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AVRUPA BİRLİĞİ ENSTİTÜSÜ
AVRUPA BİRİLİĞİ HUKUKU ANABİLİM DALI

AIR CARRIER LIABILITY IN INTERNATIONAL LAW, IN EUROPEAN LAW AND IN TURKISH LAW

YÜKSEK LİSANS TEZİ

KADER GÜNEŞ

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Danışman: Yard. Doç. Dr. BÜLENT SÖZER

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ONAY SAYFASI

Ensitümüz AB Hukuku Anabilim Dalı Yüksek Lisans öğrencisi Kader GÜNEŞ'in "AIR CARRIER LIABILITY IN EUROPEAN LAW, IN INTERNATIONAL LAW AND IN TURKISH LAW" konulu tez çalışması 24 Kasım 2008 tarihinde yapılan tez savunma sınavında aşağıda isimleri yazılı jüri üyeleri tarafından oybirliği/ ~~oyçokluğu~~ ile başarılı bulunmuştur.

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ÖZET

‘Hava Taşıyanın Uluslarası Hukukta, Avrupa Hukukunda, ve Türk Hukukunda Sorumluluğu’ başlığı altındaki bu tezi yazmaktaki amacım hava taşıyanın sorumluluğunu Uluslarası hukuk, Türk hukuku ve Avrupa Birliği hukuku açısından karşılaştırmalı olarak incelemektir.

Yedi bölümde ele alınan bu tez, hava taşımacılığı geniş bir çalışma alanını kapsadığından, esas olarak hava yük taşıyanının sorumluluğunu incelemektedir. Bu nedenle çalışmanın amacı öncelikle 1929 Varşova Konvansiyonu ile düzenlenen uluslararası havayolu ile yük taşımacılığıdır. Çalışmanın birinci bölümünde uluslararası sivil havacılıkta havayolu ile taşıyanın sorumluluğunun gelişimini, La Haye 1955 Protokolünden başlayarak 1999 Montreal Konvansiyonuna kadar olan Varşova Konvansiyonun tarihi gelişimini temel kaynaklarını, yapılan değişikleri incelenmektedir. Ayrıca bu bölümde Intercarrier Agreements (Taşıyanlar arası anlaşmalar) ve Avrupa Birliği tüzükleri incelenmektedir. İkinci bölümde Türk Sivil Havacılık Kanunu ele alınmaktadır. Üçüncü bölümde, havayolu ile yük taşıma sözleşmesi ve hava yük senedi incelenmaktedir. Dördüncü bölümde, taşıyanın borçları ve hakları ele alınmaktadır. Beşinci bölümde, taşıtanın hak ve borçları ele alınmaktadır. Altıncı bölümde, gönderilenin hak ve borçları ele alınmaktadır. Yedinci ve son bölümde, taşıyanın sorumluluğu, sorumluluk halleri ve şartları, sorumluluğun sınırlandırılması, sınırsız sorumluluk ve sorumluluk davası incelenmektedir.

ABSTRACT

With this research under the title “Air Carrier Liability in International Law, European Law and in Turkish Law’ my purpose is to analyze liability of the carrier by air by comparing and contrasting the International and Turkish law and the European Union Legislation.

The thesis, which is organized in seven parts, examines mainly the liability of the air cargo carrier, since the air transport covers a large concept of study. Therefore, the object of this study is the uniform law governing international carriage by air during international transportation of cargo which is primarily regulated by the Warsaw Convention, 1929. The first part of the thesis looks the evolution of the concept of air carrier liability in international law of civil aviation, the history of the Warsaw Convention including basic sources and subsequent amendments to the Warsaw Convention beginning from the Hague Protocol 1955 to the Montreal Convention 1999. It is also dealing with the Intercarrier Agreements and European Regulations. The second part deals with Turkish Civil Aviation Act. The third part deals with the contract for the carriage of cargo by air, and the air waybill. The fourth part deals with the rights and obligations of the carrier. The fifth part deals with rights and obligations of the consignor. The sixth part deals with the rights and obligations of the consignee. The seventh and last part deals with the liability of the carrier, liability grounds and conditions, principles of limitation of liability, unlimited liability and liability suit.

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PREFACE

International Air Law assumed great importance since the sudden increase in the International Air Transport during the twentieth century. The issue of diverging interpretations of a uniform text is not new, but it has assumed a growing importance in this century. Today's air transport industry is a strong global sector with a vastly improved and steadily improving safety record. Air transport plays an important role in economic development. In the 21 st century travel and tourism will be the most important factor of the economies of the world. The air transport is also bound to undergo many changes, so also the rules governing the international air transport including the amount of compensation and airfares in the real term.

Especially, the air cargo industry is fascinating. Each day new challenges arise, legal problems, political, commercial, operational issues and problems must be solved just as quickly. Cargo claims are commonplace in the air cargo industry, and solving them involves dealing with the customer's pressure for a quick and favourable solution, the insurer's slow and rather formalistic process, and the airline's pressure to clear all cargo claims as quickly as possible. Therefore, rather than analyzing legal issues, a person in charge of cargo claims has to find a compromise acceptable to all the parties involved[1]. Air cargo is currently a $ 40 billion industry that is expected to develop rapidly during the next 20 years. Two main factors stimulate air cargo growth, market development and technical development. A legal analysis of international air cargo claims must start with an examination of the applicable international regime. Probably the most widely accepted instrument concerning the unification of private law is the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929, which governs international carriage by air for passengers, baggage, and goods.

For 70 years the 1929 Warsaw Convention, which came into force in 1933, governed supreme, in its numerous permutations, virtually all international carriage of passengers, baggage and cargo throughout the world. The Warsaw Convention 1929 prescribes the rights and responsibilities of the International Air Carriers on one hand and passengers,

[1] Salazar, Juan Carlos, The Burden of the Proof of the Air Cargo Claimant, LLM thesis, McGill University, Montreal, 1999, p. 3

consigners and consignees of goods on the other. This Convention has undergone a series of amendments or attempted amendments, assembling a system of law known as the 'Warsaw System'. This Convention has been amended by a Protocol adopted at the Hague in 1955, by another Protocol adopted at Guatemala City 1971, and by four Protocols adopted at Montreal 1975. It has also been supplemented by the Guadalajara Convention inn 1961. The expression 'Warsaw system' refers to that ensemble of international treaties, as well as to the so called 'Montreal Agreement' concluded in 1966 whereby the major air carriers who signed it agreed to modify their Conditions of Carriage for the benefit of air travellers whose contract of transportation includes a place in the United States of America as a point of origin, point of destination, or agreed stopping place. The Convention helps to eliminate or reduce various problems arising from conflict of laws from varying rules on documents of carriage and on liability[2]. In some respects, the Convention represented a progressive development in private law and a better balance of interests between the airlines and passengers, consignees and consignors than was common for other modes of transport[3]. Its quasi-universal acceptance testifies to its success as an instrument of international uniform law, success which is in turn enhanced by its quasi-universality[4].

The object of this study is the uniform law governing international carriage by air during international transportation of cargo which is primarily regulated by the 'Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw Convention in 1929', its amendments and in European Law and to provide a comparative study with the TCAA. During the fifty years since its signing at Warsaw, when commercial aviation was still in its infancy, the 'Convention for the Unification of Certain Rules Relating to International Carriage by Air', known as the Warsaw Convention, has gained acceptance throughout the world. It has become Magna Charta of the liability of the international air carrier, which, in many countries, applies even to domestic air carriage[5]. Among these instruments, the Montreal Protocol No. 4 deals exclusively with cargo issues. It is likely that the Protocol will gain wider acceptance since

[2] Cheng, Bin, A new Era in the Law of International Carriage by Air: From Warsaw 1929 to Montreal 1999, ICLQ, Vol 53, October 2004, p 834.
[3] Milde, Michael, The Warsaw System of Liability in International Carriage by Air, Annals of Air and Space Law, Vol. XXIV, 1999, p.159.
[4] Cheng, p. 834.
[5] Mankiewicz, p. XXV.

it does not contain any controversial provisions and provides competitive advantages to air carriers.

It took nearly half a century since the Warsaw Convention, as amended by the Hague Protocol in 1955, came into effect to create a new, modern, and most of all unified instrument for liability in international carriage by air. Given the differences in standards of living and in legal traditions around the world, it is impossible to unify the liability system in carriage by air with respect to every detail, but what is essential in order to a least provide the global air transportation industry and its customers with a common liability standard has, however, been established with the Montreal Convention 1999[6].

The International Civil Aviation Organization (ICAO) took initiative with the help of International Air Transport Association (IATA), to replace the Warsaw System into a new Montreal Convention 1999, for the Unification of Certain Rules for International Carriage by Air. The Montreal Convention 1999 is designed to meet the challenges of 21st century. The Montreal Convention primarily deals with the issues of limitation of liability and proof of exoneration. When formulating the Montreal Convention, its authors were able to fall back on the air transportation industry's more than 60 years of experience with the Warsaw Convention. Central criteria such as definition of 'international carriage by air' or the liability criterion of an 'accident' as well as other positive elements have been retained. This promotes legal certainty, for countless international decisions and papers, addressing many specific issues of liability in carriage by air will thus also remain relevant in the future. Furthermore, may negative aspects of the Warsaw Convention have been eliminated. Over the course of its history, amendments and additional protocols as well as interim agreements under the private law and miscellaneous agreements between the airlines had created a legal labyrinth that moved further and further away from representing a unified liability system for carriage by air because different revision levels applied to the various states already party to or subsequently joining the Warsaw System[7].

Since the air transport covers a large concept of this study, we will only deal with the air carrier liability during transportation of cargo. Thus, this study will not include transportation of passengers and baggage. As noted above, the object of this thesis is to

[6] Giemulla/Schmid, Montreal Convention, General Section, p.3.
[7] Ibid.

analyse the liability of the air carrier during transportation of cargo under Warsaw Convention, under the European Law and under the Turkish law. This thesis confines itself to the contractual liability of the air carrier in respect of cargo carriage. It does not include the delictual liability of the manufacturers of the aircraft, traffic controller or airport authority or agents and tour operators towards passengers for acts of third parties are also not within the scope of the present study.

This study consists of seven chapters and the scheme of the thesis is as follows: First, it starts with the introduction to the story of civil aviation in general in introduction part. And, it traces the evolution of the concept of air carrier liability in international law of civil aviation, the history of the Warsaw Convention including basic sources and subsequent amendments to the Warsaw Convention beginning from the Hague Protocol 1955 to the Montreal Convention 1999. It is also dealing with the Intercarrier Agreements and European Regulations. Chapter 2 deals with the Turkish Civil Aviation Act. Chapter 3 deals with the contract for the carriage of cargo by air, and the air waybill. Chapter 4 deals with the rights and obligations of the carrier. Chapter 5 deals with rights and obligations of the consignor. Chapter 6 deals with the rights and obligations of the consignee. Finally, Chapter 7 deals with the liability of the carrier, liability grounds and conditions, principles of limitation of liability, unlimited liability and liability suit.

§ 1 - WARSAW SYSTEM

I. INTRODUCTION

1. History and Development of Air Law

In 1783 an aircraft first left the ground. A year later, the first air law was promulgated. In 1785 another balloon crossed the English Channel. The first regulation for safety in aerial navigation was made in 1894. In 1822 the first reported case of tort committed by aviation was decided in the common law, in the United States. Flight in a heavier-than-aircraft was first made in 1856. In 1865 the Aerial Navigation Company was formed[1].

The first international air conference on air law met in 1889. From that date to the end of the century, many flights in motorless heavier-than-air aircraft were made. In 1891, the first treaties on air law were published[2]. The first attempt to regulate liability in aviation was made in 1822 when a judge made the balloonists liable for destroying crops while landing. At the time of the Hague Peace Conference, 29 July 1899, an international declaration prohibiting the discharge of projectiles and explosives from balloons was made[3].

As early as 1900 the French jurist Fauchille suggested that a code of international air navigation be created by the 'Institut de Droit International', and it is interesting to note, *en passant*, that this was one of the rare instances where legal process went ahead of technology[4]. In 1902, the first code of international air law was prepared in draft. On 17 December 1903, in America, the first authenticated flight by man in a power-driven heavier-than-air machine was achieved. There years after, in 1906, aeroplanes were flown in Europe. The second Hague Peace Conference met in 1907, but many of the powers refused to renew their pious resolution of 1899[5]. The first International conference on Civil Aviation was convened in 1910 at Paris, but failed to adopt any convention[6].

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[1] Shawcross/Beaumont, Air Law, Volume I, Fourth Edition, London, Butterworths, 1977, para. 1.
[2] Ibid.
[3] Batra, J. C., International Air Law (including Warsaw Convention 1929 & Montreal Convention 1999), Reliance, 2003, p. 3.
[4] Diederiks-Verschoor, I.H.Ph, An Introduction to Air Law, 8th rev. ed, Kluwer Law International, 2006, p. 2.
[5] Shawcross/Beaumont, para. 1.
[6] Batra, p. 4

While the 1914-1918 (during First World War) war raged few civil aircraft flew but aircraft of all types were used for all kinds of military purposes. During this period, civil aviation had a setback. Following the First World War, on 8 February 1919, the first scheduled air service between Paris and London came into operation, and it was considered necessary for existing regulations to be incorporated into a Convention. Due to the aftermath of the War there were strong tendencies in favour of defending the national interest, so that the first treaty known as Paris Convention[7], adopted on October 1919 in Paris, to work out the regulation of aerial navigation and it was ratified by 32 nations. Complete and exclusive sovereignty of states over the air space above territory was recognized[8]. The Convention of Paris contained and established a system. This system comprised a series of rules governing the use and flight of aircraft over the territories of and between different states. The Convention also contained provisions for administrating this system[9].

The convention was followed by the formation of a private International Air Traffic Association (IATA), the same year, which focused attention on the prevailing uncertainty in the enforcement of terms and conditions contained in the contract of carriage and applicability and interpretation of the law. Therefore, it attempted to evolve a common code of the conditions of carriage to be adopted by its members. These efforts resulted in the formulation of general conditions of carriage by air[10].

The First International Air Law Conference was convened at Paris in 1925, which prepared a draft for consideration before a diplomatic Conference in Warsaw on Unification of Certain Rules Relating to International Carriage. The Warsaw Convention firmly established in 1929 the principle of the air carrier's liability for damage caused to passengers, baggage and goods, and for damage caused by delay[11].

[7] Convention Relating to the Regulation of Arial Navigation.
[8] Batra, p. 4.
[9] Shawcross/Beaumont, para. 4.
[10] Batra, p. 5.
[11] Ibid.

2. THE WARSAW CONVENTION

a. Historical Background of the Warsaw Convention of 1929

In the early days of international air transport, there were no uniform rules of law governing the carriage of passengers or cargo. The rights of passengers and cargo owners and the liability of the carriers depended upon the general law as applicable to carriers, which had of course developed to meet the needs of those concerned with carriage by land or sea. Different legal systems approached particular situations in different ways. Not only there was uncertainty as to the substantive content of air law in particular countries, but also in international carriage, there were difficult jurisdictional and choice of law problems in the conflict of laws[12].

After the First World War, the lack of international uniformity in the field of Private Air Law became a matter of concern. The carrier could protect himself to some extent by insisting on standard form conditions of carriage, and the International Air Traffic Association, the precursor of the present IATA founded in 1999, produced through its Legal Commission uniform conditions of carriage[13]. However, such contractual documents are subject to the risk of differing interpretations in the courts of the several countries is concerned. Each country had its own set of rules and regulations that varied from one state to another that caused a chaos in the field of Private Air Law[14].

The Warsaw Convention was the result of two international conferences held in Paris in 1925 and in Warsaw in 1929. The objective of both these conferences was to create a certain degree of unification in the legal rules governing international air transportation by law[15].

The first International Conference of Private Air Law was held in Paris from 27 October to 6 November 1925 by the initiative of French Government. It established the Comité International Technique d'experts Juridique Aeriens (CITEJA), a permanent committee of air

[12] Shawcross/Beaumont, para. 328.
[13] Batra, p. 9.
[14] Ibid.
[15] Giemulla/Schmid/ Müler-Röstin/ Dettling-Ott, Warsaw Convention, Kluwer Law International, The Hague, Loose-Leaf, (Editors Giemulla/Schmid), history, p. 1.

law experts, whose first major purpose was to study problems relating to private air law and to prepare a draft convention for consideration by subsequent international diplomatic conference[16]. The conference was attended by representatives of 43 states who examined problems of the Private Air Law. The result of the First Conference on Private Air law, held in Paris from 27 October to 6 November 1925, was the presentation of a draft convention regarding the documents of carriage and the liability of the airlines relating to international air transportation[17]. In its first and second sessions, held respectively in May 1926 and April 1927, CITEJA revised the draft of the convention on liability of the carrier, completing it with the provisions concerning the documents of air carriage, jurisdiction, successive carriage and combined carriage. In its third session, held in Madrid from 24-29 May 1928, CITEJA approved the draft Convention and sent it to the French government for distribution to all other governments with a view to convening the second International Conference of Private Air Law[18].

Four years later, at the Second International Conference in Private Air Law, forty-four nations were invited to this conference but only thirty-three nations were represented in Warsaw, Poland from 4 October to 12 October 1929 to consider the CITEJA proposal concerning the documents of carriage and the liability of the carrier relating to international carriage by air. The US had sent only an observer. The diplomatic conference approved on 12 October 1929 by twenty-three states, the *"Convention for the Unification of Certain Rules Relating to International Carriage by Air"* which is commonly known as the Warsaw Convention 1929. The Warsaw Convention was signed on behalf of 23 countries on 12 October 1929. It entered into force on 13 February 1933; ninety days after instruments of ratification had been deposited by five states in accordance with article 37 paragraph 2 of the Warsaw Convention. By the end of 1933, twelve nations had already become members of the Warsaw Convention[19].

Although the US did not participate in the work of CITEJA and sent only an observer to Warsaw in 1929, it made use of the procedure under article 39 of the Warsaw Convention

[16] Batra, p. 11.
[17] Giemulla/Schmid, history, p. 2.
[18] Dempsey Paul Stephen/Milde Michael, International Air Carrier Liability: The Montreal Convention of 1999, McGill University Centre for Research in Air & Space Law, Montreal, Canada, 2005, p. 14.
[19] Giemulla/Schmid, history, p. 3.

and acceded to the Convention by notifying the government of the Republic of Poland of its intention to do so on 31 July 1934 and it took effect for the US on 29 October 1934[20].

The Warsaw Convention arose out of the need to provide a uniform system of law applicable to all international air accidents, since international air travel involves flying over and into numerous states and countries, many different states, federal and foreign laws are involved in potential air disasters[21]. It is different from most other international treaties because it creates a system of private rules affecting the rights of individuals against the carriers and unlike Conventions dealing with other modes of transportation, the Warsaw Convention covers both passenger and cargo claims[22].

The objective of the Warsaw Convention was unification of certain rules relating to international carriage by air[23]. It has achieved uniformity in the definition of international carriage, in the documents of carriage, in the regime of air carrier's liability for the damage caused to passengers, baggage and goods, for damage caused by delay and in the jurisdiction rules and eliminated some of the uncertainty in the law governing an international air crash[24].

The Warsaw Convention is a landmark in the development of Private International Air law[25]. The rules of the Warsaw Convention are being applied almost all over the world and have demonstrated their liability and usefulness[26]. The passenger knows that, wherever and whenever he flies, there is certain degree of uniformity in the rules governing the carrier's liability, while the carrier is aware of the extent of his liability and can make arrangements to insure him against possible losses. As the time went by and aviation began expanding on a large scale, the Warsaw Convention had been amended or revised and/or modified in order to be kept up to date [27]. Moreover, some additional Conventions and Protocols were drawn and

[20] Dempsey/Milde, p. 13.
[21] Fincher, James N., Watching Liability Limits under the Warsaw Convention, Fly away, and the IATA Initiative, 10 Transnat'l Law, 1997, p. 312.
[22] Kreindler, Lee S., Aviation Accident Law, Revised Publication 332, Release 47, Lexis Nexis, Volume I, November 2002, p. 10.01(1), 10.02-03
[23] Batra, p. 12.
[24] Dempsey/Milde, p.14; Fincher, p. 312.
[25] Batra, p. 12.
[26] Diederiks-Verschoor, p. 101.
[27] Ibid.

included in the system. As of mid-2007, 152 states had ratified the original Warsaw Convention[28].

b. Amendments of the Warsaw Convention

The Warsaw Convention was first amended by the Hague Protocol adopted at the Hague in 1955 and entered into force on 1 August 1963. The purpose was to adopt Warsaw Convention to the requirements of modern transport[29]. It has been supplemented by the Guadalajara Convention in 1961 for the "*Unification of Certain Rules Relating to International Carriage by Air Performed by a Person other than the Contracting Carrier*". This amendment took the form a Supplementary Convention because it was concluded to deal with an entirely new subject matter, namely chartering. It has been in force since 1 May 1964. Then, another protocol adopted at Guatemala City on 8 March 1971 to be an amendment to the Warsaw Convention. This protocol however, has not yet come into force. In addition, another four amending Protocols were concluded at Montreal on 25 September 1975. And, there is the Montreal Agreement of 1966, a private agreement concluded between IATA carriers and the United Sates Civil Aeronautics Board and 1995 Kuala Lumpur IATA Intercarrier Agreement on Passenger Liability.

Since the Warsaw Convention entered into force in 1929, it was ratified or adhered to by most countries. For the first 20 years of its existence, the Warsaw Convention was generally regarded as satisfactory and more and more states became parties to it. However, the Convention because of its low limits of liability has been viewed as unfairly protective of the airlines and against interest of consumers/passengers. In recent years, initiatives by airlines themselves, the airlines of Japan in 1992 and IATA in 1995-1996, have led to the elimination of liability limits by voluntary agreements, while retaining a regime of airline liability without proof of fault[30].

[28] For a current list of signatories and ratifying States, see the ICAO legal Bureau website: <http://www.icao.int/ICDB/HTML/English> visited 15 June 2008.
[29] Diederiks-Verschoor, p. 101.
[30] Whalen, Thomas, The New Warsaw Convention: The Montreal Convention, Air and Space Law, Vol. XXV, Number 1, 2000, p. 14.

Given this interrelated patchwork of a treaty, protocols to the treaty, and private intercarrier agreements, it should come as no surprise that increased pressure was exerted to modernize and simplify the entire field of international aviation litigation[31]. Finally, there is the Montreal Convention of 1999 that became necessary because the Warsaw system no longer functioned satisfactorily and liability system had to be modernized[32].

On 28 May 1999, years of hard work culminated in the adoption of the Montreal Convention that will eventually replace the Warsaw Convention. Through the Montreal Convention of 1999, the virtual elimination of liability limits will become law by a treaty, as distinguished from the IATA Intercarrier Agreements where the limits were eliminated by agreement between the airline and passenger, through filed tariffs or changes in the airline's conditions of carriage. The Diplomatic Conference attended by 122 States and 11 Organizations, and signed by representatives of 52 countries, including the United States and EU Member States, in Montreal on 28 May 1999. The Montreal Convention is essentially a composite of the Warsaw Convention, several Protocols, the Supplementary Convention and the IATA Intercarrier Agreements[33]. It entered into force on 4 November 2003.

As the table of Air law Conventions and other instruments indicates, alongside the original Convention there are eight other international agreements, some of which have not come into force. This means that there are a large number of potentially applicable legal regimes, even discounting the inter carrier agreements and EC regional legislation[34].

The range of possible regimes existing in international law is as follows:

a. the Warsaw Convention 1929, unamended;
b. the Warsaw Convention 1929 amended by Montreal Additional Protocol No. 1, 1975;
c. the Warsaw Convention 1929 amended by the Hague Protocol 1955 ('Warsaw-Hague' or 'the 1955 amended Convention');
d. Warsaw-Hague further amended by Montreal Additional Protocol No. 2 1975;

[31] Kreindler, p. 10.01(1), p. 10-5
[32] Diederiks-Verschoor, p. 102.
[33] Whalen, The New Warsaw Convention, p. 14
[34] Shawcross/Beauomont, para. 129

e. Warsaw-Hague further amended by the Guatemala City Protocol 1971, principally in respect of the carriage of passengers and baggage, though the 1971 Protocol is not in force;
f. Warsaw-Hague-Guatemala further amended by Montreal Additional Protocol No. 3, 1975 (not yet in force);
g. Warsaw-Hague further amended by Montreal Additional Protocol No. 4, 1975 in respect of carriage of cargo (the MP4 Convention);
h. the Montreal Convention 1999, a full revision.

The Guadalajara Convention 1961 is a supplementary to any of the regimes listed at (a) to (g), and its effect is incorporated in the Montreal Convention 1999.

It will be noted that the Warsaw Convention in its original, unamended form remains, in force as between certain states. Most, have, however, adopted at least the amendments agreed in the Hague Protocol, and the Warsaw-Hague regime is therefore the regime most commonly applied[35].

c. Scope of the Warsaw Convention

The purpose of Warsaw Convention was not to eliminate all differences between the substantive laws of each of the parties, but to establish certain uniform rules relating to international carriage by air and to eliminate conflict of laws or uncertainty due to different domestic laws in respect of compensation[36]. By providing a set of rules, the Convention eliminated many of the troublesome conflict of laws questions, which would otherwise arise. It resolved jurisdictional questions, prescribed a limitation period, and by an elaborate set of provisions created a uniform system of documentation[37].

This Convention deals principally with the '*documents of carriage'* and the '*liability of the air carrier'*. It laid down the format regarding documents of carriage and established the

[35] Ibid.
[36] Fincher, p. 313.
[37] Shawcross/Beaumont, para. 331.

principle of the carriers' liability for damage caused to passengers, baggage and cargo, also for damage caused by delay[38].

aa. Documents of Carriage

With respect to first item, chapter II of the Warsaw Convention contains rules concerning the passenger ticket (Art. 3), baggage check (Art. 4), and air waybill (Art. 5-16), including the designation of persons responsible for issuing them, their preparation, their proper content, and the legal implications in cases of deficiencies in their issuance.

Article 3/2 of the Warsaw Convention provides that the absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of carriage which shall, none the less, bed subject to the rules of this Convention. However, if the carrier accepts a passenger without a passenger ticket having been delivered the carrier shall not be entitled to avail himself of those provisions of this convention, which exclude or limit his liability.

Article 4 of the Warsaw Convention covers registered baggage only. This provision provides that the absence, irregularity, or loss of the baggage affect shall not affect the existence or the validity of the contract of carriage which shall, none the less, bed subject to the rules of this Convention. However, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (d), (f), and (h) of paragraph 3 of this provision, the carrier shall not be entitled to avail himself of those provisions of this convention, which exclude or limit his liability.

Article 5-16 contains rules concerning air waybill. Article 5/2 of the Warsaw Convention provides that the absence, irregularity, or loss of the baggage affect shall not affect the existence or the validity of the contract of carriage which shall, subject to the provision of article 9. Article 9 of the Warsaw Convention provides that if the carrier accepts the goods without an air waybill having been made out, or if the air waybill does not contain all the

[38] Batra, p.12.

particulars set out in article 8 (a) to (i), inclusive, and (q), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

The format, content and legal significance of the documents of carriage have essentially been followed by the airlines nearly for seventy years. However, over time, the exacting formalities of the documents of carriage have proved to be an obstacle to the growing use of electronic data processing. The connection between the liability and the formalities of the ticket has no justification at present and all documents of carriage must be simplified and be capable of electronic data processing[39].

b. The Liability of the Carrier

With respect to the second item, the issues of liability represent the core subject of the Warsaw Convention. Rules regarding carrier liability are found in chapter III of the Convention. The Convention governs carrier liability in cases of death or injury of a passenger (Art 17), destruction or loss of or damage to baggage (Art 18/1) and destruction or loss of damage to goods (Art 18/1), and liability for damage caused by delay in the carriage by air of passengers, baggage and goods (Art 19)[40].

Principally, *the liability of the carrier is limited* under the Convention. Though being under obligation to compensate the victim for actual damage suffered, the carrier is not obligated to make payments over the liability limits[41]. However, liability is unlimited if damage was caused by the carrier's 'wilful misconduct' or 'gross negligence' or if the documents of carriage were either not issued at all or not in conformity with standards laid down by the relevant articles[42]. The Warsaw Convention originally established air carrier liability limits for death and bodily injury of passengers at 125.000 francs per passenger or approximately US$ 8.300 at that time with a rebuttable presumption of carrier negligence[43]. With respect to cargo and checked baggage, under the Warsaw Convention, the air carrier was only liable to

[39] Milde, Michael, The Warsaw System of Liability In International Carriage by Air: History, Merits and Flaws and the new 'non Warsaw Convention of 28 May 1999' Annals of Air and Space Law, Vol.XXIV, 1999, p. 160.
[40] Ibid.
[41] Sözer, Bülent, Consolodiation of Warsaw /Hague System, McGill Law Journal, Vol. 25, 1979-80, p. 218.
[42] Sözer, (Yeditepe), p. 33.
[43] Warsaw Convention, art. 22/1.

pay 250 francs or approximately US $9.07 per kilogram[44]. As regards objects of which the passenger carries with him the liability of the carrier shall be limited to 5.000 francs per passenger[45].

The liability of the carrier is based on its fault or negligence but the Convention adopted a boldly progressive attitude by embodying a presumption of such fault and reversing the burden of proof[46]. The carrier has two possible defences to the presumption of liability. Under article 20/1, the carrier shall not be liable if it proves that it and its agents have taken *all necessary measures* to avoid damage or that it was impossible to take such measures. Furthermore, with respect to the carriage of goods and baggage, article 20/2 provides that the carrier shall not be liable if proves that the damage was occasioned by an error piloting, in the handling of the aircraft, or in navigation, and that in all other respects it and its agents have taken all necessary measures to avoid the damage. Article 21 permits the application of rules of contributory negligence or comparative negligence as found in the law of the forum court.

The Warsaw Convention sought to balance the differing interests of the passenger and air carrier. It provided the plaintiff with recovery without the need to prove the airlines' negligence[47]. The burden of proof of the negligence is not imposed on the passenger or claimant but instead, to avoid liability, the carrier must prove that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for it or them to take such measures[48]. In 1929, the consumer protection was less firmly established and the Convention's innovative reversal of the burden of proof was a positive step toward better protection of claimants who, in view of the technical complexity of aviation, would find it difficult to collect necessary evidence[49]. To balance this reversal burden of proof, the liability of the carrier, in terms of the amount of damages to be awarded, was limited.[50].

[44] Ibid., art. 22/2.
[45] Ibid., art. 22/3.
[46] Milde, p. 159.
[47] Fincher, p. 313.
[48] Ibid.
[49] Milde, p. 160.
[50] Shawcross/Beaumont, para. 331.

II. AMENDMENTS OF WARSAW CONVENTION

1. The Hague Protocol, 1955

Shortly after entering into force of Warsaw Convention, the first criticism of the Convention arose, coming particularly from the US and some air carriers[51]. The airlines complained that the air waybill provisions were too restrictive. Although the Convention was, at the time, considered to be one of the best agreements dealing with matters of private international law, some practical and legal problems had become evident as aviation expanded rapidly between 1929 and 1955, necessitating a number of improvements in the original text[52].

However, the work on a revision of the Convention, which had already resulted in a draft worked out by the CITEJA, was interrupted by the outbreak of World War II[53]. The CITEJA was dissolved in 1947, but the newly created Legal Committee of the 'Provisional International Civil Aviation Organization' (PICAO) persisted in attempts at reform during the post war period. International Conferences which took place in Cairo (1946), Madrid (1951), Paris (1952) and the Rio de Janerio (1953) did not bring about any significant improvements[54]. The legal Committee of ICAO prepared a draft at Rio de Janerio in 1953, which was placed for discussion and approval at the diplomatic conference convened by ICAO at the Hague in 1955. The proposed revision included broadening of the definition of international carriage, enhancement of liability, simplification of travel documents and rationalization of certain unconventional policies[55].

Subsequently, a Diplomatic Conference was held at the Hague from 6 September to 28 September 1955 and proposed the adoption of a Protocol to amend the Warsaw Convention of 1929[56]. The International Conference on Private Air Law adopted a *'Protocol to Amend the Convention for the Unification of Certain Rules Relating to the International Carriage by Air Signed at Warsaw on 12 October 1929.'* This Protocol was signed at the Hague on 28

[51] Giemulla/Schmid, history, para. 3.
[52] Diederiks-Verschoor, p. 151.
[53] Giemulla/Schmid, history, para. 3.
[54] Ibid.
[55] Batra, p. 14.
[56] Diederiks-Verschoor, p. 151.

September 1955 by twenty-five of the forty-four delegates[57]. The Warsaw Convention in its original form was not replaced by the Hague Protocol but merely modified for those states which signed it and continued to be valid. As the Protocol contains only the amended articles of the original Convention without reproducing those that have remained unchanged, article XIX stipulates that the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the "Warsaw Convention as amended at the Hague, 1955"[58]. Adherence to the Protocol by any state which is not party to the Convention has the effect of adherence to the convention as amended by Protocol; it does not make that state a party to the unamended Convention. However, a party to the original Convention remains a party to that Convention despite becoming a party to the Protocol.

Although most parties to the Warsaw Convention ratified and adhered to the Hague Protocol, the United States remained dissatisfied with the low levels of liability of the Protocol. The United States signed the Hague Protocol on 28 June 1956 but has never ratified it[59]. United States eventually ratified the Hague Protocol implicitly through its ratification of Montreal Protocol No. 4[60].

The Hague Protocol simplified the content of the traffic documents (article 3 to 8) and reduced the number of mandatory provisions therein. Further, minor changes were made by the protocol in the definition of international carriage[61]. A new paragraph 3 was added to Article 15 of the Convention stating that nothing in the Convention prevents the issue of negotiable air waybill.

The central issues involved at the Hague concerned with the provisions of liability. The protocol increased the limit of liability of the carrier in case of death or injury to the passenger[62]. The liability limit in the carriage of passengers was increased from 125,000

[57] The Warsaw Convention as amended by the Hague Protocol has been ratified by Turkey on 25.3.1978 and entered into force on 23.6.1978. As mentioned above, article XXI of the Hague Protocol provides that 'ratification of this protocol by any state which is not a party to the Warsaw convention shall have the effect of adherence to the Warsaw Convention as amended by this Protocol'. With the effect of this article, Turkey has been adhered to the Warsaw Convention as amended by Hague Protocol.
[58] Shawcross/Beaumont, para. 338.
[59] Dempsey/Milde, p. 21.
[60] Ibid.
[61] Shawcross/Beaumont, para. 339.
[62] Mankiewicz, René H., The Liability Regime of the International Air Carrier, Kluwer and Taxation Publishers, Deventer, Netherlands, 1981, p. 7.

francs to 250,000 francs. However, the Warsaw Convention's liability limits for cargo were retained at 250 francs per kilogram[63].

The time limits for notice of complaint in the carriage of baggage and cargo were relaxed. The length of the period in which a claim may be brought in accordance with article 26 has been extended to fourteen days instead of seven days in the case of cargo, and to seven days instead of three for baggage. In addition, the period, in which claims for damages resulting from delay may be brought, has been extended to twenty-one days instead of fourteen days[64]. The Warsaw Convention deals only with the liability of the carrier and it contains no rule limiting the liability of his servants or agents. With the new added article 25A, it has been specified that the carrier's servants and agents entitled to avail themselves of the limits of liability established by the Convention provided they acted within the scope of their employment.

The Hague Protocol removed some of the exceptions to limited liability in the carriage of air freight, and in particular, the 'error in piloting' defence with deleting paragraph 2 of Article 20. Instead, a second paragraph was added to article 23, it provided that, in paragraph 2, that the carrier can avoid liability if it can prove that the damage, loss, or destruction of the carried cargo resulted from the inherent defect, quality, or vice of the cargo.

Article 25, providing for the removal of limitation of liability in cases of wilful misconduct or equivalent default, was amended. Article 25 of the Warsaw/Hague Convention is concerned with the intent behind the action and it abolished unlimited liability in cases of gross negligence[65]. It replaced Article 25 by a new article stating that the limits laid down in the Warsaw Convention will not apply and liability shall be unlimited if it is proved 'that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result'[66]. The advantage of this rule is that the elements of both 'dol' and 'wilful misconduct'[67] were included, while at the same time 'omission' has been included as a

[63] Warsaw Convention, art. 23; Hague Protocol, art. X.
[64] Warsaw Convention, art. 26; Hague Protocol.art. XV.
[65] Giemulla/Schmid, history, para. 4.
[66] Diederiks-Verschoor, p. 155.
[67] These terms will be discussed detailed under the Unlimited Liability chapter.

ground for unlimited liability. In the event of such negligence, the claimant is required to prove that the employee has committed the act within the scope of his employment[68].

In order to prevent difficulties and contradictory interpretations, which may arise from the use of diversity of languages, the Protocol has been drafted in three authentic texts. The only authentic text of the original Convention is drafted in French, while the Hague Protocol was drafted in English, French, and Spanish[69].

The protocol came into force on 1 August 1963, the ninetieth day after the deposit with the Government of Poland of the thirtieth instrument of ratification[70]. As of mid-2007, 136 nations had ratified the Hague Protocol 1955 amending the Warsaw Convention of 1929[71].

2. The Guatemala City Protocol, 1971

After the United States of America had withdrawn its denunciation of the Warsaw Convention, several meetings were held under the auspices of ICAO in 1966 to examine passenger aspects of the Convention and this led to a meeting of a sub-committee of the Legal Committee of ICAO devoted to the topic and finally to the production of a draft text by the Legal Committee itself at its seventeenth session, in Montreal 1970[72]. The text was the basic document before an International Air Law Conference convened by ICAO and held in Guatemala City in February and March 1971[73].

The Guatemala Protocol was designed to modify the Warsaw Convention as amended by the Hague Protocol and it was signed on 8 March 1971, by 21 states, including the United States[74]. As between the parties to the protocol, it is to be read and interpreted with the earlier documents as a single instrument to be known formally as the 'Warsaw Convention as amended at the Hague, 1955 and at Guatemala City, 1971'.

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[68] Diederiks-Verschoor, p. 155.
[69] Mankewicz, p. 7.
[70] The Hague Protocol 21, 22/1.
[71] For a current list of signatories and ratifying States, see the ICAO legal Bureau website: <http://www.icao.int/ICDB/HTML/English> visited June 15, 2008.
[72] Shawcross/Beaumont, para. 347.
[73] Ibid.
[74] Diederiks-Verschoor, p. 164.

The Protocol almost wholly concerned with the carriage of passengers and their baggage[75]. It makes major changes in the general scheme of the carrier's liability in respect of the carriage of passengers and baggage. Its main feature is a shift of principle, in that fault liability of the carrier in respect of death or injury of the passenger will be changed into absolute liability.

The maximum amount of the carrier's liability with regard to passenger is increased to 1.500.000 francs (or 100.000 USD) in cases involving the death or personal injury of a passenger, to 62.500 francs in cases of involving delay in carriage of persons, and to 15.000 francs in cases concerning baggage[76].

Under the Warsaw Convention as amended at the Hague, the carrier's liability in respect of checked baggage and goods is limited to 250 Poincaré francs per kilogramme, whereas for objects the passenger takes charge of himself the liability is limited to 5.000 poincaré francs per passenger. Article VIII of the Guatemala Protocol, however, establishes a new limit for baggage in general, amounting to 15.0000 Poincaré francs, this means that the distinction between the checked baggage and baggage the passenger takes of personally has been dropped[77]. These limits are exclusive of costs and lawyer's fees[78].

In particular, the defence available under article 20/1 of the convention, that the carrier, his servants and agents have taken all necessary measures to avoid the damage, is removed in cases concerning passengers and baggage, except where the liability is based on delay[79]. It means that the carrier will not be liable for damage caused 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[80]. Consequently, fault will still be the legal ground for liability when delay is involved[81].

The carrier will, under the Protocol, be able to exonerate himself wholly or partially: (i) if it proves that the damage was caused or contributed by the negligence or other wrongful act or

[75] Shawcross/Beaumont, para. 348.
[76] Ibid, para. 352.
[77] Diederiks-Verschoor, p. 166.
[78] Shawcross/Beaumont, para. 352.
[79] Ibid.
[80] Guatemala Protocol of 1971, Article VI.
[81] Diederiks-Verschoor, p. 165.

omission of the person claiming compensation[82]; and (ii) if death or injury resulted solely from the state of health of passenger[83].

In addition to that, the protocol further revised the provisions relating to passenger tickets and baggage checks, which were simplified at the Hague[84]. In the carriage of passengers and baggage, the protocol authorizes the use of 'any other means' that would preserve a record of the particulars required appearing on the ticket and baggage check (Art 3 and Art 4). Although the words 'other means' implies the use of computers for recording, processing, and storage of data, cannot be restricted to them. The terms are broad enough to allow the possibility of using innumerable methods still to be developed. Therefore, the words 'other means' do not necessarily refer only to electronic systems[85]. Non-compliance with the rules specified in the protocol does not affect existence or the validity of the contract of carriage, which will, nonetheless, be subject to the rules of the convention as amended by the protocol, including those relating to limitation of liability. The last point was an important change; errors or omissions in documentation no longer expose the carrier to the risk of unlimited liability[86].

Article 28/2 of the Warsaw Convention has been amended by the Guatemala Protocol and it added a further basis for jurisdiction applying to actions in respect of damage resulting from death, injury or delay of a passenger, or the destruction, loss, damage, or delay of baggage. The action may be brought in a court 'in the territory of one of the high contracting parties, if the carrier has an establishment within he jurisdiction of the court and if the passenger has his domicile or permanent residence in the territory of the same high contracting party'.

A new provision has been added to the Protocol. According to article IV of the Protocol, the carrier will be liable for damage sustained in case of destruction or loss of, or damage to baggage, provided only that the event which caused the destruction, loss or damage took place on board the aircraft, or in the course of any of the operations of embarking or disembarking, or during any period within which the baggage was in the charge of the

[82] The Guatemala City Protocol of 1971, art. VII.
[83] The Guatemala City Protocol of 1971, art. IV.
[84] Shawcross/Beaumont , para. 356.
[85] Matte, Nicolas M., The Most Recent Revision of the Warsaw Convention: The Montreal Protocols of 1975, European Transport Law; Vol. 11, pag. 822–841, 1976, p. 827.
[86] Shawcross/Beaumont, para. 356.

carrier. However, the carrier will not be liable if damage resulted solely from the inherent defect, quality or vice of the baggage.

The Convention as amended at the Hague and by the Guatemala City Protocol applies to international carriage as defined in article 1 of the Convention provided that the places of departure and destination referred to in that article are situated either in the territories of the two parties to the Protocol or within the territory of a single party to the Protocol with an agreed stopping place in the territory of another state[87] whether that state is or not a party to the Protocol or, indeed, the Convention.

The Protocol requires ratification and will come into force on the ninetieth day after the deposit with the ICAO of the thirtieth instrument of ratification. However an unusual condition is attached to this provision; if the total international scheduled air traffic, expressed in passenger-kilometres, according ICAO statistics for 1970, of the airlines of five states which have ratified the Protocol does not represent at least forty per cent of the total international scheduled air traffic of the member states of ICAO in that year, the coming into effect of the Protocol is postponed until the ninetieth day after the deposit of an instrument of ratification which ensures that this condition is met. The Protocol has not yet entered in force[88].

3. The Four Montreal Protocols, 1975

The Diplomatic Conference in Montreal in September 1975 was originally convened for the sole purpose to complete some 'unfinished business' left open by the Guatemala City Protocol[89]. The Guatemala City Protocol modernised those provisions of the Warsaw Convention as amended at the Hague and focused uniquely on the liability to passengers and liability for their luggage or delay and left the issues of cargo untouched. This protocol, designated as 'Montreal Protocol No. 4', carried out a similar task in respect of cargo, and many of the provisions of the resulting Protocol No. 4 correspond exactly to provisions

[87] Guatemala City Protocol, art. XVI.
[88] Diederiks-Verschoor, p. 164.
[89] Demsey/Milde, p. 26.

agreed at Guatemala City while the preceding 'Additional Protocols' No. 1, No. 2 and No. 3 address an issue that was not even on the original agenda of the conference[90].

Protocol No. 4 is, however, quite independent of the Guatemala City Protocol. The text it amends is the Warsaw-Hague text[91], and a state can ratify or accede to either Protocol, or both. A state ratifying or acceding to Additional Protocol No.3 may make a reservation declaring that it is not bound by the provisions of the Convention as amended by Protocol No. 4 in respect of the carriage of passengers and baggage[92]. If two or more states are parties both to Protocol No. 4 and to the Guatemala City Protocol or Additional Protocol No.3, the carriage of cargo and postal items will be subject to the system established by Protocol No. 4, and the carriage of passengers and baggage to the system established by one or the other Protocols[93].

Four 'Additional Protocols' amending Warsaw Convention as amended at the Hague were adopted by a Diplomatic Conference held in Montreal on 25 September 1975. It was signed for thirteen states, including the United Kingdom and United States[94].

The original Warsaw Convention had expressed its liability limits in terms of French (Poincaré) gold francs consisting of 65 ½ milligrams of gold at the standard of fineness of nine hundred thousandths[95]. The same 'gold clause' expressed in an abstract and non-existing currency called 'franc' was included in the 1955 Hague Protocol and the 1971 Guatemala City Protocol. The gold value would be calculated in the local currency at the date of the judgment[96].

Gold provided a stable fine yardstick until the Second World War. The official price fixed by the IMF was not acceptable due to fluctuation of free market price of the gold. Some courts while awarding compensation sometimes adopted the gold value as prescribed in the Warsaw

[90] Mankiewicz, p. 11; Dempsey/Milde, p. 26.
[91] Montreal Protocol No. 4, art. 1.
[92] Montreal Protocol No. 4, art. XXI, 3(b).
[93] Montreal Protocol No. 4, art. XXIV.
[94] Diederiks/Verschoor, p. 166.
[95] Dempsey/Milde, p. 26.
[96] Ibid.

Convention, whereas other Courts adopted the free market price[97]. Difficulties then arose from the fact that there was an official price for gold expressed in US dollars but on the free market, the price of gold could be different. As the 'gold clause' became meaningless, it became necessary to devise an alternate base point as a stable yardstick of values and to express the limits of liability in a monetary unit, which was independent of economic fluctuations[98]. The International Monetary Fund created the concept of Special Drawing Rights (SDRs), at the beginning consisting of a floating basket of sixteen currencies[99] which were chosen because the issuers had a share of total exports of goods and services in excess of 1 percent on average over the period 1968-1972, a non-existing currency often called 'paper gold'[100]. SDR is to be calculated in accordance with the method of valuation applied by the IMF and in effect at the date of the judgement[101]. States not members of IMF may express the value of the limits in 'monetary limits' of value equivalent to the gold franc as defined in the original Warsaw Convention[102].

On the initiative of United States, the Montreal Conference adopted 'Additional Protocols' Nos. 1, 2, and 3. The sole purpose of these additional protocols was to replace the 'gold clause' of different instruments by the concept of SDR, without changing the actual value of these limits[103]. However, ICAO had not convened the conference for this purpose, but rather for the specific and limited purpose of revising the Warsaw/Hague provisions on the carriage of cargo and mail, the revised provisions have been found in Montreal Protocol No. 4[104].

Additional Protocol No. 1[105] introduced the use of Special Drawing Rights instead of the Poincaré Franc for the member states, which belonged to the International Monetary Fund. Protocol No. 1 relates to the original Warsaw Convention (SDR 8.300 instead of 125.000

[97] Batra , p. 23.
[98] Giemulla/Schmid, history, para. 11; Dempsey/Milde, p. 27.
[99] Dempsey/Milde, p.27; At the beginning SDR was consisting of 16 currencies. Later on, it was reduced to five currencies, U.S. Dollar, Japanese Yen, Pound Sterling and the German Mark and French Franc. As of 1 January 1999, with the introduction Euro (replacing the German Mark and French Franc), it was reduced to four currencies, U.S. Dollar, Japanese Yen, Pound Sterling and Euro.
[100] Ibid.
[101] Batra, p. 24.
[102] Mankiewicz, p. 11; article VII of MP4.
[103] Dempsey/Milde, p. 27.
[104] Fitzgerald, F, Gerald, The Four Montreal Protocols to Amend the Warsaw Convention Regime Governing International Carriage by Air, Air Law &Com., Vol. 42, 1976, p. 276.
[105] Montreal Additional Protocol No. 1, 1975 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Ai signed at Warsaw on 12 October 1929.

gold francs). The Additional Protocol No. 2[106] does the same in respects of limits set by the Warsaw Convention as amended at the Hague in 1955 (SDR 16.600 instead of 250.000 gold francs). Additional Protocol No. 3[107] deals in a similar manner with the limits specified in the Guatemala Protocol (SDR 100.000 instead of 1.5 million gold francs).

The Montreal Protocol No. 4[108] changed, for the first time since the Hague Protocol, the liability rules relating the cargo provisions (articles 5-16) of the Warsaw/Hague regime without touching the passenger provisions and also introduced SDRs[109]. Protocol No. 4 regulates the liability of the carrier for the transportation of goods in the same manner as the Guatemala Protocol does for the passenger[110].

It set cargo liability limits at 17 SDRs (or about $25 per kilogram) and made unbreakable (art 25), except that, unlike MP3 for passengers, the consignor has the option of choosing a higher limit by paying a supplementary sum (article 22/2)[111]. The Protocol No. 4 establishes the absolute liability[112] rather than fault liability in respect of loss of or damage to cargo[113]. The defence available under Article 20/1 of the Warsaw Convention, that the carrier, his servants and agents have taken all necessary measures to avoid the damage, is removed in cases concerning cargo, except where the liability is based on delay[114]. The possibility existing under the earlier instruments of recovery beyond the prescribed maxima where the documentation was defective or on proof of intentional or reckless misconduct is removed in cases concerning cargo[115]. The Protocol contains no provisions as to jurisdiction or as to costs and lawyer's fees, and makes no changes in the maximum limits on liability[116].

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[106] Montreal Additional Protocol No. 2, 1975 to amend the Convention for the: Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955.
[107] Montreal Additional Protocol No. 3, 1975 to amend the Convention for the: Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955 and at Guatemala City on March 1971.
[108] Montreal Additional Protocol No. 4, 1975 to amend the Convention for the: Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at the Hague on 28 September 1955.
[109] Dempsey/Milde, p. 28.
[110] Batra, p. 24.
[111] Cheng, Bin, A New Era in the Law of International Carriage by Air: From Warsaw (1929) to Montreal (1999), ICLQ, vol. 53, October 2004, p. 839.
[112] Absolute liability has been already provided for by the Guatemala Protocol in respect of passengers.
[113] Batra, p. 24.
[114] Shawcross/Beaumont, para. 367.
[115] Ibid.
[116] Ibid.

MP4 eliminated the archaic cargo documentation provisions of the Warsaw Convention, thereby enabling electronic data processing and a 'receipt for cargo' replacing the paperwork (article 5 of the MP4).

After the thirtieth ratification, Montreal Protocol No. 4 at last entered into force on 14 June 1998, 23 years after its initial conclusion. The U.S. Senate ratified MP4 on 28 September, 1998 and it became effective on 4 March, 1999[117]. Any State accepting the Protocol becomes automatically a party to what is officially known as the Warsaw Convention as amended at the Hague, 1955, and by Protocol No. 4 of Montreal, 1975[118].

As of mid-2007, fifty- three nations had ratified MP4[119]. Shortly before, on 15 February 1996, Protocols No. 1 (as of mid-2007 forty-eight nations had ratified it) and No. 2 (as of mid-2007 forty-nine nations had ratified it) had also become effective. Thus, Protocol No. 3 is the only one of the four not to have this status; it is very questionable whether it will never enter into force[120].

4. Guadalajara Convention, 1961

When the Warsaw Convention was drafted in 1929, there were relatively few chartered air carriers. After the Second World War, the number of charted flights increased considerably which made it urgent to draw up new rules applicable to charter air carrier, which were not provided in the Warsaw Convention[121]. These rules laid down in a Supplementary Convention rather than in a Protocol, since it was a matter of revising old rules, they extended into an entirely new area not covered by the Warsaw Convention[122].

The Guadalajara Supplementary Convention was the result of a conference which took place from 29 August to 18 September 1961. The Diplomatic Conference meeting at Guadalajara, Mexico, adopted a '*Convention, Supplementary to the Warsaw Convention, for the*

[117] By this ratification, they accepted implicitly the Warsaw Convention as amended by the Hague Protocol of 1955 which they refused to take action for some forty-three years.
[118] Montreal Protocol, art. XV.
[119] For a current list of signatories and ratifying States, see the ICAO Legal Bureau website, http://www.icao.int/icao/e/leb, visited June 18, 2008.
[120] Diederiks-Verschoor, p. 170.
[121] Ibid., p. 157.
[122] Ibid.

Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier' which was signed at the conference by 18 of the 40 participants and it entered into force on 1 May 1964, after ratification by five states[123].

In principle, this convention is not regarded as an essential part of the Warsaw System, but as a supplement to it. The Guadalajara Convention was drawn up to provide rules to govern international carriage by air performed by an actual carrier who is not also the contracting carrier. Broadly the object of the convention was to give to an actual carrier the same rights and liabilities as a contracting carrier under the Warsaw Convention system.[124]

The Guadalajara Convention 1961 distinguishes between the carrier, which concludes the agreement and the carrier who actually carries it out, wholly or partially, each with its own obligations of liability[125]. It defines the contracting carrier as "a person who, as a principal, makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf the passenger or consignor"[126].

The Warsaw Convention limits the liability of the contractual carrier. Whereas, the carrier that actually carries out the contract of carriage, may be held with unlimited liability[127]. Under the Guadalajara Convention, the travel agents and tour operators were held liable; especially those operating chartered flights[128]. As of mid-2007, eighty-four states have ratified the Guadalajara Convention[129].

IV. PRIVATE CARRIER AGREEMENTS

1. 1966 Montreal Intercarrier Agreement

United States was not satisfied with the Hague Protocol 1955, although the liability limits had been increased to 250.000 gold francs in case of death of or injury to the passenger in

[123] Giemulla/Schmid, history, para 14; Mankiewicz, p. 7.
[124] Shawcross/Beaumont, para. 372.
[125] Batra, p. 22.
[126] The Guadalajara Con. Art. 1.
[127] Ibid., Art,VI.
[128] Ibid., Art. III.
[129] For a current list of signatories and ratifying States, see the ICAO Legal Bureau website, http://www.icao.int/icao/e/leb, visited June 18, 2008.

case of an accident. The United States considered the limits of liability established by the Hague Protocol too low. Therefore, U.S. Secretary of State Dean Rusk formally notified the Polish government of the United States' denunciation of the Warsaw Convention on 15th November 1965[130]. Despite such notice, the United States made it clear that it hoped that a solution could be found before 15 May 1966 when the notice of denunciation would take effect[131].

The ICAO called a meeting to discuss a revision of the liability limits. This meeting took place in February in 1966, produced a resolution requesting the ICAO Council to convene a Diplomatic Conference for discussing various proposals concerning maximum liability[132]. In the meantime, after much work and debate, the Director General of International Air Transport Association, Sir William Heldred, took immediate initiative and persuaded the IATA Carriers to enter into bilateral agreements with the United States Civil Aeronautic Board to raise the liability limits up to 75.000 USD at least in respect of American citizens. Consequently, the American threat of boycott ended and the United States requested the Polish Government to cancel its notification of denunciation of the Warsaw Convention on 4 May 1966[133] (notice of the denunciation was retracted only two days before the United States' denunciation would have become effective).

The Montreal Agreement[134], whose official title is '*Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol'* was concluded between number of airline companies who were the members of IATA and the Civil Aeronautics Board of the United States on 13 May 1966[135].

That decision provided that the maximum liability of the carrier in case of death or personal injury of the passenger has been fixed at 75.000 USD (58.000 USD excluding legal fees and costs); it is up to the passengers to take out additional insurance[136]. The carrier, in the case

[130] Dempsey/Milde, p. 29
[131] Shawcross/Beaumont, para. 342; Article 39/2 of the Warsaw Convention provides that the denunciation would become effective six months after notification.
[132] Diederiks-Vershoor, p. 162.
[133] Ibid., p. 163.
[134] For further information see. Lowenfed Andreas F. /Mendelsohn Allan I., The United States and The Warsaw Convention, 80 Harv. L. Rev. 497 (1966-1967), p. 497 - 602
[135] Giemulla/Schmid, history, para. 5.
[136] Diederiks-Vershoor, p. 163.

of death or injury of a passenger, can no longer avail himself of liability limitation clauses contained in article 20/1 of the Warsaw Convention stating that the carrier will not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible to take such measures. This meant that it changed the concept of fault liability with an absolute liability in the carriage of passengers. It retains article 25 of the Warsaw Convention concerning unlimited liability in cases of wilful misconduct or gross negligence. Furthermore, the carrier have to notify every passenger in writing of the possible applicability of the provisions relating to limitation of liability contained in the Convention at the same time as the ticket is issued. The notice (the 'Montreal Advice)' was a statement, required in no less than 10 point type, that the flight was governed by international law and the carrier's liability might be limited to 75.000 USD[137]. However, no penalties for failure to do so have been included in the Montreal Agreement[138].

The decision, as well as the so-called "Montreal Agreement" applies only for the carriage of passengers originating, terminating or having an agreed stopping place in the United States of America. It is binding on foreign air carriers operating into or from that country[139]. Article 2 of the Montreal Agreement makes it clear that the applicability of the Agreement depends upon a special contract between the passenger and the airline. The agreement came into force as between the original signatories on its approval by the CAB. Other carriers may become parties to it by signing a counterpart of the agreement and depositing it with the CAB[140]. Any carrier may withdraw by giving twelve months written notice to the CAB and other parties[141]. To ensure the uniform acceptance of its terms, all foreign airlines are required to sign the Agreement as a condition precedent to receiving a Foreign Air Carrier Permit to operate in the USA[142].

The Montreal Agreement is neither a Convention nor an international agreement linking with the International law. In addition, it is not an amended form or part of the Warsaw Convention or of the Hague Protocol, but a private agreement between the air carriers and the US Civil Aeronautics Board. In other words, it is a bilateral agreement or a series of

[137] Goldhirsh, p. 7
[138] Diederiks-Vershoor, p. 163.
[139] Mankiewicz, p. 8.
[140] Shawcross/Beaumont, para. 344.
[141] Ibid.
[142] Kreindler, para.10.01(5), p.10-16.

agreements between the United States and international air carriers operating from, to or via United States, but only insofar as the US citizen passengers are concerned[143]. The agreement applies only to death or personal injury, not to loss or damage of baggage or cargo.

It will be noted that the agreement, so far as it has no more than merely contractual force, derives its authority in law from its approval by the Civil Aeronautics Board acting under United States legislation, though its text was filed with other governments as required by their own law[144]. Although intended to be an 'interim solution' it remained the dominant liability regime some thirty years after its 1966 creation[145].

2. The IATA Intercarrier Agreement, 1995

The last decade of the twentieth century has witnessed several attempts to modernize the Warsaw System on air carrier liability. New initiatives both at national and international levels have been taken. The national, regional and international bodies like the European Union, the ICAO and the IATA have proposed and taken unilateral action to remedy perceived deficiencies of the Warsaw system[146]. The most pressing need has been the upward revision of low limits of liability application in case of death of or injury to passengers. It has compelled the world community to take necessary measures to rescue Warsaw system from collapsing[147].

Many airlines, in particular those from developed countries, unilaterally increased their limit of liability for passenger's death or injury to 100.000 SDRs (equivalent to about US$ 137.000)[148]. Italy adopted this limit for all Italian carriers and all other carriers operating from, to or via Italy by law. All Japanese air carriers adopted, with the approval of their government, a new tariff provision according to which they would apply a two-tier system of liability in November 1992. Up to the sum of 100.000 SDRs they would accept liability based on presumed fault with a reversed burden of proof defence of 'all necessary measures'

[143] Batra, p. 16.
[144] Shawcross/Beaumont, para. 344.
[145] Dempsey, Paul Stephen, International Air Cargo&Baggage Liability and the Tower of Bible, Geo. Wash. Int'l L. Rev., 2004, p. 257.
[146] Batra, p. 24.
[147] Ibid., p. 25.
[148] Milde, p. 164.

under article 20/1 of the Convention[149]. The Japanese took this step because of dissatisfaction with the existing liability system and because of a concern that no progress was being made toward the ratification of the various Montreal Protocols[150] cited above.

Sixty-seven airlines attended IATA's first session, held in Washington, D,C., in June 1995. The airlines agreed that the Warsaw Convention must be preserved, but acknowledged that the existing passenger liability limits for international carriage by air grossly inadequate in many jurisdictions and should be revised as a matter of urgency[151]. The IATA adopted at its 51st Annual General Meeting on 30 October 1995, in Kuala Lumpur an *'IATA Intercarrier Agreement on Passenger Liability (IIA)',* followed by '*Agreement on Measures to Implement the IATA Intercarrier Agreement (MIA)'* the essence of which was to adopt and implement the principles of the Japanese initiative[152]. The so-called 'umbrella' agreement was signed by twelve airlines in Kuala Lumpur, in Malaysia on 30 October 1995 and referred to as the IIA. This agreement is an interline agreement which makes it effective in most countries without any governmental involvement[153]. The IIA provides a general framework to guide each carrier incorporating general principles into the carrier's conditions of carriage and tariff filings[154]. Although the IIA provides overall framework of the Intercarrier Agreement, it is only an 'umbrella' agreement, requiring air carriers to develop appropriate provisions to implement it through their conditions of carriage and tariffs filed with governments, either unilaterally or by further agreement[155].

The second agreement '*Agreement on Measures to Implement the IATA Intercarrier Agreement'*, concluded in early 2 April 1996 in Montreal, was designed to implement the provisions of the IIA and is in turn referred to as the MIA[156]. The MIA addresses the language a carrier needs to incorporate the IIA into its conditions of carriage and tariffs[157].

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[149] Ibid.
[150] Lyall, Francis, The Warsaw Convention – Cutting the Gordian Knot and the 1995 Intercarrier Agreement, Syracusse J. Int'l L. & Com, Vol. 22, 1996, p. 76.
[151] Ibid.
[152] Milde, p. 163.
[153] Fincher, p. 320.
[154] Pickelman, Matthew R., 'Draft Convention for the Unificaition of Certain Rules for International Carriage by Air: The Warsaw Convention revisited for the last time?, J.Air Law&Com., Vol. 64, p. 290.
[155] Ibid.
[156] Whalen, Thomas J., Rebirth of the Warsaw Convention: The IATA Intercarrier Agreements, Annals of Air and Space Law, Vol. XXII-I, 1997, p. 326.
[157] Pickelman, p. 289.

The Air Transport Association (ATA), a trade association of American carriers, also concluded its own implementing agreement, which differed in some respects from the MIA. This IATA Intercarrier Agreement to be included in 'Conditions of Carriage and Tariffs' is referred to as the IPA[158]. The IPA pertains to U.S. carriers implementing the IIA and MIA provisions, while the MIA further defines the IIA and provides mandatory and optional provisions for carriers to include in their conditions of carriage and tariff filings[159]. The IPA is the special contract by which U.S. carriers will implement the IIA and MIA into their conditions of carriage and tariffs, and thereby terminate each carrier's participation in the Montreal Interim Agreement of 1966. All major U.S carriers are signatories to the IPA.[160].

Intercarrier Agreement on Passenger Liability (IIA) suggested two-tier liability system (absolute liability up to SDR 100.000 and unlimited liability under presumption of negligence). Signatory carriers to the agreement waived the limitation of liability for recoverable compensatory damages in article 22/1 of the Convention as to claims for death, wounding or other bodily injury of a passenger within the meaning of article 17[161]. However, a carrier has the option to waive any defence under the Warsaw Convention up to a specified monetary amount of recoverable damages[162]. It provides liability of the carrier up to 100.000 SDR irrespective of the carrier's fault. In other words, they accepted absolute liability up to that limit. The agreement added optional provisions for carriers, permitting damages to be determined in accordance with the law of the domicile or permanent residence of the passenger[163].

In addition, it provides liability of the carrier in excess of 100.000 SDRs on the basis of the carrier's negligence with defence of contributory negligence. The carrier could invoke the "all necessary measures" defence of article 20 for claims exceeding 100.000 SDRs. In addition, contributory negligence of the passenger could be invoked to reduce carrier liability[164]. The signatory carriers to the IIA agreed to implement the provisions of the IIA no

[158] Milde, p. 163
[159] Pickelman, p. 290.
[160] Ibid.
[161] Milde, p. 163.
[162] Fincher, p. 321.
[163] Whalen, Thomas, The Warsaw Convention: Historical Background and International Efforts to Modernize the Liability Regime for Air Carriers, Unif. L. Rev., 1997, p. 336.
[164] Dempsey, p. 266.

later than 1 November 1996 or upon the receipt of perquisite government approvals, whichever is later[165].

The carriers who sign into the MIA agree to incorporate the provisions of the agreement into their conditions of carriage and tariffs. This enables the agreement to become part of the airlines' contract with the passenger[166]. The MIA, like the IIA, states that the carrier will not invoke the liability the liability limits available under the Warsaw Convention article 22/1 for recoverable compensatory damages falling under the article 17 of the Warsaw Convention. The MIA requires that the carrier not assert any defences available under article 20/1 of the Warsaw Convention up to 100.000 SDR. This provision differs slightly from the IIA in that it allowed the carrier the option of waiving any defence up to a certain amount. The MIA also gives the carrier the option to limit the waiver to specific routes. The MIA has been signed by 46 carriers[167].

The IATA Agreement came into force on 14 February 1997 and it is claimed that it is in force for airlines carrying over ninety percent of all international air transport of passengers. The IATA agreement has thus become a benchmark of what is acceptable to industry, insurers and the travelling public[168]. The IIA and MIA will have significant consequences for those carriers which had signed them. Legal liability in international air transportation will no longer be uniform, with some carriers adhering to the IATA unlimited liability regime, and others adhering to the traditional Warsaw limited liability regime[169]. Because the IATA Intercarrier Agreement is based on contract and not law, the need to formally amend the Warsaw Convention's liability provisions have remained because contractual agreements cannot achieve the dual goals uniform liability limits and systematic legal procedures set out by the drafters of the Warsaw Convention. An air carrier bound by a private contract is just not the same as being held to the letter of the law or globally adopted treaty[170].

[165] Article 5 of the IATA Intercarrier Agreement on Passenger Liability.
[166] Fincher, p. 321.
[167] Ibid., for further information see Fincher p. 320 seq.
[168] Milde, p. 165.
[169] Whalen, (Historical Background and International Efforts), p. 334.
[170] Pickelman, p. 292.

V. THE MONTREAL CONVENTION OF 1999

1. Preparatory Work within ICAO

After the 1975 International Conference, ICAO did not undertake any specific action for the modernization of the 'Warsaw system'. States were of the view that any further action in that direction would jeopardize the progress of ratification of the 1975 protocols[171]. After the, adoption of the four Protocols in 1975, ICAO Assemblies only kept exhorting the contracting States to ratify Additional Protocol No. 3 and Montreal Protocol No. 4 until 1995 when the industry's initiative started a new momentum and overtook the inertia of States[172]. The ICAO Council initiated the process that eventually gave rise to the 1999 Convention on 15 November 1995, just two weeks after the adoption in Kuala Lumpur of the IATA Passenger Liability Agreement. The general work program of the ICAO Legal Committee was amended by inserting a new item entitled 'The modernization of the Warsaw System and review of the ratification of international air law instruments'[173].

An ICAO study group on the modernization of the Warsaw system was established in February 1996[174]. Instead, a Secretariat Working Group, a body not foreseen in the applicable rules, procedures and established practice, composed of officials of the ICAO Legal Bureau and experts selected by the President of the Council met in two sessions during 1996 for very brief meetings. Thereafter, a rapporteur was appointed whose report was presented to the council in early 1997. The Council then convened the 30th Session of the Legal Committee to meet at Montreal from 28 April to 9 May 1997. In spite of lack of consensus on some basic issues, the Committee considered it draft to be final and ready for presentation to a Diplomatic conference[175]. Nevertheless, unusual practice was applied and the secretariat Study Group was convened for two more brief additional sessions and eventually a new, unprecedented and unrepresentative body was established, with its members appointed by the President of the ICAO Council. The Special Group on

[171] Dempsey/Milde, p. 36.
[172] Milde, p. 168, For further information about the preparatory work within the ICAO, see Milde, Michael, 'The Warsaw system of Liability in International Carriage by Air, Annals of Air and Space Law, Vol. XXI, 1997, p. 167 -173.
[173] Milde, p. 168.
[174] Ibid.
[175] Ibid., p. 169.

Modernization and Consolidation of the Warsaw System (SGMW) was a body of doubtful constitutional standing[176].

In spite of these procedural flaws in the preparation of the draft, it has to be admitted that the SGMW prepared between 14 to 18 April 1998 a solid and convincing draft Convention which was presented to the Diplomatic Conference as the text approved by the 30th Session of the ICAO Legal Committee, Montreal, 28 April-9 May and refined by the Special Group on the 'Modernization and Consolidation of the Warsaw System', Montreal, 14-18 April 1998[177]. This text prepared without wide international participation and without due transparency was submitted to the Diplomatic Conference held in Montreal from 11 May to May 28, 1999 and attended by 118 delegations of states. These sessions resulted in the Montreal Convention of 1999 entitled *'The Convention for the Unification of Certain Rules for International Carriage by Air'* and it was signed by representatives of fifty-two nations on 28 May 1999, including United States[178].

The Montreal Convention entered into force on 4 November 2003. As of mid-2007, seventy-five nations had ratified the Montreal Convention[179].

2. The Characteristic and Structure of the Montreal Convention of 1999

a. Consolidation of the Warsaw Convention of 1929

The Montreal Convention adopted on 28 May 1999 is a separate and distinct new instrument and not yet another 'Protocol' for an amendment of the 'Warsaw System' among its parties the Convention shall replace the 'Warsaw System' and prevail over it[180]. It consolidated into one single document the instruments of the fragmented Warsaw System and adopted the best elements of the Guatemala City Protocol of 1971, Protocol Nos. 3 and 4 of 1975 and the

[176] Ibid.
[177] Ibid.
[178] Dempsey/Milde, p. 40.
[179] For a current list of signatories and ratifying States, see the ICAO Legal Bureau website, http://www.icao.int/icao/e/leb, visited June 18, 2008.
[180] Dempsey/Milde, p. 40; Article 55 of the Montreal Convention of 1999.

Guadalajara Convention of 1961, including the modernization and simplification of the documents of carriage[181].

The structure of the Warsaw Convention has been preserved by the Montreal Convention of 1999 while consolidating provisions of existing legal instruments such as the Hague Protocol of 1955 and Montreal Protocols of 1975 for incorporation into the Convention. In addition, articles 39 to 48 incorporate most of the provisions of the Guadalajara Convention in Chapter V. of the Convention entitled 'Carriage by Air Performed by a Person Other than the Contracting Carrier'[182]. In addition, articles 49 to 52 have been added in chapter VI. of the Convention entitled 'Other Provisions'.

The Montreal Convention has the following seven chapters: Chapter I- General Provisions; Chapter II– Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo; Chapter III- Liability of the Carrier and Extent of Compensation for Damage; Chapter IV- Combined Carriage; Chapter V- Carriage by Air Performed by a Person Other than the Contracting Carrier; Chapter VI- Other provisions; Chapter VII- Final Clauses. It may be noted that whereas the Warsaw Convention has 41 articles, the Montreal Convention consists of 57 articles with the new added articles.

Liability provisions of the Convention have been inspired from two-tier liability system of the 1995 IATA Intercarrier Agreement.

As mentioned above, provisions of Guadalajara Convention has been incorporated into the Convention in Chapter V. of the Convention.

Articles 4 through 16 of the new Convention incorporate the modernized cargo documentation provisions of Montreal Protocol No. 4 and provide for the use of electronic air waybills. These articles of the Montreal Convention are taken from almost identical provisions in Montreal Protocol No. 4[183].

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[181] Milde, p. 173.
[182] Sözer, Bülent, Türk Hukukunda ve Uluslararası Hukukta Havayolu ile Yük Taşıma Sözleşmesi, Yeditepe Üniversitesi Hukuk Fakültesi Dergisi Yayın No. 10, İstanbul 2007, p. 44.
[183] Whalen, Thomas J., (The New Warsaw Convention), p. 14.

In addition, although Guatemala City Protocol of 1971 and Montreal Protocol No. 3 have many shortcomings and have not succeeded in coming into force, they nevertheless have features which are considered worthy of adoption. Several provisions relating passengers have been incorporated, mostly with some modifications[184].

The interrelationship of the Convention with other instruments of the Warsaw System is set forth at article 55 of the Convention[185]. The basic rule is that the new Convention shall prevail as between the State Parties; as between a State Party and another State that is not a State Party to the new Convention, the instrument of the Warsaw System to which both States are parties will apply. Where the origin and destination of the travel are located within a single State, which is party to the Montreal Convention, the Montreal Convention will also apply.[186]. The Montreal Convention in Article 55 does not appear to displace the applicability of the Warsaw Convention where the other state involved is not a Party to the Montreal Convention, but is Party to the Warsaw Convention[187]. In that case, the Warsaw Convention, as amended, will govern, to the extent both States involved adhere to the Warsaw Convention and the same amendments to the Warsaw Convention[188].

b. The Content of the Montreal Convention of 1999 in General

The Convention removes the formalities of the documents of carriage and permits electronic data processing to replace the 'paper' documents, and also removes any relation between the particulars and form of the documents of carriage and the regime of liability[189]. Article 3 of the Montreal Convention allows the airlines to use electronic ticketing. In addition, article 3 requires minimal information, including a notice that the Warsaw may be applicable and may limit the carrier's liability, even though 'limits' have been eliminated for passenger liability. However, failure to provide this notice imposes no sanction on the carrier[190]. All the very

[184] Cheng, (A New Era in the Law of International Carriage by Air), p. 846.
[185] Weber Ludwig./Jakob A., The Modernization of the Warsaw System: The Montreal Convention of 1999, Annals of Air and Space Law, Vol. XXIV,1999, p. 346.
[186] Ibid.
[187] Whalen, (The New Warsaw Convention), p. 25.
[188] Ibid.
[189] Ibid., p. 42.
[190] Whalen, (The New Warsaw Convention), p. 16.

drastic sanctions in Warsaw and Warsaw/Hague (Articles 3/2, 4/2, and 9) against non-compliance with the rules on documents of carriage are removed[191].

Article 33 of the Montreal Convention provides an additional jurisdictional choice to four that previously available[192]. The Convention establishes a "fifth jurisdiction" only in respect of an action for a passenger's injury or death only upon cumulative fulfilment of a number of requirements[193]. Accordingly, a legal action can be brought in a state party where, at the time of accident, the passenger had his or her principal and permanent residence provided the air carrier meets criteria of commercial and operational presence in that State[194].

Under the Warsaw Convention, there is no recovery for mental injuries alone. Draft language to provide recovery solely for mental injures was rejected by the ICAO Conference, at the urging of the Air Transport Association (ATA) and the United States delegation, among others[195]. The Montreal convention does not expressly provide for the recovery of 'mental injury' as a separate, stand-alone head of damages[196]. Article 29 recites that the liability under the Convention does not allow for the recovery of 'punitive, exemplary or any other non-compensatory damages'.

Article 28 of the Montreal Convention establishes that in case of aircraft accidents resulting in a passenger's injury or death, if required by its national law, the air carrier shall provide advance payments without delay in order to assist entitled persons in meeting immediate economic needs[197].

The Montreal Convention is no longer for airlines. It is a Convention for consumers/passengers. The Government Parties to the Montreal Convention stated in the Preamble as one of the factors underpinning the new Convention: 'Recognizing the

[191] Cheng, (A New Era in the Law of International Carriage by Air), p. 848.
[192] Weber / Jakob, p. 345.
[193] Ibid..
[194] Ibid..
[195] Whalen, (The New Warsaw Convention), p.17.
[196] Weber/Jakob, p. 343.
[197] Ibid.

importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'[198].

Article 50 of the Convention provides that states agree to require their carriers to maintain 'adequate insurance' covering their liability under this Convention.

c. Liability of the Carrier With Respect to Passengers, Baggage, Cargo and Delay

With respect to passengers, the Montreal Convention embodies the liability regime pioneered by the '*Japanese initiative'* in 1992 and accepted by the 1995 '*IATA Intercarrier Agreement on passenger Liability'*, the main feature of the regime is the two-tier liability system for death or wounding of the passenger with absolute liability up to 100.000 SDRs and presumptive liability in an unlimited amount[199]. The basis of the carrier's liability of the first tier has been changed from rebuttable presumed fault (Warsaw/Hague article 20/1) to absolute, 'upon condition of only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operation of embarking or disembarking' (article 17/1), with all defences removed (article 21/1), except contributory negligence as provided in article 20[200].

With respect to baggage, under the new Convention 'baggage', means both checked and unchecked baggage, but the regime of liability differs[201]. Articles 17/2 and 20 make the carrier's liability for checked baggage, in respect of destruction, loss, or damage, while the baggage is in charge of the carrier, absolute, except for inherent defect and contributory negligence[202]. The carrier's liability for damage caused to 'unchecked baggage', including personal items, dependent on proven fault and the carrier is liable if damage resulted from its fault or that of its servants or agents[203].

With respect to cargo, article 22/3 provided that the limit of the carrier's liability in respect of cargo remains basically the same as laid down in the original Warsaw Convention, 250

[198] Whalen, (The New Warsaw Convention), p. 14.
[199] Dempsey/Milde, p. 41.
[200] Cheng, (A New Era in the Law of International Carriage by Air), p. 849.
[201] Milde, p. 854.
[202] Cheng, (A New Era in the Law of International Carriage by Air), p. 848.
[203] Ibid.

Poincaré francs translated into SDR 17 per kilogramme. However, following MP4, the basis of the carrier's liability for damage to cargo, except damage resulting from delay (article 19), has been changed from rebuttable presumed fault to absolute liability (article 18/1), apart from exceptions specified in article 18/2, such as inherent defect or war, and defence of contributory negligence (article 20)[204]. Furthermore, article 22/5 provided that the limit of SDR 17, in the case of checked baggage and cargo, is now unbreakable, although the consignor can obtain a higher limit in advance by paying, if required, a supplementary sum (article 22/3).

With respect to delay, the Convention fixed a limit for compensation in the case of damage caused by delay as specified in article 19 in the carriage of persons; the liability of the carrier the each passenger is limited to 4.150 SDR under the article 22/1 of the MC.[205]. The limits for liability for destruction, loss, damage or delay in the carriage of baggage (checked or unchecked) and of cargo are respectively 1.000 SDR per passenger, and 17 SDR per kilo (as mentioned above). The limits in the case of delay in the carriage of passengers, and destruction, loss, damage, or delay in the carriage of baggage do not apply if it is proved that the damage was caused by 'wilful misconduct' in its article 25, as subsequently paraphrased in the same article in Warsaw/Hague (Montreal, art. 22/5), on the part of the carrier or its servants and agents. Full compensation would then be recoverable[206].

VI. EUROPEAN REGULATIONS OF 1997 AND 2002

1. In General

Any introduction to international air law would be incomplete without reference to some of the more significant elements of legislation in the field of air transport that have been introduced by the European Union over the past twenty years or so. The reasons for including a summary of EU legislation are primarily because of Europe's role in the forefront of international aviation. Not only is Europe a major centre of aerospace manufacturing expertise and capability, with airbus industries being the only realistic global

[204] Ibid., p. 849.
[205] Batra, p. 438.
[206] Cheng, Bin, The 1999 Montreal Convention on International Carriage By Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention, ZLW, Vol. 49, 2000, p. 489.

competitor to the major US manufacturers, but also because Europe is one of the most powerful trading blocks in the world economy. Additionally Europe is home to a number of the world's major air carriers that serve the world's second largest air transport market. Finally, and not least, the scope and geographical reach of some elements of European legislation means that no part of the world aviation industry is beyond its grasp[207].

During the 1970s and 1980s, the European Court of Justice delivered a series of decisions that mapped out the fundamental legal underpinnings of EC/EU regulation of air transport. Until these cases clarified the law, it was unclear whether the Commission and Council had jurisdiction under the Treaty of Rome to regulate air transport. As the court delineated, the Commission and Council did indeed have such power. Through these cases, the Court detailed the structural extent of air transport regulatory power, and constructed a framework in which the Commission and Council could proceed with liberalization[208].

Within the legal framework of EC law, the air transport regime retained a unique position. Air transport is specifically mentioned once in article 80/2 (ex article 84/2) to specify that measures on air transport policy were to be taken as and when the Council so decided. Based on article 80/2 (ex article 84/2) an air transport policy was eventually formulated and implemented in the form of three packages designed to liberalize the EC air transport market. First package dates back to 1987, the second to 1990 and the implementation of the third package commenced on January 1993. From 1 April 1997, the operation of domestic routes in one Member State by air carriers of other EC Member States was permitted, whereby the aim of the third package to establish a fully liberalized internal air transport market was realized[209].

In 1991, the European Commission received a report which was sharply critical both of the airline industry and of the 'stagnation, inertia and reliance on unpredictable developments' seen as characterising approaches adopted in the United States. The report favoured a new

[207] Diederiks-Verschoor, p.67
[208] Dempsey, Paul, European Aviation Law, Kluwer International Law, Netherlands, 2004, p. 29.
[209] Diederiks-Verschoor, p. 72.

inter-carrier agreement, along the lines of Montreal Agreement, as the most likely method of averting the collapse of the Warsaw System[210].

In October 1992, the Commission issued a Consultation Paper which noted that mandatory compensation limits (e.g., those of Hague Protocol) were totally insufficient and unacceptably low in terms of reasonable minimum consumer protection standards. The Commission saw the need for a system which would give fair compensation (at least the same as in non-aviation accidents in industrialized countries), simple and speedy procedures, and which would be transparent to passengers who could consider the need for individual insurance. The Commission invited comments on mandatory as opposed to optional rules; as to the question of increased liability limits or unlimited liability; and as to the relative merits of an approach operating within or independently of the Warsaw System. On the last point, the Commission noted the 'undisputable advantages of the Warsaw system in terms of providing broadly accepted standardised procedures and a reasonable basis for broader regional coverage[211].

As part of the European debate, the European Civil Aviation Conference established a Task Force on the Warsaw Convention Liability System as part of its work on Intra-European Air Transport Policy[212]. The first initiative took place in January 1993 at the instigation of the European Commission. The transport directorate called a meeting of the member states which was held on 18 January and which was also attended by Norway and Sweden. The initiative was intended to include all EU member states and any other states, which had concluded 'carriage by air' agreements with the thresholds were too low, but also by the need to formulate a unified. It was not only motivated by the belief that liability thresholds were too low but also by the need to formulate a unified body of rules applicable to all EU member states. It was also thought necessary to introduce speedy compensation procedures for the payment of minimum amounts. On 23 March 1993, a working group was created to produce the draft of an EU Directive regulating air carrier's liability with higher compensation thresholds binding upon EU carriers and non-EU carriers conducting traffic in EU airspace. The European Commission also investigated the possibility of either

[210] Shawcross/Beaumont, VII, para. 198.
[211] Ibid.
[212] Ibid.

completely abolishing the liability thresholds or raising them to ECU 250.000-300.000 before finally resolving that they should be fixed at SDR 500.000[213]. After a consultation with Member States and other interested parties in March 1993, the Commission commissioned a study by the London solicitiors' firm Frere Cholmeley Bischoff on the cost of implications of higher mandatory compensation limits for passengers involved in air accidents.

2. Council Regulation 2027/97

Having considered the report prepared by Frere Cholmeley Bischoff, the European Commission decided that formal action by the European institutions was necessary. It produced the text of a possible Council Regulation on air carrier liability in case of air accidents, with an explanatory paper which set out the Commission' assessment of the current position. This declared that the Warsaw system, despite its deficiencies, provided a uniform basis enjoying a worldwide recognition for the settlement of claims to passengers in aviation accidents; but the current mandatory limits constituted an anachronism; many of them were unacceptably low in terms of reasonable minimum consumer protection[214].

On 15 February 1996, the Commission finally presented its proposal for a Regulation (EC) upon the Liability Applicable to Air Transport Undertakings in the event of Accidents to be issued by the Council of Ministers. It contained substantial amendments to the text proposed a year earlier[215]. The EU recognized that it was desirable; for both passengers and carriers, to have consistent liability policies throughout the union, and to that end the Council adopted Regulation 2027/97 on 9 October 1997, to come into force on 17 October 1998, one year after the date of its publication in the Official Journal[216]. The EC Regulation has been in force since 18 October 1998 and is directly enforceable in every member state of the European Community. It is based upon the scheme of liability for personal injury to passengers established by the Warsaw Convention but unlike the latter it does not impose

[213] Giemulla/Schmid, Montreal Convention, Commentary, para. 18
[214] Shawcross/Beaumont, VII, para. 199.
[215] Ibid, para. 200-210.
[216] Dempsey/Milde, p. 35.

liability upon 'carries' but upon 'Community carriers'. This latter term encompasses any airline which requires an EU operational licence under EC Regulation No. 2407/92[217].

Regulation 2027/97 lays down the obligations of Community air carriers in relation to liability for damage sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations embarking or disembarking[218]. The liability of a Community air carrier for damages sustained in the event of death wounding or any other bodily injury by a passenger in the event of accident is not to be subject to any financial limit, be it defined by law, convention or contract. In construing European texts, some importance attaches to the recitals in the preamble; these set out thinking behind the substantive provisions. In the case of this Regulation, the recitals include statements that limit of liability set by Warsaw Convention is too low by today's economic and social standards. And that this had led Member States to increase the limit but to different levels; and that the Convention only applies to international transport, whereas in the internal aviation market the distinction between national and international transport has been eliminated so that it is appropriate to have the same level and nature of liability in both national and international transport[219].

The Regulation had a force of law directly applicable to all members of the EU. Article 3 of the regulation provides that the liability of a carrier is not subject to any limit defined by law, convention, or contract[220]. Furthermore, strict liability applies up to 100.000 SDRs. In other words, for any damages up to the sum of the equivalent in euros of 100.000 SDRs, the Community air carrier may not exclude or limit his liability by proving that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures[221]. Notwithstanding this provision, if the Community air carrier proves that the damage was caused by, or contributed to by the negligence of the injured or deceased passenger; the carrier may be exonerated wholly or partly from its liability in accordance with applicable law. In respect of damages over the 100.000 SDRs, the normal

[217] Giemulla/Schmid, (Montreal Convention), Commentary, para. 28.
[218] Council Regulation (EC) 2027/97, 17.10.1997, at 1, Preamble. This incorparates the language of article 17 of the Warsaw Convention.
[219] Shawcross/Beaumont, VII, para. 200–210
[220] Council Regulation (EC) 2027/97, art. 3/1(a)
[221] Ibid, art. 3/2.

Warsaw pattern applies; the passenger does not have to prove negligence but the carrier can rely on the defence in article 20[222]. The Regulation also grants persons entitled to compensation under article 5 paragraph 1 the right to an interim payment within fifteen days to cover the immediate costs of an accident; the amount paid must be 'in proportion to the seriousness of the case'. In the event of death, it must be at least 15.000 SDR per passenger[223]. An advance payment does not constitute recognition of liability and may be offset against any subsequent sums paid on the basis of the Community air carrier liability, but is not returnable, except where it is shown that the damage was caused by, or contributed to by the injured or deceased passenger[224] or that the person who received the advance payment caused, or contributed to, the damage by negligence or was not the person entitled to compensation[225].

The Regulation is limited to passenger liability, and no reference is now made, except for the general reference to the work of ICAO, to baggage and cargo liability. Although provision as to the 'fifth forum', the jurisdiction of the courts of passenger's domicile, appeared in the final Commission proposals it has no place in the Regulation.

The Regulation is not limited to international air carriage between the member states but includes domestic flights within the borders of individual member states which are operated by airlines registered within the community. Third party states are not, however, included within the scope of the Regulation[226].

3. The Amending Regulation of 889/2002

The Regulation 2027/97 was radically amended by European Parliament and Council Regulation in May 2002, which came into force on 28 June 2004. Its declared purpose was to amend Council Regulation (EC) No 2027/97 'in order to align it with the provisions of the Montreal Convention, thereby creating a uniform system of liability for international air transport', a strategy which minimises but does not resolve the conflict between EU and

[222] Shawcross/Beaumont, VII, para. 211–212.
[223] Council Regulation (EC) 2027/97, art. 5/2
[224] Ibid, art. 3/3.
[225] Ibid, art. 5/3.
[226] Giemulla/Schmid, Montreal Convention, Commentary, para. 20.

wider international law which was part of the challenge to the original Regulation. The effect of the regulation seems to be to oblige Member States to apply the Montreal Convention in cases where they are under a treaty obligation to apply some other instrument in the Warsaw system[227].

The amending Regulation takes the form of a series of amendments to Regulation 2027/97 but they are so comprehensive as to constitute virtually a new text. The Amending Regulation declares that it implements the relevant provisions of the Montreal Convention 1999 in respect of the carriage of passengers and their baggage by air and lays down certain supplementary provisions, and also extends the application of these provisions to carriage by air within a single Member State; the baggage provisions are new[228].

The provisions of the original regulation as to the principles of carrier liability are replaced by a simple statement that the liability of a Community air carrier in respect of passengers and their baggage is governed by all provisions of the Montreal Convention 1999 relevant to such liability[229]. A new provision[230] deals with supplementary sum, which, in accordance with article 22/2 of the Montreal Convention, may be demanded by a Community air carrier when a passenger makes a special declaration of interest in delivery of their baggage at destination. This sum is to be based on a tariff, to be made available to passengers on request, which is related to the additional costs involved in transporting and insuring the baggage concerned over and above those for baggage valued at or below the liability limit.

The provisions as to advance or interim payments are restated[231]; the minimum advance in the event of death is raised to equivelant of 16.000 SDRs per passenger, an advance payment is declared not to be returnable, except in the cases prescribed in article 20 of the Montreal Convention or where the peson who received the advance payment was not the person entitled to compensation[232].

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[227] Shawcross/Beaumont, VII, para. 214.
[228] 'Baggage' is defined, unless otherwise specified, to mean both both checked and unchecked baggage with the meaning of article 17/4 of the Montreal Convention. Reg 2027/97, article 2(d) as substituted by Regulation 889/2002, article 1/3.
[229] Regulation 2027/97, art. 3/1 as substituted by Reg 889/2002, art. 1/4.
[230] Regulation 2027/97, art 3a as inserted by Regulation 889/2002, article 1/5.
[231] Regulation 2027/97, art. 5/2 as substituted by Reg 889/2002, art. 1/7.
[232] Regulation 2027/97, art. 5/3 as substituted by Reg 889/2002, art. 1/7.

The insurance obligation of Community air carriers is restated[233] to require air a Community air carrier to be insured up to a level that is adequate to ensure that all persons entitled to compensation receive the full amount to which they are entitled in accordance with the Regulation. Insurance cover for passenger, baggage and cargo liability will be part of the wider insurance cover required of all carriers and aircraft operators under EC law[234].

The provisions of the original Regulation as to the provisions of information to passengers are greatly expanded. It is provided that all air carriers must, when selling carriage by air in the Community, ensure that a summary of the main provisions governing liability for passengers and their baggage, including deadlines for filling an action for compensation and the possibility of making a special declaration for baggage, is made available to passengers at all points of sale, including sale by telephone and via the internet[235]. In order to comply with this requirement, Community air carriers must use a notice set out in the Annex to Regulation. It is provided that such summary or notice cannot be used as a basis for a claim for compensation, nor to interpret the provisions of the Regulation or the Montreal Convention.

In addition, all air carriers must, in respect of carriage by air provide or purchased in the Community, provide each passenger with a written indication of the applicable limit for that flight on the carrier's liability in respect of death or injury, if such a limit exists; the applicable limit for that flight on the carrier's liability in respect of destruction, loss of or damage to baggage and a warning that baggage greater in value than this figure should be brought to the airline's attention at chaeck-in or fully insured by the passenger prior to travel; and the applicable limit or that flight on the carrier's liability for damage occasioned by delay[236].

In the case of all carriage performed by Community air carriers, the limits indicated in accordance with these information requirements are to be those established by the Regulation unless the Community air carrier applies higher limits by way of voluntary undertaking. In

[233] Regulation 2027/97, art. 3/2 as substituted by Reg 889/2002, art. 1/4.
[234] Shawcross/Beaumont, VII, para. 216.
[235] Regulation 2027/97, art. 6/1 as substituted by Reg 889/2002, art. 1/8.
[236] Regulation 2027/97, art. 6/2 as substituted by Reg 889/2002, art. 1/8.

the case of all carriage performed by non-Community air carriers, the information requirements apply in relation to carriage to, from or within the Community[237].

§ 2- TURKISH CIVIL AVIATION ACT

1. In General

The Warsaw Convention as amended by the Hague Protocol has been ratified by Turkey on 25.3.1978 and entered into force on 23.6.1978[238]. Turkey also has been a party to the Montreal Protocol No. 4 as of 12 September 1998.

Despite the article 764 of the Turkish Commercial Act, articles of 768-797 of the Turkish Commercial Act, with the inclusion of 765-767, has been applied to contract for the carriage of cargo by air before the TCAA entered into force[239].

The text of the Warsaw Convention 1929 as amended by the Hague Protocol 1955 is the basis of provisions of the TCAA[240], dated 14 October 1983 and numbered 2920, which govern contracts of carriage and the liability of the carrier. In other words, the provisions of the TCAA has been taken identically from, except some additional articles and translation mistakes, the text of the Warsaw Convention 1929 as amended by the Hague Protocol 1955.

As systemically, TCAA has seven chapters and these chapters have been separated to several parts. Chapter III governs carriages by air (article 106-119) and it has two parts which consist of 14 articles. The first part of this chapter contains rules regarding domestic air carriages (art. 106-117), the second part (art. 118-119) contains provisions regarding 'lease and aircraft charter agreement', which are not at the type of contract of carriage, under the heading of 'Agreements of use of aircraft'. Chapter IV governs the contractual liability of the carrier under the heading of 'the liability resulting from contract of carriage'.

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[237] Regulation 2027/97, art. 6/3 as substituted by Regulation 889/2002, art. 1/8.
[238]The Act numbered 2073 and dated 13.01.1978 (Official Gazette 13 March 1977-15877) and the Cabinet decision based on this legislative act dated 29 September 1977 and numbered 7/13874 (Official Gazette 3 December 1977-16128). Both texts entered into force on 23.06.1978.
[239] Sözer, (Yeditepe), p. 59.
[240] Official Gazette 19.10.1983-18196.

2. The Principles Governing the Domestic Contract of Carriage by Air

a. In General

As noted above the provisions regarding to contract of carriage and the liability of the carrier, except some additional articles and some translation mistakes, have been taken identically from the Warsaw Convention 1929 as amended by the Hague Protocol 1955.

The provisions of the TCAA regarding to carriage by air will be applicable to all domestic carriages by air both in accordance with the rules chapter three, part one (under the heading of domestic carriages) and in accordance with the expression of article 106 of the TCAA. The Warsaw/Hague rules will be applicable, if the conditions are available, for the air carriages between Turkey and other States.

There are two interesting regulations under the TCAA. One of them takes place under the article 106 of the TCAA[241]. According to article 106 of the TCAA, if a dispute arose for the contract of domestic carriage and can not be found any provision governing this case, first the rules of the international Convention to which Turkey is party must be applied. If any provision can not be found in this international Convention, in that case the rules of Turkish Commercial Code will be applied. As a result of this article, it can be concluded that for the domestic carriage by air, the rules of the Warsaw/Hague Convention will be applicable after the national law.

The second interesting regulation is the article 124 of the TCAA[242]. Limitation of liability of the air carrier is permitted under the TCAA, however any rule has been provided in that article and this point has been left to the rules of Warsaw/Hague Convention. Under the article 124 of the TCAA, it has been provided that limitation of liability of the carrier will be determined by the rules of the Warsaw Convention 1929 as amended by the Hague Protocol 1955.

[241] Sözer, (Yeditepe), p. 60.
[242] Ibid.

The articles 106-132 of the TCAA governing contract of carriage, except the irrelevant and pointless articles of 117 and 132, has been taken from the Warsaw Convention 1929 as amended at the Hague 1955 (except partialy translation mistakes and partialy some original mistakes).

b- The Provisions Relating to the Domestic Carriage of Cargo by Air

Articles of 110-117 of the TCAA govern the carriage of cargo by air. Article 120 of the TCAA governs the liability of the carrrier for the death or wounding of a passenger or any other bodily injury to him and article 121 of TCAA governs the liability of the carrier for destruction, loss of or damage to any baggage and cargo. The articles from 122 to 132 contain common rules related to liability of the carrier for passenger, baggage and cargo.

Article 106 of the TCAA provides the sequence of the rules which will be applied for the domestic carriage of cargo. According to this article, the sequence must be as follows:

(i) First, the rules of the TCAA will be applied. If there cannot be found any provision governing the present case,
(ii) Then, the rules of International Conventions to which Turkey is a party will be applied. If there is not any provision governing the present case,
(iii) Then, the rules of the Turkish Commercial Act will be applied.

According to *Sözer,* there is a major mistake in determination of sequence of the rules under the article 106 of the TCAA and it does not contain two basic and important categotory of the rules. These are the provisions of the contract of carriage and the provisions of the Turkish Law of obligations. While hearing a case, the judge or arbitrator of the possible dispute will take the provisions of the contract of carriage and the law of obligations into consideration[243].

According to *Sözer,* the sequence of the rules for a possible dispute must be as follows:

[243] Sözer, (Yeditepe), p. 61.

aa. Statutory Provisions:

The statutory provisions must take the first place while resolving the disputes in all legal cases. In our case, the statutory provisions exist both in the TCAA and in the Warsaw/Hague Convention. This means that the judge or the arbitrator of the case must first take the statutory provisions of the TCAA and Warsaw/Hague into consideration[244].

bb. Conditions of Contract

At the second tier, the conditions of contract, made between the parties, must be applied. In a contractual relation, the rights and obligations of the parties will be determined by the conditions of contract provided that these conditions are not contrary to the rules of statutory provisions[245].

cc. The Provisions of the TCAA

These are the provisions of the TCAA that govern the contract of carriage. In this respect, it is not possible to apply the articles 118-119 of the TCAA, since they are related with the lease and charter agreements. According to *Sözer,* the provisions of the TCAA, which refer to other provisions explicitly or impliedly, must be identified same as the provisions of the TCAA[246].

dd. International Agreements

As stated by article 106 of the TCAA international agreements must be understood as the agreements that govern the carriages by air. In accordance with the articles of 90 and 104 of the Turkish Constitutional Law, it will be determined whether Turkey is a party to an international Convention or not. Turkey also has to be one of the High Contracting Party of that International Convention. Article 40A of the Warsaw/Hague as inserted by the article XVII of the Hague Protocol provides that 'the expression High Contracting Party shall mean

[244] Ibid.
[245] Ibid, p.62.
[246] Ibid, p.63. For further information see Sözer, (Yeditepe), p. 62-63.

a State whose ratification of adherence to the Convention has become effective and whose denuncation thereof has not become effective'.

It could be said that article 106 of the TCAA refer to Warsaw/Hague Convention rules. If there is not any rule governing the present case under the TCAA, then the rules of the Warsaw/Hague will be applied. In other words, since Turkey is a party to the Montreal Protocol No. 4 (to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955) the rules of Warsaw/Hague/MP4 will be applicable[247].

ee. The Provisions of the Law of Obligations

Despite the TCAA does not state the law of obligations among the sequence of the rules under the article 106 of the TCAA and any reference made to the law of obligations, in accordance with the interpreation of this article, it could be possible to apply the rules of law of obligations after the application of the rules of the TCAA[248].

Since the contract of carriage in the legal sense is accepted as an 'independent contractor agreement', articles 355-371 of the law of obligations, which govern 'independent contractor agreement', must be applied. If it cannot be found any provision governing the present case, then the articles 1-181 which govern general provisions of the law of obligations will be applied[249].

ff. The Provisions of the Turkish Commercial Act

According to *Sözer,* despite the sequence as made by the article 106 of the TCAA, the provisions of the Turkish Commercial Act will be applied, if there cannot be found any

[247] For further information and discussion see Sözer, (Yeditepe), p. 64-68.
[248] Sözer, (Yeditepe), p. 68
[249] Ibid, p. 68-69

provision to apply governing the present case under the law of obligations[250]. However, it will be difficult to determine which provisions of the Turkish Commercial Act will apply. According to *Sözer*, article 106 of the TCAA refers to the articles of 1016-1178 of the Turkish Commercial Act governing the carriages by the sea[251].

As a result of above said explanations, if the judge or the arbitrator of the present case cannot found any provision to apply both under the TCAA and under the Warsaw/Hague system, he will first look to the provisions governing the 'independent contractor agreement'. If he cannot find any provision to solve the present case, then he will apply the general provisions of the law of obligations. If he still cannot find a solution, at the last stage he will apply the provisions of the Turkish Commercial Act governing 'freight contract'. As it can be seen, it is very complicated way to reach the result. However, according to *Sözer,* as legally it will consititute a right application than applying the other rules governing any other mode of transport.

c. The Provisions Relating to International Carriage by Air

The provisions of the Warsaw/Hague will be applicable for the international carriage by air between Turkey and other ratifiying states. As stated above, Turkey has ratifed both the Warsaw Convention as amended at the Hague and Warsaw Convention as amended at the Hague by Montreal Protocol No. 4 1975.

Article XV of the Montreal Protocol No. 4 provides that 'as between the parties to this Protocol, the Warsaw Convention as amended at the Hague in 1955 and this Protocol shall be read and interpreted together as one single instrument and shall be known as Warsaw Convention as amended at the Hague, 1955, and by Protocol No.4 of Montreal, 1975'.

According to article XVII and XIX of the Montreal Protocol No. 4, 'ratification of this Protocol by any State which is not a party to the Warsaw Convention as amended at the

[250]However, article 106 of the TCAA does not specify which articles of the Turkish Commercial Act will be applied. It is further explained by Sözer. See for further explanations and discussions Sözer, (Yeditepe), p. 69-70-71.
[251] Since the provisions of the air law inspired from the maritime law, this manner of interpretation seems acceptable. See Sözer, (Yeditepe), p. 71.

Hague, 1955, shall have the effect of accession to the Warsaw Convention as amended at the Hague, 1955, and by Protocol No. 4 of Montreal, 1975'.

In this respect, between Turkey and a state that ratified Montreal Protocol No. 4 would be governed by the Montreal Protocol No. 4 even this country had not ratifed Warsaw Convention or/and Warsaw/Hague Convention before.

If the country of departure and the country of destination follow different versions of the Convention, the 'lowest common denominator' applies[252]. In this respect, between Turkey and a state that only ratified Warsaw Convention would be governed by the Warsaw Convention alone.

Likewise, between Turkey and a state that only ratified Warsaw Convention as amended by the Hague Protocol would be governed by the Warsaw/Hague Convention.

§ 3- CONTRACT FOR THE CARRIAGE OF GOODS/CARGO[253] BY AIR

I. Contract for the Carriage of Cargo by Air

1. In General

According to Article 1/1[254], the Warsaw Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for hire (reward), and to gratuitous carriage performed by an 'air transport undertaking'. This requirement in conjunction with the reference to the 'agreement between the parties' in paragraph 2 of article 1 and in paragraph 3 to a 'contract' leads to the conclusion that the application of the Convention assumes the

[252] Kreindler, p. 10.01-08.
[253] We prefer to use 'Cargo' in this concept of study.
[254] Article 1 of the Warsaw Convention is concerned with the scope of application of the Warsaw Convention. Article 1 of the Montreal Convention 1999, apart from some slight alteration in wording and addition paragraph 4, it is unchanged from the Warsaw Convention as amended at the Hague. Paragraph 1 is virtually repeated word for word while paragraph 2 retains the definition of 'international carriage'.

existence of a contract of carriage[255]. This interpretation is also supported by article 3 of the Warsaw Convention[256].

Reward is not essential as article 1/1 also applies 'to gratuitous carriage by aircraft performed by an air transport undertaking'. When there is a reward, in the French text of the Warsaw Convention the phrase 'contre rémunération' implies that the carrier's ultimate purpose must be to make a profit whether or not the contract or flight in question is profitable[257]. The expression 'for reward' must be construed as meaning any carriage that is not gratuitous; i.e. any carriage performed for remuneration, whatever the kind of that remuneration[258]. It is essential that the interest of the carrier in the transportation is a commercial one. Commercial interest need not mean pecuniary interest; it may also be understood as interest in work or services. Thus, for example, the carriage of a lawyer on his client's private aircraft to a place where he is to act for his client may be a carriage 'for hire'- depending on how the flight is connected with the lawyer's action on behalf of his client - even if it is not actually paid for[259]. The facts of the individual case must always be taken into account and in particular the intention of the parties at the time when the carriage was agreed[260].

In Gurtner v Beaton[261], it has been held that the carriage was for reward 'in the sense that reward was promised by (the passengers) for their carriage and was expected by (the carrier)' but the question required no closer examination, monetary payment being clearly intended.

Where the carrier accepts cargo or passengers without payment, the carriage is 'gratuitous' and covered only if performed by an air transportation undertaking[262], and this means that it must be performed on a commercial basis-not necessarily as the main line of business. For

[255] Giemulla/Schmid, art. 1, para. 28; Mankiewicz, p. 33. However, the article does not define or expressly require a contract of carriage by air.
[256] Giemulla/Schmid, art. 1, para. 28.
[257] Clarke, Malcolm, Contracts of Carriage by Air, LLP, 2002, p. 37; Giemulla/Schmid, art. 1, para. 31.
[258] Supreme Court, Germany (Fed. R.), 2 April 1974: 1974 ETL 777; Court of Appeals, Grenoble, France, 26 November 1969: 1970 RFDA 204 cited by Mankiewicz, p. 36.
[259] Giemulla/Schmid, art. 1, para. 31.
[260] Ibid., para. 32.
[261] S & B Av R VII/499 cited by Shawcross/Beaumont, chapter.26, para. 311.
[262] Giemulla/Schmid, art. 1, para. 33; Goldhirsch, p. 12.

example, the carriage must be performed with the intention of drawing profits from the systematic and continuous operation of aircraft[263].

Air transport undertaking is not defined neither by the Warsaw Convention nor by the TCAA, but the British Air Navigation Order 2000[264] contains a definition of the term 'air transport undertaking', which states that its business includes the undertaking of flights for the purposes of public transport of passengers or cargo for reward. It is submitted that a person, firm or company will be an 'air transport undertaking' for convention purposes if the carriage of passengers or goods by air for reward is part of its regular business, even if it also carries on other forms of business, and even it also carries on other forms of business, and even if air transport is only a small or subordinate part of small business[265]. This definition leads to the conclusions that (1) the carriage of passengers and cargo need not be the main business of the enterprise. It means that a person, firm or company would be an 'air transport undertaking' if the carriage of passengers or goods by air for reward can be part of its regular business, even if it also carries on other forms of business and even if air transport was only a small or subordinate part of the whole business[266]. (2) Carriage performed by such enterprise need not necessarily be against payment in order to be covered by the Warsaw Convention. Thus, for example, a holiday tour company may be an air carrier, if transportation by air is part of the package sold to a customer[267].

Moreover, the German Supreme Court (BGH) has held that a flying club transporting its members to an event is an air carrier subject to the Convention[268]. In Benoit c. Deschamps[269], a passenger injured in a ballooning accident sued the pilot and the owner. If the local French code ere applied, the defendants would be responsible only for proven negligence in a case of gratuitous transport. If the Convention were applicable, there would be a presumption of negligence and the plaintiff would not have to prove wrongdoing. Here, the court found that

[263] Giemulla/Schmid, art. 1, para. 33.
[264] Civil Aviation, The Air Navigation Order 2000, No. 1562, article 129/1 see, http://www.opsi.gov.uk/si/si2000/uksi_20001562_en.pdf, visited on 1.June 2008.
[265] Shawcross/Beaumont, VII, para. 312.
[266] Shawcross/Beaumont, VII, para. 312; Giemulla/Schmid, art. 1, para. 33.
[267] Clarke, p. 38.
[268] BGH 5.7.1983, NJW1984. 2445 cited by Clarke, p. 38.
[269] 1985 RFDA 495 (T.G.I. Lille, 3 October 1985) cited by Goldhirsch, Lawrence, The Warsaw Convention Annotated, Kluwer Law International, 2000, p. 13.

although there was gratuitous transport it was not undertaken by an air transport enterprise. Therefore, the plaintiff was held to a stricter standard and the defendant prevailed.

In Gurtner v Beaton[270] , where the parties agreed that the definition in Air Navigation Order was applicable, it was held that where there had been even one flight for reward in the past and such flights were available for the future a finding that the business of an undertaking included the carriage by air of passengers for reward was 'irresistible'.

In the United States, where the Warsaw Convention phrase is translated as 'air transportation enterprise', a Court of Appeals[271] has observed that as long as the carrier's activity is 'commercial', the nature of the business as a cargo or a passenger carrier is immaterial.

2- Content of the Air Cargo Contract

Both under the Warsaw Convention and TCAA, there is not any expression, which restricts the content of the air cargo contract[272]. With respect to the word 'goods' there may be a difference in definitions since the term "goods" has not been defined under the Warsaw Convention[273]. The French term "marchandise" means anything able to be the object of a commercial transaction whereas "goods" refers to any inanimate object and excludes live animals[274]. Because of that exclusion, International Civil Aviation Organization (ICAO) considered that English text should use the word "cargo"[275]. Whether "cargo" or "goods", the category applies to anything that can be carried and which the carrier has agreed to carry except "passenger baggage"[276]. Common interpretation includes any moveable objects, not only "inanimate" objects of market value[277]. Undoubtedly, a corpse is an inanimate object and it seems to be included in the meaning of "goods" in common law[278]. French law on the commercial aspect of the object carried as a marchandise constitutes a very serious obstacle

[270] S & B Av R VII/499 (1990). The point was not challenged on appeal: Gurtner v Beaton (1992) S & B Av R VII/723 , (1993) 2 Lloyd's Rep 369, CA cited by Shawcross/Beaumont, chapter.26, VII, para. 312.
[271]Sulewski v. Federal Express Corpn 933 F 2d 180 (2nd Cir, 1991), 23 Avi 17,685 cited by Shawcross/Beaumont, VII, para. 312
[272] Sözer, (Yeditepe), p. 75.
[273] Goldhirsch, Lawrence, p. 10.
[274] Ibid.
[275] Miller, Georgette, Liability in International Air Transport, Kluwer, Deventer The Netherlands, 1977, p. 10.
[276] Clarke, p. 36.
[277] Dempsey/Milde, p. 67.
[278] Miller, p. 11.

to a corpse being a marchandise[279]. Notwithstanding these differences of opinions, live animals and even corpses are considered to be "goods" in the known jurisprudence and in the conditions of carriage of different airlines[280].

3. The Parties to the Contract of Carriage

Even though the parties to the contract of carriage (i.e. the carrier, passenger and/or consignor) and other parties concerned (i.e. consignee) are mentioned in several provisions of the Warsaw Convention, it does not define any of these terms[281].

a. The (Contracting) Carrier

Since the contract for the carriage of cargo made between the carrier and the consignor, a 'Carrier' within its meaning is the person who promises the carriage of persons or objects by aircraft pursuant to a contract in his own name and has undertaken to execute his duties thereunder. In this context, it is irrelevant whether the contracting carrier actually performs the carriage himself or is really capable of performing the agreed carriage through use of his own aircraft or instead procures performance of the carriage by an authorized agent. Moreover, the contracting carrier does not have to be a businessman performing the transportation on a commercial basis[282].

b. The Consignor and Consignee

'Consignor' is any natural or legal person who instructs the carrier in its own name, by means of a contract of carriage, to transport cargo by air[283]. The consignor is usually identified in appropriate section of the air waybill. However, under the article 11 of the Montreal Convention is only prima evidence of its contents and may be rebutted. Thus the German Supreme Court (Bundesgerichtshof)[284] has held that if an agent conducts itself as if

[279] Ibid.
[280] Dempsey / Milde, p. 67.
[281] Giemulla/Schmid, art. 1, para. 36.
[282] Ibid., para. 37.
[283] Ibid., para .44.
[284] 1964 VerS, 479-480 cited by Giemulla/Schmid, Montreal Convention, art.1, para. 46.

it were the consignor, acting in its own right, in circumstances where it is clearly under the instructions of a third party, the third party will be regarded as the consignor.
A contract for the carriage of cargo is a contract in favour of a third party[285]. Although the consignee is not a party to the contract for the carriage of cargo made between the consignor and the carrier, but under certain circumstances he is a third party beneficiary under the contract[286]. 'Consignee' is the natural or legal person whom the carrier is obliged under the contract of carriage to deliver the cargo. As a rule, the consignee will be determined by the relevant entry in the air waybill, which by article 11 constitutes prima facie evidence of the conclusion of the contract. If the consignor has ordered the carrier to deliver the cargo to a person other than the consignee named in the air waybill, this other person will be regarded as consignee[287].

4- Legal Status of the Contract for the Carriage of Cargo

The contract of carriage is generally regarded as a 'contract for work and labour'. The carrier contracts to transport the passenger and baggage or cargo to a specific destination[288].

Depending upon the circumstances (i.e. round trips) a contract of carriage may also be classified as a 'services contract', since the subject matter of the contract is the carriage of passenger, cargo, or baggage to a clearly agreed destination[289]. In any case, the contract must be for reward.

The contract for the carriage of cargo is a particular form of the contract of carriage; the contracted services are performed for the benefit of a third party, the consignee[290]. According to *Sözer*, the contract of carriage is an 'independent contractor[291] agreement' under the

[285] Being a contract in favour of a third party is one of the essential feature of the contract of carriage both from the inception of maritime law and air law in Turkish law. See Sözer, (Yeditepe), p. 78; See Çaga/Kender, Deniz Ticaret Hukuku II, Arıkan, 2005, p. 12 seq.
[286] Giemulla/Schmid, art. 13, para. 1.
[287] Ibid., para. 45.
[288] Giemulla/Schmid, (Montreal Convention), art. 1, para. 30.
[289] Ibid., para. 29.
[290] Ibid..
[291] Independent contractor is a natural person, business or corporation that provides goods or services to another entity under terms specified in a contract or within a verbal agreement.

Turkish law[292]. In addition, one of the essential features of the contract of carriage is that it is a contract in favour of a third party[293].

Both according to the Warsaw Convention and according to the TCAA, the contract for the carriage of cargo is an informal consensual contract which is made in accordance with the relevant provisions of national law[294]. The contract of the carriage is established by an agreement of the parties. It is not necessary to be made in written form[295]. Since the contract of carriage is established by agreements of parties, the document of carriage has only evidential value; its composition and delivery are not a condition of the establishment of the contract[296].

Under the Article 9 of the Warsaw/MP4 and Montreal Convention and under the article 110/2 of the TCAA, it has been provided that the document of carriage constitutes prima facie evidence of the conclusion and conditions of the contract of carriage; the absence, irregularity or loss of the document does not affect the existence or validity of the contract and it remains subject to the rules of the Convention[297].

II. THE AIR WAYBILL

1. In General

The Warsaw Convention requires that documents of carriage to be delivered to the passenger or shipper. The Warsaw Convention and amended versions provides for three documents of carriage; the passenger ticket, the baggage check and the air waybill. Specific particulars are required for each type of transportation, i.e. the transportation of passengers, luggage, and cargo[298].

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[292] Sözer, (Yeditepe), p. 78; According to Ülgen, the legal nature of the contract for the carriage cargo and passeneger differs. Whereas the contract for the carriage of cargo is an 'ndependent contractor agreement', the contract for the carriage of passengers is a 'proxy agreement'. See, Ülgen, Hüseyin, Hava Taşıma Sözleşmesi, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Ankara, 1987, p. 8-9. However, in Turkish law, in common view, the contract of carriage is accepted an 'independent contractor agreement' see Ülgen, p. 45.
[293] Ibid.
[294] Sözer, (Yeditepe), p.76; Giemulla/Schmid,art. 5 , para. 11, art. 11, para. 4
[295] Sözer, (Yeditepe), p. 76.
[296] Mankiewicz, p. 61.
[297] Ibid.
[298] Miller, p. 82.

The Convention refers to the transport document required for a contract of carriage of cargo by air as an 'air waybill' (French: letter de transport aéiren; German:'Luftfrachtbrief')[299]. The air waybill evidences the existence and terms of the contract, as well as serving as a receipt by the carrier for the cargo. Since the majority of air carriages of cargo are performed without any legal problems arising, the air waybill is mainly used as an instructional document which contains relevant instructions and notes for the parties to the carriage. In the few cases where a dispute does arise between the parties this demonstrates the second function of the air waybill; it is also can be used as a document of evidence of conclusion of a contract between the carrier and the consignor (art. 11 Warsaw Convention)[300]. This means that it functions as a confirmation of contract; but the contract is not made by the delivery of the air waybill. The air waybill is also evidence of the contents of the contract since on it will be specified the date of the contract, the parties to it, the name and address of the consignee, any additional persons to be notified of delivery of the goods and the relevant scale of charges[301].

Article 5/1 of the Warsaw/Hague Convention and article 4/1 of the Montreal Convention states that a carriage of document, more particularly an air waybill, shall be delivered where cargo is carried by air. The Convention only refers to the 'Air Waybill'. However, as a result of the emergence of consolidated shipments as a distinction has in practice developed between the 'Master Air Waybill' and the 'House Air Waybill'. The 'Master Air Waybill' is the version governed by article 4 of the Montreal Convention et seq. (5 of the Warsaw/Hague). It is the Master Air Waybill which evidences the contract of carriage with the carrier. The freight forwarder is usually recorded as the consignor and the relevant airline as the carrier[302].

On the other hand, the 'House Air Waybill' covers the individual consignments which are consolidated within a single shipment under the umbrella of the Master Air Waybill[303]. By issuing a 'House Air Waybill', the freight forwarder becomes contractually bound the carry the consignment and the freight forwarder becomes the contractual carrier. The person who

[299] Giemulla/Schmid, Montreal Convention, art. 4, para. 2. In the United Kingdom Carriage by Air Acts, the 'Air Waybill' and passenger ticket are called 'air consignment note' and 'luggage ticket'.
[300] Giemulla/Schmid, art. 11, general remarks, para.1.
[301] Ibid, para. 4.
[302] Giemulla/Schmid, Montreal Convention, art. 4, para. 3.
[303] Ibid.

has contracted with the freight forwarder is referred to as the consignor[304]. The commercial advantage for the freight forwarder of issuing a House Air Waybill is that it can undertake air carriage without having to inform its customer, the shipper of the shipment, of the identity of the air carrier or more particularly the rates at which carriage by air will be performed. Another advantage for the consignor is that the House Air Waybill is a document recognised by banks for payment transactions[305].

Carriage of cargo by air is dealt with by article 5 of the Warsaw and article 4 of the Montreal Convention and subsequent articles. Article 5 of the Warsaw/Hague Convention and 4 of the Montreal Convention specifies the information to be recorded on the air waybill. Article 6 of the Warsaw/Hague Convention and 7 of the Montreal Convention states the number of copies to be made and the requirements for signature. The evidential value of the air waybill is dealt with in article 11 of the Warsaw and Montreal Convention and its form and contents are dealt with under the article 6 and 8 of the Warsaw Convention and 5 and 8 of the Montreal Convention.

2. Designation of the Air Waybill

Article 110 of the TCAA, article 5 of the Warsaw/Hague Convention and article 4 of the Montreal Convention determines designation of an air waybill related to the contract for the carriage of cargo. This designation of the air waybill is not a mandatory requirement under the Warsaw/Hague Convention (5/1 and 6/1 of the Warsaw Convention). However, under article 5/1 of the Warsaw/Hague/MP4 and under the article 4 of the Montreal Convention, the carrier is obliged to make out air waybill.

The Warsaw Convention does not deal with the format or language of the air waybill. They are left to the applicable national law[306]. In the same way, the TCAA does not deal with the format or language of the air waybill[307]. The carrier is at liberty to include in the air waybill all or some of his general conditions of carriage but has to comply with the rules in article 8

[304] Ibid, para. 4.
[305] Ibid, para. 5.
[306] Mankiewicz, p. 55.
[307] Sözer, (Yeditepe), p. 81.

of the Warsaw Convention[308] and article 5 of the 1999 Montreal Convention and article 110 of the TCAA. It is usual to reproduce some of the clauses of the "IATA General Conditions of Carriage" or refer to them in the air waybill. However, such conditions and clauses are valid only to the extent that they do not reduce the carrier's liability under the Convention or exclude its application [309].

When special conditions agreed by the parties or set forth in general conditions of carriage are mentioned in the air waybill, explicitly or by implication, they shall not be enforceable against third parties, but their omission does not prevent them from being valid and enforceable between the parties to the contract[310].

Both under article 6/1 of the Warsaw Convention and under the article 7/1 of the Montreal Convention, the air waybill is supposed to be made out by the consignor. This is sensible enough since only the consignor is able to provide the necessary data and details. As a consequence of this rule, the carriage will not be performed until the consignor has made out the air waybill. However, under the article 110/1 of the TCAA it has been stipulated that the carrier is obliged to make out the air waybill[311]. This functional formula as provided by Warsaw Convention cannot be possible to apply under the TCAA, since the carrier is obliged to make out the air waybill under the TCAA. According to *Sözer,* if the carrier abstains from making out the air waybill, the consignor can request for a preliminary injunction as stated by Çağa/Kender[312] for the carriage by sea. However, this formula may be problem for the other owners of the goods and/or passengers. On the other hand, for the charter agreements the consignor can request for a preliminary injunction. In addition, for the partial charter agreements the carrier can request for a preliminary injunction if he acts with the other owners of the goods or if he gets their express consent for a preliminary judgement[313].

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[308] Mankewicz, p. 59.
[309] Ibid.
[310] Ibid
[311] For the carriage of goods by sea, the carrier is obliged to issue a bill of lading and to give it to the shipper under the article 1097/1 of the Turkish Commercial Code. However, for the carriage of goods by road, the sender is obliged to make out the consignment note under the article 768/1 of the Turkish Commercial Code. When we compare the air waybill and bill of lading, which is used in maritime law; they are the two documents incapable of comparison. This problem has been summarized by Georges Ripert as follows, 'The bill of lading represents the goods because the captain holds them on behalf of the bearer of the bill of lading. It is not same with regard to carriage by air', quoted after Giemulla/Schmid, art. 5, para. 3.
[312] Çağa/Kender, II, p. 68.
[313] Sözer, (Yeditepe), p. 111.

According to article 6/4 of the Warsaw Convention and article 7/4 of the 1999 Montreal Convention, if, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor. As a result of this article; the consignor is held responsible for the correctness of the particulars and relating to the cargo (Art 10 of the Warsaw and Montreal Convention). The same article must also be applied where the air waybill is made out by a broker or freight forwarder[314].

Whether there is one air waybill or several, each must be made out "in three original parts" under the Art 6/1 of the Warsaw and 7/1 of the Montreal Convention. The first is for the carrier; it shall be signed by the consignor. The second is for the consignee, it shall be signed by the consignor and by the carrier. The third part, after the signature by the carrier, is handed to the consignor after the cargo has been accepted. Under the Hague Protocol, the carrier is required to sign the air waybill 'prior to the loading' of the goods, not on acceptance of the goods. However, Montreal Protocol No.4 deletes these sections concerning when the air waybill has to be signed. MP4 has eliminated the requirement that the air waybill be handed over with the goods (Art. 6/2 of the MP4). There is also no longer any need for the second original part of the air waybill to travel with the goods. Air carriers will thus be able to commence transportation even before documentation has been completed. The signatures of the carrier and the consignor are still required, but they may either be printed or stamped to facilitate electronic record keeping[315]. Since these provisions are all taken from MP4 almost verbatim, under the Montreal Convention there is a change from MP4 that MP4's phrase 'signed by the carrier and handed by him to the consignor' has been changed to 'signed by the carrier who shall hand it to the consignor'[316].

Under the article 110/4 of the TCAA, it has been specified that the air waybill shall be made out 'in three parts' whereas the Warsaw Convention provides that the air waybill shall be made out 'in three original parts'. Under article 110 of the TCAA it has been specified that the first is for the carrier; it shall be signed by the consignor. The second is for the consignee, it shall be signed by the consignor and by the carrier. The third part shall be signed by the carrier and given to the consignor after the goods have been accepted. Article 110/4 of the

[314] Mankiewicz, p. 63
[315] Giemulla/Schmid, art. 6, para. 13.
[316] Dempsey/Milde, p. 106.

TCAA does not govern what it would be done to the second part. However, as stated above the second original part of the air waybill accompany the cargo and will travel with the goods under the Warsaw/Hague Convention. This condition has been dropped under the article 6/2 of the MP4 and 7/2 of the Montreal Convention. Thus, air carriers will commence transportation even before documentation has been completed in international carriages of goods. The fact that the air waybill and cargo travelled together served to identify the cargo and ensured compliance with any custom requirements during carriage. Its abandonment is therefore not completely unproblematic[317]. However, the second part of the air waybill has to travel with the goods under the TCAA and the carrier, thus, cannot commence transportation before documentation has been completed in domestic carriages of goods.

3. Electronic Data Processing of Air Cargo

Article 3 of the Guatemala City Protocol provided for the first time for the use of 'any other means' of preserving the record of the carriage to be performed for the carriage of passengers[318]. The general term 'any other means' allows data concerning carriage of air freight to be entered and processed electronically in accordance with the current state of technology at any given time[319]. Article 5 of the Warsaw/Hague has been rephrased completely by Montreal Protocol No. 4 and with the introduction of electronic processing, article 5/2 of Montreal Protocol No. 4 allowed for the use of 'any other means' of preserving the record of the carriage to be performed[320].

This ambiguous term, 'any other means', intentionally leaves open all currently known possibilities of recording data, as well as those which will be made possible in the future by technical developments. The only requirement is that the method used includes all information about the carriage to be performed and must as a minimum contain the information required by article 5 of the Montreal Convention[321]. Furthermore, the document must also contain other non-compulsory but essential information for the proper performance

[317] Giemulla/Schmid, Montreal Convention, art. 7, general remarks, para. 2.
[318] Dempsey/Milde, p. 106.
[319] Giemulla/Schmid, art. 5, para. 15.
[320] Goldhirsh, p. 45.
[321] Giemulla/Schmid, Montreal Convention, art. 4, para. 8. Article 5 of the Montreal Convention and article 8 of the MP4 reads as follows: a) An indication of the places of departure and destination, b) An indication of at least one stopping place, being within the territory of another state, insofar as the place of departure and place of destination are within the territory of one single party, c) An indication of the weight consignment.

of carriage, e.g. the names of the parties to the contract of carriage, details of the flight numbers and dates or information about handling the cargo. All information, which is capable of being recorded on the conventional air waybill, must also be capable of being entered on this other document[322]. The traditional air waybill can still be issued, but it need not be issued. Provided the consignor consents, the carrier may substitute a computer record of necessary cargo information for the paper air waybill[323]. The consignor has the option of documentation by the paper air waybill or by 'any other means', either with or without receipt. This requires the air carrier to provide all the equipment necessary to accommodate electronic date processing[324].

Whereas under the MP4 the use of electronic documentation has been accepted only for the carriage of cargo by air, under Montreal Convention, the use of electronic documentation accepted both for the carriage of passengers by air under the article 3/2 of the Montreal Convention and for the carriage of cargo by air under the article 4/2. Since there is not any provision under the TCAA which allows the electronic data processing, it could be said that it is only possible for the international air cargo carriages by air. However, with the reference to article 106 of the TCAA with regard to the Warsaw /Hague Convention, it may be possible for the article to be applied within the rules of article 5/2 for the domestic carriages of cargo by air since Turkey is a party to the MP4[325].

Article 5/2 of the MP4 requires the carrier to obtain the consignor's consent to substitute a computer record of necessary cargo information for the paper air waybill[326]. However, that requirement has been dropped under the article 4/2 of the Montreal Convention. It means that the carrier will no longer need the consignor's consent to use of the electronic air waybill.

Article 5/3 limits the freedom of contract, which under the Warsaw /Hague is granted by article 33, by prohibiting the carrier from refusing to accept the cargo for carriage for the sole reason that at points of transit and destination it is not possible to use electronic data

[322] Giemulla/Schmid, Montreal Convention, art. 4, para. 8
[323] Giemulla/Schmid, art. 5, para. 15.
[324] Ibid, para. 16.
[325] Sözer, (Yeditepe), p. 90.
[326] Giemulla/Schmid, art. 5, para. 15.

processing[327]. Whereas, article 4/2 of the Warsaw Convention required the carrier to obtain the consignor's consent, that requirement has been dropped under the Montreal Convention[328]. In addition, article 5/3 of the MP4 has been dropped under the Montreal Convention. In this way, the carrier is no longer under the obligation to provide all the equipment necessary to accommodate electronic data processing wherever he flies. It means that the carrier can fly the places where there is not any possibility to use of the electronic air waybill without showing any reason[329].

The use of the electronic air waybill will save the carriers substantial administrative costs and it will also expedite the carriage of the consignment[330]. The possibility of using electronic data processing should speed up the carriage of cargo. If all the parties to the contract of carriage are electronically connected, they will all simultaneously receive the data necessary for the processing of the contract of carriage at the time of input, enabling all the relevant arrangements to be made[331].

4. Receipt for the Cargo

If a conventional air waybill is used, the consignor will receive a copy, namely the third copy of the air waybill from the carrier. (Art. 7/2 of the Montreal Convention). Since the possibility of electronic data processing exists, the consignor may request the carrier to issue a 'cargo receipt'. This document primarily confirms receipt of the cargo, i.e. the receipt of the cargo from the consignor by the carrier.

Both under the article 5/2 of the MP4 and under the article 4/2 of the Montreal Convention, it has been allowed the use of electronic air waybills but requires the carrier to maintain an adequate record of the consignment and allows the consignor access to the information contained in the record preserved by the electronic data processing[332]. Where electronic air waybills are employed, the carrier must, if the consignor request, deliver to the latter a receipt for the cargo which sufficiently identifies the consignment and allows access to the

[327] Ibid, para. 17.
[328] Clarke, p. 59.
[329] Sözer, (Yeditepe), p. 91.
[330] Giemulla /Schmid, art. 5, para. 15.
[331] Giemulla /Schmid, Montreal Convention, art. 4, para. 9.
[332] Clarke, p. 59; Giemulla /Schmid, art. 5, para. 15.

information contained in the record preserved by those other means[333]. In other words, the cargo receipt facilitates the consignor's access to stored data which permits it to identify cargo during carriage, track the course of carriage and issue instructions under article 12 in respect of the cargo[334].

Under the article 7/2 of the Warsaw/Hague/MP4 and 8/2 of the Montreal Convention, it has been stipulated that where there more than one package, the consignor can require the carrier to deliver separate receipts for each package if the 'other means' referred to in article 5 Warsa/MP4 are used instead of a paper air waybill[335].

The name given to the document is in itself a fair indication of its evidentiary purpose which is expressly confirmed by article 11/1 of the MP4/Montreal Convention. To this extent, it is plain that 'any other means' of recording carriage will not have the same status as an air waybill. Under the article 11, it is only the air waybill and the cargo receipt which have evidentiary value[336].

5. Air Waybill Particulars

The unamended Warsaw Convention required that 17 particulars be specified in the air consignment note. The Hague Protocol simplified Warsaw's requirements to three and MP4 and Montreal Convention incorporates the first two of the Hague's requirements[337]. Article 5 of the Montreal Convention originated in the Montreal Protocol No. 4 though there are slight changes.

The Montreal Protocol No. 4 has brought about two fundamental changes to article 8. The 12 minimum particulars, which had to be entered into the air waybill in accordance with article 8 of the unamended Convention, have been reduced to three. [338]. Article 8 WC/MP4 has

[333] Giemulla /Schmid, art. 5, para. 15.
[334] Giemulla /Schmid, Montreal Convention, art. 4, para. 10.
[335] Giemulla /Schmid, art. 7, para. 5.
[336] Giemulla /Schmid, Montreal Convention, art. 4, para. 10.
[337] Dempsey/ Milde, p. 100. These two particulars indicated under the article 8 of W/MP4 are: (i) the indication of the places of departure and destination and (ii) the indication of one of more agreed stopping places within the territory another state, if the places of departure and destination are within the territory of a 'single High Contracting Party'.
[338] Giemulla /Schmid, art.8, para. 21.

removed a major source of litigation arising from long list of particulars under Article 8 WC which the air carrier must comply with the requirements of article 8 WC in order to limit his liability under article 22[339]. Montreal Protocol No. 4 not only reduces the list of particulars, it also eliminates sanctions for omitting particulars (article 9 MP4)[340].

The article 8 MP4 differed from the Warsaw/Hague provision regarding the contents of documentation by including a brief air waybill or a receipt for the cargo. Further, the new article also stipulates that both documents must contain an indication of the weight of the consignment[341]. The third particular required under article 8 of the MP4 is the provision of article 8(i) of the unamended Warsaw Convention, which has been reincluded by the MP4 after having been deleted by the Hague Protocol. The indication of the weight proved to be essential when calculating damages for article 22 purposes[342].

Another important difference between the new article 8 of MP4 and the Warsaw/Hague provision is the omission of the requirement that the air waybill should include the Warsaw/Hague notice (Article 8/q WC; Article 8/c WC/HP) concerning the possible applicability of the Convention to cargo carriage. Failure to give such notice is no longer be subject to unlimited liability. Furthermore, since article 18 of the MP4 calls for strict liability of the carrier for damage or loss to cargo, and since as a consequence of this liability limits have become unbreakable under MP4, there was no room for the sanction of unlimited liability[343].

Both under the article 8 of the MP4 and article 5 of the Montreal Convention, the air waybill should include three details[344] in the air waybill or in the receipt of the cargo. These are the minimum requirements; additional information may also be included. Indeed, some

[339] Ibid, para. 22.
[340] Article 9WC/MP4 provides that failure to insert certain particulars in the air waybill no longer preclude the carrier from availing himself of the limitation of liability under the Convention.
[341] The weight and, in certain cases, the number of the packages must be mentioned in the air waybill because they determine the amount of compensation due in the case of destruction, loss, delay of, or damage to the cargo(art.22/2), see also Mankewicz, p. 65; Giemulla/Schmid, art. 8, para. 22.
[342] Giemulla/Schmid, art.8, para. 22.
[343] Ibid.
[344] MP4 and Montreal Convention requires that the air waybill should include (i) the indication of the places of departure and destination, (ii) the indication of one or more agreed stopping places within the territory of another state, if the places of departure and destination are within the territory of a single high contracting party and (iii) an indication of the weight of the consignment.

additional information is necessary such as the names of the parties to the contract of carriage and persons to be notified on the arrival of cargo. In practice, air waybills are made out which contain more than the minimum requirements[345].

Although the Hague Protocol has been already ratified by Turkey during debates of the TCAA, article 110 of the TCAA stipulated that the 10 particulars had to be entered into the air waybill[346]. Article 8 of the Hague has not been taken from identical in the TCAA. As a result, it could be said that the air waybill has to include the particulars provided under the article 110 of the TCAA for the domestic carriages of cargo by air and article 8 of the Warsaw/Hague/MP4 should be applied for the international carriages of cargo[347].

6. Legal Status/Nature of the Air Waybill

a. In General

The air waybill evidences the existence and terms of the contract, as well as serving as a receipt by the carrier of the cargo[348]. The existence of the air waybill is not a condition for the conclusion of the contract[349]. In addition to that, under the article 5/2 of the Warsaw Convention, it has been specified that the absence, irregularity or loss of the air waybill does not affect the existence or the validity of the contract and it remains subject to the rules of the Convention[350]. Article 5 of the Warsaw Convention has been rephrased completely by Montreal Protocol No.4 and this requirement was moved to article 9 of MP4 and Montreal Convention. The same rule has been provided under the article 110/2 of the TCAA.

Under the Article 11/1 of the Warsaw Convention the air waybill is accepted as prima facie evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage. Air waybill can be used as evidence of the conclusion of a contract between the carrier and consignor[351]. Under article 11/1, it has been established that evidential value not

[345] Clarke, p. 62.
[346] Sözer, (Yeditepe), p. 92.
[347] Ibid., p. 93
[348] Clarke, p. 59.
[349] Mankewicz, p. 63.
[350] Ibid..
[351] Giemulla/Schmid, art. 11, para. 4.

only with respect to the air waybill but also for the newly introduced 'receipt for the cargo' with the amendment has been made by the MP4. It also established that the air waybill or the receipt for the cargo is prima facie evidence only for the conditions of carriage mentioned therein[352]. The air waybill functions as a confirmation of contract, but the contract is not made by the delivery of the air waybill[353]. The air waybill is also evidence of the contents of the contract. The evidence created by the air waybill is only a presumption, which is rebuttable at any time by furnishing proof to the contrary[354].

Under the article 110/2 of the TCAA it has been specified that if the carrier accepts the cargo without an air waybill having been made out or if the air waybill does not contain the particulars required under the article 110/1, it does not affect the existence or validity of the contract of carriage. However, in such a case the carrier can not avail himself of the provisions of the TCAA which exclude or limit his liability (Article 110/2 of the TCAA).

Although the air waybill does not affect the existence of the contract of carriage, its absence does have certain effects at law under the Warsaw Convention[355]. Article 9 of the Warsaw Convention stipulates that if the carrier accepts the cargo without an air waybill having been made out or if the air waybill does not contain all the particulars set out in article 8, the carrier shall not be entitled to avail himself of the provisions of 22/2 of the Warsaw Convention which exclude or limit his liability. It means that the carrier is subject to unlimited liability where he fails to state the particulars required by article 8(a)-(i)[356]. This also applies where they do not contain the notice required by article 8/c in such a case the carrier can not avail himself of the liability limiting provisions of article 22/2[357]. According to article 9 of the unamended Warsaw Convention, the carrier is not only prevented from availing himself of the liability limiting provisions of article 22 but also relying on any provision of the Convention which excludes his liability[358].

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[352] Ibid., para. 16.
[353] Ibid.
[354] Ibid., art. 11, para. 13.
[355] Ibid., art. 5, para. 11.
[356] Ibid., art. 9, para. 12.
[357] Ibid., art. 5, para. 11.
[358] Ibid., art. 9, para. 17. The articles which have been held to 'exclude or limit liability' are: 1) Article 22- limitation of damages, 2) Article 20- all necessary measures, 3) article 21- contributory negligence, and 4) article 26 time limits

Article 9 of the Warsaw Convention has been amended with the Hague Protocol. Under the article 9 of the Hague Protocol it has been stipulated that if the carrier accepts the cargo without an air waybill having made out or if the air waybill does not include the notice required by article 8/c[359], the carrier shall not be entitled to avail himself of the provisions of article 22/2. It means that only the absence of the article 8/c requirement of the Warsaw/Hague Protocol shall avail the carrier himself of the provisions of 22/2 of the Warsaw Convention which exclude or limit his liability not the absence of 'all particulars set out in article 8' of the Warsaw Convention.

Moreover, under the article 9 of the Montreal Protocol 4 and article 9 of the Montreal Convention non-compliance with the air waybill particulars in the air waybill no longer precludes the carrier from availing himself of the limitation of liability limits of article 22/2[360]. Article 9 of the Montreal Convention derived without change from MP4. In contrast to the Warsaw Convention or the Hague Protocol, the carrier can himself invoke Montreal Protocol No. 4 and the limited liability clauses contained within it even if he has failed to make out an air waybill or if he has accepted an air waybill with incomplete indications[361]. As indicated above, in contrast to the Warsaw/Hague/MP4, the carrier can not avail himself of the provisions of the TCAA which exclude or limit his liability if he has failed to make out an air waybill or if he has accepted an air waybill with incomplete indications (Article 110/2 of the TCAA).

b. Statements Relating to Cargo

The air waybill is also used as an instructional document, which contains relevant instructions and notes for the parties to the carriage[362]. Under the article 11 of the Warsaw and Montreal Convention, it has been stipulated that the air waybill constitutes prima-facie evidence of certain facts and of certain particulars relating to the cargo. There are three different categories of statements only two of which are directly covered the Warsaw and

[359] Article 8/c stipulates that the air waybill shall contain a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and in most cases limits the liability of carriers in respect of loss of or damage to cargo.
[360] Dempsey/Milde, p. 107; Giemulla/Schmid, art. 9, para. 18.
[361] Giemulla/Schmid, art. 9, para. 18.
[362] Ibid., art.11, para. 1.

Montreal Convention. The Convention distinguishes between statements whose correctness the carrier is able to check immediately on acceptance of the goods from statements whose correctness the carrier cannot confirm without closer and inevitably more costly examination[363].

The first category of statements comprises those relating to the weight, dimensions and packing of the goods and to the number of packages. These statements are required to be stated in the air waybill under Warsaw Convention but optional since the Hague Protocol and optional under the MP4/Montreal Convention[364]. Proof to the contrary to rebut the prima facie evidence established by the statements made in the air waybill in the context of concluding a contract, the receipt of the cargo, the conditions of the carriage, the weight, dimensions, packing and number of packages have been expressly admitted under the article 11/2 of the Warsaw and Montreal Convention[365].

The second category of details comprises statements relating to the quantity, volume, and conditions of the goods. The statements relating to the quantity, volume, and condition of the cargo are only accepted by the carrier as correct, if he has checked them in the presence of the consignor and a note to that effect has been inserted in the air waybill[366]. The air waybill shall have evidential value against the carrier only where these requirements have been satisfied, unless the statements refer to the externally identifiable condition of the cargo. However, these statements should also constitute evidence against the other parties involved (i.e. consignor, consignee)[367].

c- Negotiability of Air Waybill

A maritime bill of lading is negotiable**,** that is the law recognizes the long-established mercantile custom that endorsement of the bill passes the right to possession of goods on board ship[368]. Unlike the bills of lading in maritime commerce, they are not transferable[369]. If

[363] Ibid., para. 9.
[364] Clarke , p. 69
[365] Giemulla/Schmid, art. 11, para. 1.
[366] Ibid., para. 11.
[367] Ibid.
[368] Shawcross/Beaumont, para. 472.
[369] Shawcoss/Beaumont, para. 472; Clarke, p.59.

they were transferable, making the cargo deliverable 'to order' or 'to order or assigns' endorsement and delivery of the air waybill would affect the ownership of the cargo[370]. The issue of negotiability of air waybills has been discussed, however, under the current practice air waybills are not negotiable, and this is often expressly stated on the air waybill[371].

Article 15/3 of the Warsaw Convention, which was inserted by the Hague Protocol, expressly permits to issue of a negotiable air waybill[372]. However, it was deleted by Montreal Protocol 4 and it was not taken to the Montreal Convention of 1999. Regardless of the omission of any reference to a negotiable air waybill, there is no legal obstacle in the Convention if parties agree to make it negotiable and the relevant domestic law does not exclude it[373]. Since there was discussion about the negotiability of air waybills, the dominant opinion has always been that national legislation was entitled to define the air waybill as a negotiable document. Thus, article 15/3 merely provides a clarification and in principle, the legal nature of the air waybill is governed by the applicable national law. National law can define the air waybill as a negotiable document irrespective of whether this can be reconciled with the text of the Convention or not[374].

Since there is not any provision which governs this case under the TCAA, it could be either said that it is not permitted to issue a negotiable air waybill or it could be said with the reference of the article 106 of the TCAA, it has been permitted to issue such an air waybill within the terms of article 15/3 of the Warsaw/Hague Convention[375].

From the point of view of the TCAA, there is no legal obstacle to issue a negotiable air waybill in domestic carriages of goods by air[376]. As above mentioned, according to Giemulla/Schmid there is no legal obstacle in the Convention if parties agree to make it negotiable and the relevant domestic law does not exclude it[377]. According to *Sözer*, since the TCAA does not exclude to make air waybill negotiable, the parties could agree to make it negotiable. Within the terms of article 15/3 of the Warsaw, it could be issued a negotiable air

[370] Clarke, p. 59.
[371] Shawcross, para. 472.
[372] Giemulla/Schmid, art. 15, para. 1.
[373] Dempsey/Milde, p. 117.
[374] Giemulla/Schmid, art. 15, para. 9.
[375] Sözer, (Yeditepe), p. 97.
[376] Ibid; The opposite view has been held by Ulgen, p. 150-151
[377] Giemulla/Schmid, art. 15, para. 9.

waybill with the reference of article 106 of the TCAA. However, there could be doubt to issue a negotiable air waybill on the application of the Montreal Protocol 4, since article 15/3 has been deleted by the MP4[378].

§ 4- RIGHTS AND OBLIGATIONS OF THE CARRIER

I. OBLIGATIONS OF THE CARRIER

1. To Take Reasonable Care of the Goods

It is one of the essential obligations of the carrier in the contract of carriage of the goods. The carrier is obliged to take and use reasonable care to provide an aircraft, which is fit for the journey and for the carriage of the goods in question[379]. The carrier is also obliged to take and use all reasonable care and skill to carry of the goods safely. The carrier is also obliged to refrain form acting in any way, which is inconsistent with the safe carriage of the the goods[380]. The details and failure to oblige this requirement will be dealt with under the liability of the carrier chapter.

2. To Carry the Goods at the Date Agreed Upon

It is another essential obligation of the carrier in the contract of carriage of the goods[381]. The carrier will be liable for the failure to oblige this requirement. In addition to that the details will be explained in the liability of the carrier part.

3. To Give Notice to the Consignee

Under the Article 13/2 of the Warsaw Convention and under Article 114/II of the Turkish Civil Aviation Act, carrier is obliged to give notice to the consignee as soon as the goods arrive unless it is otherwise agreed. It can be derived from the wording of article 13/2 that

[378] Sözer, (Yeditepe), p. 97.
[379] Shawcross/Beaumont, p. 381, para. 388.
[380] Ibid.
[381] Sözer, (Yeditepe), p.113

this provision can be altered by the contract of carriage between the parties[382]. This notice has to be given to the consignee who was designated as consignee on the air waybill[383]. If the notice was given to the person, who was designated 'notify party' on the air waybill, it shall be deemed as misdelivery[384].

The details of the requirements for the notice will be explained under the chapter of rights of the consignee.

4. To Obey the Instructions of the Consignor and the Consignee

The carrier is obliged to obey the instructions of the consignor and consignee, if their instructions are reasonable and not contrary both to the mandatory provisions and to the contract of carriage between the parties[385].

5. Making out the Air Waybill

Under the article 110/1 of the TCAA, it has been stipulated that the carrier is obliged to make out the air waybill. However, under the article 5/1 of the Warsaw Convention, it is the duty of the consignor to make out the air waybill at the request of the carrier and he is not obliged to do so. This clause has been amended under the Montreal Convention of 1999 and the consignor is obliged to make out the air waybill.

Since it is duty of the consignor to make out the air waybill under the Warsaw and Montreal Convention, The details of this subject will be dealt with below under the consignor's duties.

[382] Ibid., p. 114.
[383] Ibid.
[384] Clarke, p. 76.
[385] Sözer, (Yeditepe), p. 113.

II. RIGHTS OF THE CARRIER

1. Pay Claim

Since the contract of carriage is a bilateral contract, the carrier is entitled to get freight and other expenditures for undertaking the carriage. Principally, it is the duty of the consignor to pay the agreed freight. However, sometimes the carrier and the consignor may agree on that the consignee will pay the freight[386].

2. The Right on the Goods

Neither the Warsaw Convention nor the TCAA does not deal with the carrier's rights when the freight charges have not been dully settled. In cases where the carrier receives the amounts due neither from the consignor nor from the consignee, the general conditions of carriage[387] grant the carrier a right of retention and a related right to sell the goods[388].

According to *Sözer,* since it has not been provided any rule governing this case, in such a dispute it must be applied the rules of the TCA governing the freight contract. Article 1077 of the TCA provides that in the event of non-payment of the charges provided in the article 1069 of the TCA, the carrier shall have a lien on the cargo[389].

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[386] As it will be diccussed below under the heading of the obligations of the consignor, we refer to read under this heading.

[387] IATA, General Conditions of Carriage, article 5.4.3. It provides that the carrier shall have a lien on the cargo for each of the foregoing and, in the event of non-payment thereof, shall have the right to dispose of the cargo at public or private sale (provided that prior to such sale carrier shall have mailed notice thereof to the shipper or to the consignee at the address stated in the air waybill) and to pay itself out of the proceeds of such sale any and all such amounts.
http://www.transportrecht.de/transportrecht_content/1.145.517.766.pdf

[388] According to Giemulla/Schmid, the carrier can retain the goods until the consignor has paid the freight charges. Giemulla/Schmid, art. 13. para. 16.

[389] Sözer, (Yeditepe), p. 122.

§ 5- RIGHTS AND OBLIGATIONS OF THE CONSIGNOR

I. OBLIGATIONS OF THE CONSIGNOR

1. Payment of the freight and other expenditures

Principally, under the contract of carriage, it is the duty of the consignor to pay the agreed freight[390]. In some cases under the contract of carriage, the carrier and the consignor may agree on that the freight will be paid by the consignee[391]. This clause is ineffective and must be understood as a requirement to entitle the delivery of the cargo to him since the consignee is not a party to the contract for the carriage of cargo and it is not possible to make an agreement to the disadvantage of a third party[392]. In other words, if the consignee does not enforce his rights, he is not obliged to render any payment of freight charges. However, if he accepts the goods without making any payment, he becomes liable to pay amounts due. It means acceptance of the cargo results in the consignee's duty to pay the charges[393].

Since the Convention does not contain an express provision to govern this case, the consignee undertakes the obligation to pay freight charges, fees, and other expenses by accepting the cargo or by enforcing any other rights flowing from the contract of carriage[394]. Article 13 forms the basis of the consignee's right to demand delivery of the goods from the carrier against payment of the charges due[395]. The expression 'charges due' in article 13/1 applies not only to the stipulated freight but also all expenditures made by the carrier in execution of the contract of carriage, e.g. custom duties, cost of delivery of the cargo at the place of the consignee or to its final recipient, provided that the consignor has not already paid these charges[396].

If the consignee does not accept the goods, the consignor shall then become obliged to pay the freight and the other charges[397]. Consignor has to pay the freight as well as the

[390] Mankewicz, p. 86.
[391] Sözer, (Yeditepe), p.119.
[392] Ibid.
[393] Giemulla/Schmid, art. 13, para. 16.
[394] Ibid.
[395] Ibid. art. 13, para. 6.
[396] Mankewicz, p. 89.
[397] Sözer, (Yeditepe), p. 119.

expenditures incurred by the carrier in the execution of orders given by the consignors in the exercise of his right of disposition[398] of the cargo[399]. The amounts due under the contract of carriage, particularly the freight fall due at the time the order is to be carried out, the consignor can only require the carrier to carry out his order after he has paid the amounts in question[400]. Article 12/1 expressly requires the consignor to repay all costs incurred by the carrier, which are occasioned by the exercise of the right of disposition[401].

2. Making out the Air Waybill

a. In General

'Making out' an air waybill means first that the document has to be completed and the required entries have to be made on the air waybill[402]. Both under the article 6/1 of the Warsaw Convention and under the article 7/1 of the 1999 Montreal Convention, it has been stipulated that the air waybill shall be made out by the consignor. However, article 110/1 of the TCAA stipulates that the carrier is obliged to make out the air waybill[403]. It is not so clear to understand why the carrier is obliged to make out air waybill under the TCAA[404], since the consignor has access to the data required for the carriage, it appears sensible to be made out by the consignor[405]. It can be observed from the wording of this provision that the carrier

[398] The rights of disposition of the consignor in respect of the cargo are governed under Art. 12 of the Warsaw Convention and Montreal Convention.
[399] Mankewicz, p. 86.
[400] Giemulla/Schmid, art 12. para. 10.
[401] Ibid., para. 18.
[402] Giemulla, art. 6, para. 4.
[403] According to Ülgen, article 110/1 of TCAA is appropriate since the carrier, in practice, makes out the air waybill and he has the enough experience to make out air waybill. Ulgen, p. 94; Sözer does not agree with this view. Nevertheless, the carrier, as a rule acts as the agent of the consignor in drawing air waybill under the Warsaw Convention. This provision of the Warsaw Convention provides a practical solution in cases where the air waybill was not made out by the consignor. In such a case, the carriage will not be performed until the consignor has made out the air waybill. However, since it is the duty of the carrier to make out the air waybill under the TCAA, it cannot be possible to use this practical solution.
[404] Sözer, (Yeditepe), p.83. Under the article 1097 of the Turkish Commerce Act it has been provided that to make out the bill of lading, which is used in maritime law, is the duty of the carrier. According to *Sözer,* the article 110/1 of the TCAA has been inspired from the principles of maritime law.
[405] Giemulla/Schmid, Art 6, para. 10. Article 5 of the CMR (Contracts for the International Carriage of Goods By Road) does not state which of the parties must issue the consignement note. It therefore would not seem to matter which party does draft it, and in practice either may do so. The Convention appears to assume that the carrier will be respıonsible for issuing the consignment note, as it states that the first copy is to be handed to sender, the second one to accompany the goods, and the third one to be retained by the carrier. Under the article 12 of the COTIF/CIM (Uniform Rules Concerning the Contract for International Carriage of Goods by Rail), it is the consignor's duty to complete the CIM consignment note for each consignment, or wagon. And , article 14

has to make out the air waybill without any request of the consignor from the general meaning of this article. However, article 110/3 of the TCAA stipulates that where there is more than one package, the consignor can require the carrier to make out separate air waybills. Due to the lack of such demand, the carrier can make out one air waybill for the carriage of the consignment. Except this particular situation, the carrier has to make out air waybill without request of the consignor (art. 110/1 of the TCAA).

According to existing rules, Article 110/1 of the TCAA shall be applied only for the domestic carriages of goods by air, and Warsaw Convention and its amendments will be applicable for the international carriage of goods by air[406]. It means that, the air waybill shall be made out by the carrier for domestic air carriage of cargo under the TCAA, and it is the duty of the consignor to make out the air waybill for international air cargo carriages under the Warsaw Convention.

Under the Warsaw Convention, to make out the air waybill is not a mandatory requirement. The carrier, if so requested by the consignor, shall issue the air waybill. However, consignor is obliged to make out the air waybill under the article 4/1 of the 1999 Montreal Convention.

In practice, the carrier, supplies the form of air waybill in several copies, completes with references to conditions, who will also supply some of the information, such as agreed stopping places[407]. Although it is the consignor's obligation to make out the air waybill, the carrier is often asked to make out the air waybill at the request of the consignor.

Art. 6/4 of the Warsaw/Hague/MP4 and Art.7/4 of the Montreal Convention establishes the presumption that if, at the request of the consignor, the carrier makes out the air waybill, subject to proof to the contrary, he shall be deemed have done so on behalf of the consignor. The carrier, as a rule, acts as the agent of the consignor in drawing the air waybill on the consignor's instructions[408]. The carrier himself does not become a consignor, where he

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of the United Nations Convention on the Carriage of the Goods by Sea (Hamburrg Rules) states that the carrier must, on demand of the shipper, issue to the shipper a bill of lading.

[406] Sözer, (Yeditepe), p. 84.

[407] Shawcross/Beaumont, para. 470.

[408] Shawcross and Beaumont, para. 470; Giemulla/Schmid, art. 6, para. 10.

makes out the entire air waybill or enter only individual particulars[409]. This frequently occurs where the consignor is a private person who lacks specialist knowledge but does not wish to instruct a freight forwarding agent. Where the carrier acts on consignor's behalf in the air waybill, the relationship of carrier to consignor is one of mandate and in dealings with third parties the relationship is treated as one of agency[410]. Although it was not mentioned in the original or amended Convention, the same rule must be applied in the case, where the air waybill is made out by a broker or freight forwarder[411]. The consignor may sue the carrier despite the agency's relationship between the parties on the basis that the carrier did not correctly carry out its instructions as the consignor's agent. The Convention does not contain any rule of liability in this respect; it does not provide the consignor with any specific cause of action for damages in respect of the carrier's failure to properly issue an air waybill which would take precedence over any general cause of action. Therefore, a claim for damages against an air carrier who issues an incorrect air waybill must be pursued according to the rules of the applicable national law[412]. Article 4.4 of the IATA Conditions of Carriage of Cargo[413] entitles the carrier to complete or correct an incomplete or incorrect air waybill, the consignor nevertheless remains liable vis-a- vis the carrier or third parties for these additions or corrections.

The carrier's liability to third parties is unaffected by the fact that the consignor and carrier may have reached their own agreement about which of them is responsible or to what extent[414]. However, the consignor remains the defendant in cases where the carrier has completed the air waybill on his behalf[415].

Furthermore, the carrier and the consignor may agree that the carrier shall alone be responsible for drawing the air waybill[416]. This condition can be seen valid within the terms of article 23 of Warsaw/Hague and of article 26 of the Montreal Convention of 1999[417]. As

[409] Giemulla/Schmid, Art. 6, para. 10.
[410] Ibid.
[411] Mankewicz, p. 63.
[412] Giemulla/Schmid, Montreal Convention, art. 7, para. 12.
[413] IATA Conditions of Carriage for Cargo
http://www.transportrecht.de/transportrecht_content/1145517766.pdf, visited on 29 April 2006.
[414] Clarke, p. 66.
[415] Giemulla/Schmid, Art. 10, para. 13.
[416] Giemulla, art. 6, para. 11.
[417] Sözer, (Yeditepe), p. 82.

far as the relationship between the carrier and the consignor is concerned, such an agreement may only effective between the contracting parties. However, the consignor's liability to third parties remains unaffected by the fact that the consignor and the carrier have reached their own agreement[418]. Moreover, this agreement still permits the consignor to seek contribution from the carrier in cases where a claim has been brought against him by a third party. In cases where the consignor brings a claim against the carrier for having completed the air waybill inaccurately, the carrier can rely on the fact that the air waybill is treated as having been made out by the consignor. However, the consignor may, without seeking to deny the existence of a contractual relationship, seek to show that the mandate has been performed negligently. The Convention does not specifically regulate such a case. For this reason, a carrier who has made out an air waybill incorrectly must in accordance with the provisions of the applicable national law compensate the consignor for damage sustained by him[419]. German law clearly provides that when an air waybill is issued by the carrier instead of the consignor upon the consignor's request and according to its instructions, the carrier will be regarded as the agent of the consignor and the consignor will be regarded as the issuer of the air waybill.

b. Non – Compliance with Documentary Requirements

Both under article 110/2 of the TCAA and under the article 5/2 of the Warsaw Convention, it has been specified that the absence, irregularity, or loss of the air waybill does not affect the existence or the validity of the contract of carriage. From the point of the Warsaw Convention, the contract remains effective but fulfilment of the contract becomes dependent on the fulfilment of the consignor's obligations[420]. Thus, under the Warsaw Convention by accepting the goods, the carrier obtains his right to the delivery of the air waybill and the carriage will not be performed until the consignor has made out the air waybill[421]. Nevertheless, the same solution shall not be applicable under the TCAA since the carrier is obliged to make out the air waybill[422].

[418] Giemulla/Schmid, Art. 10, para. 13.
[419] Ibid, art. 6, para. 11.
[420] Giemulla/Schmid, art. 5, para. 7.
[421] Giemulla/Schmid, art. 5, para. 7; Sözer, (Yeditepe), p. 109.
[422] According to Sözer, this provision of the TCAA makes the problem even more complicated and this difference between the Warsaw and TCAA is an unnecessary attempt which was done just for the sake of the doing. See, Sözer, (Yeditepe), p. 110.

Article 5/1 Warsaw Convention provides that the carrier can require the consignor to make out and hand over to him the air waybill and every consignor has the right to require he carrier to accept this document. Article 4/1 of the Montreal Convention requires delivery of an air waybill, though it is silent as to whom it shall be delivered. Art. 5/1 of original Warsaw Convention was more precise than Art.4/1 of Montreal Convention, providing that the carrier had the right to require the consignor to make out and deliver to him an "air waybill"[423]. Art 4/1 of Montreal Convention of 1999 requires only that "an air waybill shall be delivered". In the light of article 7/1 of the Montreal Convention[424], it should still be made out by the consignor and delivered to the carrier. Article 6/1 of the Warsaw Convention included the same paragraph as provided under the article 7/1 of the Montreal Convention.

c. Responsibility for Particulars of Documentation

Article 10 of the Warsaw Convention and Montreal Convention provides that the consignor is responsible for the correctness of the particulars and statements relating to the cargo inserted by him or on his behalf in the air waybill[425] and must indemnify the carrier against all damage suffered by him, or any person to whom the carrier is liable, by reason of irregularity, incorrectness or incompleteness of the particulars and statements furnished by him or in his behalf[426]. It means that the consignor is responsible for the correctness of the particulars and statement concerning the cargo appearing in the air waybill, whether he has entered them himself or has had them entered by the carrier, custom broker, and freight forwarder[427]. His liability for damages suffered by the carrier or any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness o these particulars and statements is absolute and unlimited[428].

Article 111/1 of the TCAA provides that the consignor is responsible for the correctness of the particulars and statements relating to the cargo and must indemnify the carrier against all damage suffered by him, or any person due to irregularity, incorrectness or incompleteness

[423] Dempsey / Milde, p. 98.
[424] Article 7 of the Montreal Convention provides that 'The air waybill shall be made out by the consignor in three original parts'.
[425] Warsaw /MP4 /Montreal Convention art. 10/1.
[426] Ibid., Art. 10/2.
[427] Mankewicz, p. 65.
[428] Ibid.

of the particulars and statements furnished by him[429]. Under this article, the consignor is held liable to all third parties whereas the Warsaw specifies only 'any other person to whom the carrier is liable'[430]. According to *Sözer,* in accordance with the article 106[431] of the TCAA, this article must be interpreted within terms of Article 10 of the Warsaw Convention. It means that third parties must be interpreted only 'any other person whom the carrier is liable' not all third parties.

The consignor's liability for damages suffered by the carrier will be subject to 'culpa in contrahendo' liability and his liability for damages suffered by third parties will be based on 'tortious liability' and will be subject to Article 41 et seq. of the Turkish Act of Obligations. His liability for damages suffered by the carrier or any other person because of the irregularity, incorrectness or incompleteness of these particulars and statements is unlimited[432].

Article 111/2 of the TCAA specifies that the carrier is under no obligation to enquire into correctness or sufficiency of such information or documents unless the damage is due to the fault of the carrier, his servants or agents. At first look, it could be seen that this provision stipulates that the carrier is not under a duty to check the information or the documents concerned[433]. However, this exemption is based on a restriction that unless 'the damage is due to the fault of the carrier, his servants or agents.'

Article 111 of the TCAA comprises two different liability forms of the Warsaw system which are governed under the article 10 and 16. When these two provisions are dealt with together, it could be observed that Article 10 of the Warsaw Convention, as mentioned above, principally governs the relationship between the consignor and consignee under the private law and it has not been specified any obligation for the carrier under this article[434]. Article 10/1 of the Warsaw Convention provides that the consignor is liable for the correctness of the particulars and statements relating to the cargo which he inserts in the air

[429] Sözer, (Yeditepe), p. 85.
[430] Ibid.
[431] Ibid., p. 86, Article 106 of the TCAA provides that, in domestic carriages of goods by air , if there is not any provision which governs a subject matter, then the rules of the international agreements to which Turkey is a party must be first applied.
[432] Ibid, p. 85.
[433] Ibid., p. 87.
[434] Ibid., p. 88.

waybill. Article 10/2 of the Warsaw provides that he must indemnify the carrier against all damage suffered by him, or any person to whom the carrier is liable, by reason of irregularity, incorrectness or incompleteness of the particulars and statements furnished by him or in his behalf.

On the other hand, Article 16 of the Warsaw Convention principally governs the consignor's duty of providing the carrier with the information and documents he needs in order to be able to meet the appropriate legal formalities under the public law[435]. Under the article 16/1, the consignor must furnish any information and attach to the air waybill any documents necessary to meet the formalities of customs, octroi or police before the cargo can be delivered to the consignee[436]. Such 'formalities' include all relevant laws, regulations, police orders and decrees in force in appropriate jurisdiction, for example safety regulations governing the carriage of dangerous goods, radioactive substances, drugs, corpses or animals[437]. Article 16/2 clearly states that the carrier is not obliged to check the correctness or completeness of the information or documents provided by the consignor[438]. Any infringement of his responsibilities in this regard and any insufficiency or irregularity in the information or documents provided results in unlimited liability for the consignor, except where the damage is due to fault of the carrier or his servants and agents[439]. It means that the consignor is not liable where fault on the part of the carrier or his agents has been established[440].

Under article 16/1, the carrier is entitled to bring a claim for damages against the consignor where damage is caused by the absence, insufficiency or irregularity of information or documents[441]. In this regard, the consignor is liable only to the carrier, but his liability covers all damage suffered by the latter, including any compensation paid by him to third parties who have suffered damage by reason of the insufficiency or irregularity[442]. The consignor is

[435] Giemulla/Schmid, art. 16.
[436] Mankewicz, p. 66.
[437] Giemulla/Schmid, art. 16, para. 4.
[438] Ibid., para. 11.
[439] Mankewicz, p. 66.
[440] Giemulla/Schmid,art. 16, para. 10.
[441] Ibid., art. 16, para. 9.
[442] Mankewicz, p. 66.

also liable for indirect damage to property, which could arise, for example, from the carrier's liability to a third party or payment of custom fines or fiscal penalties[443].

It can be observed that under the article 111 of the TCAA, it has been tried to gather the two liability forms which has been governed under the article 10 and 16 of the Warsaw and Montreal Convention. This mixture makes this provision peculiar and especially article 111/2 comprises a meaningless expression. Under the TCAA, there is not any provision which governs consignor's liability under the public law[444].

Under the article 111/2 of the TCAA, the carrier or his agents and servants is obliged to check the correctness or completeness of the information or documents provided by the consignor. The carrier is liable for the absence, insufficiency, irregularity, or incorrectness of the documents or information provided that this is due to the fault of the carrier or his agents to fulfill its obligation to check and verify the information or documents provided by the consignor. The carrier's liability also covers all damage suffered by the latter, including any compensation paid by him to third parties who have suffered damage [445]. According to *Sözer*[446], to avoid this serious obligation on the part of the carrier, in accordance with the article 106 of the TCAA, article 111 of the TCAA must be interpreted within terms of Article 16 of the Warsaw Convention.

II. RIGHTS OF THE CONSIGNOR

1. The Right of Disposition

a. In General

Article 12-15 Warsaw and Montreal Convention principally governs the consignor's and consignee's rights of disposition in respect of the cargo. Article 12 and 13 of the Warsaw and Montreal Convention mainly focuses on consignor's and consignee's right of disposition.

[443] Giemulla/Schmid, art. 16, para. 9.
[444] Sözer, (Yeditepe), p. 89.
[445] Ibid., p. 87.
[446] Ibid, p. 89.

Article 12 of the Warsaw and Montreal Convention governs the consignor's right to dispose of the goods by giving orders to carrier in the course of the carriage.

The right of disposition is a contractual right arising from the contact of carriage, which can be modified by an agreement between the parties[447]. By such an agreement, the consignor's right may be limited or extended but any such limitation or extension must be recorded in the air waybill[448]. The omission from the air waybill of any agreed limitation or extension of the consignor's right of disposition merely has the effect of preventing either party from invoking that agreement vis-à-vis third parties but the agreement will not be void between the parties[449].

As mentioned above, consignor's right of disposition is a contractual right. The person entitled to dispose of the goods is the consignor and need not be their owner or possessor.[450] Nonetheless, if the consignor does own the cargo, exercise of the right of disposition may well assist him to sell the cargo[451]. The consignor's right of disposition exists and may be exercised regardless of any contractual arrangements between the consignor and consignee or third parties whose rights are derived from either of them[452].

The consignor may exercise his right of disposition as soon as he has handed the cargo over the carrier[453]. From this moment, the consignor may exercise the right of disposition within the terms set out in Article 12 provided that he carries out the obligations imposed by the contract. The consignor is entitled to give orders to the contracting, actual and successive carrier [454].

Article 12 /1 provides the consignor four alternatives for exercising his right of disposition. (1) to withdraw the goods at the aerodrome of departure or destination, (2) to stop the goods in the course of the journey on any landing, (3) to direct the carrier to deliver the goods at the

[447] Clarke, p. 72.
[448] Mankewicz , p. 83; Art 15/2 of Warsaw and Montreal Convention.
[449] Ibid.
[450] Giemulla/Schmid, art. 12, para. 2.
[451] Clarke, p. 71.
[452] Mankewicz, p. 84.
[453] Ibid.
[454] Shawcross/Beaumont, p. 440, para. 478.

place of destination or in the course of journey to a person other than the consignee named in the air waybill, (4) to require the goods to return to the aerodrome of departure.

Exercise of the right of disposition modifies the carrier's delivery obligation. Subject to terms of the initial contract, it must be done in one or more of the ways set out in article 12/1 under the Warsaw Convention. It means that he could only exercise of the right of disposition under the four alternatives which are indicated one by one under the article 12/1 of the Warsaw and Montreal Convention. Exercise of the right of disposition is not a variation of the contract, it requires no further consideration to be given to the carrier and does not require him to give or confirm his consent[455]. The consignor's rights are limited by article 12/1 in order to protect the legitimate interests of the carrier. If the consignor had unlimited right of disposition, that would be potentially burdensome for the carrier. Within the terms of article 12, the carrier must carry out the orders of the consignor[456]. The interests of the carrier are protected in general term of the Article 12 providing that the carrier must not be prejudiced. The carrier is not to be burdened more than it is necessary by the exercise of this right[457]. Moreover, it would be inadmissible to call upon the carrier to do the impossible[458].

However, these rights are not indicated one by one under the TCAA. It has only been provided that the consignor has full right of disposition under article 113/1 of the TCAA and the four alternatives, which have been indicated under the Warsaw, for exercising right of disposition have not been specified under the TCAA[459]. Nevertheless, the four alternatives for exercising consignor's right of disposition are limited and the consignor does not have any other alternative for exercising right of disposition other than indicated under article 12/1 of the Warsaw and Montreal Convention[460]. In addition, the carrier can only be required to obey instructions of the kind set out in article 12/1 and he should not undertake to follow new orders that do not fall within the terms of article 12[461]. In this respect, 'the full right of disposition' provided under the 113 of the TCAA should be interpreted within the terms of

[455] Ibid.
[456] Giemullla/Schmid, art. 12, para. 2.
[457] Ibid., para. 8.
[458] Clarke, p. 72.
[459] Sözer, (Yeditepe), p.126.
[460] Ibid.
[461] Goldhirsch, p. 60; Clarke, p. 72.

article 12 of the Warsaw Convention[462]. That being so, the full right of disposition provided under the article 113/1 of the TCAA must be understood limited with the four alternatives which are indicated under the article 12/1 Warsaw Convention

b. Requirements for Exercising the Right of Disposition

In order to be able to exercise the consignor's right of disposition, the following four conditions must be fulfilled.

aa. To Carry out All His Obligations Arising out of the Contract of Carriage

Article 12/1 provides that the consignor must carry out all his obligations arising out of the contract of carriage. This means, in particular, he must pay the freight and repay all costs occasioned by the exercise of his right. The reason for basing the right of disposition on this requirement is that the carrier must not be prejudiced with respect to his pecuniary claims[463]. The consignor can only require the carrier to carry out his order after he has paid the amounts in question[464]. If the contract does not indicate as to time for payment, the carrier may call upon the consignor for payment before carrying out the instructions within the terms of article 12[465]. It would be unfair to require the carrier to wait longer for payment.[466] Article 12/1 requires the consignor to pay all costs incurred by the carrier which are occasioned by the exercise of the right of disposition. However, this rule would not apply in the case of extremely high expenses, which he is obliged to have informed the consignor. Also, additional costs, which the carrier could have avoided, could not be charged to the consignor's account[467].

[462] Sözer, (Yeditepe), p. 126.
[463] Giemulla/Schmid, art. 12, para. 8.
[464] Ibid., para. 10.
[465] Clarke, p. 73.
[466] Giemulla/Schmid.art. 12, para. 10.
[467] Ibid., para. 18.

bb- To Produce His Part of the Air Waybill

Article 12/3 provides that the consignor must produce his part of the air waybill. The third part of air waybill is the third original part of the air waybill, which is for the consignor[468]. It must be either signed or stamped by the carrier and handed to the consignor after the goods have been accepted. The third part of the air waybill functions as an acknowledgement of receipt[469]. The consignor's right of disposition depends on his duly receiving from the carrier the third copy of the air waybill[470]. It means, the consignor can exercise his right of disposition if he is able to present the third part of the air waybill to the carrier[471]. Thus, the third part of the air waybill has a title evidencing function for the bearer and prevents third parties from claiming the cargo. The protection of a third party's good faith in the title evidencing function of the air waybill is the purpose of article 12/3[472].

In the case of failure to require production of the third part of the air waybill is that in such a case the carrier is liable for damages to the lawful possessor of the air waybill[473]. This provision is clearly limited to cases in which the consignor exercises his right of disposition under article 12/1; it does not require production of the air waybill before delivery to the original consignee[474]. Lawful possessor here means a person who has acquired possession of the third part of the air waybill either from the consignor or from his legal successor[475]. The person in question must be in possession of the document at the time of the order is given. Possession need not continue until the time the claim is brought. The carrier is only liable for damage where there is sufficient causal relationship between the damage and the failure to require production of the third part of the air waybill when the order is given[476]. In respect of claims brought against the carrier by the lawful owner, since the convention does not define the nature and scope of such claims, these will be governed by national law[477].

[468] Ibid., para. 22.
[469] Ibid.
[470] Clarke, p. 73.
[471] Giemulla, art.12, para. 22.
[472] Ibid.
[473] Ibid., para. 23.
[474] Shawcross/Beaumont, para. 480.
[475] Giemulla/Schmid, art. 12, para. 23.
[476] Ibid.
[477] Ibid., para. 27.

cc. His Instructions must be Capable of Execution

Article 12/2 provides that the consignor's instructions must be capable of execution. The carrier is obliged to carry out the orders of the consignor, provided that these orders are permitted under article 12 and that they can be carried out[478]. The carrier should not undertake to follow new orders that do not fall within term of article 12[479]. If the consignor refuses to obey a reasonable order of the consignor, the carrier can be held responsible[480]. The carrier is required to inform the consignor if it is impossible to carry out his new orders. Impossibility must be understood both objective impossibility as well as subjective incapability[481]. Subjective incapability will have to be considered in cases where the original carrier is unable to carry out the order, for example, for reasons of staff shortage but another carrier is able to carry out the order the instead[482]. Objective impossibility will be the case where, for example, the goods have already been delivered to the consignor, or where the aircraft has already continued its journey from the intermediate stop in the course of carriage[483]. The burden of proof, that is possible to carry out the order, is on the consignor[484].

The scope of the duty to inform means that the carrier should also inform the consignor of his refusal to carry out order in cases where the order does not comply with Article 12/1[485]. The carrier is liable if he fails to inform the consignor at once or he does not inform the consignor at and damage occurs as a result. Liability in such cases is governed by article 18 and 19 of Warsaw Convention[486].

dd. His Instructions must not Cause to Prejudice to the Carrier or Other Consignors

Article 12/1 provides that the instructions must not cause prejudice to the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right[487]. In

[478] Ibid., para. 9.
[479] Goldhirsch, p. 60.
[480] Ibid.
[481] Giemulla/Schmid, art. 12., para. 20.
[482] Ibid., para. 14.
[483] Ibid.
[484] Clarke, p. 74.
[485] Giemulla/Schmid, art. 12., para. 20.
[486] Ibid., art. 12, para. 21.
[487] Mankewicz, p. 85.

other words, the consignor's right of disposition is based on the premise that neither the carrier nor the other consignors[488] suffer damage through the exercise of that right[489]. The carrier need not obey the orders of the consignor if he has good reason to fear that damage will occur. The carrier, for example, would sustain damage if goods rotted thereby dirtying either the aircraft or the carrier's warehouse because they were stopped in the course of carriage[490]. In that case, the carrier must also inform the consignor that he refuses to carry out consignor's order[491]. In another example, what is far from clear is the effect on the carrier's position of possible prejudice to another consignor, where the consignor recalls cargo which has been just loaded and unloading will delay the departure of the aircraft which contains cargo of other consignors[492]. The consignor is entitled to prove that his instructions have been obeyed without causing damage to other consignors[493]. In cases, where the carrier sustains damage because he carried out the consignor's order, he must prove that the damage was in fact a direct result of that order[494].

The Convention does not mention to what extent the carrier would be liable to the consignor or the consignee in cases where his refusal to carry out an order leads to damage[495]. If the carrier, without valid reasons, does not execute the orders of the consignor, he is liable for any damage suffered by the latter in consequence[496]. Commonly the carrier's failure will result in loss, damage or delay actionable under article 18 (destruction, loss, damage) and 19 (delay) and the remedy for the breach of article 18 and 19 applies[497].

As mentioned above, the consignor can only exercise his right of disposition if he is able to present the third part of the air waybill to the carrier. Article 12/3 of the Warsaw Convention provides that the carrier is liable for damages to any person who is lawfully in possession of the third part of the air waybill in cases where he carriers out orders of the consignor without

[488] 'Other consignors', for the purposes of article 12, are in any case contracting partners of the carrier whose goods are carried on the same aircraft. For further information see, Giemulla/Schmid, art. 12, para. 13
[489] Giemulla/Schmid, art. 12, para. 13.
[490] Ibid.
[491] Ibid., para. 20.
[492] Shawcross/Beaumont, para. 480.
[493] Mankewicz, p. 85.
[494] Giemulla/Schmid, art. 12, para. 13.
[495] Ibid, para. 19.
[496] Mankewicz, p. 85.
[497] Clarke, p. 73.

previously requiring the consignor to produce the third part of the air waybill[498]. Since the Convention does not define the nature and scope of claims brought against the carrier by the lawful owner, these will be governed by the national law[499].

The right conferred on the consignor by the article 12/4 ceases at the moment when that of the consignee begins in accordance with article 13. The effect of this is that in accordance with article 13, contained in article 12/4 means that the consignor can no longer exercise his right of disposition once the goods have arrived at the place of destination[500]. It means that the consignor's right ends on the arrival of the cargo at the place of destination. Article 13/1 includes that the consignee is entitled to require the carrier to hand over the cargo on arrival of the cargo at the place of destination. It is not necessary to have been unloaded or transferred to the cargo terminal or otherwise made ready for actual delivery[501]. The effect of this is that the consignor's right ends on the arrival of the cargo at the place destination or if the cargo does not so arrive, when the carrier admits its loss, or at the expiration of seven days[502].

There is a serious difference between the article of the 12/4 Warsaw Convention and article 113/1 of the TCAA about when the consignor's right of disposition ceases[503]. As mentioned above, under the article 12/4 of the Warsaw Convention the consignor's right of disposition ceases at the moment when that of the consignee begins in accordance with article 13. It means that the consignor can no longer exercise his right of disposition once the goods have arrived at the place of destination. However, under article 113/1 of the TCAA, it is provided that the consignor has the right of disposition until the consignee exercises his rights arising out of the latter article under the TCAA. According to this provision, once the goods have arrived at the place of destination, the consignee is entitled to exercise his rights arising out of article 114 of the TCAA, however the consignor will have the right of disposition until the consignee begin to exercise his rights arising out of the article 114 of the TCAA[504]. However, under the article 12/4 of the Warsaw Convention, the consignor's right of

[498] Giemulla/ Schmid, art 12, para. 22.
[499] Ibid., para. 27.
[500] Ibid.
[501] Clarke, p. 76.
[502] Shawcross/Beauomont, para. 480.
[503] Sözer, (Yeditepe), p. 129.
[504] Ibid., p. 130.

disposition automatically ceases at the moment when once the goods have arrived at the place of destination. Article 113/1 of the TCAA must be interpreted within the terms of article 12 of the Warsaw Convention. That being so, it must be interpreted that the consignor's right of disposition ceases automatically at the moment once the goods have arrived at the place of destination under the TCAA[505].

Article 13/1 provides that 'except when the consignor has exercised its right under article 12 of the Warsaw Convention, the consignor shall be entitled to exercise his rights on arrival of the goods at the place of destination. This means that in accordance with the article 12/1, the consignor has not previously required the goods to be returned to him at the airport of destination or to be carried back to the airport of departure, or ordered the goods to be delivered to a consignee other than the one named in the air waybill[506]. This article is provided appropriate to its original text under the article 114/1 of the TCAA.

Article 12/4 provides that the consignor's right of disposition is revived where the consignee declines to accept the air waybill or the goods and where the consignee can not be communicated with[507]. This article was translated appropriate to its original text under the TCAA[508]. The situation where the consignee declines to accept the goods or the air waybill is equal to that where he has already declared that he will not accept the goods before the arrival at the place of destination[509].

In accordance with a wider construction of article 12/4, the consignor's right of disposition is also revived in cases where it had ceased under article 13/3 due to delay or loss of the cargo and where the consignee waives his rights because the cargo can be retrieved. In such a case, the fact that the consignor's right re-established is unproblematic because the carrier will hardly have an interest in the cargo, which might be in conflict with the right of the consignor[510]. In cases where the consignee cannot be communicated with, the carrier is entitled to return the goods to the airport of departure unless valid orders of the consignor stipulate otherwise. After a storage time of 30 days, the carrier may also sell the goods either

[505] Ibid.
[506] Giemulla/Schmid, art. 12., para. 28.
[507] Ibid., para. 30.
[508] Sözer, (Yeditepe), p. 130.
[509] Giemulla/Schmid, art. 12., para. 30.
[510] Ibid., para. 30.

by private or public sale. In such a case, the consignor and the owner of the goods are liable to the carrier for all expenses. Where perishable goods are concerned, the carrier is entitled to take all necessary measures, including sale or disposal of the goods, immediately and without first informing the consignor[511].

The consignor's revived right of disposition exist in the same form as before it ceased. As a result, in that case the carrier has to require production of the third part of the air waybill with any new order, unless the lawful owner of the document agrees to the order given[512]. If the third part of the air waybill is in the possession of the consignee, the carrier can carry out the consignor's order without requiring production of the document[513].

2. Implied Rights of the Consignor

In addition to his basic right, there are some implied rights of the consignor within the terms of Article 18 and Article 19 of the Warsaw Convention. The consignor has the right to require delivery of goods in good condition and at the date agreed upon[514].

§ 6- RIGHTS AND OBLIGATIONS OF THE CONSIGNEE

I. OBLIGATIONS OF THE CONSIGNEE

The contract for the carriage of cargo is a contract in favour of a third party. The consignee is not a party to the contract of carriage made between the consignor and the carrier, but under certain circumstances and in some respects, he is a third party beneficiary under the contract[515]. Although he is not a contracting party, he has certain rights and duties, which arise all from article 13 of Warsaw Convention[516].

[511] Giemulla/Schmid,art. 12, para. 32. This result is provided in the IATA's conditions.
[512] Ibid., para. 31.
[513] Ibid..
[514] Mankewicz, p. 83.
[515] Giemulla,/Schmid, Art. 13, p. 1.
[516] Ibid.

As mentioned above, the consignee cannot be obliged to pay the carrier outstanding freight charges by the contract[517]. It means that if the consignee does not enforce his rights, arising out of Article 13, he is not obliged to render any payment of freight charges as agreed in the contract of carriage between the carrier and the consignor, or in the case the freight charges has not been paid by the consignor[518]. Notwithstanding his contractual obligations vis-à-vis the consignor, the consignee has the right not to accept the air waybill or the cargo[519]. The consignee accepts the obligation to pay freight charges, fees and other expenses by accepting the cargo or by enforcing any other rights (to require the carrier to hand over to him the air waybill and to deliver the goods to him) flowing from the contract of carriage[520].

Article 13/1 of the Warsaw Convention provides that, the consignee is entitled to delivery of the goods and the handing over the air waybill to him on payment of the charges due and complying with the conditions of carriage set out in the air waybill[521]. It means that if the consignee enforces his rights within the terms of the Article 13, payment of the freight charges will be the duty of the consignee. Article 13/1 is applied not only to the stipulated freight but also all expenditures made by the carrier in execution of the contract of carriage, e.g. custom duties, cost of delivery of the cargo at the place of the consignee or its final recipient[522].

If the consignee refuses to accept the goods, the contract of the carriage will still be regarded as fulfilled, with the result that the charges in question fall due even though the goods might not have been handed over. In that case, the consignor will still be liable to pay the freight charges, fees, or other sums fall due at that moment in time the carrier takes over the cargo[523].

[517] Ibid., art. 13, para. 14.
[518] Sözer, (Yeditepe), p. 133; Giemulla/ Schmid, art. 13, para. 16.
[519] Mankewicz, p. 90, para. 121.
[520] Giemulla/ Schmid, art. 13, para. 16.
[521] Shawcross/Beaumont, para. 479.
[522] Mankiewicz, p. 89.
[523] Giemulla/Schmid, art. 13, para. 15

II. RIGHTS OF THE CONSIGNEE

1. Right to Delivery of the Goods

Article 13/1 of the Warsaw Convention provides that except where the consignor has already exercised his right of disposition of the cargo, the consignee is entitled, on arrival of the cargo at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of charges due and on complying with the conditions of carriage set out in the air waybill[524]. Article 13 has been amended slightly by MP4 and by Montreal Convention. The consignee will no longer be entitled, upon the arrival of the cargo, to require the carrier to hand the air waybill over to him[525].

Article 13/1 addresses the consignee. The consignee is determined according to the air waybill; proof to the contrary is admissible under article 11[526], and not the final recipient of the goods[527].

Within the terms of article 13/1 of the Warsaw Convention and article 113 of the TCAA, the consignee will only be able to exercise his rights if the consignor has not previously exercised his right of disposition under article 12[528]. It means that any dispositions of the consignor made prior to the arrival of the cargo at the place of destination, will prevail over the consignee's right to delivery[529].

It is stipulated under the Article 13 of the Warsaw Convention that the arrival of the goods at the place of destination is a prerequisite for the existence of the consignee's rights[530]. It means that until that time the consignee does not have any rights relating to the cargo and that only the consignor can use the right of disposition until that time. The right of the consignee begins normally with the arrival of the cargo, before it is unloaded[531]. It has been argued by some writers that the consignee's right begins only at the time of notification of

[524] Shawcross/Beaumont, para. 480.
[525] Giemulla/Scmid, art. 13, para. 26.
[526] Ibid., art. 13, para. 2.
[527] Mankiewicz, p. 88.
[528] Giemulla/Schmid, art. 13, para. 2.
[529] Ibid., para. 5.
[530] Ibid.
[531] Mankiewicz, p. 88; Shawcross/Beaumont, para. 480.

the arrival of the cargo[532]. However, this cannot be derived from the wording of Article 13/1 and with the result, that consignee's right would unduly be delayed[533]. It means that the consignor would still be in position to exercise control over the cargo, as stipulated in article 12/4 that the consignor's rights only cease when the consignee's rights begin[534]. Under Article 13/1, the consignee is entitled to require the carrier to hand over the cargo, on arrival of the cargo at the place of destination. It is not necessary to have been unloaded[535].

Article 13 of the Warsaw provided that, when the cargo has arrived at the place of destination, the consignee can require the carrier to hand over to him the air waybill and deliver the goods to him, on payment of the charges due and complying with the conditions of transportation set out in the air waybill[536].

As mentioned above, this article has been amended with the MP4 and Montreal Convention and the consignee will no longer entitled to require the carrier to hand the air waybill over to him[537]. Furthermore, the consignee has to provide that the consignor has not previously exercised his right of disposition under article 12[538].

2. Right to Request Notice of the Arrival of the Goods

Both Article 13/2 of the Warsaw Convention and the article 114/2 of the TCAA requires the carrier to notify the consignee of the arrival of the cargo unless it is otherwise agreed. It can be derived from the wording of article 13/2 that it can be agreed otherwise in the contract of carriage. The Convention neither does it prescribe a particular form nor does require the notice to be worded in a particular way. However, written notice is usual[539].

[532] This view has been held by Litvine, see Mankiewicz, p. 89. In addition there are some cases held the same view, for instance, Court of Appeals, Paris, Sprinks vs. Air France, 27 June 1969:1969 RDFA 405 cited by Mankiewicz. Giemulla/ Schmid does not agree with this view.
[533] Mankiewciz, p. 89; Giemulla /Schmid, art. 13, para. 5.
[534] Giemulla/Schmid, art.13, para. 5.
[535] Clarke, p. 76.
[536] Giemulla/Schmid, art. 13, para. 6.
[537] Ibid., para. 26.
[538] Ibid., para. 6.
[539] Giemulla/Schmid ,art.13, para 18

Article 13/2 requires the notice to be given as soon as the goods arrive. As regards the time of notice, it was decided not to have a more exact definition of the time, in order to balance the interest of the carrier and consignor both under the Warsaw Convention and under the TCAA[540].

The carrier has to give notice to the consignee as can usually be identified from the air waybill.[541] If the air waybill mentions a notify party other than consignee, the notification to another party shall be against the contract[542].

If the carrier fails to give notice, he will be liable under article 18 et esq.[543]. The carrier will be liable for the damages i.e. destruction, loss and damage under article 18 and for the delay under article 19. Failure to comply with Article 13/2 prevents the carrier from producing evidence in exoneration in accordance with article 21[544].

3. Right to Claim Compensation

After the consignee has acquired the right to request delivery under article 13/1[545], the consignee is entitled the formal right to claim compensation from the carrier for damages in accordance with Articles 18 and 19 Warsaw Convention under Article 13/3 of the Warsaw Convention[546].

Damages can be claimed under one of the following conditions, if the carrier admits the loss of the goods or if the goods have not arrived on the expiration of seven days after the date on which they ought to have arrived[547]. Before the carrier admits the loss or before the time limit expired, the consignee can only claim damages if the consignor has assigned his rights to him[548].

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[540] Ibid.
[541] Giemulla/Schmid, art. 13, para. 2.
[542] Clarke p.76; Giemulla/Schmid,art.13, para.2.
[543] Giemulla/Schmid, art. 13, para. 19.
[544] Ibid.
[545] Mankewicz, p. 90.
[546] Giemulla/Schmid, art. 13, para. 20; Mankewicz, p. 90, para. 123.
[547] Giemulla/Schmid, art. 13, para. 20.
[548] Ibid.

In cases where either the carrier has admitted the loss or the cargo has not reached the place of destination even after the expiry of 7 days, the consignee can enforce against the carrier the rights, which flow from the contract of carriage[549].

§ 7- LIABILITY OF THE CARRIER

I. GROUNDS OF LIABILITY

1. In General

Article 18 of the Warsaw Convention governs liability for damage to cargo transported under a contract for carriage by air. Paragraph 1, 3 and 4 have their origin in the original Warsaw Convention, which was addressed liability for both cargo and baggage. This provision was unchanged by the Hague Protocol. However, the Guatemala City Protocol deleted the last paragraph (since it does not deal with carriage of cargo), which was re inserted by MP4. Paragraph 2 also was added by MP4, and crates wholly new defenses from liability. However, MP4 included the word 'solely' in the first sentence of paragraph 3, between the words 'resulted' and 'from'. The deletion of this word from Montreal Convention significantly expands the defense. It does not apply to postal items[550] or unchecked baggage and, in contrast to the corresponding provision of the Warsaw/Hague/MP4; the Montreal Convention does not apply to checked baggage.

The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any cargo or registered baggage. (Article 121/1 of the TCAA[551]; Warsaw/Hague 18/1). However, article 18 of the Montreal Convention covers only cargo, baggage is dealt with separately under the article 17/2 of the Montreal Convention.

Under the Montreal Convention of 1999, the rules regarding damage to cargo are significantly different from those of the Warsaw/Hague Convention and are similar to those

[549] Ibid., para. 23.
[550] Article 2/2 of the Warsaw and Article 2/3 of the Hague Convention.
[551] TCAA differs from the Warsaw/Hague here from the point of terminology. Under the TCAA, it only mentions loss of and damage to cargo. According to Ülgen 'loss' must be understood as also covering destruction of cargo. See. Ulgen, p. 178.

of Montreal Protocol No. 4. The carrier's liability is based on fault under the Warsaw Convention. Whereas the carrier's liability for checked baggage is still based on presumed fault (article 20), in case of damage to cargo the carrier is strictly liable, irrespective of the carrier's fault, under the Montreal Convention of 1999, which retains the amendments introduced by Montreal Protocol No. 4. The carrier may only wholly or partially avoid liability by pleading and proving the defence of contributory negligence under article 20 or any one of the four grounds listed in article 18/3 Warsaw/Hague/MP4 (18 of the Montreal convention)[552]. The carrier may rely on the four exceptions listed in paragraph 3 of the MP4 (18/2 Montreal Convention) only if one or more of them were the only reasons for the damage. In the event that another unmentioned cause contributed to the damage, the carrier is not able to relieve himself of liability that is ascertained by the word 'solely'[553]. It is important to note that article 18/2 differs from the provision equivalent article 18/3 of the MP4 that offered exoneration to the carrier only if he proved that the damage resulted 'solely' from one of the elements mentioned. While the Conference anxiously tried not to touch the text of MP4, the deletion of the word 'solely' significantly expands the defenses of the carrier[554]

The conditions under which the carrier is liable for damage to cargo are stated under the Article 18/1 of the Montreal Convention, while paragraph 2 list possible defences. Paragraph 3 specifies the period during which the damage must occur and paragraph 4 excludes damage during carriage by land, by sea or by inland waterway, although in some circumstances such damage is presumed to occur during carriage by air unless the cause is known[555].

Under the Article 18/1 of the Warsaw Convention and Montreal Convention and under the article 121/2 of the TCAA, it has been stipulated that the carrier is liable for damage sustained in the event of destruction or loss of, or damage to cargo if the damaging event has occurred 'during the transportation by air'. Article 18/2 Warsaw Convention defines the term 'transportation by air' as the period during which the goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in

[552] Giemulla/Schmid, art. 18, para. 106.
[553] Ibid, para. 107.
[554] Dempsey/Milde, p. 167.
[555] Ibid, para. 1

any place whatsoever[556]. The carrier is liable for the consequences of anything which occurs during transit and causes damage. The damage itself may be sustained during the carriage itself or later[557]. In contrast, under article 17 of the Warsaw Convention the carrier is liable for injury or death to passengers only in the event of an 'accident'. The difference between two articles can be explained in the fact that the carrier has a greater degree of control over baggage and cargo in his charge than over his passengers[558].

The carrier is also liable for damage caused by delay in the carriage of cargo under Article 19 of the Warsaw Convention and under the article 122 of the TCAA.

It must be noted that the terms destruction, loss, damage and delay is not defined neither under the Warsaw Convention nor under the TCAA. In addition, there is not any provision governing the extent of the carrier's liability both under the Warsaw Convention and under the TCAA[559]. In some cases the line between the different kinds of damage, particularly between destruction and damage, may be unclear, but in view of the obligation to give notice, the exact determination of the kind of damage is of great importance[560].

2. Destruction

Whereas article 18 of the Warsaw Convention states destruction, loss of and damage to cargo, article 121/1[561] of the TCAA states only loss and damage and does not mention about destruction. However, as stated above, 'loss' must be understood as also covering destruction of cargo.

Destruction must be first assumed if the goods, the baggage or parts of it are destroyed completely. Also, destruction means diminishing of value[562]. Destruction of cargo does not mean only total physical destruction of the cargo but also the case of cargo, which still exists

[556] Giemulla/Schmid, art. 18, para. 30.
[557] Clarke, p. 106.
[558] Giemulla/Schmid, art. 18, para. 22.
[559] Sözer, (Yeditepe), p.149
[560] Giemulla/Schmid, art. 18, para. 12.
[561] Article 121/1 of the TCAA states that 'Tescil ettirilmiş bagaj veya yükün kaybı veya zarara uğraması halinde, zarara sebebiyet veren olay, havayolu ile taşıma sırasında meydana gelmiş ise zarardan taşıyıcı sorumludur'.
[562] Giemulla/Schmid, art. 18, para. 12.

in such a form as to have some monetary value but which, nonetheless, commercially valueless. In other words, destroyed goods or baggage no longer represent any commercial value besides their possible scrap value.[563].

On the other hand, destruction also comprises such alteration of the goods, or any part of them, as to make them, unfit to serve their original purpose for which they were intended, for instance, perishable foods, and dead animals[564].Greyhounds which arrive dead have been destroyed. In addition, swine that are arrive dead are considered destroyed goods, not 'damaged' goods. If racing dogs arrive at their destination dead, this is a case of destruction[565]. However, injured animals which are alive on arrival at the place of destination, but die shortly thereafter, are not regarded as destroyed, but merely considered to be damaged and the person entitled to delivery must therefore notify the carrier within the period specified by article 31[566].

Destruction in this concept serves to meet above-mentioned possibilities and in common to protect destruction of value of the cargo[567]. In the case of baggage, mutandis mutandi the rules are the same and destruction of baggage will be treated in a similar way[568].

3. Loss

Loss must be assumed if the carrier is not able to carry out his contractual obligation of putting the consignee into possession again[569]. Therefore, the cargo is lost if it is impossible to be delivered to the consignee. The cause of the impossibility is not important; cargo is lost if it is perished or cannot be found or cannot be delivered by the carrier to the entitled consignee within the foreseeable future for any reason whether legal or otherwise[570].

[563] Clarke, p. 111; Mankewicz, p. 168; Giemulla/Schmid, art. 18, para. 12; Sözer, p. 146.
[564] Mankewicz, p. 168; Giemulla/Schmid, art. 18, para. 12; Sözer, p.146; Ülgen, p. 179.
[565] Giemulla/Schmid, art. 18, para. 12; Mankewicz, p. 168.
[566] Giemulla/Schmid, Montreal Convention, art. 18, para. 11
[567] Giemulla/Schmid, art. 18, para. 12; Sözer, (Yeditepe), p. 146.
[568] Clarke, 111.
[569] Giemulla/Schmid, art. 18, para. 12; Sözer, (Yeditepe), p. 146; Ulgen, p. 179.
[570] Sözer, (Yeditepe), p. 146; Mankewicz, p. 168.

Loss of cargo includes not only in the case of cargo missing or mislaid but also that of cargo in a known location but unavailable to the claimant[571]. As cited by Giemulla/Schmid, the Oberlandesgericht Frankfurt Am Main, 14 July 1977, assumed 'loss' when a carrier had delivered cargo to the wrong consignee and there was no way of recovering it[572]. When cargo is lost because it was 'delivered to a third person rather than to the consignee, in such a case, the Court of Appeals, Paris[573] held that the consignor may claim damages for breach of contract, instead of damages for loss.

In Dalton v. Delta Airlines the US Court of Appeals (5th Cir) dated 7 April 1978[574], defined the term 'loss' as follows: 'Loss, of course, means that the location, or even the existence, of the goods is not known or reasonably ascertainable'. Cargo is also lost when stolen by third parties[575].

Equivalent to loss would be the permanent impossibility of regaining possession, for example, due to final seizure of the goods by customs authorities as a result of failure to observe customs regulations[576]. However, the carrier would not be liable pursuant to article 18/2 (d), unless the seizure was caused by the carriers non-observance of the regulations[577].

In the case partial loss, if the remaining part of the cargo is wholly without economic value, it will be deemed total loss of the cargo[578].

Article 13/3 raises a rebuttable presumption that cargo is lost which does not arrive at the place of destination within seven days of is scheduled arrival time. After the expiry of this

[571] Clarke, 111; Giemulla/Schmid, art. 18, para. 13.
[572] Cited by Giemulla/Schmid at art. 18, para. 13. In cases where a shipment is delivered to the 'notify person' named, one must work on the assumption that the goods have been handed over and lost. See. Giemulla/Schmid, art. 18, para. 13.
[573] Cited by Mankewicz in the case of UTA vs. Société d' Eqiupement d'avions, 11July 1975: 1976 RFDA 127 at p. 169.
[574]Dalton v. Delta Airlines the US Court of Appeals (5th Cir) dated 7 April 1978, 14 Avi 18, 425 cited by Mankiewicz, p. 169.
[575] It was cited by Clarke in the case of Manufacturers Hanover trust Co. v. Alitalia 429 F. Supp. 964 (D.C. N.Y. 1977), aff'd 573F.2d 1292 (2d Cir. 1977)
[576] Giemulla/Schmid, art. 18, para. 13.
[577] Ibid, para. 14
[578] Clarke 111; Ülgen, p. 180.

period the consignee may claim damages under the contract of carriage in the same way as if the carrier admits the loss[579].

4. Damage

There is damage whenever the substance and thus the value of the goods is impaired. Damage to goods either leads to a change in their outer appearance (physical damage) or to deterioration[580]. The line to be drawn between damage and destruction may be hard to define. A machine, for example, which is so seriously damaged that the repair costs would exceed the price of a new one, would have to be regarded as destroyed. Where some of the animals carried die during the carriage by air it may be a matter of dispute whether to view this is a partial loss of, or damage to, cargo. The correct legal analysis is not merely a matter a legal theory. It is important because damage requires notification to be given to the carrier in order to preserve the rights of the injured party (article 26/2 and 4), whereas notification is not required in respect of loss or destruction[581].

English law recognizes that the 'meaning of damage' varies to the context and it has different meanings in different contexts, both generally and within Warsaw Convention[582]. Sometimes it means 'monetary loss', for example, in article 17 or article 19. Sometimes it means 'physical damage', for example, article 22/2 (b). In some articles, it is used with both meanings, for example, article 18. More recently, it was referred to damage to goods as any change in the physical state of the goods which reduces their value to the person concerned [583].

The Convention applies to both total and partial damage of cargo. If the partial damage reduces its total value of cargo, in this respect it must be deemed a total damage. Besides, if the partial damage removes all economic value of cargo, in this respect it must be deemed loss[584].

[579] Giemulla/Schmid, (Montreal Convention), art. 18, para. 13
[580] Giemulla/Schmid, art. 18, para. 14.
[581] Ibid.
[582] Clarke, p. 111.
[583] Ibid., p. 112.
[584] Sözer, (Yeditepe), p. 147.

An important distinction exists between cases of 'destruction', 'loss' or 'damage' to cargo or registered baggage under article 18 and 26. Article 26 requires notice within 7 days to the carrier for 'damaged' goods. Thus, if the goods are destroyed, the 7-day notice does not apply[585].

5. Delay

The carrier is liable for damage occasioned by 'delay in the transport by air' of passengers, baggage, or cargo. Like article 18, no definition is provided for delay in article 19. Unlike article 18/1, but in compliance with the first sentence of article 1, article 19 does not distinguish between registered and hand baggage[586]. The carrier is presumed to be liable once the plaintiff shows that damages arose due to a delay. Therefore, the plaintiff has the burden of submitting evidence to prove; a delay, damages, that the delay was the proximate cause of the damages[587].

There has been little litigation concerning what constitutes delay, presumably because most air carriers take the substance out of article 19 by the conditions of carriage provided in the ticket issued. These conditions typically provide that timetables are not guaranteed and that flight times may be subject to change without notice[588]. Delay implies that some part of transportation is carried out later than it should have been, but carried nonetheless, and that the passenger, baggage or cargo concerned does arrive at destination. The case of cargo that disappears altogether is not therefore one of delay under article 19 but of destruction or loss under article 18[589].

Case law and legal authors commonly define delay as 'the untimely arrival at the place of destination' referring not to the time of landing, but to the time of disembarking (in the case of passengers) or delivery (in the case of goods or baggage)[590]. In other words, the notion of delay implies a discrepancy between the time when one party is entitled to expect the

[585] Goldhirsh, p.92
[586] Giemulla/Schmid, art. 19, para. 5.
[587] Goldhirsch, p. 100.
[588] Kreindler, Lee. S, para. 10.04[4], p. 10- 112.
[589] Clarke, p. 124.
[590] Goldhirsch, p. 101; Giemulla/Schmid, art. 19, para. 5.

performance of the carrier's duties and the time when these duties are actually performed[591]. In this respect, delay occurs when passengers, baggage or goods do not arrive at their destination on the date and at the hour indicated in the contract of carriage[592]. From the point of that 'delay' can mean the passenger, baggage, or goods did not arrive at the 'agreed time' at the destination. This 'agreed time' can be based on the time noted in the ticket or the carrier's timetable or some other agreed hour[593].

Many authors[594] and some courts are of the opinion that 'delay' should be construed as meaning 'abnormal delay', for example a delay resulting from the carrier's failure to take all appropriate measures to ensure departure and arrival of the aircraft at the times explicitly specified or indicated in his timetable[595]. According to *Shawcross/Beaumont,* commenting under the common law, 'in the absence of any express contract, a carrier is only bound to perform the carriage within a reasonable time, having regard to all the circumstances of the case'[596].On the other hand, the Swiss Supreme Court has held that the carrier is liable for delay only if he has failed to perform the contract 'in good faith'[597].

IATA regulations include some rules on delay. According to these provisions, the air carrier is allowed to carry out his timetable 'approximately'. This means that exceeding the timetable does not immediately entail damage due to delay: an 'unreasonable' duration of delay will have to be established. The question of what is to be considered as 'unreasonable' delay will depend on all sorts of circumstances, for instance the distance of carriage, the manner in which the transportation is carried out, the weather conditions, the season, the availability of other means of transport, etc.[598].

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[591] Miller, p. 154
[592] Diederiks-Verschoor, I.H.Ph, The Liability for Delay in Air Transport, Air & Space Law, Vol. XXVI/6, 2001, p. 300; Mankiewicz, p. 186.
[593] Goldhirsch, p. 101.
[594] They are cited by the Mankiewicz as Shawcross-Beaumont, Ripert, Lemoine, Riese-Lacour, Guldiman, p. 186.
[595] Mankiewicz, p. 186.
[596] Shawcross/Beaumont, para. 432.
[597] Mankiewicz, p. 186.
[598] Diederiks-Verschoor, p. 301; In the case of Bart v. British West Indian Airways it has been stated that the carrier must perform the carriage within a reasonable time having regard to all circumstances of the particular case. See, Miller, p. 157.

The carrier undertakes to use its best efforts to carry out the passenger, baggage and goods with reasonable dispatch. It is commonly provided in the 'IATA General Conditions of Carriage for Cargo[599] that 'the times shown in timetable or elsewhere are not guaranteed and form no part of this contract'. By including such 'no time' clauses, carriers seek to exonerate themselves from arriving at scheduled time. Such clauses are in violation of article 23 of the Warsaw Convention (Article 26 of the Montreal convention 1999) which prohibits any provisions which tend to relieve carriers of liability. Courts have usually agreed that these clauses are not valid for long delays[600]. In other words, it is therefore that courts do not find such clauses against article 23 of the Warsaw Convention (26 of the Montreal Convention) in short delays. In the absence of a specific contract, term delay in transportation occurs when the carrier takes an unreasonable time to perform the transportation promised[601]. The Paris Court of Appeals defined 'delay' as based upon what the shipper or passenger could expect the time to be, considering that he chose air instead of surface transportation[602]. This also appears to be the general rule in German cases[603]. Thus, the attorney representing a plaintiff who seeks damages for a delay should offer into evidence facts upon which his client had based his understanding when goods would arrive. This would include the carrier's timetable, the client's prior dealings with the carrier, the length of time other carriers take to fly the same the same route, and statements the carrier made in advertisements, press releases, and the like[604]. It appears that the courts will look first to the damages arising from a delay to see whether the delay is short and reasonable or a long and unreasonable one that gives rise to liability. What is 'short' and 'reasonable' must rest on the facts of each case[605].

On the other hand, condition of a carriage seeking to exclude liability for delay in certain circumstances, for example in the case of strikes or other labour difficulties, may be void as tending to relieve the carrier of liability. All must depend on the existence of reasonable

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[599] IATA General Conditions of Carriage for Cargo (Schedules, Routings, Cancellations), Article 6.3.1. See, http://www.transportrecht.de/transportrecht_content/1145517766.pdf.
[600] Goldhirsh, p. 101.
[601] Clarke, p. 123.
[602] Goldhirsh, p. 101. The test of 'reasonable expectations' of the shipper as used in French jurisprudence is not universally applicable.
[603] 1984 ZLW 177 (Oberlandesgericht Frankfurt am Main, 26 April 1983) cited by Goldhirsh, p. 101. The courts have defined the delay to be one that is 'reasonable' under the circumstances.
[604] Goldhirsch, p. 101
[605] Oberlandesgericht Frankfurt,1984 ZLW 177, 26 April 1983 cited by Goldhirsch, p. 102. It was held that eleven-hour delay unreasonable.

delay. If the delay in question could have been reasonably foreseen and prevented by the carrier, it is submitted that the condition will not avail him[606].

It is submitted that in accordance with the usual principles of statutory interpretation, article 19 should be read in its context, and, in particular, in conjunction with articles 17, 18, 22, and 24. However, without giving any indication that the period of carriage by air for the purposes of article 19 is different from that prescribed for the appropriate claim under one of the other articles[607]. A delay under article 19 may occur before the departure of the aircraft, during the carriage by air and, in the case of a carriage of cargo and registered baggage, even after the arrival of the aircraft. Indeed, there is nothing in article 19 resembling the specification, in articles 17 and 18, of the period of time during which the event causing the damage must have occurred[608].

Convention applies in cases where the proximate cause of the delay is in some sense 'operational' and associated with aviation, such as bad weather or mechanical failure during transportation even though, in the case of mechanical failure, the ultimate cause of the failure can be traced back to poor maintenance prior to the transportation[609]. In contrast, delay caused by administrative or management 'failure' is not subject to article 19.

In article 19 damage occasioned is not defined but, insofar as no conclusion can be drawn from the text of the Convention, issues of damages are left to national law. English law generally recognizes that the meaning of 'damage' varies according to the context. In the context of Warsaw Convention, the word damage is used in more than one sense. Sometimes it means 'monetary loss'- for example in article 17 or article 19. The corollary then is that it does not include distress or disappointment. Distress or disappointment is not generally 'damage' for which compensation is recoverable under the Conventions. The measure of damage is largely a matter for national law. On this basis the carrier will be liable for all kinds of loss which, given what the carrier knew or should have known about the claimant,

[606] Shawcross/Beaumont, para. 433.
[607] Ibid, para. 431.
[608] Court of Appeals Paris, in the case Iran Air vs. Compagine générale de Géophysique, 14 November 1974, cited by Mankiewicz, p. 186.
[609] Clarke, p. 122.

should have been in the reasonable contemplation of the carrier at the time of contracting as resulting from a breach of the kind that occurred[610].

In the case of delayed cargo, this might include a lost market at the place of destination perhaps a particularly lucrative market, if the carrier knew or should have been aware of the salient facts. If the carrier knew or should have known that cargo comprised parts or material needed for the owner's business, the carrier may be liable for loss of business such as loss of production[611]. In the case of perishable goods, delay may be easy to prove; however, one should always consider having an expert witness to provide evidence that the delay had deleterious effects on cargo. For example, in an instance where chickens arrived late and died and died prior to their delivery to the consignee, the damage to the shipment may have been caused by delay or by some disease they when shipped. Expert testimony may be required to establish when the damage or death occurred[612]. In the case Assureurs divers c. Alitalia[613], it has been stated that the amount of damages for delayed cargo will be the loss of market value of the cargo due to delay. In addition, consequential damages are generally available but damages vary from country to country.

II. Conditions of Liability

1. Damaging Event Has to Occur 'During Carriage by Air'

Under article 18/1 the carrier is liable for damage sustained in the event of destruction or loss of, or damage to, any registered baggage and goods, if the damaging event has occurred *'during its carriage by air'*. Article 18/2 of the Warsaw Convention defines the term 'carriage *by air*' as the period 'during which the baggage or goods are in charge of the carrier, whether in airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever.' The same expression has been provided under the MP4. The period of carriage by air is determined under the article 18/3 and 4 of the Montreal

[610] Ibid, p. 120.
[611] Ibid, p. 121.
[612] Goldhirsh, p. 105.
[613] Assureurs divers c. Alitalia 1983 RFDA 153 (Trib. De Comm. de Paris, 4 November 1982) cited by Goldhirsh, p. 106

Convention. The same term 'carriage by air' has been used under the article 121/2 of the TCAA.

As stated by *Giemulla/Schmid,* the Warsaw Convention differs from other laws governing the carriage of cargo since it does not define liability according to the period between the carrier's acceptance and delivery of the cargo but according to the location of the cargo and its control by the carrier[614], and it refers to two criteria for the definition of the period of liability: first to 'the place where the goods are', and second to 'the fact that the carrier is in charge of the goods'[615]. The plain meaning of article 18/2 of the Warsaw Convention clearly indicates that there can be 'carriage by air' only when two elements of the definition are present in a particular situation[616]. These means that a case where only one of the two criteria applied, for example, where the goods are in the charge of the carrier but neither located in an airport nor on board an aircraft, excluding the case of landing outside an airport, could not be termed an air carriage under article 18/2 of the Warsaw Convention. In other words, the term 'carriage by air' includes both criteria[617] and they must be fulfilled at the same time both under the Warsaw Convention and under the TCAA[618]. However, both under the doctrine and under the case law, the courts assess who is legally in charge of the goods, instead of examining the facts in order to assess who is actually in charge of the goods[619].

Article 18 of the Montreal Convention 1999 introduced some changes to the Warsaw Convention in this respect. It does not retain the same definition of the period of liability as the Warsaw Convention but defines it instead as any time during which cargo 'in the charge of' the carrier and so links liability to control rather than location[620]. The actual condition with regard to 'place where the goods are'[621] has been removed under the 18/3 of the Montreal Convention and only legal condition with regard to 'charge of the carrier' has been

[614] Giemulla/Schmid, art. 18, para. 30; Commentators agree that the meaning of carriage in the air Conventions should be same as that under CMR, or indeed those for other modes of carriage. See Clarke, p. 115.
[615] Giemulla/Schmid, art. 18, para. 30; Miller, p. 143
[616] Miller, p. 144
[617] As stated above, these two criteria comprise both the legal condition, i.e., the goods are 'in charge of the carrier', and the actual condition, i.e., the goods are in an aerodrome or on board an aircraft, or in the case of landing outside an airport, in any place whatsoever. See, Sözer, p. 285.
[618] Giemulla/Schmid, art. 18, para. 31; However, a few isolated cases, cited by Miller, appear to have been satisfied that there could be carriage by air on the strength of only one of these elements. See. Miller, p.144.
[619] Miller, p. 147.
[620] Giemulla/Schmid, Montreal Convention, art. 18, para.33
[621] Article 18/2 of the Warsaw Convention states that as 'whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever.'

preserved by this article. Article 18/3 of the Montreal Convention provided that the carriage by air within the meaning of paragraph 1 of this article comprises the period during which the cargo is in the charge of the carrier. This was done to clarify 'that the Convention applies whenever and wherever the cargo is in possession, custody or charge of the carrier, whether on or off airport premises'[622]. This change is likely to increase the ambit of liability of the carrier. The carrier is not only required to transport the cargo but must also take care of it and protect it from damage[623].

Another major change was an additional statement included in article 18/4 applicable to cases of substitute carriage. It provides that if a carrier, without the consent of the consignor, substitutes carriage by other mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by other mode of transport is deemed to be within the period of carriage by air. This provision was taken from the 'Alvor II' proposal, and it is intended to ensure that the unilateral decision of the carrier to substitute part of the carriage by air other means of transportation does not exclude the application of the new Montreal Convention. The new wording of the Montreal Convention clarifies that such carriage 'is deemed to be' within the period of carriage by air, but it is not very clear whether it is possible to make proof to the contrary, and what consequences of such proof are[624].

2. Being 'In the Charge of the Carrier'

As mentioned above, the carrier is liable for damage sustained in the event of destruction or loss of, or damage to, goods, if the damaging event has occurred *'during carriage by air'*. At the same time, the Convention refers to two criteria for the definition of the period of liability. (i) the place where the goods are, and (ii) the goods are in charge of the carrier.

The first criterion has been defined under the article 18/2 of the Warsaw Convention. According to this provision, 'the goods must be either in an airport or on board an aircraft, or in the case of a landing outside an airport, in any place whatsoever'.

[622] Salazar, p. 118.
[623] Giemulla/Schmid, MC, art. 18, para. 33
[624] Salazar, p. 119.

The second criterion 'in the charge of the carrier' is a phrase with the central word 'charge' that reflects a concept (*la garde*) well known in French law[625]. *Garde* is a term of art in the French law of civil liability; it signifies the 'control', which a person is entitled to exercise and does exercise over a thing or a person directly or through an intermediary, servant or agent[626]. The German translation conveys the concept by using the word *'Obhut'* which literally means 'keeping' and has been considered by the German courts in cases where German law supplements the Convention[627].

Generally, when the carrier has physical possession of the goods in an airport or on board, it has been held that it is 'in charge' of them[628]. However, there are times when physical possession does not result in the carrier's being 'in charge of the goods. For example, the cargo can be placed at the disposition of the consignee while still on board the airplane. Likewise, there are times when the carrier does not have physical possession of the goods yet it still may be considered 'in charge' of the goods[629]. *Mankiewicz* takes the view that 'being in control' (or charge) does not require possession or control of the goods but requires them to be in the sphere of control of the carrier in order that he can discharge his obligation to protect the goods and to prevent them from being damaged or lost[630].

This criterion has been expressed with the words 'protection' (muhafaza) and 'supervision' (nezaret) under the article 121/2 of the TCAA. According to *Sözer*, 'in charge of the carrier' means 'having custody of an object' in the legal sense. It also must be borne in mind that one of the distinguishing feature of the contract for the carriage of cargo is having actual custody of the cargo[631].

The OLG Frankfurt am Main[632] dated 21 May 1975, has taken the stance that the French term *'la garde',* which has been translated by *'charge'*, does not simply mean 'having custody of an object' belonging to someone else but also implies the legal duty to protect and

[625] Clarke, p. 115.
[626] Mankewicz, p. 170.
[627] Giemulla/Schmid, Montreal Convention, art. 18, para. 34.
[628] Goldhirsch, p. 93.
[629] !975 ZLW 218 (Oberlandesgericht Frankfurt am Main, 21 May 1975) cited by Goldhirsch, p. 93-94
[630] Mankiewicz, p. 170.
[631] Sözer, (Yeditepe), p. 103-104.
[632] OLG Frankfurt am Main, 1975 ZLW 218; NJW 1975, 1604; ZLW 1978, 216 ; NJW 1978, 2457; RJW 1978,197; TranspR 1979, 73 cited by Giemulla/Schmid, in art. 18, para. 32.

exercise due care and supervision in respect of the cargo[633]. According to the court the term 'charge of the carrier' as used in the Convention shall clearly define the period of time during which the carrier is responsible for the goods and consignor and consignee cannot dispose of them. Consequently, according to the OLG Frankfurt the term 'in charge' requires the consignor and consignee to have been deprived of all control over the goods, and that the actual custody and right of control has passed over to the carrier alone[634].

Such strict interpretation of the term 'in charge' by the OLG Frankfurt has been rejected by the Federal Supreme Court (Bundesgerichtshof)[635]. According to BGH, the meaning and purpose of article 18/2 is to extend the carrier's liability to damage that does not occur during the actual air carriage, but a time when cargo is in an airport, on board an aircraft or, in case of landing outside an airport, in any place whatsoever, but still within the carrier's sphere of control so that he is able to prevent the cargo from being damaged or lost in accordance with its duty of preservation. 'Being in control' does not require the carrier taking physical possession (appropriation) of, or control over, the goods[636]. It ought to satisfy the requirements if the carrier has been put in a position (with the consent of the consignor or the supplier) to exercise actual control over the goods and to prevent them from being damaged or lost. Unlike the OLGt Frankfurt, the German Bundesgerichtshof requires neither appropriation of the goods nor that the consignor be deprived of all possibilities of exercising control over the goods[637]. The Bundesgerichtshof therefore overruled the earlier judgement of the Oberlandesgericht Frankfurt that the carrier must have physical control of the cargo to the exclusion of the consignor in order to be in charge of it[638]. It is therefore sufficient that the cargo is under the control and responsibility of the carrier who has adequate power to protect it from damage in accordance with its duty of preservation[639].

[633] For the same approach, see Sözer, (Yeditepe), p. 104.
[634] Giemulla/Schmid, art. 18, para. 32.
[635] BGH VersR 1979 83; RIW 1979,420; MDR 1979 288; 1980 ZLW 61, cited by Giemulla/Schmid, art. 18. para. 33.
[636] Goldhirsch also takes the same view that there is no strict requirement that the carrier be in possession of the goods for him to be considered 'in charge'. Goldhirsch, p. 94.
[637] Giemulla/Schmid, art. 18, para. 33.
[638] OLG Frankfurt am Main, 1975 ZLW 218 cited by Giemulla/Schmid, Montreal Convention, art.18, para.36.
[639] LG Köln,TranspR 1987 = 1988 ZLW 262 cited by Giemulla/Schmid, art. 18, para.36.

In the case decided by the Bundesgerichtshof[640], one of the carrier's employees operating a fork-lift truck had assisted in unloading a machine from the deliverer's lorry. Through a mistake the lorry driver caused the machine to fall off the lorry and top of the fork-lift truck. The court ruled that the carrier is liable, reasoning that the machine had already been in his charge as by opening the cargo hatch and loosening the safety catch of the pallets the carrier had been put in the position to take over the cargo. By starting to unload the carrier assume control of the cargo from the time of unloading[641]. However, this decision is not a clear-cut. In the case at hand, the carrier had to carry out several tasks which did not form his usual duties. Tasks performed by the carrier in assisting the consignor in enabling the carrier to exercise control over the cargo must not be held against him. At least, the individual case should be examined closely in order to determine whether the carrier is merely assisting the consignor or actually in charge of the cargo in that it is completely in his sphere of control and responsibility[642].

On the other hand, Oberlandesgericht Nürnberg (Nuremberg Higher Regional Court)[643] ruled that a cargo of horses which were led by a trainer employed by the consignor into a container prepared by the carrier were not in the charge of the carrier who was not actively involved in the loading operations and therefore did not take charge of the cargo. In another case, the OLG Frankfurt[644] , dated 10 January 1978, has ruled that when the goods with a handling agent of the carrier because that agent, even though he is working for several carriers, is this carrier's servant.

In the US, in the case *Alltransport v. Seaboard World Airlines*[645] it has been held that 'in charge' means actual custody and control. The court reasoned that the Convention was concerned physical custody and actual delivery, not constructive delivery[646]. On that basis, the judge refused to allow the carrier to rely on the contractual conditions according to which delivery to the consignee was deemed completed when the goods were turned over to customs. This, for the court, did not put an end to the carrier being in charge of the goods.

[640] BGH VerS 1979, 83 = RIW 1979, 420 = MDR 1979, 288, 1980 ZLW 61, cited by Giemulla/Schmid, art. 18, para. 33.
[641] GiemullaSchmid, art. 18, para. 33.
[642] Ibid, para. 34.
[643] OLG Nürnberg, 1988 ZLW 184, cited by Giemulla/Schmid, art. 18. para. 34.
[644] 1978 ZLW 215 cited by Mankiewicz, p. 171.
[645] 76 Misc..2d 308, 349 N.Y.S.2d 277 (Civ. .Ct. 1973) cited by Giemulla/Schmid, art. 18, para. 38.
[646] Kreindler, 10.04 (3), p. 104

This could happen only by the physical handing over of the goods to the consignee[647]. In the case *Magnus Electronics Inc. v. Royal Bank of Canada*[648] it has been that the period of 'transportation by air' does not end with 'constructive delivery'. In another case, it has been held that liability under the article 18 begins when the carrier or his agents gain control over the goods[649].

The Convention remains silent on the question of whether the carrier must always exercise control over the goods personally or whether he may avail himself of a third party's service[650]. The consignor expects the carrier to accept the goods for carriage and to keep them in safe custody during carriage but he does not expect him to do that all by himself. However, the consignor wants to be assured that the charge of the carrier does not end at a point in time when both he and the consignee are deprived of the possibility of exercising their right of disposition over the cargo. For this reason, the cargo even remains in the charge and sphere of responsibility of the carrier in particular cases where the latter avails himself of a third party in discharging his contractual obligations[651]. Since the charge of the carrier continues while the goods are in custody of one of his servants or agents, he is liable for damage occurring during that period[652]. The carrier's charge does not end just because the goods are handed over to a third party for safe keeping. This does not free the carrier from his obligations vis-à-vis the entitled claimant. This means that the period after landing, during which the goods are stored with a third party until delivery to the consignee, is still part of the carriage by air[653].

Article 18/2 of the Warsaw Convention combines taking charge of the cargo with two more liability-limiting factors[654]: the goods must be either 'on board an aircraft' or 'in an airport'.

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[647] Miller, p. 148.
[648] 611 F. Supp. 436, 440 cited by Giemulla/Schmid, art. 18, para. 38.
[649] Julius Young Jewelry Co. v. Delta 414 N.Y.S 2d 528 (App.Div.1979); 1978 ZLW 215 (Oberlandesgericht Frankfurt am Main, 10 Jan. 1978) cited by Goldhirsch , p. 94
[650] In the case New York Supreme Court, Appellate Division, Young Jewelry Manufacturing Co. Et al. vs. Delta Airlines et al, 20 March 1979: 15 Avi 17. 568 it has been held that within the meaning of article 18, the expression 'carrier' comprises any agent performing functions that the carrier could or would otherwise perform himself. cited by Mankiewicz, p. 200.
[651] Giemulla/Schmid, art. 18, para. 35.
[652] OLG Frankfurt am Main, 1975 ZLW 218 (10 January 1978) cited by Giemulla/Schmid, art. 18, para. 35.
[653] Giemulla/Schmid, art. 18, para. 35.
[654] As mentioned above this requirement has been removed under the Montreal Convention.

a. 'On Board'

The easiest case to interpret is one in which there is damage to cargo while they were 'on board the aircraft'. Here, the commencement of the carrier's responsibility over the goods and its termination is clearest[655]. Cases where goods are '*on board'* an aircraft are not controversial, because the carrier always has charge of them. Thus, the time between loading and unloading the cargo falls within the period of liability[656].

b. 'In an Airport'

The second factor refers to the periods before loading and after unloading, the goods must be 'in an airport', for example, in its boundaries. This ascertains that the carrier is only liable for damage that has been caused either in the air or on the ground, and in the latter case only within the boundaries of an airport[657]. No definition of the word airport can be found, either in Warsaw 1929, or in Montreal 1999. However, one can refer to the definition contained in Annex 14 of the ICAO Convention[658], which runs as follows: 'An aerodrome' is a defined area on ground or water (including any buildings, installations and equipment), intended to be used either wholly or in part for the arrival, departure and surface movement of aircraft. Thus an airport encompasses a fixed area, and certain activities, for example, storage of freight, which have to be performed outside that area due to lack of space in the airport itself, cannot be regarded as being performed 'in an airport' and are therefore not subject to the liability regime of the Convention[659].

When defining the liability of the carrier, case law tends to keep close to the text of article 18/2, drawing the line along the boundaries of the airport area. Activities of the carrier, which although connected to the carriage are carried out outside these boundaries for lack of space, are not taken into consideration when determining the carrier's liability. However, such a definition guided by article 18/2 may lead to the conclusion that a warehouse kept by

[655] Goldhirsch, p. 94.
[656] Giemulla/Schmid, art. 18, para. 36.
[657] Ibid.
[658] Annex 14 of the ICAO Convention **(**Aerodromes - Aerodrome Design and Operations, Heliports). The same definition has been provided by Diederiks-Verschoor in 'Current Practice and Developments in Air Cargo': Comparison of the Warsaw Convention 1929 and the Montreal Convention 1999, European Transport Law, 2004, p. 749; Giemulla/Schmid, art. 18. para. 36; Sözer, (Yeditepe), p. 104.
[659] Giemulla/Schmid, art. 18. para. 36.

the carrier only a few hundred metres beyond the airport boundaries might have to be treated differently from one inside boundaries when it comes to questions of liability[660].

According to *Goldhirsch*, the carrier is 'in charge' of the goods in an airport from the time the goods are delivered to it in the legal sense, until it transfer the custody and control of the goods to the consignee or, in the case of baggage, to the passenger[661]. In the case *E.I. Dupont v. Schenkers International Forwarders,* it has been held that with respect to cargo, the carrier accepts the goods when it issues an air waybill[662].

At what point the carrier's liability for the transportation by air begins and ends can be determined very precisely by the criteria 'charge', 'on board an aircraft', and 'in an airport', and by additional reference to article 18/3, according to which the period of the carriage by air 'shall not extend to any transportation by land, by sea or by river performed outside an airport'[663]. In other words, those means of transportation or carriage from or to the domicile or place of business of the consignor or consignee is not a carriage by air but is a typical supplementary service of the carrier, for which he is no longer liable under the contract for carriage by air. If damage occurs during such transportation, the carrier's liability is not founded on article 18 but, as provided by article 31/1 of the Warsaw Convention, exclusively on the conditions of contract that have been agreed upon in connection with the applicable national law[664].

From the context of the above-mentioned regulations, the time at which the carrier's liability under article 18 begins and ends becomes clear: if the carrier received the goods outside the airport and has thereby obtained charge of them, the carriage begins when goods pass the airport gate, which is normally the airport boundary. If the carrier only takes over the goods from the consignor or his agent at the airport, the carriage does not commence when the airport boundary is passed, but only when the carrier gains actual control over the goods

[660] Giemulla/Schmid, art. 18, para. 36; Where the damage is proven to have been caused outside the airport the Convention is inapplicable even if damage took place near the airport. Cited by Goldhirsch in the case Hitachi Data Systems v. Nippon Cargo Airline Co. Ltd. 24 Avi. 18433 (D.C.N.Y. 1995), See related cases Goldhirsch, p. 95.
[661] Goldhirsch, p.94
[662] E.I. Dupont v. Schenkers International Forwarders 12 Avi. 18360 (N.Y.Sup.Ct. 1974), cited by Goldhirsch, p. 94
[663] Giemulla/Schmid, art. 18, para. 36.
[664] Ibid.

delivered. The air carriage ends upon leaving the airport of destination, in cases where the carrier has agreed to delivery outside the airport[665].

The time during which the cargo is in the charge of the carrier, which is also the decisive criterion for the limitation of liability in other fields of transport law, in most national and international regulations on the transportation of freight is marked by the terms 'acceptance' and 'delivery'[666]. Even though the terms used may vary depending on the language of the individual provisions, they refer to the same processes. The CITEJA's preliminary draft of the Convention also referred to the acceptance and the delivery of the cargo; the term 'delivery' also appears in article 18/3 of the Warsaw Convention[667]. Since there is no reason, why the period of liability in cases of carriage by air should be determined in a different manner to that arising in the cases of other modes of transportation, the beginning and end of the period of liability in a carriage by air under the Convention, must also be determined by 'acceptance' and delivery of the cargo[668]. These terms will be defined hereafter more precisely.

c. Acceptance

The term 'acceptance', used in connection with the transport of cargo, normally defines the act of taking delivery by the carrier either to take possession or custody of cargo for the purpose of transportation[669].

The German Bundesgerichtshof[670], dated 27 October 1978, has ruled that consignor is not necessarily be deprived of all control over cargo while it is in the charge of the carrier, since an interpretation like that cannot be derived from article 18 or any other provision of the Convention. The requirements are satisfied if the goods are in the sphere of control of the

[665] Giemulla/Schmid, art. 18, para . 37; Mankewicz, p. 170; Sözer, (Yeditepe), p. 103
[666] Giemulla/Schmid, art. 18, para. 37.
[666] Giemulla/Schmid, art. 18, para. 37.

[667] Ibid.

[668] Ibid.
[669] Giemulla/Schmid, art. 18, para. 38.
[669] Giemulla/Schmid, art. 18, para. 38.
[670] BGH 1980 ZLW 64; NJW 1979 493; VerS 1979 83; 1979 ETL 651; 1979 MDR 288 cited by Giemulla/Schmid art. 18, para. 38.

carrier by the consent of the consignor and consignee so that he is in position to protect them and is empowered to prevent them from being lost or damaged. Acceptance does not occur until after the carrier has had an opportunity to check the particulars of the goods. *Giemulla/Schmid* states that 'air carriage commences when the carrier has accepted the goods and thereby taken them into his charge', they need not necessarily be transported by aircraft – at least so long as acceptance has taken place in an airport[671]. *Goldhirsh* states that the liability of the carrier begins 'when he or his agents gain control over the goods'[672].

According to the case law acceptance occurs once the carrier has inspected or has had the opportunity to inspect cargo which it collects from the consignor for interim storage or which the consignor delivers to its warehouse[673].

According to *Sözer*, in cases where the carrier has accepted the goods and thereby taken them into his charge, if the actual transportation is going to commence afterwards, it will not be possible to apply provisions of Warsaw Convention and TCAA just for taking delivery by the carrier. The carrier could be still held liable for damage or loss of the goods, for example, by virtue of a contract of deposit[674].

However, storage of cargo immediately prior to departure or immediately after arrival at destination may be part of carriage, if the cargo is in the charge of the carrier, even though the cargo is not moving. The court in Westminster Bank v. Imperial Airways[675] stated that the carrier is liable for objects he has accepted for carriage and keeps in his airport warehouse until the actual carriage starts. If the cargo is damaged on the premises of the air carrier, it will be presumed that it was damaged while in the carrier's charge[676]. The carrier does not take charge of cargo on arrival at its place of business or warehouse where such

[671] Giemulla/Schmid art. 18, para. 38.
[672] Goldhirsh, p. 94; Mankewicz also states that the carrier's liability commences when he accepts the cargo or registered baggage and thereby gains control over it. See. p. 171.
[673] US District Court (SDNY), 1998, 26 Avi 15, 821 – Federal Insurance Co. v. Yusen Air & Sea Service cited by Giemulla/Schmid, MC, art. 18. para. 42
[673] US District Court (SDNY), 1998, 26 Avi 15, 821 – Federal Insurance Co. v. Yusen Air & Sea Service cited by Giemulla/Schmid, MC, art. 18. para. 42
[674] Sözer, p. 288; contra Ulgen, p. 170.
[675] Westminster Bank v. Imperial Airways, 1936, 55 Lyods' Law Review 242 cited by Giemulla/Schmid, art. 18, para. 43.
[675] Westminster Bank v. Imperial Airways, 1936, 55 Lyods' Law Review 242 cited by Giemulla/Schmid, art. 18, para. 43.
[676] Air France v. Air Cat, Cass.28.5.1996 (1997) 32 ETL 129 cited by Clarke, p. 116

cargo is brought to the airport by the consignor in its own lorry. In these circumstances the consignor must surrender control of the cargo by transferring it to the custody of the carrier is treated as having charge of it. A borderline case is that of cargo damaged when being lifted from lorries, which had been brought them to the airport, by a device operated by the carrier. The Bundesgerichtshof[677], dated 27.10.1978, has therefore ruled that the carrier had taken in charge; they had come into carrier's sphere of influence which did not necessarily mean in the carrier's physical possession. The carrier only takes charge of cargo brought to the airport in a lorry driven by the consignor where such cargo is surrendered to the carrier and the carrier signals its acceptance of the cargo by commencing unloading operations[678].

d. The Delivery

'Delivery' is generally defined in transport law as the operation 'by which the air carrier gives up the charge of the goods, with the implied or expressed consent of the person entitled to delivery, if that person is put in the position to exercise actual control over the goods[679]. It is irrelevant whether delivery takes place in the place of arrival as agreed in the contract of carriage or not, provided that the consignee has given his consent to delivery. In such a case, the carrier is not liable for damage occurring during the carriage to the original place of the arrival[680]. The carrier's charge ends with the delivery of the cargo, provided that the carrier has made the goods available to the consignee in such a way that the latter can take them into his possession without any difficulty. Taking physical possession is not required, but the carrier must have given up possession of the cargo[681].

This shows that the mere arrival of the cargo at the place of destination does not constitute delivery. Neither does the period of liability end with unloading the goods from the aircraft. Liability lasts for as long as the carrier stores the cargo until delivery to the consignee[682]. The liability of the carrier also extends to the period during which the cargo is temporarily stored

[677] BGH 27.10.1978, NJW 1979, 493, cited by Clarke, p. 116.
[678] Giemulla/Schmid, Montreal Convention, art. 18, para. 42.
[679] Giemulla/Schmid, art. 18, para. 39; Ülgen, p. 171; Çağa/Kender, p. 61; Sözer, (Yeditepe), p. 116
[680] Giemulla/Schmid, art. 18, para. 39.
[681] Ibid.
[682] Ibid., para. 40.

during intermediate stop[683]. The contract for carriage by air covers the whole period during which the cargo is in the charge of the carrier[684].

According to *Miller,* the courts instead of examining the facts in order to assess who is actually in charge of the goods, they try to define who is legally in charge of the goods by using the concept of 'delivery', which marks the end of the carrier's duties in the general law of carriage, event though it is not mentioned in article 18/2[685]. Therefore, 'the air carrier is seen as being in charge of the goods until delivery of the goods to the consignee or his agent has taken place'. Delivery in that sense is the legal act by which the consignee accepts the goods. It is not physical act by which the goods are placed within the actual control of the consignee[686]. With regard to this issue, *Mankiewicz* states that the liability of the carrier ends when control of the cargo passes to a person authorized to receive it and who is not one of his servants or agents, when they are delivered to a successive or actual carrier, to the consignee or his broker or agent designated on the air waybill; and in any event, when the cargo is put at the disposal of the consignee or his agent because this act of the carrier 'completes the performance of the contract of carriage'[687]. The decisive moment is the one when actual (not constructive) delivery takes place[688].

The carrier's liability does not end if the consignee refuses to take delivery of the cargo in question. In such a case, the carrier must consult the consignor for further instructions. If the consignor does not instruct the carrier on what to do with the cargo, and if the cargo is then seized by custom authorities, the carrier's liability is ended. If the carrier must return the goods to the consignor because the consignee has refused to take delivery, the goods remain under his control until they are handed over to the consignor again[689].

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[683] OLG Frankfurt, 1993 TranspR 103 cited by Giemulla/Schmid, art. 18, para. 40.
[684] Giemulla/Schmid, art. 18, para. 40.
[685] Miller, p. 147.
[686] Ibid
[687] German Supreme Court, 27 October 1978, 1979 ETL 651; New York City Civil Court, New York Country, Alltransport vs. Seaboard World Airlines, 1 November 1973: 12 Avi 18. 163; Court of Appeals, Paris, Sprinks vs. Air France, 27 June 1969: 1969 RFDA 405 cited by Mankiewicz, p. 172. As mentioned above, if the goods are delivered to an unauthorised person they are considered as being lost)
[688] New York City Civil Court, New York Country, Alltransport vs. Seaboard World Airlines, 1 November 1973: 12 Avi 18. 163 cited by Mankiewicz, p. 172.
[689]Alltransport vs. Seaboard World Airlines, 1 November 1973: 12 Avi 18. 163 cited by Mankiewicz, p. 172.

Bearing this definition in mind, the period of liability does not end by the carrier's giving up possession of the goods but only when also the second requirement, handing over the goods to a person entitled to delivery, is satisfied[690]. 'Person entitled to delivery' is the consignee named in the air waybill or a forwarder duly authorized by the consignee. The 'notify' party named in the air waybill is not entitled to delivery, it merely has to be informed of the arrival of the cargo. If the consignor has ordered delivery to a person other than the consignee named in the air waybill, that other person is entitled to delivery. Delivery of the goods to a person who is not entitled to take delivery cannot be viewed as the end of the period of liability as laid down in article 18 of the Warsaw Convention. Delivery may only be made to a third party other than consignee if it is entitled to delivery or is a substitute consignee designated in a place of the original consignee or is authorised by the consignee to take delivery or is an assignee of the consignee's right of delivery[691].

Delivery of cargo by the carrier to a person other than the consignee named in the air waybill, for example to the notify party named in the air waybill, must be viewed as damage having occurred in the course of the carriage if the person entitled to delivery is not able to retrieve the cargo[692]. Similarly, if the carrier delivers the cargo to a person who is not properly authorized to take delivery (misdelivery) does not terminate carriage by air. In cases where the consignee names a forwarder as person entitled to delivery, delivery to that forwarder ends the period of liability whereas delivery to an unauthorized forwarder does not. The carrier remains liable under the Convention to the person entitled to it[693].

As a rule, the period of liability also ends when one carrier in a successive carriage[694] hands over the cargo to another carrier for onward carriage. However, in such case the question may arise as to when the first carrier's liability ends and successive carrier's liability begins. Firstly, the liability of the first carrier may only end when the goods are loaded into the aircraft of the second carrier. This would certainly be the case, where transhipment i.e., activities taking place between unloading the cargo from the first and loading it into the second aircraft, is performed by servants or agents of the first air carrier. Secondly, the

[690] Ibid., para. 41.
[691] OLG: Stuttgart, 3 U 210/01 of 27 Mar. 2002 cited by Giemulla/Schmid, MC, art. 18, para. 43.
[692] Ibid., para. 42. Also, it must be viewed as damage having occurred in the course of the carriage if the carrier cannot retrive the cargo.
[693] Giemulla/Schmid, art. 18, para. 42; Clarke, p. 117.
[694] Article 129 of the TCAA; article 39 of the Warsaw/MP4; article 36 of the Montreal Convention of 1999.

liability of the successive carrier begins when the first carrier's servants or agents have finished unloading the first aircraft and his servants or agents start loading the cargo into the second aircraft. However, where transhipment is performed by a transhipment company or, in the case of stopover, by a warehouse company, the beginning and end of the periods of liability of the first and second carrier must be determined on a case by case basis, perhaps by reference to the respective contracts made with the companies involved[695].

Cases where the consignee affirms delivery of the cargo on the freight documents without having actually received the cargo are normally not regarded as delivery. The carrier is still liable if forwarder entitled to delivery signs the receipt as 'received in good order and condition' in order to obtain the documents necessary for customs clearance while the goods are still kept in the air carrier's warehouse located within the airport area[696]. The Tribunal de Commerce de Bruxelles[697], dated 1 June 1983, held that in such a case the carriage by air had not ended. *Giemulla/Schmid* agrees with this view because documentary 'delivery' does not end the charge of the carrier, only physical 'delivery' does. In cases where the consignee postpones physical delivery for a long time, the carrier's liability ends with the documentary delivery of the goods. Further storage by the carrier is then performed by virtue of a contract of deposit[698].

The storage of cargo in protected warehouse of the carrier located within the airport area before or after the carriage is also covered by the carrier's liability[699]. Storage of cargo after the actual carriage has ended until the goods are delivered to the consignee is part of the 'carriage by air', provided that the warehouse is located in an airport, and damage arising during the time of storage is treated as one having occurred 'in the course of carriage'. Neither does the carrier's liability end when he hands over the cargo to a transhipment company in the airport, since also this company will normally be treated as a servant or agent of the carrier[700].

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[695] Giemulla/Schmid, art. 18, para. 41.
[696] Ibid., 18. para. 40.
[697] The Tribunal de Commerce de Bruxelles, 1 June 1983, cited by Giemulla/Schmid, art. 18. para. 40.
[698] Giemulla/Schmid, art. 18. para. 40.
[699] Giemulla/Schmid, refer to the following decisions: OLG Munich, 25U1094/83; Picconi Ragatense c. Extra Spedizioni e Aeroporrti di Roma, 1994 Al 45 No. 21, Tribunale di Roma, 1991, No. 12353; OLG Frankfurt, 12 July 1977, 1978 ZLW 217 cited by Giemulla/Schmid, art. 18, para. 43.
[700] Giemulla/Schmid, art. 18. para. 43.

The problem of determining the moment of delivery is further complicated by custom regulations. It is a matter of dispute whether the period of liability ends, continues or is interrupted when the goods are handed over to the customs authorities. The OLG Stuttgart held that in such a case the period of liability ends[701]. The court reasoned that the carriage itself has come to an end, and that the carrier is deprived of any actual or legal responsibility of exercising control over the cargo after he has handed the goods over to the custom authorities who then exercise exclusive control[702].

The same view was held by the Court of Appeals, Brussels in the case *Favre vs. Etat de Belgique et Sabena*[703], dated 10 June 1950, for the reason that the carrier 'had no right whatsoever of supervision over the goods once they had been handed over to the customs authorities who are solely in charge of the storehouse'. The same approach was implicitly adopted in the French case of *Cie Air Liban c. Cie Parisienne de Réescompte et Cie Air France*[704].

Later cases show a distinct change in attitude. *In Syndicat d' Assurances des Llyods c. Sté Aérofret*[705], the Paris Court of Appeal had indicated that the damage had occurred during the transportation by air because the goods, which were within an airport, were also under the legal custody of the carrier. The carrier was responsible for the loss while the goods were in customs[706]. In the case *Air Express International Agency (France) c. Sté Marais & Cie*[707], the Paris Court of Appeal further indicated that the contract of carriage by air comes to an end only when the consignee takes actual possession of the package. The same court made its reasoning much more explicit in *Sprinks & Cie c. Air France*[708], the Paris Court held that the transportation ends by the delivery of the cargo to its consignee or to the consignee or the consignee's agent, or by placing the cargo at their disposal. It is by examining the facts of

[701] OLG Stuttgart, 1996 ZLW 63; 1968 MDR 93 cited by Giemulla/Schmid, art. 18. para. 43.
[702] Giemulla/Schmid, art. 18. para. 43.
[703] The Court of Appeals, Brussels, Favre vs. Etat de Belgique et Sabena, 10 June 1950 (1950 USAR 392) cited by Mankiewicz, p. 172.
[704] Cie Air Liban c. Cie Parisienne de Réescompte et Cie Air France (1956) 10. RFDA 320 (C.A. Paris 31 May 1956) cited by Miller p. 146.
[705] Syndicat d' Assurances des Llyods c. Sté Aérofret 1967 30 RGAE 168 (C. A. Paris, 27 June 1966), aff'd 1969 RFDA 397 (Cass. 22 April 1969) cited by Miller, p. 147.
[706] The same approach has been held in cases: Accord: Belgium: 1976 ETL 918 (Rechtbank van Koop en Handel van Antwerpen, 10 July 1975; Germany: Oberlandesgericht Frankfurt, 12 July 1977, 1978 ZLW 217 cited by Goldhirch p. 96.
[707] (1968) 22 RFDA 79 (C.A. Paris, 13 January 1968) cited by Miller p. 147.
[708] (1969) 23 RFDA 405 (C. A. Paris, 27 June 1969) cited by Miller p. 147.

each case, and the particular contractual terms that the time of legal delivery must be assessed. In *Sprinks*, the Court found that the custody of the goods had not been transferred to the consignee and accordingly, held Air France liable for the damage[709]. The early cases based their reasoning on determining who was actually in charge; they released the carrier after the goods had been handed to the customs authorities. The later cases base their reasoning on determining who is legally in charge. Since a carrier remains legally in charge until he is released by the only person who has the power to do so, i.e. consignee or his agent, the physical presence of the goods in a customs warehouse is of no relevance. The carrier remains in charge throughout the custom operations until delivery to the consignee can be completed[710].

In the USA, the carrier will usually be held responsible for loss or damages to goods while they are in custody of customs[711]. When the cargo, before delivery to an authorised person, is stored in the carrier's warehouse or with customs authorities, they are still under the control of the carrier[712]. Even where there is a contract that defines 'delivery' as the point at which the airline gives the cargo to customs, the carrier may still be held responsible. In *Alltransport Inc. v. Seaboard World Airlines*[713], an agreement existed with the carrier that delivery to the consignee was considered to have occurred when the carrier turned the goods over to customs. Nevertheless, the judge said that 'in charge' must mean 'actual custody and control', and that the Convention was concerned with physical custody and actual delivery, not constructive delivery. On that basis, the court did not permit the carrier to avoid liability for losses after it had turned the goods over to customs. It held that only when the goods are transferred physically to the consignee does the carrier cease to be in charge of them.

Another view is that the carriage only ends with the delivery of the cargo to the consignee named in the air waybill or cargo receipt[714]. Therefore, the carrier normally remains in

[709] Miller, p. 148.
[710] Ibid.
[711] Locks v. Bristish Airways 759 F. Supp. 1137 (D.C. Pa. 1991) cited by Goldhirsch, p. 96.
[712] Mankiewicz refers to the following cases: U.S. District Court of New York, Manufacturers Hanover Trust vs. Alitalia, 16 April 1977: 14 Avi. !7. 710; King's Bench Division, London, Westminster Bank vs. Imperial Airways, 27 May 1936: 136 USAR 39 cited by Mankiewicz, p. 172.
[713] 349 N.Y.S. 2d 277 (N.Y. Civ. Ct. 1973) cited by Miller p. 148.
[714] Giemulla/Schmid refer to the following cases: Magnus Electronics v. Royal Bank of Canada, 611 F. Supp. 436 and 19 Avi 17,944, US District Court, III., 1985; Jaycee Patou v. Pier Air International et al., 21 Avi 18,496,US District Court, SDNY, 1989; Kologel v. Down in the Village, Inc., 17 Avi 17,104, US District Court, SDNY, 1982; LG Stutgart, 1993 TranspR 141. See Giemulla/Schmid, art. 18. para. 43.

charge of cargo held by customs since the customs authority is not a consignee, and performs its statutory duties according to the law of the land and not according to the contract of carriage. The US District Court of Massachusetts accepted this argument in *Bennett Importing v. Continental Airlines*[715] and ruled that the carrier remains in charge of cargo inspected by customs officers in its own warehouse since it retains control of the cargo in its capacity as warehouse manager. The OLG Cologne[716] extended the scope of this decision by ruling that this also applies if the carrier hands the goods over to a third party which has been ordered to take the cargo into custody by the customs authorities and, therefore, is not a servant or agent of the carrier. This is not delivery to the consignee. The court argued that the carrier was still able to exercise control over the cargo, albeit within certain limits set by public law, as he was able to determine the kind of customs treatment. On the other hand, the carrier is not liable for damage if the cargo handed over to a forwarder, authorized by the consignee, prior to custom regulations[717].

According to *Giemulla/Schmid*, the best approach is to consider the facts of each case on its merits. The carrier retains legal (de jure) and actual (de facto) control and is therefore in charge of cargo which is stored in its own warehouse pending customs inspection particularly if the relevant customs regulations enable it to influence the manner in which the cargo is handled. However, the carrier normally loses actual control of cargo where customs treatment is performed either at the customs warehouse or at the warehouse of a third party. During that time, he is not in the position to prevent carriage-related damage from occurring. For this reason, the carrier is not liable under article 18 of the Warsaw Convention until he is put back in full control of the cargo and in the position to prevent the goods from being damaged or lost[718]. The carrier is also not liable under article 18 of the Warsaw Convention for cargo or baggage that is seized by the customs on account of prohibited contents. The confiscation of prohibited items under customs regulations is a matter over which the carrier has no control and is a risk which belongs to the consignor[719].

[715] 21 Avi 17,917, US District Court, DMass, 1988 cited by Giemulla/Schmid, art. 18. para. 43.
[716] OLG Köln, TranspR 1982, 43, 1982 ZLW 167 cited by Giemulla/Schmid, art. 18. para. 43.
[717] Giemulla/Schmid, art. 18. para. 43.
[718] Ibid., para. 44.
[719] OLG Köln, 10 April 1992, 25U10/91- Unpublished cited by Giemulla/Schmid, art. 18, para. 45.

According to *Ülgen*, for solving this matter of dispute, it must be looked the agreement between the parties. If the carrier has agreed on to deliver the goods to the consignee, the goods will be still under the control of the carrier until the delivery of the goods to the consignee[720]. However, if the carrier has agreed on to deliver the goods to the custom authorities; the carrier's liability will end with delivery of the goods to the customs authorities[721].

According to *Sözer,* delivery to custom authorities does not mean that the carriage is over and carrier is held responsible until delivery to the consignee. When the cargo is stored with custom authorities, they are still under the control of the carrier. Carriage is not over until delivery to the consignee[722].

We agree with *Sözer* that the carrier is liable until delivery to the consignee. It will be a wider interpretation of the article 18 to consider that delivery to a customs authority ends carriage. It is a commonly known fact that once the cargo has arrived at the airport of destination, it will be subjected to customs procedures. In a recent case, Italian Court of Cassation had held that performance of a contract of carriage is not complete just because the goods are conveyed to the place of destination; the purpose of carriage is delivery to the consignee and it is appropriate for the carrier to remain liable for the safe of custody of the goods until this object is achieved[723].

3- Surface Transport

While article 18/2 of the Warsaw Convention defines the term 'carriage by air', article 18/3 of the Warsaw (18/5 of Warsaw/MP4 and 18/4 of the Montreal Convention) determines that carriage by land, sea or river is not covered by that term and governs the ground transportation of goods outside airport.

[720] As indicated above, the person entitled to deliverry is the consignee named in the air waybill.
[721] Ülgen, p. 174.
[722] Sözer, (Yeditepe), p. 118.
[723] Odino Valperga Italeurope SpA v. New Zealand Insuarance Co Ltd. (Corte di Cassazione, 19 June 1993) Dir Mar 1037, 1994 29 Eur Tr. L. 674 cited by Kreindler, p. 880.

The first sentence of Article 18/3 of the Warsaw, article 18/5 of Warsaw/MP4 and 18/4 of the Montreal Convention provided that the period of carriage by air does not extend to any carriage by land, by sea, or by river performed outside an aerodrome. This paragraph seems to be the logical complement of the definition of carriage by air contained in article 18/2. After having determined what constitutes carriage by air, the Convention clearly indicates what is not to be included in the period of carriage by air and makes it clear that the period of carriage by air does not include transport by land, sea or river outside and airport. This is consistent with article 31 of the Convention which deals with cases so called combined carriage, which is performed partly by aircraft and partly by another means of transportation. According to article 31 the Convention only applies to that part performed by aircraft[724]. However, the second sentence contains one important exception to this rule in that it indicates that if such transportation takes place in performance of the contract for transportation by air, for purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been result of an event of which took place during the transportation by air. This therefore means that this category of transportation shall be treated as carriage and subject to Warsaw Convention.

According to the first sentence of article 18/3, carriage by sea, land or river outside an airport does not come within the scope of the term 'carriage by air'. Thus, article 18/1 is not applied to surface carriage performed between two airports for the purpose of transhipment from one aircraft to the other. By way of reverse conclusion, it becomes clear from the first sentence article 18/3 that the types of carriage listed there can be viewed as carriage by air as long as they are performed within an airport. Any transport for the purpose of delivery, loading or transhipment taking place outside an airport (article 18/3, sentence 1) is not considered to take place as part of a carriage by air. However, the second sentence of article 18/3 contains a specific rule of evidence if any transportation by sea, land or inland waterway takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

[724] Giemulla/Schmid, art. 18, para. 48; Miller, p. 151.

Surface carriage as mentioned above is merely accessory to the carriage by air and is not by any means part of a combined carriage by air, which finds its expression in the fact that part of the flight distance agreed, for lack of a suitable airport near by or lack of suitable connecting flights, has to be covered by surface carriage[725]. This means that surface carriage under article 18/3 is a feeder service; either from the airport of destination to the consignee, or from the consignee to the airport or between two airports for the purpose of transhipment. On the other hand, if the carrier uses means of surface transport despite the fact that a regular flight service is performed on the route in question, such carriage is not covered by article 18/3. Such carriage is termed substitute carriage. Here, carriage by aircraft is possible, but it is replaced with a carriage by a means of transportation, to which the principles laid down in article 18/3 do not apply[726].

Firstly, the surface carriage is required to be one for the purpose of loading, delivery or transhipment; secondly, it is also required to take place in performance of a contract for carriage by air, which requires the surface carriage to be agreed on part of the entire carriage when the contract of carriage is made and to be noted in the air waybill. Surface carriage performed under a special agreement between the parties is not covered by article 18/3[727]. Another point is that the sufficient, and at the same time essential, requirement of surface carriage for the purpose of loading, delivery or transhipment in performance of the contract of carriage is that both the carriage performed by aircraft and the carriage performed by any mode of surface transport have been agreed as one operation, albeit in separate contracts. For this reason, the requirement 'in performance of the contract of carriage' will be satisfied if the surface carriage is agreed to be part of a single operation[728]. However, if another compulsory regime such as CMR applies outside the fence, the extension is impossible[729].

[725] Giemulla/Schmid, art. 18, para. 50.
[726] Ibid.
[727] Ibid., para. 51.
[728] Ibid.
[729] Clarke, p. 107.

III. LIMITATION OF LIABILITY

1. Limited Liability System

a. In General

The basic rule or fundamental principle in law is 'unlimited liability'. However the liability of the carrier is limited under the Warsaw/Hague system and 'unlimited liability' is accepted as an exception under certain specific and defined cases. The Warsaw Convention provides an identical regime to govern the liability of an air carrier for the carriage of passengers, baggage, and goods. Liability of the carrier for personal injury to the passenger, for damage or loss of goods and baggage, and for damage due to delay in transportation is limited.

b. Limited Liability under the TCAA

Under the TCAA, the matter of limitation of liability is totally based on the Warsaw/Hague system. In this respect, limitation of liabilities in domestic carriages will be determined according to the provisions of Warsaw/Hague system[730].

Article 124/1 of the TCAA provides that limitation of the carrier's liability shall be determined according to '*Convention for the Unification of Certain rules relating to International Carriage by air, signed on 12 October 1929 in Warsaw, and its amendments to which Turkey is party*'[731].

Article 124/2 of the TCAA allows the carrier to agree to a higher limit of liability by special contract than those provided under the first paragraph of this article.

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[730] Sözer, (Yeditepe), p. 153.

[731] '12 Ekim 1929 tarihinde Varşova'da imzalanan ve Uluslar arası Hava Taşımalarına İlişkin Bazı Kuralların Birleştirilmesi Hakkındaki Sözleşme ve bu Sözleşmeyi Değiştiren Türkiye'nin Katıldığı Sözleşme ve Protokoller'.

c. Limited Liability under the Warsaw/Hague System

The amounts of the limits are determined by the gold francs more popularly called as Poincaré Francs under the Warsaw Convention 1929, Hague Protocol 1955 and Guadalajara Convention, by American Dollar under the 1966 Montreal Intercarrier Agreement, and by the SDR (Special Drawing Rights) both under the Montreal Protocols and under the Montreal Convention 1999.

The SDR is an international value used to provide a regular comparative evaluation by the International Monetary Fund (IMF) of the currency of member nations[732]. SDR is as defined by the International Monetary Fund and, in the case of high contracting parties which are members of the IMF, the value of a national currency in terms of the SDR is to be calculated in accordance with the method of valuation applied by the IMF at the date of judgement for its own operations and transactions. The SDR, at the beginning, which is related to a basket of sixteen currencies[733], which were chosen because the issuers had a share of total exports of goods and services in excess of 1 percent on average over the period 1968-1972[734]. In the case of high contracting parties not members of the IMF, the value of national currency in terms of the SDR is calculated in a manner determined by the high contracting party[735]. A state which is not a member of the IMF and whose law does not permit the use of the SDR concept is permitted, on ratifying or acceding to the convention or at anytime thereafter, to declare the limits of liability in terms of 'a monetary unit' of sixty five and half milligrams fineness nine hundred, that is the value of the gold franc[736].

Since Turkey has ratified Montreal Protocol No. 4, the amounts of limits shall be determined at the value of SDR between Turkey and the states which have also ratified MP4. However,

[732] Salazar, p. 129.
[733] Then it was reduced to five currencies U.S. Dollar, Japanese Yen, Pound Sterling and the German Mark and French Franc. As of 1 January 1999, it was reduced to four currencies, U.S. Dollar, Japanese Yen, Pound Sterling and Euro.
[734]For more information see. Wijfels, R. H., Gold Value and Special Drawing Right (SDR) with Regard to Total Vessel or Tonnage Limitation, XII ETL 2, p. 201; Matte, Nicolas M., The Most Recent Revision of the Warsaw Convention: The Montreal Protocols of 1975, XI ETL, p. 839.
[735] Shawcross/Beaumont, para. 335.
[736] Ibid

the carriages between Turkey and the states which have ratified only Warsaw Convention or Warsaw/Hague shall be subject to gold franc[737].

The 'gold franc' shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold at the standard of fineness of nine hundred thousandths according to description of the article 22/5 of the Warsaw Convention. In other words it is equivalent to a currency unit consisting of 58.95 milligrams of gold at the standard of fineness of twenty-four. It can also be equivalent to a currency of 65.5 milligrams of gold at the standard of fineness of twenty one[738].

The SDR is an international reserve asset, created by the IMF in 1969 to supplement the existing official reserves of member countries. SDRs are allocated to member countries in proportion to their IMF quotas. The SDR also serves as the unit of account of the IMF and some other international organizations. Its value is based on a basket of key international currencies[739].

The currency value of the SDR is determined in accordance with a formula whereby the values in U.S. dollars, Japanese Yen, Pound Sterling and Euro (replacing the German Mark and French Franc as of 1 January 1999) a combined to give one fixed figure. The SDR currency value is calculated daily and the valuation basket is reviewed and adjusted every five years.

The currencies included in the SDR shall be the four currencies issued by Fund members, or by International Organizations (EU in our case) that include Fund members, whose exports of goods and services during the five-year period ending 12 months before the effective date of the revision had the largest value and which have been determined by the Fund to be freely usable currencies in accordance with the Article XXX (f)[740] of the Agreement of the

[737] Ibid.
[738] Sözer, (Yeditepe), p. 156.
[739] http://www.imf.org/external/np/fin/data/rms_sdrv.aspx. visited 10 August. As mentioned above, at the beginning it compesed of sixteen currencies.
[740] Article XXX (f) states that; 'A freely usable currency means a member's currency that the Fund determines (i) is, in fact, widely used to make payments for international transactions, and (ii) is widely traded in the principal exchange markets'.

International Monetary Fund. In the case of a monetary union and/or free trade area, trade between members of the union is excluded from the calculation[741].

In 2005, after the completion of the regular five-yearly review of the method of valuation of the Special Drawing Right (SDR) and the determination of the SDR interest rate, the value of the SDR continued to be based on a weighted average of the values of a basket including the U.S. Dollar, Euro, Japanese Yen, and Pound Sterling. Since 1 January 2006, the SDR valuation basket has been assigned the following weights based on their roles in international trade and finance: U.S. Dollar (44 percent), Euro (34 percent), Japanese Yen (11 percent), and Pound Sterling (11 percent). The next review by the Executive Board will take place in late 2010.

The SDR has the great advantage that its value in national currencies is calculated daily in accordance with the IMF rules and is published in the Press. As users of transport services may travel or consign goods to all parts of the goods to all parts of the world, the use of the world's major currencies in determining the value of the SDR has much to commend it even though some carriers might prefer a unit linked with a basket of currencies more closely related to their own receipts or expenditure[742].

Article 124/1 of the TCAA provides that, the amounts of limits will be determined according to the limitations specified under the MP4 and at the value of SDR for the domestic air carriages.

Article 22/4 of the Warsaw Convention establishes the method of conversion of the limits liability and states that the sums may be converted into national currencies in round figures but it did not provide any statement about which date shall be take into consideration for the conversion of the sums into national currencies[743]. According to *Drion*, there are four possibilities: the date of adherence to the Convention, the date of loss, the date of the

[741] http://www.imf.org/external/np/sec/pr/2005/pr05265.htm, visited on 10 August.
[742] Bristow, Miss L., Gold Franc- Replacement of Unit of Account, LMCLQ 1, 1978, p. 34
[743] Sözer, p. 158.

judgement, and the date of payment[744]. *Goldhirsh* adds a fifth one: the date of transportation contract[745].

The question has been cleared up in countries adhering to the Hague Protocol. Hague Protocol added a new paragraph 22/5 which provides that 'Conversion of the sums into national currencies other than gold shall, in the case of judicial proceedings, be made according to the gold value of such currencies at the date of judgement'(article 23/1 of the Montreal Convention). Montreal Protocol No. 4 and Montreal Convention retained the same solution.

There were copious discussion and litigation on how to convert the gold franc into national currencies. Some countries[746] have availed themselves of the possibility given in the second sentence of article 22/4 of the Warsaw Convention and have enacted legislation to convert Poincaré Franc into their own currencies in round figures[747]. Writers and courts have proposed other methods of conversion, such as conversion according to the official price of gold, conversion according to the market price of gold, conversion through SDRs, and conversion through new French francs. Various US decisions have addressed this issue; have by considering four basic standards[748]: a) the free market price of gold, b) the last official price of gold, c) SDRs, d) the exchange value of the French franc at the time of accident.

In a heavily commentated decision, Franklin Mint Corp v. TWA[749], the US Supreme Court put an end to the discussion. In 1979, Franklin Mint shipped weighting 714 pounds of valuable coins from the USA to England, which the carrier subsequently lost and for which it admitted liability. The US Supreme Court, after considering the four possible standards of conversion, chose the last 'official' price of the gold in accordance with Civil Aeronautics Board (CAB) regulations. According to the Supreme Court, the purposes for establishing liability limits expressed in terms of gold are: setting some limit on a carrier's liability for lost cargo; setting a stable and predictable limit; setting a constant value that would keep pace with the value of the cargo; and setting an internationally uniform limit.

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[744] Drion, Henri, Limitation of Liabilities in International Air Law, Martinus, Nijhoff, The Hague, para. 158.
[745] Goldhirsh, p. 134.
[746] Such as the United Kingdom, Israel, Italy, Canada, Belgium, The Netherlands, Germany and Sweeden. See for further information see Salazar, p.127.
[747] Salazar, p. 127.
[748] Goldhirsch, p. 125.
[749] Franklin Mint Corp v. TWA, 16 Avi. 18.024 (D.C. NY 1981); aff'd 17 Avi 17,491 (2d Cir. 1982); aff'd 18 Avi. 17,778 (US Sup. 1984) cited by Goldhirsch, p. 126.

2. Limited Liability of the Servants and Agents of the Carrier

Despite various references to a carrier's servant and agents, the original Warsaw Convention does not include any provision regarding the possibility of actions against a carrier's servants and agents[750] ('préposés' in French), and applicability of liability limitation clauses for such servants and agents. The word 'préposés' was translated into English as 'servants' and 'agents', although the French legal meaning is broader and seems to include independent contractors. The Hague Protocol, however, substituted the expression 'servant and agent'. Unfortunately, the meaning of 'servant and agent'[751] is not the same as that of 'préposé'[752].

According to legal doctrine and case law in civil law countries, the 'préposé' may be an employee of the carrier or an independent carrier. Under common law, only the former is a servant or agent of the carrier, an independent carrier performing the carriage for the contracting carrier is an independent contractor to whom the rules of agency do not apply[753]. Whether an independent contractor falls within scope of Article 25A is an unsettled question. After some hesitation, the Courts of the United States agreed that servants and agents, including independent contractors, can be sued under the Warsaw Convention and avail themselves of the defences available to the carrier under that Convention although article 25A does not apply in that country[754].

As stated above, the text of unamended Warsaw Convention does not provide a cause of action as to action by a consignor or consignee (or by a passenger) against servants and agents of the carrier. It is a matter of some controversy whether the unamended Warsaw Convention has any application to such actions. The matter is usually discussed in the context of the limits of liability imposed by article 22. However, it is of much wider importance; if the Warsaw Convention does not apply to an action against a servant or agent of the carrier, his liability will not be subject to the regime of presumed fault, nor will the

[750] For further details see Miller, p. 275-283; Mankiewicz, p. 45-48.
[751] As it is defined by Giemulla/Schmid; ' Servants and agents of an air carrier are all persons of whom the carrier avails himself in order to perform the carriage, irrespective of whether these persons are employed or independent contractors as long as they are acting in performance of work which they have entrusted with by the carrier'. Giemulla/Schmid, art. 25, para.7; for details on the term 'servants and agents' see Giemulla/Schmid, art. 20, para. 28 et seq.; Mankiewicz, p.45-48; Miller, p. 275-283.
[752] Goldhirsch, p. 122; Mankiewicz, p. 45.
[753] Mankiewicz, p. 45.
[754] U.S. Court of Appeals, Second Circuit, Reeed Wiser, 26 April 1977: 14 Avi 17. 841, reversing U.S. District Court, Southern District of New York: 13 Avi 18. 426 cited by Mankiewicz, p. 47.

specific defences in articles 20 and 21 be available to him. In addition they cannot be protected by provisions that apply to the Warsaw defendant such as the rules governing the action in relation to jurisdiction (article 28) and time limitation (article 29)[755].

The matter was discussed at the Hague in 1955 and a new article 25A was adopted clarifying what was almost certainly the meaning of the unamended text and applying the liability limits of article 22 of the Warsaw Convention to claims against the carrier's servants and agents[756]. Like several other provisions of the Warsaw Convention it was designed to prevent a circumvention of the liability limits, and thus to safeguard the Warsaw System as a whole[757]. Article 127/I of the TCAA dealt with the liability of the servants and agents of the carrier.

The question whether the servants and agents can avail themselves of the liability limitations has been controversial both in legal doctrine and in case law for many years[758]. It has been put forward that those servants or agents of the carrier were subject to unlimited liability and in order obtain unlimited damages, claims brought to those people by injured parties[759]. A majority of doctrine contends that action against a carrier's servants and agents are outside the scope of the Warsaw Convention because they are not part of the contract of carriage[760]. In France, employees or agents of the carrier are not entitled to the limitation. The French Courts have reasoned that such persons cannot be liable under the Warsaw Convention as they were not contracting parties[761]. Accordingly, they can neither be liable on the basis of articles 17, 18, and 19, nor be protected by provisions that apply to the Warsaw defendant, such as the liability limitations (article 22) and the rules governing the action in relation to jurisdiction (article 28) and time limitation (article 29).

This has not been altered by the Hague Protocol because that text does not create a right of action against servants and agents but simply governs the action that may be allowed by the relevant municipal law. French law does not allow such an action and Article 25A does not

[755] Shawcross/Beaumont, VII, para. 1076.
[756] Ibid.
[757] Giemulla/Schmid, art. 25A, para. 1.
[758] Mankiewicz, p. 47.
[759] Sözer, (Yeditepe), p. 160.
[760] Miller, p. 276; contra Giemulla/Schmid, art. 25/A, para. 1; Mankiewicz, p. 98.
[761] See the related cases Goldhirsch, p. 122-123; Miller, p. 276-277

apply because there is no action it could apply to[762]. However, even under Warsaw Convention, U.S courts reached the contrary result. The Convention limitations have been extended to include not only air carriers, but their employees and agents without the need to rely on Article 25A of Warsaw/Hague. U.S courts have also held that whoever performs the tasks the carrier as required to do is entitled to the limitations[763].

Article 25/A included by the Hague Protocol states that the carrier's servant or agent can avail themselves of the liability limits stipulated in article 22 of the Convention, provided they prove that they were acting within the scope of their employment. The new article 25 A, introduced by the Hague Protocol to extend the limitation to servants and agents was characterized as a 'clarifying statement' that did not bring something new into the Convention scheme but essentially lifted the doubts that may have previously existed on this point[764]. The Hague Protocol is more specific than the other texts when it states that servants and agents may claim the benefit of the limits which the carrier 'is entitled to invoke under article 22'. With regard to article 22 of the Warsaw/Hague, it has been settled that liability is at least not limited in amount. By the express reference to article 22, the controversy over whether the liability limit was to be dropped in cases of a declaration of value under article 22/2 has been eliminated. At least according to article 25 Warsaw/Hague a declaration of value must be considered as a 'limit of liability' specified in article 22[765]. While the Hague Protocol provision specially refers to the limits under article 22 of the Convention, the Guadalajara Convention, the Guatemala City Protocol, Montreal Convention 1999 refer to the 'the limits of liability' applicable to the carrier[766]. In another respect, it is a difficult task to determine which are the provisions of the Convention exclude or limit liability in relation to articles 28 (jurisdiction) and 29 (time limitation) of the Convention. Under the Hague Protocol it is only article 22 the protection of which may be lost, however, under the Guadalajara Convention, Guatemala City Protocols and Montreal Convention the servants

[762] Miller, p. 278.
[763] See for further references Goldhirsch, p. 123; Mankiewicz, p. 47; For further information about the case law under U.S law see Miller, p. 278- 282. Under the case Reed v. Wiser- 555 F.2d 1079 (2d. Cir. 1977) (cited by Miller, p. 279) the U.S court was satisfied that at least in some jurisdictions, the language of article 22/1 would have effect of limiting the liability of the carrier's employees as well as that of the carrier. The Court put an end to the controversy that had arisen over whether the Convention's liability limits applied to airline employees. For the Second Circuit, the fact that the United States had not ratified the Hague Protocol could not be used as an argument against including the carrier's employees within the scope of the Convention.
[764] Miller, p. 280
[765] Giemulla/Schmid, art. 25, para. 55.
[766] Miller, p. 275.

and agents may lose the protection of a wider group of provisions which exclude or limit his liability. Article 25 and 25 A were deleted by the Guatemala City Protocol with respect to the carriage of passengers and baggage. In addition, unlimited liability for damage to freight has been deleted by the Montreal Protocol No. 4.

In any event, when the carriage is performed under the Hague and Guatemala City Protocols and/or the Guadalajara Convention, the servants and agents of the contracting carrier or the actual carrier are liable only within the limits applicable to the carrier concerned provided they prove that they have acted within the scope of their employment[767]. In both Hague Protocol and the Guadalajara Convention, the personal liability of a servant and agent will be unlimited if it is proved that the servant and agent acted in a manner which prevents the limits of liability from being invoked[768]. Under the Guatemala City Protocol, those limits are made unbreakable in relation to passenger cases both for the carrier and for his servants and agents[769]. In relation to cargo, the limits have also been made unbreakable by the Protocol No. 4 of Montreal, 1975[770].

Article 30 of the Montreal Convention 1999 replaced the entire Warsaw system which is the equivalent of the article 25A. However, article 30/1 of the Montreal Convention no longer refers only to article 22 but to the Convention as a whole, since the limitations of liability are spread over several provisions[771]. Paragraph 3 of the article 30 of the Montreal Convention 1999 takes the cargo transport out of the exemption from the application of paragraph 1 and 2. Article 30/1 of the Montreal Convention also provided that 'servants or agents of the carrier shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention'[772]. The expression 'the conditions of liability' has been added by the Montreal Convention 1999. It means that the servants and agents of the carrier will have protection of a wider group of provisions under the Montreal Convention.

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[767] Mankiewicz, p. 98; Contra, see Miller, p. 276; Giemulla/Schmid, art. 25A, para. 1; According to Sözer 'within the scope of their employment' must be understood as 'while they are acting their employment'. See, Sözer, (Yeditepe), p. 160.
[768] Article 25A/3 of the Warsaw Convention as amended by the Hague Protocol; Article 5 of the Guadalajara Convention.
[769] Article VII, IX, and XI of the Guatemala City Protocol.
[770] Article VII of the Protocol No. 4 of Montreal, 1975.
[771] Giemulla/Schmid,art. 25A, para.7.
[772] Warsaw/Hague art 25A provided that servant or agent shall be entitled to avail himself of the limits of liability which the carrier is entitled to invoke under article 22.

Article 127/1 of the TCAA used very flexible expression and provided a large protection shield for the servant or agent of the carrier[773]. According to that provision a servant or agent of the carrier shall be entitled to benefit from all points which the carrier itself is entitled to invoke under this Act.

Article 25A(3) of the WC/HP provided that 'the provisions of paragraph 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result'. This provision has not been provided under the TCAA. However, it could be reached the same result when provisions of article 124/1 and 126/1 are together dealt with the article 127/1 of the TCAA which was provided under the article 25A(3) of the WC/HP[774].

A requirement found 25A in the Hague (later in Guatemala City Protocols and Guadalajara Convention, Montreal Convention 1999) is that to benefit from limitations of liability, the servant or agent concerned must prove that he acted within the scope of his employment. In contrast to article 25 the burden of proof is not on the plaintiff but on the defendant[775]. The reason for this is the principle that in civil proceedings the parties must prove those facts and circumstances which speak in their favour. The prerequisites of article 25A work to the advantage of the defendant servants and agents of the carrier, while those of article 25 work to the advantage of the plaintiff[776].

It has been rightly been held that article 25A does not provide a cause of action for the consignor suing a servant or agent[777]. Indeed, such action can only be based on the applicable national tort law[778]. Since national regulations on claims in tort do not usually establish liability limits, the servants and agents of the carrier would be exposed to unlimited liability in such cases[779].

[773] Sözer, (Yeditepe), p. 161.
[774] Ibid.
[775] Miller, p. 276; Giemulla/Schmid, art. 25A. para. 3.
[776] Giemulla/Schmid, art. 25A, para. 3.
[777] Court of Appeals, Paris, 17 November 1975: 1976 RFDA 109 cited by Mankiewicz, p. 47.
[778] Giemulla/Schmid, art. 25A, para. 1; Mankiewicz , p. 47
[779] Giemulla/Schmid, art. 25A, para. 1.

In cases where the carrier was exposed to unlimited liability, the servants and agents of the carrier would be exposed to unlimited liability as well. The article 25A of the WC/HP just states that the servants and agents are liable only within the limits applicable to the carrier. The article 30 of the Montreal Convention makes a clear statement and provides that servants and agents of the carrier shall be entitled to avail themselves of 'conditions and limits of liability', which the carrier itself entitled to invoke under this Condition.

The legal consequence prescribed by article 25A (1), i.e., the extension of the Warsaw Convention liability limits to include liability on the part of the carrier's servants and agents tacitly implies that such claims cannot be excluded on the merits. For this reason, the injured party may have to deal with two defendants, the air carrier himself and his servants and agents. Since the latter will often be able to shift their liability onto the carrier, the carrier is danger of having to pay multiple damages if the damage sustained goes beyond the liability limits set by the Warsaw Convention. To prevent this occurring, article 25A/2 of the Warsaw/Hague stipulates that the aggregate of damages to be paid by the carrier and his servants and agents must not exceed the limits laid down by article 22. Thus, the carrier can normally be sure that he will not have to pay compensation exceeding those limits[780].

IV. UNLIMITED LIABILITY

1. In General

As stated above, the basic rule or fundamental principle in law is 'unlimited liability'. However the liability of the carrier is limited under the Warsaw/Hague system. 'Unlimited liability' is accepted as an exception under certain specific and defined cases.

According to unamended Warsaw Convention, (i) the liability of the carrier is unlimited if the damage or injury is attributable to non-compliance with the requirements of the Warsaw Convention in relation to the documents of carriage. (ii) The carrier shall not be entitled avail himself of the provisions which exclude or limit his liability if damage is caused by intentional misconduct or such a fault as, in accordance with the law of the court seized of the case is considered to be equivalent to intentional misconduct by any servant or agent of the carrier acting within the scope of his employment.

[780] Ibid., para. 5.

Under Warsaw Convention and Hague Protocol, the carrier's liability is based on fault and as a rule the liability of the carrier is limited. Under the Montreal Intercarrier Agreement the carrier's liability is based on absolute liability for the carriage of passengers and baggage (operating to, from or through the territory of the United States) however limited liability of the carrier has been preserved. Under the Guatemala City Protocol of 1971 the carrier's liability for the carriage of passengers and baggage is absolute and limited. In addition, carrier's liability would be limited in any case for the carriage of passengers and baggage. In other words, the limits laid down under this Protocol are unbreakable and the plaintiff would not have the alternative to benefit from former unlimited liability provisions[781].

Montreal Protocol No. 4 and the Montreal Convention of 1999 includes absolute liability for the carriage of cargo on the part of the carrier that requires no fault-based litigation. In addition, the liability limit for the carriage of cargo is essentially unbreakable and the principle of unlimited liability has been removed. While compensation under the Montreal Convention remains based strictly on actual compensable damage and is not a fixed sum forfeit, in the case of passenger death or injury, it makes the carrier absolutely liable up to the sum of 100.000 SDR (art. 17 and art. 21/1), subject only to the rule of contributory negligence (art. 20). Beyond 100.000 SDR, the carrier's liability is based on rebuttable presumed fault, with the burden falling on the carrier of proving that the damage was not due to his fault or that of his servants and agents, or that it was due solely to the fault of a third party (art. 21/2)[782]. There is no upper limit. The shifting of the burden of proof onto carrier and the elimination of any limit in regard to the carrier's liability for passenger death or injury can be considered the biggest breakthroughs achieved by the Montreal Convention. There is a limit of SDR 4, 150 on the carrier's liability for delay in the carriage of passengers (art. 22) based on rebuttable presumed fault (art. 19). The carrier's liability for delay in the carriage of baggage and cargo is also based on rebuttable presumed fault.

Under the 1995-1996 IATA Intercarrier Agreements, under which the airline agreed to waive all limits of liability, but retained the right to invoke the 'all necessary measures' defence of article 20 for that portion of a claim in excess of 100.000 SDRs. The carrier, except where it

[781] Since the Guatemala City Protocol has not entered into force, the provisions of this Protocol cannot be applied.
[782] Cheng, Bin, Treaty Limits of the International Air Carrier's Liability and the Automatic Mechanism for their Revision in the 1999 Montreal Convention, Journal Luchtrecht, December 2005, no. 9/10, p. 45.

could prove contributory negligence, is strictly liable for provable damages up to 100.000 SDRs for bodily injury or wrongful death as a result of an accident, and was presumptively liable to unlimited amount[783].

As regards cargo, the carrier's liability, first established in 1929 by the Warsaw Convention (art.22/2), and this limit, converted to SDR 17 per kilogramme, has been retained in both Montreal Protocol No. 4 (Art. 22) and the Montreal Convention (art. 22/3). Montreal Protocol No. 4 has, however, altered the basis of liability from rebuttable presumed fault to absolute liability, save for various specified circumstances and contributory negligence, and this change is adopted in the Montreal Convention[784].

2. Unlimited Liability under the Warsaw/Hague System

a. Under the Warsaw Convention, 1929

Article 25 of the unamended Warsaw Convention provides that the carrier cannot avail himself of the provisions which exclude or limit his liability, 'if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law the Court seized of the case, is considered to be equivalent to wilful misconduct'. The carrier's liability is also unlimited if such act or omission was done by his servants or agents when acting within the scope of their employment. The official French text requires that '*le dommage provient de son dol ou d'une faute qui, d 'après la loi du tribunal saisi, est considéré comme équivalente au dol'*.

It was established at the Warsaw Conference that the civil law concept of 'dol' has no equivalent in the common law; that the nearest approximation is 'wilful misconduct'; and that there exist essential differences between the two concepts; and if 'dol' as was suggested, was translated or replaced by 'an illicit and intentional act' that the interpretation of that expression would create problems for common law courts and result in undesirable judgment[785]. As it was seen earlier that the drafters of the Convention used two different

[783] Whalen, The New Warsaw Convention, p. 14.
[784] Ibid, p. 45-46.
[785] Mankiewicz, p. 122.

concepts of 'dol' and 'wilful misconduct' to indicate in which situations the carrier ought to be prevented from limiting or excluding his liability. It was clear from the start that these concepts had different meanings and it was easily foreseeable that divergences would appear between cases applying the English text based on the concept of 'wilful misconduct' and cases applying the French text based on the concept of 'dol'[786]. Some hesitation appeared among delegates from civil law countries as to whether the principle of the equivalence of 'faute lourde' to 'dol' should be included in the Convention, so that there would be no limitation of liability in cases of faute lourde (gross negligence) as well as in cases of dol. For some delegates, the only difficulty was that there were no similar concepts in other countries. However, for other delegates, the introduction of faute lourde was dangerous because it was a very vague concept which could allow almost any fault to be qualified as faute lourde, thus rendering meaningless the limitation of liability. The final text of the Warsaw Convention refers to the carrier's dol and to 'such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct'. Thus, if there is in the lex fori a rule providing that a particular category of fault is equivalent to dol, the liability will be unlimited in both cases. However, if the lex fori does not have any equivalent to dol, the liability will be unlimited in cases of dol only[787].

The common law conduct closest to 'dol' is 'wilful misconduct', which need not be an intentional act. The Convention had to be drawn in such a way that it could be applied by civil and common law courts. For that reason, the Convention also provided for 'conduct equivalent to wilful misconduct'. Wilful misconduct could comprise a reckless act or omission with the knowledge, sometimes implied that harm would occur. Proof of wilful misconduct is less stringent than the degree of proof required to prove 'dol'. The Convention thus allows the court to which the case is submitted to measure the conduct by its own standards that the court equates to 'dol'[788]. According to legal understanding in civil law countries, the concept 'dol' is defined as knowledge (the actual act) and desire of resulting

[786] The concept of dol was unknown in English law. The meaning of dol had been explained several times during the elaboration of the Convention; it was summarized by the British delegate as 'an act deliberately performed with the intent to injure, to cause harm'. Then it was proposed to express that concept by 'wilful misconduct' in the English text. It was stated by the delegates that 'wilful misconduct' was wider than dol since it included acts performed recklessly, regardless of the consequences. Wilful misconduct, in turn, was seen by other delegates as corresponding 'maybe not entirely but almost entirely to ''dol' and 'faute laurde'. See Miller p. 80; Mankewicz, p. 122.
[787] Miller, p. 79
[788] Goldhirsch, p. 152.

damage. According to *Mankiewicz*, dol means an unlawful act or non-fulfilment of a duty, done with the intent to cause damage[789]. According to *Miller*, traditionally, dol in the execution of a contract is defined as a wrong intentionally committed[790]. According to German jurisprudence the acting party must have anticipated the result and known of probability risk of the result occurring. According to French legal understanding, the term 'dol' implies the element of intention or will to cause damage. According to Spanish jurisprudence, 'dolo' is defined as the intention to cause damage to another person or to another person's property[791].

Dean George Ripert, the eminent civil lawyer and member of the French delegation to the Warsaw Conference, had violently opposed 'any attempt to introduce into an international convention an expression as flexible and vague as 'faute laurde' (gross negligence). Civil law courts applying article 25 have consistently held that the carrier is liable without limitation not only for 'dol' but also for any equivalent default. The question divides them is whether faute lourde (gross negligence) is equivalent to dol in accordance with their national law. No problems with the interpretation of that provision arise in common law countries because the common law does not know of a 'default equivalent to wilful misconduct'[792]. Under Austrian, German, Swedish and Swiss law, faute lourde is equivalent to dol[793]. Belgian and Italian laws do not permit such assimilation[794].

France eventually moved away from requiring proof of 'dol' and ruled that gross negligence or 'faute lourde' would suffice and was equivalent to 'dol'.[795]. Indeed, 'faute lourde' differs both from 'dol' because it does not require an intention to cause damage and from wilful misconduct, deemed to be equivalent to 'dol', which requires either an intentional act or a reckless act or omission and the knowledge of the probability of damage, criteria which are extraneous to, and exclude, faute lourde[796]. In 1953, the Paris Court of Appeals was still of

[789] Mankiewicz, p.124.
[790] Miller, p.195.
[791] Giemulla/Schmid, art. 25, para. 13.
[792] Mankiewicz, p. 122.
[793] Austrian Supreme Court, 10 October 1974: 1979 ZLW 287; Tribunal Frankfurt, 1931 Archiv fuer Luftrecht 180; Tribunal Köln, 9 April 1964: 1965 ZLW 88; Tribunal Stockholm, 20 November 1957 1974 RFDA 367; Tribunal Zürich, 15 December 1964: 1965 ZLW 338 cited by Mankiewicz, p. 123.
[794]Tribunal Brussels, 6 May 1950: 1950 FRDA 411; Commercial Court Antwerp, 10 December 1975: 1976 ETL 918 cited by Mankiewicz, p. 123.
[795] Goldhirsch, p. 152.
[796] Mankiewicz, p.123.

the opinion that article 25 encompasses faute lourde (gross negligence) stating that 'Even if the Convention were considering dol only, it would be quite normal to construte it, in line with positive French law, as assimilating faute lourde with dol[797].

With the adoption of the Hague Protocol, the common law definition of wilful misconduct was substituted: an act or omission and with knowledge that damage would probably result. Thus, today, whether the jurisdiction follows the civil or common law, one would think the rule is that 'wilful misconduct' is more analogous to gross negligence than it is to 'dol'. In England 'wilful misconduct' involves a person doing or omitting to do that which is not negligent but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be[798].

According to the legal view of the common law States, the concept 'wilful misconduct' implies acting wrongfully on purpose. Unlike the term 'dol', however, this does not imply willingness to be directed to the resulting outcome. According to English legal thinking, the term describes a person's act or omission which is more than just negligent. The person must know and appreciate the act to be wrong and disregard the consequences[799]. In American jurisprudence, the term 'wilful misconduct' is construed similarly as an intentional act or omission causing damage to another person. In addition, the person in question must know and appreciate that his conduct is wrong and recklessly ignore the probable consequences[800].

Since negligence can never possibly be equal to wilful misconduct, at most, there can only be a form of negligence coming close to wilful misconduct. Wilful misconduct is equivalent only to itself. At most, there can only be a form of negligence coming close to wilful misconduct. This formulation can be explained by the fact that in Anglo-American law the term 'wilful misconduct' covers a part of what in civil law is subsumed under 'gross negligence'[801]. It was necessary to introduce 'negligence (default) equivalent to wilful misconduct' in addition to 'wilful misconduct', since this area was also to be covered by unlimited liability in the civil law states. The unamended article 25 therefore leaves it to the

[797] Nordisk Transport v. Air France, 28 February 1953: 1953 RFDA 103 cited by Mankiewicz, p. 123.
[798] Goldhirsch, p. 153.
[799] Giemulla/Schmid, art. 25, para. 14.
[800] Ibid., para. 15.
[801] Ibid., para. 16.

court to define the meaning of 'negligence equivalent to wilful misconduct' on the basis of its own law. Thus, the door was opened wide to divergent case law by one of the crucial provisions of the Warsaw liability system, since different national laws apply different definitions of 'negligence' in some cases, even exceed the scope of wilful misconduct. Fortunately, this matter was settled by the Hague Protocol where the term was paraphrased and uniformity was re-established[802].

The common law term 'wilful misconduct' implies gross negligence (faute lourde) and thus reaches further than the civil law term 'dol'. The line separating limited from unlimited liability was to be drawn by the term 'wilful misconduct'. In common law, inasmuch as every aspect of the common purpose was covered by the term 'wilful misconduct'. The courts of the common law states, therefore, did not extend the scope of unlimited liability to a form of negligence equivalent to wilful misconduct.

On the other hand, in civil law states the term 'default …equivalent to wilful misconduct' enabled reference to gross negligence and both its aspects of conscious and unconscious negligence. Of these two forms, only conscious (gross) negligence corresponds to 'wilful misconduct'. Unfortunately, also unconscious (gross) negligence led to the exclusion of a limitation of liability, and this had been the intention of those drafting Convention[803]. Under civil law 'default equivalent to wilful misconduct corresponds to term 'gross negligence' and to the French term 'faute lourde', based on the principle of 'culpa lata dolo aequiparatur'[804]. Gross negligence does not require an intentional act or omission but a complete and unjustified disregard of the possible consequences of the act or omission[805]. Under German law a person acts negligently when he fails to observe the duty of reasonable care. The law does not distinguish between negligence and and gross negligence, and it is thus left to the judge to decide according to the facts of the individual case. Gross negligence (recklessness) is assumed where the violation of the duty of reasonable care is extreme, i.e. where not even that degree of care was taken which under the circumstances everybody ought to have considered necessary. While normal negligence may be judged exclusively by objective criteria, for the evaluation of gross negligence subjective factors, which are founded in the

[802] Ibid.
[803] Ibid., para. 10
[804] Ibid., para. 18.
[805] Mankiewicz, p. 124.

individual character of the acting person, must also be taken into account[806]. According to French legal thinking, it is not possible to reduce 'faute lourde' to either *culpa in concreto* or to a person's tendency towards negligent acting. What consititutes the specific nature of this term is the clarity with which either lack of competence or wilful carelessness becomes obvious. Thus, 'faute lourde' is recklessness, incompetence and blindness (to consequences) as well as intentional 'estémérairement' (temerity)[807].

Even though the definition of wilful misconduct is wider than the definition of dol, since it may include cases where no intentional wrong has been committed, plaintiff in many civil law courts were in a better situation than those in common law courts. The reason is that most civil law courts widened the scope of article 25 by the use of the notion of faute lourde, whilst no similar move was made to resort to 'gross negligence' in common law courts. The divergence appears even more clearly, when it is realised that faute lourde and gross negligence are amost identical notions[808].

b. Under the Hague Protocol, 1955

The unamended text of the Warsaw Convention speaks of wilful misconduct and of such default as is equivalent to wilful misconduct. The reason for using different expressions in the Warsaw Convention and the Warsaw/Hague is especially the difficulty of defining the boundary between limited liability and unlimited liability, in a way which is understandable and unequivocal for all contracting states. During the first years after the Convention came into force, it became obvious that in view of two legal systems involved (i.e. civil law and common law) the expression used in the unamended Convention were not successful in drawing such a boundary and almost necessarily created a lack of uniformity between the different courts[809]. It was generally considered that, instead of referring to concepts, such as 'dol' or 'wilful' misconduct, an amended version ought to spell out precise conditions in which the liability of air carriers was to unlimited. This was achieved by article XIII of the Hague Protocol[810]. The new article 25 does not refer to concepts such as 'dol', or 'wilful

[806] Giemulla/Schmid, art. 25, para. 19.
[807] Ibid, para. 23.
[808] Miller, p. 200.
[809] Giemulla/Schmid, art. 25, para. 3.
[810] Miller, p. 200.

misconduct'. Instead, it describes the actual circumstances in which liability limitations may be set aside[811]. With this article, the unamended article 25 was clarified and became considerably more onerous in the Hague Protocol. The Hague Protocol, however, does not use legal terms to deal with the issue which might lead different interpretations, but has resorted to the method of explaining what is required[812]. In editorial respects, the former two paragraphs were reduced to just one[813].

Article 25 of the Warsaw/Hague text provides that: 'the limits of the liability specified in article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment'.

Article 25 which was replaced by the article XIII of the Hague Protocol did three things:

(i) It defined 'wilful misconduct' in terms of a person's actions and not in terms of a legal concept and required actual knowledge of probability of injury;
(ii) It clarified article 25 by expressly providing the wilful misconduct could be by the carrier's servants and agents;

(iii) It penalized the carrier by only prohibiting it from using the limitations of article 22, but not any other defense such as article 20 (all necessary measures) or article 21 (contributory negligence)[814].

The Hague Protocol has introduced some amendments in respect of the mental element, although these do not affect its substance under common law. These amendments had the aim of abolishing the discrepancy between common law and civil law insofar as the distinction between limited and unlimited liability had been created by the unamended Convention. The original intention of the parties to the Convention namely to deprive the

[811] Ibid, p. 81.
[812] Giemulla/Schmid, art. 25, para. 3.
[813] Ibid, para. 57.
[814] Goldhirsch, p. 152.

carrier of the advantages of liability limitations in cases of intentional wrongdoing on his part (wilful misconduct), was now to be put into words without using fixed legal terms such as 'dol' or 'wilful misconduct'[815].

The common law notion of wilful misconduct, the definition in the new article 25 introduced by the Hague Protocol, provide for two distinct cases of unlimited liability: (i) an act or omission done with intent to cause damage, and (ii) an act or omission done recklessly and with knowledge that damage would probably result[816].

The same general principles of evidence in both civil law and common law jurisdictions apply to the two situations listed in article 25, although actual cases deal with the second situation only. Firstly, the burden of establishing compliance with article 25's requirements rests upon the plaintiff. Secondly, ascertaining the existence of the fault referred to in article 25 is not sufficient. The plaintiff must also establish that fault has caused the damage that was complained of. It is essentially in relation to the second case of unlimited liability that difficult problems have arisen and, more specifically, in relation to the assessment of the intent to act with knowledge that damage would probably result. However, article 25 requires two complementary elements in the second case of unlimited liability; not only must the agent be conscious of dangers involved, but also he must commit a 'reckless act'. The interpretation of what constitutes a reckless act is a question of fact that will be assessed by courts[817].

In contrast to the unamended text, article 25 of the Hague Protocol not only requires wilful misconduct but intent to cause damage. The English authentic text of the Hague Protocol[818] says that damage must result from an act or omission 'done with intent to cause damage'. The phrase, intent, is used to emphasise the necessary functional connection of the action with its results, i.e. the purpose of the carrier's (or his agents) act or omission must have been to cause damage. This is substantially the same, albeit differently phrased, as what under civil law expressed by the term 'dol' namely knowledge (regarding the result) and desire

[815] Giemulla/Schmid, art. 25, para. 29.
[816] Miller, p. 203.
[817] Ibid, p. 204.
[818] Unlike the unamended Warsaw Convention, the Hague Protocol was drafted not only in French but also in English and Spanish.

(regarding result). Thus, this formulation covers that part of wilful misconduct which under civil law is expressed in the term 'dol'[819].

The phrase, recklessness and knowledge that damage would probably result, besides the term 'intent', paraphrases the second form of intentional wrongdoing. Together with 'intent', this forms what is called 'wilful misconduct'. No substantial amendments were made in respect of common law, since the term 'wilful misconduct' was already used in the unamended text of the Convention and under common law, 'negligence equivalent to willful misconduct' by 'the law of the court seized of case' does not exist. However, in the civil law states this expression has the intended of delimiting the field of unlimited liability. The term 'gross negligence', which is replaced with this expression, not only encompasses conscious (gross) negligence but also unconscious (gross) negligence. As a result of the limitation of unlimited liability by the new formulation to cases of conscious gross negligence, unconscious gross negligence is again covered by the limitations on liability. Unlike 'intent', the second component of the mental element, which the Hague Protocol expressed as 'recklessness and knowledge that damage would probably result', could not be explained in one single term[820].

This two-pronged mental element has produced some controversial discussion in international case law and legal writing. It was argued that under German law this concept of fault had to be ranked between gross negligence and contingent intent, and that conscious gross negligence always meant that the actor foresaw the possibility of damage, negligently hoping that it would not occur. On the other hand, in the case of contingent intent (the actor does not want to cause damage but decides to accept it, i.e. agrees to its actual occurrence. According to the concept of fault expressed in article 25 Warsaw/Hague the actor neither wants nor approves of the damage, but in contrast to the case of gross negligence he thinks that the occurrence of damage is probable and consciously runs the risk of the damage occurring[821].

In international case law, wilful misconduct includes two elements. These two elements are recklessness (regarding the action) and knowledge (in respect of the resulting damage). The

[819] Giemulla/Schmid, art. 25, para. 31.
[820] Ibid., para .32.
[821] Ibid., para. 33.

highest degree of uniformity of view has been achieved in respect of the term 'recklessness', it should be noted that this phrase only gives a rather imperfect and 'colourless' impression of the French term 'témérairement'. The mental state described in this term, which would have been expressed more pertinently by 'hazardous', 'audacious' or 'foolhardy', implies that the carrier or his servants and agents crassly disregarded the safety interests of persons and goods in their charge. Only such a manifest violation of the clear and indubitable obligation to take care of given safety interests in a particular situation would qualify as 'témérairement'. According to foregoing, not every failure to take additional security precautions is automatically to be deemed recklessness[822]. The term 'recklessly' used in the original English text of the Hague Protocol is paraphrased by 'careless', i.e. failure to heed the damaging result of an action[823]. The opinions of legal writers and courts are divergent when it comes to defining the second component (knowledge in respect of the resulting damage) of this two-pronged mental element, i.e. on the subject of the degree of the actor's knowledge of the probability of damage. In international case law and legal writing, a controversy has developed as to whether the test to be applied in assessing whether the agent had knowledge that damage would probably result is subjective or objective[824]. This question was discussed at the Hague. The delegates favoured the subjective approach. The majority voted for the expression 'acted recklessly and knew that damage would probably result' and refused the alternative proposal 'acted recklessly and knew or should have known that damage would probably result (objective approach)[825].

c. Under the Montreal Protocol No: 4

MP4 (since it amended the 1929 Warsaw Convention as amended at the Hague only with respect to cargo and left the provisions relating to passengers and luggage untouched) preserves the ability of plaintiffs to pierce the liability ceilings for personal injury and loss or damage of baggage where they prove that damage result 'from an act or omission of the carrier, his servants or agents (acting within the scope of their employment), done with intent to cause damage or recklessly and with knowledge that damage would probably result[826].

[822] Ibid, para. 34.
[823] Ibid, para. 35.
[824] Miller, p. 205.
[825] Giemulla/Schmid, art. 25, para. 36-37.
[826] Dempsey/Milde, p. 196.

Unlimited liability for damage to cargo (as provided by article 25 and 25 A) has been deleted by Montreal Protocol No.4. While preserving the wilful misconduct mechanism for piercing the liability ceiling for damages to passengers or their baggage, MP4 provides that for cargo, 'the limits of liability constitute the maximum limits and may not exceeded whatever the circumstances which give rise to liability'. Hence, MP4 removes cargo (but not baggage) from the willful misconduct exception. In other words, willful misconduct means of piercing the liability ceiling has been removed by MP4[827].

Since the provisions of the TCAA have been taken from Warsaw/Hague Convention, in accordance with the articles of the Warsaw/Hague, unlimited liability is provided under article 126 of the TCAA. In this respect for the domestic carriages of cargo, the carrier will be subject to unlimited liability in accordance with article 126 of the TCAA. However, the carrier's liability will be limited for the carriages of cargo between Turkey and the states, which had ratified the Montreal Protocol No. 4

d. Under Montreal Convention of 1999

The Montreal Convention 1999 achieves a similar result. As under MP4 the general rule under Montreal Convention 1999 is that the limits of liability (of 17 SDRs or approximately $ 11 per pound) for cargo loss or damage are unbreakable, even under circumstances where the carrier or its employees engaged intentional or reckless misconduct. However, the willful misconduct remains in effect for destruction, loss, damage or delay of baggage (otherwise subject to a 1.000 SDR limitation per passenger, unless a special declaration of value has been made). As explained above under the MP4, the same conflict between the TCAA and MP4 exists between the TCAA and Montreal Convention 1999.

3. The Test Which Applies to Determine Unlimited Liability

One problem the courts have had is in deciding how much proof would be needed to show whether or not the guilty person acted with 'intent to cause damage' or 'had knowledge that damage would probably result'. Two standards or tests may be applied: if one were to apply

[827] Ibid.

an 'objective' test, the court would not inquire as to what the wrongdoer actually had intended. Rather, it will look only to what a reasonable person, under same circumstances, would have thought. On the other hand, when the court looks to the wrongdoer's state of mind at the time of the misconduct, this is considered a 'subjective' test[828]. In other words, an objective test, or '*appreciation in abstracto'*, is used when the agent's behaviour is assessed through a comparison with the behaviour of a reasonable man, placed in similar circumstances. A subjective test, or '*appreciation in concreto'* is used when the agent's is assessed in itself; the agent is not required to do what a reasonable man would have done[829].

The objective test is applied by the majority of French Courts[830]. In the case Emery vs. Sabena[831], dated 15 December 1967, the Court held that the behaviour of the pilot in question should be appreciated '*in abstracto',* i.e. by applying an objective test. Subsequent decisions of the French Supreme Court and French Courts of Appeals have confirmed the Emery approach[832]. In the case Lamberth vs. Guiron[833], the court held that the French courts do not ask whether the person in question actually knew that damage would probably result, but they hold the carrier liable without limit if that person 'could not fail to be aware of the risk to which he exposed his passengers deliberately and unnecessarily'.

On the other hand, the subjective test is applied by Belgian courts. The Cour Supréme de Gabon[834] also decided to apply this test. The subjective test is also applied by British courts. In England the court will see if the person concerned appreciates that he is acting wrongfully or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be[835]. Italian courts also follow the subjective approach[836].

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[828] Goldhirsh, p. 154.
[829] Miller, p. 205.
[830] Cour de Cassation, 1968, RFDA184, Emercy c. Sabena; 1976 RFDA 105, Air France c. Monoit et al.; 1977 RFDA 415, Air Centre c. Veuve Morand et al.; Air Centre c. Veuve Morand et. al.; 1979 RFDA 202, Bossard c.Air France; Cour d'Appel de Paris, 1976 RFDA 109, Le Lannedoc c. Sociéte Hernu-Peron; Cour de Cassation de France, 1981 RFDA 225 and 1982 ETL 181 cited by Giemulla/Schmid, art.25, para. 38
[831] Cour de Cassation, 1968, RFDA184, Emercy c. Sabena; 1968 RFDA 184 cited by Mankiewicz, p. 114.
[832] French Supreme Court, Lamberth vs. Guiron, 9 June 1966: 1966 RFDA 448; Court of Appeals, Riom, Morand vs. Air Centre, 24 January 1973: 1976 RFDA 138 cited by Mankiewicz, p. 116.
[833] French Supreme Court, Lamberth vs. Guiron, 9 June 1966: 1966 RFDA 448 cited by Mankiewicz, p. 116.
[834] 1979 RFDA 456, Air Service et Sonagar c. Wiffering et CNSS; 1981 RFDA 363, Dame van Duyvendik c. Air Service et al. cited by Giemulla/Schmid, art. 25, para. 40
[835] Horabin v. British Overseas Airways Corp. (1952) 2 All E.R. 1016(Q.B) cited by Goldhirsh, p. 154.
[836] Giemulla/Schmid, art. 25, para. 41-44

The objective test is the one usually applied the U.S.A. In the case, Pasinato v. American Airlines[837] the court held that 'knew conduct would probably result in injury or acted with reckless disregard for consequences of her actions'.

The Objective test has also been applied in Germany[838]. Both the German BGH and the OLG Düsseldorf defined this element as follows: '…means the obtrusive realisation on the part of the actor that as a result of his reckless behaviour damage will probably occur. Such a realisation, as a subjective phenomenon, must be assumed where the careless conduct itself, according to both its nature and the circumstances in which it happens, justifies such a conclusion. In this context, it must be noted that not every reckless act (or careless behaviour) is necessarily connected with knowledge in that sense, i.e. the realisation of the probability of the occurrence of damage[839].

According to *Sözer,* applying the *subjective* test is more appropriate, since the liability of the carrier is limited under the Warsaw Convention and unlimited liability is accepted as an exception. Since the burden of proof rests on the plaintiff for the unlimited liability, at least insofar as the definition of negligence is concerned, satisfying the burden of proof could be more difficult. While the plaintiff tries to satisfy the burden of proof, this can give rise to a heavy risk for the carrier[840]. Article 25 of the Warsaw/Hague and article 126 of the TCAA requires actual conscience of the probability of damage. In this respect, it must be proved that the carrier or his servants or agents had actual knowledge and not that they normally should have knowledge of the probability of damage.

4. Unlimited Liability for Non-Compliance with the Convention's Requirements as to the Air Waybill

Under the Warsaw/Hague Convention, it has been laid down sanctions which is to apply where non-compliance with the Convention's requirements as to the documents of carriage (article 9 as to the air waybill). The strict situation, as provided by the Warsaw Convention, has been considerably altered by the Hague Protocol, the Montreal Protocol No. 4 and

[837] Pasinato v. American Airlines 24 Avi. 18081 (D.C. III. 1993) cited by Goldhirsch, p. 154.
[838] Bundesgerichshof, 10 May 1974, 1974 ETL 630 cited by Mankiewicz, p. 117.
[839] Giemulla/Schmid, art. 25, para. 46.
[840] Sözer, (Yeditepe), p. 169.

Montreal Convention 1999. MP4 and Montreal Convention 1999 having elaborated a system where documents of carriage are given much less importance than previously.

(i) Article 9 of the unamended Warsaw Convention provides that 'if the carrier accepts the goods without an air waybill is having been made out or if the air waybill does not contain all particulars set out in article 8(a) to (i) inclusive (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability'[841].
(ii) Article 9 of the Warsaw/Hague Convention provides that 'if the carrier accept the goods without an air waybill is having been made out, or if the air waybill does not include the notice required by article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of article 22, paragraph 2'.

(iii) Article 9 of the Warsaw/Hague/MP4 and Montreal Convention 1999 provides that the failure to deliver an air waybill or non-compliance with the provisions of new articles 5 through 8 will not affect the existence or validity of the contract of carriage, which none the less, be subject to the rules of this Convention including those relating to limitation of liability. In this respect, the new cargo limits of liability are unbreakable (article 24 makes expressly clear that the higher limit of liability in cargo cases 17 SDR per kilogram, or about $ 24.30 per kilogram at 1998 conversion rates). Unlimited liability only applies to passenger and baggage claims.

Article 110/2 of the TCAA provides that if the carrier accepts the goods without an air waybill is having been made out or if the air waybill does not contain all particulars set out in this article the carrier shall not be entitled to avail himself of the provisions of this Act which exclude or limit his liability'. In this respect, there will be different applications between domestic carriages, which are subject to the article 110/2 of the TCAA, and international carriages that are subject to the rules of Warsaw/Hague and Warsaw/Hague/MP4.

[841] Provisions excluding or limiting liability are article 20 (all necessary measures), 21 (contributory negligence) , 22 (limitations of damages) ve 26 (time limits). See, Goldhirsch, p. 152, Sözer, (Yeditepe), p. 175.

5. Unlimited Liability for Special Declaration of Value

Article 22/2 of the Warsaw Convention; article 22/2 (a) and 22 (b) of the Warsaw/Hague and 22/3 of the Montreal Convention 1999 provides that 'the liability limit does not apply to registered baggage and cargo, where the passenger or consignor has made a special declaration of interest in delivery at destination at the time of handing the package over to the carrier and has paid the agreed supplementary sum'. In that case the carrier is liable under article 22/2 to pay a sum not exceeding the declared sum, unless he proves that that amount is greater than the passenger's or consignor's actual interest in delivery at destination. Since the burden of proof rests on the carrier, a motion for the admission of evidence field by him is considered to be an inadmissible as purely exploratory evidence under German law[842].

On the other hand, except this specific provision there is a general rule governed under article 25 of the Montreal Convention 1999. It provides that 'the carrier may stipulate that the contract of carriage shall be subject to higher limits of liability than those provided for in this Convention or to no limits of liability whatsoever'.

6. Unlimited Liability under the TCAA

Under the article 126[843] of the TCAA it has been provided that 'the carrier shall not be entitled to avail himself of the provisions of this Act which exclude or limit his liability, if the damage is resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or reckless act[844] and with knowledge that damage would probably result. It also provided that it has been preserved the right of the provison of 55 of the law of obligations related to damage subject to unlimited liability[845].

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[842] Giemulla/Schmid, art. 22, para. 9.

[843] Article 126 of the TCAA reads as follows: 'Zararın, taşıyıcının veya adamlarının zarar vermek kastı ile veya zararın doğması ihtimali olduğunu bilerek dikkatsizce yaptıkları bir hareket veya ihmal sonucunda meydana geldiği ispat edildiği taktirde; bu Kanunda öngörülen sorumluluk sınırları uygulanmaz. Ancak, taşıyıcının işçileri veya temsilcileri gibi yardımcı kişilerin meydana getirdği sınırsız sorumluluk talebine mevzu zarar hakkında Borçlar Kanunun 55 inci madde hükümleri saklıdır'.

[844] It was provided as 'Dikkatsizce davranış' under the article 126 of the TCAA

[845] Article 126 of the TCAA provides a rule about servants or agents; however, it refers to article 55 of the law of obligations. Since the article 55 of the law of obligations governs the liability of the employer, it will be wrong to apply this rule. However, article 100 of the law of obligations governs the liability of the servants. Under the article 126/2, it has been specifed to apply the article 55 for the servants of the carrier which is actually governed under the article 100 of the law of obligations. According to Sözer, it must be understood that

Article 126 of the TCAA has been taken from the article 25 of the Warsaw/Hague Convention. However, there are some important differences between two texts related the phrase 'reckless act' in terms of literal interpration of the provision. As stated above, the term recklessly used in the original English text of the Hague Protocol is not every failure to take additional security precautions is automatically to be deemed recklessness. Therefore, the article 126 of the TCAA must be interpreted in accordance with article 25 of the Hague Protocol[846].

Under the Turkish law fault comprise the forms of intent and negligence. Negligence comprises culpa lata (equivalent to gross negligence) and culpa levis (slight negligence). When the article 126 of the TCAA is interpreted in accordance with article 25 of the Warsaw/Hague, the carrier will be subject to unlimited liability either the carrier acted with specific intent (intent to cause damage) or consciously negligent (recklessly and with knowledge that damage would probably result)[847].

V. EXONERATION OF THE CARRIER

1. Exoneration Based on Having Taken 'All Necessary Measures'

a. Under the Warsaw/Hague System

Article 20/1 of the Warsaw Convention provides that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures (Article 123 of the TCAA). Only claims based on articles 17-19 are covered by article 20; claims based on articles 10 and 12 of the Convention are not covered by article 20[848]. The foremost purpose of article 20 is to give the carrier the possibility of freeing himself from the liability stipulated by articles 17-19.

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the reference made in the article 126/2 of the TCAA is related to article 25 of the Warsaw/Hague. See, Sözer, (Yeditepe), p. 173-174.

[846] Sözer (Sorumluluk I), p. 797; Sözer (Sorumluluk II), p. 57–58; Sözer, (Yeditepe), p. 170–171.

[847] For further information see Sözer, (Yeditepe), 170–171.

[848] Giemulla/Schmid, art. 20, para. 1.

Under the article 20/2 of the original Warsaw Convention, in cases of loss of or damage to goods and baggage, the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. This provision concerns goods and baggage only. The second portion of the article permits the carrier to exonerate itself for damage to baggage and cargo occasioned by errors in piloting, navigation or aircraft handling. The Hague Protocol 1955 deleted this second portion; however, it is still viable for countries that have not adopted the Hague Protocol[849].

The Montreal Intercarrier Agreement 1966 has considerably lessened the importance of that defence, it was so waived by all carriers party to the Montreal Agreement 1966 in respect of carriage falling within that agreement. In other words, the signatories of the Montreal Agreement 1966 have waived their right to invoke the protection of article 20/1 in cases arising out of death, wounding or other bodily injury of a passenger. However, it may be used in actions for damages based on articles other than 17. The Montreal Agreement 1966 applies to all flights with departures and destinations, which according to the contract of carriage, include a place in the USA as a point of origin, destination or agreed stopping place. By signing the Montreal Agreement, the airlines have contracted with passengers to waive article 20 as a defence[850].

A direct amendment to the Convention has been made by the Guatemala City Protocol. The article 20 defence was abolished, except in cases involving liability for delay, in respect of passengers and baggage by the Guatemala City Protocol. In other words, as regards the carriage of passengers and baggage, the possibility of exoneration exists only where damage is caused by delay; apart from that liability is strict and independent of fault. The carrier shall only be exonerated in cases where the death or bodily injury of a passenger result solely from the passenger's state of health or from an inherent defect, quality or vice of the baggage. Furthermore, the carrier shall no longer be able to exonerate himself for damage to or loss of

[849] If the country of departure and the country of destiantion follow different versions of the Convention, 'the lowest common denominator' applies. That is, if Country A is party to the Warsaw Convention amd country B is party to the Montreal Convention, which applies higher damages limitation, a carriage from A to B would be governed by the Convention alone.
[850] Goldhirsch, p. 111.

hand baggage. Only in the carriage of goods will exoneration still be possible to the same extent as before[851]. However, the Guatemala City Protocol has not yet entered into force.

The scope of that provision depends on the meaning of 'all necessary measures'. The meaning of 'necessary measures' remains unclear in the text of article 20. Even the original French text, where it reads 'mesures nécessaries'[852], is of no help in this respect. If this article interpreted literally, the carrier would be burdened with proving that it took 'all necessary measures' to avoid damages[853]. The article must be read as requiring something less than that, e.g. the carrier has to take all reasonable measures to avoid the damage. The text will have no practical application if a literal interpretation is accepted that the mere occurrence of the damage demonstrates that not all 'necessary measures' to avoid the damage have been taken[854]. The wording of article 20 makes it quite clear that only after the cause of the accident or the damage has been established is the carrier in a position to effectively prove that 'he and his servants and agents have taken all necessary measures to avoid the damage (or that it was impossible for him or them to take such measures). In other words, article 20 cannot be pleaded if the cause of the accident, the delay or the loss of or damage to the cargo, remained unknown[855].

'Initially, United States courts adopted a very restrictive attitude in their interpretation of article 20/1. It was not enough to show that the carrier had taken all reasonable measures. American courts required that all possible measures be taken, or that the carrier did everything in its power to take the necessary measures. Accordingly, the carrier could not avoid liability when there was a particular measure which could not avoid liability when there was a particular measure which could have avoided the damage, or lessened the risk of its occurrence, and that this measure was not taken[856]. In the case, Rugani v. KLM[857], some

[851] Giemulla/Schmid, art. 20, para. 71.
[852] The wording of article 20 changed from 'mesures raisonnables' in earlier drafts, to 'mesures nécessariés' in the final draft, both attempting to translate the common law concept of 'due diligence' in French law, there was no precise linguistic expression for such a concept, and final French text incorporates what must have been seen as the closest equivalent. But when the Convention was translated into English, a literal translation was given, which did not refer to 'due diligence'. See, Miller, p. 167.
[853] Goldhirsh, p. 111.
[854] Miller, p. 161.
[855] Mankiewicz, p. 100.
[856] Miller, p. 162.
[857] Rugani v. KLM Royal Dutch Airlines, City Court, New York County, 20 January 1954; (1954) USAvR 74; 4 Avi 17,257; IATA ACRL, No. 25 cited by Diederiks – Verschoor, p. 122.

expensive furs were stolen from a KLM hangar at Idlewild airport in New York, where they had been placed in storage prior to shipment. The New York City Court ruled that all necessary and possible measures had not been taken. Although there had been a guard on duty, he was unarmed; consequently, the guard was unable to protect the goods, because he had no effective defence in this case of armed robbery[858].

In American courts, a marked change in attitudes was signalled in the 1972 case of Feilbelmann v.Compagnie Nationale Air France[859]. In that case, it has been held that the Montreal Agreement had waived 'the defence of due care Warsaw Convention article 20'[860]. The same approach was adopted, with much more explicit reasoning, in the case of Manufacturers Hanover Trust Co. v. Alitalia Airlines[861] the court ruled that the phrase 'all necessary measures' could not be read literally but must be construed 'all reasonable measures'. Applying a 'common sense' reading, the court stated that 'article 20 requires of defendant carrier 'proof, not of a surfeit of preventive measures, but rather, of an undertaking embracing all precautions that in sum are appropriate to the case, i.e. measures reasonably available to defendant and reasonably calculated, in cumulation, to prevent the subject loss'. Since the carrier had failed to take all reasonable measures that prudent foresight would have envisaged for the security of high-value cargo, he was held liable to the shipper for the theft of his goods by armed robbers from the air carrier's building. The court defined all 'reasonable' measures, ones that were appropriate to the risk. This means measures that are: (i) reasonably available to the carrier, and (i) reasonably calculated to prevent the loss[862]. In Greece, the standard is 'reasonable measures that would be taken by any conscientious and diligent transporter'. In order to avoid liability the carrier must undertake to prove that the accident was caused by something beyond its control[863].

In the case Grein v. Imperial Airways, Ltd..[864], a leading judgment has been held by the English Court of Appeals and it has been subsequently followed by cases in the United Kingdom and Canada. In this case it has been held that the carrier must prove that he

[858] Diederiks – Verschoor, p. 122.
[859] 12 Avi. 17,575 (N.Y. City Ct. 1972) cited by Miller, p. 162.
[860] Miller, p. 162.
[861] U.S. District Court, Southern District of New York, Manufacturers Hannover Trust Co. Vs. Alitalia, 16 April 1977: 14 Avi.710 cited by Miller, p. 162.
[862] Goldhirsch, p. 113.
[863] Ibid.
[864] 1 Avi. 622 (Ct. App. 1936) cited by Miller, p. 163

exercised 'all reasonable skill and care in taking all necessary measures to avoid causing damage or that it was impossible to take such measures' . Thus, the letter of article 20/1 is respected in that the carrier has to take all necessary measures but his duty is only that of a reasonable man in taking these measures. The actual requirement was further explained by Greer L. J. who stated onus was on the carrier 'to prove that the accident could not have been avoided by the exercise of reasonable care'[865].

In French courts, several cases make it clear that article 20 requires evidence that specific measures which could have avoided the particular damage, have been taken, or that was impossible to take such measures[866].. In the case Cie La Jugosdlavenski Aéro-Transport c. Gati[867], it has been held that the provision of an airworthy aircraft and competent aircraft was insufficient; the carrier must also establish that measures 'directly and immediately in relation to the accident' have been taken. Conversely, the carrier cannot avoid liability if he has failed to take all 'reasonable measures'. Once the exact circumstances of the occurrence of the damage are known, there still remains the problem of how the reasonableness or normality of the carrier's conduct is to be evaluated. Several courts have expressly stated that the carrier must prove that his damage is due to conditions that are not dependent upon his will, i.e. beyond his control.

'All necessary measures' was intended by the drafters to require something like the application of reasonable care and skill; but in recent times the phrase has been interpreted more strictly to require that has been described as 'utmost care'[868]. In practice, there are two lines of approach identifying necessary measures. The first is an *a priori* approach, which tends to decisions close to a rule requiring no more than reasonable care. The carrier is required to prove that he took all reasonable measures that could be expected of him in circumstances without particular regard to what actually went wrong later. It other words, it means that he must prove that he provided an airworthy aircraft and competent personnel. The second is *a posteriori* approach in which the court focuses attention on the particular

[865] Miller, p. 163,
[866] Ibid., p. 165.
[867] Cie La Jugosdlavenski Aéro-Transport c. Gati, (C. A. Paris, 12 December 1961) D. 1962.J.707 cited by Miller, p. 165.
[868] Utmost care is (lawful) conduct that says 'better safe than sorry' and takes a 'worst scenario' view of what might happen but one that falls a degree and obsessive while paying minimal attention to the cost of the precaution. Clarke, p. 127.

peril that occurred and asks what could or should the carrier have done to prevent it or similar peril. The claimant should suggest what the carrier could and should have done to avoid the loss, damage, or delay that occurred - an exercise in reasonable speculation rather than proof. Then it is for the carrier to rebut the claimant's suggestion to prove that measure suggested by the claimant would have not avoided the loss, damage or delay that occurred[869]. That is no reversal of the onus of proof; the claimant's role is one of speculation rather than of proof. Moreover, the carrier must first give 'evidence of the facts sufficient to bring the defence into play'[870].

The 'necessity' of the measure must not be determined through retroactive considerations, since, when considered after the event, almost any imaginable cause of damage could have been avoided albeit sometimes only by canceling the carriage. On the other hand, it is not sufficient if the carrier submits that he and his servants and agents took the usual measures, when the circumstances obviously called for additional measures[871]. Thus, one will have to assume that 'necessary measures' are such as would be taken by the prudent, diligent and reasonable businessman or his servants and agents, in the specific circumstances at hand and which are appropriate to the risk[872]. Which measures were 'necessary' can only be evaluated in keeping with the relevant state of technical knowledge and upon consideration of all the circumstances of the individual case. In any case, the observance of all legal and authoritative provisions regarding the admission of aircraft as well as the relevant traffic regulations must be part of this evaluation[873]. Another 'necessary measure' would be a careful operational organization in compliance with the high demands placed on safety aspects, which ensures a constant examination and inspection of staff and equipment[874].

In any case, the carrier will not able to escape liability proving that 'the damage would have occurred even if all necessary measures had been taken to avoid the damage'. As it has been stated in the case Manufacturers Hanover Trust Co. v. Alitalia, 'the defendant carrier has to undertake all precautions that in sum are appropriate to the case, i.e measures reasonably available to defendant and reasonably calculated, in cumulation, to prevent the subject

[869] Clarke, p. 127.
[870] Ibid., p. 128.
[871] Giemulla/Schmid, art. 20, para. 6.
[872] Ibid.
[873] Ibid, para. 7.
[874] Ibid. For further examples see, Giemulla/Schmid, art. 20, para. 7- 16.

loss'[875]. The wording of article 20 of the Warsaw Convention does not give the carrier such an assumption to exonerate himself. The carrier can only exonerate himself by proving that all necessary measures were taken to avoid the damage or that it was impossible to take such measures whether by himself or his servant or agent.

The carrier is also able to exonerate himself from liability for damage caused by delay (article 19). However, the requirements are not satisfied by merely proving that, after a delay had become obvious, he did everything necessary to minimize the damage; the carrier must also prove that there was no negligence in the occurrence of the delay itself[876].

b. Under Montreal Protocol No. 4 and Under the Montreal Convention of 1999

The Montreal Protocol fundamentally changed the carrier's liability for cargo. The carrier is still liable for destruction or loss of, or damage to cargo. Whereas under article 18 of the Warsaw/Hague his liability was based on presumed fault, the carrier is now, however, subject to absolute liability. Montreal Protocol No. 4 left the liability of the carrier for checked baggage untouched. Whereas the carrier's liability for checked baggage is still based on presumed fault (article 20), in case of damage to cargo the carrier can only relieve himself of liability if he succeeds in proving that one or more of the causes listed in article 18/3 WC/MP4[877]. According to this provision, the carrier may rely on the four exceptions listed in paragraph 3 to exonerate from liability.

a. inherent defect, quality or vice of that cargo;
b. defective packing of that cargo performed by a person other than the carrier or his servants or agents;
c. an act of war or an armed conflict;
d. an act of public authority carried out in connection with the entry, exit or transit of the cargo.

[875] Emphasis added, Mankiewicz, p. 100.
[876] Giemulla/Schmid, art. 20, para. 28, Miller, p. 156.
[877] Giemulla/Schmid, art. 18, para. 104-106

Under MP4, the exoneration in accordance with article 20 will be admissible only in the case of damage caused by delay to cargo or in accordance with article 18/2 Warsaw Convention..

The role of article 20 in the Warsaw Convention liability system is becoming less and less significant regarding the changes of rules by the IATA and European Commission. Firstly the IATA Intercarrier Agreement and later, article 3 para. 2 of Council Regulation number 2027/97 of 9 October 1997 make the article 20 defence in passenger liability cases available only for the carrier where the damage exceeds 100.000 SDR[878].

This philosophy was later the basic idea of the new rules of the Montreal Convention of 1999. Under the Montreal Convention of 1999, the article 20 defence is available only in cases of liability for delay (article 19). In that Convention it is, however, provided that in passenger cases to the extent that the damages exceed 100.000 SDRs, the carrier is not liable if the carrier proves that such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents. Or, such damage was solely due to the negligence or other wrongful act or omission of a third party.

c. Under the TCAA

Article 123 of the TCAA is taken from identical provision of article 20 of the Warsaw/Hague. Since the provisions of the TCAA are taken from the Warsaw/Hague system, contract for the carriage of cargo (contract for the carriage of passenger as well) will be subject to the rules of fault-based liability[879]. In this respect, the carrier shall be subject to exoneration rules of the Warsaw/Hague system for the domestic carriages of cargo (TCAA article123).

However, the carrier can rely on the exoneration rules of the MP4 for the carriage of cargo between Turkey and the states ratifying MP4. In this respect, the carrier will be subject to the rules of absolute and limited liability for the carriage of cargo (In this context, article 123 of the TCAA will not be applicable for the stated carriages of cargo).

[878] Ibid., art..20, para. 74.
[879] Sözer, (Yeditepe), p. 178.

It must also be noted that the carrier can only rely on the exoneration rules of the Warsaw Convention for the carriages of goods between Turkey and states ratifying only Warsaw Convention. However, there is not any difference between Warsaw and Warsaw/Hague system for the rules of exoneration.

2. Contributory Negligence

Article 21 of the Warsaw Convention provides that the carrier will also be exonerated, wholly or partly, from liability if he proves that the damage was caused by, or contributed to by the negligence of the injured person. This refers to each of the different types damage named in articles 17-19, which are bodily injury, death, damage, loss of cargo and delay[880]. Since the liability of the carrier is basically a tortious liability, it is evident that contributory negligence will be taken into account when setting the amount of compensation[881].

In contrast to the Warsaw/Hague, there is not any provision that governs contributory negligence under the TCAA. However, with the reference of article 106 of the TCAA, the provisions of the Warsaw/Hague system which governs this issue should be applicable also with respect to TCAA[882].

The Hague Protocol did not change article 21 nor did the Montreal Agreement of 1966. In contrast to the possibility of giving exoneration evidence with regard to its own fault, as provided for in article 20, exoneration with article 21 of the Convention is not covered by the Montreal of 1966[883]. In other words, the Montreal Agreement of 1966 does not prohibit carriers the use of Article 21 as a defence as it does article 20[884].

Article 21 refers to the national law of the court because the consequences of contributory negligence differ according to national laws[885]. Each country has its own rules concerning contributory negligence and its effect on parties. For this reason, the court hearing a Warsaw case must apply its own law. The court having jurisdiction of the case will have to look to its

[880] Giemulla/Schmid, art. 21, para. 1; Goldhirsch, p. 117.
[881] Giemulla/Schmid, art. 21, para. 3.
[882] Sözer, (Yeditepe), p.178; Ülgen has expressed the same view, p. 188-189
[883] Giemulla/Schmid, art. 21, para.1.
[884] Goldhirsch, p. 117.
[885] Mankiewicz, p. 106.

'own law' to determine how this article will be applied[886]. The defence of 'contributory negligence' was within the discretionary powers of the Court seized of the case under its lex fori. In countries where contributory negligence is not a bar to recovery, the carrier cannot exonerate himself from his liability in the case of contributory negligence and stipulations of the parties or general conditions of carriage which exonerate the carrier from his liability in the case of contributory negligence are null and void under the article 23 of the Warsaw Convention[887]. In cases where the contributory negligence is a complete bar to any claims for damages, the court can either reduce the carrier's liability for damage or completely exonerate him from liability[888].

Although article 21 allows the court to apply its own law to determine the rules of contributory negligence, it does not give the forum court an absolute right to follow its local law if it does not conform to the rules of the Convention. The court cannot, for example, use contributory negligence as a complete bar to the claim if such is the forum's own law. To do so would run contrary to the spirit of article 23 that prohibits courts from reducing the liability of the carrier under the Warsaw Convention[889].

Article 21 contains two requirements: first, that contributory negligence or fault on the part of the injured party must exist, and second the rule of the onus probandi, i.e. that such contributory negligence or fault must be proved by the carrier[890]. Pursuant to the Convention, the carrier must prove that the damage was caused or contributed to, by the injured person. The burden of proof, where it is sought to reduce or even exclude liability does no rest on the claimant (the injured person) but on the defendant (the carrier).

The fact that article 21 determines who and the extent to which any party or parties is to be liable in damages by reference to fault, throws some light on how the term 'contributory negligence' ought to be defined. It can only be derived from the Convention's understanding of the main-term 'fault'. The liability of the carrier under articles 17-19 is liability based on presumed fault. This means, that fault is not a requirement of liability which has to be proved

[886] Goldhirsch, p. 117.
[887] Sözer, (Yeditepe), p. 178; Mankieicz, p. 107
[888] Sözer, (Yeditepe), p. 179.
[889] Goldhirsch, p. 118.
[890] Giemulla/Schmid, art. 21, para. 3.

by the plaintiff, but the absence of fault results in exoneration from liability[891]. This concept of responsibility leads to the definition of contributory negligence which is fault on the part of injured party[892]. Under German law this definition comes close to the definition of term 'Fahrlassigkeit' (German for 'negligence'). In German jurisprudence, the term 'negligence' means the failure to take the required care in one's relations with others. Typically, the English translation of the Convention uses the term 'contributory negligence' in article 21. The term 'faute' used in the original French text of the Convention, as is the case with the German term 'Verschulden' (i.e. fault) includes wrongful intent as well as negligence[893]. As far as the context in which these terms are used is concerned, it is irrelevant which of the terms fault or negligence is used. The subject matter of article 20 and article 22 is the carrier's relief from liability (albeit merely the limits of liability laid down in article 22), and the terms in question are used in the negative. Thus, with respect to subjective aspect of liability, negligence is the minimum requirement for exoneration of the carrier. Definitely, the carrier is also exonerated, where he can prove that he did not act intentionally, or where the injured party did[894]. Thus, in the context of article 20 and 21 a distinction between 'intention' and 'negligence' is not necessary. 'Intention' (i.e. knowledge of and consent to resultant damage is also covered by the term 'fault' in the sense in which it is used in article 20 and 21[895].

Although the article 21 only speaks of negligence on the part of 'injured person', this does not in any case mean that this person has to have acted wrongfully himself[896]. The carrier has the right to prove the negligence of the passenger or his representatives and, in the case of the goods, the negligence of the consignor, consignee and their agents, servants, and independent contractors[897].

The contributory negligence defence is not governed under the TCAA. Howver, contributory negligence defence that is governed under the article 21 of the Warsaw/Hague, could be

[891] Ibid, para. 5.
[892] Ibid, para. 6.
[893] Ibid, para. 7.
[894] Ibid, para. 8
[895] Ibid, para. 9.
[896] Ibid, para. 12.
[897] Mankiewicz, p. 107; Goldhirsch, p. 118;

applied in Turkish courts since the defence of contributory negligence is provided as a defence under the article 44 of the Turkish Code of Obligations.

The Montreal Protocol No. 4 has also preserved this defence, however it split the comparative fault defence into two paragraphs - one is addressing the carriage of passengers and baggage, and the other addressing cargo. In the Convention as amended by Montreal Protocol No. 4, the language of the earlier Convention texts is retained in respect of passengers and baggage, with the substitution for 'injured person' of the phrase 'the person suffering the damage'; that change makes it clear that the defence is not limited to passenger cases, as the word 'injured' might suggest[898]. For baggage, the contributory negligence of the passenger may, in accordance with local law, exonerate the carrier wholly or partly from its liability. However, for cargo cases, it has been stated under the article 21/2 of the MP4 that 'if the carrier proves that the damage was caused by or contributed to by negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage'. This removes the reference to the national law of the court seized of the case. Montreal Protocol No. 4 extends this to the contributory negligence on the part of the claimant and his legal predecessor.

The Montreal Convention also preserves the contributory negligence defence under article 20 of the Montreal Convention and the first sentence article 20 has its origin in article 21 of the original Warsaw Convention. It is important to note that article 20 applies also with respect to article 21/1; thus, even within the first tier up to (100.000 SDRs) of liability, the carrier may avail itself to the defence of article 20 and its liability is not 'absolute'[899]. The intention is clear, that the defence of contribution is available even when the damages are below that figure.[900] Under article 21 of the original Warsaw Convention, the defence of 'contributory negligence' was within the discretionary powers of the Court seized of the case under its lex fori. The Guatemala City Protocol of 1971 and Montreal Convention of 1999 has unified substantive law on this subject and the matter is no longer within the discretionary power

[898] Shawcross/Beaumont, VII (509), para. 460-468.
[899] Milde/ Dempsey, p. 179.
[900] Shawcross/Beaumont,, VII(509), para. 460-468

under lex fori. In addition to that Montreal Convention of 1999 provides under article 20 that when by reason death or injury of a passenger compensation is claimed by a person other than other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed by the negligence or other wrongful act or omission of that passenger.

3. Contractual Provisions

Article 23/1 prohibits any provision which tends to relieve the carrier of liability or to fix a lower limit than that provided in the Convention. The existence of such provision does not render the entire Convention inapplicable. Only the provisions, which are prohibited, are rendered null and void; however, the rest of the Convention, including its limits, are still in effect. According to paragraph 2, which was inserted by the Hague Protocol, an exclusion or limitation of liability is admissible, where damage or loss result from the inherent defect, quality or vice of the cargo carried. Article 23 was not amended either by the Guatemala City Protocol or by Montreal Protocols.

Article 23 of the Warsaw/Hague almost identically worded by the article 125 of the TCAA.

Article 26 of the Montreal Convention originated in article 23 of the Warsaw Convention. Paragraph 2 of the 23 of the Warsaw Convention now appears in Article 18/2 and it provides for an exclusion of liability in cases where the cause of destruction, loss or damage is an inherent defect, quality or vice of that particular cargo. Consequently, provisions to relieve the carrier of liability are no longer necessary in such cases.

VII. Liability Suit

1. Notice of Complaint

a. In General

Particularly in the sphere of cargo carriage, there is a great need for speedy resolution of possible damage claims. In the course of transportation, goods will pass through many hands,

and in most cases even the consignee will not be their final destination. Thus, it may be quite difficult to determine the actual cause of the damage[901]. Article 26 addresses this problem. Firstly, in the event that the goods are accepted without complaint, article 26/1 establishes a presumption ('prima facie evidence') that the goods were delivered in good order. Article 26/1 thereby aims to achieve an equitable distribution of the burden of proof. Secondly, article 26/2 - 3 and 4 requires a complaint to have been made within certain time limits. This requirement aims at informing the carrier about potential damage claims so as to enable him to take necessary measures including the preservation of evidence[902].

However, personal injury is not covered by this provision. Therefore, the two-year limitation for bringing an action established by article 29/1 only applies to personal injuries. Damage to objects of which the passenger takes charge himself is also not covered by article 26, although the article itself does not expressly make any distinction between such objects and other (checked) baggage[903].

Paragraph 1 of the Warsaw Convention establishes a presumption that goods were delivered in good order if they are accepted without any complaint. Paragraphs 2 and 3 establish certain formalities and time limits applicable to the notice of complaint, and paragraph 4 refers to consequences of not providing a notice of complaint, and exceptions to this requirement.

b. The Complaint under the Article 26/1

Article 26/1 contains the rebuttable presumption that if the cargo or baggage is received without complaint by the person entitled to delivery constitutes prima facie evidence that the cargo has been delivered in good condition and in accordance with the document of carriage. It is thus clear that contrary evidence may be brought in order to establish that the goods were not in good condition, or that they were not delivered in accordance with the document

[901] Giemulla/Schmid, art. 26, para. 1.
[902] Ibid.
[903] Ibid., para. 2

of carriage. If such evidence cannot be brought, the carrier cannot be held liable because there is no proof of damage or loss[904].

The wording of Article 128/1 of TCAA is essentially same as article 26/1 of the Warsaw/Hague and time limits laid down in article 128/2 have been taken from article 26/2 of the Warsaw/Hague which was extended in Hague Protocol.

The complaint under the article 26/1 can be made in two ways. If the person entitled to delivery discovers the damage at the moment when he takes over the goods, he is required to give proper written notification to preserve the possibility of bringing an action against the carrier. In this case, the presumption will not apply because of the notification. Failure to complain at the time of delivery does not preclude a later claim for damages. However, the plaintiff will have to refute the presumption created by article 26/1 and must prove that the damage, delay or loss occurred during the carriage by air[905]. The latter situation may exist where the damage is not discovered immediately upon the receipt of the goods is such that it is possible to conclude that damage may have occurred. In this case a specific complaint, that satisfies the requirements of paragraph 2 would not be possible while a more general notice could be given[906].

The carrier can avail himself of the presumption established by article 26/1 only if the baggage or cargo was received by 'a person entitled to delivery' namely, in the case of baggage, the bearer of the baggage check and, in the case of cargo, the consignee named in the air waybill or the consignor if the cargo is returned (where article 12/1 applies)[907], and their servants and agents authorized to receive it[908].

[904] Miller, p. 170.
[905] Ibid. The plaintiff has to prove that the goods were not in good condition, or that they were not delivered in accordance with document of carriage.
[906] Giemulla/Schmid, art. 26, para. 3
[907] Article 12/1 of the Warsaw Convention stipulates that the consignor shall have the right of dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure.
[908] Mankiewicz, p. 178.

The complaint provided for by article 26/1 must be made upon receipt i.e. as soon as the consignee or his representatives takes control of the goods. To this extent article 26/1 can be seen to be stricter than article 26/2, which lays down certain time limits within which the complaint has to be made[909].

c- The Time Limit for Notification under the Article 26/2

Article 26/2 of the Warsaw and Warsaw/Hague provides that if baggage or cargo is damaged or delayed, the 'person entitled to delivery' must complain to the carrier 'forthwith after the discovery of the damage'. In this context 'forthwith' means without undue delay, so as to ensure a minimum time for the assessment of the situation and the issue and dispatch of the complaint[910]. In any event, the unamended Warsaw Convention of 1929 laid down time limits of three days for damage to baggage, and seven days for damage to cargo. The Hague Protocol has extended the period in case of damage to 14 days from the date of receipt of then cargo. In claims of delay of cargo, the Warsaw Convention requires the complaint to be filed within fourteen days and in the Hague Protocol, this term extended to 21 days.

Article 128 of the TCAA does not contain any rule about when the complaint has to be made. Article 26/3 Warsaw Convention and Warsaw/Hague simply requires that the complaint be 'dispatched within the times aforesaid'. Most authors agree that article 26/2 would be satisfied as long as it is sent to the carrier within the time limit, even if the complaint is received afterwards[911]. Furthermore, the risk of the complaint getting lost does not rest with the complainant.[912].

The starting date of the period of notification, it will be noted, is different in the case of damage and delay. In the former case, it is computed from the date of the receipt of the cargo or baggage, i.e. from the moment of their actual delivery. However, in the case of delay, the time starts running on the day that the baggage or cargo is placed at the disposal of the

[909] Giemulla/Schmid, art. 26, para. 4
[910] Giemulla/Schmid, art. 26, para. 18; Mankiewicz, p. 183.
[911] Giemulla/Schmid, art. 26, para. 17; Miller, p. 172; Mankiewicz, p. 184
[912] Giemulla/Schmid, art. 26, para. 17

person entitled to delivery, i.e. normally when the carrier notifies him of the arrival of the goods[913].

Article 35 specifies that the term 'days' means 'current days', not 'working days' but as the manner of computing the period prescribed in article 26/2 is not specified by the Convention, it is governed by the applicable national law[914]. In article 35 in conjunction with the definitions contained in article 1 of the IATA General Conditions of Carriage (Passenger and Baggage)[915] and article 1.9 IATA Conditions of Carriage for Cargo,[916] days are defined as full calendar days including Sundays and public holidays. According to the definitions provided by the IATA, the day when the complaint is mailed will not be counted.

Sometimes general conditions of carriage stipulate a seven-day time limit for damage to cargo and fourteen-day time limit for delay. These time limits are the same as those laid, down in the unamended Convention of 1929, and therefore shorten the times applicable under the Warsaw Convention. Such provisions fall foul of article 23/1 of the Warsaw/Hague and therefore null and void[917].

d. Form of the Complaint

Article 26/3 of the Warsaw Convention provides that the complaint must be made in writing either by annotation on the document of carriage or by written notice dispatched within the specified time limits. This requirement cannot be waived and therefore the complaint cannot be made orally.[918].

Article 128/3 of the TCAA also provides that the complaint must be made either in writing or by annotation on the document of carriage. Since the provision does not contain any detail and a specific wording for the written complaint, the purpose of the complaint must be taken into consideration for the interpretation of this provision. The requirement of written

[913] Giemulla/Schmid, art. 26, para.18, 20; Mankiewicz, p. 183.
[914] Mankiewicz, p. 183.
[915] IATA General Conditions of Carriage (Passenger and Baggage), see http://www.transportrecht.de/transportrecht_content/1145517747.pdf
[916] IATA Conditions of Carriage for Cargo; see http://www.transportrecht.de/transportrecht_content/1145517766.pdf
[917] Giemulla/Schmid, art.26, para. 21.
[918] Giemulla/Schmid, art. 26, para. 16

complaint has the purpose of ensuring that the complaint will be received by the carrier's respective office and it can be proven. According to Sözer, the reservations either should be delivered by hand and signed or if the requirements exist the written complaint should be sent by registered post with an acknowledgement of receipt or through the medium of notary public[919].

e. The Content of the Complaint

The Convention does not prescribe a specific wording for the written complaint, it is sufficient that the complaint indicate in unequivocal terms the damage for which the carrier is held responsible[920]. The Oberlandesgericht Frankfurt/Main, dated 15 January 1980 held that the complaint must be sufficient to enable the carrier to make inquires about the nature and the cause of the damage. For this reason the complaint must describe the goods and state the reason for the complaint, i.e. namely indicate whether it is based on damage or delay, or both[921]. It also held that a notice of delay not be insufficient, merely because it failed to specify which parts of the shipment did not arrive. The requirement to describe the affected goods will be met where reference is made to the air waybill.[922]. The Oklahoma Supreme Court considered it sufficient that a notation of 'Received Damaged' by a connecting carrier is sufficient notice to the carrier upon arrival[923].

The Oberlandesgericht Hamburg held that in cases of partial loss a general description of damage was sufficient, and did not consider detailed list of all missing objects to be mandatory particular[924]. On the other hand, the Oberlandesgericht Köln[925], dated 11 June 1982, held the complaint to be insufficient where the notice merely stated that on delivery of the consignment one carton was missing and several cartoons were soaked through. The court held that such notice is merely provisional which acts only to eliminate the presumption that the goods were delivered undamaged. The court also held that such notice

[919] Sözer, (Yeditepe), p. 180.
[920] Commercial Court of Brussels, Air Zaire v. Kimo, 9 Jan. 1976: 1977 RFDA 96; also Court of Appeals, Frankfurt, Germany (Fed. R.), 10 May 1977: 1977 ZLW 230; Tribunal Frankfurt, Germany (Fed. R.) 15 November 1974: 1975 ZLW 354 cited by Mankiewicz, p. 179.
[921] OLG Frankfurt, 15 January 1980, 1980 ZLW 146 cited by Giemulla/Schmid, art. 26, para. 12.
[922] Mankiewicz, p.179.
[923] Schmoldt v. Pan Am, 21 Avi 17, 974 (Sup. Ct. Okla 1989) cited by Goldhirsch, p. 172.
[924] 1988 TranspR 201/203 and (1988 ZLW 362/ 364) cited by Giemulla/Schmid, art. 26, para. 12.
[925] Oberlandesgericht Köln, 11 July 1982, 1983 ZLW 167 cited by Goldhirsch, p. 172.

is insufficient to give the carrier notice of what kind of damage was being asserted and what resulting claims would be made.

Where additional damage is discovered after the original complaint has been made, another compliant is required to be served within the prescribed time limits[926]. A complaint of damage is not therefore sufficient to cover any subsequently discovered additional damage which has been caused by delay.[927]

f. Fraud on the Carrier's Part

Article 26/4 of the Warsaw/Hague provides that, other than in cases where there has been fraud on the carrier's part, failure to make a complaint within the prescribed time limits will mean that no action shall lie against the carrier[928]. The same rule has been provided under the article 128/4 of the TCAA. Article 26/4 of the Warsaw/Hague provides that the time limits set out in article 26/2 do not apply where there has been fraud on the carrier's part, but the provision does not define what constitutes fraudulent conduct.

In this context, fraud means that the carrier must have wrongfully prevented the plaintiff from determining the facts or from filing a timely complaint. Deceit concerning the extent of the damage may also constitute fraud within the meaning of article 26/4[929]. According to *Goldhirsh*, this is a matter to be determined by local law[930]. The French Code of Civil Aviation gives an authentic interpretation of the word *fraude*, namely, an 'act by which the carrier conceals or tries to conceal the damage, loss or delay, or any other means which prevents or tries to prevent the consignee from filing a complaint within the prescribed time limits'[931]. Consequently, fraud encompasses any action of the carrier that tends to prevent the consignee from complaining within the prescribed period[932].

[926] Makiewicz, p. 180
[927] Schmoldt v. Pan Am, 21 Avi 17, 974 (Sup. Ct. Okla 1989) cited by Giemulla/Schmid, art. 26, para. 15.
[928] Giemulla/Schmid, art. 26, para. 39.
[929] Ibid., para. 32.
[930] Goldhirsh, p. 173.
[931] Mankiewicz, p. 185.
[932] Miller, p. 173

Article 31 of the Montreal Convention is substantially the same as article 26 of the Warsaw/Hague with certain necessary adjustments, notably article 31/1 in fine which allows for 'other means', i.e. electronic documentation. In addition, in accordance with paragraph 1, paragraph 3 of the article 31 deleted the wording 'upon the document of transportation' and just kept that 'complaint must be made in writing'.

2. The Parties

a. The Plaintiff

Warsaw/Hague system does not have any express provision indicating who is entitled to sue the air carrier in cargo cases. Article 24/1 of the Warsaw Convention simply states that 'in the cases covered by article 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention'.

In practice, difficulties arose only in cargo cases. Cargo cases are in general more complex. Between its point of departure and its point of destination, cargo is often handled by a number of different persons exercising various rights over it. For the reason that, it will be difficult for a court to assess who is a proper plaintiff in cargo cases[933].

In theory, first the consignor has the right to bring an action to the carrier as a party to the contract for the carriage of cargo. Since the contract for the carriage of cargo is a contract in favour of a third party, the consignee also has the right to bring action to the carrier. The consignee's right to require delivery of cargo under article 13/1 also provides the basis for a claim for damages in accordance with articles 18 (destruction, loss of or damage to the goods) and 19 (delay) of the Warsaw Convention under article 13/3. Article 13/3 provides that in cases where either the carrier has admitted the loss or the cargo has not reached the place of destination even after the expiry of 7 days, the consignee can enforce against the carrier the rights which flow from the contract of carriage.

[933] Ibid, p. 249.

Article 14 of the Warsaw Convention provides that the consignor or named consignee with the right to bring an action to enforce those rights granted them under articles 12 and 13 respectively. The lawsuit under this article is limited to rights derived only from articles 12 and 13 of the Warsaw Convention, that is, the consignor's right of stoppage in transit, and the consignee's right to demand that the goods and documents of carriage be handed over to him. It does not relate to the rights, based on article 18/1 of the Convention, to obtain damages in the event of destruction, loss of or damages to the goods or for delay under article 19[934].

Article 30 provides the rules of liability for successive carriers. According paragraph 3 of the article 31 of the Warsaw Convention, the passenger or consignor has a right of action against the first carrier and the passenger or consignee entitled to delivery has a right of action against the last carrier apparently for any occurrence during whole transportation. In addition to that, each can take action against the carrier, who actually performed the carriage during which the occurrence took place.

b. The Defendant

It is easy to identify the defendant under the Warsaw Convention. The response to 'whom to sue' is 'sue the carrier'. In addition to that, article 127 of the TCAA and article 25/A of the Warsaw/Hague gives a right of action against the servants and agents of the carrier.
With respect to the proper defendant, the Warsaw Convention only covers situations of successive and combined carriage. Article 30 sets out the conditions under which an action may be brought against an air carrier in the case of carriage to be performed by various successive carriers and article 31 deals with the cases of combined carriage. In other words, article 30 and 31 of the Warsaw Convention clarify the issue of whom to sue in cases of successive and combined carriage.

As mentioned above, article 30/3 of the Warsaw Convention gives the right of action against the first carrier to the passenger or the consignor, and the right of action against the last carrier to the passenger or the consignee who is entitled to delivery. Moreover, the carrier

[934] Goldhirsh, p. 63; Miller, p. 250-251.

who performed the carriage during which the damage took place may be sued by either the passenger, or the consignor, or the consignee.

Article 30/2 of the Warsaw Convention is relating to the successive carriage of passengers and 30/3 is relating to the successive carriage of baggage and cargo. The same issue was governed under the paragraph 2 and paragraph 3 of the article 129 of the TCAA. However, paragraph 2 of the TCAA is more complex and governs the issue relating to passengers and 'owner of the goods'.

Paragraph three of the TCAA, is relating only to the successive carriage of baggage and cargo like the 31/3 of the Warsaw/Hague. Since paragraph 3 of the TCAA governs the issue relating to successive carriage of baggage and cargo, paragraph 2 of the TCAA must not have contained the term 'owners of the goods'. According to *Sözer,* complex structure of this article can be explained by a translation mistake[935].

In addition, it must be noted that the Warsaw/Hague does not contain a category named 'owner of the goods'. Actually, TCAA does not contain that category, too[936].

Article 30 of the Warsaw/Hague designates the carrier answerable to the passenger or the consignor or consignee, but it does not determine which carrier will finally be responsible and bear the financial costs. Any doubts on that question removed by article 30/A of the MP4 which provides that nothing in the Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

3. The Proper Forum

a. According to the TCAA

The TCAA does not contain any particular provision relating to forum for litigation of cases against the air carrier. According *Sözer*, in such a case, despite the reference to the article

[935] Sözer, (Yeditepe), p. 181.
[936] Ibid.

106 of the TCAA[937], firstly, it will be proper to apply the provisions of the Turkish Code of Civil Procedure besides domestic rules of jurisdiction, such as jurisdiction as to subject matter and jurisdiction as to place[938].

b. According to Warsaw/Hague System

Article 28 of the Warsaw/Hague provides plaintiffs with four places of jurisdiction where they can file a claim for damages against the carrier. These places of jurisdiction must be within a High Contracting Party, in order to ascertain the applicability of the Convention. In other words, any action under the Convention must be brought in a court in a country that has ratified the Convention.

The wording of article 28 means the choice of four places of jurisdiction is alternative, not cumulative. The court must ask itself if one of the four criteria under article 28 is satisfied for the contract of transport involved. If the answer is 'no', the court must dismiss the case despite valid local jurisdiction[939]. On the other hand, the appropriate court within a state with jurisdiction under article 28 is a matter for the national law of that state.

Article 32/1 of the Warsaw Convention provides that the parties are not allowed to enter into contracts to agree on the jurisdiction of the courts. Therefore, the parties to a contract of carriage cannot deviate by agreement from the places of jurisdiction a set out in article 28 of the Convention prior to any accident.[940]. Regarding the nullity of such agreement article 23/1 would have to be applied accordingly, which ensures that the nullity of any such agreement does not affect the contract as a whole.

In connection with the carriage of goods, the Convention allows parties to agree upon an arbitration clause under the condition that they observe the provisions of the Convention. If,

[937] As stated before, article 106 of the TCAA stipulates that firstly the rules of international agreements which Turkey is party shall apply in cases where there cannot be found any provision governing the related case under the TCAA. In other words, article 106 of the TCAA first refers to the rules of Warsaw/Hague/MP4, in cases where there cannot be found any provision governing the related case under the TCAA.
[938] Sözer, (Yeditepe), p. 182; the opposite view has been held by Ülgen, see. p 219. According to Ülgen, the reference of the article 106 of the TCAA must be taken into account and first article 28 of the Warsaw Convention must be applied for the domestic carriages of cargo.
[939] Ibid.
[940] Giemulla/Schmid, art. 28, para. 9.

instead of an action, the parties agree to arbitration under article 32/2, they still must submit to one of the jurisdictions specified in article 28.

Article 28 determines the place of jurisdiction on an international level only, the four places named in article 28 all refer to a specific country. The actual 'venue' is defined in accordance with applicable national procedural law[941].

An action for damages must be brought, at the option of the plaintiff, before one of the following courts, provided that the court is located in contracting state:

(i) The Court of the Domicile of the Carrier: The Convention provides a place of jurisdiction at the 'domicile' (US translation), 'ordinary residence' (UK translation) and domicile (in French text) of the carrier without defining the term. It has to be determined in accordance with the lex fori. According to French law, the domicile of a person is the place where he has his principal residence. The English translation is thus very close to the meaning carried by the French text when it refers to the 'ordinary residence'. 'Ordinarily resident' means a person's abode which he has voluntarily adopted for settled purposes as part of the regular order of his life[942]. However, American translation is more rigid than the French concept. Because the domicile of the common law is that place 'where a man has his true, fixed and permanent home, and to which, whenever he is absent, he has the intention of returning' a man may change residence many times in the course of his life and retain the same domicile[943].

If the carrier is physical person, the provisions of the civil code define his or her domicile. In the case of corporation, the term 'domicile' refers to the seat of the corporation[944]. In France, the domicile of a corporation is usually the place designated in its articles of Association. In the US, the domicile of a corporation is where the carrier is incorporated[945]. 'Domicile' in the U.S.A does not include any place where the airline carriers on it business on a regular and

[941] Sözer, (Yeditepe), p. 182; Giemulla/Schmid, art. 28, para. 7.
[942] Goldhirsh, p. 183.
[943] Miller, p. 300.
[944] Giemulla/Schmid, art. 28, para. 10.
[945] Miller, p. 301.

substantial basis[946]. According to *Sözer,* in the case of corporation, carrier's domicile first refers to the place designated in its articles of association or in its regulation. If it cannot be found any record in its articles, it refers to the place where the executive and main administrative functions of the carrier are located[947].

(ii) Principal Place of Business of the Carrier: The Convention provides a further place of jurisdiction at the principal of his business of the carrier. It refers to the place where the carrier conducts its main administration and where the main management of the company is located[948]. The principal place of business is not necessarily identical with the domicile. There can be only one such place. If the executive and managerial work is done in one place but the registered office or the carrier's depot is in another place, the principal place of business is none the less the first of them. This is normally where the carrier is incorporated; none the less what counts is where the executive and managerial work is done[949].

(iii) Place of Business Through/The Establishment by Which the Contract has been made: Article 28 names as a third possible place of jurisdiction, the establishment by which the contract has been made. Where the contract has been made is the place, branch or agency, where the original contract was made. The court of place where the contract has been made has jurisdiction only if the carrier has at place an establishment – an expression which the United Kingdom Carriage by Air Acts translate by 'establishment' but which the unofficial translation of the U.S. Department of State translates by 'place of business'[950].

A decisive criterion to define if a carrier has an establishment is whether the carrier is permanently represented by a third party, which acts upon instructions of the carrier and thus is a steady recognisable part of the sales organisation. The establishment must be an establishment of the contracting carrier, not of the substitute carrier, on the question whether a carrier is a surrogate or a contracting or successive carrier[951]. 'Establishment' means a commercial office belonging to the carrier, not a ticket office operated by an agent for his

[946] Goldhirsch, p. 367.
[947] Sözer, (Yeditepe), p. 182.
[948] Giemulla/Schmid, art. 28, para. 11.
[949] Clarke, p. 187.
[950] Mankiewicz, p. 136.
[951] U.S District Court, Southern District of New York, Parkinson v. C.P. Airlines, ! April 1968: 10 Avi. 967 cited by Mankiewicz, p. 137

own benefit[952]. It has rightly been held that a mere ticket office is not a 'place of business' under article 28[953]. Likewise, the office of the travel agent issuing the ticket is no an establishment of the air carrier[954].

IATA agencies are a fixed part of the sales organisation of the carriers and most tickets are issued by IATA agencies. IATA (an organization for carriers) has though requirements in order to minimise the risk if an agent can act in the name of the airline, and ties it into its sales organisation with a contract. Based thereon, the IATA agent can permanently represent the carriers which are part of IATA when concluding contracts of carriage. Thus, it is not surprising that Courts have decided an IATA agent would qualify as an 'establishment' in the sense of article 28 of the Warsaw Convention[955].

(iv) The Place of Destination: The Convention provides a fourth jurisdiction at the place of destination. Article 28 does not define the term. However, both article 1 and article 29 of the Convention name the 'place of destination' as a criterion; in article 1 it is an element in order to define the applicability of the Convention and in article 29 in order to define the beginning of the statute of limitations[956]. The destination is the destination agreed by both parties. Interpreting the terms of the contract in order to discover the intention of the parties is a question of fact, to be ascertained by taking into account all elements of each case[957].

The place parties to the contract agree upon as the ultimate destination of the entire trip has to be considered as 'place of destination' in the sense of article 28[958]. The place of destination of the goods is the place where it has been agreed to deliver the goods to the consignee.

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[952] US District Court, District Court of Colombia, Dunning vs Pan American Airways, 7 January 1954:1954 USAR 70; New york Municipial Court, Woolf vs. Aerovias Guest, October 1954: 1954 USAR 399; Court of Appeals, Paris, 2 March 1962: 1962 RFDA 177 cited by Mankiewicz p. 136.
[953] New york Supreme Court, King's County, Mascher vs. The Boeing Corp. And Varig, 8 September 1975: 13 Avi. 18. 047 cited by Mankiewicz, p. 137.
[954] Tribunal, Paris, Orcheste Symphonique de Vienne vs. TWA, 22 March 1971 cited by Mankiewicz, p. 137.
[955] Giemulla/Schmid, art. 28, para. 15.
[956] Ibid, para. 21
[957] Miller, p. 309.
[958] Ibid..

In the case of a single contract for a trip in several distinct sections the destination is the ultimate destination. However, in the case of multimodal transport with a final destination to be reached by some other mode of transport, it is not that but the last air destination which is the destination under article 28. In the case a round trip, the destination is the place where the trip ends[959].

In the case of successive carriage in the sense of article 1, paragraph 3; the last agreed landing is the place of destination in the sense of article 28[960]. Article 28/2 of the Warsaw Convention provides that questions of procedure are governed by the law of the Court seized in the case. This includes provisions about the burden of proof in as much as they are not governed by the Convention[961].

In addition to that the Montreal Convention increased the available forums for litigation of Warsaw cases from four to five if the claim is for passenger injury and death. The Montreal Convention created a 'fifth jurisdiction' in respect of damage resulting from death or injury of a passenger, before a court in the territory of a State Party in which at the time of the accident the passenger had his or her principal and permanent residence. That 'place' also must be a place to or from which 'the carrier operates services for the carriage of passengers by air, either on its own aircraft or another carrier's aircraft pursuant to a commercial agreement and in which that carrier conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier which it has a commercial agreement (article 33/2 Montreal Convention).

4. Arbitration

The second sentence of article 32 prohibits arbitration clauses for the carriage of passengers and baggage and states that they shall be allowed for the carriage of cargo. However, the arbitration must take place within one of the jurisdictions referred to in article 28/1(art. 32/2 of the Warsaw Convention).

[959] Clarke, p. 189.
[960] Giemulla/Schmid, art. 28, para. 25
[961] Ibid, para. 26.

Article 34 of the Montreal Convention incorporates article 32 of the Warsaw Convention. Article 34 of the Montreal Convention expressly permits the insertion of arbitration clauses in cargo air waybills and recognises the enforceability of such provisions. Such agreement must be in writing (art. 34/1). The place of arbitration is restricted to the forums provided in article 33. (Art. 34/2 Montreal Convention).

The arbitrator or arbitration tribunal has to apply the provisions of this Convention (art. 34/3). In addition, paragraph 4 of the article 34 provides that the provisions of paragraph 2 and 3 of this article shall be deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith shall be null and void.

5. Cause of Action

In order to bring suit against a defendant, it is necessary to establish a cause of action. There are contradictory interpretations whether the Warsaw Convention creates a cause of action or not[962]. Article 24 of the Warsaw Convention and article 29 of the Montreal Convention 1999 speak of an 'action for damages', without specifying which law identifes the heads of damages for which compensation may be sought and, with varying effect, declare that the Convention rule is without prejudice to the questions who are the persons who have the right to bring suit and what are their respective rights[963].

For some 30 years, the prevalent view in the United States was that the Warsaw Convention did not create an independent cause of action. This view rested largely upon the decisions in the Second Circuit rulings in Komlos v. Compagnie Nationale Air France[964] and Noel v. Linea Aeropostal Venezolana[965] assumed that the Convention did not create independent causes of action and only established the conditions and standards to be applied to a cause of

[962] For further information see Sözer, Hava Yolu ile Yapılan Milletlerarası Taşımalarda Yolcunun Ölümü veya Yaralanması Sonucunda Doğan Zararlardan Taşıyanın Sorumluluğu (Sorumluluk I), p. 809–812; Sözer, Türk Sivil Havacılık Kanununun Hükümlerine Göre Taşıyanın ve İşletenin Sorumluluğu (Sorumluluk II), p. 64–65; Sözer, (Montreal) 184-189; Calkins, Nathan, The Cause of Action Under the Warsaw Convention, 26 J. Air L & Com.1959, p. 217 et seq. (Part I), p. 323 et seq. (Part II)
[963] Shawcross/Beaumont, VII, para. 401.
[964] Komlos v. Compagnie Nationale Air Fr., 209 F. 2d 436 (2d Cir. 1953) cited by Kreindler, 10.10 – 194; Miller, p.224; For the further information and details about this case see Calkins, Part II, p. 326 et seq.
[965] Noel v. Linea Aeropostal Venezolana, 247 F. 2d 677 (2d c.r. 1957) cited by Kreindler, 10.10 – 194; For the further information and details about this case see Calkins, Part II, p. 326 et seq.

action created by domestic law. These courts reasoned that 'the Convention was effective only to impose its terms on actions otherwise founded in law, by itself Warsaw created no cause of action'[966].

In 1977, in Benjamins v. British European Airways[967], the Second Circuit overruled both Komlos and Noel and concluded that article 17 of the Convention indeed creates independent causes of action for death and personal injury. The primary rationale behind the Benjamins ruling was that 'the desirability of uniformity in international air law could be best recognized by holding that the Convention, otherwise universally applicable, is also the universal source of the right action'. The court also noted that the Convention did not refer to national law, except to specify that questions of standing to sue, the relative rights among claimants, the effect of contributory negligence, and procedural matters should be left to national law[968].

It was stated in Zousmer v. Canadian Pacific Air Lines, Ltd[969]. that 'it is quite apparent from the language of the Convention that its authors explicitly refained from legislating on certain matters traditionally considered vital to the creation of a new right of action.
The language of the Convention was analyzed in detail in Husserl v. Swiss Air Transport Co[970]. In particular, Article 24 of the Warsaw Convention provides that in the cases covered by articles 17, 18, and 19, 'any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, was seen as indicating that no cause of action was created by the Convention[971]. It was stated by the court that 'If the drafters had intended articles 17, 18, and 19 to create independent causes of action, they probably would have referred to causes 'arising under' those articles rather than 'covered by' them. The phrase 'however founded' likewise implies that the foundation of causes of action is not in the articles. Furthermore, if the causes were created by the Convention, they would

[966] Gorman, Michael, D/ Kuner Cristopher B., The Creation of an Independent Cause of Action Under the Warsaw Convention, Notre Dane Int'l L.J., p. 92.
[967] Benjamins v. British European Airways, 572 F. 2d 9113 (2d Cir. 1978) cited by Kreindler, 10.10 – 194. See also Gorman/ Kuner, p. 92.
[968] Kreindler, 10.10 – 195.
[969] 11 Avi. 17, 381 (S.D.N.Y 1969) at p. 17, 387 cited by Miller, p. 225.
[970] 13 Avi. 17.381 (S.D.N.Y. 1975) cited by Miller, p. 225.
[971] Miller, p. 224.

not be 'subject to' the limits and conditions; but rather those limits and conditions would be integral parts of the cause of action themselves'[972].

According to *Miller,* once it was established that the Warsaw Convention did not provide a cause of action, it was imperative to find another basis on which wrongful death cases could be brought. More generally, it was important to find which law would determine who could bring the suit, who had a right or interest in the suit, and what damages could be recovered[973].

Article 24[974] of the Warsaw Convention have the objective, namely to ascertain that Warsaw liability system, which is aimed at an appropriate reconciliation of interests, is not circumvented by other regulations. Such other regulations could be special agreements between the parties to the contract of carriage. In most cases described in articles 17-19 there also exist claims which are based on national law. The requirements and legal consequences in respect of such claims are of a different design to those of the Warsaw Convention. The danger could arise of the injured party bringing out the claim on the legal basis which suits best in the particular situation This would make the application of the Warsaw Convention dependent on chance and would challenge its purpose of creating a certain legal uniformity[975]. The Ninth Circuit Court of Appeals, in In re Air Crash in Bali, Indonesia, dated 22 April 1974[976], stated that the Convention only limits remedy and recovery in international aviation cases, without precluding any causes of action that a plaintiff may assert. The Ninth Circuit concluded that article 24 supports the view that the drafters of the Convention did not intend state causes of action to be preempted, but rather, only intended that they should be interpreted consistently with the conditions and restrictions of the Convention.

[972] Ibid, p. 225.
[973] Ibid, p. 227.
[974] The equivalent provisions in the Convention as amended by Montreal Protocol No. 4 and in Montreal Convention 1999, begins with the words 'in the carriage of passengers, baggage and cargo…' this makes very clear the exclusivity of the Convention rules across the whole field.
[975] Giemulla/Schmid, art. 24, para. 1.
[976] In re Air Crash in Bali, Indon., on Apr. 22, 1974, 684 F. 2d 1301 (9th Cir. 1982) cited by Kreindler, 10.10.-196.

In Air France v. Saks[977] and Eastern Airlines v. Floyd[978], the United States Supreme Court declined to decide whether the Convention casuses of action for death and injury, if applicable, preempt causes of action based on state law and are, therefore, exclusive causes of action.

In Re Air Disaster at Lockerbie, Scotland on 21 December 1988[979], the Court of Appeals for the Second Circuit, principally addressing the 'exclusivity' issue and explicitly held that the Convention's goal of uniformity mandates that if it applies, its causes of action must be deemed exclusive and preempt all state law causes of action. The court concluded that the goal of uniformity would not be furthered by making the Convention's causes of action merely a limit on recovery under state causes of action. If state law could still apply on issues not covered by the Convention, there would be no uniform rules applicable to carriers within the United States. Accordingly, the court ruled that state causes of action were pre-empted. Acknowledging that the Convention does not address all issues necessary for complete resolution of a case, the Lockerbie court went on to hold that the federal common law of torts would apply, rather than state law, to determine damages and other matters the Convention does not address[980].

Lockerbie was overruled by the Supreme Court in Zicherman. In Zicherman v. Korean Air Lines Ltd.[981], the United States Supreme Court held that, before which the parties were in agreement that, if the issue in the case was not resolved by the Convention, it was a matter for 'the law of the United States'. Without addressing exclusivity or preemption of state law, the court in Zicherman ruled that the Convention did not by itself establish the substantive damages law that governed an article 17 wrongful death action and that it did not authorize federal courts to adopt and apply a uniform federal law of damages for wrongful death cases governed by the Convention. Instead, article 17 creaating a presumption of liability in the event of injury or death to a passenger and article 24 providing that an action for damages, however founded, must be brought subject to the conditions and limits of the Convention,

[977] Air Fr. v. Saks, 470 U.S. 392, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985) cited by Kreindler, 10.10 – 195.
[978] E. Airlines v. Floyd, 499 U.S. 530, 588, 113 L. Ed. 2d 569, 111 S. Ct. 1489 (1991) cited by Kreindler, 10.10–195.
[979] In Re Air Disaster at Lockerbie, Scot, on Dec. 21, 1988, 928 F. 2d 1267 (2d Cir. 1991) cited by Shawcross/Beaumont, VII, para. 403; Kreindler, 10.10-198.
[980] Kreindler, 10.10-199.
[981] Zicherman v. Korean Airlines Co., 516 U. S. 217, 133 L. Ed. 2d 596, 116 S. Ct. 629 (1996) cited by Shawcross/Beaumont, VII, para. 403; Kreindler, 10.10-199.

without prejudice to determine which parties have a right to bring suit and their respective rights[982].

The United States Supreme Court in El Al Israel Airlines Ltd v. Tseng[983], dated 12 January 1999, noted that the issue would be settled once Montreal Protocol No. 4, which had been approved by the United States Senate, came into force; the new language of article 24 allows no recourse to an alternative remedy. The plaintiff's claim, which related to a body search, which did not consititute an 'accident' for the purposes of article 17, had been brought under New York tort law. It was held that such reliance on claims outside the Convention was precluded by article 24. Tseng was clearly of opinion that the text of the Convention as amended by Montreal Protocol No. 4 pointed to the exclusivity of the Convention cause of action[984].

The cause of action in the sense previously used for common law countries rarely presents itself as an issue in France. It is only in exceptional circumstances that a plaintiff will not be able to get compensation because he does not have a cause of action. In carriage by air, the cause of action will in most cases be provided by the contract of carriage which can provide a basis for any action, be it wrongful death, personal injury, delay or damage to baggage or cargo[985].

According to *Sözer,* the Warsaw Convention does not create an independent of cause of action. Article 24 of the Warsaw Convention (article 29 of the Montreal Convention) provides that in the cases covered by articles 17, 18, and 19, 'any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention, was seen as indicating that no cause of action was created by the Convention[986]. TCAA also does not have any provision governing this issue.

[982] Kreindler, 10.10–195.
[983] 119 SCt 662 (1999), 26 Avi 16,141 cited by Shawcross/Beaumont, VII, para. 409.
[984] Shawcross/Beaumont, VII, para. 409.
[985] Miller, p. 231.
[986] Sözer, (Yeditepe), p. 188. What is clear that if the carrier is liable under the Convention, there can be no liability on any other basis. Where the Warsaw convention applies, its limitations and theories of liability are exclusive. We agree that the Warsaw Convention does not create an independent cause of action.

6. Time for Suit

Article 29 of the Warsaw Convention limits the time in which a plaintiff can bring an action against the carrier. The purpose of this limitation, as with any statute of limitations, is to clarify claims which may have arisen in connection with an accident or damage. After the period has elapsed, the carrier no longer has to expect any claims[987]. The period of limitation of article 29 refers to all actions seeking damages. However, article 29 leaves open whether it refers to claims under the Convention only, or whether it includes actions for damages based on applicable law[988].

The first paragraph of the authentic French text provides that the damage action must be brought, on pain foreclosure within two years. However, in the Schedule to the United Kingdom Carriage by Air Act, 193 and in the unofficial American translation of the Warsaw Convention, Article 29 reads as follows, 'the right to damage shall be extinguished if an action is not brought within two years. American and French courts are likewise divided on the question whether article 29 is simply a statute of limitation or whether it establishes a condition precedent resulting in foreclosure of the action[989]. If it is a statute of limitations, it can be tolled. If it is viewed as a condition precedent, the suit must be brought within two years and cannot be suspended or interrupted[990].

Being unaware of the looseness of the translation of the French text of article 29, most American courts have held that the article is only a statute of limitation and that the limitation can be interrupted or suspended in accordance with the procedural law of the court seized of the case[991]. Although the U.S.A cases are not uniform, it now appears that majority rule is that article 29 contains a condition precedent[992].

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[987] Giemulla/Schmid, art. 29, para.1
[988] Ibid, para. 2.
[989] Mankiewicz, p. 137.
[990] Goldhirsch, p. 197.
[991] New York Supreme Court, Appellate Division, Bergman vs. Pan American Airways, April 1969, Austrian Supreme Court, 29 March, 1978 cited by Mankiewicz, p. 138
[992] Husmann v. TWA 169, 8th Cir. 1999; Fishman v. Delta Airlines 938 F. Supp.228 (D.C.N.Y. 1996), aff'd 132 F. 3d. 128 (2d Cir. 1998); Flanagan v. McDonnel Douglas Corp. 428 F. Supp. 770 (D.C. Cal. 1977); Egan v. Kollsman 253 N. Y.S. 2d 679 (N.Y. Sup. Ct.1964); Joseph v. Syrian Arab Airlines 15 Avi. 18394 (D.C.N.Y. 1980); Magnus Electronics and Royal Bank of Canada and Aerolineas Argentinas 611 F. Supp. 436 (D.C. III. 1985) cited by Goldhirsh, p. 197.

In most countries, the courts held that article 29 contains condition precedent[993]. For many years, French courts have consistently held that two-year period is a délai préfixe (condition precedent) which can be neither interrupted nor suspended[994].

Reversing it former stand, the French Supreme Court in 1968 and again in 1971 adopted the same view and held that the delay can be interrupted and suspended[995]. Thereupon, the Supreme Court, meeting plenary session, confirmed its decision of January 1977 and declared that the Convention 'contains no express provision which, derogatory from the general principles of French law, stipulates that the period of limitation can not be interrupted or suspended'. Consequently, the Court held that the period of limitation is interrupted by the intervention of the plaintiff in criminal proceedings against the carrier[996].

According to *Sözer*, article 29 of the Warsaw Convention and article 131 of the TCAA is a statute of limitation which can be interrupted or suspended[997].

Article 29/2 of the Warsaw Convention provides that the manner of calculating the two-year period is determined by the law of the court seized of the case. Thus, the court will determine whether the first day of the period is counted or when it ends if the last day is a holiday, or falls in the time[998]. The statute begins to run from the date of arrival at the destination, or when the aircraft should have arrived, or the date on which transportation stopped.

The same provision of the 29/1 of the Warsaw Convention takes part under the Article 131 of the TCAA. The actions under articles 120, 121 and 122 of the TCAA are covered by the

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[993] Barcelona Court, 9 October, 1973; Memorex and Granite State Insurance v. Alitalia Airlines and Saudi Arabian Airlines, C.A. Brussels, 2 May 1984; Celada and Gallina v. Aerovias Nacionales de Colombia-Avianca , Civ. Ct. Rome, 17 April 1991 cited by Goldhirsh , p. 198.

[994] Court of Appeals Paris, 19 December 1967:1968 RFDA 72; the same view was held by the Court of Appeals, Zurich, 23 January 1958:1959 RFDA 189; by the Court of Appeals, Brussels, 3 October 1973; 1975 and by the Tribunal Rome, Rotella vs. Air France, 19 January 1972: 1974 cited by Mankiewicz, p. 138.

[995] Spier vs. Air France, 4 November 1968; Kamara vs. Air France, 24 June 1968 cited by Mankiewicz, p. 138

[996] Lorans vs. Air France, 14 January 1977, Dubois vs. Air- Alpes, 24 February 1978 cited by Mankiewicz, p. 138.

[997] Sözer, (Yeditepe), p. 191. The opposite view hs been held by Ulgen, p.228; Kırman, Ahmet, Hava Yolu ile Yapılan Uluslararası Yolcu Taşımalarında Taşıyıcının Sorumluluğu, Banka ve Ticaret Hukuku Araştırma Enstitüsü, Türkiye İş Bankası Vakfı, Cebeci, Ankara, p.174.

[998] Giemulla/Schmid, art. 29, para. 31.

two year limitation. This provision will also apply for the actions against the servants and agents of the carrier under article 127 of the TCAA[999].

Article 29 must be specifically pleaded and applies to any damage action under the Convention, whether in contract or in tort, that are not governed by the shorter limits of article 26. It also will apply to counterclaims against carriers where the carrier has brought the main action[1000]. The Convention makes it clear that actions under articles 17-19 are covered and those under articles 3, 4, 8, 9, 10, 12/3 and 16 are not covered. Article 3, 4, 8, and 9 deal with insufficient documents; 17-19 refer to the liability of the carrier but articles 10 and 16 are concerned with the consignor's responsibility. Article 12 deals with claims by carriers so such actions are not covered.

As article 29 applies only within the Warsaw system, it does not apply in recourse actions among carriers; nor in an action of the consignor of cargo against his transit agent; nor does it provide a defence where the carriage is outside the scope of the Convention.

[999] Sözer, (Yeditepe), p. 189.
[1000] Goldhirsch, p. 189.

CONCLUSION

The present thesis outlines air carrier liability during transportation of cargo. Despite attempts to realise a unified Warsaw System, the interpreations used by different national courts have been contradictory. The many decisions concerning the Warsaw System thus reveal a positive evolution in its application and interpretation. Courts are increasingly interpreting the cargo provisions of the Warsaw System differently from the passenger provisions. In particular, it is very important for the cargo claimant to know and meet his burden of proof. The claimants must be careful to file a timely written complaint upon delivery, make proof of a legal relationship with the carrier, prove that the damage occurred while in the charge of the carrier, and prove the extent of damage.

The airline liability regime known as the 'Warsaw System' has governed international air travel since the early days of the industry. Undoubtedly, the Warsaw Convention is widely accepted as a private international law treaty. Most readers will be aware that the liability of airlines in respect of accidents involving passengers, baggage and cargo is governed by the Warsaw Convention 1929. Many will also be aware that one of the principal features of the Convention is to limit the liability of airlines in such events. Ever since the 1929 Warsaw Convention came into force on 13 February 1933, it has been a subject of critisim and amendments. Various amendments to the Convention have increased the limits, but generally only by relatively small amounts. However, there has been voluntary action by airlines to increase, or even waive entirely, the limit which applies in connection with the death or injury of passengers, most notably as a result of the IATA Intercarrier Agreement signed by large number of airlines in 1995, and there has also been some regional legislative activity on the subject, such as Council Regulation (EC) 2027/97 and the Amending Regulation of 889/2002 on air carrier liability, which removed the passenger liability limit for EC airlines[1001].

Most of the problems relate to the fact that the unification of rules provided by the Warsaw Convention for the carriage of passengers, baggage and goods has been adversely affected by the multitude of amendments. The modernization and consolidation of the Warsaw System

[1001] Balfour, John, The Montreal Convention 1999, A Solution to the Limitations of the Warsaw Convention, International Travel Law Journal, 1999, p.113.

into a new legal instrument called the Montreal Convention will fulfil the future requirements of states and members of the world aviation community, the travelling public, air carriers and the air transport industry in the third millennium. The Montreal Convention 1999, *on Unification of Certain Rules for International Carriage by Air,* is no doubt a historic attempt to meet the challenges of the 21 st century requirements of the international air transport, consolidating the private air law. It has gone a long way in replacing the jumble of conflicts and permutations and combinations of various liabilities regimes. There is now one single instrument, which clearly and unequivocally establishes the liability of the Air Carrier with regard to the passengers, baggage and cargo. The aeronautical technology has since changed almost beyond recognition; there is need of international cooperation and coordination to make it available universally at affordable costs to each of the High Contracting Party. The changing legal and socio economic scenario, and environmental requirements of the world, needs a most efficient and futuristic analysis to anticipate the likely problems of tomorrow, in order to find solution[1002].

The new facelift to the Warsaw Convention is designed to meet the challenges of the 21 century in the of interntional civil aviation. It is early to assess whether the Montreal Convention 1999 shall meet the requirements of the consumer as well as the operator of the international air transport industry and will make air travel economical, safer, and fully secured universally[1003]. Since the Montreal Convention 1999 unifies the whole Warsaw System, with its realistic changes provides even more hope for the future.

From the view of Turkey, the scenario is more complicated as it has been tried to explain in this thesis. Turkey has ratified the Montreal Protocol No. 4, however has not ratified the Montreal Convention 1999 yet. Since the cargo provisions of the Montreal Protocol No.4 are almost identical with the provisions of the Montreal Convention 1999, it could be said there will not be so much difference between these two texts relating to international air cargo carriages. However, as it was tried to outline in this thesis, the difference between domestic air carriages and international air carriages will still exist, since the text of the TCAA is identical with the Warsaw/Hague text. Moreover, besides its translation mistakes and including Warsaw/Hague's low liability limits, it could be said that the TCAA is already

[1002] Diederiks-Verschoor, p. 180
[1003] Batra, p. 124.

outdated from the perspective of international air carrier liability law. Maybe, it must be questioned the difference between Montreal Convention 1999 and the TCAA and at least the difference between the Montreal Protocol No. 4 and the TCAA. As it could be observed, so many international efforts have been made to provide a uniform law in international air carrier liability. In this respect, some regional activity to amend the TCAA could be questioned to meet the challenges of the international air carrier liability law, besides ratifiying Montreal Convention 1999.

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