The Refinement of the Draft Convention for the Unification of Certain Rules for International Carriage by Air

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I. Introduction

The ICAO Council decided at the seventh Meeting of its 154th Session on 3 June 1998 to convene a Diplomatic Conference to be held from 10 to 29 May 1999 in Montreal, in order to deliberate the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, on the basis of the Text approved by the 30th Session of the Legal Committee convened from 28 April to 9 May 1997 in Montreal and refined by the Special Group on the Modernization and Consolidation of the "Warsaw System"(hereinafter referred to as "SGMW/1") held from 14 to 18 April

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1998 in Montreal, and also to adopt a new instrument.

During its 146th Session on 15 December 1995, the Council decided that a Secretariat Study Group (hereinafter referred to as "SSG") be established to assist the Legal Bureau in a mechanism within the framework of ICAO to accelerate the modernization of the "Warsaw System". The SSG was requested to provide the Legal Bureau with its views which should permit the Council to consider the appropriate steps to be taken for the modernization of the "Warsaw System". In my opinion, it is rather curious and inequitable that almost all the absolute majority of its members had been constituted from the legal experts of the Common Law States and that no Japanese and Chinese legal experts whose Civil Law States had sent their legal experts to the first and second International Conferences of Private Air Law convened by the French Government in Paris and Warsaw in 1925 and 1929 and also to the three Sessions of the C.I.T.E.J.A. during the period, had been selected. As a result, the common law oriented Group, for instance, had, as a basic compensatory principle governing the new passenger liability regime, agreed upon the principle of "equitable compensation based on the principle of restitution", making reference to Article Ⅶ of the 1972 *Convention on International Liability for Damage Caused by Space Objects*, which had set out a tortuous liability between the launching State and the claimant State, in other word, the state responsibilities. In this point, it should be recalled that the rapporteur Mr. Henry De Vos in his Report relating to the draft Warsaw Convention presented by him on 25 September 1928 had told us that the texts would apply only to the contract of carriage, ; in other word, it in principle was presumed to be a contractual liability between the private persons.

On 4 June 1997, during its 151st Session, the Council was informed that the 30th Session of the Legal Committee had approved the text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air.* This draft instrument contains a number of square brackets on certain important questions,on which no consensus had been found in the legal Committee.

The Council, during the 151st Session, expressed the desire to consolidate the possible alternatives so that an appropriate solution to the different legal points could be found. One way of pursuing this objective could be through further meetings of the SSG. However,it was clear that a substantial part of the yet unresolved questions in the draft text reflected not only legal but also policy issues. Therefore,it might be appropriate to complement the further works of the SSG by input of another entry, which might add an element of governmental representation to the process, without unduly delaying the completion of a refined draft. As a result, a legal Panel named the SGMW/1 could be set up for this purpose.

On 14 to 18 April 1998,the first meeting of the SGMW/1 comprising 20 States with members of the SSG and the international organizations concerned was convered in order (1) to supplement the work achieved by the Legal Committee and to prepare drafting suggestions for resolving the outstanding questions in the draft text approved by the 30th Session of the Legal Committee, in particular the provisions presently contained in square brackets, and (2) if appropriate, to elaborate on possible drafting suggestions deemed necessary for reasons of linguistic clarification, presentation and editing.

On 3 June 1998, at the seventh Meeting of its 154th Session, the Council decided to convene an International Conference of Plenipotentiaries on Air Law ("Diplomatic Conference") to be held from 10 to 29 May 1999 in Montreal, in order to review the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, and to adopt a new instrument.

In this paper, the author is going to do the whole refinement of the draft new instrument. The first of all, the titles of the draft instrument, its Chapters and Articles will be considered ; the second, repositioning of certain paragraphs will be recommended ; in the third part, certain important phrasing and wording are to be reconsidered ; and finally, regarding almost all Articles, the refinement will be done Article by Article.

Ⅱ. Titles of the Draft Convention, its Chapters and Articles

1. The Title of the Draft Convention

The Title of the original draft instrument developed by the Legal Bureau of ICAO with assistance of SSG was "*ICAO Draft Convention on the Liability ofthe Air Carrier and Other Rules Relating to International Carriage by Air*". In the 30th Session of the Legal Committee, the Chairman proposed the term "ICAO" to be deleted. One delegation, supported by others, stated that the new convention convered many matters and emphasis should not be given in the title to liability issues. He proposed retention of the original title of the Warsaw Convention. Upon the suggestion of the Rapporteur, the Committee agreed to defer consideration of the title, until a clearer picture emerged of the contents of the proposed new instrument. In the final stage, the Committee reconsidered the title of the new Convention, as some delegations expressed their wish to retain the original of the Warsaw, while others preferred to modify it to take into account new realities, it was decided to refer the matter to the Drafting Group.

The Group decided it on the "*Draft Convention for the Unification of Certain Rules for International Carriage by Air*". The title decided by the Drafting Group involving the same words "for" twice seems to require further refinement: one alternative is that the second "for" should be replaced with "relating to" or "in relation to" ; the other is that the first "for" to be replaced with "on".

2. The Titles of Chapters

2.1. Chapter II

The title of Chapter II reads "Documentation and Duties of the Parties Relating to the Carriage of Passengers, Baggage and Cargo". This title includes the phrase "and Duties of the Parties". However, this Chapter also

includes "Rights of Parties" e.g., in Articles 11 and 13. Therefore, it is recommended that the phrase "and Duties of the Parties" should be deleted.

Moreover, in paragraph 1 of Article 1, the phrase "carriage of persons, baggage or cargo" is used. Therefore, it is recommended that the second "and" would be replaced with the term "or". In conclusion, the present title of Chapter II should be replaced with the phrase "Documentation Relating to the Carriage of Passengers, Baggage or Cargo" or simply "Documentation of Carriage".

2.2. Chapter III

Chapter III has a title reading "Liability of the Carrier and Extent of Compensation for Damage". The first part of the title sets out a general requirement but the second a specialized requirement mainly emphasizing Articles 20, 21A and other Articles relating to the limits. If the second part remains, other specialized requirements including Jurisdiction, arbitration, limitation of actions and so forth also ought to be added to it. The title of Chapter III of the Warsaw Convention has only the title "Liability of the Carrier". The same, therefore is recommended.

3. The titles of Articles

3.1. Article 2

This Article is a supplementary Article of Article 1 setting out the scope of application, the object of which is "carriage". Therefore, in order to refine the title of Article 2, it should be considered whether or not the phrase "Carriage of" should be added before the term "Postal Items".

3.2. Article 3

Regarding the title of this Article, it is reconsidered whether or not the term "and" should be replaced with the term "or", since the paragraph 1 of Article 1 deals with "all international carriage of persons, baggage or cargo".

3.3. Article 9

Regarding the title of this Article, it is reconsidered whether or not the words "and Statements" should be added to after the term "Particulars".

3.4. Article 16

Regarding the title of this Article, it is reconsidered whether or not the word "and" should be replaced with the word "or", since the paragraph 1 of this Article has the phrase "in case of death or bodily injury of a passenger".

3.5. Article 22A

This title is too enchanting ; this Article by no means grants any freedom to contract to passengers, consignors or consignees. Therefore, the phrase "permitted by Carriers" should be added after the term "Contract".

3.6. Article 23

The phrase "Basis of Claims" relates only to the first sentence. Regarding the second sentence,the title of this Article should be replaced with the phrase "Basis of Claims-Non-recoverable Compensatory Damages".

3.7. Article 24

If paragraph 1 of this Article is by no means revised, the first half of the title should be replaced with the phrase "Servants or Agents", but if the phrase "a servant or agent" in this paragraph to be replaced e.g., with the phrase "servants and/or agents", then so replaced with.

3.8. Article 37

If the text of this Article is not revised, the title should be replaced with the phrase "Servants or Agents", but if the phrase "servant or agent" in this text to be replaced with the phrase "servant and /or agent", the title should be replaced with the phrase "Servants and/or Agents".

3.9. Article 51 as reference material

The title of this Article reads "Relationship with other Warsaw Convention Instruments" Considering preambular paragraph 2, this title should be replaced with the phrase "Relationship with the Warsaw Convention and other Related Instruments".

Ⅲ. Repositioning of Certain Paragraphs

1. Paragraph 3 of Article 12 and Paragraph 3 of Article 16

Paragraph 3 of Article 12 sets out the rights of the consignee or consigner in case of the loss or late arrival of the cargo and Paragraph 3 of Article 16 sets out the rights of passenger in case of the loss or late arrival of the checked baggage. However, it is pointed out that the former is stipulated in Chapter Ⅱ relating documentation of the carriage, while the later in Chapter Ⅲrelating liability of the carrier. Although both paragraphs deal with the same problems, they are differently positioned. The appropriate solution is that paragraph 3 of Article 12 relating the loss or late arrival of the cargo would be repositioned after paragraph 2 of Article 17 and paragraphs 3 and 4 of the Article should be renumbered as paragraphs 4 and 5.

2. Paragraph 4 of Article 16

Paragraph 4 of Article 16 is a definition provision relating the term "baggage" which reads "Unless otherwise specified in the Convention, the term" baggage "means both checked baggage and unchecked baggage". Regarding Article 16, there are two more paragraphs relating to baggage but both paragraphs 2 and 3 relate only to checked baggage. Therefore it is considered that the most appropriate positioning of paragraph 4 of this Article is set out in Chapter Ⅵ relating to "Final Provisions". This

paragraph should be repositioned after Article 46 and renumbered as Article 46A. Moreover, the words "the term" should be replaced with "the expression".

Ⅳ. Reconsideration of Certain Phrasing and Wording

1. "Equitable compensation based on the principle of restitution" provided for in the third draft preambular paragraph - "Drafting Procedure on Trial".

Problems arise when considering the meaning and scope of this principle of equitable compensation based on the principle of restitution. In fact, its formulation reveals a degree of theoretical confusion of the drafters.

The roots of the term "equitable" are generally found in Common Law(e.g., sustainable in the Court of Equity), but in other legal systems including Civil Law system it may reveal a closer logical connection with the particular decision procedure for considering a claim :the procedure should be just and engender the best possible result for the parties while in mind special protection for the consumer. It is believed that in all equitable decision procedure of

justification in any legal system, the necessary and sufficient justification for any particular decision consists in the fact that the decision is the most just for the particular case, while ways in which justice has been administered by means of an equitable decision procedure will be diversified.

On the other hand, the term "restitution" refers to the substance of compensation and reflects the axiom of *restitutio in integrum*, which underlies the entire legal system of liability and compensation in both national and international law, whether based in tort or breach of contract. The substantive meaning of this concept is that the claimant should receive compensation which is equal to his actual damage, no less nor more. Many

jurists consider that the term "restitution" is synonymous with the term "compensation", however, in the common law of damages, only the later concept covers the expectation interest. To eliminate any possible confusion between these terms, having different connotations in different legal systems, the new draft convention should instead use the expression "equitable procedure based on the principle of compensation".

In light of the above interpretation of "equitable compensation", this third enumerated postulate "equitable balance of interests" loses its significance. Thus, the third principle should be deleted.

2. Unification of the Wording Relating to Definition Provisions

Paragraph 2 of Article 1 sets out the expression *international carriage.*

Paragraph 4 of Article 16 has the term "baggage". Paragraph 3 of Article 27 sets out "commercial agreement". Article 47 reads "the expression" "days".

In order unify, all of the definition provisions have the term "the expression" before the words to be defined.

3. "Rules" and "Provisions"

The term "rules" being as a general term remains unchanged, but, in order to unify, certain "rules" indicating "provisions" are replaced with the term "provisions". Therefore, the terms "rules" of paragraph 5 of Article 3, Article 8, and Article 34 are replaced with the term "provisions". Regarding Article 43 reading "……to infringe the *rules* laid down by this Convention, ……the rules as to jurisdiction, ……", it would be recommended that both "*rules*" of this Article remain unchanged. Moreover, regarding "the terms" of paragraph 4 of Article 1, it should be reconsidered whether it remains or be replaced with the term "provisions".

4. Unification of the Phrasing Relating to Articles 2, 30 and 32

Paragraph 1 of Article 2 has the phrasing "falls within the conditions laid down in Article 1", paragraph 1 of Article 30 reads "falling within the definition set out in paragraph 3 of Article 1", and then, paragraph 1 of Article 32 sets out "falls within the terms of Article 1". Therefore, it should be reconsidered whether they ought to be unified or not.

5. Unification of the Texts of Article 3 and 4 Relating to the Term "other means"

Paragraph 2 of Article 3 relating to passenger and baggage reads "Any other means which preserves the information indicated in paragraph 1 may be substituted for delivery of the document referred in that paragraph. If any such other means is used, the carrier shall offer to deliver to the passenger a written statement of the information so preserved", while paragraph 2 of Article 4 relating to cargo sets out "Any other means which preserves a record of the carriage to be performed may be substituted for the delivery of an air waybill".

If such other means are used, the carrier shall, if so requested by the consignor, deliver to the consignor a receipt for cargo permitting identification of the consignment and access to the information contained in the record preserved by such other means.

In considering paragraph 1 of Article 25 which has the wording "or with record preserved by the other means referred to in Article 3, paragraph 2, and Article 4, paragraph 2", it is pointed out that the both paragraphs should be more refined.

Regarding paragraph 2 of Article 3, the simplest alternative is to add the words "a record of" after the term "preserves" and replace the term "so preserved" with the term "contained in the record preserved by such other

means". Even if so revised, the chapeau of the second sentences of both paragraphs should also be unified either in a singular or plural formation.

The most refined alternatives relating to paragraphs 1 and 2 of Article 3 and paragraphs 1 and 2 of Article 4 are as follows ;

Article 3

1. In respect of *the* carriage of passengers an individual or collective document of carriage shall be delivered containing :
   (a) an indication of the places of departure and destination ; *and*
   (b) if the places of departure and destination are within the territory of a single State Party, one or more agreed stopping places being within the territory of another State, an indication of at least one such stopping place.
2. Any other means which preserves *a record of* the information indicated in paragraph 1 *of this Article* may be substituted for the delivery of the document referred to in that paragraph. *If such other means are used,* the carrier shall offer to deliver to the passenger a written statement of the information contained in the record preserved by such other means.

Article 4

1. In respect of the carriage of cargo an air waybill shall be delivered *containing* :
   (a) *Article 5 (a) (as is)*
   (b) *Article 5 (b) (as is)*
   (c) *an indication of the [nature and] weight, dimensions, packing and number of packages of the cargo.*
2. Any other means which preserves a record of the information *indicated in paragraph 1 of this Article* may be substituted for the delivery of the air waybill *referred to in that paragraph.* If such other means are used, the carrier shall, if so required by the consignor, deliver to the consignor *a cargo receipt* permitting identification of *the cargo* and access to the information contained in the record preserved by such other means.

As a result, Article 5 is to be deleted and the following Articles are to be cenumbered.

6. The Phrasing "in some cases" set out in Paragraph 4 of Article 3

The 100,000 SDR ceiling of the first tier is to be construed as a limit, therefore, it is considered that the phrase "in some cases" should be replaced with the phrase "in most cases".

7. The Phrasing "for insertion in cargo receipt or" set out in Paragraph 1 of Article 9.

It had been pointed out by the author of this paper in 1983 that this phrasing was meaningless. Regarding the drafting history of this paragraph, see ICAO Doc 9154-LC/174-1, at 32, at 71 et seq. and at 257.

8. Inclusion of the term "the cargo receipt" to Article 10

It is reconsidered whether the words "the cargo receipt" should be added to after the term "waybill" in line 5 of paragraph 2 of Article 10.

9. The term "bodily injury" of Article 16

While the 30th Session of the Legal Committee affirmed "bodily or mental injury", the SGMW refused adoption of the concept "mental injury". One expert told us at the fourth meeting of the SSG that the original French version which used the term "lsion corporelle" which is in his view also encompassed some psychic elements. When recalling that the Guatemala City Protocol adopted the term "personal injury" for its French

version and the Montreal Additional Protocol No.3 endorsed the same term, it is appropriate that the term "bodily injury" should be replaced with the term "personal injury" within which also encompassed some psychic elements.

10. Unificasion of the Terms "accident(s)", "event(s)" and "occurrence(s)"

The wording relating to the facts which caused the recoverable compensatory elements should be reconsidered : in case of the passengers, the term "the accident" is used, while in case of the baggage, the term "the event", and in case of the cargo the term "occurrence". Moreover, in the provision of paragraph 6 of Article 21A, the term "the occurrence" including accidents, events or delay is used, while in the provision of the paragraph 2 of Article 30, the term "accident or the delay" is used. In the later case, the term "accident" is deemed to include the term "the event", but exclude the term "delay".

However, it should be noted that term "the event" in the first line of paragraph 1 of Article 17 is used in the meaning of the term "case" exceptionally. In this context, in order to unify, it, in the author's opinion, is recommended to adopt the term "the event" which was adopted in the Guatemala City Protocol as the terms to indicate all the facts which cased the recoverable compensatory elements.

11. Carrier's Liability Relating to Unchecked Baggage

The last sentence of paragraph 2 of Article 16 stipulates that " [I] n the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault". Regarding the term "its fault", it is reconsidered whether or not the fault of the carrier's servants or agents acting within the scope of their employment should also be included in the sentence.

Moreover, regarding the term "personal items", it is recommended to consider whether or not the term should be replaced with the term "personal effects".

12. Phrasing of Article 18

In this Article the phrasing "damage occasioned by delay" is used twice, while in the paragraph 1 of Article 21A, the phrasing "damage cased by delay" is done. Therefore, it is reconsidered which words should be adopted.

In this Article the phrasing "the carriage by air of passengers, baggage, or cargo" is used. However, for the sake of unification with other Articles, the term "by air" of this phrasing should be deleted.

In this Article the phrasing "all measures that could reasonably be required to avoid the damage" is used, while in the sub-paragraph(a) of Article 20 the phrasing "all necessary measures to avoid the damage" is done. Therefore, it is reconsidered which phrasing should be adopted.

The later half of carrier's defense of this Article reads that "it was impossible for it or them to take such measures". Regarding the later half of the carrier's defense of Article 20 it reads that "(b) it was impossible for carrier or them to take such measures". In my opinion it is considered that the both phrasing are inappropriate, since the phrasing "it (the carrier) or" them is included within them the term "or". Therefore, it is recommended that the term "or" should be replaced with the term "and".

13. Refinement of the Phrasing "Paragraph 1 of Article 16" in Article 20

The phrase should be replaced with "the first sentence of paragraph 1 of Article 16". For the reason, see M. Sekiguchi "The Passenger Liability Regime of the New Deal : But New Wine Must Be Put into Fresh Wineskins (1997) X X II : II Ann. Air & Sp.L., at 249.

14. The Phrasing "a servant or agent acting within the scope of its employment" in Articles 21A, 35, 37 and 38

It is noted that regarding all the paragraphs and Articles concerned including the abovementioned phrasing, the term "or agency" after "employment" had been deleted. The original French version of the wording "employment" is "fonctions". Therefore, this uniformity may be estimated.

15. Conversion of SDR into National Currencies

Regarding the term "100,000 SDR" of Article 20, it should be replaced with the term "100,000 Special Drawing Rights". The second sentence of paragraph 1 of Article 21B reads that " [C] onversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of the judgment".

As you all know, the value of the U.S. dollar in terms of the SDR is the reciprocal of the sum of the dollar values, based on market exchanges rate, of specified quantities of the five currencies. Practically the exchange rates for this purpose in principle are the noon rates in the London foreign exchange market. Therefore, while it is easy for any Courts to get access to the homepage of the IMF and see the exchange rates, all the Courts located in the area from Tokyo to London can not get access to the correct value of their national currencies in terms of the SDR at the date of the judgment before the noon in accordance with the Greenwich time, but merely one at the previous date of the judgment. Regarding the phrasing of this sentence, reconsideration is to be required.

16. Escaltor System Set out in Article 21C

The escalator system contained in Article 21C embodies the inflation monism theory. Unfortunately, the drafter neglects an essential factor insofar as the nominal value of a national currency as expressed in SDRs may also fluctuate depending on the economic strength of the particular State,independent of its rate of inflation. Thus, the conversion rate rises or falls in inverse proportion to the economic strength of the relevant State, and this axiom may constitute an opposing notion named by the author as the proper nature theory.

For instance, in Japan, 100,000 SDRs was equivalent to ¥35,723,000 at the end of 1975. If a Protocol containing the escalator clause with a 10% automatic increase every five years had been adopted at that time and entered into forth in 1980, 100,000 SDRs would have been automatically modified to 110,000 SDRs in 1985, yet the exchange rate for 1 SDR at the end of 1985 was merely ¥220.23.

Therefore 110,000 SDRs in 1985 would translate into only ¥24,225,300. Similarly, at the end of 1990, 110,000 SDRs would automatically increase to 121,000 SDRs, while 1 SDR fell to ¥191.21, therefore 121,000 SDRs would be calculated as ¥23,136,410. Regarding SFr., 100,000 SDRs was equivalent to SFr. 306,710 at the end of 1975. However, nowadays (on December 15, 1998) 1 SDR fell to 1.889 SFr., therefore 121,000 SDRs would be calculated as SFr. 228,569. The above illustration demonstrates that the escalator clause which is constructed according to the inflation monism theory for which the Legal committee had suggested and the SGMW had endorsed, fails to accomplish the desired result. For Switzerland, the above mentioned escalator clause would actually function as the so-called "de-escalator clause". Therefore, it is submitted that the escalator clause should be redrafted according to both of the proper nature theory and the inflation theory.

In order to establish a functionable review system, the following scheme should be considered.

In the first stage, considering the proper nature theory, the value of national currencies in terms of the SDRs of a State Party which is a Member of the IMF shall be calculated in accordance with the method of valuation applied by the IMF for its operations and transactions and shall also be fixed e.g., at the date of entry into force of this Convention.The value of national currencies in terms of the SDRs of a State Party which is not a Member of the IMF shall be calculated and fixed in a manner determined by that State. In other word,in this stage, the nominal value of national currencies in terms of the SDRs of State Parties of the Convention shall be fixed at the date of entry into force of the Convention.

In the second stage, the limits of liability established under this Convention should be reviewed by the ICAO at five year intervals,by an inflation factor which corresponds to the accumulated rate of inflation, upon condition that it has exceeded 10%. It however is desirable that the first such review should not be taken place at the end of the fifth year following the date of entry into force of this Convention but be done at the fifth year date of entry into force of this Convention, since the end of the year is not the working date of the ICAO, and moreover at the date, the London market is closed and the New York market is also closed ; accordingly the exchange rates used for this purpose in the IMF exceptionally are employed by the Frankfurt fixing rates.

17. Revision of Article 40 (Additional Jurisdiction)

In accordance with the revision of Article 27, it is desirable that the text of the Article 40(Additional Jurisdiction) should also be revised in the same vein. The first of all, the terms "court" in lines 2 and 3 should be replaced with the terms "Court". Then, the phrasing "the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business" should be replaced with the phrasing "the Court of domicile of the actual carrier or of its principal place of business".

V. Refinement of the Articles

1. Preamble

In the preambular paragraph 2, the term "other" should be added before the term "related instruments".

In the preambular paragraph 3, as the author of this paper urged in the foregoing Chapter, the phrase "equitable compensation based on the principle of restitution" should be replaced with the phrase "equitable procedure based on the principle of compensation".

In the preambular paragraph 4, the phrase "international air transport operation" should be replaced with the phrase "services for international carriage by air to be operated by carriers".

If the phrase "equitable compensation based on the principle of restitution" is replaced with the phrase "equitable procedure based on the principle of compensation", the preambular paragraph 5 should be redrafted as "CONVINCED that collective State action is the most adequate means of achieving further harmonization and codification of certain rules governing international carriage by air through a new Convention".

2. Article 1

Regarding paragraph 4,the word "international" should be added before the term "carriage" and the word "terms" should be replaced with the word "provisions".

3. Article 3

Regarding paragraph 4, the term "stop" may be replaced with the phrase "at least one agreed stopping place" and also the term "and" in the last line may be replaced with the term "or".

4. Article 4

The terms "the consignment" and "a receipt for the cargo" of paragraph 2 of this Article should be replaced with the terms "the cargo" and "a cargo receipt" respectively.

5. Article 5

The term "the consignment" of sub-paragraph(c) of this Article should be replaced with the term "the cargo".

6. Article 7

At the end of the sub-paragraph(a), the term "and" should be added.

7. Article 8

In order to unify the wording, the term "none the less" should be redrafted to the term "nonetheless" or "nevertheless".

8. Article 10

In line 5 of paragraph 2, the term "or the cargo receipt" should be added to after the term "the air waybill".

9. Article 14

In the chapeau of paragraph 1, the term "The provisions of" should be added to.

10. Article 15

The phrasing of the last line of paragraph 1 should be replaced with the phrasing "of the carrier or its servants or agents acting within their scope of employment".

11. Article 17

Regarding paragraph 2, the term "or" should be added to the end of sub-paragraph(c), and the term "or an omission" might be added to after the term "an act" of sub-paragraph(d).

12. Article 21A

The term "persons" in paragraph 1 should be replaced with the term "passengers".

Regarding paragraph 4, there are many problems ; the term "distraction", should be added to before the word "loss" in lines 1 and 3 ; the word "a" should be added to before the word "part" in line 1 ; the word "any" in line 1 should be replaced with the word "an"; the word "cargo" should be added to before the word "receipt" in line 5 ; and the words "package or" should be added to before the word "packages" in line 4.

Regarding paragraph 5, the term "foregoing" of line 1 should be deleted, and the comma after the term "the carrier" should be deleted and added the term "or".

13. Article 21B

Regarding paragraph 2, the term "ratification or accession" in line 3 should be replaced with the term "ratification, acceptance, approval or accession" in accordance with the Vienna Convention on the Law of

Treaties.

Regarding paragraph 3, the term "manner of" should be added before the term "calculation" in line 1. The term "The" should be added to the chapeau of the second sentence. Moreover, the term "depositary" in line 5 should be replaced with the term "Depositary".

14. Article 21C

Regarding paragraphs 1 and 3, the term "at the end of the fifth year" should be replaced with the term "at the same date of the fifth year" or the term "on the basis of the final dealing date of the London foreign exchange market of the fifth year".

15. Article 22

Regarding this article, first of all, the term "contractual" should be set out before the term "provision" in line 1, the term "the whole contract" should be followed by the term "of carriage".

16. Article 23

The "comma" after the term "baggage" in line 1 should be deleted.

17. Article 24

It is reconsidered whether the term "or" between a servant or agent in line 1 of paragraph 1 should be replaced with the term "and/or" or not. It is also reconsidered whether or not the "comma" after the term "the carrier" in line 1 of paragraph 2 should be replaced with the term "and".

18. Article 25

The phrasing "in Article 3, paragraph 2, and Article 4, paragraph 2", should be replaced with the phrasing "in paragraph 2 of Article 3 and paragraph 2 of Article 4".

The term "no action" in paragraph 4, should be replaced with the term "no action of damages".

19. Article 27

The term "the accident" in sub-paragraph(a) of paragraph 2 should be replaced with the term "the event". Moreover, the term "the carrier actually or contractually" in sub-paragraph(b) of paragraph 2 should be replaced with the term "the actual or contracting carrier". Furthermore, the term "that carrier" in sub-paragraph(c) of paragraph 2 should be replaced with the term "the actual or contractual carrier". Regarding paragraph 3, the term "In this Article", should be replaced with the term "For the purposes of this Article", and before "commercial agreement", the term "the expression" should be set out. Regarding paragraph 3 bis, the phrasing "ratification, adherence or accession" should be replaced with the phrasing "ratification, acceptance, approval or accession", and the word "depositary" should also be replaced with the word "Depositary".

20. Article 29

The term "The right to damages" mentioned in paragraph 1 should be replaced with the term "The action for damages".

21. Article 30

Regarding paragraph 2, the term "carriage of this nature" should be

replaced with the term "carriage referred to in the foregoing paragraph 1 of this Article". The term "the accident or the delay occurred" should, as above mentioned, be replaced with "the event caused".

Regarding the phrasing "or any person entitled to compensation in respect of him or her", it is reconsidered whether or not it might be deleted. It, in my opinion, is considered that this phrasing should not necessary to be emphasized.

Regarding the term "can", it is reconsidered whether the term should be replaced with the term "may" or not.

Regarding paragraph 3, the term "As regard" should, in order unify, be replaced with the term "In the case of carriage of". The term "a right of action" in lines 1 and 2 should be replaced with the term "the action for damages".

22. Article 31

In order to refine, the term "its provisions" should be replaced with the term "the provisions of this Convention". Moreover,it is reconsidered whether or not the term "or indemnification" should be added to after the term "recourse".

23. Article 32

Regarding paragraph 2, the term "the document of air carriage" should be replaced with the term "the document of carriage by air".

24.Article 34

The term "agreement" in line 2 should be replaced with the term "contract of carriage" and the term "the agreement" in line 4 should be replaced with the term "the contract".

25. Article 35

The term "no such act or omission" in line 3 of paragraph 2 should be replaced with the term "no such acts and omissions".

26. The chapeau of Article 37, 38 and 39

The terms "In relation to the carriage" should be replaced with the terms "In the case of carriage".

27. Revised Article 40

See "Revision of Article 40 (Additional Jurisdiction)" in 17 of Chapter Ⅳ.

28. Article 41

The term "the whole agreement" in line 3 of paragraph 1 should be replaced with the term "the whole contract of carriage". Regarding paragraph 2, the term "In respect of the carriage" should be replaced with the term "In the case of carriage",; the term "the preceding paragraph" should be replaced with the term "the foregoing paragraph",; and the term "destruction", should be added to before the term "loss".

29. Article 43

The term "special agreements" should be replaced with the term "special contracts".

30. Article 47

The phrasing "The expression" days "when used in this Convention"

should be replaced with the phrasing "For the purpose of this Convention, the expression" days.

31. Article 49 as reference material

The term "he" in line 3 of paragraph 4 should be replaced with the term "he or she".

32. Article 51 as reference material

The comma between "the Convention" and "Supplementary" in sub-paragraph (c) of paragraph 1 should be reconfirmed.

Ⅵ. Final Remarks

This paper is the first one written by a civil law scholar having experience of teaching Equity in English Law to deal with the total refinement work relating to the "*Draft Convention for the Unification of Certain Rules for International Carriage by Air*".

In the Part Ⅱ, the author suggests that the title of the new instrument should be replaced with the "*Convention on Unification of Certain Rules Relating to International Carriage by Air*".

The author considers in the part Ⅲ repositioning of certain paragraphs and suggests right positioning thereof.

In the fourth part, the author suggests reconsideration relating to seventeen phrasing and wording of this draft instrument. For instance, regarding the disputable principle of "*equitable compensation based on the principle of restitution*" referred to the preamble of the draft new instrument, the author urges inappropriateness of the "principle of restitution" as a compensatory principle for the contractual liability and improper usage of the term "equitable" of the phrase "equitable compensation"

; in the later issue the author points out that the denotation of "equitable" is restrictive and relates not to the term "compensation" but in principle to the phrasing "the particular decision procedures" including the particular judicial, arbitral, mediatory and other dispute settlement procedures. Therefore, the author suggests that the present principle of "*equitable compensation based on principle of restitution*" should be replaced with the "*equitable procedure based on the principle of compensation*".

In the fifth part, the author reads the texts of all Articles and refines them Article by Article.

It is not difficult for the author to predict the future of the new instrument ; if the two points regarding the presumed fault liability regime in the second tier in Article 20 and the so-called "fifth jurisdiction" in article 27 would literally be affirmed in the Diplomatic Conference, the U.S.Delegation may sign the text of the new instrument. However, if either would be negated, the Conference itself would fail. It is analyzed that more than the majority of the State Parties of ICAO seem at present not to be positive and sympathetic for the new instrument, so that the coming Conference is not much likehood of its success.