



FACULTY OF LAW
University of Lund

Examiner: Dr. Lars Göran Malmberg

**The Air Carriers Liability for
Transportation of Goods According
To Article 18 of the Warsaw
Convention.**

Carrier Liability Under the Warsaw Convention
As Amended by the Hague Protocol.

By

Christian Hegelund Nielsen

Thesis in Air Law

1999

Thesis in Air Law

1999

The Air Carriers Liability for
Transportation of Goods According to
Article 18 of the Warsaw Convention

Carrier Liability Under The Warsaw Convention
As Amended by the Hague Protocol

By

Christian Hegelund Nielsen
700703-9436

Contents

SUMMARY	3
ABBREVIATIONS	5
1 INTRODUCTION	6
1.1 CARGO	8
1.2 PRESUMED FAULT LIABILITY	10
2. THE CARRIER	12
2.1 THE CONTRACTING CARRIER	13
2.1.1 THE LIABILITY OF THE CONTRACTING CARRIER	14
2.2 THE ACTUAL CARRIER	15
2.2.1 THE LIABILITY OF THE ACTUAL CARRIER	17
2.3 THE SUCCESSIVE CARRIER	18
2.3.1 THE LIABILITY OF THE SUCCESSIVE CARRIER	21
3 DESTRUCTION, DAMAGE AND LOSS	23
3.1 DESTRUCTION	24
3.2 DAMAGE	26
3.3 LOSS	28
3.4 PARTIAL LOSS - DAMAGE OR LOSS?	29
4. TRANSPORTATION BY AIR	36
4.1 TRANSPORTATION BY AIR ACCORDING TO	

ARTICLE 18(2)	36
4.2 THE CONCEPT OF BEING "IN CHARGE"	38
4.2.1 WHEN DOES THE CARRIER BEGIN TO BE "IN CHARGE"?	40
4.2.2 "IN CHARGE" DURING TRANSPORTATION	46
4.2.3 "IN CHARGE" AFTER ARRIVAL AT THE CARGOS DESTINATION	47
4.2.4 "IN CHARGE" DURING CUSTOMS CLEARANCE	48
4.2.5 WHEN DOES THE CARRIER CEASE TO BE "IN CHARGE"?	51
4.3 THE CONCEPT OF "ON BOARD" AND "IN AN AIRPORT"	52
4.3.1 "ON BOARD"	52
4.3.2 "IN AN AIRPORT"	52
5. SURFACE TRANSPORTATION	59
5.1 SURFACE TRANSPORTATION ACCORDING TO ARTICLE 18 (3)	59
5.2 THE CONCEPT OF LOADING, DELIVERY AND TRANSHIPMENT	63
5.2.1 LOADING	63
5.2.2 DELIVERY	65
5.2.3 TRANSHIPMENT	68

5.3 COMBINED TRANSPORTATION	68
5.4 SUBSTITUTE CARRIAGE	71
6. CONCLUSION	74
7. APPENDIX	77
7.1 WARSAW CONVENTION AS AMENDED BY THE HAGUE PROTOCOL, 1955.	78
7.2 ARTICLE 18 OF THE WARSAW CONVENTION AS AMENDED BY THE GUATEMALA PROTOCOL, 1971.	98
7.3 ARTICLE 11 OF THE WARSAW CONVENTION AS AMENDED BY THE MONTREAL PROTOCOL NO. 4, 1975.	99
7.4 ARTICLE 18 OF THE WARSAW CONVENTION AS AMENDED BY THE MONTREAL PROTOCOL NO. 4, 1975.	100
7.5 WARSAW CONVENTION. DRAFT DRAWN UP AT THE MONTREAL CONFERENCE, MAY 1999. ARTICLE 17 - DAMAGE TO CARGO.	102
BIBLIOGRAPHY	103
TABLE OF CASES	108

Summary

The liability of the carrier is spelt out, as far as cargo is concerned, in Article 18 of the Warsaw Convention.

Article 18 (1) informs us that the carrier is liable for damage if there is a causal connection between the damaging event, or occurrence as it is called in the Convention, and the damage sustained to the goods. The carrier is liable for destruction, loss and damage. It is vital, if the goods has been delivered in damaged condition, to determine whether the goods is destroyed, lost or damaged since, in cases of damage there is a time limit within which the person entitled to delivery must complain, Article 26 (2). No such time limit exists concerning destroyed or lost goods.

The carrier is only liable for the damage, destruction or loss if the damage to the goods has been inflicted during the “transportation by air”. The “transportation by air” comprises two things, two requisites that has to be met if the period during which the damaging event took place is going to be held as one during “transportation by air”. The first requisite is that the carrier has to be “in charge” of the goods. The second is that the carrier has to be in charge “in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.” Both requirements has to be met at the same time. If only one is covered it is not “transportation by air” according to Article 18 (2).

As a general rule, transportation on the surface is not within the scope of the “transportation by air”, but sometimes such transportation on land, on the sea or on the river can be considered to be part of the “transportation by air”. If the transportation on the surface is a so called feeder service under the contract for carriage, and the feeder service is performed for the purpose of either loading, delivery or transshipment, then it is held, in the event of damage, to be part of the “transportation by air”.

Should the cargo, when delivered to the consignee, prove to be damaged there is a presumption in Article 18 (3) working to the disadvantage of the carrier. If the carrier cannot present satisfactory evidence that the damage occurred during the surface transportation, i.e., the feeder service, the damage will be presumed to have occurred during the “transportation by air” and the carrier will be held liable according to the provisions of the Warsaw Convention.

Abbreviations

AL	Air Law
ASL	Air & Space Law
CMR	Convention on the Contract for the International Carriage of Goods by Road, 1956
ETL	European Transport Law
F.2d	Federal Reporter, 2d Series
F.Supp	Federal Supplement
IATA	International Air Transportation Association
ICAO	International Civil Aviation Organisation
Lloyd's Rep	Lloyd's Law Reports
N.Y.S.2d	New York Supplement, 2d Series
Q.B.	Queens Bench Division
WC	Warsaw Convention

1 Introduction

As the title of this thesis indicates , The Air Carriers Liability for Transportation of Goods According to Article 18 of the Warsaw Convention, the matters that are to be dealt with concerns air law and carrier liability. Unavoidably cargo is sometimes damaged during the air transportation and questions arises that needs an answer. The answers to these questions are seldom easy to determine. In this thesis the Warsaw Convention as amended by the Hague Protocol, 1955, will be the instrument with which I will try to provide an answer to the following three questions:

- Who is liable?
- For what is the carrier liable?
- When is the carrier liable?

Article 18 of the Warsaw Convention deals with two things, checked baggage and goods, however, only goods will be examined. Cargo on the other hand does not necessarily have to be dead material things, the word cargo, or goods, is broad and can include, for example, live stock.

Air carriage is, as sea carriage, an adventure which means that there are risks involved; risks that can cause damage. Every time an aircraft takes off or puts down, two critical manoeuvres, there are risks that has to be calculated with. There is always the possibility of incidents or even accidents. At times it is only the skills of the pilot that prevents a highly dangerous situation to escalate into a full blown disaster, killing or injuring passengers and crew on board and killing or injuring people on the ground and causing tremendous material damage to third party property on the surface. However, it does not take an accident to trigger liability according to Article 18. It does not need to be that dramatic. A failure to deliver the goods raises questions of liability as does damaged goods.

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air dates back to 1929¹, in force since Feb. 13, 1933, was the result of two international conferences, one of them held 1925 in Paris and the other held 1929 obviously in Warsaw, hence the name. As the name suggests it is a unification attempt and the rules are being applied all over the world, “they are widely and broadly accepted, but the modifications brought up by the Protocol of Hague were less widely accepted, and the complementary convention of Guadalajara in 1961, even less so.”² However, not all countries are bound only to the Warsaw Convention; quite a few have ratified the Hague Protocol from 1955.³

It is interesting to note that if controversy should arise between the French text of the Warsaw Convention and, for example, the English translation the French text always prevails.

Before I continue I would like to say that I will consistently throughout this paper refer to the carrier as a he since I prefer this over referring to the carrier as an it even though that might be more appropriate. It is just a matter of choice and not a gender issue.

1.1 Cargo

Article 18 (1) speaks of “goods” but the Convention does not, however,

¹ If the reader is interested of the history and the developing of the Warsaw Convention I can recommend Giemullas short but excellent historical overview in Giemulla/Schmid/Ehlers, Warsaw Convention, Introduction para 1 – 15.

²Roger R. Nys. Legal Aspects of the Carriage of Goods by Air. 1975 ETL 713 (vol. 10).

³ Sweden, for example, have ratified the Warsaw Convention of 1929, the Hague Protocol of 1955, the Guadalajara Supplementary Convention of 1961, the Guatemala City Protocol

define the word. If one consults other Conventions, such as the CMR⁴, for guidance one is non-the wiser since neither this Convention defines the word "goods".⁵ The Hague – Visby Rules⁶, which governs carriage of goods by sea, on the other hand, defines "goods" in Article 1 (c) as including "goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried." This definition may not be well suited for airfreight. So what is goods? Müller-Rostin puts forward a definition that the term "goods" should "comprise all material objects which can be transported."⁷ Another definition to the word is cited by Magdelénat, that cargo, i.e., goods should be "goods transported which are not passenger baggage."⁸ Müller-Rostins definition is vague to say the least, but if one thinks of all material objects that can be transported by aircraft we are starting to narrow it down. In IATA Conditions of Carriage for Cargo⁹ the word "cargo" is defined in Article 1 (4). "Cargo which is equivalent to the term 'goods', means anything carried in an aircraft except mail, or baggage under a passenger ticket and baggage check, but includes baggage moving under an air waybill or shipment record." Article 2 of the Warsaw Convention clearly states that the Convention is not applicable to carriage of mail and postal packages and according to the IATA Conditions of Carriage for Cargo mail and postal packages does not fit the definition of the word "goods".

The French text uses the word "marchandise" and this is translated in the English and the American version by "goods". There has been some debate

of 1971, the Montreal Protocols No. 1 – 4 of 1975. The United States of America on the other hand are only bound by the Warsaw Convention of 1929.

⁴ Convention on the Contract for the International Carriage of Goods by Road, 1956.

⁵ CMR only states that it shall apply to "every contract for the carriage of goods by road in vehicles for reward...", Article 1 (1).

⁶ The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading as amended by the 1968 protocol signed in Brussels (the Hague – Visby Rules).

⁷ Giumulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 7.

⁸ Jean-Louis Magdelénat. Air Cargo. Regulation and Claims. Butterworths 1983. p. 5. The author cited Mapelli.

⁹ IATA Conditions of Carriage for Cargo. (Recommended Practice 1601). This is a recommendation, it is not legally binding.

about whether this is an exact translation or not since, in order to be "marchandise" the object in question has to have some commercial and economic value¹⁰ where as "goods" can be anything.¹¹ This divergence has caused some discussion whether human remains are goods or not. A corpse does not have any commercial or economic value and therefore it is hard to see how it can be goods, or rather "marchandise", according to the French text. But according to the English and American translations a human corpse is goods since goods can be anything. Human remains are listed, in Article 3 (4) of IATA Conditions of Carriage for Cargo, under the caption "Cargo Acceptable Only Under Prescribed Conditions" as cargo. Even though it is acceptable only under certain conditions it is nevertheless listed as cargo. Miller puts forward an idea how to solve this discrepancy between the French text and the translated versions of the same and she says: "(o)ne way to avoid difficulties would be to argue that since a corpse is placed outside the world of commercial transactions because of its link with the idea of a human body, that link should be used to include the carriage of corpse in the scope of the Convention through the category of carriage of *persons*."¹² This is one way of dealing with the problem. I, on the other hand, would say that a corpse is a parcel like anything else and therefore can be included within the scope of the word "goods".

What then, is normally carried as goods on an aircraft? Traditionally the goods are of a more valuable and less voluminous nature, less voluminous for obvious reasons. There are cargo simply not suited for air shipment, it has to be, among other things, economically justifiable. The bulky cargo such as oil, ore, grain and coal are with great advantage freighted by sea. Greater volumes can be carried at a more competitive cost. And if the goods do not fit the cargo holds of the vessel, the master of the ship has the possibility to consider stowing and freighting the cargo on deck. This is not

¹⁰ Georgette Miller. Liability in International Air Transport. The Warsaw Convention in Municipal Courts. Kluwer 1977. The Netherlands. p. 10; Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 7.

¹¹ IATA Conditions of Carriage for Cargo, Article 1 (4).

an option for the air carrier. If the goods does not fit the cargo compartment of the available aircraft it cannot be carried, as simple as that.

What is normally carried is, as mentioned, high value items such as gold, diamonds, banknotes, watches, computers and furs but also electronics, pharmaceuticals, heavy machinery and construction materials.¹³ Fruit, vegetables, breeding chickens, cut flowers and other perishable cargo¹⁴ is also commonly carried by aircraft. Cargo can, in other words, be just about anything that an aircraft can hold and is permitted to take off with.

1.2 Presumed Fault Liability

When the carrier undertakes to carry goods under a contract for carriage he also promises the safety of the goods, that it will be delivered undamaged and on time. If the carrier fails to do so he will be held liable. The liability system in the Warsaw Convention creates a presumption of fault against the carrier.¹⁵ It is a fault liability, not strict liability, with a reversed burden of proof; it is up to the carrier to rebut this presumption.

The carrier has the possibility of exonerating himself by invoking 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."¹⁶ The carrier has to prove "that he has exercised all reasonable care in relation to the goods."¹⁷ One could ask the question just how much proof the carrier has to supply to support his claim that he has indeed taken all necessary measures to avoid damage. This will most certainly be decided by the circumstances

¹² Miller, *ibid.* p. 11.

¹³ Jacob W.F. Sundberg. *The Changing Law of Air Freight*. 1981 AL 230.

¹⁴ Magdelénat, *ibid.* p. 7.

¹⁵ Miller, *ibid.* p. 64; Bertil Bengtsson. *Kompendium i Transporträtt*. Juridiska Föreningen i Uppsala. 4:e uppl. 1973. p. 23

¹⁶ Article 20. For the entire Article 20 see appendix 7.1.

¹⁷ Lord McNair. *The Law of the Air*. Third Edition. Stevens & Sons. London 1964. p. 184.

and facts of each particular case. However, there is one view which says that it "seems to be universally established that the carrier only discharges his burden of proof if he shows positively how the loss or damage was caused otherwise than by his negligence and that he has not discharged this burden if the cause of the loss or damage remains unknown."¹⁸ The burden of showing that the carrier has taken all necessary measures are heavy and not one to be taken lightly. However, Article 20 and the possibility to avoid all or part of the liability might inspire the carrier to investigate the cause of damage in a thorough and sufficient manner to the benefit of all involved parties.

¹⁸ Stephen Zamora. Carrier Liability For Damage or Loss to Cargo In International Transport. *The American Journal of Comparative Law*. Volume 23. 1975 p. 441.

2 The Carrier

Who is liable? The answer to this legitimate question can be found in Article 18 (1)¹⁹ and the answer is as simple as it is short; the carrier is liable. But just who is the carrier? The Warsaw Convention does not define what or who the carrier is.²⁰ A definition can, however, be found in the Guadalajara Supplementary Convention²¹ as will be seen in the forthcoming discussion. Apparently there were some debate about who could be the carrier. One view would be that the carrier was in fact the contracting carrier. This would be the view held on the Continent while in the Anglo – American system the actual carrier was considered to be the carrier.²² This matter is, according to Schoner, now solved by the Guadalajara Supplementary Convention. However, before we examine some of the carriers, something ought to be said about the common carrier and the private carrier.

The common carrier is a carrier who offers to carry goods, or passengers for that matter, for anyone who wishes to employ him²³ and therefore he can not refuse to carry the goods offered to him unless the goods have, inter alia, defective packing or if he has not been paid in full.²⁴ Should the common

¹⁹ See appendix 7.1.

²⁰ The Warsaw Conference rejected a proposal put forward concerning a definition attempt of the word "carrier". R.H. Mankiewicz. *The Liability Regime of the International Air Carrier*. Kluwer Law and Taxation Publishers. 1981. p. 37; Giumulla/Schmid/Ehlers, *Warsaw Convention*, Article 1 para 36.

²¹ The 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, Guadalajara, 18th September 1962. In force since 1 May 1964. The preamble to the Guadalajara Supplementary Conventions clearly states the purpose of the existence of the Convention. "The States Signatory to the Present Convention Noting that the Warsaw Convention does not contain particular rules relating to international carriage by air performed by a person who is not a party to the agreement for carriage. Considering that it is therefor desirable to formulate rules to apply in such circumstances."

²² Magdelénat, *ibid.* p 22; Dieter Schoner. *The Freight Forwarder as an Air Carrier*. 1980 AL 9.

²³ John F. Wilson. *Carriage of Goods by Sea*. Third Edition. Financial Times Pitman Publishing. 1998. p. 245 footnote 1. Wilson's description of the common carrier is of a common carrier of ships, but I do not think its a mistake to say that this description can also be used on an air carrier who makes himself out to be a common carrier.

²⁴ Shawcross & Beaumont, issue 74, VII/5.

carrier refuse to carry the goods without a proper cause, he makes himself open for actions for damages on the ground of wrongful refusal.²⁵ The private carrier, on the other hand, can choose whom he will or will not enter into a contract of carriage with.²⁶ Another difference is that the common carrier is more or less strictly liable for the goods. He can avail himself from liability if he proves that the damage was a result of an act of God, an act of the Queens enemies, the inherent vice of the goods themselves or as a result of default or misconduct on the consignors part.²⁷ The private carrier is only liable "if he has wilfully damaged or lost the goods or if he has been guilty of negligence."²⁸ Needless to say, the common carriers are a minority.²⁹

2.1 The Contracting Carrier

As the expression suggests the contracting carrier is the one who has entered into a contract for carriage with a consignor. By doing so he is also responsible for the carriage and he has to make sure that the contract is honoured although he is under no obligation to actually carry the goods himself. The contracting carrier does not even have to be capable of transporting the goods, it does not matter whether he has the necessary equipment or not, it is irrelevant.³⁰

²⁵ Ibid., issue 74, VII/4.

²⁶ Ibid., issue 74, VII/5.

²⁷ Miller, *ibid.* p. 52; Shawcross & Beaumont, issue 74, VII/5. See also Wilson, *ibid.*, who explains that these exceptions are old common law exceptions available to the common carrier. p. 245 and footnote 1. Wilson also gives a thorough description of acts of God, acts of the Queens enemies and inherent vice, p. 245 – 247.

²⁸ Miller, *ibid.* p. 52.

²⁹ Shawcross & Beaumont states that it "is believed that there is no English case in which an air carrier has been held to be a common carrier." Further they notice that in Canada it has been accepted "that an air carrier may be a common carrier." In the United States of America, on the other hand, there appear to be quite a lot of cases in which the air carrier have been held to be a common carrier, issue 74, VII/3, although less so in cargo cases than in passenger cases. Magdelénat, *ibid.* p. 22.

³⁰ Mankiewicz, *ibid.* p. 37; Giumulla/Schmid/Ehlers, Warsaw Convention, Article 1 para 37.

According to the Guadalajara Supplementary Convention Article I (b) the:

“‘contracting carrier’ means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor.”

The Article says nothing to the extent that he has to perform the agreed transportation himself and neither does the Warsaw Convention, which only speaks of an undefined carrier. This means that the contracting carrier can arrange for the goods to be carried by either his own means of transportation or by engaging a third party to do it, but even though someone other than the contracting carrier performs the transportation, he is still responsible and liable for the carriage.

2.1.1 The Liability of the Contracting Carrier

Article II of the Guadalajara Supplementary Convention reads:

“If an actual carrier performs the whole or part of a carriage which, according to the agreement referred to in Article I, paragraph b/, is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in this Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement, the latter solely for the carriage which he performs.”

The contracting carrier is liable for the whole carriage even if he himself does not carry any of the goods at all. This is only natural since he is the one the consignor signed a contract of carriage with.

Article III (1) of the Guadalajara Supplementary Convention states that the

“acts and omissions of the actual carrier and of his servants or agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.”

Not only is the contracting carrier liable for his own servants and agents acts and omissions, if they are performed within the scope of their employment,³¹ but also for the acts and omissions of the actual carrier and his servants and agents.

These provisions makes it easier for the plaintiff when he is looking for someone responsible to sue. Since the contracting and the actual carrier has been made jointly and severally liable, the plaintiff is spared the difficulties surrounding the matter of proving who caused the damage.³²

2.2 The Actual Carrier

The contracting carrier can, as mentioned, engage a third party to perform the actual transportation and this third party would then be the actual carrier, the one who actually carries the goods the entire distance or just some part of it.

The actual carrier is not a contracting party with the consignor. The consignor might not even be aware of the fact that the contracting carrier engages someone else, the actual carrier, to perform the transportation.

³¹ See chapter 2.2.1 Article III (2).

³² Giemulla/Schmid/Ehlers, Warsaw Convention, Commentary on the Guadalajara Supplementary Convention, Article III para 1.

According to the Guadalajara Supplementary Convention, Article I (c) the expression “actual carrier” means:

“a person, other than the contracting carrier, who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph b/ but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.”

As can be inferred from the Article, the actual carrier is not the same person or entity as the contracting carrier, he is someone who by virtue of authority performs the carriage or some part of it. This distinction is important as is the fact that the actual carrier actually carries. Ehlers states that “a person who is named the actual carrier on the basis of a contractual agreement with the contracting carrier but who in fact for some reason does not perform the carriage does not qualify.”³³ He goes on by saying that “the actual carrier must be in charge of the crew, the flight and the aircraft used.”³⁴

As can be concluded from the definition in Article I (c) cited above, the actual carrier must also be authorised by the contracting carrier. According to Ehlers, the actual carrier is authorised if the consent given by the contracting carrier has become clear but the authorisation can also be implied, for example, the contracting carrier paying the actual carrier.³⁵

³³ Gjemulla/Schmid/Ehlers, Warsaw Convention, Commentary on the Guadalajara Supplementary Convention, Article 1 para 7.

³⁴ Ibid.

2.2.1 The Liability of the Actual Carrier

The actual carrier is liable only for the part of the transportation, which he performs.³⁶ This is also the only part the actual carrier can control and influence and it would be astounding should he be liable for some part of the carriage beyond his control; a carriage performed by someone else.

The actual carrier is also held liable for the contracting carriers and his servants and agents acts and omissions, as can be deduced from Article III (2):

“The acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 of the Warsaw Convention. Any special agreement under which the contracting carrier assumes obligations not imposed by the Warsaw Convention or any waiver of rights conferred by that Convention or any special declaration of interest in delivery at destination contemplated in Article 22 of the said Convention, shall not effect the actual carrier unless agreed by him.”

An interesting difference can be noticed from Article III (1) and (2). When no act or omission shall subject the actual carrier to liability exceeding the limits of Article 22 of the Warsaw Convention, no such thing is expressed on behalf of the contracting carrier. If the requirements in Article 25 of the Warsaw Convention are met, the contracting carrier can in fact be held fully

³⁵ Gjemulla/Schmid/Ehlers, Commentary on the Guadalajara Supplementary Convention, Article I para 8.

³⁶ See chapter 2.1.1 Article II.

liable for the acts and omissions of the actual carrier, his servants and agents.³⁷

2.3 The Successive Carrier

The successive carrier is one of at least two carriers who takes part in a chronological transportation; each successive carrier transporting the goods some portion of the entire distance. Even if the successive carrier shows resemblance with the previously discussed actual carrier it is important to distinguish the two. That the actual carrier is not a successive carrier is emphasised in Article I (c) of the Guadalajara Supplementary Convention.³⁸

Article 30 of the Warsaw Convention is divided into three paragraphs, but only paragraph 1 and 3 will be discussed since they are the ones, which are of interest to the matters concerning carriage of goods.³⁹

Article 30 (1) reads:

“In the case of transportation to be performed by various successive carriers, and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation which is performed under his supervision.”

As can be seen from the wording, the Article makes a reference to Article 1 (3) of the Warsaw Convention which states that:

³⁷ Miller, *ibid.* p. 262. See appendix 7.1 for Article 22, 25 and 25A.

³⁸ See chapter 2.2.

“Carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.”

Article 30 (1) refers to Article 1 (3) and states that the requirements of the latter has to be met. As Article 1 (3) governs and defines whether the carriage is a successive one or not, Article 30 governs the liability of the successive carrier.⁴⁰ If the carriage cannot be held to be a successive carriage, then Article 30 does not apply.

It is important to know what exactly the intentions of the contracting parties were when they agreed upon the conditions of the carriage, because, as Article 1 (3) puts it, the carriage will be considered undivided “if it has been regarded by the parties as a single operation.”⁴¹ It does not matter if the single operation is undertaken under one or more contracts, but it has to be agreed by the parties in advance.⁴² Another requirement is that the carriage has to be performed by several successive air carriers.

Article 1 (3) also appears helpful in determining whether a successive carriage is international or not. This is important since the Warsaw

³⁹ Diederiks-Verschoor. Considerations on Carriage by Air Executed by Various Successive Carriers. 1970 ETL 144. See also appendix 7.1 for Article 30 (2).

⁴⁰ Lawrence B. Goldhirsch. The Warsaw Convention Annotated: A Legal Handbook. Martin Nijhoff Publishers. Dordrecht 1988. p. 159.

⁴¹ Diederiks-Verschoor. An Introduction to Air Law. Sixth revised edition 1997. Kluwer Law International. p. 81; Miller, *ibid.* p. 22.

⁴² Giemulla/Schmid/Ehlers, Warsaw Convention, Article 1 para 14; Miller, *ibid.* p. 21; Mankiewicz, *ibid.* p. 41; Magdelénat, *ibid.* p. 23; Shawcross & Beaumont, issue 74, VII/152.

Convention only applies to “international carriage”.⁴³ According to Miller, Article 1 (3) “singles out the original point of departure and the final destination as the only elements to be considered in the ascertaining whether a carriage is international.”⁴⁴ This simplifies things somewhat. If part of the successive carriage is performed within the territory of the same State, this does not make the carriage non-international when this particular carriage is seen as part of one undivided carriage.⁴⁵ One simply identifies where the successive carriage begins and where it ends.

If the carriage is a successive carriage according to Article 1 (3), then each successive carrier shall be subject to the rules of the Warsaw Convention and its liability system. When reading Article 30 (1) one also finds that he shall be deemed to be one of the contracting parties to the contract of transportation which is performed under his supervision.

The successive carrier is one carrier out of several who undertakes to perform part of a transportation which is regarded by the contracting parties to be a single operation.

2.3.1 The Liability of the Successive Carrier

The liability of the successive carrier differs from the liability of the actual carrier, as can be inferred from Article 30 (3):

“As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of

⁴³ See appendix 7.1 for Article 1 (1) WC.

⁴⁴ Miller, *ibid.* p. 21.

⁴⁵ Shawcross & Beaumont, issue 74, VII/152.

action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or to the consignee.”

The general rule is that the successive carrier is liable only “during the part of the carriage which has been performed under his supervision.”⁴⁶ In case of destruction, damage or loss the first carrier can be held liable by the consignor even though the damage, destruction or loss did not happen during that part of the carriage. The last carrier can be held liable by the consignee even though he took no part in the damage causing event. The reason for this system is that it is almost impossible to prove when the damaging event occurred.⁴⁷ If it can be proven during which part of the successive carriage the damage was caused, that carrier is liable and can also be sued by the consignor and the consignee. But, even though it is known who caused the damage, the consignor and the consignee can choose to hold either the first carrier or the last carrier liable since all carriers participating are jointly and severally liable according to Article 30 (3).⁴⁸

As mentioned in the beginning under this caption, there are differences in liability between the actual carrier and the successive carrier. The former cannot be held liable beyond the limits of Article 22 of the Warsaw Convention but this is not so with the latter who can be held fully liable for another successive carriers damaging acts.⁴⁹

⁴⁶ Mankiewicz, *ibid.* p. 95.

⁴⁷ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 39 para 29.

⁴⁸ Shawcross & Beaumont, issue 74, VII/296.

⁴⁹ Miller, *ibid.* p. 258.

3 Destruction, Damage and Loss

What is the carrier liable for? According to Article 18 (1) for destruction, loss and damage to the goods if the destruction, damage or loss has been inflicted during the transportation by air.⁵⁰ Obviously there has to be a causal connection between the occurrence and the damage.

What then is destruction, loss and damage? One might think that it is unnecessary to determine the differences in meaning between the words, but one would be terribly wrong in thinking that. It is of utmost importance to make clear what kind of damage that has occurred, and the importance becomes very clear when reading Article 26 (2), which reads:

“In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within (---) fourteen days from the date of receipt in the case of goods.”

Article 26 (2) speaks of damage, not destruction or loss. This is why it is vital to decide the fate of the goods. If the cargo is destroyed or lost no notification to the carrier is needed.⁵¹ Mankiewicz claims that this is unnecessary since, in case of destruction and loss, “the carrier is already

⁵⁰ One should be aware of the Montreal Protocol No. 4 which is now in force. By virtue of the new amended Article 18 (3) the carrier has a possibility to exempt himself from liability in case of loss, destruction or damage to the carried goods by invoking that the loss, destruction or damage is the result of any of the enumerated exemptions. See appendix 7.4.

⁵¹ Reverse conclusion of Article 26 (2). Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 14; Mankiewicz, *ibid.* p. 180.

aware of it.”⁵² However, in the case of damaged goods, it is, as can be seen in the text of Article 26 (2), necessary to notify the carrier of the complaint.

3.1 Destruction

Cargo will be considered destroyed if they have ceased to have any “economic value and utility, being reduced in effect to scrap”⁵³ and if the destruction is “both total and obvious.”⁵⁴ Mankiewicz submits that destruction “does not mean only physical destruction of the cargo but also, (- -), such alteration of the goods, or any part of them, as to make them unfit for the use for which they were intended.”⁵⁵

One of the leading cases in distinguishing damage and destruction is *Dalton v. Delta Airlines*.⁵⁶

The Irish citizen, Dalton, shipped five greyhound racing dogs from Shannon in Ireland to Miami in Florida. The dogs were carried from Shannon to Boston by Irish Airlines and the dogs arrived in good condition. The next day Delta Airlines carried the five greyhound from Boston to Miami, the final destination. The dogs were in good condition when handed over to Delta Airlines but at arrival in Miami the dogs were dead. An autopsy proved that the unfortunate animals had suffocated.

Dalton sued Delta and claimed negligence in the carriage of his dogs. However, Delta claimed that Dalton “did not give written

⁵² Mankiewicz, *ibid.* p. 180. A similar view is held in *Fothergill v. Monarch Airlines* (1980) 2 Lloyd’s Rep. 295, where the judges cite Dr. Guldimann on p. 300. See also Goldhirsch, *ibid.* p. 130.

⁵³ Shawcross & Beaumont, issue 72, VII/271.

⁵⁴ *Ibid.*, issue 72, VII/271.

⁵⁵ Mankiewicz, *ibid.* p. 168.

⁵⁶ *Dalton v. Delta Airlines, Inc.* 570 F.2d. 1244 (1978).

notice of his claim until the 20th day after the arrival of the dead greyhounds.”^{57, 58}

From Delta Airlines point of view the goods had been damaged. The court saw it differently and held that “live dogs are goods, when dead they are no longer just damaged goods. They are not at all the thing shipped.”⁵⁹ The court concluded that the dogs were in fact destroyed, and since the dogs were destroyed, Dalton needed not complain according to Article 26 (2) which by “its own terms (...) is applicable only in cases of damage or delay.”⁶⁰

The Dalton case is important and is frequently cited since it expresses the view that destroyed goods “are wholly without economic value or utility to the shipper/consignee beyond the mere scrap value”⁶¹ as mentioned above. This view is somewhat made clear in Hughes – Gibb & Co. v. Flying Tiger Line.⁶²

In Hughes –Gibb & Co. v. The Flying Tiger Line, 60 breeding swine⁶³ out of a total of 130 had died, probably as a result of suffocation, during the carriage from Chicago in the United States to Manila in the Philippines. The grim fate of the 60 swine were discovered upon arrival at Manila.

Flying Tiger Line held that the pigs “in contrast to the Dalton dogs, must be considered damaged”, for which notice to the carrier had to be given according to Article 26 (2), “rather than destroyed (---) because, even when dead, they (the pigs) had

⁵⁷ Ibid. p. 1245.

⁵⁸ Article 26 (2) of the unamended version of the Warsaw Convention, which the United States of America is bound by, speaks of a period of seven days in which the person entitled to delivery must complain.

⁵⁹ Dalton v. Delta Airlines p. 1247.

⁶⁰ Ibid. p. 1246.

⁶¹ Ibid. p. 1247.

⁶² Hughes-Gibb & Co. , LTD. v. Flying Tiger Line, Inc. 504 F.Supp. 1239 (1981).

⁶³ 12 more pigs died during transportation in the Philippines but their fate will not be discussed here.

economic value.”⁶⁴ This argument presented by Flying Tiger Line was based on the fact that dead swine are edible, so, unlike dead greyhounds, they had some value. This argument, however, was rejected by the court which pointed out that the “economic value test for destroyed goods” put forward by the Dalton court “is whether the goods remain useable for the owner’s purpose.”⁶⁵

One sees the point in the defendants argument, that dead pigs have value when served as meals while dogs, in most countries, have not. A dead pig comprises a value and with the economic value test from the Dalton v. Delta Airlines case in mind, a dead pig would in fact be damaged goods and not destroyed goods. However, not only does the economic value test speak of a total absence of economic value beyond mere scrap value it also says, as the court in Hughes-Gibb & Co. v. Flying Tiger Line rightly points out, that the goods are wholly without utility beyond mere scrap value. Even though the object shipped still comprises some economic value it might be totally useless for the intended purpose. The shipped pigs were bought for the purpose of breeding not for the purpose of being served on a plate. The court came to the obvious conclusion that dead breeding swine can scarcely breed, and from the owners point of view the 60 dead swine had no value and therefore they were destroyed.

3.2 Damage

Obviously there are some difficulties in defining the word “damage”. It appears that there are consensus about the fact that it should comprise

⁶⁴ Hughes-Gibb & Co. v. Flying Tiger Line p. 1243.

⁶⁵ Ibid. p. 1243.

physical damage as well as deterioration.⁶⁶ It has also been held that “damage concerns the state or condition of the goods.”⁶⁷ Physical damage ought to be reasonably easy to detect.⁶⁸ However, it can sometimes be hard to determine whether the damage to the carried goods are so severe that it is damaged or actually destroyed.

Stud⁶⁹, the owner of the shipped horse, Super Clint, sued Trans International Airlines for damages since the shipped horse died ten days after shipment from Canada to New Zealand. A post mortem was performed by a veterinarian who came to the conclusion that the cause of death was “pleuro pneumonia probably brought on by the stress of travel and a second and final autopsy concluded that “temperature fluctuations in the cabin (---) probably caused the illness.”⁷⁰

The court recognised the fact that the “carrier is prima facie liable for damage to goods shipped by air if the damage was caused during the transportation by air.”⁷¹

Stud had not complained within the time limit set forth in Article 26 (2) so to him it was vital that the court came to the conclusion that the horse was not merely damaged but, in fact, destroyed. The court reasoned, using a comparison with Dalton v. Delta Airlines, that the dogs shipped in the Dalton case were alive and kicking when handed over to the carrier but dead on arrival. However, the United States Court of Appeal noticed that “unlike the dogs in Dalton, Super Clint arrived alive and in apparent good health. When he left Transamerica’s hands, Super

⁶⁶ Mankiewicz, *ibid.* p. 199; Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 14; Miller, *ibid.* p. 170 who agrees at least to physical damage and so does Goldhirsch, *ibid.* p. 69.

⁶⁷ Malcom A. Clarke. *International Carriage of Goods by Road: CMR*. Second edition. Sweet & Maxwell 1991 p. 304

⁶⁸ *Cartons containing manuals and spare parts for computers were damaged by wetness*. 1999 AL 40.

⁶⁹ *Stud v. Trans International Airlines*. 727 F.2d 880 (1984).

⁷⁰ *Ibid.* p. 881.

⁷¹ *Ibid.* p. 882.

Clint had been neither lost or destroyed. At most, according to the allegations of the complaint, the horse had been damaged.”⁷²

The facts at hand at the time of delivery will decide whether the cargo is damaged or destroyed. The pigs in *Hughes – Gibb & Co. v. The Flying Tiger Line* and the dogs in *Dalton v. Delta Airlines* arrived dead unlike *Super Clint*. *Super Clint* was alive and the carrier had no reason to believe or suspect, at the time of delivery that the horse had suffered damage that later resulted in death.

3.3 Loss

According to Goldhirsch⁷³ loss constitutes the situation when the shipped goods cannot be delivered to the named consignee in the air waybill. Situations when this type of problem arises could be when the goods is nowhere to be found, it is delivered to the wrong consignee or to anyone who is not entitled or authorised to delivery, when the goods are stolen⁷⁴, or the goods “has been altered to the extent that it cannot be used in the manner intended.”⁷⁵

According to the *Dalton* court loss “means that the location, or even the existence of, the goods is not known or reasonably ascertainable.”⁷⁶ I believe that goods can be lost even though the carrier knows where the goods are. If it is, as mentioned above, delivered to the wrong consignee and the carrier realises the mistake but his efforts to repair the mistake and reclaim the goods are unavailing; then the goods are lost. I do not think one should

⁷² Ibid. p. 883.

⁷³ Ibid. p. 69. See also Mankiewicz, *ibid.* p. 168; Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 13.

⁷⁴ Goldhirsch, *ibid.* p. 69.

⁷⁵ Mankiewicz, *ibid.* p. 168.

⁷⁶ *Dalton v. Delta Airlines* p. 1246.

define loss as a situation where the goods is nowhere to be found although, I admit, this would normally be the case. Loss could be defined as a situation where the carrier cannot deliver the goods, according to the contract for carriage, to the consignee. In cases of damaged and destroyed goods the carrier is able to deliver the goods, however not in the condition intended. The goods are physically there at the time of delivery. In cases of lost goods, at the agreed time of delivery, the goods is not there. The carrier cannot deliver and even when , as suggested, he knows to which person he has miss delivered, the goods is lost if he cannot again get possession of it. The Frankfurt Higher Regional Court has held that “the release of the goods to a person other than the consignee named in the air waybill (---) constituted a loss within the meaning of Article 18 of the Warsaw Convention. A loss could be considered to have occurred when the goods had been delivered to the wrong party and could not be reclaimed from that party.”⁷⁷

The Dalton court is however right when it explains that lost goods are “wholly without economic value or utility to the shipper/consignee beyond mere scrap value.”⁷⁸

3.4 Partial Loss – Damage or Loss?

Clarke holds that partial loss must be distinguished from damage since the former “affects the quantity, weight or volume of goods”.⁷⁹ Damage, in his opinion, relates to the goods state and condition.

Miller believes that the English translation is not as clear as one might wish since damage can be interpreted as also including non-physical damage.⁸⁰ To her knowledge, the French word “avarie” refers “to the physical damage”

⁷⁷ Wolf Müller-Rostin. Recent Developments in German Aviation Law. 1991 AL 16.

⁷⁸ Dalton v. Delta Airlines p. 1247.

⁷⁹ Clarke, *ibid.* p. 304.

⁸⁰ Miller, *ibid.* p. 171.

and it “cannot be seen as including cases of partial loss or non-delivery.”⁸¹ Müller-Rostin is of the opinion that the French text does not lead to a clear definition and goes on by simply stating that whether the word “avarie” comprises both damage and partial loss is still a matter of dispute.⁸²

Let us look at some cases where the partial loss is categorised as loss.

The Civil Court of the City of New York held that loss of three packages out of a total thirty was a loss and not a partial loss. Apparently the cargo documentation evidenced that the shipment was not sent as a whole but as thirty packages, three of them never delivered.⁸³

In *Schwimmer v. Air France*⁸⁴, Schwimmer shipped eleven cases containing household goods and furniture from Moscow to New York. Only four of the eleven cases reached New York and Schwimmer but in damaged condition. The other seven cases Schwimmer never received. Schwimmer lost the suit since he had not complained within the time limits required by Article 26 (2) for damaged goods and in the case of the lost goods within the time period in Article 29 (1). However an interesting remark was made by the court. To the defendants, Air France, argument that “the loss of a portion of a shipment constitutes ‘damage’”, the court disagrees and responds “damage is damage and loss is loss.”⁸⁵

⁸¹ Miller, *ibid.*

⁸² Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 16.

⁸³ 1987 AL 44.

⁸⁴ *Schwimmer v. Air France* 384 N.Y.S.2d 658

⁸⁵ *Ibid.* p. 659. See also *ST. Paul Insurance Co. Of Illinois v. Venezuelan International Airways, Inc.* 807 F.2d 1543 (11th Cir. 1987) where it was held that “(l)oss, (---), should not mean only total loss; ‘loss’ should mean all kinds of loss and ‘damage’ should mean only physical damage.” p. 1543.

It was held that “loss of portion of shipment does not constitute ‘damage’”.⁸⁶

In other cases partial loss has been construed as damage.

The Higher Regional Court in Cologne interpreted the word “avarie” contrary to Miller and held that the word also covered partial loss.⁸⁷ In another case decided by the Oberlandesgericht Hamburg a shipper had sent eight packages and upon arrival it was discovered that damage had been inflicted to some of the packages and shortages in contents of the packages were noted. “In the case before the Hamburg court, the eight packages comprising the shipment were not listed as separate packages; the air waybill did not list each package individually, but rather lumped them together under a total number, 8, and a total weight and thus consolidated them into a single shipping unit.”⁸⁸ Since the eight packages were not listed individually in the air waybill the court determined that this was a case of damage.

In *Parke, Davis & Co. v. BOAC*⁸⁹ 75 cages containing 900 live Rhesus monkeys were transported from India to the United States of America. Upon arrival 185 animals were missing and plaintiff, Parke, Davis & Co., brought action for damages. BOAC held that this was damage but this view was challenged by plaintiff who claimed partial loss. The court ruled in favour of the defendant and held the 185 missing monkeys to be damage and not partial loss. “There is no validity to the claim by plaintiff that this was a partial loss and not a damage claim.”⁹⁰

⁸⁶ *Schwimmer v. Air France* p. 658.

⁸⁷ Müller-Rostin. 1991 Al 14

⁸⁸ Müller-Rostin. 1991 AL 15; Giumulla/Schmid/Ehlers, Warsaw Convention, Article 26 para 26.

⁸⁹ *Parke, Davis & Co. v. British Overseas Airways Corporation* 170 N.Y.S.2d 385.

⁹⁰ *Ibid.* p. 387.

One of the more important cases are undoubtedly *Fothergill v. Monarch Airlines*⁹¹ in which Mr. Fothergill accompanied by his wife had been on a holiday. When Mr. Fothergill picked up his baggage he discovered that a side seam on his suitcase was completely torn away. Fothergill filed a complaint to the carrier, who admitted responsibility and liability for the damage. However, when he got home Fothergill noticed that, not only had his suitcase sustained damage during carriage, some of its contents were missing. He reported this to his insurance company which about a month later claimed Monarch Airlines for the damages, both the damage to the suitcase and the loss of contents. Monarch Airlines admitted liability for the damaged suitcase but rejected the claim concerning loss of contents. The issue before the court was whether “damage in the sense of physical injury in art. 26 (2) include loss of contents of registered baggage and if so whether the notice given was sufficient.”⁹²

The House of Lords, provides a long discussion of whether the word “damage” includes “partial loss” or not. The court recognises that damage in the English text of the Warsaw Convention sometimes refers to “monetary loss” and sometimes to “physical damage”.⁹³ The House of Lords then turns its attention to the French text which, in the courts opinion, “at least avoids part of the English difficulty, in that it confines the use of the word ‘dommage’ to monetary loss... When it refers to physical ‘damage’ it uses the word ‘avarie’ “. ⁹⁴

In the courts efforts to try to determine the possible meaning and scope of “avarie” they turn to dictionaries and doctrine. It is held

⁹¹ *Fothergill v. Monarch Airlines, LTD* (1980) 2 Lloyd’s Rep 295. Although this thesis deals only with cargo related question this case is illustrative to this discussion. For another baggage case where a partial loss of contents were also considered damage, see 1986 AL 175.

⁹² *Fothergill v. Monarch Airlines* p. 295.

⁹³ *Ibid.* p. 299.

that avarie “has both an ordinary meaning and a special meaning as a term of maritime law. In the ordinary meaning, the word signifies physical damage to a movable; in its special meaning, it is capable of meaning physical damage, or loss, including partial loss.”⁹⁵ The House of Lords recognises that both the English and the French texts uses words that are somewhat ambiguous but it is held, however cautious, that “perhaps the French text points somewhat more in the direction of partial loss than does the English.”⁹⁶ The doctrine analysis performed by the learned judges of the court lead them to conclude that, although they consider both the English and the French texts to be unsatisfactory, “of the governing French text it can at least be said that it does not exclude partial loss from the scope of the paragraph.”⁹⁷ Consequently, the House of Lords holds that damage includes partial loss.⁹⁸

The House of Lords findings in *Fothergill v. Monarch Airlines* contradicts the view represented by Miller who claims that “avarie” does not include partial loss.⁹⁹

The United States District Court came to the same conclusion in *Denby v. Seaboard World Airlines*.¹⁰⁰ Silver had been shipped in a container aboard a Seaboard World Airlines flight from England to John F. Kennedy International Airport. The silver was later stolen while stored in a Seaboard warehouse at the airport. The shipment was described in the air waybill as one container containing 40 packages; 36 of them were missing. Plaintiff, Denby and a group of insurance underwriters, sought

⁹⁴ Ibid.

⁹⁵ Ibid. p. 300.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid. p. 296.

⁹⁹ See above.

recovery but had failed to file a written complaint to the defendant. The court held that in “the context of the modern air freight business, shortages in the contents of a cargo container must be characterised as ‘damage’ within the meaning of Article 26 (2) of the Convention, rather than loss.”¹⁰¹

As the learned judges in the House of Lords had done in *Fothergill v. Monarch Airlines*, a discussion was held by the United States District Court in this case on how to define the word “avarie”. The court reaches the same conclusion as the House of Lords and holds that “a linguistic analysis is inconclusive, indicating at best that the use of ‘avarie’ in Article 26 does not require defining damage to exclude shortages from containers.”¹⁰² The court goes on by stating that “(l)oss of one or more whole packages – whether cartons, loose pieces, suitcases or containers – may need no written notice. But delivery of a package or container with part of its contents missing is damage and requires notice...”¹⁰³

Magdelénat states that, in America, “a partial loss is not assimilated to damage”¹⁰⁴ and as a consequence of this fact it is not necessary for the consignee to give notice to the carrier in cases of partial loss. If what Magdelénat holds is accurate¹⁰⁵ then the decision in *Denby v. Seaboard World Airlines* is wrong. However, since the United States District Court added so much weight to the *Fothergill* decision, it is more likely that the solution presented marks a new judicial view to this particular problem.

¹⁰⁰ *Denby v. Seaboard World Airlines, Inc.* 575 F.Supp. 1134 (1983).

¹⁰¹ *Ibid.* p. 1137.

¹⁰² *Ibid.* p. 1139.

¹⁰³ *Ibid.* p. 1141.

¹⁰⁴ Magdelénat, *ibid.* p. 111.

¹⁰⁵ Magdelénat’s view is expressed in the book *Air Cargo. Regulation and Claims*. Published 1983. The *Denby v. Seaboard World Airlines* case is also dated 1983. Perhaps, had Magdelénat had the opportunity to read this decision, he might have reviewed his position.

From an English point of view the problem has been resolved since partial loss is held to be equivalent to damage according to *Fothergill v. Monarch Airlines* but also since there is a statutory provision in the Carriage by Air and Road Act 1979.¹⁰⁶

Müller-Rostin is of the opinion that, at least from a German point of view, the distinction whether the partial loss is to be considered as damage or loss is answered by how the goods is sent and how it is documented in the air waybill. He explains that if “one air waybill was delivered for a shipment of several pieces of cargo, some of which are missing, this would have to be viewed as loss.”¹⁰⁷ From this one can deduce that, should the shipment have been sent as a whole, the packages not marked individually, lumped together as a total,¹⁰⁸ the partial loss would be considered as a damage.

¹⁰⁶ Shawcross & Beaumont, issue 72, VII/272 and footnote 2; Magdelénat, *ibid.* p. 112.

¹⁰⁷ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 17.

¹⁰⁸ See above.

4 Transportation by Air

4.1 Transportation by Air According to Article 18

(2).

The transportation by air is defined in Article 18 (2) and reads:

“The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.”

As can be concluded, there are two requirements that have to be fulfilled in order for it to be a transportation by air. One being that the goods has to be “in an airport or on board an aircraft, or, in case of a landing outside an airport, in any place whatsoever”, the other being that the cargo has to be “in the charge of the carrier”. According to Müller-Rostin¹⁰⁹ both requisites has to be met if the Convention shall be applicable.¹¹⁰ Magdelénat¹¹¹ supports this view, stating that it is not enough that the goods is in an airport, it must also be in the charge of the carrier. In case of a landing outside an airport, it

¹⁰⁹ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 31.

¹¹⁰ The Swedish text in Luftfartslagen (1957:297), chapter 9, article 19, para 2, clearly states that both requirements has to be met. “Med lufttransport avses i denna paragraf den tid som godset är i fraktförarens vård på en flygplats, ombord på ett luftfartyg eller, vid en landning utanför en flygplats, var än godset finns.”

¹¹¹ Magdelénat, *ibid.* p. 80. The view is also supported by Miller who claims “there can be ‘carriage by air’ only when the two elements of the definition are present in a particular situation. If only one element of the definition is present, i.e. the carrier is not in charge of the goods even though the goods are in an aerodrome or on board an aircraft, or if the carrier is in charge of the goods even though the goods are neither in an aerodrome nor on board an aircraft, the consequence ought to be that there is no carriage by air on the strength of only one of these elements.” *Ibid.* p. 143.

appears that the requirements in Article 18 (2) are satisfied if the carrier is in fact in charge of the goods.¹¹²

The scope of the Warsaw Conventions “transportation by air” in Article 18 appears wide compared to the requisite “in flight”, Article 1 (1), in the Rome Convention¹¹³ from 1952 which governs the air carriers liability for surface damage. The latter is only applicable to damage on the surface if it is caused by an aircraft “in flight or by any person or thing falling therefrom”.

Article 1 (1) of the Rome Convention, 1952, reads in its entirety:

“Any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by this Convention. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations.”

What is interesting to note is the words “in flight”. In order to hold the air carrier liable for surface damage, the period in which the damage occurred, must be during the time when the aircraft is in flight. The period during which an aircraft is in flight is defined in Article 1 (2) of the Rome convention and reads:

“For the purpose of this Convention, an aircraft is considered to be in flight from the moment when the power is applied for the purpose of actual take-off until the moment when the landing

¹¹² Miller, *ibid.* p. 143; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 67.

run ends. In the case of an aircraft lighter than air, the expression `in flight´ relates to the period from the moment when it becomes detached from the surface until it becomes again attached thereto.”

As can be seen, the carrier is not liable for taxi-ing to and from the runway. Lödrup claims that both the expressions “take off” and “landing run” are so vague that they can be construed to encompass taxi-ing. However, he is of the opinion that taxi-ing falls outside the scope of Article 1 (1) of the Rome Convention.¹¹⁴

Transportation by air comprises so much more. Not only the actual flight. The liability for the carrier begins at the precise moment when he becomes in charge of the goods until he delivers the goods to the named consignee in the air waybill, provided that he is in charge in an airport or on board an aircraft.

In the following the conditions that constitutes the transportation by air will be closely examined, starting with the term “in charge”.

4.2 The Concept of Being “In Charge”.

Mankiewicz¹¹⁵ submits that the words “in charge” is perhaps not the most accurate translation of the French texts “sous la garde”, and puts forward that a more precise translation would be “under the control”. He goes on by saying that “Garde is a term out of art in the French law of civil liability, it

¹¹³ Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome 7th October 1952.

¹¹⁴ Peter Lödrup. Luftfart og ansvar. En undersökelse av tredjemannsansvaret i norsk og fremmede luftrett. Forlagt av Johan Grundt Tanum. Oslo 1966. p. 280-281. The same position is taken by Shawcross & Beaumont, issue 58, V/117.

signifies the 'control' which a person is entitled to exercise and does exercise over a thing or person directly or through an intermediary, servant or agent."¹¹⁶ It may be true that the translation suggested by Mankiewicz would be more correct but I, for one, would say that the concept "in charge" comprises "under the control". It can also be interpreted as "actual control and custody."¹¹⁷ As far as interpretation goes, the German Oberlandesgericht Frankfurt interprets "in charge" in a strict manner, stating that the "consignor and consignee" has to "have been deprived of all control over the goods"¹¹⁸ and that the carrier has to be in control. This is to strict an interpretation. According to *United International Stables v. Pacific Western Airlines*¹¹⁹ the consignor was not totally without control since the horses handlers were on board, but their physical presence did not make the carrier less liable. The carrier was still the one in charge of the goods. One opinion might be, that the consignor does not have to be deprived of all his control and the carrier alone does not have to be in total control for him to be deemed in charge, since the carrier is the one who controls the events and is also the best equipped to prevent damage.

When is the carrier in fact in charge of the goods? The period when the carrier is in charge of the goods begins with the precise moment when the goods leaves the consignors sphere of control and enters the carriers. The carrier is then in charge of the goods until the goods is transferred from the carriers sphere of control into the consignees. This being so even if the consignor or consignee or any of their agents or servants should be present to look after the goods.¹²⁰

It is hard to determine exactly when the liability period begins and ends for the carrier. It is very much a matter of studying the facts in each particular

¹¹⁵ Mankiewicz, *ibid.* p. 170.

¹¹⁶ *Ibid.*

¹¹⁷ *Alltransport, Inc. et. al. v. Seaboard World Airlines* 349 N.Y.S.2d 278

¹¹⁸ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 32.

¹¹⁹ As summarised by Miller, *ibid.* p. 145; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 31; Shawcross & Beaumont, issue 74, VII/287.

case. The critical moments are when the carrier accepts the goods from the consignor and when the carrier delivers the goods to the consignee. During these procedures it can sometimes be delicate to determine who is in charge.¹²¹ In between these critical moments the carrier is in charge. Should damage occur during this period he is liable under the Warsaw Convention provided, of course, that the other requisites are met.

4.2.1 When does the Carrier Begin to be “In Charge”?

When does the air carrier begin to be “in charge” of the goods? One approach could be to consult Article 11 (1) of the Warsaw Convention which reads:

“The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and the conditions of transportation.”

This means, according to some authority,¹²² that the air waybill, when it is signed, is proof that the carrier has actually taken charge of the goods and, should the carriers opinion on the matter differ, it is up to him to prove that he has not received any goods. Miller claims that most problems surrounding the moment when the air carrier “starts being in charge of the goods are solved on the basis of Article 11 (1)”.¹²³ In E.I. Du Pont de

¹²⁰ Magdelénat, *ibid.* p. 81; Miller, *ibid.* p. 149; Mankiewicz, *ibid.* p. 171.

¹²¹ Dieter Schoner. Art, 18 Warsaw Convention, Begin of Carriage by Air: German Federal Supreme Court (Bundesgerichtshof), Decision of 27 October 1978 (I ZR 114/76), 1979 AL 222.

¹²² Mankiewicz, *ibid.* p. 67; Miller, *ibid.* p. 146 footnote 10; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 11 para 7. Some simply acknowledge the fact that the air waybill is *prima facie* evidence of the receipt of the goods. For this see Goldhirsch, *ibid.* p. 43; Magdelénat, *ibid.* p. 42; David A. Glass & Chris Cashmore. Introduction to the Law of Carriage of Goods. Sweet & Maxwell 1989. p. 217. Shawcross & Beaumont holds that sometimes the air waybill will determine when the carrier becomes in charge of the cargo, but sometimes one has to subject the situation to scrutiny. Issue 74, VII/286.

¹²³ Miller, *ibid.* p. 146 footnote 10.

Nemours & Co. v. Schenkers International Forwarders, Inc. the New York Supreme Court held that the “air waybill receipt signed on the back by the air carrier’s warehouseman were prima facie evidence of the delivery of merchandise to the air carrier for shipment.”¹²⁴ This does not say much more than the carrier is in charge of the goods. It does not say when he becomes in charge.

Millers position is rejected by Schoner who claims that Article 11 (1) “does not (...) help to determine the moment *when* the carrier starts to be in charge of the cargo.”¹²⁵ The air waybill shall be prima facie evidence of the receipt of the goods and a receipt by definition is a paper showing that something has been received¹²⁶ i.e., the air waybill is signed after the goods has been received and accepted.¹²⁷ This does not mean that the carrier could not have become in charge previous to the signing of the air waybill. This is the situation in the criticised case from the Bundesgerichtshof¹²⁸ where the carrier became in charge by his employees assistance in de-trucking , which was interpreted as an expression of readiness, a willingness to take charge of the goods.

Article 11 (1) has been changed by the Montreal Protocol No. 4, 1975,¹²⁹ so that the air waybill is prima facie evidence of the acceptance of the goods. In my opinion, the Montreal Protocol No. 4, although, I admit that replacing receipt by acceptance is better, does not make the situation more clear. It says nothing more than the obvious, that when the air waybill is signed by the carrier, it evidences his acceptance of the goods. The amendment provided by the Montreal protocol No. 4 does not solve the problem when the carrier becomes in charge. However, I will submit to the fact that, if the circumstances prior to the signing of the air waybill is unclear, in fact so

¹²⁴ 1975/76 AL 42. See also 1994 ASL 43, where a court in Belgium came to the conclusion that “the description of the goods in the air waybill constitutes a presumption (---) of the acceptance of the goods by the carrier.”

¹²⁵ Schoner, 1979 AL 226.

¹²⁶ P.H. Collin. English Law Dictionary. Esselte Ordbok. 1990. p. 263.

¹²⁷ See appendix 7.1 for Article 6 (2).

¹²⁸ 1979 ETL 651, discussed below.

¹²⁹ See appendix 7.3.

obscure and diffuse as one can not make either heads nor tails of them, the air waybill will prove, at the latest, that from the moment when the carrier or his representative places his signature on it, the carrier is in charge of the goods. Otherwise I support Schoners position, that the air waybill is only prima facie evidence of the receipt of the goods, not when the carrier has become in charge of it.

If the air waybill does not show when the carrier becomes in charge, what does? The moment the carrier becomes in charge starts when he takes over the goods from the consignor. This will be prior to the issuing of the air waybill which means that the carriers liability starts before the air waybill is issued as a receipt for the goods.

When the carrier accepts or, as mentioned, takes over the cargo from the consignor he is in charge. The carrier has to gain control over the goods. However, it can be complicated to decide when he takes over the goods. In a case decided by Oberlandesgericht Nürnberg¹³⁰ the carrier was held not to be liable since the damage occurred before he was in charge of the goods, in this case horses. Although the carrier provided the container in which the horses were supposed to be carried, the carriers servants did not assist the consignor in the actual loading during which the damage happened. Just by providing a container the carrier does not become in charge. Had the carrier in some way assisted the consignor, the matter might have got a different solution.

The Bundesgerichtshof in Germany expresses the view that “it ought to satisfy the requirement if the carrier has been put in a position to exercise actual control over the goods.”¹³¹ In the case,¹³² which the Bundesgerichtshof had to decide, expensive machinery had been severely damaged during the process of de-trucking where an employee of the carrier had assisted. Was the carrier in charge of the goods when the damage was

¹³⁰ 1987 AL 296; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 34.

¹³¹ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 33.

inflicted? The Bundesgerichtshof answered the question in the affirmative. “The term ‘charge’ has to be defined according to the sense and purpose of Art. 18 (2). Its meaning and purpose is apparently to extend the carrier’s liability to cases which do not occur during the carriage by air as such, (---), provided it is in the operation area of an air carrier, so that he is in a position – as far as his obligation to take care of the goods is concerned – to protect them against loss and damage. Where the cargo is delivered to the airport for carriage by air, a physical taking possession of the cargo on the carrier’s part is not required. An agreement between the parties is also sufficient, provided the carrier has been enabled by the shipper or deliverer to exercise actual power over the goods and to protect them from damage or loss. If this is the case, and the air carrier expresses by his acts his will to take over the good in his area of responsibility, custody has passed on to him.”¹³³ As the carrier’s employee assisted in the off loading process, the court’s opinion, as stated above, was that the carrier became in charge of the goods and therefore liable for the damage. Schonher is critical and explains that the court’s findings are too far reaching and hard to support. The employee of the carrier only “helped offloading the goods”¹³⁴ and, according to Schonher’s thinking, therefore the carrier cannot be considered to be in charge. Schonher has a point when he says that had “the carrier’s employee not helped the driver and had damage been caused to the good at that stage, nobody would conclude that the goods were in the carrier’s custody at that moment. The fact that the carrier’s employee helped the driver cannot change this situation.”¹³⁵ Müller-Rostin expresses a view very similar to Schonher’s. “Tasks performed by the carrier in assisting the consignor in enabling the carrier to exercise control over the cargo must not be held against him.”¹³⁶ The machinery was delivered by truck to the airport and with the cargo still inside the truck, the carrier cannot be said to be in charge of it unless the

¹³² 1979 ETL 651

¹³³ Schonher, 1979 AL 223

¹³⁴ Schonher, 1979 AL 226.

¹³⁵ Ibid.

¹³⁶ Giamulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 34.

contract for carriage says otherwise. It has to be unloaded in order for him to be effectively in charge.

The machine was damaged as a result of unfortunate circumstances during offloading as it slipped off the truck. The employee of the carrier assisted in unloading so that he could take charge of the goods. The truck driver, acting as an agent, servant or employee of the consignor, was, in my mind, in charge of the goods until it can be considered to be delivered for the purpose of transportation by air. It cannot be delivered just because an employee of the carrier lends a helping hand in unloading cargo. A kind gesture can, I admit, easily be misconstrued as an expression of readiness to take charge of the goods, but all it is, is in fact a kind gesture. I agree with the criticism of the judgement in this case.

Swiss Bank Corporation and others v. Brink's M.A.T. LTD, and others¹³⁷ is a case frequently referred to when it comes to determining the moment when the carrier becomes in charge. Three consignments of banknotes were taken in a security van to the air carriers, K.L.M., warehouse at Heathrow Airport. The consignments were unloaded, checked and weighed by Brink's M.A.T.'s agent with a K.L.M. employee supervising the procedure. When two consignments had been unloaded, checked and weighed and the third consignment were just about to be checked and weighed, a robbery took place and all three consignments of banknotes were stolen.

The security van was inside the carriers warehouse located within the airport. However, this is not enough to make the air carrier liable since he cannot be considered to be in charge of the goods at this point. The van was unloaded by Brink's M.A.T.'s agents, not the carriers. "If K.L.M.'s employee had unloaded the van, rather than the Brink's Mat employees then they would have been in charge of all three consignments of banknotes the moment they were unloaded."¹³⁸ If one should follow the thinking in the

¹³⁷ 1986 Q.B. 853; and as summarised by Shawcross & Beaumont, issue 74, VII/286-287; Giumulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 38; Glass & Cashmore, *ibid.* p. 214-215.

¹³⁸ Glass & Cashmore, *ibid.* p. 215.

decision rendered by the Bundesgerichtshof,¹³⁹ had the K.L.M. employees unloaded the van they would almost certainly have been in charge of the three consignments from the moment the vans doors had been unlocked and opened and the K.L.M. 's employees, by their actions, had shown their intent to take over the goods.

This was not the situation in *Swiss Bank Corp. v. Brink's M.A.T.* Brink's M.A.T.'s agents unloaded the consignments, checked and weighed them. During these procedures the K.L.M. employees only supervised, but as soon as Brink's M.A.T.'s agent had weighed them the weight was checked in the air waybill by an K.L.M. employee. This was the moment when the carrier became in charge. Brink's M.A.T.'s agent unhanded the consignment.

In this case two of the consignments had entered the carriers sphere of control, i.e., he was in charge of them. The third, however, was considered to still be in the consignors agents charge since, when the warehouse was robbed, the consignors agent was holding the consignment in his hand, ready to put it on the scale.

It appears, from the apparent lack of relevant case law, that the matter when the carrier starts to be in charge is not often the cause of lawsuits. If there has been disputes concerning this issue, they have been of such a nature that the parties have been able to solve the matter themselves.

4.2.2 "In Charge" During Transportation.

From the moment when the carrier takes over the goods and until delivery he is in charge of the goods. Goldhirsch is rightly of the opinion that if the carrier has "physical possession of the goods in an airport or on board"¹⁴⁰ an aircraft, the carrier is also in charge of them. This is true, but being in charge can be extended beyond physical possession, a fact Goldhirsch also

¹³⁹ 1979 ETL 651.

admits.¹⁴¹ When the goods enters the carriers sphere of control he is in charge. He does not need to have the goods in his physical possession. If this were true the carrier could never engage a third party to carry out the actual carriage.

Air transportation, as well as any other mode of transportation, is usually based on a contractual agreement between the consignor and the carrier. If the carrier for some reason opts to engage a third party for the whole or part of the carriage and should an incident occur during that part of the carriage where the third party is in possession of the goods, the carrier is nevertheless deemed to be in charge and therefore liable. This is because the contract for carriage is between the consignor and the carrier and not between the consignor and the third party. The consignor might not even be aware of the third party. If the goods are damaged or lost while in the care of a third party they are lost while in charge of the contracting carrier. The third party is also in charge but just during the distance he performs.

Situations where an agent of the consignor accompanies the cargo throughout the entire transportation does not change the fact that the carrier is in charge. In the previously mentioned case, *United International Stables v. Pacific Western Airlines*¹⁴² races horses were transported from New Zealand to Canada. During the transportation a horse managed to break out of its stall and since a dangerous situation arose that could be disastrous for the entire flight, the captain was forced to destroy the horse. According to Miller, the airline argued “that it could be liable only during the period in which the horses were `in charge of the carrier`, and that they were never in its charge because the plaintiff’s handlers had charge of the horses throughout.”¹⁴³

¹⁴⁰ Goldhirsch, *ibid.* p. 70.

¹⁴¹ *Ibid.*

¹⁴² See footnote 119.

¹⁴³ Miller, *ibid.* p. 145.

The argument made by Pacific Western Airlines was rejected by the court, which held that “even if the carrier was not fully ‘in charge’ of the cargo” the carrier were in “over-all charge of the animals.”¹⁴⁴ The horses handlers presence did not put the consignor in a position where he shared responsibility or liability with the carrier.

4.2.3 “In Charge” After Arrival at the Cargos Destination

After arrival at the airport of destination chances are that the goods has to be stored pending customs clearance and delivery to the consignee.

If the cargo is not unloaded then, according to a decision rendered by the Tribunal of Rome, it is the “carrier’s obligation to keep and guard the unloaded cargo until its final delivery”.¹⁴⁵ If the goods are unloaded and taken to a warehouse within the airport premises the carrier is liable under the Warsaw Convention since he is in charge of the goods and also in an airport.¹⁴⁶ If the carriers warehouse facilities are situated outside the airport, the carrier is only in charge of the goods.

The carrier is also in charge if he himself does not have any storage facilities and therefore stores the goods with a third party before they are handed over to the consignee.¹⁴⁷ However, if the carrier is deprived access to the goods or if he can only get to the cargo with assistance of the third party the situation might be viewed differently. In an Argentine case the cargo was in “private bonded store, the sealing and opening of which required the co-

¹⁴⁴ Ibid.

¹⁴⁵ 1994 ASL 45.

¹⁴⁶ Mankiewicz, *ibid.* p. 172. See also *Westminster Bank, LTD. v. Imperial Airways, LTD.* (1936) 55 Lloyd’s Rep. 242.

¹⁴⁷ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 35 and 43.

operation of another company and the authority of customs officers”, the goods were held not to be in charge of the carrier.¹⁴⁸

4.2.4 “In Charge” During Customs Clearance

Is the carrier in charge while the goods are going through customs clearance? There is a German case where the court came to the conclusion that the liability period ended when the goods were handed over to customs. The court reasoned “that the carriage itself has come to an end, and that the carrier is deprived of any actual or legal possibility of exercising control over the cargo after he has handed the goods over to the customs authorities who then exercises exclusive control.”¹⁴⁹ The same view was held in *Favre v. SABENA* since the carrier “had no right whatsoever of supervision over the goods once they had been handed over to the customs authorities who are solely in charge of the storehouse.”¹⁵⁰ In an Italian case decided by the Tribunal of Rome, some Rolex watches were stolen while stored in the airport warehouse under customs control. The warehouse had a gate which needed two keys for opening, one was held by the customs authorities and the other was held by Aeroporti di Roma staff. It was held that “when the air carrier delivers the goods to the airport handling operator he is no longer in charge of the goods, not by his own choice but as a result of the system which grants monopoly to one operator over ground handling services. At the moment of delivery the air carrier’s liability ceases under Article 18 of the Warsaw Convention.”¹⁵¹

In these cases the courts are looking at who actually controls the goods. When cargo is transferred from the carrier to the customs authorities he no longer has them in his physical possession, he has no direct control over

¹⁴⁸ Shawcross & Beaumont, issue 74, VII/288 and footnote 8 on p. VII/289.

¹⁴⁹ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 43.

¹⁵⁰ Mankiewicz, *ibid.* p. 172.

¹⁵¹ 1999 ASL 41.

them. However, it has been held that physical possession is not needed for the carrier to be regarded as being in control. Does it really matter that the carrier has no actual control over the goods? Can a carrier have non-physical possession over the goods but still be in charge when the customs authorities have, as the German court held above, “exclusive control” over the goods?

It is alleged that if one determine, by for example examining the contractual terms, who is legally in charge then who is actually in charge is irrelevant.¹⁵²

Miller explains that since “a carrier remains legally in charge until he is released by the only person who has the power to do so, i.e. the consignee or his agent, the physical presence of the goods in a customs warehouse is of no relevance. The carrier remains in charge throughout the customs operations until delivery to the consignee can be completed.”¹⁵³

In the *Guardian Assurance Company v. SABENA* the carrier was held liable for theft committed by customs personnel from his warehouse situated within the customs area.¹⁵⁴ In another case it was held that “the period of transportation by air was not terminated when the carrier placed the cargo in its customs bonded warehouse cargo facility.”¹⁵⁵

Which is better, to let the period when the carrier is in charge end when the goods are handed over to customs or to let the carrier be in charge throughout customs clearance? The latter has the advantage that the parties knows who is in charge, that it to say they know who is liable. Since the carriage does not end until, according to this interpretation, the goods are handed over to the consignee one never has to have doubts as far as liability is concerned. The former, on the other hand, is more logical. When the goods are handed over to a customs authority, an authority who can exclude the carrier from all possibilities of control over the goods and from making necessary arrangements to prevent the goods from being damaged, it is

¹⁵² The concept “legally in charge” appears to be what Magdelénat calls “broad interpretation” as opposed to “strict interpretation” which would be “actually in charge”. Magdelénat, *ibid.* p. 81-82.

¹⁵³ Miller, *ibid.* p. 148.

¹⁵⁴ 1976 ETL 918; 1978 AL 126.

¹⁵⁵ 1989 AL 271.

logical to say that the carrier is no longer liable. However, if the customs clearance is performed in the carriers warehouse or in a warehouse where the carrier can in some way influence and have some control over the goods, he might be deemed as still being in charge. Müller-Rostin holds that where “customs treatment is performed either at the customs warehouse or at a warehouse of a third party, the carrier will normally not be in a position to actually control the cargo. During that time he is not in the position to prevent carriage-related damage from occurring. For this reason”, Müller-Rostin explains, “ the carrier is not liable under Article 18 until he is put back in full control of the cargo and in a position to prevent the goods from being damaged or lost.”¹⁵⁶ According to this opinion, the carrier is not liable if he is excluded from possibility to control the goods, but as soon as the customs procedure is over he is once again liable until he is released by delivering the goods to the consignee. One question comes to mind. Who is liable when the goods are being cleared through customs? Is it the customs authorities? Is it the consignor? Is it the consignee and if it is the consignee, is that not strikingly bizarre? When the goods are handed over to customs by the carrier the liability ends for him and the risk is shifted to the consignee. But as soon as the goods are cleared through customs the risk shifts and the carrier is once again liable and remains liable until he delivers the goods to the consignee. If, on the other hand, it is held that the carriage ends when the goods are delivered to the customs authorities then the consignee is liable for the eventual damage during customs clearance.

The solution to this problem is a matter of dispute. In my opinion both solutions are appealing in their own way. However, the legally in charge theory is the one I opt for. The carrier will know, when he enters into a contract for carriage, that, his liability will not end until the consignment is handed over to the consignee named in the air waybill. Should damage occur during customs clearance, he will be held liable and can therefore undertake

¹⁵⁶ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 44.

the necessary measures to minimise his loss, perhaps by buying extra insurance or raise his transportation rates.

If both theories are used by the courts it is very important that the facts of each case are subjected to scrutiny as far as the carriers possibilities to control and influence the goods.

4.2.5 When does the Carrier Cease to be “In Charge”?

The carrier ceases to be in charge the moment when the goods are transferred to the controls sphere of the consignee or any person or entity who is authorised to take delivery.¹⁵⁷ The carriers charge over the goods will also cease if the goods are confiscated by the authorities.¹⁵⁸

4.3 The Concept of “On Board” and “in an airport”.

4.3.1 “On Board”

Now let us turn to the other requirement, that the goods must be in an airport or on board an aircraft. There is no real problem when the goods are on

¹⁵⁷ Mankiewicz, *ibid.* p. 172; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 39.

¹⁵⁸ Shawcross & Beaumont, issue 74, VII/288; Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 45.

board an aircraft¹⁵⁹ since, in those cases, the carrier is always in charge of them.¹⁶⁰

4.3.2 “in an Airport”

There is no definition of an airport in the Warsaw Convention but one can say that an “airport defines a fixed area on the ground...(including the terrain, facilities and equipment), which is partly or entirely meant for aircraft movement.”¹⁶¹

The carrier has to be in charge of the goods within the airport if he is going to be held liable under Article 18 of the Warsaw Convention. If the carrier has agreed to accept the goods somewhere outside the airport it does not mean that he is not liable if damage should occur, it means only that the requisites in Article 18 (2) are not met and therefore the carrier is not liable under the Warsaw Convention. As soon as the goods are transported over the boundaries of the airport, the prerequisites in Article 18 (2) are met and the carrier will be liable if he is considered to be in charge of the goods. This is the situation when the carrier has accepted the goods outside the airport premises and the carrier himself or any of his agents or servants transports the cargo to the airport. If an accident occurs before the shipment reaches the airport and damage to the goods are inflicted he is liable according to the conditions of the contract and national law.¹⁶² Should the accident happen after the crossing of the airport boundaries he is liable under the Warsaw Convention.

¹⁵⁹ Goldhirsch believes that the “easiest case to interpret is one in which there is damage to goods while they were on board the aircraft.” Ibid. p. 70.

¹⁶⁰ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 36. See also summary of United International Stables v. Pacific Western Airlines above.

¹⁶¹ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 36. Shawcross & Beaumont, issue 70, III/3, defines an airport “as the aggregate of the land, buildings and works comprised in an aerodrome” and aerodrome is defined as “any area of land or water designed, equipped, set aside or commonly used for affording facilities for the landing and departure of aircraft.”

The situation is different if the goods are transported to the airport by the consignor. Under those circumstances the carrier is not liable even though the goods are in an airport. Both requirements has to be met. The carrier has not yet effectively been put in charge of the goods and this he becomes when he accepts the goods.

The carrier is liable for storage within the airport.

“In *Hanover Trust v. Alitalia Airlines*¹⁶³ the cargo, banknotes, were in the charge of the carrier, Alitalia, in its cargo building at John F. Kennedy Airport in New York when an armed robbery took place and the banknotes were lost. The air carrier was held liable under the Warsaw Convention.

Another clear case illustrating a carrier definitively in charge within an airport is *Westminster Bank v. Imperial Airways*.¹⁶⁴

In *Westminster Bank v. Imperial Airways* three bars of gold were delivered to Croydon Airport and kept in a strong room within the premises of the carrier, Imperial Airways. On the very same night they were stolen from the strong room where they were meant to be safe.

In the judgement it is said that “it seems to me impossible successfully to contend that at the time when the loss was sustained the carriage by air had not begun.”¹⁶⁵

It is indeed easy to agree with the learned judge Lewis in this case.

¹⁶² Giamulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 36.

¹⁶³ *Manufacturers Hanover Trust Company v. Alitalia Airlines* 429 F. Supp. 964 (1977). An interesting case where the details of the robbery is cautiously and precisely reproduced.

¹⁶⁴ *Westminster Bank, LTD. v. Imperial Airways, LTD.* (1936) 55 Lloyd’s Rep. 242.

¹⁶⁵ *Ibid.* p. 247.

If the goods are stored in the carriers warehouse facility outside the airport the matter is viewed differently. In a case decided by the United States District Court for the Northern District of California, it was held that damage to goods inflicted in the carriers warehouse located just outside the airport could not be held as damage occurring during transportation by air. “The Warsaw Convention (---) are not applicable in cases in which damage is sustained on the ground outside of the airport.”¹⁶⁶

In *Victoria Sales v. Emery Air Freight*¹⁶⁷ a pharmaceutical product was transported from Frankfurt, Germany to J.F.K. Airport in New York where it was unloaded and taken to Emerys, the defendant, warehouse situated less than one-quarter mile outside the airport. When the plaintiff, Victoria Sales, came to pick up the shipment it was nowhere to be found and it was agreed that the cargo was lost at Emerys warehouse facility.

The location of the Emery warehouse proved important. However close it was to the airport, it was still outside the airport boundaries.

The defendants attempted to offer a “more practical, sensible interpretation of Article 18, extending the coverage of the Warsaw Convention to include the storage of cargo at a place outside of the airport until the goods are picked up by the consignee pursuant to the carriage contract.”¹⁶⁸ The defendants also held that “the language of Article 18 must be viewed in the light of modern commercial realities so that Emerys warehouse, despite its location outside of the airport’s official boundaries, may be deemed to be functionally part of the airport.”¹⁶⁹

The court rejected the interpretation suggested by the defendants since the language of Article 18 could not be construed that way.

¹⁶⁶ 1996 ASL 41.

¹⁶⁷ *Victoria Sales Corporation v. Emery Air Freight, Inc.* 917 F.2d 705 (2nd Cir. 1990).

¹⁶⁸ *Ibid.* p. 707.

¹⁶⁹ *Ibid.*

“The plain language of Article 18 draws the line at the airport’s border.”¹⁷⁰ It was held that transportation by air “would include a loss occurring while the cargo was in the air *or* on the ground but within the confines of the airport’s boundaries.”¹⁷¹

The court majority held that the Warsaw Convention did not govern the loss. However, judge Van Graafeiland was dissenting and expressed that in his opinion the loss sustained did fall within the term transportation by air. He even suggested that the matter should perhaps not be viewed as a loss outside an airport since the word airport is not defined in the Warsaw Convention. He argues that we should view “airport as functional rather than ‘metes and bounds’ entities. Because of the tremendous growth in air cargo transportation and the virtual impossibility of crowding all the unloading and delivery facilities of every carrier into the geographical confines of busy airports, we ought to interpret the term ‘airport’ in a manner that will carry out the general intent of the Convention’s framers.”¹⁷² Judge Van Graafeiland suggests “that if a carrier is performing the normal functions of an airport facility in its handling of cargo, the general intent of the framers would be to bring it within the ‘transportation by air’ provision of the Convention.”¹⁷³ The learned dissenting judge cites Shawcross & Beaumont when arguing for his opinion. The expression airport “is in a more common use than ‘aerodrome’, as signifying the whole undertaking involved in the use of an organized place for landing and departure of aircraft, and the embarking and disembarking of passengers, rather than the piece of land used for that purpose.”¹⁷⁴

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid. p. 710.

¹⁷³ Ibid. p. 711.

Judge Van Graafeilands opinion, however well expressed, is wrong. Article 18 is clear on the matter and does not leave room for speculation or dubious interpretation. Transportation by air comprises the period during which the goods are in the charge of the carrier, whether in an airport or on board an aircraft. Note the words “in an airport” in Article 18 (2). It does not say whether in an airport or just outside an airport. If the courts starts to construe the definition of an airport to also encompass warehouses just outside the airport, then how far away from the airport boundaries is just outside? If we want conformity in the rulings from various courts the interpretation of the Articles ought to be carried out with caution and if a change of an Article is needed this change should be through an amendment to the Convention.

The arguments presented by judge Van Graafeiland in his dissenting opinion is worth considering though. The air transportation industry is growing to proportions not conceivable when the Warsaw Convention was originally drafted in the late 1920’s. The airports today, are in many cases becoming to small and they are unable to accommodate all the necessary activities needed for an effective and functional airport. The question is if it is really a necessity for carrier liability that the warehouse storage, for example, is performed within the airport. The harsh reality is, in many cases, that this is simply not possible today with the consequence that the Warsaw Convention is not applicable.

It appears as if the legislators and representatives from different countries and organisations has observed this problem and an attempt was made in Montreal this year to update the Warsaw Convention.¹⁷⁵ Article 18 has been re-numbered to Article 17 and it deals only with cargo related issues. This new Article 17 is divided into 4 subparagraphs and subparagraph 3 reads:

¹⁷⁴ Ibid.

¹⁷⁵ Jeroen Mauritz. Reports of Conferences. Current Legal Developments: The ICAO International Conference on Air Law, Montreal, May 1999. 1999 ASL 153.

“The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.”¹⁷⁶

According to this new draft it is enough that the carrier is in charge of the goods to trigger liability under the Warsaw Convention.¹⁷⁷

The carrier is also liable for surface transportation within the premises of the airport. This could be during loading and unloading or during transshipment between aircrafts.

In *Julius Young Jewelry v. Delta Air Lines*¹⁷⁸ jewelry was lost by an independent contractor engaged by Delta Air Lines among others. This independent contractor performed transfer service between connecting airlines at the airport. The contractor was considered to be an agent of the carrier, and had the carrier not engaged this agent the carrier would have performed this service

himself and while performing that service he would have been liable under the Warsaw Convention.

¹⁷⁶ For paragraph 1 see appendix 7.5.

¹⁷⁷ It remains to be seen if this draft gains approval in the various States around the world. In order for it to enter into force it needs to be ratified by 30 States, Article 53 (6).

¹⁷⁸ *Julius Young Jewelry Manufacturing Co. v. Delta Air Lines* 414 N.Y.S.2d 528.

5 Surface Transportation

5.1 Surface Transportation According to Article 18 (3).

In the previous chapter the transportation by air was discussed and an attempt to determine the scope of the expression was made. In the present chapter, the issue at hand will be surface transportation and the judicial problems surrounding and evolving out of that area and how transportation performed on the surface sometimes is a part of the transportation by air. One must keep in mind that, although the transportation by air might sometimes comprise even surface carriage, surface transportation covered by Article 18 (3) is not an extension of the transportation by air.¹⁷⁹

The rules governing surface transportation are laid down in Article 18 (3) and governs transportation outside the airport and the carrier is, as a general rule, not liable under the Warsaw Convention for damages to the carried goods during such transportation. If it is proven that the damage took place during some kind of surface carriage, the convention is not applicable. If no such proof, on the other hand, is adduced, the damage will be presumed to have taken place during the transportation by air, even though the damage in fact took place during surface transportation, and the Convention is applicable.

Article 18 (3) reads:

“The period of transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.”

The first sentence of Article 18 (3) makes it very clear that any transportation by land, sea or river outside an airport is not part of the transportation by air, but should such transportation, on the other hand, be performed inside an airport they would be.

Surface carriage, as opposed to transportation by air, is performed by other modes of transportation than aircrafts and would not normally be covered by the Warsaw Convention¹⁸⁰ and surface carriage is not part of the transportation by air according to Article 18 (3) first sentence. But if, according to the second sentence of Article 18 (3), the transportation by land, sea or river outside an airport is performed under a contract for carriage by air any damage during loading, delivery or transshipment is presumed to have taken place during transportation by air.

It is essential that the transportation by land, whether it be for the purpose of loading, delivery or transshipment is incidental to the air transport.¹⁸¹ If it is not, the surface transportation might be held as part of a combined transportation¹⁸² and the suing party has no way of relying on the presumption in Article 18 (3). It is instead he who must prove that the

¹⁷⁹ Shawcross & Beaumont, issue 74, VII/290.

¹⁸⁰ Article 1 (1) WC. “This Convention shall apply to all international transportation (---) performed by aircraft...”

¹⁸¹ Miller, *ibid.* p. 152.

damage took place during the transportation by air if he wants to sue the air carrier.

Arkwright –Boston v. Intertrans Airfreight¹⁸³ is a case where the plaintiff could not rely on the presumption in Article 18 (3) of the Warsaw Convention. The circumstances were such as there was no direct evidence showing where the damage occurred.

A machine was transported from South Carolina, USA, to Northern Ireland. The first portion of the carriage between South Carolina and New York was performed by truck and the plaintiff, Arkwright, alleges that Intertrans received and accepted the shipment in good order and condition. When Intertrans received and accepted the goods in its New York warehouse, an air waybill was issued. The machine was then shipped by air from New York to London and from London to Ireland by truck and boat. At arrival it was discovered that the crate and the machine was damaged. Arkwright alleged that the damage occurred during the transportation by air.

The transportation can be seen , and should be seen in my opinion, as two separate transportations. One being the ground transportation from South Carolina to New York arranged by AVX, the seller of the machine, and performed by Old Dominion Trucking, and the other being the air transportation under the air waybill arranged by Intertrans.

The court explains that at “no time was Intertrans involved in any way in the delivery of the shipment from AVX to Intertrans’ warehouse. Specifically, Intertrans did not arrange for, contract with or pay Old Dominion for the services rendered to AVX.”¹⁸⁴

¹⁸² See chapter 5.3.

¹⁸³ Arkwright – Boston Manufacturer’s Mutual Insurance Company v. Intertrans Airfreight Corp. 777 F. Supp. 103 (D.Mass. 1991)

¹⁸⁴ Ibid. p. 105.

In order for Arkwright to rely on the presumption in Article 18 (3), they had to show that the damage was not inflicted during the ground transportation between South Carolina and New York. Arkwright obviously assumed they could do that by introducing the clean air waybill where no exceptions or indications relating to the goods condition was marked.

The court, however, was not satisfied as the clean air waybill, apparently evidencing the good order and condition of the goods, only furnished proof of the external conditions of the crate. Hence, it could not be excluded that the machine was already damaged when Intertrans accepted it in New York.¹⁸⁵

The court concluded, since Arkwright could not produce any additional proof supporting their case, that the air waybill, evidencing the goods good order and condition, standing alone “quite simply is not enough.”¹⁸⁶

If the surface transportation is incidental to the transportation by air the presumption remains and the burden of proof lies with the carrier. The presumption can be rebutted and if the carrier can prove by adducing evidence that the damage was inflicted during surface carriage the Warsaw Convention is not applicable.¹⁸⁷

As can be concluded from Article 18 (3), not only does the surface transportation have to be for the purpose of loading, delivery or transshipment it also has to be in the performance of a contract for transportation by air. The carrier must be under a contractual obligation to perform such a feeder service if the damage to the goods is going to be held damage inflicted during transportation by air.¹⁸⁸

¹⁸⁵ Ibid. p. 107.

¹⁸⁶ Ibid. p. 108.

¹⁸⁷ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 52.

¹⁸⁸ 1988 AL 145.

5.2 The Concept of Loading, Delivery And Transshipment

5.2.1 Loading

Nowhere in the Warsaw Convention can criteria be found that can be helpful in determining the scope of loading, delivery or transshipment. However, Kuhn has made an attempt to define the three different concepts. “Transportation for the purpose of *loading* under Article 18 (3) is performed by land, sea or river from the place where the goods are to be collected to the nearest airport with the technical equipment and transportation links required for air carriage.”¹⁸⁹

In *Boehringer Mannheim v. Pan Am*¹⁹⁰ a blood chemistry analyser machine had suffered damage during transportation by air. The machine was carried from a Sao Paulo trade show, where it had been demonstrated, to the Viracopos Airport in Brazil. Pan Am then flew it to New York since they had no flights between Brazil and Houston, Texas, which was the goods destination. At the New York airport the machine was unloaded just to be loaded on another aircraft with destination Houston. When a truck driver arrived at the Houston airport to pick up the machine the damage was discovered.

The plaintiff needed only show that the machine was in good condition when the carriage by air began and there was given testimony to that effect, that the blood chemistry analyser

¹⁸⁹ Gjemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 50. Definition suggested by Kuhn.

¹⁹⁰ *Boehringer Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc.* 531 F. Supp. 344 (1981).

machine was not damaged when it was packed for the carriage to the Viracopos Airport.¹⁹¹

The defendants held that plaintiff was unsuccessful in showing that the machine was in good condition at its arrival at Viracopos Airport, an opinion rightly rejected by the court. Pan Am had not objected to the conditions of the shipment upon arrival which could indicate that there were no damages at that point and even if there were it would not have been a task for the plaintiff to show. The court said that under the Convention “plaintiff receives the benefit of a presumption that, subject to proof to the contrary, damage has been the result of an event that took place during transportation by air if the prior transportation by land takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery, or transshipment”.¹⁹²

The court found that it was undisputed that the air waybill was issued when the analyser was still at the United States Trade Center. The court also reminded of Article 11 (1) of the Warsaw Convention; the air waybill is prima facie evidence of the conclusion of contract for carriage. “The land transportation (---) must be deemed transportation for the purpose of loading or delivery in the performance of a contract for transportation by air within the meaning of Article 18 (3).”^{193, 194}

In *Boehringer Mannheim v. Pan Am* it could not be determined where the damage to the blood chemistry analyser machine was sustained and

¹⁹¹ Ibid. p. 346.

¹⁹² Ibid. p. 347.

¹⁹³ Ibid.

¹⁹⁴ A likely scenario is that the machine was damaged during the reloading at the New York airport since the Pan Am employees used a risky technique, “(t)estimony at trial indicated Pan Am employees tilted the crate by using a somewhat risky procedure in which two or three fork-lifts push and then catch the crate as it falls”, although there “was no direct testimony to show whether the crate actually was damaged during this process.” Ibid. p. 347.

therefore the plaintiff benefited from the presumption, that the machine was damaged during the transportation by air since Pan Am had shown no evidence to the contrary.

5.2.2 Delivery

“Transportation for the purpose of *delivery* under Article 18 (3) is a transport from (---) an airport lying nearest to the place of destination of the goods to that destination.”¹⁹⁵ According to IATA Conditions of Carriage for Cargo¹⁹⁶ delivery service means “the surface carriage of inbound shipments from the airport of destination to the address of the consignee or that of his designated agent or to the custody of the appropriate government agency when required, including any incidental surface carriage between airports.”

Often the consignees place of business lies outside the airport premises or there might be other reasons why the consignee wants the shipment delivered to an address outside the airport. In order to fulfil the contract for carriage the carrier has to transport the goods from the nearest lying airport to its destination and this is normally done by truck.

This was the case in *Jaycees Patou v. Pier Air International*¹⁹⁷ where Patou had contracted a French transport company for shipment and delivery of some 27 boxes women’s clothing. The French company arranged for Trans World Airlines (TWA), one of the defendants, to fly the shipment from Paris to New York, where the goods were transported directly to a warehouse owned by another defendant waiting for customs clearance. Pier Air, yet another defendant, picked up the goods at the warehouse and

¹⁹⁵ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 50. Definition suggested by Kuhn.

¹⁹⁶ IATA Conditions of Carriage for Cargo. (Recommended Practice 1601) Article 1.10.

¹⁹⁷ *Jaycees Patou, Inc. v. Pier Air International*, LTD 714 F. Supp. 81 (S.D.N.Y. 1989)

delivered them to Patou's Manhattan address, but some of the cartons were in damaged condition why Patou filed a lawsuit.

Patou argued that the Warsaw Convention was not applicable since the damage had not occurred until after TWA had delivered the cargo to the warehouse and therefore the damage had not happened as a result of the transportation by air. They claimed that "the Warsaw Convention only applies to damages sustained before release of goods by a carrier after an international flight."¹⁹⁸ Furthermore, Patou argued that there was more than one contract and that the delivery order was evidence of a "separate contract for ground transportation."¹⁹⁹

This was contested by the defendants. The contract should "be read as a whole"²⁰⁰; the air waybill provided for a door-to-door delivery and therefore the ground transportation was included in the transportation by air.

The court agreed with the defendants; there were just one contract evidencing the agreement of a door-to-door arrangement from France to the New York airport and from the airport to Patou's Manhattan premises. Therefore the facts of the case "lead the court to conclude that the presumptive period of transportation by air envisioned in Article 18 (3) did not end until the goods were delivered to plaintiffs premises."²⁰¹

In *Pick v. Lufthansa*²⁰² a shipment of mink skins were hijacked during the ground transportation from the plaintiffs place of business to the airport where they were supposed to have been flown to Germany. The plaintiff argued that the Warsaw Convention was not applicable since the carriage by air had not

¹⁹⁸ Ibid. p. 83.

¹⁹⁹ Ibid. p. 82.

²⁰⁰ Ibid. p. 83.

²⁰¹ Ibid. p. 84.

²⁰² *Pick v. Lufthansa German Airlines* 265 N.Y.S2d 63.

yet begun.²⁰³ The carrier claimed that the “air waybill had been issued for a carriage that by its terms was within the ambit of the treaty and the goods had begun their international voyage.”²⁰⁴

The parties both admitted the fact that the damage, i.e., the hijacking, had occurred during the transportation by road, so the question whether the transportation from the plaintiffs office to the airport was part of the transportation by air or not was left unanswered. I believe that the court would have answered this question in the affirmative.²⁰⁵

In yet another case,²⁰⁶ Air Express International were contracted by Corning, Royal Insurance Co. brought action as subrogee, to transport optical equipment from North Carolina, USA, to London, England. The equipment were transported to Air Express Internationals warehouse situated a couple of miles outside the airport. After reaching the warehouse the goods disappeared.

Air Express International argued that “since the goods were last seen in its warehouse, the goods were not lost in ‘transportation by air’.”²⁰⁷

The court, however, saw the matter differently and referred to Article 18 (3). Since the defendant could not show a place where the goods were lost, the court concluded that the loss was sustained during transportation by air. “The defendant has offered no evidence that the goods were lost on the ground, prior to reaching the airport, except the fact that the goods were last seen in its warehouse. Where the goods actually were lost

²⁰³ Ibid. p. 67.

²⁰⁴ Ibid.

²⁰⁵ So would Müller-Rostin. Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 48.

²⁰⁶ Royal Insurance Company of America v. Air Express International 906 F.Supp. 218 (S.D.N.Y. 1995).

remains a matter of speculation. In these circumstances the Court adheres to the clear terms of the Convention, and holds that the goods were lost during transportation by air.”²⁰⁸

The cases referred to above illustrates how the presumption works. If the transportation on the surface outside the airport is performed within the terms of a contract for carriage, and it is for the purpose of a feeder service ,and if it cannot be determined where the damage to the goods is in fact inflicted, it is presumed to have occurred during the transportation by air.

5.2.3 Transhipment

A transportation for the purpose of transhipment can be a transportation between two different airports by truck if there are no available flights trafficking the particular route.²⁰⁹

5.3 Combined Transportation

Transportation on the surface for the purpose of loading, delivery or transhipment governed by Article 18 (3) shall in no way be misconstrued with combined transportation in Chapter IV, Article 31 of the Warsaw Convention. Even though there are similarities, for example in cases governed by Article 18 (3) where after air transportation the goods are transported by truck to the consignees town office and two modes of transportation are used, it is not a combined transportation since the delivery, in this scenario, is incidental to the air carriage and, furthermore, it takes place in the performance of a contract for carriage by air.

²⁰⁷ Ibid. p. 219.

²⁰⁸ Ibid. p. 220.

If the transportation is going to be considered a combined transportation, it has to be a combination of at least two modes of transportation, air, sea, road or rail. As can be inferred from Article 31 (1) below, the Warsaw Convention will govern only the air portion of such a combined transportation²¹⁰ even though there is only one single contract for carriage which covers the whole carriage.²¹¹

Article 31 (1) reads:

“In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this Convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.”²¹²

It has been held that it is mandatory that, not only that there be at least two different kinds of transportation, the different modes of transportation must be of equal weight.²¹³ In case of a combined air and road transportation the road transportation must go beyond that of a feeder service, it must not be incidental to the air transportation.

In *Pick v. Lufthansa*²¹⁴ the transportation between the shippers place of business and the airport can be viewed as incidental to the air carriage. It can at least not be said to have equal weight and importance as the air carriage since the air transportation was going to be between New York and Frankfurt, Germany.

²⁰⁹ Giumulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 50.

²¹⁰ Giumulla/Schmid/Ehlers, Warsaw Convention, Article 31 para 1; Goldhirsch, *ibid.* p. 171; Magdelénat, *ibid.* p. 26; Mankiewicz, *ibid.* p. 195; Shawcross & Beaumont, issue 72, VII/149; McNair, *ibid.* p. 173.

²¹¹ Giumulla/Schmid/Ehlers, Warsaw Convention, Article 31 para 2.

²¹² For Article 1 see appendix 7.1.

²¹³ Giumulla/Schmid/Ehlers, Warsaw Convention, Article 31 para 2.

²¹⁴ See footnote 202.

The court concluded that the Warsaw Convention was not applicable to ground transportation.²¹⁵ The court also cites Drion: “it may not always be easy to draw the line where surface transport incidental to air carriage ends, and genuine ‘combined carriage’ starts. Generally the concept of combined carriage should not be construed in a restrictive way. The fact that the ground transportation is performed by the air carrier may be an indication that the parties considered it as something incidental to the air transportation, but is by itself not sufficient to take the carriage out of the sphere of Article 31.”²¹⁶

The cited opinion by Drion differs from that of Müller-Rostin’s, who, as above said, is of the opinion that the different modes of carriage should have equal weight, or, at least, close to equal weight.

In *Pick v. Lufthansa*, the parties had inserted in the air waybill the Warsaw Convention limitation to also cover the ground transportation, so the shipper could not recover beyond this limit. This can be done by virtue of Article 31 (2) of the Warsaw Convention, which reads:

“Nothing in this Convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this Convention are observed as regards the transportation by air.”

²¹⁵ *Pick v. Lufthansa German Airlines* p. 64.

²¹⁶ *Ibid.* p. 75.

5.4 Substitute Carriage

Even though it is not expressly covered by the Warsaw Convention in force, a chapter on surface transportation would not be complete without at least mentioning, however very briefly, substitute carriage.

The feeder services discussed above, namely those performed under a contract for carriage for the purpose of loading, delivery or transshipment, governed by Article 18 (3), must be distinguished from substitute carriage. Substitute carriage means that the carrier substitutes part of or the whole air transportation for surface transportation, despite the fact that there exists scheduled air service on the route.²¹⁷

A couple of reasons will be given to why the carrier opts to engage surface carriage instead of air transportation. The feeder plane from the domestic or international airports to the carriers hub or vice versa “may be short on loading capacity or booked to full capacity”, aircrafts are not permitted to start or land at night and substitute carriage might prevent a situation where the goods misses a connecting flight.²¹⁸

When is the carrier permitted to engage surface transportation? Obviously in cases of express agreement with the consignor. If the consignor agrees that some or all of the transportation can be undertaken by surface transportation, then the carrier is entitled to do so. The carrier is also permitted to substitute air carriage for surface transportation by integrating the IATA Resolution 507b in the contract for carriage.²¹⁹ According to IATA Resolution 507b, the possibility for the carrier to engage surface transportation is open if:

a/ lack of available cargo space on such carrier’s air services

²¹⁷ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 53.

²¹⁸ Giemulla/Schmid/Ehlers, Warsaw Convention, Article 18 para 53.

- b/ size, weight or nature of the consignment is such that it cannot be accommodated on the type of aircraft operated by such carrier
- c/ such carrier refuses to accept the consignment
- d/ carriage of the consignment on such carrier's air services will delay its arrival at:
 - the connecting point, where surface transportation is to be used on the first sector, or
 - the final destination, where surface transportation is to be used on the last sector;
- e/ carriage of the consignment on such carrier's air services cannot be accomplished within 24 hours of acceptance of the consignment or within 24 hours of its arrival at a connecting point
- f/ carriage of the consignment on such carrier's air services will result in a missed connection.

Müller-Rostin believes that the provisions of IATA Resolution 507b are “highly flexible” and they make “trucking permissible under almost any circumstances.”²²⁰

Substitute carriage can work to the advantage of both parties. The carrier has the possibility to choose which kind of transportation he shall use and this can be beneficial for the consignor who, obviously, wants his shipment carried as fast as possible without unnecessary delay.

Substitute carriage can, however, cause problems when liability questions are raised. It would appear that there is no consensus on the matter. The final solution to the problem concerning substitute carriage liability cases is yet to be formulated. An attempt was made at the Montreal Conference, May 1999, to solve the matter when the carrier has substituted an agreed air transportation without the consent of the consignor. The carrier should then

²¹⁹ IATA Resolution 507b does not have the force of law. They are only general terms, binding, however, for IATA carriers.

be held liable under the Warsaw Convention since, in case of damage, the substituted carriage will be seen as part of the carriage by air.²²¹

²²⁰ Wolf Müller-Rostin. *Air Carrier's Liability for Surface Transportation*. 1992 ASL 293.

²²¹ See appendix 7.5 for Article 17 (4) last sentence. See also Giemulla/Schmid/Ehlers, *Warsaw Convention*, Article 18 para 58-62; Müller-Rostin, 1992 ASL 291; Ronald Schmid. *Trucking Air Cargo – which liability regime is applicable?* 1991 AL 31, for discussions on substitute carriage liability.

6 Conclusions

Numerous different situations might arise during transportation by air that needs a solution and it is paramount that such solutions can be found. Article 18 of the Warsaw Convention covers a vast area and the scope of it is wide. Even though it is designed to cover such a large area, it works, in my opinion, rather well. This can also be seen when studying the different amendments made over the years. The Hague Protocol, 1955, did not amend Article 18. The Guatemala Protocol, 1971, excluded checked baggage from the scope of Article 18. The Montreal Protocol No. 4, 1975, however, changed the Article quite a bit. Instead of 3 subparagraphs it got 5. A possibility for the carrier to exonerate himself from liability if damage was inflicted to the cargo was inserted, a change for the better I think.

We live in a variable world and the aviation industry has to be able to meet the demands of the public and perhaps also be able to create new demands. As the aviation industry evolves and expands it is vital that it can rely on the fact that the law governing aviation provides effective and acceptable solutions to arising problems rather than hampering the development through inefficiency. If the old solutions are no longer working new ones must be created.

All the parties involved in air transportation should not lose either the benefits nor the disadvantages of the Warsaw Convention just because the geographical area of the airports can no longer accommodate the facilities needed to be functional and efficient. When it is a fact that air carriers are forced to leave the airport area or cannot establish themselves there, not by choice, because there is simply no more available space for them to function in, the law has to adjust to this development.

I was critical of judge Van Graafeiland previously in this thesis, stating that he was wrong in holding that a warehouse one-quarter of a mile outside the

airport boundaries could be held to be within the airport, or at least, a case such as that should not fall outside the scope of Article 18. The current Article 18 cannot support this view and neither can I as far as the law is concerned. However, I am more than willing to support Van Graafeilands intention. When time and evolution changes the conditions for the aviation industry, it must be the task for the legislators to provide a law in conformity with its needs.

The Montreal Conference, May 1999, made adjustments to Article 18. They deleted the requisite, that cargo must be “in an airport or on board an aircraft, or, in case of a landing outside an airport, in any place whatsoever” from the text. This leaves just one requisite, namely that the carrier has to be “in charge” of the goods for the carriage to be “transportation by air”. By eliminating the fact that the goods has to be in an airport or on board an aircraft, problems like the one arising in *Victoria Sales v. Emery Air Freight* can be avoided.

In my opinion a lot can be gained from this change. The parties can rely on the fact that the Warsaw Conventions provisions are applicable from the moment when the carrier accepts the cargo until it is delivered. It also makes the application of Article 18 somewhat easier since only one requisite has to be covered when the carrier shall be held liable.

Until this “new” Warsaw Convention has gained enough ratifications enabling it to enter into force we will have to continue to work with what we have. I am not saying that the current system is unsatisfactory I am merely saying that the changes made at the Montreal Conference, May 1999, are welcome as they appear more “up to date” and in conformity with aviation of our time. However, that the Warsaw Convention as amended by the Hague Protocol, 1955, works is indicated by the fact that the requisites that triggers liability has been left unchanged for 70 years.

7 Appendix

- 7.1 Warsaw Convention as Amended by the Hague Protocol, 1955.**

- 7.2 Article 18 of the Warsaw Convention as Amended by the Guatemala Protocol, 1971.**

- 7.3 Article 11 of the Warsaw Convention as Amended by the Montreal Protocol No. 4, 1975.**

- 7.4 Article 18 of the Warsaw Convention as Amended by the Montreal Protocol No. 4, 1975.**

- 7.5 Warsaw Convention. Draft drawn up at the Montreal Conference, May 1999. Article 17 – Damage to Cargo.**

7.1 Warsaw Convention as Amended by the Hague Protocol, 1955.

Chapter I

Scope – Definitions

Article 1

- (1) This Convention shall apply to all international carriage of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.
- (2) For the purpose of this Convention, the expression *international carriage* means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purpose of this Convention.
- (3) Carriage to be performed by several successive carriers is deemed, for the purpose of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because

one contract or a series of contracts is to be performed entirely within the territory of the same State.

Article 2

- (1) This Convention shall apply to transportation performed by the State or by legal entities constituted under public law provided it falls within the conditions laid down in Article 1.
- (2) This Convention shall not apply to carriage of mail and postal packages.

Chapter II

Transportation Documents

Section I – Passenger Ticket

Article 3

- (1) In respect of the carriage of passengers a ticket shall be delivered containing:
 - (a) an indication of the places of departure and destination;
 - (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.
 - (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss or damage to baggage.

- (2) The passenger ticket shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of this Convention. Nevertheless, if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or if the ticket does not include the notice required by paragraph 1 (c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22.

Section II – Baggage Check

Article 4

- (1) In respect of the carriage of registered baggage, a baggage check shall be delivered, which, unless combined with or incorporated in a passenger ticket complies with the provisions of Article 3, paragraph 1, shall contain:
- (a) an indication of the places of departure and destination;
 - (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more agreed stopping places being within the territory of at least one such stopping place;
 - (c) a notice to the effect that, if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of the carriers for death or personnel injury and in respect of loss or damage to the baggage.
- (2) The baggage check shall constitute *prima facie* evidence of the registration of the baggage and the conditions of the contract of carriage. The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which

shall, none the less, be subject to the rules of this Convention. Nevertheless, if the carrier takes charge of the baggage without a baggage check having been delivered, or if the baggage check (unless combined with or incorporated in the passenger ticket which complies with the provisions of Article 3, paragraph 1 (c)) does not include the notice required by paragraph 1 (c) of this Article, the carrier shall not be entitled to avail himself of the provisions of Article 22 paragraph 2.

Section III – Air Waybill

Article 5

- (1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an “air waybill”; every consignor has the right to require the carrier to accept this document.
- (2) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall, subject to the provision of Article 9, be none the less governed by the rules of this Convention.

Article 6

- (1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.
- (2) The first part shall be marked “for the carrier”, and shall be signed by the consignor. The second part shall be marked “for the consignee”; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.
- (3) The carrier shall sign prior to the loading of the cargo on board the aircraft.

- (4) The signature of the carrier may be stamped; that of the consignor be printed or stamped.
- (5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of the goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

The air waybill shall contain:

- (a) an indication of the places of departure and destination;
- (b) if the places of departure and destination are within the territory of a single High Contracting Party, one or more stopping places being within the territory of another State, an indication of at least one such stopping place;
- (c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carrier in respect of loss of or damage to cargo.

Article 9

If, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the air waybill does not include the notice required by Article 8, paragraph (c), the carrier shall not be entitled to avail himself of the provisions of Article 22, paragraph 2.

Article 10

- (1) The consignor shall not be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.
- (2) The consignor shall indemnify the carrier against all damage suffered by him, or by any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the particulars and statements furnished by the consignor.

Article 11

- (1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.
- (2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent conditions of the goods.

Article 12

- (1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or on the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of

departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.

- (2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.
- (3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.
- (4) The right conferred to the consignor shall cease at the moment when that of the consignee begins in accordance with Article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

- (1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.
- (2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.
- (3) 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 shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

- (1) Articles 12, 13 and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.
- (2) The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air waybill
- (3) Nothing in this Convention prevents the issue of a negotiable air waybill.

Article 16

- (1) The consignor must furnish such information and attach to the air waybill such document as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.
- (2) The carrier is under no obligation to enquire into the correctness of such information or documents.

Chapter III

Liability of the Carrier

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

- (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.
- (2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
- (3) The period of transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid damage or that it was impossible for him or them to take such measures.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of two hundred and fifty thousand francs. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed two hundred and fifty thousand francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) (a) In the carriage of registered baggage and cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogramme, unless the passenger or consignor has made, at the time when the packages was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum greater

than the passenger's or consignor's actual interest in delivery at destination.

(b) In the case of loss, damage or delay of part of registered baggage or cargo, or of any objects contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

- (3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to five thousand francs per passenger.
- (4) The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the day of the occurrence causing the damage, or before the commencement of the action, if that is later.
- (5) The sums mentioned in francs in this article shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrams of gold of a millesimal fineness nine hundred. These sums may be converted into national currencies in round figures. Conversion of the sums into national currencies other than gold shall, in case of judicial proceedings, be made according to the gold value of such currencies at the date of the judgement.

Article 23

- (1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.
- (2) Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 24

- (1) In the cases covered by Article 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this provision.
- (2) In the case covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the question as to who are the persons who have the right to bring suit and what are the respective rights.

Article 25

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

Article 25A

- (1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he

proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier is entitled to invoke under Article 22.

- (2) The aggregate of the amounts recoverable from the carrier, his servants or agents, in that case, shall not exceed the said limits.
- (3) The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 26

- (1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.
- (2) In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay the complaint must be made at the latest within twenty-one days from the date in which the baggage or cargo have been placed at his disposal.
- (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.
- (4) Failing complaint within the time aforesaid, no action shall lie against the carrier, save the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

Article 28

- (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business through which the contract has been made, or before the court at the place of destination.
- (2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

- (1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.
- (2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

- (1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall

be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation which is performed under his supervision.

- (2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.
- (3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV

Provisions Relating to Combined Transportation

Article 31

- (1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this Convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.
- (2) Nothing in this Convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this Convention are observed as regards the transportation by air.

Chapter V

General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

Article 33

Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this Convention.

Article 34

The provisions of Article 3 to 9 inclusive relating to the documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression “days” when used in the Convention means current days, not working days.

Article 36

This Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

- (1) This Convention shall be ratified. The instrument of ratification shall be deposited in the archives of the ministry for Foreign Affairs of Poland, which will notify the deposit to the Government of each of the High Contracting Parties.
- (2) As soon as this Convention shall have been ratified by five of the high Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties who shall have ratified and the High Contracting Party who deposits his instrument of ratification on the ninetieth day after the deposit.
- (3) It shall be the duty of the Government of the Republic of Poland to notify to the Government of each of the High Contracting Parties the date on which this Convention comes into force as well as the date of the deposit of each ratification.

Article 38

- (1) This Convention shall, after it has come into force, remain open for accession by any state.

- (2) The accession shall be effected by a notification addressed to the Government of the Republic of Poland, which will inform the Government of each of the High Contracting Parties thereof.
- (3) The accession shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

- (1) Any one of the High Contracting Parties may denounce this Convention by a notification addressed to the Government of the Republic of Poland, which will at once inform the Government of each of the High Contracting Parties.
- (2) Denunciation shall take effect six months after the notification, and shall operate only as regards the Party who shall have proceeded the denunciation.

Article 40

- (1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of accession declare that the acceptance which he gives to this Convention does not apply to all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or his authority, or any other territory under his suzerainty.
- (2) Accordingly any High Contracting Party may subsequently accede separately in the name of all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or his authority or any other territory under his suzerainty which have been thus excluded by his original declaration.
- (3) Any High Contracting Party may denounce this Convention, in accordance with its provisions, separately or for all or any of his colonies, protectorates, territories under mandate or any other territory

subject to his sovereignty or his authority, or any other territory under his suzerainty.

Article 40A

- (1) In Article 37, paragraph 2 and Article 40, paragraph 1, the expression *High Contracting Party* shall mean *State*. In all other cases, the expression *High Contracting Party* shall mean State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.
- (2) For the purpose of the Convention the word *territory* means only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for the assembling of a new International Conference in order to consider any improvements which may be made in this Convention. To this end he will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such Conference.

This Convention done at Warsaw on the 12th October, 1929, shall remain open for signature until 31st January, 1930.

Additional Protocol

With reference to Article 2

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed

directly by the State, its colonies, protectorates, or mandated territories or by any other territory under its sovereignty, suzerainty or authority.

7.2 Article 18 of the Warsaw Convention as Amended by the Guatemala Protocol, 1971.

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the cargo is in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
3. The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

7.3 Article 11 of the Warsaw Convention as Amended by the Montreal Protocol No. 4, 1975.

Article 11

1. The air waybill or the receipt for the cargo is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of the carriage mentioned therein.
2. Any statements in the air waybill or the receipt for the cargo relating to the weight, dimensions and packing of the cargo, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the cargo do not constitute evidence against the carrier except as far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo.

7.4 Article 18 of the Warsaw Convention as Amended by the Montreal Protocol No. 4, 1975.

Article 18

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, any of the registered baggage, if the occurrence which caused the damage so sustained took place during the carriage by air.
2. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the occurrence which caused the damage so sustained took place during the carriage by air.
3. However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo resulted solely from one or more of the following:
 - (a) inherent defect, quality or vice of that cargo;
 - (b) defective packing of that cargo performed by a person other than the carrier or his servants or agents;
 - (c) an act of war or an armed conflict;
 - (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.
4. The carriage by air within the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.
5. The period of the carriage by air does not extend to any carriage by land, by sea or river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, 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.

7.5 Warsaw Convention. Draft drawn up at the Montreal Conference, May 1999.

Article 17 – Damage to Cargo

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
 - (a) inherent defect, quality or vice of that cargo;
 - (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
 - (c) an act of war or an armed conflict;
 - (d) an act of public authority carried out in connection with the entry, exit or transit of the cargo.
3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.
4. The period of carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, 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. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transportation for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

Bibliography

- | | |
|-------------------|--|
| Bengtsson, Bertil | Kompendium i Transporträtt
4:e uppl. Juridiska Föreningen i Uppsala,
1973. |
| Clarke, Malcom A. | International Carriage of Goods by
Road: CMR. |

- Second edition. Sweet & Maxwell,
London. 1991.
- Diederiks-Verschoor, I.H.P. An Introduction to Air Law.
Sixth revised edition. Kluwer Law
International, The Hague 1997.
- Giemulla, Elmar &
Schmid, Ronald. Warsaw Convention
Kluwer Law International, The Hague
1997.
- Glass, David A. &
Cashmore, Chris. Introduction to the Law of Carriage of
Goods.
Sweet & Maxwell, 1989.
- Goldhirsch, Lawrence B. The Warsaw Convention Annotated:
A Legal Handbook.
Martinus Nijhoff Publishers, Dordrecht
1988.
- Lödrup, Peter. Luftfart og ansvar. En undersökelse av
Tredjemannsansvaret i norsk og
fremmende luftrett.
Forlagt av Johan Grundt Tanum, Oslo
1966.
- Magdelénat, Jean-Louis. Air Cargo. Regulation and Claims.
Butterworths, Toronto and Vancouver,
1983.
- Mankiewicz, René H. The Liability Regime of the International
Air Carrier. A Commentary on the
present Warsaw System.
Kluwer Law and Taxation, 1981.
- McNair, Lord. The Law of the Air.
Third edition, Stevens & Sons, London,
1964.
- Miller, Georgette. Liability in International Air Transport.

The Warsaw System in Municipal
Courts.

Kluwer, Deventer, The Netherlands,
1977.

Shawcross & Beaumont.

Air Law. Volume 4.

Wilson, John F.

Carriage of Goods by Sea.

Third edition, Financial Times Pitman
Publishing, London, 1998.

Dictionaries

Collin, P.H.

English Law Dictionary.

Esselte Ordbok AB, 1989.

Periodicals

Diederiks-Verschoor, I.H.P.

Considerations on Carriage by Air

Executed by Various Successive Carriers

1970 ETL 143.

Mauritz, Jeroen.

Reports on Conferences. Current Legal

Developments: The ICAO International

Conference on Air Law, Montreal, May

1999.

1999 ASL 153.

Müller-Rostin, Wolf.

Air Carrier's Liability for Surface

Transportation.

1992 ASL 291.

Müller-Rostin, Wolf.	Recent Developments in German Aviation Law. 1991 AL 13.
Nys, Roger R.	Legal Aspects of the Carriage of Goods By Air. 1975 ETL 713.
Schmid, Ronald.	Case Law and Comments Trucking Air Cargo – which liability regime is applicable? 1991 AL 31.
Schoner, Dieter.	Art. 18 Warsaw Convention, Begin of Carriage by Air: German Federal Supreme Court (Bundesgerichtshof), Decision of 27 October 1978 (I ZR 114/76). 1979 AL 222.
Schoner, Dieter.	The Freight Forwarder as an Air Carrier. 1980 AL 2.
Sundberg, Jacob W.F.	The Changing Law of Air Freight. 1981 AL 230.
Zamora, Stephen.	Carrier Liability For Damage or Loss to Cargo In International Transport. The American Journal of Comparative Law 1975 (vol. 23) 391.

Conventions, Statutes and Recommendations

Air Transportation

Guadalajara Convention, 1961.

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, Guadalajara, September 18, 1961.

Guatemala Protocol, 1971.

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929 as amended by the Protocol at The Hague on 28th September 1955, Guatemala City, 8th March 1971.

IATA Conditions of Carriage for Cargo. (Recommended Practice 1601).

IATA Resolution 507b

Luffartslagen (1957:297)

Montreal Additional Protocol No. 4, 1975.

Additional Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12th October 1929 as Amended by the Protocol Done at The Hague on 28th September 1955.

Rome Convention, 1952.

Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, Rome 7th October 1952.

Warsaw Convention

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Warsaw, October 2, 1929, as amended by the Hague Protocol, 1955.

Warsaw Convention

Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28th May, 1999.

Road Transportation

CMR

Convention on the Contract for the International Carriage of goods by Road:
CMR, 1956.

Sea Transportation

Hague-Visby Rules

The International Convention for the Unification of Certain Rules Relating
to Bills of Lading as amended by the 1968 Protocol signed in Brussels (the
Hague – Visby Rules).

Table of Cases

Alltransport, Inc. et. al. v.	
Seaboard World Airlines.	349 N.Y.S.2d 277
Arkwright-Boston Manufacturer's Mutual Insurance Company v.	
Intertrans Airfreight.	777 F.Supp. 103 (D.Mass: 1991)
Boehringer Mannheim Diagnostics, Inc. v.	
Pan American World Airways, Inc.	531 F.Supp. 344 (1981)

Dalton, Patrick v.
 Delta Airlines, Inc. 570 F.2d 1244 (1978)
 Denby, M.E. v.
 Seaboard World Airlines, Inc. 575 F.Supp. 1134 (1983)
 Fothergill v.
 Monarch Airlines, LTD. (1980) 2 Lloyd's Rep. 295
 Hughes-Gibb & Co., LTD. v.
 The Flying Tiger Line, Inc. 504 F.Supp. 139 (1981)
 Jaycees Patou, Inc. v.
 Pier Air International, LTD. 714 F.Supp. 81 (S.D.N.Y. 1989)
 Julius Young Jewelry Manufacturing Co., Inc. v.
 Delta Air Lines. 414 N.Y.S.2d 528
 Manufacturers Hanover Trust Company v.
 Alitalia Airlines. 429 F.Supp. 964 (1977)
 Parke, Davis & Company v.
 British Overseas Airways Corporation 170 N.Y.S.2d 385
 Pick v.
 Lufthansa German Airlines 265 N.Y.S.2d 63
 Royal Insurance Company of America v.
 Air Express International 906 F.Supp. 218 (1995)
 Schwimmer, Bernard v.
 Air France. 384 N.Y.S.2d 658
 ST. Paul Insurance Co. of Illinois v.
 Venezuelan International Airways, Inc. 807 F.2d 1543 (11th Cir. 1987)
 Stud, Nevelle R. v.
 Trans International Airlines 727 F.2d 880 (1984)
 Swiss Bank Corporation and others v.
 Brink's M.A.T., LTD. (1986) Q.B. 853
 Victoria Sales Corporation v.
 Emery Air Freight, Inc. 917 F.2d 705 (2nd Cir. 1990)
 Wetminster Bank, LTD. v.
 Imperial Airways, LTD. (1936) 55 Lloyd's Rep. 242

- 1975/76 AL 42 (E.I. Du Pont de Numerous & Co., v. Schenkers International Forwarders, Inc.)
- 1996 ASL 41 (Hiatchi Data Systems Corp. v. Nippon Cargo Airlines)
- 1988 AL 45 (Landgericht Köln)
- 1999 ASL 40 (Oberlandesgericht Frankfurt am Main)
- 1987 AL 297 (Oberlandesgericht Nürnberg)
- 1986 AL 175 (Panzer v. Aerolines Argentinas)
- 1994 ASL 45 (Picconi Ragastense v. Extre Spedizioni Internazionali and Aeroporti di Roma)
- 1978 AL 126 (Rechtbank van Koophandel, van Antwerpen)
- 1987 AL 44 (Siemens Corp. v. KLM)
- 1994 ASL 43 (Sphere Drake Insurance Group v. Swissair et. al.)
- 1999 ASL 41 (Tribunal of Rome)
- 1989 AL 271
- 1976 ETL 918 (The Guardian Assurance Company v. SABENA)
- 1979 ETL 651 (Bundesgerichtshof)

