The Warsaw System : Developing Instruments[1]

Sung-Hwan Shin[2]

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Ⅰ. Introduction : The Warsaw System

There is little doubt that the current system should be modified, mainly because the compensation limit is too low. However, in spite of huge efforts by the U.S. Government, and ICAO and its contracting parties, a resolution has not been reached and it has become fruitless debate. In these circumstances, how to interpret the Warsaw System is very important to get the new solution.

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1. This Article is my disagreement for the thesis of professor Bin Cheng in 'International Conference on Air Transport and Space Application in a new world' in Tokyo on 2-5 June, 1993.

2. Lt.Col. Sung Hwan, Shin, BS in Korea air force academy, LL.B. in Seoul National Univ. Law School, LL.M. in McGill Univ. Air & Space Law. Council Member of the Korean Association of Air Law.

Professor Bin Cheng stated that however, notwithstanding repeated and almost ritualistic resolutions by successive sessions of the brotherhood of airlines in the form of IATA and the league of governments in the form of ICAO, urging States to ratify MAP3, it has not received sufficient ratification to come into force. The result is that the medicine prescribed in 1971, which has by now well passed its "sell-by" date, has not yet been taken.[3] And he also concluded that the Montreal Protocols No.3 and No.4 have increased chances of confusion[4].

But there is a different perspective for the Warsaw System which interpret the Warsaw System as "Developing Instruments". Ratifying the Montreal Protocols No.3 and No.4, States will bring into force a new international instrument resulting from the step-by-step amendments to the original Warsaw Convention, which was achieved in the form of a Protocol (Hague), then Protocol to Protocol (Guatemala) and, eventually, Protocols-to-Protocol-to-Protocol (Montreal Protocols No.3 and No.4).[5] Without such unification of law, complex conflicts of laws could arise and the settlement of claims would be unpredictable, costly, time-consuming and possibly uninsurable. Furthermore, conflicts of jurisdiction could arise which would further aggravate the settlement of liability claims.[6] As a result, withdrawal from the Unification of the Warsaw System with rejection of the Protocols would lead to chaos.[7]

In order to solve the current problems, efforts are being made to find

3. B. Cheng, "The Warsaw System : Mess up, Tear up, or Shore up ? ", International conference on air transport and space application in a new world, Tokyo, 2-5 June 1993, 39 at 2.

4. B. Cheng, "What is wrong with the 1975 Montreal Additional Protocol No.3 ? ", Air L. 1989, 220 at 223.

5. ICAO, "Warsaw System and Text of convenience related thereto", ICAO LE 3/27, 3/28-91/3 (Circular letter on the Warsaw System), Jan.16, 1991, p.11.

6. ICAO, ibid. p.10.

7. S.N.Avruch, "KAL 007 Accident", 76 Boston College Int'l 7 Comp. L. rev.,v.8,no.1, 1985,111 at 122. Proponents' opinion in U.S. Senate.

a new instrument for the unification of the liability system, within and outside of the Warsaw System. To be acceptable worldwide, the solutions must be both "reasonable" in law and "practical" in reality ; while the unification of law is an achievable goal in this field, the varying costs of living in different countries could make it next to impossible to reach a general consensus on the amount of the limit of liability.

Professor Bin Cheng stated in Tokyo conference (June, 1993) that what is perhaps the most regrettable in this whole affair is the determined efforts exerted throughout these years by most airlines and their government in and outside their international forums to persist in promoting an out-of-date cure, now being sold under the name of MAP3, and to discourage any discussion of alternatives, often citing such old saws as, "One bird in hand is better than two in the bush", or "The better may be the enemy of the good".

But I would like to change the above old saws to "One small bird in hand is better than big bird in the bush" and "The best may be the enemy of the better". What are "small bird" and "the better", those mean Montreal Protocol No.3 and No.4 in Warsaw System. The Montreal Protocol No.3 with domestic supplemental plan in Warsaw System may not be a perfect solution in everyone's view but they are far better than the current convention and far better than having no treaty at all.

II. Different Perspectives for the Warsaw System

1. Opponents' Perspective for the Warsaw System

A. U.S. Trial Lawyers' Perspective[8]

The U.S. trial lawyers' perspective is based on two alleged purposes,

8. Senator Ernest Hollings, a former practicing lawyer of South Carolina, led the oppone-

one to protect the U.S. citizen and the other to retain the advantage of the U.S. legal system under the current system.[9]

To protect U.S. victims against the currently low compensation system, they want international airlines to be treated like domestic airlines,[10] which means that they want to apply unlimitd liability to international air transportation. In other words, their aim is the denunciation of the underlying Warsaw Convention.[11] This idea comes from the legal maxim of the tort law and from the fact that American passengers constitute about 50 percent of the world's international passengers.[12] Senator Hollings, a former trial lawyer, stated that Americans would be uniformly forced to settle just claims for less compensation than justified and less than they would settle for here in the domestic market.[13] Also, Mr. Kreindler stated that the sole purpose of the Montreal Protocols is to deny American passengers their rights to adequate damages.[14]

With the advantages in U.S. legal system, U.S. trial lawyers have enjoyed benefits especially under the low-limitation system, but if Montreal Protocols No.3 and No.4 enter into force, it would be hard to continue to keep their interests (except resort to the concept of product liability).

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nts of ratification of the Montreal Protocols in the Senate debate, and as a lawyer, Mr. Kreindler of the New York Bar.

9. See also, R. Mankiewicz, "From Warsaw to Montreal with certain intermediate stops", v.14, Air L, Dec., 1989, 239 at 255.

10. L.S. Kreindler, "Montreal and a Denunciation of Warsaw", July 2, 1990, N.Y. L.J. p.4.

11. L.S. Kreindler, ibid. p.4.

12. E.F. Hollings, "The Montreal Protocols : A Threat to the American System of Jurisprudence", Trial, September, 1982, 69 at 70.

13. E.F. Hoolings, "The Montreal Protocols : A Threat to the American System of Jurisprudence", Trial, May, 1983, 20 at 24.

14. L.S. Kreindler, "Montreal Protocols Ready for Vote", v.189, New York L. J. March 7, 1983, p.1, col.1.

B. Academic Perspective[15]

Professor Bin Cheng stated that Re-Unification of passenger liability limit is no longer realistic.[16] In his opinion, the Warsaw System and a new system should be created. Before the Air Law Committee of the International Law Association (1982, Montreal), Professor Bin Cheng suggested an integrated system of civil aviation liability in internationl carriage by air combined also with provisions in respect of surface damage caused to third parties. The new and crucial element of this proposal was unlimited liability. However, there were strong objections to the concept of unlimited liability.[17] The proposal and opinions of Professor Bin Cheng are contained in the Alvor Draft which was adopted by the Fourth Lloyd's of London Press International Aviation Law Seminar, held at Alvor, Portugal, from 11 to 16 Oct. 1987.[18] No further work has been done on the "Alvor Draft" and there is no United States' governmental support for this academic proposal.

C. Japaness Airlines' action in 1992 : Self-Interest

In an unprecedented move, the airlines of Japan have amended their conditions of carriage to waive, effectively, the limitations of liability for passenger injury or death provided by Article 22 of the Warsaw Convention/Hague Protocol as to passengers carried on the aircraft of the airlines of Japan. The Minister of Transport in Japan has approved the amendments[19]

15. Proponents : Professor Bin Cheng and Professor de la Rechére.

16. B.Cheng, supra, note 4 at 236.

17. ILA, Report of the sixtieth conference, Air Law Committee, (Montreal, 1982) p.586-587.

18. B. Cheng, "Sixty Years of the Warsaw Convention : Airline Liability at the Crossroads", ZLW, 38, J. 4/1989, 319 at 338.

19. Lloyd's Aviation Law, vol.11, No.22, Nov.15, 1992. p.2. Amendments : All other Japanese airlines have adopted similar conditions." JAL agrees in accordance with Article 22(1) of the Convention that as to all international carriage hereunder as defined in the Convention."

and they became effective on November 20, 1992.[20]

On Nov. 20, following the Transport Ministry's approval, the ceiling on international routes of 100,000 SDR ceased to exist. This comes 10 years after a decision to remove a similar ceiling on redress to victims on domestic flights. Although the compensation ceiling on Japan's domestic routes was lifted in 1982, the lifting of the upper limit on international routes has been delayed because of the need to strike a balance with the limits set by various foreign countries.[21]

As the amendment has been made solely by Japanese airlines, it is applicable only to the passengers who are on board Japanese airlines and it is not applicable to passengers who are on board foreign airlines. Therefore, for examples, even if the passenger makes a reservation or purchases a ticket on a flight of foreign airlines through Japanese airlines, the limits of liability of the foreign airlines will be applicable in case the passenger is on board the foreign airlines.[22]

Of course, professor Bin Cheng has strongly proposed the Japanese airlines' action in 1992. He stated that as regards the possible effect of a complete waiver of the limit of liability for passenger injury and death on insurance capacity, insurance premium and air fares, it may be mentioned that the 1992 Report of the Japanese Civil Air Law Research Institute, basing itself 'on Japanese airlines' 10 years of experience of abolishing such limits in domestic flights, while recognizing that the actual increase in premium in specific cases depends on complex factors, basically arrives at the conclusion that there is no real problem, and it is this advice that has been accepted by the Japanese airlines.

But we should examine whether Japanese Airlines' action in 1992 is realistic to practice worldwide or not.

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20. Lloyd's Aviation Law, ibid. p.1.
21. Asahi Evening News, Japan Asahi Daily News Co. Nov.10, 1992.
22. Association of Scheduled Airlines, Nov.9, 1992, (Translation).

2. Proponents' Perspective for the Warsaw System

The Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 is one of the most successful and widely accepted unification of private law.[23] Since aviation was obviously going to link many lands with different languages, customs, and legal systems, it appeared desirable to establish, at the outset, a certain degree of uniformity in legal regulation. The Convention achieved this almost completely as to documentation (passenger tickets, baggage check, waybills) and to a degree as to the procedure for dealing with claims arising out of international transportation and the substantive law applicable to such claims.[24]

This concept of uniformity has been described as "a precious international gift which so far has been insufficiently recongnized in the current debate on the value of the Warsaw system."[25] The Warsaw Convention accomplishes this by creating a presumption of liability for accidents and limits passengers' recovery for injuries caused by such accidents during transportation covered by the Convention.[26] The most trenchant problem has been to maintain the concept of uniformity while different economic conditions have become increasingly the order of the day and to cope with the increasing disparity between industrialized and developing nations.[27]

And the Warsaw system has proven advantages for passengers which should be preserved. These are most evident in respect to the various

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23. M. Milde, "ICAO work on the modernization of the Warsaw system", Air L.,vol. 14, no.4/5, 1989, 193 at 193.

24. A.F. Lowenfeld and A. I. Mendelsohn, "The United States and the Warsaw Convention", Harvard L. Rev., vol.80. Jan.1967 no.3,497 at 499.

25. IFAPA, Fair compensation for passengers in aircraft accidents, IFAPA, 1989, 15 at 15.

26. L. B. Goldhirsch, The Warsaw Convention Annotated--A Legal Handbook, (Nijhoff Pub.Dordrecht, 1988) at 5.

27. IFAPA, supra, note 25 at 8.

aspects of procedural uniformity.[28] The purpose of the treaties is to establish predictable and uniform liability regimes.[29] The proponents argued that the U.S. should take the initiative in updating the law by ratifying the Montreal Protocols, and then encourage other nations to follow suit.[30]

III. The relationship between the passengers and the air carriers : Common Interest

The interpretation of the relationship between passengers and air carriers is very important for the evaluation the Warsaw system, especially with regard to limited liability and unlimited liability.

As an opponent to the Montreal Protocol No.3, U.S. Senator Hollings has stated that the limitation was in the interest of the airlines, rather than the passengers.[31] Also, Professor Bin Cheng believes that air carriers no longer require this protection[32] because the economic position of the aviation industry has changed dramatically. Instead of being an infant industry, air transportation is now a well-organized and technologically sophisticated industry which provides a normal means of conveying passenger traffic over all appreciable distances, almost completely supplanting maritime and other forms of surface transport.[33] In his view, the Montreal Proto-

28. IFAPA, supra, note 25 at 20.

29. J. Marques, 15th Remarks in General Counsel U.S. Department of Transportation Before the American Bar Association National Institute on Litigation in Aviation, Washington, D.C May 30, 1986, p.277.

30. 129th Congress, Rec. S. 2235 (daily ed. Mar. 7, 1983) (Statement of Senate, annotate by S. Avruch, supra, note 7 at 108.

31. S. N. Avruch, supra, note 7 at 114.

32. Also, IFAPA report mentioned that the rationale behind limiting liability was the desire to protect an infant, financially weak industry which would have been unable to sustain massive compensation for damages following a catastrophic accident. There was, not unnaturally, little emphasis on consumer issues at this time.IFAPA, supra, note 25 at 8.

33. B. Cheng, "Fifty Years of the Warsaw Convention : Where Do We Go from Here ? ", ZLW, 1979, 373 at 376.

and the United States announced that it would withdraw from the Convention, effective from March 16, 1966.[42] To prevent a possible chaotic situation, the Council of ICAO decided to arrange international consultations on the matter and convened a Special ICAO Meeting on Limits for Passengers under the Warsaw Convention and The Hague Protocol in February 1966. The United States of America eventually withdrew that notice of denunciation on 14 May 1966, just two days before it was supposed to take effect. The Montreal Agreement of 1966 was adopted by the CAB on 13 May 1966.[43]

The U.S. Government continued to pursue the objective of revising the treaty so as to increase recoveries for claimants and establish a system providing for adequate, certain and speedy recovery. Subsequent negotiations on the passenger liability limit resulted in the adoption of the Guatemala City Protocol in 1971, which increased the passenger liability limit to $100,000 (now approximately $130,000 with the devaluation of the dollar).[44]

However, the U.S. administration never submitted the Guatemala City Protocol to the Senate to seek its advice and consent for ratification, primarily because the liability limits expressed in terms of, or linked to, gold were considered inappropriate.[45]

2. The Limited Liability in Montreal Protocol No.3 with U.S. Domestic Supplementary Plan[46]

A. The Limited Liability in Montreal Protocol No.3 : 100,000 SDR

42. U.S., the Senate, Report of the Montreal Aviation Protocols 3 and 4, 101st Cong., 2d Sess., Ex-Rept. 101-21(Oct 1990),p.3.

43. M. Milde, supra, note 23 at 199.

44. U.S. Senate, supra, note 42 at 3.

45. N. M. Matte, "The Warsaw System and The Hesitations of The US Senate", Annals of Air & Space Law, 1983, 151 at 158.

46. IFAPA, supra, note 25 at 9. See also, Summary of International Legal Liability Limits FIGURE 1.

Opponents of Montreal Protocol No.3 claim that the worst feature of Protocol and the Guatemala City Protocol from the passenger's point of view, is that the inadequate limit of the carrier's liability has been made — in who else's interest but that of the carriers? — absolutely unbreakable : 100,000 SDR.[47]

With the exception of Montreal Protocol No.3 and the Guatemala City Protocol, the limit of the Montreal Agreement (US $75,000) is the highest currently in practice. However, the Montreal Agreement is not an international agreement and does not represent a formal revision of the Warsaw System.[48] The Montreal Protocol No.3 raises the limits to 100,000 SDR, and adopts the concept of unbreakable limits and an escalation mechanism initially proposed in the Guatemala City Protocol. The new limit is a dramatic increase over the $ 10,000 level of the original Warsaw Convention and is almost twice the level of the 1966 Montreal inter-carrier agreement.[49] As Well, to date, the 100,000 SDR is the highest limit which has been established domestically in several countries, for instance, United Kingdom, Italy and Korea.[50]

B. U.S. Supplementary Compensation Plan

1) History of the U.S. Supplementary Compensation Plan

If the United States ratifies the Montreal Protocols No.3 and No.4, the revised system will become effective in the near future because many European countries are expected to follow the lead plan,[51] other States would

47. B. Cheng, supra, note 4 at 232.

48. M. Milde, supra, note 23 at 199.

49. IFAPA, supra, note 25 at 22.

50. L. Tae-Hee, "The current status of the Warsaw Convention and the subsequent Protocols in leading Asian countries"(1986) 11, Air L.at 251-252, Korean Air Lines raised the limit of its passengers' legal liability to 100,000 SDR from July 3, 1984.

51. U.S. Department of Transport. Agreement to establish a US Supplementary Compen-

rely on the U.S. Supplementary Scheme. Therefore, it is necessary to discuss and analyses the U.S. Supplementary Compensation Scheme.

In 1983, the Administration's proposed Supplemental Compensation Plan for U.S. citizens would have provided up to $ 200,000 of additional coverage per passenger, 1983, the Reagan administration participated in the process of revising the authorized Supplemental Compensation Plan in order to make the Protocols comply with the concerns of its opponents. On June 24, 1988, the Secretary of Transportation submitted a new draft plan as part of the Administration's normal request.[52] On June, 21. 1990, the committee voted 13 to 2 to report the Protocols favorably to the Senate for advice and consent with the three provisions.[53] The Committee ordered the Montreal Protocols be reported favorably with three Provisos.[54] Thus, the President of the United States can proceed to ratify the Protocols subject only to the conditions placed upon U.S. ratification by the Senate.

There are two kinds of US Supplemental Compensation Plans. The first is one that was proposed in 1983 and the second is a revised plan that was submitted by the airlines and the Bush Administration in 1990.

In 1990, the Secretary of Transportation preliminarily approved a Supplemental Compensation Plan (SCP) as follows :

(a) The SCP would provide for damage recovery up to $ 500 million per aircraft, per incident and would compensate victims and their families for both their economic and non-economic losses ;

(b) All U.S. citizens and permanent residents of the U.S. who are passengers on international flights would be covered, even if their tickets were purchased outside the United States ;

(c) A settlement inducement clause is included which would encourage

sation Plan pursuant to Article 35A of the Warsaw Convention as amended in October 1990,(Oct 1990) Sec.1.11 Section 6.4.

52. U.S. Senate, supra, note 42 at 5-11.

53. Senate Report, ibid. at 6.

54. Senate Report, ibid. at 9-10.

more timely and adequate settlement offers from the SCP's insurance contractor.

It has been estimated that a $2 to $3 per ticket surcharge (to be included in the advertised ticket price) would be used to fund the insurance coverage provided by the SCP.[55]

2) The highest compensable limit

In 1990, the airlines of the United States and the Bush Administration submitted a revised plan that provides for the recovery of evident economic and non-economic damages. The new plan was revised to satisfy the Senate's non-economic losses and provide for total compensation of up to $500 million per aircraft for each accident.[56] This $500 million limit per aircraft would exceed the largest compensation ever paid for an airline disaster. The highest amount ever dispensed was $400 million by Japan Airlines and Boeing for the 500 victims of a Boeing 747 crash in Japan. Northwest Airlines paid approximately $200 million in total compensation for an airplane crash in Detroit.[57]

According to the Rand report, the total amount of compensation for all 25 aviation accidents was approximately $770 million and the estimate of the full economic costs resulting from the decedents' lost future earnings was almost $3 billion. Furthermore, if the willingness-to-pay estimates of the life's value were used, the total economic loss would be over $11 billion.[58] According to this data, the average cost for willingness-to-pay is $440 million per aviation accident, which could be fully covered by the $500 million compensation proposed in 1990.

55. Senate Report, ibid. at 5.
56. Senate Report, ibid. at 64. See also, IFAPA, supra, note 3 at 30.
57. Senate Report, ibid. at 65.
58. E.M. King and J.P. Smith, Economic Loss and Compensation in Aviation Accidents, Rand Corp. R-3551-ICJ, 1988, viii. De Daro, 1986. P.viii. at xvii.

3. "Unlimited Liability" : Full compensation

A. Definition of "Unlimited Liability"

The term "unlimited" liability frequently leads to confusion. It should not mean "excessively high" compensation but rather full compensaiton for the damage and full restitution of the loss, without any legal limit as to the amount of compensation.

Professor Bin Cheng has also stated that unlimited liability is not really a very correct description ; for what is involved is simply that the claimants, in respect of personal injury or death, can recover in full in respect of damage actually suffered.[59]

B. Fundamental Situation Changed ; Air Industry and Insurance Industry

The proponents of unlimited liability argue that the fundamental situation has changed since 1929 : the existence of an airline is no longer threatened by the loss of one aircraft, civil air transport has become a strong (though not very profitable) industry and so, too, has the insurance industry.[60] Modern airlines have adequate resources and insurance to cover their risks—they don't need or deserve liability limits.[61] Professor Bin Cheng stated that one could also justifiably say that those who make use of public air transport should to some extent share in the risk. He believes that the above-stated reasons no longer apply and limitation of the carrier's liability, especially in the carriage of passengers, can no longer be justified and should be eliminated.[62]

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59. B. Cheng in ILA, supra, note 18 at 584.
60. W. Guldimann, "A Future system of liability in air carriage", v.16, Annals of Air & Space L. 1991, 93 at 99.
61. U.S. Senate Report, supra, note 42 at 22.
62. B. Cheng, supra, note 4 at 231.

C. Tort Law Maxim

The advocate of unlimited liability, U.S. Senator Hollings, has criticized the Protocols for being inconsistent with U.S. tort law. He has stressed that any liability limit is not in the tradition of the U.S. legal system, which guarantees that a tort-feasor fully compensates a victim. In his view, limit of the airlines' liability would leave many claimants not fully compensated.[63] Professor Bin Cheng also believes that full compensation is new only in so far as the evaluation of the Warsaw system is concerned. It is, in fact, going back to what is the normal solution in law.[64]

4. Shortcomings of the "Unlimited Liability"

A. Different Economic Conditions

It must be conceded that damages in the amount of US $ 75,000(Montreal Agreement) are "peanuts" in comparison with the actual losses suffered by a typical American businessman. However, if the deceased passenger lives in a country with a low standard of living, the same amount could represent a fortune and his dependents could live comfortably on the interest alone for the rest of their lives.[65]

According to these different economic conditions, it is unrealistic to apply "full compensation" worldwide.[66] Unlimited liability is too heavy a burden for the airlines and ultimately for the public, especially for flag carriers in the developing countries where the states may not be able to support its flag carriers with the financial security methods mentioned in the Alvor

63. S. N. Avruch, supra, note 7 at 112.
64. B. Cheng in ILA, supra, note 18 at 584.
65. B. Crans, supra, note 18 at 584.
66. See also, A. Tobolewski, Monetary Limitation of Liability in Air Law, DeDaro, 1986, pp.142-145.

draft.[67]

The existence of limits is probably still important for some smaller airlines and a weaker airline industry.[68] For example, in China, the limit of the compensation is US $ 20,000 under the Hague Protocol, which is too low in the viewpoint of developed countries. However, the airlines in China[69], as a developing country, are still financially weak, and the standard of living of its people is much lower than that in the developed countries.[70] Therefore, it is impossible to apply a strict and unlimited compensation system.[71]

In all probability the concept of unlimited liability would be fully acceptable to one single State[72] of the international community and could hardly represent a basis for the unification of the law. For instance, Japanese airlines have taken steps to entirely waive the Warsaw Convention and the Hague Protocol limitations of liability on passenger injury or death.[73] Japanese airline firms will become the first in the world to remove a ceiling on the amount of compensation granted to victims of accidents on international routes.[74] There are fears that the United States may denounce the

67. ILA, supra, note 17 at 591, Mrs. Mieke Komar (Indonesia) in ILA.

68. See H. Drion, Limitation of liability in international air law, 1954, McGill L.L.M. Thesis, p.12. The rationale of limitation of liability of the air carriers' or operators' liability : 1) Analogy with maritime law 2) protection of a financially weak industry 3) catastrophical risks 4) necessity of the carriers' insurance 5) possibility for the claimants' insurance 6) counterpart to the aggravated system of liability imposed upon the carrier 7) avoidance of litigation 8) unification of the law of compensation.

69. W. Jianduan, "Some thoughts on compensation for passengers in China in a recent air crash", v.16, Air L, no.2, 1991, at 76. See also, Annex 1. Scheme for Compensation.

70. W. Jianduan, "The Current System Relating to the Compensation For Bodily Injury or Death of Passengers in Domestic Air transport in China", v.15, Air L., no.2 1990, 87 at 87.

71. W. Jianduan, 1991, supra, note 69 at 77.

72. In the United States and Japan, the liability of air carriers on domestic flights for passenger deaths or injuries is not limited. B. Cheng, supra, note 4 at 231.

73. Lloyd's Aviation Law, supra, note 19, p.1.

74. Asahi evening news, Nov.10, 1992.

Warsaw convention altogether. Other States may still wish to go ahead with their ratification but there will be a lot of hesitation. On the other hand, Japan made a real "breakthrough" by deciding that, as of 21 November 1992, the Japanese airlines will not invoke limitation of liability. It appears quite unrealistic to expect that unlimited liability would be acceptable to any significant portion of the international community.[75]

B. Too much burden of insurance premium

Increases in insurance costs pass through to the passenger. At present, insurance premiums represent about 0.2% of direct operating costs for most airlines. Numerous sources suggest that the existence of limits is an irrelevant factor in determining premium levels, which depend on a wide variety of market force factors. In the US and Japan insurance costs for unlimited domestic liability exposure have not proven prohibities.[76] Unlimited insurance for international carriers would probably cost much more than the price paid for international carriers would probably cost much more than the price paid for domestic travel.[77] An IATA observer at the Guatemala City Conference noted that the most significant point was that the breakable limit of the Convention had a direct connection with the cost of insurance, and that there was approximately forty million dollars a year difference between a breakable limit of 100,000 dollars and the unbreakable limit of the plan.[78]

Also, Professor Milde stated at the ILA 60th conference that there was sufficient proof to state that, in general, the airlines of developing countries with marginal operations have to pay premiums vastly in excess of those

75. M. Milde in ILA, supra, note, 17 at 585-586.

76. IFAPA, supra, note 25 at 10.

77. M. N. Leich, "The Montreal Protocols to the Warsaw Convention on international carriage by air." Am. J. of Int'l. L. v.76, 1982, 412 at 415.

78. ICAO Legal Committee, Seventeenth Session, Montreal, 1970, ICAO Doc, No. 8878-LC/162 at 77. see also by W.J. Hickey Jr., "Breaking the limit-liability for wilful misconduct under the Guatemala Protocol., 42 J. of Air L.&Comm. 1976, 603 at 610.

paid by well established airlines of developed countries.[79]

V. The Evaluation of the Deletion of "wilful misconduct"

1. Strict Liability

After ratifying the Warsaw Convention, the lawyers of the claimants tried to break the low limitation by relying on Article 25 of the Warsaw Convention ("wilful misconduct").[80] Contrarily the air carriers defended themselves with Art. 20 (all necessary measures).[81]

Therefore, it seems necessary that the claimants employ expert lawyers because in the "wilful misconduct" clause the burden of proof is on the claimant. The air carriers also have employed lawyers to get rid of the "wilful misconduct" attach for the claimants. Article 20(1) states that the air carrier shall not be liable if there is sufficient evidence that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. The establishment of strict liability in the Protocol eliminates "all necessary measures" or "due care" defense for the air carriers.

Strict liability was not a new concept in the Protocol. The Montreal Agreement considerably reduced the importance of the defense in case of transportation of passengers having a point of contact within the United States, as the signatories of the Agreement have waived their right to invoke the protection of Article 20(1).[82] However, it was in the Protocols that such a provision had first been set forth in a multilateral treaty. This means

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79. Dr. J.Z. Gertler (Canada), ILA, supra, note 17 at 587.

80. And also Warsaw Convention Art. 1 (non-international transportation), Art. 3(2) (inadequate delivery of passenger ticket), Art.4(4), Art.9, Art.12(3), and Art.18.

81. Also with Warsaw Convention Art.21, 22, 26, and 29.

82. G. Miller, Liability in Internationl Air Transport, 404 (Devente : Kluwer, 1977) at 404.

that strict liability will make the airlines absolutely liable for damages resulting from personal injury or death, up to a limit of 100,000 SDR. This will require the airlines to have the absolute liability even in the event of the downing of an aircraft by the use of military force, as was the case in the KAL and Iran Air tragedies, or by a terrorist's bomb,[83] as was the case in the more recent Pan Am-103 and UTA tragedies.[84] By eliminating the possibility for the airlines to argue that the accident is not its fault nor that of its agents, the litigation process will be shortened or even eliminated and this will result in a faster settlement.[85]

2. Deletion of "wilful misconduct"

It is necessary to distinguish the definition of "unlimited liability" in a case of "wilful misconduct" from the definition of "full-compensation". The definition of "unlimited liability" can be easily called "no-limit" liability. The exact meaning of "unlimited liability" due to an air carrier's "wilful misconduct" is that the limit under Article XXII of the Warsaw Convention is not applicable. In this case, "unlimited liability" shall be interpreted under the fundamental purpose of the Warsaw Convention, the unification of the rules relating to the international carriage by the air.

Although Senator Hollings argues that a settlement in the $ 600,000-and-above range is not common in an air carrier's "wilful misconduct",[86] it

83. See also, H. Gam, "Liability damages for injuries sustained by passengers in the event of hijacking of aircraft and other violations of aviation security, Lloyd's MCLQ, May, 1988, 217 at 224. According to the art.20(1) "all necessary measures", for judging the liability of the airline, it is necessary to examine the secuirty requirements and the "measures not possible". See also, Barboni v. Cie Air France case and Ayache v. Cie Air-France case.

84. J.E. Landry, Airline Liability ; The long overdue updating of the Warsaw regime in the United States, Presentation in McGill Univ. Air & Space Law 45th Anniversary. 1991, at 7.

85. IFAPA, supra, note 25 at 24.

86. E.F. Hollings, supra, note 12 at 22.

is hard to accept the settlement from the "wilful misconduct" clause as "full-compensation" in tort litigation. For instance, in 1986, an eight-year-old girl who became paralysed and suffered brain-damaged from a Jeep accident won a $23.7 million verdict, including $65 million to a Brooklyn woman who lost most of her small intesting after the hospital failed to diagnose an obstruction in her stomach. $58 million was for pain and suffering.[87] Comparing these tort litigation cases with air litigation in a case of the air carrier's "wilful misconduct", the compensation of air litigation is lower than the compensation for tort litigation.

Opponents argue that there is no way to seek the "full-compensation" under the Warsaw System without the "wilful misconduct" clause. They state also that by threatening to take their case to a jury on "wilful misconduct" grounds the recent years, surviving families with strong cases were able to receive more than $600,000 in settlements from airlines. Domestic flight settlements not covered by the international Convention limits have consistently averaged over $400,000 and individual settlements ofter exceed $1 million.[88]

Also, opponents argue that there is no opportunity for a litigation to begin based on an airline's fault. It can only begin with "wilful misconduct" cases, faulty documents, the air carrier's intentional and criminal cause of damage,[89] etc.

However, the original purpose of deleting the "wilful misconduct" clause is not to punish the airlines. We should remember that the purpose of "wilful misconduct" clause allows claimants to seek compensation over and

87. P.W. Huber, Liability : the legal revolution and its consequences, 260, (New York, 1988) p.121. For 1973 case, see Nichole Fortman v. Hemco Inc. Los Angeles Supreme Court, NWC 86375, Record Award in California, The Executive Letter, Insurance Information Institute, Oct. 27, 1986. For 1986 case, see Malpractice Case, The Executive Letter, Insurance Information Institute, July 28, 1986.

88. E.F. Hollings, supra, note 12, at 22.

89. B. Cheng, supra, note 4 at 232. See also, E.F. Holings, supra, note 12 at 20.

above the liability limitations of Art.22 of the Warsaw Convention. Therefore, the deletion of "wilful misconduct" should be interpreted on condition that the victims could receive the maximum amount of "full-compensation" with 100,000 SDR plus Supplementary Compensation Plan.

During a conference held by the Legal Sub-Committee of ICAO in 1971, a delegate from New Zealand emphasized the importance of adopting the Guatemala Convention, which would permit a speedy settlement of claims given that it represents a fair and reasonable compensation. This would eliminate the possibility of the claimants' having to take recourse to litigation and make the "wilful misconduct" provision unnecessary.[90] Also a delegate from Germany pointed out that cases falling under Art.25 have rarely occurred and any such cases could be fully covered by slightly modifying the existing Art.24 of the Guatemala Convention.[91]

It is clear from the wording of Art.25 that the burden of proving acts of "wilful misconduct" is given to the claimant.[92] Therefore, the claimants must almost always employ a legal expert to prove "wilful misconduct" by the airlines. Thus, deletion of the "wilful misconduct" clause by dropping Art.25 could lead to a speedy settlement. This would satisfy the practical interests of both the passengers and the air carriers.

Opponents of the Montreal Protocol No.3 have contended for a long time that the elimination of civil litigation in cases of internationl air accidents would undermine important safety factors. Senator Hollings vehemently argued that such elimination would foster the idea that an air carrier's liability could never exceed the limits set by the Montreal Protocols, even in the most flagrant case of wanton recklessness. This is dangerous, Senator

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90. A. Khan, Air carrier's unlimited liability under the Warsaw system., (Montreal : 1990) McGill Univ.Master Thesis, at 141, ICAO Doc. 8878-LC/162 at 51-52, 77, 153.

91. A. Khan, ibid. p.142, ICAO same doc. at 56.

92. R. Mankiewicz, The Liability regime of the International Air Carrier, 259(1981, Antwerp-London-Boston-Frankfurt), p.126. See also, in U.S.cae, Cohen v. Varig, New York Supreme Court, Appellate Division, May 2, 1978 : 15 Avi 17.115. In France case, "the plaintiff must prove 'dol' or 'faute lourde'", Court of Appeals, Paris, Nordisk Transport v. Air France, 28 Feb. 1953 : 1953 RFDA 105.

Hollings feared, because it might lead to a relaxation of safety precautions by the air carriers.[93]

The Rand Corporation research has demonstrated that the "market forces" themselves play a far more important role as a safety incentive than does the fear of exposure to litigation. While the actual compensation to the victims of an accident is covered by the liability insurance already paid by the airline, it has been shown that the airline involved in the accident would be perceived as unsafe by customers. This will cause the airline to lose money due to a sharp decrease both in operating revenues and canceled bookings and in their stock prices. Throughout the world, government agencies have the primary responsibility for regulating and overseeing airline operations and safety practices.[94]

Moreover, the original purpose of "wilful misconduct" (Article 25 in the Warsaw Convention) was to overcome the limitation of compensation. Therefore, we could seek to restrict the air carrier's unsafe flying by relying on other regulatory institutions such as the ICAO, IATA and domestic institutions.

Ⅵ. SDR as a new Unit

1. The Background of SDR

SDR was suggested at the Montreal Conference in 1976. This was done because the "gold clause"[95] was not conducive to a uniform interpretation in view of the present "free" price of gold which is subject to serious

93. S. N. Avruch, supra, note 7, at 114-115.

94. Senate Report, supra, note 42, p.61. For instance : in the United States, the FAA and the Transportation Safety Board have considerable influence over airline safety practices through regulations, oversight, and investigations.

95. Warsaw Convention Article 22 (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs…… (2) In the transportation of checked baggage and goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram.

fluctuations ; furthermore, no "official" price of gold exists in the present market and for all practical purposes, gold has been "demonetized" and, consequently, has ceased to be an objective, reliable and stable yardstick of values.[96]

In 1975 the High Contracting Parties agreed to the adoption of four Montreal Protocols, thereby completely abandoning the conversion based on the gold standard. Instead they agreed to use a new unit, a SDR. A SDR is a unit of currency defined by the International Monetary Fund, and is based on the currencies of 5 countries : France, Britain, Japan, Germany and the US. Under the Montreal Protocols, the Convention's limits were to be increased to 100,000 SDRs which, at that time, were worth about $ 100,000[97].

When the Convention was drafted in 1929, the gold clause was adopted to ensure judgements of uniform value as well as a stable and easily calculable limitation on liability. The standard chosen was a French "gold franc" with a specified quantity and purity of gold, to wit, 65.5 mg with a fineness of 900. This was also called a "Poincaré" franc.[98]

In 1934, 125,000 (Poincaré francs) were worth approximately $ 8,300 in US currency, which were roughly equivalent to $ 76,000 in 1987. In 1955, the reference to a "French Franc" was deleted and the monetary unit was merely called a "currency unit."

The decrease in the value of the dollar in the 1970s caused the world to abandon rigid "official" gold rates.[99] In 1945, the United Stated joined the International Monetary Fund and undertook to maintain a "par value" for the dollar and to buy and sell gold at the official price in exchange for U.S. dollars officially held by other IMF Nations. In August 1971, the United States suspended its commitment to convert dollars into gold. The U.S. dollar was subsequently devalued by raising the official price of gold

96. M. Milde, supra, note 23, at 205.
97. L. B. Goldhirsch, supra, note 26, at 96-97.
98. L. B. Goldhirsch, ibid. 95-96.
99. L. B. Goldhirsch, ibid. 96.

to $38.00 per ounce in May 1972 and to $42.22 per ounce in October 1973.[100]

In 1976, the U.S. Congress repealed Section of the Par Value modification Act, 31 U.S.C §449 thus abolishing the official prices of gold. However, the CAB and the airlines in the United States continued to rely upon the last official price as the method to determine liability under the Convention. Also, with the Senate's failure to ratify the Montreal Protocols, the United States courts were faced with the dilemma of what unit of conversion to use in converting the Warsaw convention's liability limits, which are expressed in terms of the French franc of a specified gold content, to United States currency.[101]

However, other parties to the Convention have chosen different conversion methods, French courts have held that the current French franc is comparable to the "Poincaré" franc and is to be used as the measure of liability under the Convention. The SDR has been adopted legislatively by Britain and Sweden and by court decisions in the Netherlands and Italy. Courts in India and Greece and a United States District Court for the Southern District of Texas have chosen the free market price of gold. The United States Court was presented with four currently recognized units of conversion and was asked to choose one. The four methods are : (1) the last official price of gold, (2) the free market price of gold, (3) the Special Drawing Right ("SDR") of the International Monetary Fund (IMF), and (4) the current French franc.[102]

The "gold clause" is contained in several instruments of the "Warsaw System". However, it has lost its practical meaning because in 1968 a free

100. B. Reukema, "No New Deal on Liability Limits for International Flights", Int'l Lawyer, Fall 1984, 984 at 984.

101. D. Davenport, "Liability limitations under the Warsaw Convention-the cargo limits of the Warsaw Convention are fully enforceable at the rate of $9.07 per pound.", v.50 J. of Air L. & Comm. Wint 1984, 155 at 170.

102. IATA, "Air Crash at Kimpo International Airport, 1983", IATA Air Carrier's Liability Report, 1983, at 602.

market for gold was established and there is no "official" price of gold at present. The price of gold on the free market fluctuates by wide margins at different times and gold can no longer serve as a reliable and stable yardstick of values. Therefore, the Montreal Protocols of 1975 have substituted the concept of the SDR for the "gold cluase". This seems to be the most practical answer to the question of the conversion of the "gold clause" to national currencies.[103]

2. SDR as a new Unit

The main purposes for establishing liability limits expressed in terms of gold are as follows : [104] (1) setting some limits on an air carrier's liability for lost cargo ; (2) setting a stable and predictable limit ; (3) setting a constant value that would keep pace with the value of cargo ; and (4) setting an internationally uniform limit.

A. Last official value solution

The use of the last official price of gold, the Court wrote, would satisfy several of the Convention's objectives, including the continuation of a reasonable liability limitation. Moreover, its use would ensure that a stable, predictable, and reliable limitation would remain in effect.[105] Although this solution was adopted by the U.S. Supreme Court in the Franklin Mint case, it is unfit to practice in changing economic conditions. As well there is no legal reference to use the last-official-gold price after abolishing it.

103. ICAO, supra, note 3 p.9.
104. D. Davenport, supra, note 101 at 181.
105. D. Davenport, ibid. at 180.

B. Free market solution[106]

Since the purpose of expressing the limits in gold francs was to maintain the purchasing power of the amounts in question, it is submitted that the conversion into national currency should be made at the exchange rate for gold on the open market.[107]

In the Franklin Mint v. TWA case, Justice Stevens, of the U.S. Supreme Court, interpreted Article 22(4) of the original Warsaw Convention text as being a classic "gold clause" minimizing the importance of the text of a reference not only to a quantity of gold but also to a specific currency, the French franc. This interpretation was not an essential feature of the case for a "market price" solution. Even Justice Stevens conceded that the interests of stability and predictability were against this solution. This led the majority of the Supreme Court to reject it.[108]

The Court discussed why it declined to adopt the free market price of gold as the method for converting the Convention's liability limitations into U.S. dollars. Referring to the extreme fluctuations in the price of gold on the international market in recent years, the Court stated, "reliance on the gold market would entirely fail to provide a stable unit." The court concluded that the use of the free-market price of gold would fail to establish a stable unit of conversion because gold has become a commodity, which is subject to unpredictable swings in price. This solution was also rejected in a resolution of ICAO's Legal Committee in October 1974.[109]

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106. See, B. Cheng, supra, note 18 at 329. Adopting by the courts, Greece (Athens, Court of Appeal,3d Dep't, Zakoupolos v. Olympic Airways Corp.), Argentina, India, Italy, Turkey and Supreme Court of New South Wales, Austria in S.S. Pharmaceutical Co.Ltd. v. Qantas Airways Ltd. on Sept.22, 1988.

107. Mankiewicz, supra, note 92, p.114.

108. Shawcross and Beaumont, Air law,(1982, Butterworths, London), VII/120.

109. Shawcross and Beaumont, ibid. at VII/123.

C. French franc solution

Only French courts had decided that the current French franc was equivalent to the Warsaw Convention's "Poincaré" franc and should be used as the unit of conversion under the Convention.[110]

This solution is based on the argument that the ascription of a gold value to a national currency is in a sense no longer possible or meaningful. Therefore, the reference to franc in the Warsaw System must be applied to the French franc, which is the currency currently used in France.[111] There was Chamie v. Company National Egypt of the Air Transport which was adopted by the courts outside France with this solution. However, this was overruled by the Cour de Cassation, on March 7, 1983 on the grounds that as a question of order, public monetary law raised by the courts must seek and follow the official governmental interpretation.[112]

However, both the majority and dissenting judgements stressed that the Convention's framers chose an international, not a parochial standard, free from the control of any one country.[113] Also, the "French Franc" solution is inconsistent with the intention of the delegates at Warsaw and, even more so, of those at the Hague.[114]

D. SDR

This solution reflects government practice in a number of countries and has growing support from the courts and national legislatures.[115] The SDR

110. S. N. Avruch, supra, note 7, at 75.

111. Shawcross and Beaumont, supra, note 108, at VII-120.

112. Shawcross and Beaumont, ibid. at VII/120.

113. The Supreme Court Judgement, Franklin Mint v. TWA 690 F 2s 307(2nd circ, 1982), 17 Avi. Case 17,491[1984], shawcross and Beaumont, ibid. VII/120.

114. Shawcross and Beaumont, supra, note 108, VII/123.

115. R. S. J. Martha, "The debate on profound changes of circumstances and international of the gold clauses in international transport treaties", v.32, Netherlands Int'l L. Rev., 1985, 48 at 54.

solution accords with the objectives of the Warsaw Convention as seen by the Court : (1) to set some limit on an air carrier's liability ; (2) to set a stable, predictable, and internationally uniform limit ; and (3) to link the Convention to a constant value that would keep step with the average value of cargo carried and in doing so remain equitable for the carriers and transport users alike. It seems reasonable to infer from the judgement that any future adjustment of the CAB limit reflecting changes in the SDR would be acceptable to the Court.[116]

It is recommended that in attempting to give effect to the purpose and intent of the Convention, courts should adopt the SDR solution. This solution recognizes the international practice, offers the best hope of stability and uniformity in liability limits, and deserves the support of all those engaged in international aviation practice.[117]

The Montreal Protocols No.3 and No.4 provide the SDR as a new unit not only to solve problems such as the Franklin Mint case and the Kimpo case but to solve all possible problems. Therefore, if there is no legal problems for the U.S. to adopt the SDR as a solution for the both cases, the SDR should be adopted as a newly developed instrument in the Warsaw System.

Ⅶ. Conclusion

1. The fruitless debate has emerged from different perspectives of the proponents and opponents in viewing the Montreal Protocol No.3 and No.4. The main opponents' opinion comes from the U.S. trial lawyers and academic professors. Their strong opinion favors strict and unlimited liability (full-compensation).[118] The opponents of the Warsaw Convention want to see the denunciation of the Warsaw System by rejecting the Montreal Proto-

116. Shawcross and Beaumont, supra, note 108, VII/123.
117. Shawcross and Beaumont, ibid. VII/123.
118. See Chapter I. III. 2. A. U.S. Practicing Lawyers' Perspective.

cols No.3 and No.4.[119]

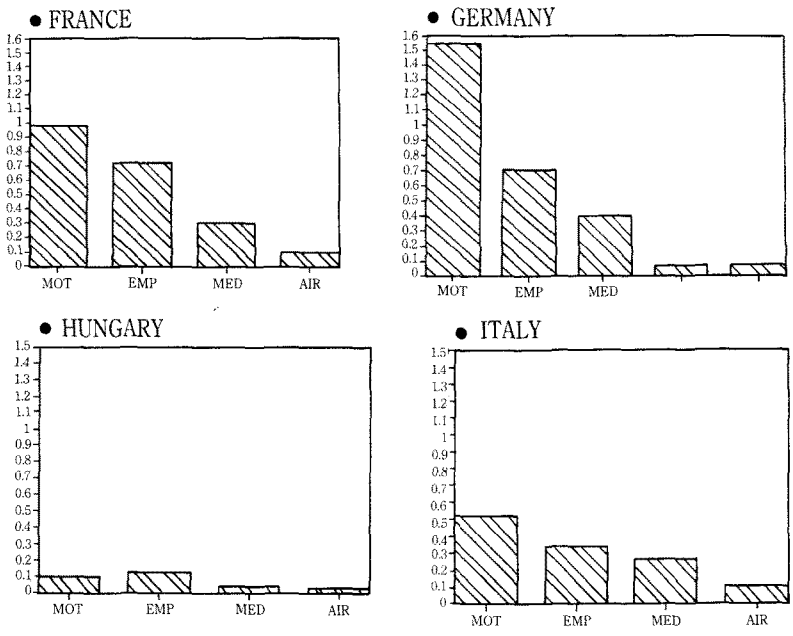
Professor Bin Cheng regards the Japanese Airlines' action and the EC Consultation Paper as the starting point to adopt unlimited liability regime in private international air law.[120] And he concluded that if such a system were extended from Japan to Europe, the United States, and other industrialized nations, a much healthier system for air passengers would have been established covering a good part of the world. From this point of view, the guideline suggested by the EC Consultation Paper as what victims of aviation accidents in EC countries should be entitled to has much to commend itself : [121]

> "Fair compensation amounts should probably be at least the same as the levels of compensation to victims in non-aviation accidents in industrialized countries and should not be lower than amounts paid to victims in aviation accidents in other industrialized regions.

From the EC Consultation Paper, I would point out that 'Fair compensation' does not mean 'unlimited-liability'. What is particularly significant is the similarity in the western European levels for each "case" and the overall disparity between air transport compensation limits and compensation limits in "non aviation accidents".

119. L.S. Kreindler, supra, note 10, p.4.
120. B.Cheng, ibid. at 37.
121. B.Cheng, ibid. at 38.

[Figure 1. Awards in accidents[122]]



(Unit=million SDRs)

- MOT=Motor Vehicle 3rd Party
- EMP=Employers Liability
- MED=Medical Malpractice
- AIR=Airline Limits

As for aviation accidents in unlimited regimes, the Rand Report provides a detailed analysis on compensation levels awarded by US courts relating to all US airline major aviation death accident cases between 1970 and 1982. The study found that the average compensation level was $363,000. About 20% of the deaths resulted in compensation of less than US $179,000. The maximum compensation awarded was more than US $1,000,000, but these cases account for almost 33% of the compensation paid for all

122. IFAPA, supra, note 25 at 13.

deaths combined.[123]

We should examine whether Japanese Airlines' action in 1992 is realistic to practice worldwide or not. What is the Japanese economic situation? Japan is the strongest economic country in the world. Comparing with Japanese Airlines' action, the limitation of the compensation in China is $ 20,000 which is too low for the developed countries. What is the most regrettable affair is that Japanese Airlines' action ignored the "Unification" of the Warsaw System.

I would like to interpret the Japanese Airlines' action in 1992 as 'Self-Interest'. Japan should retrieve the Japanese Airlines' action in 1992 and would rather participate the continuing effort to find the new solution which could be practice worldwide.

In order to integrate different levels of economic conditions, the Warsaw Convention as a unification of private law provides a limited liability somewhat similar to international maritime Conventions and the Convention on Road and Rail Transport. As for non-aviation transport accidents,[124] international land and sea transport are also covered by Conventions limiting liability-although none have the same scope as the Warsaw Convention. In the case of the Athens Convention relating to Sea Transport, which has a limit equivalent to some $ 60,000, countries such as the US, Australia and The Netherlands refused to ratify it because they thought limtis were too low. The International Rail Convention, adhered to by some 33 states, provides a limit of 70,000 SDR's, Convention, adhered to by some 33 states, provides a limit of 70,000 SDR's, equivalent to $ 90,000. The Internaional Road Convention, which has so far only obtained 2 ratifications, has, in contrast, a limit equivalent to $ 20,000.[125]

123. IFAPA, ibid. at 14.

124. IFAPA, supra, note 25 at 11.—from the research undertaken by the Institute of Air and Space Law at Leiden, which focused on Europe.

125. IFAPA, ibid. at 11.

2. The principle of unlimited liability (full-compensation) is based on change in the air carrier industry with respect to the insurance industry and the legal maxim which supports full-compensation.

First of all, it is unrealistic to practice unlimited liability (full-compensation)[126] in the international community, because insurance premiums are too heavy a burden on the airlines, especially for developing countries.[127] As well, in all probability, such a concept would not be fully accepted by the international community and could hardly represent a basis for unification of law.

Secondly, opponents have ignored the original purpose of the Warsaw Convention, which is the unification of certain rules relating to International Carriage. Without such unification of law, many conflicts relating to the rules would arise and the settlement of claims would be unpredictable, costly, time-consuming, and possibly uninsurable. Furthermore, there is a possibility that conflicts of jurisdiction would arise which would further aggravate the settlement of liability regime. As a result, the rejection of unification of the Warsaw System would lead to chaos.

Thirdly, the opponents' perspective is based on the adverse relationship between the air carrier and the passenger, but this is not correct. The relationship between the passenger and air carrier should be interpreted as a common interest status, each sharing both the risks and interests. It is more of a "mutual" relationship. The original Warsaw System was developed in order to keep a balance of interests between the passenger and air carrier. By adopting the Montreal Protocols No.3 and No.4, they could share the risks and interests with the developing insurance industry.

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126. See also, supra, note 85. It is hard to accept the unlimited liability(full-compensation) in tort litigation. For instance, in 1986, an eight-year-old girl who became paralysed and suffered brain-damaged from a Jeep accident won a $23.7 million verdict, including $6 million for pain and suffering. As well, in July 1986, a New York Court awarded $65 million to a Brooklyn woman who lost most of her small intestine after the hospital failed to diagnose an obstruction in her stomach. $58 million was for pain and suffering.

127. W. Jianduan, supra, note at 76.

3. Professor Bin Cheng concluded that Montreal Additional Protocol No.3, alias the Guatemala City Protocol dressed up in SDR, from the passengers' point of view, retains all the fundamental flaws of the latter. It is by now, in addition, totally obsolete, and its coming into force would certainly be for most passengers a retrograde step which would diminish rather than enhance their rights. The supplemental compensation scheme is an impractical idea which especially on the international level is likely to cause a great deal of difficulties. And also suggested that a complete revision of the Warsaw System will take time. Immediate steps are necessary to adapt it to meet current requirements which may vary from country to country and from region to region.[128]

But Montreal Protocol No.3 is the recent-developing instrument which could solve the current problems in private international air law.

First of all, the Montreal Protocol No.3 could solve the fundamental problem of a low compensation limit by providing the highest compensation for the victims in an air accident wirh 100,000 SDR and an additional supplementary compensation plan. 100,000 SDR is the highest limit ever to be established in the Warsaw System. As well, the supplementary compensation plan would cover both economic and non-economic losses and would provide total compensation of up to $500 million per aircraft for each accident. This $500 million limit per aircraft exceeds the largest amount ever paid out for an airline disaster in the history of air transportation. That $500 million limit is a heavy burden for Korean airlines and developing countries' airlines. We should undertake research to find out how to enforce the domestic supplementary compensation plan with regard to the non-contracting parties, how to calculate the limit of the domestic compensation plan, and how to confine the possibility of increasing surcharges by the weak airlines in developing countries. This technical research would be the next step for the development and the unification of the Warsaw System under Montreal Protocols No.3 and No.4.

128. B. Cheng, supra, note 3 at 36.

Although, the burden of surcharge ($3-5) of the Supplementary Plan is up to the passenger, it should be interpreted in the light of the common interest relationship between the passenger and the air carrier. Determining the "adequate cost" of surcharge is not an important subject in legal research but is technical one.[129]

Secondly, the Montreal Protocols No.3 and No.4 are based on the strict liability system. Strict liability was not a new concept, but it was the first time that such a provision was set forth in a multilateral treaty. By completely that of its agents, the litigation process will be shortened or even eliminated and a settlement will be accelerated.

Thirdly a speedy settlement could be induced by the deletion of the "wilful misconduct" concept. Opponents strongly argue against the deletion of "wilful misconduct" in the Montreal Protocol No.3. However, the deletion of "wilful misconduct" is reasonable on condition that the Montreal Protocol No.3 quarantees almost "full-compensation" to the victims in an air accident with 100,000 SDR and the additional Supplementary Compensation Plan.

Even though the purpose of "wilful misconduct" is to provide a higher compensation for the passenger, this doesn't means that it must be "full-compensation". Rather it should be interpreted under the fundamental purpose of the Warsaw Convention, unification. Therefore, it should be interpreted as "no-limit" so as not to confuse it with unlimited liability (full-compensation).

There are many different interpretations for "wilful misconduct" which often result in largely litigations. Some sources of different interpretations are : (1) the different legal systems, (2) strict and liberal interpretation, and (3) objective and subjective test in the Hague Protocol. We can see that the deletion of "wilful misconduct" would lead to a much speedier settlement in air litigation.

There are some people who worry that the deletion of "wilful misconduct"

129. Senate Report, supra, note 42 at 66.

could affect safety conditions. However, we should remember that the purpose of "wilful misconduct" is not to punish the "guilty" air carrier or interfere with the safety conditions of the air carrier. Also, according to the Rand Study on the effects of accidents on airline operations, it has been demonstrated that market forces themselves actually play a far larger role as a safety incentive than does the fear of exposure to litigation.

Fourthly, the Protocol provides a "settlement inducement clause" which should speed up the pace of litigation since the courts are entitled to award attorneys' fees if the carrier does not settle the claim within a stated period. The victims would see a much speedier litigation, and the contingent fee arrangements by the claimant's lawyers would no longer be necessary. This means that the lawyer's role in air litigation process would be diminished.

Fifthly, an additional jurisdiction is provided by the Montreal Protocol No.3. The extension of jurisdiction is particularly useful for the passenger. It greatly reduces the need for the victims to bring suit in unfamiliar or distant countries. This would lead to reduced costs.

Sixthly, SDR would be used under the Montreal Protocols No.3 and No.4. Although the last-official-solution was adopted by the U.S. Supreme Court in the Franklin Mint case, it is not practical to apply it in today's changing economics. The judgement in the Franklin Mint case showed a classical example of the legal reference in judging the past affair. But the Montreal Protocols No.3 and No.4 have been devised to do more than that. They are supposed to be reasonable and stable solutions to solve future problems.

The SDR solution accords with the objective of the Warsaw Convention as seen by the Court : (1) to set some limit on a carrier's liability ; (2) to set a stable, predictable, and internationally uniform limit ; and (3) to link the Convention to a constant value that would keep up with the average value of cargo carried and to remain equitable for the carriers and transport users alike. In order to maximize the purpose and intent of the Convention, the courts should adopt the SDR solution. This SDR

solution recognizes international practice and offers the best hope of stability and uniformity in liability limits. It deserves the support of all those engaged in international aviation practice.

【要 約】

바르샤바体制의 改正問題

辛 聖 煥*

지난 6월 3일 동경에서 있었던, 아시아 항공/우주법 학술대회 제3분과에서 영국 Bin Cheng교수의 "The Warsaw System : Mess up, Tear up, or Shore up?"이라는 주제의 논문발표가 있었다. Bin Cheng교수는 특히 유럽의 EC Consultant Paper와 일본항공사들의 1992년의 무한책임보상주의 채택에 대하여, 마치 무한 책임보상주의의 이론이 승리하였으며, 위의 상황들이 그 시작이라고 단정하였는데 이러한 견해는 아직까지 시기상조라고 생각한다. 본 글에서는 동경회의에서의 Bin Cheng교수의 논문중 특히 10항의 결론 부분을 중점으로 반대되는 의견을 제시하고자 한다.

국제항공사법인 와르소체제가 과연 발전하고 있는 것인가? 퇴보하고 있는 것인가? 와르소체제의 반대론자들은 미국의 소송변호사들, 일본항공사들과 일부 순수이론을 고수하는 학자들로써, 이들은 와르소체제로부터의 탈퇴와 무한책임보상주의를 고수하고 있다. EC Consultation Paper (각주 122 참조)에서 보듯이, 비록 항공운송시의 손해배상액이 타 운송시의 손해배상액보다 적기는 하지만, 이것이 곧 '무한책임보상주의'를 의미하는 것은 아니다. 미국의 판례중 불법행위로 인한 소송(Nichole Fortman v. Hemco Inc.)에서 보면, 작은 창자의 대부분을 병원의 과실때문에 잃은 Brooklin의 한 여인에게 500억 정도의 손해배상이 주어진 것을 보면, 과연 완전보상에 맞는 무한책임이 과연 항공소송에 적용될 수 있는 것인가를 알아야 한다.

무한책임보상주의는 특히 개발도상국의 항공사들에게 보험료가 너무 과중하고, 와르소협약의 근본목적인 국제항공법의 통일성에 반하고 있기 때문에 국제사회 전반에 적용하기에는 비현실적이다. 와르소체제의 통일

* 空軍士官學校 空軍中領, 韓國航空法學會 理事

성에 대한 거부는 만약 와르소체제에 버금가는 다른 보상체제가 있는 경우에는 다르지만, 현실적으로는 결국 국제적 혼란만을 야기시킬 것이다.

또한 와르소체제 반대자들은 항공운송인과 승객들의 관계를 갈등관계로 보고 있지만, 근본적으로 와르소협약에서의 항공운송인과 승객들의 관계는 공동이익관계로 보아야 한다. 항공운송사업의 목적도 또한 이윤추구인 바, 승객들이 항공운송인에게 과다한 손해배상을 요구하면, 결국 항공운송인은 승객들의 주머니에서 그 댓가를 찾으려고 할 것이다. 결국 양자의 갈등으로 이익을 보는 것은 소송변호사들 뿐이라고 볼 수 있다.

또한 'Unlimited Liability'에서 'Unlimited"란 'Full-Compensation'을 의미하는 것으로, 'Wilful-Misconduct'의 경우에는, 'Full-Compensation'의 개념과 다르게, 그 보상액이 Warsaw협약 제22조 1항에 적용되지 않는 'No-limited'의 개념으로 해석하여야 한다. 항공소송의 경우에 통상 'Wilful-Misconduct'의 경우에 손해배상액이 약 $700,000인 것을 보더라도 'Full-Compensation'의 의미로 해석할 수 없다. 몬트리올 제3추가의정서에서 'Wilful-Misconduct'의 개념을 삭제하고자 하는 것은, 이에 대비하여 추가보상제도, 유한책임액수의 증액, 엄격책임주의 등의 요소들을 전제로 하고 있기 때문이다.

몬트리올 제3추가의정서가 최근의 발전적인 손해배상제도인가에 대하여, Bin Cheng교수는 반대를 하고 있지만, 최선의 제도를 찾는 입장에서 본다면, 몬트리올 추가 의정서는 여러가지로 부족하다. 그러나, 유한책임제도의 개선, 엄격책임주의의 도입, 빠른 소송타결의 제도, 재판관할권의 확대 그리고, SDR 화폐단위의 채택 등은 헤이그 의정서 이후의 보다 나은 제도적 장치를 하고 있다고 해석하여야 할 것이다. 시대의 변화에 따라 점진적으로 발전된 보상제도를 채택하였다면, 오늘날과 같이 시대에 뒤떨어진 보상체제로 혼란을 겪고 있지 않았을 것이다.