Legal Issues Arising out of Delay in Civil Aviation

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I. Introduction

Since the introduction of air transport services into our daily life, the ensuing advantages have been widely recognized. The efficiency brought about by air transport has been a spectacular aspect which any other existing means of transportation can never achieve.[2] Witnessing the rapid development of world economy along with the trend of globalization,[3] we are increasingly getting ourselves involved in more frequent movement transcending international borders, which provides as a fundamental impetus to the prosperity of the civil aviation industry.[4] Though suffered from the disastrous event of September 11, 2001, the industry has never

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2) It is claimed to be both convenient and relatively inexpensive, allowing more passengers to travel to more places than ever before. See S.T. Collins & J.S. Hoff, In Flight Incivility Today: The Unruly Passenger, 12 *Air & Space Law* 23 (1998).

3) W. Walker, S. Mellow & M. Fox, The Concept of Globalization, 14 *Company and Securities Law Journal* 59 (1996).

4) See World Airline Passenger Traffic Growth Pick Up Through to 2001, at <http://www.icao.org/icao/en/nr/pio9909.htm>.

stopped its pace. After several strategic adjustments, civil aviation is picking up pace and reclaiming its fame in the arena of transportation due to an expected overall strengthening of the world economy.[5]

However, since its history as a commercial department in national economy, civil aviation has consistently suffered from various claims,[6] including the claims of delay. Many cases have been put forward as a result of delay out of various reasons. The charter for air transport: Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw Convention)[7] is a comprehensive international treaty governing the liability of carriers in all international transportation of persons, baggage and goods. Among those liabilities, the Convention offers the basic structure holding carriers liable for delay. Such uniformity with respect to liability[8] allowed the carriers to raise the investment capital that was needed to expand their operations.[9] But no clear definition and detailed rules are provided for a final resolution.[10]

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5) One Year After 11 September Events ICAO Forecasts World Air Passenger Traffic Will Exceed 2000 Levels in 2003, at <http://www.icao.int/icao/en/nr/pio200210.htm>.

6) See B.I. Rodriguez (Ed.) Aviation Accident Law 10-16 (1996).

7) Warsaw Convention, Warsaw, 12 October 1929; ICAO Doc. 7838, 9201; (1933) 137 LNTS 11; 49 Stat. 3000; (1933) JAL 302; (1934) USAvR 284.

8) See *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1467 (11th Cir. 1989); *Asher*, 70 F. Supp. 2d at 618. See generally J.L. Neville, The International Air Transportation Association's Attempt to Modify International Air Disaster Liability: An Admirable Effort with an Impossible Goal, 27 *Georgia Journal of International & Comparative Law* 573-574 (1999); F. Lyall, The Warsaw Convention: Cutting the Gordian Knot and the 1995 Intercarrier Agreement, 22 *Syracuse Journal of International Law & Commerce* 68-69 (1996).

9) A.F. Lowenfeld & A.I. Mendelsohn, The United States and the Warsaw Convention, 80 *Harvard Law Review* 498 (1967); S.M. Speiser & C.F. Krause, Aviation Tort Law 11.4, at 635-636 (1978 & Supp. 1999); A. Buff, Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Intercarrier Agreement Eliminate the Need to Amend the Convention?, 20 *Fordham International Law Journal* 1774 n. 42 (1997).

10) J. Cousins, Warsaw ConventionAir Carrier Liability for Passenger Injuries Sustained Within a Terminal, 45 *Fordham Law Review* 388 (1976).

Such ambiguity has further confused or delayed the proper resolution in practice.[11] Relevant references can sometimes also be made to the protocols concluded within the Warsaw System.[12] However, considering their comparatively limited acceptance,[13] the original Warsaw Convention

11) One excuse for such ambiguity could be that the drafters intended a flexible approach which would adapt to the changing conditions of international air travel over the years. See for example *Buonocore v. Trans World Airlines, Inc.*, 900 F.2d 8, 10 (2d Cir. 1990); *Day v. Trans World Airlines, Inc.*, 528 F.2d 38 (2d Cir. 1975); *Martinez Hernandez v. Air France*, 545 F.2d 284 (1st Cir. 1976).

12) The 1955 Hague Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, September 28, 1955, 478 U.N.T.S. 371); the 1966 Montreal Interim Agreement (Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol (1966), Civil Aeronautics Board Agreement No. 18,900, approved by Exec. Order No. 23,680, 31 Fed. Reg. 7,302 (1966)); the 1971 Guatemala City Protocol (Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, as Amended by the Protocol Done at the Hague on 28 September 1955, March 8, 1971); the supplemental Guadalajara Convention of 1961 (Convention, Supplementary to the Warsaw Convention, For the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier) and four Montreal protocols are added to Warsaw Convention, which constitute a complete body for regulating air transportation. The Four additional Montreal Protocols are as follows: Additional Protocol No.1 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929, September 25, 1975, reprinted at the IATA, Principal Instruments of the Warsaw System 3-47 (2d Ed. 1981) (hereinafter Principal Instruments); Additional Protocol No.2 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, September 25, 1975, reprinted at Principal Instruments, at 553; Additional Protocol No.3 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955 and at Guatemala City on 8 March 1971, September 25, 1975, reprinted in Principal Instruments, at 54-57; Additional Protocol No.4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at the Hague on 28 September 1955, September 25, 1975, reprinted in Principal Instruments, at 2-47.

13) For example, the United States did not adopt The Hague Protocol due to its continued dissatisfaction with the amount of the Protocol's limits. The same happens to the Guatemala City Protocol, which requires 30 ratification to take effect. See further M.R. Pickelman, Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time, 64 *Journal of Air Law & Commerce* 284 (1998); F. Ortino & G.R.E. Jurgens, The IATA Agreements and the European Regulation: The Latest Attempts in the Pursuit of a Fair and Uniform Liability Regime for International Air Transportation, 64 *Journal of Air Law & Commerce* 384 (1999); N.M. Matte, The Warsaw

shall remain as the basic document for the present discussion.

Realizing the importance of defining the legal status of delay in civil aviation, the present author attempts to analyze the problem of delay from the legal angle. Proper understanding and reasons resulting in air flight delay shall be described in Part 2. Legal issues entailed in delay shall be outlined in Part 3, which include the validity of flight tickets; rights and obligations of passengers; remedies available. A specific cause of delayoverbooking shall be further discussed in Part 4, exemplifying the application of previous discussion in Part 3. Finally, a conclusion shall be made in Part 5 offering suggestions for further improvement in resolving disputes over liability resulting from delay.

II Delay and its Causes

Delay exists almost everyday in civil aviation. People suffered from delay are complaining and many claims have been dealt with by national courts. But so far there is no uniform understanding on its exact meaning. The lack of definition in Warsaw Convention along with its history in discussion for a proper explanation of delay accounts for the difficulty of defining this term. Even more than 70 years after its existence, the process of formulating Montreal Convention[14] to take the place of

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System and the Hesitations of the U.S. Senate, 8 *Annals of Air & Space Law* 158 (1983); R.H. Mankiewicz, Warsaw Convention: The 1971 Protocol of Guatemala City, 20 *American Journal of Comparative Law* 335 (1972).

14) Convention for the Unification of Certain Rules for International Carriage by Air, 28 May 1999, ICAO DCW Doc. No. 57. For the text of Montreal Convention, see 24 *Air & Space Law*, 344-354 (1999).

Warsaw Convention has successfully avoided including this issue in its agenda.

From its literal meaning, delay simply refers to a lag between the scheduled time and its actual time in leaving and arrival. Such time differences can directly contribute to delay. When tracing to Article 17 of Warsaw Convention, it is doubtful whether delay can be attributed to an accident. For example, in the case of *Chendrimada v. Air-India*, the court took the efforts elaborating whether an eleven-hour detainment aboard an aircraft constitutes an accident for the carrier.[15] When looking further into the structure of the Convention, it offers the negative answer since Article 19 clearly defines delay instead of including delay in Article 17. In practice, no accident has been found where the passenger claimed an injury as a result of a prolonged sitting due to delay.[16] However, it is necessary to read all those provisions in conjunction in order for a better and complete understanding of liability for the carriers.[17]

A careful study of delay is necessary for discerning various reasons leading to delay, which can account for different legal consequences for the carriers. Thus, it is inevitable at this stage to classify the causes for delay.

According to general practices, five categories of causes can be attributed. This classification is more or less based on different parties who cause the delay. Firstly, delay can arise out of adverse weather

15) 802 F. Supp. 1089 (S.D.N.Y. 1992)

16) See *Margrave v. British Airways*, 643 F. Supp. 510, 512 (S.D.N.Y. 1986).

17) See for example, R.H. Mankiewicz, *The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System* 91 (1981).

during the taking off, the flying or landing stage. Secondly, the operation from the side of the carriers can result in delay. For example, the late arrival of a specified plane for the coming flight, the mechanical problem of the plane or the problem with the staff of the carrier can have strong influence on the final delay of the air flight. Indeed, this constitutes more than half the delay in air transport. It is thus necessary to reserve room in Warsaw Convention providing liability of the carrier in case of delay.

Thirdly, delay occurs because of air traffic regulation, like control of traffic number within a certain area or forbidden traffic area in a certain period. Generally speaking, with better arrangements, this shall not happen very often. Fourthly, delay results from the side of the airport with the problem of ground services, security in airport, catering, cleaning, packing, etc. Finally, the actions from the passengers themselves can also cause delay. Now various scholars are starting to research into the topic of unruly passengers,[18] which is very meaningful, aside from its implication to other legal issues, to reduce delay from the passengers' side.

Delay in baggage or goods and delay in passengers can have different causes. Some scholars have classified the cause of delay based on different subject matter, which is also helpful for displaying the complicated situation.[19] Delay in baggage or goods can arises from wrong loading or delivery, no reservation, which shall not happen in passengers. Nevertheless, for the present discussion, we can still rightly

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18) See for example, R.I.R. Abeyratne, Unruly PassengersLegal, Regulatory and Jurisdictional Issues, 24 *Air & Space Law* 46-61 (1999); see also J.R. Karp, Mile High Assaults: Air Carrier Liability under the Warsaw Convention, 66 *Journal of Air Law and Commerce* 1551-1568 (Fall 2001); IATA Guidelines for Handling Disruptive/Unruly Passengers, December 1998, at <http://www.iata.org>.

19) See for example R. Schmid, Which are the Duties of an Air Carrier Who Does not Execute an Air Carriage Contract as Agreed, 15 *Air Law*, 102-104 (1990).

attribute such minor causes to the third category mentioned above. Thus, this classification shall be valid for the following elaboration on the legal issues arising out of delay.

III. Legal Issues Arising out of Delay

A. Validity of Flight Tickets

Flight tickets are generally standard contracts between the carriers and the passengers. Rights and obligations between the two parties are defined therein. Once the carriers or their agents hand over the tickets, the contracts are formed. Both parties should act in accordance with the relevant terms of the contracts. However, as standard contracts, flight tickets do not contain all the contents of normal contracts. The tickets are only a primary evidence for a formal contract of air transportation, which shall contain detailed rules and regulations, conditions of the carriers, declarations, notice and other relevant information.[20] The tickets, though not the formal contracts, shall still contain the date and time for departure.

In a strict sense, a delay itself constitutes violation of the contract, no matter the length of delay in time. However, such an explanation shall largely add to the liability of the carrier. Proper application of law of contract should be adopted. First of all, we should look into the reasons lying behind the fact of delay, trying to locate the essential party liable

20) See further Article 11 of Warsaw Convention.

for the delay. Secondly, it is not sensible to consider reasonable delay as a violation of contracts. Reasonable consideration of time period of leaving and arrival should be afforded to the carrier, which has actually in practice. Thirdly, exemption rules are developed to absolve the carrier from the liability, for example, the carrier shall provide the evidence that they have taken reasonable measure to avoid such a delay. Once this evidence is admitted, the carrier shall be exempted from the liability of delay. As mentioned above, the standard contract can contain declarations for exemption, such declarations shall subject to the examination to relevant provisions in Warsaw Convention or other applicable rules[21),22)]

In the case of *Freedman v. Northwest Airlines, Inc.*,[23)] plaintiff brought a suit for damages from delay. Defendant resorted to the tariffs printed on the plaintiff's ticket, which provided that in the event of such an occurrence, the role and exclusive remedies available were alternative transportation or a ticket refund ticket for the unused portion. The court went on to discuss the issue of validity of the exculpatory clause in the contract. Though the Convention was not mentioned, the court concluded that the terms of the tariff did not preclude the plaintiff from maintaining an action for breach of contract and negligence.[24)]

B. Consumer Rights

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21) Some countries' civil laws allow carriers to contractually disclaim liability for injury or death. See further H. Drion, *Limitation of Liabilities in International Air Law* 1-11 (1954).

22) See for example *Austin*, 75 F. 3d at 1541-1542. The Court of Appeal decided that the airlines' ticket provisions limiting recovery are plainly inconsistent with the rights Congress granted the government and are no bar to the government's right to refunds. This is especially true where federal transportation regulations implementing congressional policy, were part of the agreements with the airlines.

23) 638 N.Y.S. 2d 906 (N.Y. Albany City Ct. 1996).

24) *Id.* At 907-908.

Passengers or consignees are properly defined as consumers now.[25] In international practice, it is generally recognized that consumers should be afforded special protection.[26] This shall also apply to the present case. While not adding too much burden on the carriers, consumers should at least have the right to information. Once there is a delay, consumers should be informed of such information in good order. New schedule of the flight should also be provided efficiently to the consumers. In the case of delay, the carriers should strive to arrange an alternative flight as early as possible to avoid further delay. Arrangements should also be made to accommodate those consumers, including providing catering, accommodations, if necessary. Depending on different causes for delay, the carriers shall undertake different portion of expenses. Generally speaking, consumers should pay for themselves expenses during delay from causes of not involving the carriers. But the carriers should be in the position to provide as much assistance and convenience as possible.

C. Liability

As discussed, in case of delay, the carrier is in violation of the contract and liability arises accordingly. Warsaw Convention provides that the carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.[27] With such a

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25) As defined by Australian Competition and Consumer Commission (ACCC), a global consumer shall mean a consumer that acquires goods or services for personal, household or domestic use from a trader who is situated (even though it may not be apparent to the consumer) in another country. See further ACCC, the Global Enforcement of ChallengeEnforcement of Consumer Protection Laws in a Global Marketplace, Discussion Paper, Australian Government Publishing Service, Canberra, August 1997, at 3, at <http://www.accc.gov.au..

26) See generally United Nations General Assembly Protection, Res. N. 39/248, 9 April 1985. For analysis, see further D.J. Harland, The United Nations Guidelines for Consumer Protection, 11 *Journal of Consumer Policy* 245-266 (1987).

27) Article 19 of Warsaw Convention.

simple provision, problems come out in its applications.

Firstly, it is recognized that not all delays shall be subject to liability. Since there is no definite legal meaning for delay in air transport, a literal meaning shall be assumed, however, the application of this definition shall lead up to unreasonable liability for the carriers. Thus, an appropriate definition for delay in the case of air transport shall be most appropriate. What conditions should be needed to constitute the delay in civil aviation? The generally recognized condition is that only an unreasonable duration of delay constitutes liability. As long as the carrier carries out his responsibility appropriately, he shall undertake no responsibility.[28] The International Air Transport Association (IATA), a private worldwide organization of international air carriers, also formulated regulations requiring the carrier to use his best efforts to carry the passenger and his baggage with reasonable dispatch.[29] However, what standards shall be up to the reasonableness? No steadfast rules exist. The explanation shall rest largely within the free discretion of the judges. Nevertheless, several circumstances shall be considered to testify the reasonableness: for example, the distance of carriage, the manner of carrying out transportation, the weather conditions, the season, the availability of other means of transportation.[30] From such considerations, we can understand that great difficulty indeed exists in giving a proper definition to delay in air transport. With ongoing discussion, we can expect that a clear definition for delay shall take some time.

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28) I.H.Ph. Diederiks-Verschoor, The Liability for Delay in Air Transport, 26 *Air & Space Law*, No.6, 301 (2001).

29) See for the 1970 version of the IATA General Conditions (Passengers) [1971] *German Journal of Air & Space Law (ZLW)* 214-232.

30) See Air Travellers Fly-Rights (CAB) (1973).

Secondly, delay should occur during air transportation of passengers, baggage and goods. The rules of Warsaw Convention shall be applicable exclusively in the sphere of transportation. The liability of pure delay shall be governed by civil law, or common law, as the case may be.[31] Accordingly, it is all the more important to understand the period of air transportation specified by the Convention. With no clear guidance, we assume the period shall be the same as defined in Article 17 and Article 18, which deal respectively with damage in the event of death, wounding or other bodily injury of passengers, and damage to goods and baggage. Accordingly, the period of air transportation of passengers shall be from the operation of embarking, on board the aircraft till the operations of disembarking;[32] air transportation of baggage or goods shall be the period during which the baggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing, outside an aerodrome, in any place whatsoever.[33] Such an understanding is only a last resort, it is thus suggested that a clear provision on the period of air transportation in case of delay be clarified as soon as possible.

From Article 19 of Warsaw Convention, we can see the direct relationship between delay and damage. Delay is the only and direct cause for damage, which forms the basis of claims for compensation. Fault liability shall apply in case of delay.[34] Such a fault system is extremely important since it offers a public protection and improves aviation safety and security.[35] As long as the unreasonable delay arises,

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31) I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, 71 (7th Ed., Kluwer, 2001).

32) Article 17 of Warsaw Convention.

33) Article 18, Section 2 of Warsaw Convention.

34) For a general discussion on fault system, see further N.M. Maltee, The Warsaw System and the Hesitations of the U.S. Senate, 8 *Annals of Air & Space Law* 164 (1983).

the carrier shall be liable. According to the Rapporteur of the 1925 Conference[36]: the Commission asked itself which liability regime had to be adopted: risk or fault. The general feeling is that, whilst liability towards third party must see the application of the risk theory, by contrast, in the matter of the carrier's liability in relation to passengers and goods, one must admit the fault theory.[37]

Under such considerations, there are possibilities for the carrier to exonerate from liabilities once he proves that the delay was not occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation or that he and his agents have taken all necessary measures to avoid the delay or it was impossible for him or them to take such measures.[38] An analysis of Warsaw Convention minutes leads to the conclusion that Article 20 of Warsaw Convention was meant to exonerate a carrier who took all those measures which could have been foreseen as reasonable and useful to avoid the damage, excepting those that were impossible to take.[39] Consequently, in practice, the carrier must know all the facts and circumstances leading to the accident, be able to identify the exact cause or all possible cause of the accident, and then with the advantage of hindsight identify and prove that it took all reasonable measures that could have been useful to avoid the accident.[40] In some cases, the court has indeed interpreted all

35) See R.I.R. Abeyratne, Liability for Personal Injury and Death Under the Warsaw Convention and Its Relevance to Fault Liability in Tort Law, 21 *Annals of Air & Space Law* 4 (1996).

36) See J.J. Ide, The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.), 3 *Journal of Air Law & Commerce* 32-36 (1932)

37) See G. Miller, *Liability in International Air Transport: The Warsaw System in Municipal Courts* 63 (1977).

38) Article 20 of Warsaw Convention.

39) B.I. Rodriguez, Recent Developments in Aviation Liability Law, 66 *Journal of Air Law & Commerce* 30 (Winter 2000).

necessary measures to mean all reasonable measures[41] or sometimes refer as the due care defense to be found in the Warsaw Convention.[42] In justice, the carrier should assume the burden of due care in providing the services; but in equal justice, the passengers should also assume those risks that are possibly beyond the bounds of due care.[43] In *Obuzor v. Sabena Belgium World Airlines*, the court held that it would not have been reasonable to delay the departure of the Brussels to Lagos flight, since this would have caused delay to other passengers who had already reached Brussels on time.[44] In another case, the court held that extended sitting on an airplane due to a bomb threat cannot be characterized as the sort of accident that triggers liability under Warsaw Convention.[45] All those defenses shall be raised by the carrier by producing the necessary evidence.[46]

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40) G. Miller, *Liability in International Air Transport* 58-62 (1977).

41) See for example, *Manufacturers Hanover Trust Co. v. Alitalia Airlines*, 429 F. Supp. 964 (S.D.N.Y. 1977), affirmed, 573 F.2d 1292 (2d Cir. 1977), cert. denied, 435 U.S. 971 (1978); *Rugani v. K.L.M. Royal Dutch Airlines*, 4 Av. Cas. (CCH) 17, 257 (N.Y.C. Ct. 1954); *Am. Smelting & Ref. Co. v. Phil. Air Lines, Inc.*, 4 Av. Cas. (CCH) 17, 413 (N.Y. Ct. 1954); *Peralta v. Continental Airlines, Inc.*, 1999 WL 193393 (N.D. Cal. 1999). The court in the latter case found that the carrier had taken all necessary steps to accommodate plaintiff and avoid damage and thus, the plaintiff could not recover for delay.

42) See further Article 20 (1) of Warsaw Convention, which provides that: (1) the carrier shall not be liable if he proves that he had his agents take all necessary measures to avoid the damage or that it was impossible for him or them to take such measures; and (2) in the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting in the handling of the aircraft or in navigation and that, in all other respects, he and his agents had taken all necessary measures to avoid the damage. See also *Dunn v. Trans World Airlines*, 589 F.2d 411 (9th Cir. 1978).

43) See G.W. Orr, fault As the Basis of Liability, 21 *Journal of Air Law & Commerce* 418-419 (1954).

44) No. 98 CIV 0224 (JSM), 1999 WL 223162 (S.D.N.Y. 1999).

45) See further *Margrave v. British Airways*, 643 F. Supp. 512 (S.D.N.Y. 1986).

46) See for example *Verdesca v. American Airlines, Inc.*, 2000 WL 1538704, at 10 (N.D.Tex., October 17, 2000).

This defense is especially relevant for the time being because the airports have strengthened their security measures since the event of September 11, 2001. The delay caused by the elaborate security measures[47] from the side of the airports shall not be undertaken by the carriers.[48] However, if such measures are specifically requested by the carriers, the carriers might still be liable for the delay caused thereby.

Nevertheless, in practice, this might pose analytical difficulties. In *El Al Israel Airlines, Inc. v. Tseng*, for example, a search was at issue.[49] The airline subjected a passenger to an intrusive search pursuant to established pre-boarding security procedures when a guard considered the passenger to be a high security risk.[50] The Second Circuit held that the search was a routine part of international travel and thus, not an unexpected or unusual event. The possibility of erroneous search is inherent to any effort to detect malefactors. If conducted pursuant to customs and procedures, a security search is not unexpected or unusual even if the searched passenger claims injury or is not a safety threat.[51]

When it comes to perishable foodstuffs, the situation can be a little complex. It was formerly permissible for the carriers to refuse to accept

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47) S.W. Melzer (Chair) *et al.*, Report on Aviation Safety Committee on Aeronautics of the Association of the Bar of the City of New York, 64 *Journal of Air Law & Commerce* 817 (Summer 1999).

48) For further discussion, see N.Y. Mineta, Chair, National Civil Aviation Review Commission Report, Avoiding Aviation Gridlock and Reducing the Accident RateA consensus for Change, December 11, 1997, at <http://www.faa.gov/ncarc/reports/people.htm>; see also C. Drew, The Fate of Flight 800: Safety Stalled, *New York Times*, August 13, 1996, at A1.

49) See *El Al Israel Airlines, LTD v. Tseng Yuan Tsui*, 525 U.S. at 155 (1999). Another spectacular lesson from the case is that it is suggested that an intrusive routine security search can be interpreted as an accident under Warsaw Convention.

50) See *Tseng*, 122 F. 3d at 103.

51) Cf. *Zuliana de Aviacion v. Herrera*, 763 So. 2d 499 (Fla. App. Ct. 2000).

any liability for loss or damage of perishable foodstuffs during transportations producing the claim of faulty goods.[52] Nevertheless, if they are carried by air and arrive at the destination with a delay considerably exceeding what could be considered as normal, and which the shipper would probably have taken into account when choosing the method of transportation, the carrier shall still be liable under Warsaw Convention if the loss suffered by the consignor of the goods exceeds the shortfall normally accepted in such circumstances.[53] Only four grounds can exonerate the carrier from his liability, namely: inherent defect, quality or vice of the cargo; defective packing of the cargo performed by a person other than the carrier of his employees of agents; an act of war or an armed conflict; and an act of public authority carried out in connection with the entry, exit or transit of the cargo.[54]

D. Remedies

In case of delay, monetary compensation could be claimed. Most States have adopted this method as the sole and ultimate way out. Such practice is also adopted in Warsaw Convention. But the difficulty is how to standardize the limits for such compensation. How to quantify delay in digital numbers? While taking into various elements, Warsaw Convention gives a maximum number for such claims.[55] The limitation shall not be upheld if the carrier causes delay purposefully.[56] National States can set

52) Article 23 of the Hague Protocol of 1955 and the Montreal Protocol No.4.

53) Diederiks-Verschoor, *supra* note 30, at 95.

54) Diederiks-Verschoor, *supra* note27, at 310. See also *Ets. Peronny v. Ethiopian Airlines*, Cour d'Appel de Paris (5e Ch.), 30 May 1975; [1975] RFDA 395; Schoner's Case Law Digest, 1 *Air Law*, 262 (1976).

55) Article 22 of Warsaw Convention.

56) Sometimes Article 25 is interpreted as an exception to the Convention's limitations on the recovery of compensatory damages. See for example, *Harpalani v. Air India, Inc.*, 634 F.

up their limits for domestic and international transportation respectively.

However, different types of damages exist in case of delay. The problem resides in what types of damages are claimable under the present legal regime. It is clear from Warsaw Convention that damages can be claimed because of delay, to be exact, damages directly connected with delay. However, claims have been brought to the court concerning indirect damages from delay, like loss of expected contract or benefits, psychological suffering, etc.[57] Warsaw Convention does not address the availability of punitive damages, nor was the subject raised at the 1929 Warsaw Conference.[58] From the judicial practice, such claims are usually denied.[59] It is understood that only compensatory damages shall be awarded, no punitive damages, or anticipatory damages for delay.[60]

E. New Development

Warsaw Convention lays the most important legal foundation for liability in delay. Despite of the ambiguity entailed in the wording, it is a great success in including delay within the framework. Nevertheless, when it entered to the end of 20th century, calls for modernization of the

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Supp. 799 (N.D. Ill. 1986).

57) For further discussions, see G.S. Petkoff, Recent Developments in Aviation Law, 63 *Journal of Air Law & Commerce* 110-114 (August/September 1997).

58) Rodriguez, *supra* note 38, at 32.

59) See for example *In re Air Disaster at Lockerbie, Scotland* on December 21, 1988, 928 F.2d 1270 (2d Cir. 1991), cert. denied, 502 U.S. 920 (1991); *Floyd v. E. Airlines, Inc.*, 872 F.2d 1483 (11th Cir. 1989), reversed on other grounds, 499 U.S. 530 (1991); *In re Korean Air Lines Disaster* of September 1, 1983, 932 F.2d 1490 (D.C. Cir. 1991), cert. denied, 502 U.S. 994 (1991); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 225 (1996); *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 14 (2d Cir. 1996).

60) See for example *Transports d'Armorique v. La Langouste and Cie. Parisienne de Garantie*, Cour de Cassation, 28 May 1974;

Convention were raised,[61] which ultimately resulted in the Montreal Convention of 1999.[62]

The creation of Montreal Convention was not directly to resolve the problems with delay in Warsaw Convention.[63] But the changes made have some influence, the most important of which is the principle of a new passenger liability. This change has direct connection with the distinct use of the term consumers, which include a much larger group of people who are in the contractual relationship with the carriers.[64] The application of this term also signifies the drastic transfer of the basic conception--protection of the carrierto the modern trend of consumer protection.

With such guidance, the provisions are modified to the extent offering better protection to consumers, while trying to balance both interests.[65] As far as delay is concerned, two aspects can be identified. Firstly, provision of liability in delay is remained, followed by clear exoneration for the carrier.[66] This is an improvement compared with Warsaw

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61) See for example, J.C. Batra, Modernization of the Warsaw System Montreal 1999, 65 *Journal of Air Law & Commerce* 430 (2000). However, there are claims that practically all the dissatisfaction with the Warsaw Convention stems from the amount of limits imposed. See further B. Cheng, A New-Look Warsaw Convention on the Eve of the Twenty-First Century, 22 *Annals of Air & Space Law* 46-47 (1997).

62) ICAO Doc. C-WP/10381, 5/3/96.

63) L. Weber, The Modernization and Consolidation of the Warsaw System on Air Carrier Liability: The Montreal Convention of 1999, in M. Benko & W. Kroll (Eds.), *Air and Space Law in the 21st Century, Liber Amicorum K.H. Bockstiegel*, 247-255 (2001); see also J.C. Batra, Modernization of the Warsaw SystemMontreal 1999, 65 *Journal of Air Law & Commerce* 429 (2000).

64) See further T.J. Whalen, The New Warsaw Convention: The Montreal Convention, 25 *Air & Space Law*, 12-26 (2000).

65) *El Al Israel Airlines, Ltd. V. Tseng*, 525 U.S. 170 (1999).

66) See further Article 19 of Montreal Convention.

Convention. From the Warsaw System, we can only deduce from relevant provisions and make such provisions to the case of delay. But in Montreal Convention, liability of delay and possible exemptions has been ostensibly defined in the same provision. No deduction is needed. Thus, a complete legal basis for liability in delay is offered.

Secondly, delay is set as a category of damage liability for the carrier. When dealing with the limits of liability for remedies, clear provision also provides for the financial compensation limits for delay.[67] This differs from Warsaw Convention in defining all the limits based on the division of passengers, baggage and goods. Such horizontal and vertical division can better suit the complicated situation of damages suffered by consumers in case of civil aviation. Furthermore, the new Convention explicitly provides that punitive, exemplary or any other non-compensatory damages shall not be recoverable.[68] Another aspect from such provisions is that the limits are raised in accordance with the development of international economics and aviation industry.

Acknowledging the difficulty confronted by civil aviation after the September 11 Event, the aviation industry is in the position of soliciting confidence from customers. Montreal Convention, while providing better protection to consumers, might be one impetus to the revival of the industry. However, it is doubtful whether the aviation industry will accept this Convention in the long run since the carrier shall undertake heavier liabilities under this framework. Nevertheless, this Convention at least shows the majority concerns before and during the period of drafting. The appropriateness thereof shall be left to the States, and further to the aviation industry itself and other interest groups.

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67) Article 22 of Montreal Convention.

68) Article 29 of Montreal Convention.

IV. Delay out of Overbooking

A. Understanding on Overbooking

One typical event causing delay is overbooking. Simply speaking, overbooking is the seats booked exceed the capacity of the carrier (the actual seats). How can this happen? The carrier should have knowledge of its own capacity and should only offer the exact number to the customers. However, the practice provides the opposite case. The carrier usually allows overbooking.[69] One reason is obvious to all who have the experience of air flight. Many customers booked and confirmed the tickets, but did not board the airplane for various reasons. They are allowed to change the flight at some time later with no monetary penalty. For efficient employment of the air flight and to achieve the maximal economic benefits, the carrier will set down the possible limits for overbooking taking into account of former experience, change of seasons, difference of destination, length of flight and other relevant factors. This measure has to a certain extent provided the carrier the opportunity to realize its own benefits.

Meanwhile, adverse weather condition can also cause overbooking. The customers whose flight is cancelled because of adverse weather might need to take the next flight, which causes the problem to this next flight. Overbooking is annoying to customers who have confirmed their flight but was refused boarding. Ways have been proposed to resolve this problem, but we can never eliminate this phenomenon since it is the practice of civil aviation and the way out is to find the appropriate compensation and try to better accommodate the angry customers.

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69) See for example, Compensation for Flight Delays and Overbookings, at <http://www.airsafe.com/complain/bumping.htm>.

B. Liability for Overbooking

Many cases have been brought to the courts for decision. Two cases have particularly received wide attention. In September 1989, Hendriken, a lawyer, who was flying to Copenhagen to meet his client, was denied boarding while producing the confirmed the ticket because of overbooking. He refused to accept the compensation offered by the carrier and took another flight for the meeting. Later he claimed compensation for the costs entailed. The Danish judge affirmed his right and ordered the carrier to pay the reasonable extra cost and expenses caused by taking another flight. The reasoning of the case was based on the violation of the contract.[70]

Ten years later in the United States, the same problem arose. The plaintiff, Minas booked the return ticket from New York to New Deli. When returning from New Deli, she was refused boarding on account of overbooking. She had to stay for extra 45 days, as a result of which she missed the bar exam. She claimed for the loss resulting from missing the bar exam and the accompany of the spouse, and also the compensatory and punitive damages from extra stay. The judge adopted the rules of Warsaw Convention, based on which her claim for punitive damages was refused.[71]

The judges in the two cases used different rules in making the final decisions. But heated discussions on the application of Warsaw Convention or State law have been ongoing for quite some time.[72] Such

70) See further http://www.caacjournal.com/GB/news_view.php?subj_id=253

71) *Minas v. Biman Bangladesh Airlines*, 1999 WL 447445 (S.D.N.Y. June 30, 1999).

72) See for example, *Krys v. Lufthansa German Airlines*, 119 F.3d 1518 n.8 (11th Cir. 1997); *Compare Abramson v. Japan Airlines*, 739 F.2d 134 (3d Cir. 1984); *Beaudet v. British Airways*, PLC, 853 F. Supp. 1072 (N.D. Ill. 1994); *Fisherman v. Delta Airlines, Inc.*, 132 F.3d

a consequence relates to the fact that Warsaw Convention does not create in itself a cause of action.[73] Some have reasoned that Article 24's express language of any action however founded indicates that the drafters' intention that the Warsaw Convention does not preclude causes of action based on State law.[74] The fact also gives rise to the discussion on how the latter Montreal Interim Agreement imposes upon international aviation a quasi-legal system of liability that is essentially contractual in nature.[75] In common law countries, the court might need to examine the Convention itself in order to find out whether cause of action had been created by it.[76] Even in cases where an accident has occurred within the meaning of the Convention, plaintiffs frequently claim damages for the same injury under both the Convention and State law.[77]

As far as overbooking is concerned, this was closely connected with the ongoing discussion on the intention of the carrier. It can easily be deduced from the practice of overbooking that the carrier knows or should have known of the possible results.[78] To allow the existence of

142 (2d Cir. 1998); *Potter v. Delta Airlines, Inc.*, 98 F.3d 885 (5th Cir. 1996).

73) See further Diederiks-Verschoor, *supra* note 30, at 90.

74) See *Zinn v. American Jet, S.A.*, No. CV 96-4251, 1996 WL 757191, at 4 (C.D. Cal. October 10, 1996); see also *Gensplit Fin. Corp. v. Pan American World Airways*, 581 F. Supp. 1242 (E.D. Wis. 1984).

75) See for example, *Husserl v. Swiss Air Transp. Co., Ltd.*, 351 F.Supp. 704 n.1 (S.D.N.Y. 1972).

76) In *Sidhu v. British Airways, Plc.*, [1997] 1 All Eng. Rep. 193 (H.L.), one plaintiff sued under Article 19 of the Convention, alleging delay and under the common law for breach of contract's implied duty to take reasonable care for her safety.

77) F.B. Chapman, Exclusivity and the Warsaw Convention: In re Air Disaster at Lockerbie, Scotland, 23 *University of Miami Inter-American Law Review* 498 (1991); see also L.F. Ras, Warsaw's Wingspan Over State Laws: Towards a Streamlined System of Recovery, 59 *Journal of Air Law & Commerce* 596 (1994); G.C. Sisk, Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion Corporelle, 25 *Texas International Law Journal* 153 (1990).

78) In *Sidhu v. British Airways, Plc.*, one plaintiff's sole cause of action was for negligence

overbooking is the intentional acts from the carrier's side. Thus, failure to perform the contract should be imputed to the carrier for his intentional action or negligence. Accordingly, any kind of limitation in the Convention shall not be applicable.

However, a more prevalent view has been the application of Warsaw Convention. The rules on the liability of the carrier in the Convention are considered exclusive and shall be applied to all international air transportation.[79] The latter development in international legislation made it clear to all: the Montreal Protocol No. 4 proposed in 1975, an important part of the Warsaw System, made it clear that the Convention precludes passengers from bringing actions for bodily injury, delay in cargo or baggage damages under local laws.[80] Thus, the Convention provided an exclusive remedy even in instances where the international passengers could not establish liability under the Convention.[81] Notably, this position has been further incorporated in the Montreal Convention of 1999.[82]

When looking further into the phenomenon of overbooking, the present author stands for the latter view. Overbooking is so prevalent in the

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at common law and one of the allegations was that the carrier knew or should have known the war. For further discussion, see R. Coleman, I Saw Her Duck: Does Article 17 of the Warsaw Convention Cover Injuries or Accidents?, 7 *George Mason Law Review* 228-229 (Fall 1998).

79) Four factors are used to determine whether the transportation involved is international for purposes of the Warsaw Convention: the point of departure; the destination; any agreed stopping places and the High Contracting Parties to the treaty. See L.B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 14 (2000).

80) See Article 8 of Montreal Protocol No.4.

81) See further T.A. Weigand, Accident, Exclusivity, and Passenger Disturbances Under the Warsaw Convention, 16 *American University International Law Review* 925-926 (2001).

82) Article 49 of Montreal Convention.

present practice, while admitting the knowledge of the carrier for the possible consequences; we should not overlook the fact from the side of the customers, who have the right to delay flight without any liability. To balance the interests of both parties, we should on the one hand allow the existence of overbooking, and on the other hand urge the carrier to make better arrangements for delay out of overbooking.

C. The way out for Overbooking

As discussed above, we should not eliminate overbooking. Since the most important cause for overbooking is from the customers who always book the ticket but do not board. To find the way out for overbooking, we need to push both sidesthe carrier and consumers.

It is undeniable that all the passengers who have valid and confirmed tickets should have the right to claim for damage in case of denial of boarding because of overbooking. Indeed different countries or regions have made relevant rules and standards of compensation depending on the distance and period of delay. For example, the European Community issued a rule on 4 February 1991 providing that EC passengers are entitled to a certain sum to be paid by the air carrier in case of overbooking, apart from and additional to any compensation for damage caused by the ensuing delay.[83] Furthermore, a unified standard for compensation is provided.[84] Once accepting the compensation, the consumers shall be deemed to have waivered the right to sue on courts.

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83) Council Regulation No. 295/91. See also B.J.H. Crans & E.M.H. Loozen, EC Aviation Scene, 16 *Air Law*, 185-186 (1991).

84) According to the rule, in case of flights of 3500 kilometers or under the amount is set at Euro 150, for longer flights at Euro 300. These amounts are halved if the passenger is offered alternative transportation enabling him to arrive with a delay of no more than two hours in respect of his original time of arrival, or four hours in case of flights of more than 3500 kilometers.

Accordingly, such rules and standards on compensation shall be deemed as offer from the carrier, the customers shall have the right to decide on accepting or not. Once he refuses to accept, he reserves the right to sue in the court based on Warsaw Convention for compensation, as long as this delay falls within the Convention.

Now the prevalent practice is that many carriers shall try to help those who can not delay for various reasons and look for volunteers who will accept the delay under certain conditions, like giving some rewards and arrange the earliest flight. Furthermore, the carrier can at its own discretion decide the priority of boarding.

While the carriers are making compensation for such delay, the customers might be able to do something to better the situation. Customers should try their best to inform their modification of plan to the carrier and try to avoid booking in several travel agencies at one time. Nevertheless, customers shall not be up to the liability for multi-booking, it is their moral obligation and good intention to help alleviate the problem of overbooking.

V. Conclusion

Since aviation enters the commercial world, various problems have been arising calling for proper regulation. The issue of delay in international air transportation is itself a serious problem requiring international co-ordinance. Warsaw Convention took the first step to put the burden on the carrier and regulate its liability. When approaching the new century, increasing occurrence of international aviation brings forward the demand on more detailed rules on delay, which to a certain extent contribute to the new Montreal Convention.

While the civil aviation is still undertaken by national carriers, national laws also take an active part in the regulation. European Union, United States, China and many other countries have made relevant rules providing the appropriate liability for delay in aviation. Thus, the problem of choice of law appears in court processes.[85] With recourse to Vienna Convention on the Law of Treaties,[86] this has been properly resolved. International Convention shall take the priority.[87] However, considering the contractual character of the aviation, the customers have the freedom

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85) See for example D.J. Bederman, Revivalist Canons and Treaty Interpretation, 41 *University of California Los Angeles Law Review* 970 (1994); J.K. Setear, An Iterative Perspective on Treaties: A synthesis of International Relations Theory and International Law, 37 *Harvard International Law Journal* 139 (1996); M. Frankowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 *Virginia Journal of International Law* 284 (1988); I. Brownlie, *Principles of Public International Law* 4 (4th Ed. 1980).

86) 1155 U.N.T.S. 331, May 23, 1969 (entered into force January 27, 1980). See *Chubb & Sons v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000); Air France v. Saks, 470 U.S. 397 (1985); see also M.F. Kowska, The Vienna Convention on the Law of Treaties Before United States Courts, 28 *Virginia Journal of International Law* 286 (1988).

87) Article 27 of Vienna Convention on the Law of Treaties provides that a party may not invoke the provision of its internal law as justification of its failure to perform a treaty.

to choose which rule to apply. Expressing their real intention, the customers can choose the procurement from national regulation while waivering their rights from the Convention.

Delay shall continue to arise. Since civil aviation is highly influenced by various factors, delay is commonplace to most customers. Minor delay within a reasonable period is understandable, but for a smooth functioning of civil aviation, we should try to make complete legal structure for well resolving problems or disputes arising out of delay.