basis of a proposal put forth by the United States in September of 1969.

The proposal of the United States is premised upon the belief that any revision of the Convention should assure three objectives:

1. Certainty of recovery;
2. Speed of recovery; and
3. Sufficiency of recovery.

The proposal of the United States considered by the Legal Committee in February and March of 1970 may be summarized as follows:

1. The existing regime of liability in the Warsaw Convention would be replaced with a regime of absolute liability on the part of the air carrier.

2. The only defense available to the carrier would be the contributory negligence of the passenger injured or killed. There would be no defense available to the carrier in accidents caused by acts of war, sabotage or hijacking. Rights of recourse against third parties would be preserved in favor of the carrier.

3. A settlement inducement clause would be included in the revised Convention. Courts would be authorized to award costs and reasonable

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30 Id.
31 Id. at 2.
legal fees if no offer of settlement has been made by the carrier prior to litigation or if the proven damages exceed the last offer.

4. The limit of liability would be increased automatically at the rate of 4% per year, simple interest. A diplomatic conference would be convened five years after the coming into force of the new Convention for the purpose of reviewing the limit and the automatic increase mechanism. 34

5. With regard to Article 25 and its willful misconduct provision, the United States is neutral as to whether this provision should be retained or deleted in the revised Convention.

6. The new limit of liability would not be exceeded for either failure to deliver a ticket or failure to give adequate notice of the limitation. States would be entitled, however, to require some form of notice as part of their national laws; such laws would have no relation to or permit the breaking of the Convention limits.

7. Article 28 would be amended to include as an additional jurisdiction for the bringing of an action the place of domicile or permanent residence of the claimant, if the carrier is otherwise subject to the jurisdiction of the courts in that state.

8. The new limitation of liability would be $100,000 per passenger.

In presenting this new proposal, the United States:

... emphasized that the proposal sets forth minimum requirements of a "package" plan, each element of which is essential in permitting the U.S. to accept a limit of as low as $100,000. 35

The final report of the Legal Committee on the February-March, 1970, meetings has not been prepared or released. 36 However, I understand that the delegation of New Zealand submitted a package proposal substantially the same as the U.S. proposal and the "New Zealand Proposal" was the one actually voted on by the Legal Committee at the end of its session.

The New Zealand Proposal 37 consists of a six-point package, as follows:

1. Absolute liability on the part of the carrier for death or injury of passengers, would be subject only to the defense of contributory negligence.

2. A limitation of liability would be $100,000 per passenger.

3. The limitation of liability would be unbreakable in all circumstances.

4. The limitation would be increased automatically by $2,500 each year for twelve years. Diplomatic conferences would be convened during the fifth year to decide whether this automatic increase arrangement should be amended and during the tenth year to decide whether to continue with automatic increases.

35 Id.
36 Since the presentation of this article, the Report of the ICAO Legal Committee has been released. ICAO Doc. 8865 LC/159 (16 March 1970). The full text of the Report relating to the proposed revisions of the Warsaw Convention is reproduced as Appendix A to this article.
5. A settlement inducement clause would be used to enable courts to award costs in addition to damages unless the carrier has made an offer of settlement as per the proposal of the United States.

6. Article 28 would be amended to provide an additional forum, namely the court of the domicile or permanent residence of the victim, if the carrier has a business establishment in that jurisdiction.

The delegation of New Zealand emphasized that the foregoing six-point proposal was submitted for consideration by the Legal Committee on the basis that the unbreakability of the $100,000 limit would be accepted by all parties.38

The United States voted in favor of the New Zealand Proposal as a whole although it abstained on the question of exceeding the limit in case of willful misconduct, in keeping with its previously announced position of neutrality on this issue.39 The Legal Committee ultimately agreed upon the New Zealand Proposal being taken as the basis for a diplomatic conference to consider the revision of the Warsaw Convention.40

This, then, is the current state of affairs as a result of diplomatic efforts spearheaded by the United States Government since the Montreal arrangement was agreed to in 1966. I do not propose to comment in detail on the New Zealand Proposal in the course of this paper. I urge each of you to study this proposal very carefully and all of the background material leading to its acceptance in Montreal by the Legal Committee of the International Civil Aviation Organization. I would like to make one or two comments, however, on the more significant elements of the New Zealand Proposal.

I am not an advocate of the concept of absolute liability in aviation accidents. I fail to see any justification for treating aviation any differently from any other form of transportation or, for that matter, any other form of accidental injury or death. It is surprising to me that so many of the world’s largest air carriers seem to be prepared to accept such a concept of liability. This concept, of course, is coupled with an unbreakable limit of $100,000 and for that reason undoubtedly has attraction for many airlines. From a Government viewpoint, the argument is made that the airlines are better able to bear the cost of a disaster and should, therefore, accept liability without fault within this unbreakable limit.

There seems to be no economic justification for a limitation of liability of $100,000 per passenger, at least so far as the United States is concerned. The aviation industry in this country is economically the soundest in the world and has experienced growth unequalled by any other nation. This position has been achieved in the atmosphere of a legal system premised upon liability for fault with recoverable damages unlimited in amount. I find it very difficult to accept a limitation of liability which is represented as one which is capable of compensating 80 or 90 percent of the...
cases. What possible justification is there to force the high-risk loss to pay the price for the low-risk loss?

The argument that a limitation of liability of this nature will satisfy the commendable objective of speed of recovery and sufficiency of recovery is, from a practical viewpoint, unsound. The great volume of aviation litigation in this country in the past twenty years has consisted for the most part of litigation involving efforts by plaintiffs to break limitations of liability and efforts by defense counsel to have limitations of liability upheld. With the average death award in aviation cases approaching $250,000 per passenger, plaintiffs' counsel would be professionally obliged to use every effort at their command to break a limit of $100,000 where the economic loss to the victim substantially exceeds that sum. At the same time, defense counsel, with such a limitation as part of the law, would be professionally obliged to use every effort at their command to see that the limitation is not broken.

With a limitation of $100,000 per passenger, I visualize endless years of litigation challenging such a limit until, eventually, it is broken by court interpretation of the convention in which it is embodied. This is precisely what has happened with respect to the 1929 Warsaw Convention because of its limitation of liability and I see no reason why we should not realistically expect the same result in the future with a limitation of $100,000 rather than $8,291.87. As a final note, a limitation of liability of this nature is not a particularly effective means of inducing early settlement of cases. In my experience, the greatest inducement or incentive to early settlement is the prompt assessment of your liability situation and a practical realization of what the result is likely to be if the case is tried to a jury.

The automatic increase of the unbreakable limit of $100,000 by the sum of $2,500 per year for twelve years is, in today's damage world, a mere token. At the end of twelve years the unbreakable limit will be $130,000. Based upon the present level of awards in non-international case in this country, we can expect that the average award twelve years from now will probably be in excess of $300,000. The situation will be no better then than it is today in the relationship between domestic awards in a system of fault liability with no limitation on recoverable damages and international cases with a system of absolute liability and limited damages.

This brings us to the question whether there remains any justification for the United States to continue as a party to any agreement embodying

a system of liability premised upon the Warsaw Convention or any re-
visions of same presently under consideration.

IV. SHOULD THE UNITED STATES BE A PARTY TO ANY INTERNATIONAL
AGREEMENT WHICH ENCOMPASSES A UNIFORM LIMITATION OF
LIABILITY FOR THE DEATH OR INJURY OF PASSENGERS IN
INTERNATIONAL AIR TRANSPORTATION?

Any consideration of this question necessarily entails an examination
of the reasons why the United States adhered to the Warsaw Convention
in the first instance.

The fundamental objective of the Warsaw Convention, namely uni-
formity of liability rules relating to international air transportation, is still
much to be desired today. I believe it is in the interests of the United
States to be a party to any international agreement which serves to elimi-
nate potential conflict of laws problems and to establish uniformity in
liability rules relating to international transportation. I would add one
proviso to this belief. The price which the United States must pay to re-
main or become a party to any international agreement should not exceed
the benefits to be derived from participating in the agreement. An un-
breakable limit of liability of $100,000 per passenger as part of a “pack-
age” which involves absolute liability on the part of air carriers in the
event of an accident is, in my opinion, too high a price.

The report of the Secretary of State of the United States in 1934, recom-
mending that the Senate give advice and consent to adherence by the
United States to the Warsaw Convention, recognized that the combined
effect of Articles 17 and 20 placed the passenger in a better position than
the then recognized rules of common law liability.42 The doctrine of res
ipsa loquitor was not applied by too many states in 1934 in aviation acci-
dent litigation. The expertise in the investigation and the determination
of the causes of aviation accidents which we have now did not exist in 1934.

The advantages of the liability system created by the combined effects
of Articles 17 and 20 were undoubtedly significant in the 1930’s and even
in the 1940’s. However, circumstances have changed. Investigation of the
causes of accidents has reached a very advanced stage and it is rare today
that the probable cause of an accident cannot be determined as a result
of the combined efforts of the governments concerned, the air carrier and
the manufacturer. Additionally, there has developed in the 1950’s and
1960’s in the United States a very formidable array of attorneys who have
acquired unparalleled ability in digging into the facts of an accident with
a view to determining the cause for civil litigation purposes.

Finally, the doctrine of res ipsa loquitor is now applicable generally
throughout the United States to aviation accident litigation.43

As a result of these developments, it is now rare when, if an airline has
been at fault in circumstances leading up to an accident, liability is not

43 See, e.g., Cox v. Northwest Airlines, Inc., 379 F.2d 893 (7th Cir. 1967); Citrola v. Eastern
imposed as a result of civil litigation. In those cases where an airline is not proven to have been at fault, I see no justification for imposing absolute liability upon the airline simply because it is better able to bear the risks attendant upon the operation of its aircraft.

While it may have been advantageous in the 1930's and 40's to enable an airline to purchase liability insurance upon the basis of a fairly predictable and limited exposure, this would no longer appear to be a necessary element to the growth of aviation or the reduction of operating costs. The domestic aviation industry in the United States has grown in the past 25 years within a system of unlimited liability and is today the strongest economically of any country in the world. Also, the aviation insurance market has matured to the point where it is now able to assess on a fairly reasonable and accurate basis the risks incident to the operation of any airline and furnish whatever insurance coverage may be required. Contrary to what many of you may have come to believe on the basis of comments you have previously heard or read, the aviation insurance market prefers to remain neutral on questions of limitations of liability. They believe that their function in the aviation industry is to provide whatever coverage is required by the airlines regardless of the state of the law and whether any limits of liability may apply. The aviation insurance market has shown a remarkable adaptability to the increasing risks to which airlines are exposed as a result of civil litigation, the growth in numbers of airplanes being used and their size. The market has most recently accepted the challenge of the 747 era and I believe that it will be able to continue doing so regardless of the state of the law, limits of liability or the size of the airplanes.

In summary, it can probably be said with some foundation that the Warsaw system of liability furnished a much better system in 1934 than then existed in the United States, even under common law principles, for dealing with passenger liability. But this is no longer true in the United States. There is no longer any need of a Warsaw system of liability to adequately protect the rights of American passengers in international air transportation. The common law system which prevails in this country has also grown with the aviation industry and it too has matured to the point where it is capable of dealing with the rights of passengers and airlines fairly and justly.

At this point you may be wondering how I would propose to answer the question raised at the beginning of my remarks on this point: Is there any justification for the United States remaining a party to a Warsaw Convention system of liability? My answer is: Yes, provided some practical revisions are made to the existing system. My reasons are twofold:

1. Air transportation is essentially international. This being the case, it must be in the interest of the leading civil aviation nation in the world to strive to achieve international agreement in all phases of air transportation.

2. Uniformity of the law is always to be desired where the very
essence of the industry is international. It is questionable, however, whether there can be any justification for including in any international agreement, or as part of any uniform laws, a uniform limitation on recoverable damages. Nothing is more personal and therefore not subject to uniformity than the economic loss inflicted upon the individual victims of any aviation disaster.

Why does the United States Government continue to press for a per passenger limitation of liability in international aviation when, at the same time, an unlimited liability situation exists in domestic aviation in the United States?

The answer to this question must be the desire for international agreement on all matters dealing with aviation where feasible and the additional desire for uniformity of liability rules applicable to passengers and carriers throughout the world. If these are valid considerations, and I believe they are, then we must be prepared to accept a compromise, since this is the essence of any international agreement among the many competing interests involved.

The United States cannot and should not withdraw from the Warsaw Convention. Rather it should continue to press for early agreement on an updated convention capable of dealing with the next twenty years and beyond. These efforts will have a better chance for acceptance in the United States if something other than a uniform per passenger limitation of liability can be agreed upon.

I would now like to place before you a suggestion for dealing with this difficult problem of limitation of liability in international aviation in the decades to come.

V. A SUGGESTION FOR LIMITATION OF LIABILITY BY TREATY AND STATUTE IN THE FUTURE

To a great extent the difficulty with which the United States is presently confronted in the field of limitation of liability in international air transportation is due to the fact that there has never been any limitation of liability applicable generally to domestic air transportation in the United States. The drafters of the Warsaw Convention of 1929 had hoped that this difficulty would be avoided by the member nations making the Warsaw Convention provisions part of their national law. This was never done in the United States.

The growth and development of aviation and the substantial increase in the past fifteen years in damage awards generally, and in particular in domestic aviation cases, has emphasized the disparity which exists between those cases governed by international rules and those governed by domestic laws in the United States. To be truly effective in the future any system of limitation of liability by treaty to which the United States is a party should be made applicable by statute to domestic transportation as well.

My first suggestion, therefore, is that if there is to be any system of limitation of liability in aviation in the future in the United States, the
limitation should apply to both domestic and international air transporta-
tion.

What system of limitation of liability, then, would be worthy of con-
sideration? A per passenger limitation of liability seems to be the least
attractive because it works the greatest hardship in the greatest number
of cases. Further, any such limitation is bound to come under constant
attack in this country where the provable damages exceed the limitation
and, ultimately, the limitation will probably be broken as a matter of
course.

The Warsaw Convention system of liability, if we disregard for the
moment the limitation of liability, has worked very well over the past 40
years. It would be a good convention system of liability even without the
limitation. Would it be possible, then, to resolve the present problem by
amending the Warsaw Convention to simply delete Article 22(1) and
Article 25? Each party to the Convention could then determine whether
it should have any limitation of liability and, if so, what this limitation
should be. This solution would preserve all of the other advantages of the
Warsaw Convention and its uniform liability rules. At the same time, it
would enable the United States to deal with limitations of liability solely
upon the basis of domestic considerations without upsetting the interna-
tional balance.

Supporters of completely uniform liability rules would no doubt ob-
ject to this system since it would eliminate any hope for uniformity in a
limitation of liability. As pointed out earlier in this paper, we do not
have uniformity at the present time under the Warsaw Convention and
it does not appear that this is the proper subject of uniform treatment
in any event.

Another possible objection to this type of system could be that foreign
residents would seek to present their claims in the courts of that state
which has the most liberal rule for the assessment of damages. This could
be prevented by amending Article 28 to prohibit any suit from being
brought in any jurisdiction other than the state of the domicile of the
claimant or the State where the carrier has its principal place of business
or from which it has received a basic operating certificate.

Assume that the United States is successful in securing revision of the
Warsaw Convention along these lines. Should the United States then let
the present domestic system of no limitation continue or formulate some
program for limiting the liability exposure of an airline in the event of
an accident? The latter alternative seems to be the better of the two in
view of the substantial liability risks airlines will be confronted with in the
era of the 747 and the airbuses. However, rather than imposing a
limitation system based upon a per passenger limit, I would suggest a
system involving a per accident limitation of liability. The limitation could
be based upon the seating capacity of the aircraft times a selected multiple.
For example, a 400 passenger capacity Boeing 747 could involve a limita-
tion of the air carrier's total passenger liability of $40, $60 or $80 million,
depending upon which multiple of $100,000 or $150,000 or $200,000 is selected. If experience proves such a limitation inadequate, revisions upward could be accomplished by amending the existing legislation to increase the multiple factor.

In any given accident, if the total of the provable damages exceeds the per accident limitation, each individual damage award would be pro-rated downwards.

Rights of indemnity in favor of the air carrier against manufacturers, traffic controllers or other third parties should be preserved.

In any such system, liability should be premised upon proof of fault on the part of the air carrier. There is no justification for imposing absolute liability upon an air carrier in those situations where it has not been at fault.

Administrative problems could be avoided by legislation such as the Tydings Bill which would make the right of action exclusively federal and the jurisdiction over any litigation arising out of an aviation accident exclusively federal. I believe such a system would be manageable and would be in the interests of the United States both domestically and internationally.

It is my hope that the government of the United States would consider the feasibility of a liability system along the foregoing lines. It seems to me to present a practical solution to a very difficult problem and would represent a balance between all competing interests, both domestically and internationally.

VI. Conclusion

We are now in the era of the 747. Just as the advent of this aircraft has necessitated reexamination of existing facilities, namely, airports, passenger terminals, passenger handling systems, with revisions and improvements in almost every case, the present legal system applicable to aviation accident litigation needs complete reexamination, revision and improvement.

It is said that a fair and reasonable settlement of any dispute is one with which no interested party is completely satisfied. Any compromise solution of the competing interests involved in arriving at a sensible and workable system of limitation of liability must be of this character. All of the competing interests must give a little if any compromise is to be reached.

In 1967, at the Symposium on the Warsaw Convention, it was said:

[T]he question of appropriate limits of liability should be the subject of frank and vigorous public debate in each air transport country and a limit determined which is felt to be appropriate to the typical local passenger and airline.

It is my hope that, as a result of this Symposium, you will return to your respective cities and give very careful and serious consideration to

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this whole problem of Air Accident Litigation and particularly the limitation of liabilities arising therefrom. Then, you simply must make your views known to the legislative and executive branches of our Government, either jointly as a result of some committee study or, and this is a poor substitute for joint study and recommendation, at least individually. But I would sincerely hope that any joint views would be the result of a compromise solution presented by the Aviation Bar as a whole rather than conflicting views as to the problem presented by plaintiffs' lawyers, defense airline lawyers, manufacturers' lawyers, airline house counsel and legal scholars.

APPENDIX A

Warsaw Convention

Part III

Agenda Item No. 3: Question of Revision of the Warsaw Convention of 1929 as Amended by the Hague Protocol of 1955†

HISTORICAL.

1. The question of revision of the Warsaw Convention, as amended by the Hague Protocol was placed on the work programme of the Legal Committee by decision of the Assembly of ICAO in 1965. Since that time the subject has been studied in ICAO as an urgent and important one on several occasions at meetings of different bodies convened by ICAO: see LC/SC Warsaw WD 1 at page 115 of Doc 8839-LC/158-1. The subject came before the Legal Committee itself for the first time at the present session.

DOCUMENTATION.

2. The subject was extensively documented and the Legal Committee had the benefit of having the reports of various bodies which had previously studied the subject, as well as the comments received from States on the latest of such reports, namely, that of the Subcommittee of the Legal Committee which had met in September 1969 (LC/SC Warsaw—Report II). A list of the documents available to the Legal Committee is attached: see Annex A hereto.

MAIN QUESTIONS CONSIDERED.

3. Although the question of revision of the Warsaw Convention and the Hague Protocol had arisen initially, in 1965, with respect to the amount of the limit of the carrier's liability, several other important problems had


emerged during the course of the studies made of the subject since that
time. The main problems examined by the Committee at this session were:

(1) Rule of liability of the carrier in the carriage of passengers and defenses
which the carrier will be permitted to invoke;
(2) Limitation of liability and exceptions, for example, willful misconduct,
ticket or notice;
(3) Amount or amounts of limit;
(4) Revision of limit; periodic, automatic, or other method;
(5) Cost of litigation; and
(6) Jurisdiction.

3.1 The problems enumerated above have already been examined by the
Subcommittee, in relation to the two plans which had been submitted to
that body for revision of the Warsaw Convention and the Hague Protocol
by the United States of America and the International Air Transport
Association (Annex E and D to the Subcommittee’s report, LC/SC Warsaw
—Report II in Doc 8839-LC/158-1). Those problems were also dealt with
in a proposal submitted during this session of the Committee by the Dele-
gation of New Zealand: LC/Working Draft No. 745-15 (copy of Annex
B hereto). The results of the examination of those problems by the Legal
committee are indicated below.

3.2 In addition to the foregoing, the following questions also were studied
in the Committee, namely —

(i) the carrier’s right of recourse; and
(ii) relationship of the proposed instrument (convention or protocol) to the
Warsaw Convention of 1929, that Convention as amended at the Hague
in 1959 and the Guadalajara Convention.

OTHER QUESTIONS.

4. The possibility of undertaking at this session a revision of the rules of
the Warsaw system with respect to cargo was mentioned. The question
was becoming urgent in view of developments in procedures in the hand-
ling of cargo and the fact that rules for combined carriage of cargo by
surface transport as well as by air were being developed in other interna-
tional organizations. The plan presented by IATA to the Subcommittee
(Annex D to LC/SC Warsaw—Report II) included suggestions for chang-
ing the rules of the Warsaw Convention with respect to the carriage of
passengers’ baggage, cargo and mail. A Working Group established by the
Committee examined these questions. The Committee took note of the
reports presented by that Group, namely LC/Working Drafts Nos. E45-8
and 745-20, but was unable, due to insufficient information and lack of
time, to take any decisions on these problems. In the circumstances it was
only possible for the Committee to decide that these two reports should
be included in the prepartory documentation for the diplomatic conference
which may be convened to consider the texts presented in Annex C hereto,
without making any recommendation on the contents of those reports of
the Working Group (Annexes D and E hereto).

4.1 For the same reasons the Committee was unable to examine the Formal
Opinion, transmitted to ICAO, as adopted by the Congress of the Universal Postal Union held in Tokyo in October 1969 to the effect that the provisions of the Warsaw Convention be amended with a view to regulating liability for postal items within the limits prescribed by the Acts of that Union.

OPINIONS ON THE MAIN QUESTIONS.

5. The following paragraphs indicate, in summary form, the opinions expressed in the Committee on the problems enumerated in paragraphs 3 and 3.2 above. The minutes of this session will contain additional information on the discussions held during the session. It should be emphasized that the votes indicated below were taken not on the basis of single acceptance or rejection of a solution proposed for a particular problem, but on the bases that (a) the six points of the above-mentioned New Zealand proposal (LC/Working Draft No. 745-15, copy at Annex B hereto) constituted together one indivisible proposal, even though each point was voted on separately, and (b) each Delegation voting would thereby indicate whether it could or could not accept each of those points.

RULE OF LIABILITY IN CASES OF DEATH OR INJURY.

6. The Committee considered the question whether in the case of death or injury suffered by a passenger the liability of the carrier should be absolute and unrelated to any fault on his part or whether the existing rule of liability under the Warsaw Convention should be maintained, under which the carrier is exonerated if he proves that he and his servants and agents had taken all necessary measures to avoid the damage or that it was impossible for them to take such measures (Article 17 read with Article 20 of the Convention). The rule of absolute liability was considered in 1966 at the Special ICAO Meeting and was recommended by the Panel of Experts as well as by the Subcommittee. The objectives of having that rule are explained in the proposals which were presented to the subcommittee by IATA and the USA: Annexes D and E to the Subcommittee’s report LC/SC Warsaw—Report II. The Committee, with the exception of a few Delegations, is of the opinion that the carrier’s liability should be absolute, unrelated to any fault on his part.

6.1 The Committee considered whether the carrier should be permitted to invoke the defense that the damage resulting from a passenger’s death or injury was caused by armed conflict or by sabotage, provided that the carrier proves that he and his servants and agents took all necessary measures to avoid the damage. Point No. 1 of the New Zealand proposal would exclude such defenses, and the only ground for exoneration of the carrier would be proof that the damage suffered by the claimant was the result of a wrongful act or omission of either the claimant or the passenger who suffered death or injury. On Point No. 1, the voting indicated that 25 Delegations could accept it, while 6 indicated the contrary.

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6 As regards the case of delay in the carriage of passengers, see paragraph 14 below.
4 See LC/SC WD 3 at page 125 of Doc. 8839-LC/158-1.
6.2 The above-mentioned conclusions of the Committee are reflected in the revised text of Article 17 and the amendment of Article 20 of the Warsaw Convention which are presented in Annex C hereto. A related, further amendment is made to Article 21 (see Annex C), the objective of the amendment being that the text itself declares that the carrier shall be wholly or partly exonerated from his liability to a person claiming compensation if the damage was caused or contributed to by the negligence or other wrongful act or omission of that person or of the passenger who was killed or injured.

6.3 The Legal Committee established a Working Group to examine the question of definition of armed conflict and sabotage as grounds of defense. The majority of the Committee having finally decided that these defenses should not be available to the carrier, the Committee did not discuss the contents of the report of that Working Group, namely, LC/Working Draft No. 745-21, which, however, will be included in the documentation to be placed at the disposal of the diplomatic conference.

LIMITATION OF LIABILITY.

7. Point No. 2 of the New Zealand proposal was that the carrier's liability shall be limited to U.S. $100,000. Certain economic information bearing on the limit was available to the Committee in the documentation before it. The Committee noted the Resolution adopted by the Council of ICAO on this subject on 27 June 1969 (page 61 of Doc 8839-LC/158-1) to the effect that the economic information, although incomplete, should not prevent the Subcommittee which met in September 1969 from completing its work. Subject to the understanding that the limit would be unbreakable in all circumstances, 18 Delegations indicated that they could agree to the figure of $100,000, 13 Delegations indicated their opposition, while 6 Delegations abstained in the indicative voting taken on that question.

LIMIT NOT TO BE EXCEEDED.

8. The New Zealand proposal, as emphasized in LC/Working Draft No. 745-15, was submitted on the basis that the limit specified shall be unbreakable in all circumstances. The voting on this point showed 29 Delegations to be in favor, 6 opposed, with 4 abstentions. An essential consequence would be the elimination of any connection between the limit and the issuance of, or any defect in, a passenger ticket or any notice to passengers concerning limitation of liability. On this aspect there was consensus, and accordingly a revised text of Article 3 of the Convention was prepared: see Annex C. Further, it follows that the provisions of Article 25 of the Warsaw Convention and that Convention as amended at the Hague relating to willful misconduct as a ground for compensation in excess of the limit specified in Article 22 should be eliminated.

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5 It is understood that the sums expressed in francs in revised Article 22, paragraph 1, in Annex C, for the limits and annual increase discussed in paragraph 10 of the Report could be converted into national currencies in round figures.
6 The revised text of Article 3 also takes into account certain developments in procedures relating to tickets, i.e., group travel and automated ticketing.
addition, the provisions of paragraph 3 of Article 25 A, relating to willful misconduct on the part of servants and agents of the carrier would also be eliminated. Moreover, the Committee, taking note of the possibility that mere elimination of those provisions might not be regarded in some courts as preventing awards in excess of the limit in cases of willful misconduct, considered that the second paragraph of Article 24 should be reworded (see Annex C) to reflect the view that the limit specified in Article 22 shall be unbreakable in all circumstances. Some Members considered that those amendments alone, without a positive statement that the carrier’s liability would be limited even in a case of willful misconduct by him or his servants or agents, may not prevent courts from awarding compensation in an amount exceeding the limit specified in Article 22. However, those amendments were adopted by a vote of 25 against 5, with 11 abstentions.

9. In connection with paragraph 8 it should be added that the Committee, by a vote of 16 to 13, with 7 abstentions, deleted the last sentence of Article 22, paragraph 1, of the Convention, which reads: “Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.” Furthermore, the Committee rejected by a vote of 15 to 10, with 8 abstentions, a proposal to amend Article 23 by inserting after the word “lower” the words “or higher”.

**Revision of Limit.**

10. The Committee agreed (by 20 votes against 13) with regard to Point No. 4 of the New Zealand proposal that the limit of US $100,000 shall automatically be increased by US $2,500 each year during a period of twelve years; that a diplomatic conference should be convened in the fifth year to examine whether the arrangement in respect of periodic increase of the limit should be amended; and that another conference should be convened in the tenth year to decide whether the system of periodic increase of the limit should be continued after the expiry of the twelve-year period. The texts of Article 22, paragraph 1, subparagraph (b), and of the “Another New Article” appearing in Annex C were prepared accordingly and adopted by 18 votes against 11, with 5 abstentions.

**Costs of Litigation.**

11. Point No. 5 of the New Zealand proposal (Annex B) specifies that courts may award costs in addition to the compensation unless the carrier has made an early and adequate offer of settlement. This point was agreed by a vote of 17 in favour, 11 opposed, with 5 abstentions. The texts of subparagraphs (a), (b) and (c) of paragraph 4 of Article 22 in Annex C have consequently been prepared. In adopting the revised text of paragraph 4 of Article 22 by a vote of 17 to none, with 9 abstentions, the Committee did so in the knowledge that the drafting gave rise to various substantive issues which had not been resolved by the Committee. Consec-

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This corresponds to Solution No. 7 in the Report of the Working Group which studied questions relating to Article 25 (LC/Working Draft No. 741-14).
quently the attention of States should be drawn to the problem relating to the text adopted.

**Jurisdiction.**

12. The Committee agreed, by 21 votes to 14, that in a case of death, injury or delay suffered by a passenger, the plaintiff shall have the option of suing either in one of the courts described in Article 28 of the Warsaw Convention or in a court within the territory of one of the contracting parties where the carrier has an establishment if the passenger has his domicile or permanent residence in that territory: hence new paragraph (2) in Article 28 at Annex C.

**Acceptability of the New Zealand Proposal.**

13. A vote showed that the proposal in LC/Working Draft No. 745-15 could be accepted, as a whole, by 19 Delegations, but not by 13 Delegations, while 6 abstained from voting.

**Delay.**

14. The Committee agreed that in the case of damage arising from delay in the transportation of a passenger, the carrier should not be absolutely liable and that the provisions of Article 20 of the Convention should continue to apply. The Committee reached no decision on the amount of the limit to be specified for damage arising from delay in the carriage of persons. Therefore, in drafting revised Article 22, paragraph 1, subparagraph (c), in Annex C, a blank has been left in regard to the amount. The Committee expressed the hope that adequate information on this point would become available to the diplomatic conference.

**Carrier’s Right of Recourse.**

15. In view of the fact that under the rule of absolute liability the carrier could be liable for acts or omissions of third parties, the Committee, agreeing with the Subcommittee, considered that the revised Warsaw Convention should contain an express statement that any right of recourse which he might have against other persons would remain unaffected. Accordingly, a provision entitled New Article is included in Annex C.

**Relationship between the proposed new instrument and existing ones pertaining to the air carrier’s liability.**

16. A Working Group of the Committee prepared a report on this subject: LC/Working Draft No. 745-22. The Committee adopted the conclusions in paragraphs 6 and 7 of that report and, not having completed discussion on other points therein, decided that the report should be included in the documentation for the diplomatic conference.

**Article 29.**

17. The attention of the Legal Committee was drawn to the fact that there had been judicial cases where interpretation of the term “déchéance” in Article 29 had been involved. There was no specific proposal placed
before the Committee for amending that Article; possibly, however, some Government may submit one before or at the diplomatic conference.

CONCLUSIONS.

18. As a result of its deliberations, the Legal Committee drafted tests of certain articles for the purpose of revising the Warsaw Convention as amended at The Hague. These texts are set out in Annex C hereto. In the opinion of the Legal Committee the draft, namely, Annex C, is ready for presentation to the States as a final draft. It will therefore be transmitted to the Council together with this Report for action in accordance with the Procedure for Approval of Draft Conventions specified by the Assembly of ICAO in Resolution A7-6, including submission of the draft to a diplomatic conference for consideration, with a view to its approval.

18.1 In view of the above procedure, the Legal Committee did not consider further questions relating to the convening of the diplomatic conference. The Bulgarian, Czechoslovak, Hungarian and Polish Delegations have made a declaration to the effect that the principles specified in Article 40 of the Vienna Convention on the Law of Treaties (May, 1969) concerning certain rights accorded to all States parties to a particular treaty, should apply also in this case: see LC/Working Draft No. 745-23.

ANNEX A

List of Documents

Doc 8839-LC/158-1 ....... Subcommittee of the Legal Committee on the question of the Warsaw Convention as amended by the Hague Protocol—Volume I—Reports and documentation


LC/WORKING DRAFT NOS.

745-2 (1) ....... Comments from Ivory Coast.
745-2 (2) ....... Comments from Algeria.
745-2 (3) ....... Comments of Denmark.
745-2 (5) ....... Comments of Upper Volta.
745-2 (6) ....... Comments of Republic of China.
745-2 (7) ....... Comments of I.U.A.I.
745-2 (8) ....... Comments of Finland.
745-2 (9) ....... Comments of Sweden.
745-2 (10) ....... Comments of Norway.
745-2 (11) ....... Comments of Republic of South Africa.
745-2 (12) ..... Comments of Gabon.
745-2 (13) ..... Comments of Barbados.
745-2 (14) ..... Comments of Federal Republic of Germany.
745-2 (15) ..... Comments of Szechoslovak Socialist Republic.
745-2 (16) ..... Comments of Ireland.
745-2 (17) ..... Comments of Singapore.
745-2 (18) ..... Comments of Canada.
745-2 (19) ..... Comments of Colombia.
745-2 (20) ..... Comments of U.S.A.
745-2 (21) ..... Comments of I.C.C.
745-3 ......... Air Conveyance of Insured Items
........................ Adopted by UPU in Tokyo 1969)
745-4 ......... Relationship between the new Convention, The
........................ Warsaw Convention of 1929 and the Warsaw Con-
........................ vention as amended at the Hague in 1955: Deter-
........................ mination of the entry into force (Presented by
........................ Switzerland)
745-5 ......... Baggage, Cargo and Mail (Presented by Switzer-
........................ land)
745-6 ......... Strict liability, unbreakable limits and the Warsaw
........................ Convention (Article by Mr. A. Kean)
745-7 ......... Co-ordination of the new instrument with the
........................ Warsaw Convention and the Hague Protocol (Sug-
........................ gestions of the International Law Association—
........................ l'Association de Droit international—ILA)
745-8 ......... Report of the Working Group on Baggage, Cargo
........................ and Mail
745-9 ......... Passenger ticket (Submitted by Mr. Voss, Sweden)
745-10 ......... Periodic revision of the limits, automatic adjust-
........................ ment (Text prepared by Switzerland)
745-11 ......... Means of amending the Warsaw Convention and
........................ the Hague Protocol (Presented by the Polish Dele-
........................ gation)
745-12 ......... New Article (Presented by the Delegation of
........................ France)
745-13 ......... Breaking of limits for wilful misconduct
........................ + Corr.  (Presented by the Delegation of Canada)
745-14 ......... Report of the Working Group on Article 25
745-15 ......... Proposal of the Delegation of New Zealand
745-16 ......... Proposal of the French Delegation
745-17 ......... Costs (Proposed by Working Group on costs com-
........................ posed of Mr. J. Verstappen (Belgium), Mr. A.W.G.
........................ Kean (United Kingdom) and Mr. J. Carter (United
........................ States of America))
745-18 ......... Texts adopted by the Drafting Committee
........................ + Add 1 - 6
ANNEX B

Proposal of the Delegation of New Zealand

The Delegation of New Zealand believing that the Warsaw Convention should be amended to substantially increase the limit of liability of the carrier and to provide that such new limit is unbreakable in all circumstances proposes that the following principles be accepted as a "package" on the basis of which the drafting committee should prepare a text:

1. The carrier to be absolutely liable for death or injury subject only to the defense of contributory negligence.
2. Liability to be limited to US-$100,000.
3. The limit to be unbreakable in all circumstances.
4. Automatic increase of the limit by US-$2,500 each year for twelve years. Diplomatic conferences to be convened during the fifth year to decide whether to amend this arrangement and during the tenth year to decide whether or not to continue it.
5. A settlement inducement clause to enable courts to award costs in addition to damages unless the carrier has made an offer of settlement in principle as proposed by the United States and amended by Belgium.
6. A further forum to be added to those in Article 28 viz. the court of the domicile or permanent residence of the victim if the carrier has a business establishment in the same Contracting State.

The New Zealand delegation emphasizes that this "package" is submitted on the basis that unbreakability of the limit is accepted.

ANNEX C

Draft Text Prepared by the Legal Committee

The texts of the several articles which appear on the following pages have been prepared by the Legal Committee with the understanding that:

(1) The texts on the following pages pertain to the "single instrument" described in Article XIX of The Hague Protocol and
known as the “Warsaw Convention as Amended at The Hague, 1955;”

(2) It is proposed that the following articles of the “Warsaw Convention as Amended at The Hague, 1955” be deleted and replaced by those articles which appear on the following pages with corresponding numbers:

- Articles 3, 17, 20, 21, 22, paragraph 1, subparagraphs (a), (b), (c), and paragraph 4, subparagraphs (a), (b), (c), 24, paragraph 2, 25 (delete), 25A, paragraph 3 (delete), 28; and

(3) A “New Article” and “Another New Article,” so described at the end of the following pages, be incorporated in the instrument of amendment of “The Warsaw Convention as Amended at The Hague, 1955.”

Article 3

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

(a) An indication of the places of departure and destination;
(b) If the places of departure and destination are within the territory of a single 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.

2. Any other means which would preserve a record of the information indicated in (a) and (b) of the foregoing paragraph may be substituted for the delivery of the document referred to in that paragraph.

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

Article 17

The carrier is liable for damage sustained in case of death or personal injury of a passenger upon proof only that the event which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. However, the carrier is not liable if the death or injury resulted solely from the infirmity of the passenger.

Article 20

1. In the carriage of passengers the carrier shall not be liable for damage occasioned by delay if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

2. In the carriage of baggage and cargo the carrier shall not be liable for damage resulting from destruction, loss, damage or delay if he proves
that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

Article 21

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

Article 22

1. (a) In the carriage of persons the liability of the carrier for damage suffered in a case of death or personal injury is limited for each passenger to the sum of one million and five hundred thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed one million and five hundred thousand francs.

(b) The sum mentioned in subparagraph (a) of this paragraph shall be increased every first of January starting in the year 197 and ending in the year 198 on the first of January of each of the twelve years following the entry into force of this.

(c) In the case of delay in the carriage of persons the liability of the carrier for each passenger is limited to francs.

4. (a) The courts of the High Contracting Parties which are not authorized under their law to award the costs of the action, including an attorney's fee, shall, in actions to which this applies, have the power, in their discretion, to award to the claimant the whole or part of the costs of the action, including an attorney's fee which the court considers reasonable. Any high contracting party whose courts are not authorized under its law to award such costs may deny its courts the power to award such costs under this.

(b) The costs of the action including an attorney's fee shall be awarded only if the claimant gives a written notice to the carrier of the amount claimed including the particulars of the calculation of that amount and the carrier does not make, within a period of six months after his receipt of such notice, a written offer of settlement in an amount at least equal to the compensation awarded within the applicable limit. This period will be

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1 At the rate of U.S. $35 per ounce of gold, this sum represents about $100,000.
2 At the rate of U.S. $35 per ounce of gold, this sum represents about $2,500.
extended until the time of commencement of the action if that is later.

(c) The costs of the action including an attorney's fee awarded under the law of the court seised of the case or under subparagraph (a) shall not be taken into account in applying the limits under this Article.

**Article 24**

2. In a case covered by Article 17 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.

**Article 25**

Delete

**Article 25A**

Delete paragraph 3.

**Article 28**

1. (No change).

2. In respect of damage resulting from the death, injury or delay of a passenger, the action may also be brought in the territory of one of the high contracting parties before the court where the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same high contracting party.

3. (Present paragraph 2).

**New Article**

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

**Another New Article**

Without prejudice to the provisions of Article 41 of the Warsaw Convention, a conference of the parties to the present convention shall be convened by . . . during the fifth and tenth years of the period established in paragraph 1 (b) of Article 22 of the present convention. The first of these conferences shall examine whether to amend the arrangement established in the said paragraph in respect of the periodic increase. The second conference shall decide whether to continue the system of periodic increase beyond the period indicated in paragraph 1 (b) of Article 22.

**ANNEX D**

**Report of the Working Group on Baggage, Cargo and Mail**

**MEMBERSHIPS AND MEETINGS**

1. The working group on baggage, cargo and mail, established by the legal committee on 9 February 1970, was composed of the following members: Mr. E. A. da Silveira (Brazil), Mr. Kiyoshi Shidara (Japan),
Mr. M. J. Nederlof (Kingdom of the Netherlands), Chairman, Mr. B. Buchmüller (Switzerland) and Messrs. Gerald Goldman and Peter B. Schwarzkopf (United States of America). The working group held two meetings on 10 and 11 February 1970.

**Terms of Reference**

2. The terms of reference of the working group were as follows:

   (a) To take as the basis of its work on baggage, cargo and mail the material thereon found in the report of the second session of the subcommittee on the revision of the Warsaw Convention as amended by The Hague Protocol and to study any proposals placed before the working group;

   (b) To decide what action should be taken in respect to baggage, cargo and mail in relation to the current work on the revision of the Warsaw Convention as amended by the Hague Protocol, it being understood that the working group could recommend proposals for immediate amendment of relevant provisions of the Warsaw Convention as amended by the Hague Protocol or deferral of consideration of the question of such amendment until some future time after the more urgent amendments had been made to the existing Warsaw/Hague provisions concerning the carriage of passengers.

3. After considering available documentation on the carriage of baggage, cargo and mail and after hearing the views of its members, the working group formulated the views set forth below.

3.1 The working group considered that there is no legal impediment to amending the provision on passengers, in the Warsaw Convention or that Convention as amended by the Hague Protocol, while the provisions on baggage and cargo would remain substantially unchanged, subject only to necessary drafting adjustments due to changes made to the provisions on passengers.

3.2 Nevertheless, the working group considered that it was necessary to examine the question of amending the provisions on baggage and cargo for the following reasons: First, these provisions had been in effect for a lengthy period without any revision, save for the amendments made to them in the Hague Protocol; in this regard, it was noted that technological advances would call for a re-examination of the relevant provisions of the Warsaw Convention or the convention as amended by the Hague Protocol in order to bring these provisions into conformity with current and future techniques for facilitating the carriage of baggage and cargo. Second, the amendment of the Warsaw/Hague provisions on passengers inevitably raised the question whether the provisions on baggage and cargo would also require to be modernized and possibly brought into line with the new regime of passenger liability.

3.3 The working group considered that the re-examination of the provisions on baggage and cargo was an urgent matter and that such re-
examination should be given a high priority. However, due to the fact that the subcommittee which had met in 1968 and 1969 had not considered these provisions and that, accordingly, only a few comments had been made on them, the working group did not consider it appropriate to make any recommendations concerning changes that could be made to the provisions at this time. Nevertheless, the working group noted that it would be possible for the re-examination of these provisions on baggage and cargo to be carried out by a subcommittee of the legal committee without hindering a diplomatic conference from adopting a revised regime for passengers.

3.4 The working group considered that the question whether the carriage of mail should be included in the convention required investigation and that the opinion of states might be sought as to such inclusion.

ANNEX E

Second Report of the Working Group on Baggage, Cargo and Mail

1. At its eighteenth meeting on 21 February 1970, the legal committee requested the working group on baggage, cargo and mail to examine the possibility of including provisions on baggage in the draft revision of the Warsaw Convention now under preparation in the legal committee.

2. The working group held two meetings on 23 and 25 February 1970. An additional representative on the working group for those meetings was Mr. S. Yamaji (Japan).

3. The working group considered that there would be considerable advantages if it would be possible at this time to bring the provisions on baggage into line with the new draft provision on passengers. First, it was only logical to deal with passengers and baggage together, since normally the baggage accompanies the passengers. Second, in all cases where an action was brought in respect to the death of or injury to a passenger, there would probably be a claim in respect to loss of or damage to baggage. Thus, it would be convenient to have such litigation brought in the same forum. Third, it was possible to distinguish baggage from cargo, in that the latter did not accompany a passenger, but was sent by a consignor who would have ample opportunity to take out insurance. Fourth, at least at that time, there was a combination form of passenger ticket and baggage check issued to the passenger in international carriage.

4. While the working group considered that provisions on baggage could usefully be included in the draft provisions now being prepared by the legal committee, it noted that there were certain questions of principle that could not be finally settled until more information is made available. The views of the working group concerning various questions of principle that would have to be settled before new provisions on baggage could be drafted are set forth in the following paragraphs.

5. Regime of liability: The working group considered that, given the close relationship between a passenger and baggage, it was only logical that the carrier should be subject to absolute liability in respect to the carriage
of baggage. The working group decided that the carrier’s liability, in respect to carriage of baggage, should in principle extend to carriage by air as defined in Article 18.

6. Whether or not the liability of the carrier should be limited: The working group noted that there had been lengthy discussions in the legal committee concerning the amount of the limit in the case of passenger liability and that much data had been accumulated on this point before the committee had felt disposed to make a decision on it. Because similar data was lacking in the case of liability in respect to baggage, it was an open question, “If there is to be a limit, what should the amount be?” In this regard, it was pointed out that if provisions on baggage were to be included in a convention prepared by a forthcoming diplomatic conference, information concerning baggage would have to be placed before that conference. Finally, in this regard, the working group agreed that, if there is a limit, it should be stated in a form that would not interfere with innovations in loading and ticketing procedures. Thus, considerations might be given to establishing a limit for each passenger in respect to all of his baggage.

7. Whether there should be a distinction made between registered and unregistered baggage: The working group considered that there should be no distinction made between registered and unregistered baggage since, otherwise, there could be litigation as to the category in which the baggage would fall. For example, as when a passenger handed over an object to one of the airline’s cabin staff or, when as in the future, much hand baggage would be placed in a special compartment on board the aircraft.

8. Baggage check: The working group considered that provisions, if any, on the baggage check should not be more exacting than provisions on the passenger ticket. It considered that since the requirement for notice had been deleted from the provisions of the passenger ticket, there should be a similar deletion from the provisions on the baggage check.

9. Delay: The working group agreed that the rule of liability applicable to the delay of passengers should, in the interest of uniformity, apply in the case of a delay of baggage.

10. Defences: In the opinion of the working group, the defences established by the committee in the case of death, injury or delay of passengers should apply, mutatis mutandis, in the case of damage, loss or delay of baggage. In the absence of information as to why a provision on inherent vice should be applied to baggage, the working group has no recommendation to formulate on this item.

11. Wilful misconduct: On the assumption that the absolute liability rule would apply to the carriage of baggage and that a limit would be set as in the case of the carriage of passengers, the working group considered that logically, as in the case of the passengers, the limit should be unbreakable.

12. Forum: The working group considered that since an additional forum will be included in Article 28 in the case of the carriage of passengers, it would be in the interest of uniformity to have that forum apply also to the carriage of baggage.
13. Automatic increase in the limit: In the absence of information on the limit that might apply to baggage, the working group was unable to say whether a system of automatic increase in the limit, such as the system that had been adopted for the passenger limit, should be adopted for the baggage limit. Possibly the necessity of an automatic annual increase of what might be a relatively small limit in monetary terms, could be overcome through some other means such as calculating the increase at a certain annual amount, but applying the increase only at the end of a stipulated period, or by providing that a diplomatic conference convened at the end of a certain period could consider what the amount of the increase should be.

14. Settlement inducement clause: In the interest of uniformity, the working group considered that the settlement inducement clause established by the committee for the carriage of passengers should apply to the case of baggage, it being noted that Article 22(4) as included in the Hague Protocol also applied to baggage.

15. Special declaration of interest in delivery at destination: The working group considered that more information on this subject was required before any recommendation could be made.