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Liability in Air Carriage. Carriage of Cargo Under the Warsaw and Montreal Conventions

ABSTRACT

This article discusses the liability of the carrier of goods by air under the Montreal Convention 1999. It deals with some of the more eye-catching changes, like the basis of liability and the (im)possibility of breaking the limits. Also, a number of subjects are covered where, in the author's view, the Montreal Convention should have introduced new rules (the interpretation of the term 'damage') or should have clarified existing case law (right to sue and exclusivity).

1. INTRODUCTION

At the time of publication of this article it has been about nine years since the 1999 Montreal Convention was realized. This Convention was to replace the well-known 'Warsaw regime' that governed international air carriage since 1929.

The Montreal Convention came into force on 8 November 2003. Although it introduced a system that fundamentally altered the liability of the international air carrier, its practical implications initially were considered to be limited because it was ratified by a small number of States. The Montreal Convention entered into force after the deposit of its thirtieth ratification. The Warsaw Convention on the other hand, was ratified virtually worldwide. Because both systems would coexist for some time to come, it was generally assumed that the role of the Warsaw system was not finished by far. But things have changed. The Montreal Convention is gaining field on its predecessor At present 86 States have ratified it or acceded to the Montreal Convention, which is more than half the amount of Warsaw States Parties. It is therefore high time to focus our attention on this regime.

Since it is not possible to discuss the Convention in its totality, only a number of subjects will be discussed. This article will focus on subjects where the Montreal Convention either introduced a new regime (the basis of liability, breaking the liability limits, the right to sue and the issue of exclusivity), or in my view *should* have introduced a new regime but failed to do so (the notion

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of damage). But first of all a short exposé will follow about the 'Warsaw regime'.

2. The Warsaw Regime

The Warsaw regime consists of the 1929 Warsaw Convention, several protocols[2] and a supplementary Convention[3], complemented by a number of so-called 'private agreements'[4] – most of which were in fact regionally-bound agreements between governments and air carriers – and European Community legislation.[5] Lying at the heart of this system is the Warsaw Convention of 1929 and all the above-mentioned instruments are designed to function in connection with the Warsaw Convention.

The Warsaw system presents something of a paradox: ratification-wise it is an example of far-reaching unification, because the treaty has been ratified virtually worldwide. In itself, however, the system is an example of total dramatic disunification: the many amendments, supplements and private agreements resulted in a highly fragmented regime, because these rules were not ratified as universally as the original Warsaw Convention.

While some of the ICAO instruments deal with both passengers as well as cargo, [6] others exclusively concern cargo[7] or passengers.[8] The Private Agreements and European Regulations exclusively concern the carriage of passengers. Although this article is not about the carriage of passengers, some of these passenger instruments have to be mentioned because, in my view, the evolution of cargo liability cannot be seen in isolation from passenger liability. For instance, the basis of liability for carriage of goods lies in the 1971 Guatemala City Protocol, an instrument designed exclusively for carriage of passengers. This Protocol introduced a regime of strict liability with an unbreakable liability limit for death and bodily injury suffered by passengers. The 1975 Montreal Protocol number 4 was designed to introduce a cargo equivalent of this regime. It introduced strict liability with an unbreakable liability limit for carriage of cargo. At first, Montreal Protocol number 4 seemed to be just as unsuccessful

2. The Hague Protocol 1955, the Guatemala City Protocol 1971 (not in force), Montreal Protocols 1, 2, 3 and 4 (Montreal Protocol no. 3 not in force).
3. The Guadalajara Supplementary Convention 1961.
4. The Montreal Agreement 1966, the Malta Agreements, as from 1974, the Japanese Initiative 1992, IATA Intercarrier Agreements 1995 and 1996.
5. Regulation (EC) No. 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No. 2027/97 on air carrier liability in the event of accidents, see OJ L 140/2, 2002.
6. The Hague Protocol, Guadalajara Supplementary Convention and Montreal Protocol nos 1 and 2.
7. Montreal Protocol no. 4 1975.
8. Guatemala City Protocol 1971.

as its model - the Guatemala City Protocol.[9] It took 23 years to obtain enough ratifications to enter into force.[10] Although the Montreal Convention seemed new in 1999 (Montreal Protocol number 4 had remained underexposed in case law because of its unsuccessfulness) the Montreal Convention introduced a system that was nearly a quarter of a century old.

3. Basis of Liability

The Montreal Convention introduces the most fundamental changes to the basis of the liability regime compared to the Warsaw Convention and the 1955 Hague Protocol . To fully understand just how drastic these changes really are, a brief exposé of the basis of the Warsaw liability rules is necessary. The Warsaw Convention and the 1955 Hague Protocol have a fault-based liability system. This means that the carrier is only liable for loss, destruction or damage (Article 18) or delay (Article 19) when this is the result of its fault or that of its servants and agents. However, the carrier bears the burden of proof (Article 20). The result is that in principle the carrier is liable if the claimant proves that the carrier has failed to deliver the cargo to the consignee, or has delivered it and it has been destroyed, damaged or is too late.[11] Only when the carrier proves that it is not at fault it is exonerated.

Under the Warsaw Convention and the 1955 Hague Protocol, the carrier could exonerate itself from liability under Article 20 of this Convention and Protocol if it could prove 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*'. Over the years case law progressively imposed more stringent requirements for such proof. So stringent, in fact, that ultimately the liability under the Warsaw Convention could *de facto* be compared with strict liability.[12] It should be emphasized, though, that this only applied to liability for destruc-

9. This protocol never came into effect due to insufficient ratifications.
10. The fact that it ultimately did enter into force can – to a large extent – be ascribed to pressure from ICAO. Since 1996, at the outset of the drafting process of the Montreal Convention, ICAO had encouraged States to ratify Montreal Protocol no. 4 because it was integrally reproduced in the new draft Convention and it was assumed that broad support for Montreal Protocol no. 4 would mean broad support for the Montreal Convention.
11. The proof of destruction, loss or damage under Art. 18 of the Warsaw Convention is usually based upon the facts; it can be determined objectively. Evidence that the goods have been delivered late, however, is less easy to provide because in carriage by air a specific period of time for carriage will seldom be agreed upon. The determining factor in that case is whether the delay is *unreasonable*, a subjective element, in other words. This is established by considering all the circumstances of the case, which makes the case law on this matter highly casuistic.
12. See also M.A. Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 136.

tion, loss and damage as set out in Article 18 of the Warsaw Convention. Liability for delay (Article 19) was less serious, because it was more difficult for the party entitled to the delivery of the cargo to prove that there had in fact been any failure.[13]

In 1975, Montreal Protocol number 4 abandoned the classic fault-based liability principle as regards destruction, loss and damage to the cargo. In its place, the liability of the carrier was based on the concept of risk. This liability was modelled – in general terms – according to the liability of the *common carrier* under Anglo-American law. Under Article 18 of Montreal Protocol no. 4 the carrier could only exonerate itself from liability if it could prove that the damage had been caused *solely* by one of the four specific causes described in the Convention (inherent defect, quality or vice of the cargo, defective packing, an act of war or armed conflict or an act of a public authority carried out in connection with the entry, exit or transit of the cargo).[14] *Any fault* on the part of the carrier prevented him from being exonerated from liability, and also unknown or unclear causes of damage would be attributed to the carrier. A very strict liability therefore, under which exoneration was practicably impossible.

This very strict liability makes sense in the particular time-frame of the 1970s, in which the economic analysis of law played an important role. The 1975 Montreal Protocol number 4 was a product of this. It was as an instrument that would bring the carriage of cargo into line with the carriage of passengers in the – at that time still regarded as successful – 1971 Guatemala Protocol. It was part of a package that introduced a closed system of strict liability subject to an unbreakable limit. The basic idea was that such a system would make air law more cost-efficient, from which all parties involved in international air carriage would profit. However, it must be said that although the foundations of the Warsaw Convention's and Montreal Protocol number. 4's liability regimes are each other's mirror image in a *theoretical* sense, the *practical* consequences do not seem to be that considerable because under the Warsaw Convention and the 1955 Hague Protocol, the fault-based liability regime was interpreted so strictly in case law that it could *de facto* be considered a strict liability.

In 1999 the regime of Montreal Protocol number. 4 was integrally adopted in the Montreal Convention. At least, that was the basic intention of the drafters.[15] However, the Convention deviates from this on one important point. Article 18 paragraph 2 of the Montreal Convention states that the carrier will

13. Liability for delays, incidentally, has not been changed in either Montreal Protocol no. 4 or the 1999 Montreal Convention. The principle of fault, which originated from the 1929 Warsaw Convention, therefore still applies here. For an interpretation of liability for delay, one can therefore rely on the literature and case law under the Warsaw regime.
14. See Article 18 paragraph 3 of the Montreal Protocol no. 4.
15. See working paper C-WP/ 10420 14/6/96 for the 148th session of the ICAO Council in 1996, in: International Conference on Air Law (Doc 9775-DC/2), Vol. III Preparatory Material, p. 24.

not be liable *if and to the extent that* the damage resulted from one of the four causes referred to above.[16] It is unclear how this change came about or what its motives were. The conference papers do not shed any light on why and how this change came about. The change simply appeared in the draft Convention after the thirtieth session of ICAO's Legal Committee in 1997.[17] The results, however, are vast. As a result, the additional wrongful act on the part of the carrier no longer leads automatically to the liability of the carrier, but can be divided proportionally among the parties. This means that the position of the carrier has improved extensively. Because the word 'solely' was deleted, the carrier no longer has to prove the absence of all possible concurrent causes to be exonerated as under the Montreal Protocol number. 4. Instead, the carrier is half way there when he proves that one of the causes listed in Article 18 paragraph 2 of the Montreal Convention caused the damage. It is up to the claimant then to prove that there is another concurrent cause for which the carrier is liable. The court can then – if it chooses to do so – divide the liability evenly amongst the parties.[18] I agree with Dempsey and Milde[19] that this change cannot be seen as anything other than a deliberate relaxation of the air carrier liability scheme. For the consequences of substituting the word 'solely' for 'if and to the extent that' was discussed extensively during the Diplomatic Conference in 1975, when Montreal Protocol number 4 was concluded.[20] Moreover, during the thirtieth session of ICAO's Legal Committee the word 'solely' was discussed in relation to Article 16 of the draft (liability for death and injury suffered by passengers). The transcripts show that a number of delegates had argued that the deletion of the word 'solely' would result in '*comparative negligence'*.[21] It is strange that such an important change was implemented so quietly.

16. *Supra* n. 14.
17. See 3:6 Report of the meeting of the special group on the modernization and consolidation of the 'Warsaw System' (SGMW), see also ICAO *International Conference on AirLaw, Montreal, 10–28 May 1999* (Doc. 9775-DC/2), Volume III, Preparatory Material, p. 257. The change was based on an amendment that was not very clear: '*The reason for this proposal is that it is unreasonable for the carrier to be burdened with liability for damage to cargo to the extent it is attributable to any of the listed causes'* at p. 349.
18. Dempsey and Milde call this the '*comparative fault theory',* see P.S. Dempsey and M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999,* (Montreal, Centre for Research in Air & Space Law McGill University 2005), p. 167.
19. See Dempsey and Milde *supra*.
20. See the discussions reported in ICAO *International Conference on Air Law, Montreal Sept. 1975* (Doc. 9154-LC/174-1) Vol. I Minutes, p. 131 en (Doc. 9154-LC/174-2) Vol. II Documents, p. 135 et seq., especially the Swedish proposal at p. 135, 136.
21. See the review of the 30th session of the ICAO Legal Committee, ICAO *International Conference on air law, Montreal, 10-28 May 1999* (Doc. 9775-DC/2), Volume III, Preparatory Material, p. 251.

4. Limits to Liability

One of the basic characteristics of carrier liability that is present in almost all modes of transport is that the liability of the carrier is limited. In international air carriage the liability limit has been set at 17 SDR (Special Drawing Rights) per kilogram since 1929, although the limit was expressed in Francs Poincaré until 1975. Although the level of the limit has remained virtually unchanged since 1929 (the Warsaw limit of 250 Francs Poincaré is equal to 16.6666, which rounded off amounts to 17 SDR, the Montreal limit), due to far-reaching monetary depreciation over the years the liability limit has become progressively lower in proportion to the average value of the cargo carried. The 1929 liability limit of 250 Francs Poincaré represented twice the average weight of the goods carried.[22] In 1975 statistics showed that the liability limit of 250 Francs Poincaré was merely 40% of the average weight of the cargo carried.[23] That the limit was left unchanged in 1975 can primarily be attributed to technical insurance arguments. A higher liability limit would automatically lead to higher premiums for the liability insurance of the carrier. These higher premiums would be charged on to the shipper via higher freight prices. A higher limitation, on the other hand, would *not* automatically lead to substantially lower cargo insurance premiums.[24] Even a liability limit that would cover the entire value of the goods would not make a cargo insurance policy unnecessary for the shipper. After all, the shipper insures the goods from door to door, in other words: including transport to and from the airport and including storage. Because air carriage represents only a part of the insurable event, the liability limit for the air carriage part will only influence the total premium marginally. Thus it was decided to leave the liability limit unchanged.

When the Montreal Convention was drawn up, raising the liability limit was again considered. In the drafting process of the Convention a considerable increase in the limit was considered so as to counterbalance the effects of inflation since 1975. The starting point was a liability limit of 50 SDR,[25] three times

22. See the preparatory materials of the Warsaw Convention, in: *II Conférence de Droit Privé Aérien* 4-12 Octobre 1929, Varsovie, (Procès-verbaux) Warsawa: l'OACI 1930, p. 60-63.
23. *International Conference on Air Law*. Montreal, Sept. 1975. Vol. I *Minutes* (ICAO-Doc. 9154-LC/174-1) p. 153-155: 'the cause of the discussion was the proposal of the delegates of the USA to raise the limit with 30%, to an amount of 333 Francs Poincaré per kg. (SDR 22.2)'.
24. See for an extensive exposé of the relationship between the liability limit, insurability and the freight price in a maritime law context, Lord Diplock, 'Conventions and Morals – Limitation Clauses in International Maritime Conventions, *JMLC* 1970, p. 525 et seq.
25. See *Comments on the draft text approved by the 30th session of the ICAO Legal Committee by the Special Group on the modernization and consolidation of the "Warsaw system"* (SGMW) (SGMW/1-WP/14), in: Vol. III *Preparatoy materials* (Doc. 9775-DC/2) p. 355.

the original liability limit of 250 Francs Poincaré (3 times 16.66667 SDR).[26] Ultimately, however, the 1929 limit was retained. The reason for this was based largely on (again) economic arguments. Raising the limit would only result in higher insurance costs on the side of the carrier and ultimately would only lead to higher freight prices. Furthermore, the low limit was not considered unacceptable since the Convention provides the consignor with the option of raising or setting aside the liability limit by means of a special declaration of interest in delivery at destination (Article 22 paragraph 3 of the Montreal Convention).[27] In practice, however, this option is virtually never used.[28]

Another reason why it was felt acceptable not to raise the limit could in my view be imputed to the fact that the liability limit of 17 SDR can be considered to be relatively high in comparison to other international transport treaties like CMR, [29] CMNI[30] and HVR, [31] and equal to the limit of COTIF CIM.[32]

However, ICAO did create an instrument to review the liability limits of the Convention at five-year intervals (Article 24). Similar provisions cannot be found in maritime, road or railway Conventions. This type of provision it not completely new in international air carriage treaties. The 1971 Guatamela City Protocol was equipped with a provision that provided for a possibility to increase the liability limits for damage in case of death or bodily injury suffered by passengers.[33] What makes Article 24 of the Montreal Convention special is that it enables ICAO to index the limits without having to convene a Diplomatic

26. Up until the diplomatic Conference of 1999 the limit of SDR 17 in the various drafts was regarded as 'indicative'. Calculations had shown that in 1997 the purchasing power of the SDR was approximately one-third of the value it had been in 1975. In other words, in 1998 in order to obtain the equivalent of SDR 1 at its 1975 value, it would be necessary to increase the limit by a factor of 2.78. See *International Conference on Air Law*, Montreal 10-28 May 1999, Vol. II *Documents* (Doc. 9775-DC/2), p. 61.
27. See the consideration of the *consensus package* that contained the liability limit of SDR 17 during the 13th session of the Commission of the Whole at the Montreal Conference in 1999 as reported in: *International Conference on Air Law Montreal*, 10-28 May 1999, Vol. I Minutes (Doc. 9775-DC/2), p. 203.
28. The high valuation charge which the carrier will charge for special declaration is higher than the insurance premium the shipper or consignee will have to pay when he takes out cargo insurance.
29. Convention on the Contract for the International Carriage of Goods by Road.
30. Budapest Convention on the Contract for the Carriage of Goods by Inland Waterways.
31. The Hague-Visby Rules. The Hague Rules as amended by the Brussels Protocol 1968.
32. Uniform Rules Concerning the Contract for International Carriage of Goods by Rail.
33. The Protocol introduced a provision that established that in the fifth and tenth year after the coming into effect of the Protocol, a Conference would be convened in order to raise the limit by USD 12, 000 at most. See International Conference on Air Law, Guatemala City. Feb.-March 1971 (Doc. 9040–LC/167–1) Vol. 1 *Minutes*, p. 99-111 and p. 254-263.

Conference.[34] The provision is also known as the *'Escalator clause'* and is derived from the procedure for reviewing the technical annexes of the *ICAO Convention on the Marking of Plastic Explosives for the Purpose of Detection* 1991.[35] It is extremely doubtful, however, if ICAO will ever use this instrument to raise the liability limit for the carriage of cargo.

5. (Un)Breakable Limits

The possibility of breaking the liability limit is just as much a characteristic aspect of general transportation law as is the limitation of liability. All international uniform transportation treaties contain provisions according to which the liability limits can be broken under certain circumstances. This was also the case under the Warsaw Convention, where the liability limit could be set aside if the party entitled to delivery of the cargo proved that the damage was caused by the carrier's '*wilful misconduct or by 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*'.[36] The problem with Article 25 of the Warsaw Convention was the lack of uniformity in its interpretation. Under the Warsaw Convention the reference to the *lex fori* was widely construed by the courts as an instruction to interpret the question which gradation of fault was 'equivalent to wilful misconduct' according to their own legal standards. In the 1955 Hague Protocol, the level of fault equivalent to wilful misconduct was replaced by the following formulation: '*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*'.[37]

The basic idea was to only make it possible to break the limit in very exceptional cases. Only when the carrier (or its servants and agents) caused the damage with intent or, alternatively, by actions so recklessly that it could almost be considered as having been done intentionally would the liability limit be set aside. This notion is also known as *wilful misconduct*. In respect of the proof of the *knowledge* of the carrier *a subjective* test is applied.[38] This means that the claimant must prove that the carrier or its servants or agents *were actually aware* of the fact that the damage would probably be the result of their acts (or

34. Council – 154th session, modernization of the Warsaw system, presented by the Secretary-General, Doc. C-WP/10862, International Conference on Air Law Montreal, 10-28 May 1999, Vol.III, p. 110.
35. B. Cheng, 'The 1999 Montreal Convention on International Carriage by Air Concluded on the Seventieth Anniversary of the 1929 Warsaw Convention (Part I)', *ZLW* 2000, p. 301.
36. Art. 25 of the Warsaw Convention.
37. Art. XII of the Hague Protocol 1955.
38. See M.A. Clarke, *Contracts of Carriage by Air* (London, LLP, 2002), p. 159 et seq.

the lack thereof).[39] This corresponded to the interpretation of the concept of wilful misconduct under *common law.*[40] In Dutch case law from the 1960s onwards, the rules for breaking the limit under the original Warsaw Convention and the 1955 Hague Protocol were interpreted in a similar way.[41] Dutch courts would primarily follow English and American case law on this point.[42] The same can in general be said for German case law.[43] In France however, an objective test was applied.[44] At the same time, there was also an increasing tendency to mitigate the burden of proof resting on the party entitled to delivery based on legal rules of procedure relating to alleging a fact and proving it. In these rulings, the carrier could not merely deny wilful misconduct, but also had to dispute it with reasons. If it failed to do so, the court could accept the assertion of the party entitled to the delivery of the cargo that the carrier had acted with wilful recklessness as insufficiently contested, so that the carrier could be held liable without limit.[45] In German case law the same tendency can be discerned.[46] It resulted in diversity between Member States: in some countries it became increasingly simpler to break through the limits, while in other counties the door was kept firmly shut. Needless to say, this was detrimental to uniformity and legal certainty.

As said, the 1975 Montreal Protocol number. 4 solved the problem of non-uniformity by abolishing the provision for breaking the limits all together. The idea was that legal proceedings concerning breaking the limits were lengthy, costly and very inefficient. By removing the possibility of breaking the limit, a clearer and thus more cost-efficient set of rules would be introduced. Moreover, the unbreakable limit was introduced as a *package deal,* as *quid pro quo* for the strict liability that was imposed on the carrier by deleting the '*all necessary measures'* defence of Article 20 of the Warsaw Convention. It was, in other

39. See the discussion during the diplomatic Conference in the Hague in 1955, in: International Conference on Private Air Law, The Hague, Sept. 1955, Vol. I *Minutes* (Doc. 7686-LC/140), p. 285.
40. See P. Martin, J.D. McClean et.al. in: *Shawcross & Beaumont, On air law,* (4th ed.) (London, Butterworths, (loose-leaf)), VII [516]-[517] and M.A.Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 159 et seq.
41. See for an extensive overview of Dutch case law on this point: I. Koning, *Aansprakelijkheid in het luchtvervoer. Goederenvervoer onder de verdragen van Warschau en Montreal,* (Zutphen, Uitgeverij Paris 2007), p. 275 et seq.
42. See for an extensive description of the interpretation of Art. 25 in Anglo-American Law: M.A.Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 159 et seq.
43. I. Koller, *Transportrecht,* (6. Auflage), (Münich, C.H. Beck, 2007), p. 1584.
44. Lamy Transport Tome 2, 2005, p. 673-674 and the case law cited on p. 1030.
45. See for instance the judgment of the Court of Amsterdam, 17 Dec. 1997, *S&S* 1998, 121 (*Sainath v. KLM*); Court of Amsterdam 22 Sept. 1999, *S&S* 2000, 139 (*EDV-Beratung Adam v. KLM)*; See also Court of Amsterdam 28 Feb. 2007, Case no. 26721/HAZA 03-1449, see ‹http://www.rechtspraak.nl› (*Monstrey Worldwide Services c.s. vs. KLM*). In this case the carrier succeeded in producing the requested information.
46. See BGH 21.9.2000, *TranspR* 2001, p. 29.

words, inextricably bound up with the introduction of strict liability.[47] The 1975 Montreal Protocol number. 4 was never really put to the test in case law because it took twenty-three years to come into effect and was only ratified by a small number of States.[48]

Nevertheless, the 1975 Montreal Protocol number. 4 must be considered a milestone in air law history. This is because the unbreakable liability limit was taken over in the 1999 Montreal Convention and, consequently, lengthy proceedings about the question whether the limit can be broken are definitely a thing of the past, since the liability limit will apply in all circumstances. The level of fault, or even intent on the part of the carrier, is no longer relevant.

There was hardly any debate on the desirability or undesirability of a breakable limit at the diplomatic Conference in Montreal in 1999. This is strange when one considers that in all preliminary drafts of the Convention the provision of the 1955 Hague Protocol was reintroduced and was eventually presented to the Diplomatic Conference. The draft Convention reintroduced the provision for breaking the limit of the 1955 Hague Protocol. In all the preliminary drafts and working papers that subsequently passed the review, the provision was maintained.[49] Even the final text of the draft Montreal Convention that was approved by the 30th session of ICAO's Legal Committee in Montreal in 1997, the possibility of breaking the limit for the carriage of goods appears in Art. 21A paragraph 5.[50] Everything would seem to indicate, therefore, that the ICAO initially had its doubts about the feasibility of the unbreakable limit for the carriage of goods. Eventually, however, the possibility of breaking the liability limit in case of carriage of cargo was removed from the Convention with-

47. International Conference on Air law, Montreal Sept. 1975, Vol. I Minutes (Doc. 9154 – LC/ 174-1), p. 163.
48. Initially it was only ratified by thirty of the one hundred and fifty-three Warsaw States Parties. Later the number of ratifications rose to fifty-three. For a current list of signatories, see <http://www.icao.int>.
49. See also the draft of the Secretariat Study Group on the Warsaw System, Draft New Warsaw Instrument. ICAO Draft Convention on the Liability of the Air Carrier and other Rules Relating to International Carriage by Air. Clean text, Drafted pursuant to Council Decision C-DEC 147/15 of 14 March 1996, C-Wp/10470 Attachment, in: International Conference on Air Law, Montreal 10-28 May 1999, Vol. III Preparatory Materials (Doc. 9775-DC/2), p. 40. See also the text of the draft Convention approved by the Special Group for the Modernization of the Warsaw System, Doc. C-WP/10862, attachment, in: Vol. III Preparatory Materials (Doc. 9775-DC/2), p. 120.
50. See International Conference on Air Law, Montreal 10-28 May 1999, Vol. II documents (Doc. 9775-DC/2), p. 20 (DCW Doc. No. 3). Art. 21 A para. 5 'The foregoing provisions of paras 1 , 2 and 3 [para. 3 contains the liability limit for cargo, K] of this Art. shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its 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 such servant or agent was acting within the scope of its employment.'

out substantial discussion. What had happened? The reintroduction of the breakable limit for carriage of cargo was raised during the eighth session on 17 May 1999, where it endured fierce criticism from the representative from IATA: *'The Observer from IATA indicated that, from a carrier's perspective, there was nothing in the current draft which improved upon the said Protocol* [Montreal Protocol number. 4, K] *while there was an enormous step backwards in terms of liability. Reverting to breakable limits would foster needless litigation over whose insurer should pay for any claim in excess of the new limit.'*[51] These words were supported by the delegates of Japan, Mauritius and Canada, three member States that were at that time – on a national level – involved in the ratification or accession procedures of Montreal Protocol number. 4 and therefore had much to gain by maintaining that regime.[52]

In addition, it became increasingly clear that the Conference was divided on other fundamental issues as well (for instance, the liability of the carrier for the death or injury of a passenger and the fifth jurisdiction). It was feared that the required two-thirds majority for the approval of the draft Convention would probably not be attained. In other words; the Conference was at risk of ending in a fiasco. That the Conference eventually did succeed must be attributed to the President of the Conference who formed the so-called '*Friends of the Chairman Group*'[53] in which negotiation on a more informal level concerning the 'stumbling blocks' in the draft Convention was possible. The negotiations had an exclusive character. Minutes were kept, but they were silent on the subject of deleting the possibility of breaking the limit in case of carriage of cargo. The *Friends of the Chairman Group* presented a *consensus package* on 25 May 1999 in which the possibility of breaking the limit of Article 21A paragraph 3 was deleted, which resulted in a reintroduction of the unbreakable limit.[54] On the thirteenth session of the *Commission of the Whole* the *package deal*

51 See International Conference on Air Law, Montreal 10-28 May 1999, Vol. I Minutes (Doc. 9775-DC/2), p. 98.

52. See for a complete list of ratifications <http://www.icao.int>.

53. The *Friends of the Chairman Group* consisted of twenty-seven delegations and was geographically well balanced, see M. Milde, 'The Warsaw System of Liability in International Carriage by Air. History, Merits and Flaws…and the New 'non-Warsaw' Convention of 28 May 1999, *AASL* 1999, p. 172.

54. The real reasons for deleting the possibility of breaking the liability limit for cargo were not officially recorded. The Minutes of the sessions of the Friends of the Chairman's Group only show extensive debate on Art.s 16 (Death and Injury to Passengers), 20 (Compensation for Death or Injury of Passengers, and 27 (Fifth Jurisdiction). Only two references to Art. 21 A paras 3 and 5 are to be found in the minutes of the fifth meeting on Thursday, 20 May 1999. The first reference is under no. 10, where it is decided that under Art. 21 A para. 3 the figure of SDR 17 should be retained. Under 11 it is stated that no change is to be made in paras 4, 5 and 6 (para. 5 contains the possibility of breaking the limit for the carriage of cargo). Strangely enough, in the *package deal* that was later presented to the Commission of the Whole on 25 May (DCW Doc. No. 50) Art. 21 A para. 5 was miraculously changed. Paragraph 5 no longer refers to para. 3 where the

was presented by the President of the Conference,[55] who labeled the provisions it contained (Articles 16, 19, 20, 21A, 22 A, 22B and 27) as *'core issues related to a host of sensitive matters.'*[56] The stakes were high; the *package deal* left little room for negotiation: *'Noting that what was contained in DCW Doc No. 50* [The package deal, K] *was no longer a draft consensus package, the Chairman underscored that it represented a very fragile balance between the interests which he had identified. Cautioning that any attempt to tinker with one element of that balance could have a very significant domino effect, he indicated that the package was indivisible and was intended to be accepted as a whole or not at all.'*[57] The Conference was urged in no uncertain terms to accept the proposed package deal: *'The Conference had a duty to history and history would condemn it if it did not seize this window of opportunity to move forward so as to ensure that the passenger who was injured or killed in an accident, the victims and their families, might not have to suffer lengthy court litigation, the expenses and the horrors which often characterized the system which was dependent upon many unpredictable factors.'*[58]

Yet, an official vote was never held. According to the transcriptions the presentation of the package deal (which retained the liability limit of SDR 17 and deleted the possibility of breaking the limit for the carriage of cargo)[59] was greeted with '*sustained applause'*, after which the President of the Council, who considered the sustaining applause as an acceptance of DCW Doc. No. 50, invited the Conference to actually officially accept the proposal. Thereafter the President declared that *'in the absence of further comments'* the package deal was adopted by the Conference.[60] Then the transcriptions show that the delegate of Mauritius stressed once more that the sustained applause at the Conference following the presentation of the package deal had to be considered as an acceptance: *'The Delegate of Mauritius took the applause which the Chairman had twice received after his presentation and the commendation of the President*

liability limits for the carriage of cargo can be found. Conversations with persons who were present at the above-mentioned negotiations of the Friends of the Chairman Group seem to indicate that the breakable limit for the carriage of cargo was removed under pressure from air carriers. They considered that the proposed draft was not sufficiently balanced. The cargo insurers who can be considered as *the* party with a key interest in a breakable limit were represented at the meeting and did not, according to reports, object to the deletion of the breakable limit.

55. The *package deal* was presented in DCW Doc. No. 50; see *International Conference on Air Law, Montreal 10-28 May 1999*, Vol. II documents (Doc. 9775-DC/2), pp. 271-274.
56. *International Conference on Air Law, Montreal 10-28 May 1999,* Vol. I Minutes (Doc. 9775-DC/2), p. 199.
57. See *International Conference on Air Law, Montreal 10-28 May 1999*, Vol. I Minutes (Doc. 9775-DC/2), p. 200.
58. *Ibid.*
59. *Supra* at, p. 203.
60. *Supra* at, p. 206.

of the Council to indicate clearly that the Commission of the Whole endorsed the consensus package as a whole in the spirit of everything that united them.'[61]

Although the manner in which the *package deal* was navigated through the decision-making process of the diplomatic Conference is rather questionable, it does not, in my view, diminish its legal authority. The Convention was adopted, signed and subsequently ratified by an impressive number of States, [62] including some major aviation countries.[63] But it does make the regime unnecessarily susceptible to criticism, however, which cannot be considered as a positive aspect.

There has been ample criticism. Especially in Germany the unbreakable liability limit of 1975 Montreal Protocol number 4 and the 1999 Montreal Convention was the subject of fierce discussion[64] and criticism.[65] Moreover, in 2004 the unbreakable liability limit of the 1975 Montreal Protocol number 4 was challenged before the German Court of Appeal of Frankfurt am Main.[66] The question was not *how* the unbreakable liability limit of Montreal Protocol number 4 should be interpreted, but rather if it could be applicable at all.[67] The

61. *Ibid.*
62. So far, 86 States have ratified or acceded to the Convention, see <www.icao.int>.
63. For instance, the USA, the entire EU, Japan and China.
64. See the series of articles by the commentators A. Kirsch and K. Heuer in *Transportrecht* 2002 en 2003: A. Kirsch, 'Die Haftung des internationalen Luftfrachtführers nach dem Warschauer Abkommen im Anwendungsbereich des Montrealer Protocokolls Nr. 4', *TranspR* 2002-11/12, p. 435-437; K. Heuer, 'Was ist eigentlich so besonders am Luftfrachtverkehr, oder Haftungsbeschränkungen für Vorsatz? Eine Polemik gegen den Beitrag von *Kirsch* in TranspR 2002, 435 ff', *TranspR* 2003-3, p. 100-102; A. Kirsch, 'Das Besondere am Luftfrachtverkehr. Eine replik auf eine Polemik', *TranspR* 2003-7/8, p. 295-297; K. Heuer, 'Das soll das Besondere am Luftfrachtverkehr sein ? Eine (letzte) Antwort auf die Beiträge von *Kirsch* in *TranspR* 2002, 435 ff und 2003, 295 ff', *TranspR* 2003-11/12, p. 445-447 and see also E. Ruhwedel, 'Haftungsbegrenzungen und deren Durchbrechung im Luftrecht Oder: Die absolute Beschränkung der Haftung bei Schäden an Luftfrachtgütern', *TranspR* 2004-4, p. 137-141; I. Koller, 'Die unbeschränkte Haftung des Luftbeförderers nach dem Montrealer Übereinkommen 1999?', *ETR* 2005, p. 629-639; C. Harms en M. Schuler-Harms, 'Die Haftung des Luftfrachtführers nach dem Montrealer Übereinkommen', *TranspR* 2003-10, p. 372-377.
65. See Heuer 2003 supra at p. 101. The author describes the abolition of unlimited liability in the case of intentional acts by the carrier or its servants and agents within the scope of their employment as '*den Teufel mit Beelzebub auszutreiben'*.
66. Court of Appeal Frankfurt am Main, 16.3.2004, *TranspR* 2004-6, p. 261 et seq.
67. Art. 6 of the German EGBGB (*Einführungsgesetz zum Bürgerlichen Gesetzbuch,* or the German Code on the Conflict of Laws): *'Eine Rechtsnorm eines anderen Staates ist nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führt, das mit wesentlichen Grundsätzen des deutschen Rechts offensichtlich unvereinbar ist. Sie ist insbesondere nicht anzuwenden, wenn die Anwendung mit den Grundrechten unvereinbar ist'.* It determines that a legal rule of another State is not applicable when its application leads to a result that is fundamentally incompatible with substantial principles of German law (pub-

Court of Appeal decided that in the case at hand the unbreakable liability limit was not in conflict with the rules of German public order. The reason for this was that merely a light form of fault (*leichtfertigen Organisationsverschulden*) could be imputed to the carrier. German law permits a limitation of liability for certain lighter degrees of fault. In other words; it is not at all unthinkable that the Court of Appeal would set aside the liability limit of the 1975 Montreal Protocol number 4 if a higher level of fault or actual intent *had* been proven in this case.[68] Fortunately, this question will not play a role under the 1999 Montreal Convention. Germany has ratified the Montreal Convention and its rules have been embedded in Germany's legal order.[69]

The Montreal Convention is a big success, both politically and in the economics of law sense. As said, the ratification/accession process can be considered to have been very successful. Moreover, the amount of legal proceedings seems to have diminished.[70]

However, one may wonder to what extent the Convention can be considered a success in a 'dogmatic' sense. The regime can hardly be considered to be well balanced. After all, the word '*solely*' from Article 18 of the 1975 Montreal Protocol number 4 was deleted in Article 18 of the Montreal Convention, which substantially mitigates the strict liability of the carrier. The *quid pro quo* for the strict liability that was once the primary reason for deleting the breakable limit of the Warsaw Convention and the 1955 Hague Protocol no longer exists, considering that the liability of the carrier has become less strict. In combination with a liability limit that is at the same level as it was in 1929, [71] the unbreakable liability limit must in my opinion be considered to be the tailpiece of a regime that is extremely favourable towards the carrier.

6. Damage

In the preceding part of this article it has been shown that one can debate (and this has been done extensively) the question whether the introduction of the un-

lic order). Montreal Protocol no. 4 was never ratified by Germany and is therefore a rule of foreign law so its application could be challenged.

68. *Supra* at p. 236.
69. By *Gesetz zur Harmonisierung des Haftungsrechts im Luftverkehr, Act of* 6 April 2004, Bundesgesetzblatt 2004, I, p. 550 et seq.
70. The trend that had been noticeable in the Netherlands since 1998 as a consequence of the coming into effect of Montreal Protocol no. 4 perseveres under the 1999 Montreal Convention.
71. In 1929 the limit was 200% of the average weight of the goods carried. In 1975 the limit merely represented 40% of the average weight of the goods carried and between 1975 and 1997 the value of the SDR decreased by another 30%. See I. Koning, *Aansprakelijkheid in het luchtvervoer. Goederenvervoer onder de verdragen van Warschau en Montreal* (Zutphen, Uitgeverij Paris, 2007), p. 253, 254.

breakable liability limit under the 1975 Montreal Protocol number 4 and the 1999 Montreal Convention must be considered as a desirable change in respect of the Warsaw and Hague System. In the following section a subject will be examined where in my view the 1999 Montreal Convention *should* have introduced a change, but failed to do so: in respect of the term 'damage'.

When goods are lost, destroyed, damaged, or their delivery is delayed, a variety of types of damage can be the result. Firstly, the fact that the goods themselves are damaged depreciates their value. It is also possible that damage does not exist because of damage to the goods *as such* but *arises out of,* or *in connection* with the loss, damage, destruction or delay of the goods: so-called *consequential loss.* It is very common in transportation law (both national law as well as uniform treaties) that the damages for which the carrier is liable are confined to certain types of damage. For instance, under *common law* the carrier is not liable for damages that were unforeseeable to him at the time the contract was concluded.[72] Similar approaches can be found in Continental-European law systems.[73] Likewise, the generally accepted restriction of compensatory damage to the market value of the goods at the place of departure or destination can be considered as an application of the maxim that only foreseeable damages are to be recoverable.[74] These types of restrictions can be found across the whole spectrum of international uniform transportation law.[75] The question is whether this also applies to the Montreal and Warsaw Convention. This question is not easy to answer, because neither the Montreal nor the Warsaw Convention contains specific provisions that limit the recoverable damage. Both Conventions merely determine that the carrier is liable for damage *sustained in the event of* loss, destruction or damage (Article 18) or delay (Article 19). In short, both Conventions are completely silent concerning the question *which* types of damage can be claimed.[76]

72. *Hadley v. Baxendale*, 1854, 9 Ex. 341, 156 Eng. Rep. 145 (1854). See also P. Martin, J.D. McClean et.al. in: *Shawcross & Beaumont, On air law,* (4th ed.) (London, Butterworths, (loose-leaf)), VII [31], M.A. Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 110.
73. See H. Drion, *Limitation of Liability in International Air Law,* (The Hague, Martinus Nijhoff, 1954) p. 119.
74. See Drion *supra.*
75. CMR, for instance, limits the recoverable damage to the value of the goods at the place and time at which they were accepted for carriage (Art. 23 para. 1). In addition, the carriage charges, customs duties and some other charges can be refunded, *but no further damage shall be payable* (Art. 23 paras 3 and 4 CMR). CIM-COTIF also restricts recoverable damages to the actual value of the goods (Art. 40-43 CIM 1980, 30-33 CIM 1999). Art. 4 para. 5 of the Hague Visby Rules stipulates that the total amount of recoverable damage shall be calculated by reference to the value of the goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been so discharged.
76. They merely specify the possible causes of the damage, namely loss, the destruction or damage of the goods and delay, see E. Du Pontavice, J. Dutheil de La Rochère and G.

The Montreal Convention provides a little more to hold on to than the Warsaw Convention. Article 29 of the Montreal Convention determines that punitive, exemplary or any other non-compensatory damages are not recoverable. This leads to the *a contrario* conclusion that compensatory damages are recoverable. But this does not bring about much clarity since the term 'compensatory damages' has a very wide meaning under common law. It includes *pecuniary loss* (which includes normal loss as well as consequential loss) as well as *non-pecuniary loss* (immaterial damage).[77] In other words: practically all types of damage imaginable fall under this heading. Article 29 of the Montreal Convention therefore does not help us any further in determining whether the recovery of consequential damages is possible.

For the sake of uniformity and legal certainty, it is preferable that the meaning of the term 'damage' is derived from the Convention itself by way of autonomous interpretation.[78] The point is that there is simply no starting point whatsoever under the Warsaw Convention. The result is that the general view – in the literature and in case law – is that national law should be normative in interpreting the term 'damage'.[79] The drafters of the 1999 Montreal Convention were of the same opinion. Moreover, the preparatory works of the 1999 Montreal Convention indicate that this was the assumption of ICAO's Legal Committee when they drafted the Convention.[80] The result is that there is no uniformity on this point.

As a consequence, case law and literature in the UK, the United States, France, Germany and the Netherlands shows a wide variety of opinions. In English literature the prevailing opinion is that national law determines which kinds of damage can be recovered under the Convention.[81] Under English law

M. Miller, *Traité de Droit Aérien,* Vol. 1 (Paris, L.G.D.J., 1989), p. 1117.

77. See McGregor on Damages 1997, p. 25 *et sec*. According to McGregor on Damages, the following types of *non-pecuniary loss* can be distinguished: physical inconvenience and discomfort, pain and suffering and loss of amenities, mental distress, social discredit and loss of society and relatives, see McGregor on Damages, p. 92 et seq.
78. Grammatical, contextual and purposive methods supplemented by historic interpretation on the basis of the *travaux préparatoires*.
79. See H. Kronke, in: J. Basedow (ed.), *Münchener Kommentar zum Handelsgesetzbuch*: HGB. Band 7: Viertes Buch. Handelsgeschäfte. §§ 407-457. *Transportrecht*, (Münich, Beck, 1997), p. 2035; I. Koller, *Transportrecht* (6. Auflage), (Münich, C.H. Beck, 2007), p. 1533; E. Ruhwedel, *Der Luftbeförderungsvertrag. Ein Grundriß des deutschen und internationalen Rechts der Personen- und Güterbeförderung auf dem Luftweg* (3. Auflage), (Neuwied, Luchterhand 1998), p. 351. E. Giemulla, in: Giemulla/Schmid, *Warschauer Abkommen. Frankfurter Kommentar zum Luftverkehrsrecht* (Band 3), (Munich, Luchterhand (loose-leaf)), Art. 18 WA, note 44.
80. ICAO working papers for the 148th session of the Council, (S-WP/10420, 14/6/1996), in: International Conference on air law, Montreal 10-28 May 1999, Vol. III Preparatory Material, p. 25.
81. P. Martin, J.D. McClean e.a. in: *Shawcross & Beaumont, On air law,* (4th ed.) (London, Butterworths, (loose-leaf)), VII-[939]. According to the authors 'Art. 18 (1) [of the

both the depreciation in the value of the damaged goods as well as various kinds of consequential loss are recoverable. Clarke[82] states: 'The rule of English law is that the carrier is liable for all kinds of loss which, given what the carrier knew or should have known at the time of contracting with him about the claimant's situation, should have been in the reasonable contemplation of the carrier as likely to result from a breach of the kind that occurred'[83] If the carrier knew or should have known that the cargo was to be utilized in the owner's business, the carrier may be liable for the loss of business such as loss of production.[84]

Likewise, in the United States consequential damages seem to be recoverable as well. But the means by which the American Federal District Courts came to this result is different. The Federal District Court of Illinois decided in 1985 in the case *Deere v. Lufthansa*[85] that *consequential damages* could be compensated under the Warsaw Convention. The District Court referred to a judgement of the Federal District Court of Michigan, *Saiyed v. Transmediterranean Airways*.[86] In this case *consequential damages* were awarded in case of damages occasioned by delay. The court based its decision primarily on a contextual and teleological interpretation of the Warsaw Convention, therefore autonomously. According to the Federal Court, the parties to the Warsaw Convention had – instead of following the common law principle of forbidding the recovery of consequential damages in contract cases as established in *Hadley v. Baxendale* – sought to set limits on liability in order that the airlines might establish reasonable rates for carriage considering potential risk exposure. Rather than limiting the *type of damages* recoverable, the parties to the Convention placed a *ceiling* on the amount of proven elements of damage which could be recovered, as was considered by the Federal Court in *Saiyed*.[87] French case law seems to follow the same line of thought. Damage under the Warsaw Convention is not limited to specific types of damage.[88] In French transportation law the carrier is generally held liable for all damage that arises directly from the breach of the contract of carriage. The recoverable damage is,

Warsaw Convention, K] contemplates the award of consequential damages, although it does not specify the precise scope of recovery under this head; that will fall to be determined under the appropriate conflict rules of the forum State'.

82. M.A. Clarke, *Contracts of carriage by air*, (London, LLP, 2002), p. 110.
83. *Ibid.*
84. See Clarke *supra*, with reference to *Hadley v. Baxendale* (1895) 9 Ex 341.
85. *Deere v. Lufthansa*, 81 C 4726 (N.D. Ill. 1985), aff'd on other grounds 885 F.2d. 385 (7th Cir. 1988).
86. *Saiyed v. Transmediterranean Airways*, 509 F. Supp. 1167 (W.D. Mich. 1981).
87. According to the court the alternative would result in the recovery of different elements of damage depending upon the country in which the action for breach was instituted and uniformity could soon be lost. See *Saiyed v. Transmediterranean Airways*, 509 F. Supp. 1167 (W.D. Mich. 1981).
88. See Lamy Transport (Tome 2) 2003, p. 971, 672.

however, restricted to the damage that was foreseeable to the carrier at the time the contract of carriage was concluded, unless the damage was caused by an intentional act *(dol)* or gross negligence (*faute lourde)* of the carrier or its servants or agents.[89]

German literature is divided on the question whether the general rules of the Civil Code or the specific rules for transportation in the Commercial Code should be applied for interpreting the term 'damage' under the Warsaw Convention.[90]

The Civil Code (§ 249 BGB) does not restrict the recoverable damage and therefore allows the recovery of consequential damage. The Commercial Code, however, (§ 429 HGB) restricts recoverable damages to the market value of the goods and explicitly excludes further damages (§432 HGB). According to Koller[91] the Commercial Code should be applied. According to this author, lacunas in the Convention should be filled by the application of the provisions in the Commercial Code. Koller considers the impossibility of recovering consequential damages to be one of the basic principles of German transportation law and it should also be applied in the case of carriage by air.[92] Müller-Rostin, on the other hand, is of the opinion that the special nature of air transportation leads to the application of the German Civil Code,[93] and was supported in this view by the Court of Appeal of Frankfurt am Main.[94]

The German Supreme Court resolved the matter in June 2004 and it followed Müller-Rostin.[95] If the Warsaw Convention applies then sub-section 249 of the German Civil Code applies by which consequential damages are recoverable. That did not settle the matter, however. The German legislator seems to have followed the view of Koller in *Gesetz zur Harmonisierung des Haftungsrechts im Luftverkehr*,[96] of 6 April 2004 (also *Montrealer-Übereinkommen-Durchführungsgesetz*) by which the Montreal Convention was implemented in German Law. Article 2 of this Act determined that in the case of loss, destruction or damage in the sense of Article 18 Montreal Convention, sub-section 429 of the Commercial Code should be applied. Based on this Article the recoverable damage should be calculated on the basis of the value of the goods at the time and at the place of departure. The judgment of the Supreme Court came

89 See P. Le Tourneau, *Droit de la responsabilité et des contrats,* (Paris, Dalloz, 2006), p. 908, 909.
90. See H. Kronke 1997 *supra* at, p. 2035.
91. See I. Koller, *Transportrecht. Kommentar* (München, C.H. Beck, 2007), p. 1533, 1534.
92. *Ibid*.
93. Müller-Rostin, *in: Giemulla/Schmid*, Art. 18 WA, note 44-46. According to the author the high freight prices for carriage by air in comparison with other freight prices in other modes of transportation makes a restriction of the recoverable damage to the market value of the goods insufficient. See also Kronke 1997, p. 2036.
94. OLG Frankfurt am Main, 28 April 1981, *ZLW* 1981, p. 312-313.
95. BGH 9.6.2004- I ZR 266/00, *TranspR* 2004-9, p. 371, 372.
96. Act of 6 April 2004, Bundesgesetzblatt 2004, I, p. 550 et seq.

two months after the *Montrealer-Übereinkommen-Durchführungsgesetz*. It seems as if the Supreme Court deliberately disregarded the Act. But in my view that conclusion is going too far. Firstly, the Supreme Court did not have to look at the Act because the Warsaw Convention, as amended by the Hague Protocol, was applicable instead of the Montreal Convention. Secondly, I believe that the Act leaves the possibility of recovering other types of damages open. This is because *Montrealer-Übereinkommen-Durchführungsgesetz* merely refers to sub-section 429 of the Commercial Code (which contains the criterion for the calculation of the damage) and *not* to sub-section 432 of the Commercial Code in which the recovery of consequential damages is explicitly excluded. Therefore, in Germany consequential damages are recoverable under the Warsaw as well as the Montreal Convention. In Dutch case law concerning carriage by air the question whether consequential damages are recoverable was never raised explicitly, which left the matter completely in the dark. In 2005 the Dutch legislator introduced a new title in the Civil Code[97] that incorporates the provisions of the 1999 Montreal Convention. Article 8:1357 of this title determines that the recoverable damages are restricted to the value of the goods at the place of destination. In other words, if Dutch law is to be applied – by virtue of the rules of private international law – for the determination of the recoverable damage, consequential damages are explicitly *not* recoverable. This is not only the case when the damage is sustained in cases of loss, destruction or damage to the goods, but also for damage occasioned by delay.[98]

By unequivocally referring to national law for the interpretation of the term 'damage', uniformity and legal certainty are unnecessarily compromised. In my view the ICAO's solution to leave the interpretation to national law does not win any prizes for initiative. This leaves possibilities for national legislators like the Dutch and German to fill the gap without any regard for international developments on this point, which could eventually result in a complete lack of uniformity with regard to one of the key concepts of the Convention. In my view the solution should be sought in an autonomous interpretation, where courts should seek an interpretation that has the broadest support in international case law. In my view this means that consequential damages should be recoverable.

7. Basis of Claims

In continental European legal doctrine the question of what forms the basis of claims has never received as much attention as it has done in Anglo-American law. Under the continental European law systems, the basis of the Warsaw

97. Title 16 of Book 8 of the Civil Code.
98. In the case of delay the prevailing view is that consequential damages are recoverable.

claim had a clear contractual connotation and the basis of claims was without much discussion derived from Articles 18 and 19 of the Warsaw Convention.[99] In Anglo-American doctrine and case law this conclusion was less obvious, and the cause of action has been subject to much discussion.[100] In my view the cause of this discussion originates primarily from American case law. Before 1978, the prevailing view was that the Warsaw Convention did not create a cause of action.[101] Instead, the cause of action had to be found in a national contractual or extra-contractual basis of a claim. The Warsaw Convention merely drew the boundaries by means of, for instance, limitation of action, [102] limitation of liability,[103] and jurisdiction.[104] The 'Anglo-American' view is largely based on the drafting history of the Warsaw Convention.[105] However, since the 1970s this view has changed. Since then it is the prevailing view in Anglo-American case law and doctrine that the Convention provides its own cause of action.[106] The

99. See H.J.Abraham, *Das Recht der Luftfahrt. Kommentar und Quellensammlung*. (Cologne, Carl Heymanns Verlag, 1960). p. 258; W. Guldimann, *Internationales Lufttransportrecht. Kommentar zu den Abkommen von Warschau 1929/55 und Guadalajara 1961* (Zürich, Schulthess, 1965), p. 22; E. Ruhwedel, *Der Luftbeförderungsvertrag. Ein Grundriß des deutschen und internationalen Rechts der Personen- und Güterbeförderung auf dem Luftweg* (3. Auflage), (Neuwied, Luchterhand, 1998), p. 156; E. Giemulla, in: Giemulla/ Schmid, *Warschauer Abkommen. Frankfurter Kommentar zum Luftverkehrsrecht* (Band 3) (Münich, Luchterhand (loose-leaf)), Art. 1 WA note 27, p. 17, 18; J.W.F. Sundberg, *Air Charter. A study in legal Development*, (Stockholm, Norstedt & Söner 1961), p. 198; D. Goedhuis, *Handboek voor het luchtrecht*, (The Hague, Martinus Nijhoff, 1943) p. 199; H. Drion, *Limitations of liabilities in international air law*, (The Hague, Martinus Nijhoff, 1954), p. 54 ; R.H. Mankiewicz, *The liability regime of the international air carrier. A commentary on the present Warsaw System,* (Antwerp, Boston London Frankfurt, Kluwer, 1981), p. 33.
100. See for instance P. Martin, J.D. McClean e.a. in: *Shawcross & Beaumont, On air law,* (4th ed.) (London, Butterworths, (loose-leaf)), VII-[402]-[407], G. Miller, *Liability in international air transport. The Warsaw system in municipal courts,* (Deventer, Kluwer, 1977), p. 224-247, M. Pourcelet, *Transport aérien international et responsabilité,* (Montréal, Les Presses de l'Université de Montréal, 1964), p. 175-201.
101. See also P. Martin, J.D. McClean et.al. in: *Shawcross & Beaumont*, *On air law,* (4th ed.) (London, Butterworths, (loose-leaf)) VII-[402]; according to the authors the first judgment dates back to 1941. Most commentators regard the judgment of the District Court of New York in the case *Komlos v. Cie Nationale Air France*, 111 F. Supp 393, (S.D.N.Y. 1952) as the first case in which an American court decided that in the case of international carriage by air the cause of action ought to be sought in national law. Later this view was followed by many other US Courts.
102. Art. 29 of the Warsaw Convention.
103. Art. 25 of the Warsaw Convention.
104. Art. 28 of the Warsaw Convention.
105. The most important indication for this view can be found in the minutes of the 1928 Conference in Madrid as described by G. Nathan Calkins, The Cause of Action Under the Warsaw Convention: Part I, 26 *JALC* 217, 218-29 (1959) as cited in *Jack v Trans World Airlines,* 820 F.Supp. 1218 (N.D. Cal. 1993).
106. The change started with a decision of the Federal Court of Appeal in the *case Benjamins v. British Airways*, 572 F 2d 913 (2nd Cir. 1978), cited in P. Martin, J.D. McClean et al.

same can be said of the Montreal Convention. That the issue of the basis of claims is still not a thing of the past is shown by the heading of Article 29 of the Montreal Convention: '*basis of claims*'.

8. Concurrence of Claims

Another question is whether the Warsaw and Montreal Conventions permit, in addition to claims under Articles 18 and 19, parallel claims on a national basis. Article 29 of the Montreal Convention[107] (Article 24 of the Warsaw Convention)[108] provides for a scheme that can be interpreted in two ways. In the first interpretation concurrent claims based on another (national) basis are permitted, but the Convention curtails these claims by its limitations and liability limits. Secondly, the Convention prohibits the concurrence of claims on a national basis with 'Convention claims'. Although the first view is broadly supported in the literature, [109] in English and American case law the second vision seems to be predominantly followed.[110] In my view, however, the choice of vision which one follows in fact makes no difference to the outcome of a case so long as there is actually a concurrent claim under the Warsaw or Montreal Conventions. The effect of blocking a parallel claim is the same as that of a prohibition. In both

in: *Shawcross & Beaumont, On Air Law,* (4th ed.) (London, Butterworths, (loose-leaf)) VII-[403]. See for a more extensive description of the cause of action issue P. Martin, J.D. McClean et al. in: *Shawcross & Beaumont*, *On Air Law,* (4th ed.) (London, Butterworths, (loose-leaf)) VII-[402]-[407].

107. 'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable'

108. Paragraph 1 of Art. 24 reads: 'In the cases covered by Art.s 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.'
Paragraph 2: 'In the cases covered by Art. 17 the provisions of the preceding para. also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.'

109. In Germany see Ruhwedel 1999, p. 163, Kuhn 1989, p. 22.Hübsch 1996, p. 367; for English law see P. Martin, J.D. McClean e.a. in: *Shawcross & Beaumont, On Air Law,* (4th ed.) (London, Butterworths, (loose-leaf)) VII-[405], M.A. Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 156. This view is also followed in New Zealand case law: *Emery Air Freight Corp. v. Nerine Nurseries*, Court of Appeal Wellington 5 May, 14 July 1997 [1997] 3 *NZLR* 723.

110. See for English law *Sidhu v. British Airways (*HL 12 Dec. 1996, [1997] 2 *Lloyd's Rep*. 76, the USA *El Al Israel Airlines. v. Tsui Yuan Tseng* 525 U.S. 155 (1999). See for an extensive reference to American case law also M.A. Clarke, *Contracts of carriage by air,* (London, LLP, 2002), p. 154 et seq.

cases, the carrier is not liable beyond the scope and limitations imposed by the rules of the Convention. In this respect Article 29 of the Montreal Convention should not be interpreted differently from Article 24 of the Warsaw Convention.

The real concern is the question whether the Convention can exclude claims on a national basis if there is *no parallel claim* under the Convention. In that case, concurrence is no longer at issue, but what is at issue is rather the question as to the material scope of the Convention. In 1996, the House of Lords[111] held that the Warsaw Convention provides exhaustive rules for the liability of the carrier arising from international carriage by air. In 1999, the US Supreme Court[112] followed with a similar conclusion. In the literature this is referred to as the *doctrine of exclusivity*. Although both cases concern the carriage of passengers under Article 17 of the Warsaw Convention, their relevance for the carriage of cargo under Articles 18 and 19 should not be underestimated. This is because the House of Lords and the US Supreme Court did not restrict themselves to the interpretation of the wording of Article 17 of the Warsaw Convention, but looked at the matter in a much broader sense.

9. Exclusivity

In my view, however, the above-mentioned decisions are debatable. In both cases the question arose whether a passenger's national contractual or extra-contractual claim arising out of international air carriage was allowed when the claim could *not* be brought under Article 17 of the Warsaw Convention. In both cases the decision was that these claims were excluded, as a result of which the passengers had no remedy whatsoever. Because the judgment of the House of Lords in the *Sidhu* case is in my view the most far-reaching, my comments mainly focus on this decision.

In a voluminous Opinion – that was supported unanimously by the other Law Lords – Lord Hope of Graighead came to the conclusion, based on systematical-contextual and teleological methods of interpretation, that Articles 17, 18 and 19 were meant to describe in an exhaustive manner all situations in which the carrier could be liable for damages arising out of international carriage by air.[113] Because Articles 17, 18 and 19 of the Warsaw Convention did not in themselves determine that they were meant to provide exhaustive rules, Lord Hope inferred this from the Articles within the context of Chapter III of the Warsaw Convention,[114] in particular the structure of Articles 23 and 24.

111. *Sidhu v. British Airways* [1997] 2 *Lloyd's Rep*. 67 HL.
112. *El Al Israel Airlines. v. Tsui Yuan Tseng* 525 U.S. 155 (1999).
113. *Sidhu v. British Airways* [1997] 2 *Lloyd's Rep*. 80 HL et seq.
114. Ch. III comprises Art.s 17 to 30 of the Warsaw Convention and is entitled 'liability of the carrier'.

According to Lord Hope, these Articles created a closed system for the carrier as well as the passenger (or any other party claiming compensation): on the one hand, the carrier surrenders his freedom to contract out of liability (Article 23) and, on the other, the passenger is restricted to the claims he/she can bring under the Convention. This led to the question of what the boundaries of Articles 17, 18 and 19 were. In other words: a question about the material scope of the Convention. This is the core of the case, as Lord Hope indeed acknowledged:

> The reference in the opening words of Article. 24(2) to "the cases covered by Article 17" does, of course, invite the question whether Article 17 was intended to cover only those cases for which the carrier is liable in damages under that Article. The answer to that question may indeed be said to lie at the heart of this case. In my opinion the answer to it is to be found not by an exact analysis of the particular words used but by a consideration of the whole purpose of the Article. *In its context the purpose seems to me to be to prescribe the circumstances – that is to say, the only circumstances – in which a carrier will be liable in damages to the passenger for claims arising out of his international carriage by air* [emphasis added].[115]

In the eyes of Lord Hope, Article 17 does not only formulate in a positive sense which kinds of damage or which specific causes fall under Article 17, but also in a negative sense which kinds do not; namely all other conceivable types of damage and causes which can arise out of international carriage by air that do not fall under Article 17. This makes the material scope of Article 17 infinite. In my opinion this conclusion is too far-reaching. In 1999, the US Supreme Court came to a similar conclusion.[116] In this case, a passenger claimed damages for personal injuries caused by the carrier's security search preceding the flight. The US Supreme Court decided that recovery for personal injury suffered on board an aircraft or in the course of embarking or disembarking, if not under Article 17 of the Warsaw Convention, is not available at all. The US Supreme Court followed a similar line of reasoning as the House of Lords had done in the *Sidhu* case. In the view of the House of Lords all claims in connection with international air carriage that fall outside Articles 17, 18 of 19 are barred, not only under the Convention but under national law as well. Such a far-reaching conclusion (it leaves passengers without any remedy at all) needs a firm basis in the wording, the context, the purpose or the history of the Convention. In my view it is questionable whether that foundation exists. My criticism of this approach is twofold. Firstly, I do not agree with the conclusion of the House of Lords that the scope of Articles 17, 18 and 19 of the Warsaw Convention must be considered infinite. Secondly, in my view the House of Lords formulated its decision too broadly.

115. *Sidhu v. British Airways* [1997] 2 *Lloyd's Rep.* 82 HL.
116. *El Al Israel Airlines. v. Tsui Yuan Tseng* 525 U.S. 155 (1999).

With respect to the first point of criticism: If the drafters of the Convention really did intend to make the scope of Articles 17, 18 and 19 of the Warsaw Convention infinite, would it not have been logical for them to clarify this in the wording of those Articles? This argument was also raised by Justice Stevens in his *dissenting opinion* in the *Tseng* case.[117] Articles 17, 18 or 19 do not determine this, and neither does Article 24 of the Warsaw Convention, for that matter. It can just as well be argued that when the Convention was drafted in 1929, it was never intended to make an exhaustive set of rules. It is just as likely that the drafters merely wanted to determine in which cases the carrier was subjected to the – at that time in comparison with existing national laws – severe system of liability based on presumed fault and to leave other questions to the underlying national law system. Moreover, the *travaux préparatoires* of the Warsaw Convention seem to point to the fact that the drafters took into account that there were lacunas in the liability regime they had drafted and they considered the underlying national law systems to be applicable in such cases.[118] Secondly, in my opinion the decision of the House of Lords is formulated too broadly. The view of Lord Hope is not restricted to an interpretation of the words 'injury' or 'accident' in Article 17, but extends to Articles 18 and 19 as well and makes no distinction between other matters that are also regulated in these articles. For instance: to the period of carriage. Articles 17 and 18 of the Warsaw Convention (and the Montreal Convention as well) stipulate that the liability of the carrier is limited during a specifically defined period.[119] Outside the 'period of liability' the convention does not apply.[120] Therefore, damage

117. *El Al Israel Airlines. v. Tsui Yuan Tseng* 525 U.S. 155 (1999), p 177 et seq.
118. See CITEJA, *II Conférence Internationale de Droit Privé Aérien*, 4-12 Octobre 1929, Varsovie (Procès-verbaux), Warsawa: l'OACI 1930, p. 14-17, which is translated in R.C. Horner & D. Legrez, *Second International Conference on Private International Aeronautical Law Minutes, Warsaw 1929,* (South Hackensack, Fred B. Rothman, 1975), p. 22.
119. Article 17 of the Warsaw Convention determines with regard to the carriage of passengers that the carrier is only liable 'if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.' Article 18 paragraph 1 of the Montreal Convention determines with regard to the carriage of goods that the carrier is only liable 'if the occurrence which caused the damage so sustained took place during the carriage by air.' The concept of 'carriage by air' is subsequently defined in paragraphs 2 and 3. Paragraph 2 determines that 'The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever'. Paragraph 3 restricts the period of liability in a geographical sense: 'The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air'.
120. See M.A. Clarke, *Contracts of Carriage by Air,* (London, LLP, 2004), p. 117 et seq.

caused by the carrier outside the period of liability is subject to the law that is applicable by virtue of the rules of private international law.[121] In the case of carriage of goods it frequently occurs that the carrier agrees to carry the goods by road to the airport or from the airport to their final destination. This transportation normally falls outside the period of liability.[122] It would be illogical if the carrier could not be held liable in any way for damage caused during this agreed part of the transportation merely because it falls outside the period of liability as defined in Article 18 of the Warsaw Convention. However, this seems to be exactly the consequence if one extrapolates the decision of the House of Lords – that Articles 17, 18 and 19 prescribe the only circumstances in which the carrier will be liable – directly to the period of liability. The decision of the House of Lords lacks a clear nuance on this point.[123]

In view of what has been stated above it is, in my opinion, regrettable that the drafters of the Montreal Convention seemed to have followed the judgments of the House of Lords and the US Supreme Court. Article 29 has reformulated Article 24 of the Warsaw Convention in a much broader sense to fit the verdicts. Article 29 of the Montreal Convention no longer refers to Articles 17, 18 and 19 like the old version did, but simply states that 'In the carriage of passengers, baggage and cargo' *in general*, any action for damages can only be brought subject to the conditions and limits of liability of the Convention. In my view Article 29 of the Montreal Convention should be interpreted narrowly, just as the decisions of the House of Lords and the US Supreme Court should be refined.[124]

11. Right to Sue

Another matter that has been the subject of much debate is the question of who is entitled to claim compensation under the terms of the Warsaw and Montreal

121. The French Supreme Court seems to have taken this premise as a starting point in a decision that arose out of the same circumstances as in the *Sidhu* case: see CC 15 Juillet 1999 (no. de pourvoi 91-100268). The case can be found at <www.legifrance.gouv.fr>.
122. For a more detailed discussion of 'accessory transport' and combined carriage in relation to the period of liability see M.A. Clarke, *supra* p. 119-121.
123. Shawcross & Beaumont, *On air law,* (4th ed.) (London, Butterworths, (looseleaf)), VII [408]-[409].
124. An interesting question is whether the decision of the Court of Justice of the EU of 10 Jan. 2006, C344/04 j 2006, 403 (concerning EU Regulation 261/2004 on denied boarding, cancellation and long delay of flights) is in conflict with the exclusivity doctrine of the House of Lords and the US Supreme Court. Unfortunately this article does not leave room to consider this issue. For a more extensive discussion, see: I. Koning, *Aansprakelijkheid in het luchtvervoer. Goederenvervoer onder de verdragen van Warschau en Montreal,* (Zutphen, Uitgeverij Paris 2007), p. 315 et seq.

Conventions. Under the Warsaw Convention it was fairly generally accepted that the consignor and consignee had the right to claim compensation.[125] This was usually derived from Articles 13 paragraph 3[126] and 30 paragraph 3[127] of the Warsaw Convention. The same must be assumed for the Montreal Convention since these articles were taken over virtually unchanged. The central question here is whether, apart from the consignor and the consignee in the contract of carriage, others may also claim compensation. Under the Warsaw Convention, three different approaches could be derived from the literature and case law. In Dutch,[128] French[129] and German case law,[130] the prevailing view was that the Warsaw Convention only conferred the right of action on those who were stated as consignor and consignee on the air waybill. Moreover, in the Netherlands the right of action was further restricted to the party having the right to dispose of the goods. The consignor and consignee could therefore only claim compensation with the exclusion of each other.[131] Although these views were based on autonomous (grammatical and systematically) interpretation methods,[132] they are in my opinion too strict and formal. There is no reason to assume that the right to sue under the Warsaw Convention must be attributed exclusively to the consignor or consignee mentioned in the airway bill. Such a conclusion cannot be inferred from the Warsaw Convention's wording, context or its drafting history. Moreover, the restriction is also contrary to the rules for the right to sue in most underlying national law systems. In the United States, the right of action was also conferred on the consignor and the consignee, but the question as

125. W. Guldimann, *Internationales Lufttransportrecht. Kommentar zu den Abkommen von Warschau 1929/55 und Guadalajara 1961,* (Zürich, Schulthess 1965), p. 89; M.A. Clarke en D. Yates, *Contracts of carriage by land and air,* (London, LLP, 2004). p. 331.
126. 'If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage'.
127. 'As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee'.
128. The view is based on Drion's argumentation, *see Limitation of Liability in International Air Law,* (The Hague, Martinus Nijhoff, 1954), p. 329. One of the earliest Dutch decisions where this view was followed was that of the Court of Haarlem 25 May 1971, *S&S* 1971, 59; Court of Appeal of Amsterdam 14 Dec. 1989, *S&S* 1990, 131.
129. CA Paris 2 juin 1985, *RFDA* 1985, p. 343 and TC Paris 15 janvier 1986, *RFDA* 1986, p. 276 See also I. Zivy, 'Le droit du destinataire réel d'une LTA', *RFDA* 1986, p. 18 et seq.
130. OLG Köln, 20.11.80, *ZLW* 1982, p. 176 and BGH, *NJW* 1969, p. 2008.
131. See HR 19 April 2002, *NJ* 2002, 412 (*Sainath v. KLM*).
132. Based on the '*a contrario*' reasoning by Drion in his dissertation, see Drion *supra.*

to who the consignor and consignee could be was given a broader interpretation.[133] According to the Federal District Court the Warsaw Convention did not explicitly restrict the circle of persons who are entitled to claim compensation to those who are mentioned as consignor and consignee in the airway bill. Under certain circumstances the undisclosed principal of the consignor or consignee can claim compensation as well.[134] Under English law, on the other hand, the prevailing view was that the Warsaw Convention did not contain any provisions regarding the right of action.[135] Consequently, the matter had to be interpreted based on national law. In English law, therefore, as well as the consignor and the consignee, the owner of the goods – who is not a party to the contract of carriage – could also claim compensation.[136] Under the Montreal Convention this latter vision will have to be followed because Article 29 of the Montreal Convention explicitly states that the Convention does not provide for the question of who can instigate an action. To leave such a central issue to be solved by the various underlying national law systems is in my opinion unacceptable and detrimental to uniformity and legal certainty.

In conclusion, the liability system of the Montreal Convention is more favourable for the cargo carrier, the consignor and consignee. Not only is the basis of liability less strict then it was under the 1975 Montreal Protocol number 4, the liability limit is absolutely unbreakable while the limit is virtually unchanged since 1929. In my view the Montreal regime would have been more balanced if either the liability limit had been substantially higher then SDR 17

133. *B.R.I. Coverage Corp. v. Air Canada*, 725 F. Supp. 133, (E.D.N.Y. 1989).
134. See also *Lufthansa German Airlines v. American Airlines,* 797 F. Supp. 446 (D.C. Virgin Islands 1992). See also *Bennet Importing v. Continental Airlines* WL 34031697 (D.Mass. 1998). *Commercial Union Insurance Company v. Alitalia Airlines,* 347 F. 3d 448 (2nd cir. 2003).
135. *Western Digital Corporation v. British Airways*, *[2000]* 2 Lloyd's Rep. 162, 163 CA.
136. Saliently, the Court of Appeal in the *Western Digital* case expressed this view in defiance of an *obiter dictum* of the House of Lords in the *Sidhu* case from 1996 (see *supra* n. 111). Instead the Court of Appeal followed a decision from a court of first instance dating back to 1989, *Gatewhite v. Iberia Líneas Aéreas de España Sociedad [1989]* 1 Lloyd's Rep. 160. Precisely the case that the House of Lords had expressly criticized in the *Sidhu* case. Although in the *Sidhu* case a fundamentally different question was at issue (the *Sidhu* case was about the scope of Art. 17 of the Warsaw Convention), the House of Lords considered that it would be more in line with the purpose of the Warsaw Convention to adopt an approach like the French, German and Dutch view under which the right to sue was restricted to the consignor and consignee as mentioned in the airway bill. Initially, the court of first instance in the *Western Digital* case *[1999]* 2 Lloyd's Rep. 380, followed the House of Lords and decided that the right to sue was restricted to the consignor and consignee as named in the airway bill, thereby denying the owner of the goods (who was not a party to the contract of carriage) a right to sue. On appeal, however, the Court of Appeal followed the *Gatewhite* case instead of the House of Lords. See for an elaborate discussion of the cases M.A. Clarke, *Contracts of Carriage by Air,* (London, LLP, 2002), p. 199.

per kilogram, or a possibility of breaking the limit in case of proven intent of the carrier would have been introduced.

Moreover, the drafters of the Montreal Convention missed the opportunity to clear up some important issues like the interpretation of the term damage, the question who can sue under the Convention and the issue of exclusivity.