

A. GENERAL OVERVIEW OF THE INTERNATIONAL LIABILITY FRAMEWORK

I. The Warsaw System of Conventions

1. Warsaw Convention 1929

9. The first international air convention, the "*Convention for the Unification of Certain Rules relating to International Carriage by Air*", was signed in Warsaw in 1929 (hereinafter referred to as "Warsaw Convention 1929"). As its title suggests, the convention is aimed at unifying the rules on international carriage by air. According to Article 1 (1) the **Warsaw Convention 1929** "*applies to all international carriage of persons, luggage or goods performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.*"¹⁵

10. The Warsaw Convention 1929 was negotiated at a time when commercial aviation was at its infancy. Two major considerations shaped the liability regime laid down by the Warsaw Convention 1929. On the one hand, it was seen necessary to protect air carriers (which at the time were mainly state-owned) from open-ended liability in case of damage to or loss of cargo or baggage and injury or death of passengers.¹⁶ On the other hand, shippers and passengers needed to be reassured that if something went wrong they would have an effective remedy against the carrier and be compensated.

11. The Warsaw Convention 1929 entered into force on 13 February 1933 and has been adopted by 151 States.¹⁷ To date, it is thought to be one of the most widely adopted international conventions.

12. The Warsaw Convention 1929 provides a comprehensive framework of a unified liability regime applicable to claims arising out of international air transport, irrespective of the domicile of the parties, the place of loss or injury, or the venue of the trial. The major areas in which the Warsaw Convention 1929 achieves uniformity may be summarised as follows.

13. The Convention:

- standardises particulars to be included in the documents of carriage;
- creates a penalty for non-compliance with the particulars to be included in the documents of carriage, (carrier loses monetary cap limiting his liability);

¹⁵ The terms "*aircraft*" and "*reward*" in Article 1 (1) are not defined in the Warsaw Convention 1929. However, they have been interpreted to mean that international carriage for any kind of remuneration, whether monetary or other, will be covered. See, Shawcross & Beaumont, *Air Law*, 4th ed., London, 2000, Part VII: Carriage by Air, (hereinafter referred to as "*Shawcross, Air Law*"), paras. 363 to 365. Note that all paragraph references cited from Shawcross, *Air Law* relate to Part VII: Carriage by Air.

¹⁶ The expressions "cargo" or "goods", "baggage" or "luggage", and "passengers" or "persons" respectively are used inter-changeably throughout this report.

¹⁷ Status of ratification of the various international conventions and protocols referred to in this report, as at 1 June 2006. For ease of reference, a consolidated list of Contracting States is appended to this report (Annex 2). Authoritative information on the entry into force and status of ratification of the different international conventions and protocols, as well as on any declarations and reservations, may be obtained from the International Civil Aviation Organization (ICAO), www.icao.org.

- sets out rules whereby the claimant does not need to prove the fault of the carrier, or his agents, in respect of a loss;
- specifies a limited number of defences to liability for the benefit of the air carrier;
- fixes a monetary cap limiting the liability of the air carrier;
- defines the circumstances in which the carrier may lose the benefit of the monetary cap limiting his liability;
- sets out rules as to time limitation and jurisdiction;
- provides for the exclusive application and mandatory effect of the rules laid down.

14. The Warsaw Convention 1929 provides for a monetary cap limiting the carrier's liability in relation to both passengers and their luggage, and cargo. At the same time, it creates a presumption of fault on the part of the carrier. In other words the claimant does not need to adduce evidence to prove that the carrier was at fault. The burden is on the carrier to prove that he was not at fault by using one of the limited defences available to him. Under certain specified circumstances, the conduct of the carrier is considered so reprehensible that the claimant may "break" the monetary cap limiting the carrier's liability, with the result that the carrier loses the right to the limitation and is liable in full. However, such circumstances are strictly limited. The Warsaw Convention 1929 also contains specific rules, which determine who a claimant may sue (i.e. the appropriate party), when (i.e. the time limitation within which a claimant may bring an action) and where (i.e. before which national courts a claimant may bring an action).

15. The provisions of the Warsaw Convention 1929 are of exclusive application and have mandatory effect. This means that in circumstances where the Warsaw Convention 1929 applies to a particular claim, a claimant can only rely on the liability rules of the Warsaw Convention 1929 and may not rely on any other relevant national law.¹⁸ Moreover, the carrier, in the contract of carriage, may not seek to exclude, or limit his liability, or otherwise derogate from the mandatory rules laid down in the Warsaw Convention 1929.

16. In this context, it is worth noting that the contract of carriage is not individually negotiated between the parties, but is carried out on the carrier's standard terms of contract as typically contained in or evidenced by a transport document issued by the carrier. Therefore, one of the underlying aims of the Warsaw Convention 1929 - and this is common to all existing international liability regimes in the field of transport - is to reduce the potential for abuse in the context of contracts of adhesion, used where parties with unequal bargaining power contract with one another. By establishing minimum standards of liability, which apply mandatorily and may not be contractually modified, international liability regimes seek to ensure the protection of cargo interests with little bargaining power against unfair contract terms unilaterally introduced by the carrier in its standard terms of contract.¹⁹

17. As was stated above, one of the major provisions of the Warsaw Convention 1929 concerns the monetary cap limiting the air carrier's liability. This was fixed by reference to the monetary unit of the French or Poincaré franc, which was in circulation in France at the time

¹⁸ See the U.S. Supreme Court's decision in *El Al Israel Airlines Ltd. v. Tsui Yuan Tseng* (1999) 525 US 155 and *Abnett v. British Airways Plc. (Scotland)*, *Sidhu v. British Airways Plc.* [1997] A.C. 430; [1997] 2 Lloyd's Rep. 76, a decision by the U.K. House of Lords.

¹⁹ Note that contractual increase of a carrier's liability is permitted in all international transport conventions, with the exception of the CMR 1956, the international road carriage regime, which does not permit any contractual derogation (cf. Art. 41 CMR).

and consisted of a specified quantity of gold defined by the Warsaw Convention 1929²⁰ (hereinafter referred to as "gold franc"). The monetary cap is 125,000 gold francs (about US\$ 5,000 at the rates of exchange prevailing in 1929)²¹ for passenger injury or death, 250 gold francs (about US\$ 10) per kilogram for loss or damage to cargo or registered baggage and 5,000 gold francs (about US\$ 200) per passenger for unregistered baggage.²²

18. However, dissatisfaction in some countries with the level of the monetary limitation of the air carrier's liability, especially for passengers, and the erosion of the value of the gold franc standard after the Second World War, led to calls for change. The Warsaw Convention 1929 contains a provision for its review through convening of an international conference.²³ On this basis, a series of revisions of the Warsaw Convention 1929 have been agreed, with the result that there are several amended versions of the Warsaw Convention 1929, in addition to the original Warsaw Convention 1929.

2. Hague Protocol 1955

19. In 1955, a protocol was adopted in The Hague to amend the Warsaw Convention 1929 (hereinafter referred to as "Hague Protocol 1955").²⁴ The **Hague Protocol 1955** doubles the monetary cap on the carrier's liability in respect of passenger injury or death from 125,000 to 250,000 gold francs. However, the Hague Protocol 1955 does not change the financial limitation of the carrier's liability in respect of cargo and registered baggage (which remains at 250 gold francs), or in respect of unregistered baggage (which remains at 5,000 gold francs per passenger).

20. Some other innovations of the Hague Protocol 1955 include the following. The Protocol:

- simplifies the particulars to be included in the documents of carriage, however, maintains the penalty for non-compliance with the particulars to be included in the documents of carriage (carrier loses monetary cap limiting his liability);
- specifies that legal costs are excluded from a claimant's award of damages;²⁵
- introduces an incentive for out of court settlements.²⁶

21. The Hague Protocol 1955 expressly provides that if a State becomes a Contracting State²⁷ to the Hague Protocol 1955, but is not a Contracting State to the Warsaw Convention

²⁰ Art. 22 (4) Warsaw Convention 1929.

²¹ Shawcross, *Air Law*, para. 106.

²² Art. 22 (1)-(3) Warsaw Convention 1929.

²³ Art. 41 Warsaw Convention 1929.

²⁴ Protocol to Amend the Convention for the Unification of Certain Rules relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Done at the Hague on 28 September 1955.

²⁵ Art. XI Hague Protocol 1955.

²⁶ *Ibid.* It provides that the court may make an award that the claimant's costs be paid by the carrier, unless the amount awarded to the claimant in damages, excluding costs, does not exceed the amount the carrier offered in writing to settle to the claimant within six months from the date of the occurrence causing the damage, or within six months before the commencement of the action, if that is later. This provision provides an incentive to the carrier to settle a claim to avoid litigation expenses and other costs.

²⁷ In Art. 1 (2) Warsaw Convention 1929, the expression "*High Contracting Party*" is used, which is not defined in the Warsaw Convention 1929. It is defined in Art. XVII Hague Protocol 1955 as "*a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective*". The term "*Contracting State*" will be used throughout this report.

1929, this "*shall have the effect of adherence*" to the "*Warsaw Convention as amended at The Hague, 1955*"²⁸ (hereinafter referred to as "Warsaw-Hague Convention 1955").

22. The Hague Protocol 1955 entered into force on 1 August 1963 and has been adopted by 136 States.

3. Guadalajara Convention 1961

23. The large increase in charter and other flights, brought about the practice of code-share agreements, whereby a "*contracting*" carrier would substitute his own performance of part of the carriage with that of another carrier, without the agreement of the consignor. The "*actual*" carrier, however, is not a party to the contract of carriage with the consignor. In order to extend the contracting carrier's rights and liabilities under the Warsaw Convention 1929 to any non-contracting "*actual carrier*", a further convention was adopted in 1961 in Guadalajara²⁹ (hereinafter referred to as "Guadalajara Convention 1961").

24. The **Guadalajara Convention 1961** is supplementary to either the Warsaw Convention 1929, or the Warsaw-Hague Convention 1955, depending on which one is applicable in a given case.³⁰ The Guadalajara Convention 1961 entered into force on 1 May 1964 and has been adopted by 84 States.

4. Guatemala City Protocol 1971

25. In 1971, agreement was reached in Guatemala City on a protocol to amend the Warsaw-Hague Convention 1955.³¹ The Guatemala City Protocol 1971 further raises the monetary cap on the carrier's liability in respect of passengers and their luggage, but does not change the relevant provisions in relation to cargo.³² The Protocol has, however, never entered into force and will therefore not be further considered here.

5. Montreal Additional Protocols Numbers 1, 2, and 3 of 1975

26. As a result of developments at the International Monetary Fund (IMF) which led to the demonetisation of gold and prevented the member States from setting official prices to gold in relation to currency,³³ three additional protocols were drawn up in Montreal, known as the **Montreal Additional Protocols Numbers 1, 2, and 3 of 1975** (hereinafter referred to as

²⁸ Arts. XXI (2), and XXIII (2) Hague Protocol 1955. Also, see Art. XIX Hague Protocol 1955.

²⁹ Convention supplementary to the Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Signed in Guadalajara on 18 September 1961.

³⁰ Art. I (a) Guadalajara Convention 1961. Note that the Convention may also be applicable in relation to a contract governed by the Warsaw Convention 1929 or Warsaw-Hague Convention 1955 as later amended by one of the Montreal Additional Protocols.

³¹ Protocol 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, Signed at Guatemala City on 8 March 1971.

³² For injury or death of passengers the carrier's liability is capped at 1,500,000 gold francs, for delay in the carriage of passengers the carrier's liability is capped at 62,500 gold francs and, for loss, damage or delay in respect of passenger luggage, the carrier's liability is capped at 15,000 gold francs per passenger.

³³ See further Shawcross, *Air Law*, para. 109.

"MAP 1 1975", "MAP 2 1975" and "MAP 3 1975", respectively, and as "MAP 1 to 3 1975, collectively).³⁴

27. MAP 1 to 3 1975 replace the monetary unit of account when referring to the monetary cap on the air carrier's liability from the gold franc to the Special Drawing Right (SDR) established by the IMF and calculated on the basis of a basket of international currencies.³⁵ MAP 1 to 3 1975 amend the following international air conventions:

- MAP 1 1975 amends the Warsaw Convention 1929³⁶ (hereinafter referred to as "Warsaw-MAP 1 Convention 1975");³⁷
- MAP 2 1975 amends the Warsaw-Hague Convention 1955³⁸ (hereinafter referred to as "Warsaw-Hague-MAP 2 Convention 1975");³⁹ and
- MAP 3 1975 amends the Warsaw-Hague-Guatemala Convention 1971.⁴⁰ However, neither MAP 3 1975, nor the Warsaw-Hague-Guatemala Convention 1971, have entered into force, as they have not been adopted by the required number of States.

28. Once again, in all cases ratification of or accession to one of the Montreal protocols has the effect of adherence to the relevant convention.⁴¹ MAP 1 1975 entered into force on 15 February 1996 and has been adopted by 48 States. MAP 2 1975 entered into force on 15 February 1996 and has been adopted by 49 States.

6. Montreal Additional Protocol Number 4 of 1975

29. The most significant changes in relation to the liability regime for the carriage of *cargo* were introduced by a further amendment of the Warsaw-Hague Convention 1955, also drawn up in Montreal and known as the **Montreal Additional Protocol Number 4 of 1975** (hereinafter referred to as "MAP 4 1975").⁴² By way of a mechanism similar to that used in the other protocols, ratification of or accession to MAP 4 1975 has the effect of adherence to the Warsaw-Hague Convention 1955 as amended by MAP 4 1975 (hereinafter referred to as "Warsaw-Hague-MAP 4 Convention 1975").⁴³

³⁴ Additional Protocol No. 1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw on 12 October 1929, Signed at Montreal, on 25 September 1975; Additional Protocol No. 2 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, Signed at Montreal, on 25 September 1975; Additional Protocol No. 3 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 8 March 1971, Signed at Montreal on 25 September 1975.

³⁵ See www.imf.org.

³⁶ Art. I MAP 1 1975.

³⁷ Art. IV MAP 1 1975.

³⁸ Art. I MAP 2 1975.

³⁹ Art. IV MAP 2 1975.

⁴⁰ Art. I MAP 3 1975.

⁴¹ Arts. VI (2) and VIII (2) MAP 1 1975 and MAP 2 1975.

⁴² 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, Signed at Montreal on 25 September 1975.

⁴³ Art. XV, Art. XVII (2) and Art. XIX (2) MAP 4 1975.

30. MAP 4 1975 includes the following significant changes:

- it simplifies and modernises the particulars to be included in the document of carriage and removes the penalty for non-compliance with the documentary requirements
- it introduces the concept of an electronic air waybill;
- it introduces four specific defences for the carriage of cargo.
- the monetary cap limiting the carrier's liability for cargo remains the same, but the monetary unit of 250 gold francs per kilogram is replaced by 17 SDR per kilogram;⁴⁴
- the monetary cap limiting the carrier's liability becomes unbreakable for the carriage of cargo.

31. MAP 4 1975 entered into force on 14 June 1998 and has been adopted by 53 States.

32. As is apparent from this brief overview over the original Warsaw Convention, adopted in 1929, its amended versions and the Guadalajara Convention 1961 (hereinafter collectively referred to as "Warsaw-system conventions"), the international legal framework evolved from a comprehensive framework of a unified liability regime to what has been described as a "*legal labyrinth ... in which even a highly proficient lawyer could easily become lost.*"⁴⁵ The net result of this evolution is that there are a considerable number of international legal instruments in force, all based on the Warsaw Convention 1929, which may be potentially applicable to a claim arising out of a contract of international carriage of goods by air (see Table 1).

Table 1: The Warsaw-system Conventions	
1. Warsaw Convention 1929	6. Warsaw Convention 1929 supplemented by Guadalajara Convention 1961
2. Warsaw-Hague Convention 1955	7. Warsaw-Hague Convention 1955 supplemented by Guadalajara Convention 1961
3. Warsaw-MAP 1 Convention 1975	8. Warsaw- MAP 1 Convention 1975 supplemented by Guadalajara Convention 1961
4. Warsaw-Hague-MAP 2 Convention 1975	9. Warsaw-Hague-MAP 2 Convention 1975 supplemented by Guadalajara Convention 1961
5. Warsaw-Hague-MAP 4 Convention 1975	10. Warsaw-Hague-MAP 4 Convention 1975 supplemented by Guadalajara Convention 1961

II. Montreal Convention 1999

33. Against this background and in order to unify the fragmented liability regime of the Warsaw-system conventions, the "*Convention for the Unification of Certain Rules Relating to*

⁴⁴ Note that the unit of account relevant to liability arising from carriage of passengers and luggage remains unaffected, i.e. is still expressed in gold francs.

⁴⁵ Paul Stephen Dempsey, *International Air Cargo & Baggage Liability and the Tower of Babel*, 2004, 36 Geo. Wash. Int'l L. Rev. 239. p. 19.

International Carriage by Air" (hereinafter referred to as "Montreal Convention 1999") was adopted in Montreal on 28 May 1999.

34. The **Montreal Convention 1999** provides⁴⁶ that it "*shall prevail over any rules which apply to international carriage by air*" as between Contracting States to the Montreal Convention 1999, which are also Contracting States to one or more of the Warsaw-system conventions. Thus, as between States which are Contracting States to any one of the Warsaw-system conventions and the Montreal Convention 1999, the Montreal Convention 1999 takes precedence.

35. The cardinal achievement of the Montreal Convention 1999 is that it consolidates all the various Warsaw-system conventions in one single text. It therefore provides certainty as to the applicable international air convention and the contracting parties' corresponding rights and obligations. As a result, it creates greater international uniformity of legislation and reduces the need for costly litigation as to the applicable legal regime.

36. The Montreal Convention 1999 reflects changes to the Warsaw-Hague Convention 1955 which had been effected by MAP 4 1975, in relation to the carriage of cargo. It also clarifies the obligations of carriers engaged in code-share or similar operations, by incorporating the provisions of the Guadalajara Convention 1961 on the liability of "*actual*" carriers.

37. In addition, the Montreal Convention 1999 introduces some substantive changes in relation to the carriage of passengers and their luggage. As passenger carriage is not the focus of this report, only brief mention is made of these changes here, for the sake of completeness.⁴⁷

38. The most notable features of the Montreal Convention 1999 in relation to passengers and their baggage are the following:

- for damage in excess of 100,000 SDR arising from injury or death of passengers the monetary cap limiting the carrier's liability is removed; however, the carrier may still be wholly or partly exonerated from liability if he proves that he was not negligent or that there was contributory negligence by the passenger;
- there is strict liability (i.e. liability independent of fault) for proven damages up to 100,000 SDR for injury or death of passengers and the carrier may not exclude or limit his liability;
- the liability of the carrier for delay to passengers is limited to 4,150 SDR;
- the liability of the carrier for loss, damage or delay to baggage is limited to 1,000 SDR for each passenger;
- an action for damages in respect of injury or death of passengers may also be brought before the courts of a Contracting State in which, at the time of the accident, the passenger had his principal and permanent residence.

39. The Montreal Convention 1999 entered into force on 4 November 2003 and has, to date, been adopted by 70 States. The fact that such a large number of States have adopted the Montreal Convention 1999 in a relatively short period of time illustrates the need for greater

⁴⁶ Art. 55 Montreal Convention 1999.

⁴⁷ See also "Simplified Comparative Table of Limitation of Liability and Exceptions to Liability" in Annex 1.

uniformity in the field of air law; it also suggests that the Convention has achieved the right balance between the conflicting interests of the different parties involved in air transportation.

III. How to determine the applicable international air convention

40. As is evident from the above overview, there are different legal regimes which may potentially be applicable to a claim arising from the international carriage of goods by air. Whether one of the Warsaw-system conventions or, alternatively, the Montreal Convention 1999 is an important and, in practice, often complicated question.

41. In all cases, the trigger for the application of any one of the international air conventions and its corresponding legal regime is the concept of "*international carriage*". There is a single definition of "*international carriage*", which has not been changed in substance by the various amendments to the original Warsaw Convention 1929, or by the most recent Montreal Convention 1999. To determine whether a specific contract of carriage is "*international carriage*" governed by one of the international air conventions, there is a two-stage inquiry, which is complex and in practice often creates considerable difficulty, both for traders and for courts charged with the resolution of disputes.

42. In simple terms, the process may be summarized as follows. First, it is necessary to determine whether the carriage comes within the technical concept of "*international carriage*", defined by reference to the **agreed places of departure and destination** and any **agreed stopping place**. Secondly, it is necessary to check that the State/s of departure and destination are Contracting States to the *same* version of either one of the Warsaw-system conventions, or the Montreal Convention 1999.⁴⁸

43. The first stage of the inquiry consists of considering the definition of "*international carriage*". Both the Warsaw-system conventions and the Montreal Convention 1999 use similar language to define the term "*international carriage*". They make reference to the "*contract made by the parties*",⁴⁹ or the "*agreement between the parties*",⁵⁰ in two distinct situations.

- i) The agreed place of departure and the place of destination are situated within the territories of *two Contracting States*, whether or not there is a break in the carriage or a transshipment;
- ii) The agreed place of departure and the place of destination are situated within the territory of a *single Contracting State*, if there is an *agreed stopping place within the territory of another State*, whether or not this is a Contracting State.

44. Therefore, in order to determine whether a contract for the transport of goods is "*international carriage*" governed by any one of the Warsaw-system conventions or the Montreal Convention 1999, it is imperative to study the air waybill or ticket closely to ascertain the agreed places of departure and destination, as well as any agreed stopping place, and to determine whether these meet the requirements set out in i) or ii) above. If the

⁴⁸ See Annex 2.

⁴⁹ Art. 1 (2) Warsaw Convention 1929.

⁵⁰ Art. 1 (2) Warsaw-Hague Convention 1955, Warsaw-Hague-MAP 4 Convention 1975, Montreal Convention 1999.