

Canadian Law of Carriage of Goods by Air:  
An Overview and Analysis of Burden of Proof

Prepared by  
Christopher J. Giaschi  
Giaschi & Margolis  
Vancouver, British Columbia

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## Introduction

The Canadian law of carriage of goods by air is considerably more complicated than the law in relation to carriage of goods by sea or rail and possibly also by road. This is so because the law differs depending upon whether the carriage is domestic or international and because there is no single international regime governing all international carriage. To the contrary, the *Carriage by Air Act*<sup>1</sup> implements four related but separate regimes that apply to international carriage. These are the Warsaw Convention<sup>2</sup>, the Warsaw Convention as amended by the Hague Protocol<sup>3</sup>, the Warsaw Convention as amended by the Montreal Protocol No. 4<sup>4</sup> and the Montreal Convention<sup>5</sup>. The determination of which regime applies depends on the countries of departure and destination.

This paper will begin with a brief review of the domestic law of Canada in relation to carriage of goods by air and will then consider the different international regimes.

## Domestic Air Carriage

### *Definition*

Domestic air carriage is simply the carriage of goods by air from one place in Canada to another place in Canada. Generally, there will be no issue as to whether a particular carriage is domestic, such as when there is a direct routing from one place in Canada to another place in Canada. However, in cases where there is a stop over or a *transshipment* in a place outside of Canada (ie. carriage from Vancouver to Montreal via Chicago), there can be an issue as to whether the carriage is domestic or international. This is so because the various International Conventions and Protocols define international carriage as including carriage between two places within the territory of a single state if there is an “agreed stopping place” in another state.<sup>6</sup> In such cases the carriage is international and is governed by the applicable convention/protocol in force at the time.<sup>7</sup>

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<sup>1</sup> R.S. c. C-26, as amended.

<sup>2</sup> Schedule I to the Carriage by Air Act

<sup>3</sup> Schedule III to the Carriage by Air Act

<sup>4</sup> Schedule IV to the Carriage by Air Act

<sup>5</sup> Schedule VI to the Carriage by Air Act

<sup>6</sup> See for example art. 1 of the Warsaw or Montreal Convention. This is dealt with in more detail below.

<sup>7</sup> For carriage between two places in Canada with an agreed stopping place outside Canada that occurs after 4 November 2003 the applicable convention would be the Montreal Convention.

## ***Liability Regime***

Surprisingly, the domestic carriage of goods by air is not extensively governed by legislation. The *Carriage by Air Act* does not apply to domestic carriage. The only legislation governing the form and content of domestic air carriage contracts is the Air Transportation Regulations<sup>8</sup> passed pursuant to the provisions of the Canada Transportation Act<sup>9</sup>. These regulations merely require air carriers to file tariffs with the Canadian Transportation Agency and to specify in those tariffs the terms and conditions of their contracts of carriage.<sup>10</sup> The regulations do not attempt to impose upon carriers any particular terms and conditions.

Therefore, the domestic carriage of goods by air is governed by the general common law. This has two important implications. First, the common law imposes strict liability on the carrier subject to certain limited exceptions. It is sometimes said that the carrier is an insurer of the goods. To establish a *prima facie* case against the air carrier all that the plaintiff needs to do is to prove receipt by the carrier of the cargo in good condition and failure to deliver or delivery by the carrier in a damaged condition. The carrier is then liable for damages unless it establishes one of the common law defences available to it. The common law defences are that the loss or damage was caused by<sup>11</sup>:

- Act of God;
- Inherent Vice;
- Act of Queens Enemies; or
- Fault or fraud on the part of the shipper or owner of the goods.

The second important implication of domestic carriage of goods by air being governed by the common law is that the parties to the contract of carriage are free to negotiate and to include whatever terms they wish in the contract of carriage. Contracts for the carriage of goods by air generally include many defences in addition to the common law defenses and also, most importantly, include provisions excluding and limiting the liability of the carrier. In some cases (particularly in the case of courier companies) these contractual provisions can comprise many pages.

Although the domestic carriage of goods by air may be unregulated by legislation, the general common

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<sup>8</sup> SOR 88/58

<sup>9</sup> S.C. 1996 c. 10

<sup>10</sup> For an overview of filed tariffs see Matlow, P. Theodore, "Damages Arising from Air Carriage", *The Advocates' Quarterly*, v.8, 1987, at pp. 283-284.

<sup>11</sup> Palmer N.E., *Bailment*, 2<sup>nd</sup> ed., pp. 975-978.

law of contract does impose some constraints and limits on the ability of carriers to completely avoid the consequences of their breach of contract or negligence. For example, the general law of contract requires that onerous terms or conditions be properly and sufficiently brought to the attention of the other party to the contract before or at the time the contract is entered into. There have been many decided cases in which exclusion or limitation clauses were held not to form part of the contract of carriage because they were not properly brought to the attention of the shipper prior to shipment.<sup>12</sup> Additionally, when interpreting exclusion or limitation clauses the courts will usually require that any such term be expressed in clear and unambiguous language and will strictly construe such terms against the interest of the carrier and in favour of the shipper.<sup>13</sup> Again, there have been many decided cases in which exclusion or limitation clauses have been held not to be applicable because of imprecise or inadequate wording. Finally, any terms or conditions that are considered to be “unconscionable” by the courts will not be enforced.

### ***Order and Burden of Proof***

In a domestic air carriage case the order and burden of proof is the same as with any other carriage of goods case governed by the common law. The plaintiff has the initial burden of proving the following matters:

- Right and title to sue (ie. as consignor, consignee or owner of the goods);
- Receipt of the goods by the carrier in good order and condition (This is generally done through the air waybill which acknowledges receipt by the carrier in apparent good order and condition.);
- Failure to deliver or delivery by the carrier in a damaged condition; and
- damages suffered by the plaintiff as a consequence.

The burden then shifts to the defendant carrier to establish a common law defence, a contractual defence or a contractual exclusion or limitation of liability.

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<sup>12</sup> For example: *Ludditt v Ginger Coote Airways Ltd.*, [1947] 2 DLR 241; *Meurin v Canadian Airlines International Inc.*, (May 13, 1994) No. P9190100730 (Alta. Prov. Ct.).

<sup>13</sup> See for example: *MDSI v Federal Express*, [2003] B.C.C.A. 9.

## International Carriage

### *Regimes*

Section 2 of the *Carriage by Air Act* implements four separate regimes governing the international carriage of goods by air:

- Section 2(1) of the Act implements the Convention for the Unification of Certain Rules Relating to International Carriage by Air (commonly referred to as the Warsaw Convention) which is contained in Schedule I to the *Carriage by Air Act*. The Warsaw Convention was originally signed in 1929 and came into force in 1933. There are currently 151 state parties to the Warsaw Convention.
- Section 2(2) enacts the Hague Protocol to the Warsaw Convention which is contained in Schedule III to the *Carriage by Air Act*. The Hague Protocol was originally signed in 1955 and came into force in 1963. There are currently 136 state parties to the Hague Protocol. (Given the amount of air traffic between Canada and the United States, it is noteworthy that the United States did not sign the Hague Protocol.)
- Section 2(2) also enacts the Montreal Protocol No. 4 to the Warsaw Convention which is contained in Schedule IV to the *Carriage by Air Act*. The Montreal Protocol was signed in 1975 and entered into force in 1998. There are currently 53 state parties to the Montreal Protocol.
- Section 2.1 of the *Carriage by Air Act* enacts the Convention for the Unification of Certain Rules Relating to International Carriage by Air Done At Montreal on 28 May 1999. This is commonly referred to as the Montreal Convention and is contained in Schedule VI to the *Carriage by Air Act*. The Montreal Convention came into force internationally on 4 November 2003 and was proclaimed into force in Canada on the same day<sup>14</sup>.

### *Application*

The above Conventions/Protocols apply to “international carriage of persons, baggage or cargo”. The term “international carriage” is defined in art. 1 of the various instruments. Although the definitions differ slightly the differences are not material. The definition from the Montreal Convention is as follows:

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<sup>14</sup> Order in Council dated 22 October 2003 (SI/2003-165)

(2) For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a *transshipment*, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.

There are two important aspects to the above definition. First, each Convention/Protocol will only apply where both the country of departure and the country of destination are parties to the Convention/Protocol. Therefore it is necessary to ascertain which instruments the country of departure **and** country of destination have ratified in order to determine which Convention/Protocol will govern. A useful website to determine which instruments a country has ratified is the International Civil Aviation Organization Treaty Collection at: [http://www.icao.int/cgi/goto\\_leb.pl?icao/en/leb/treaty.htm](http://www.icao.int/cgi/goto_leb.pl?icao/en/leb/treaty.htm). Other useful sites are McGill University's Air and Space Law Institute at <http://www.iasl.mcgill.ca/airlaw/statusof.htm> and Juris International at <http://www.jurisint.org/pub/>.

The second important aspect of the definition of "international carriage" is that domestic carriage will be caught by the definition where there is an "agreed stopping place" in the territory of another state. Thus, for example, carriage from Vancouver to Montreal with a stop at Chicago that is disclosed in the air waybill would be international air carriage. However, if the stop was unscheduled<sup>15</sup> or not disclosed in the air waybill the carriage would probably be considered domestic carriage.<sup>16</sup>

One final, and perhaps trite, point to note is that the Montreal Convention only came into force on 4 November 2003 and therefore can only apply to carriage that occurred after that date.

### ***Right to Sue***

The various Conventions/Protocols deal identically with rights of suit and use the same article numbers. The Conventions/Protocols specifically address rights of suit with respect to loss of cargo and failure to deliver but are silent with respect to claims for damage or delay.

Pursuant to art. 13(1) the consignee is given the right to demand delivery of the cargo from the carrier. Pursuant to art. 13(3), if the carrier fails to deliver the cargo, the consignee is entitled "to enforce against the carrier the rights which flow from the contract of carriage". Pursuant to art. 14 the

<sup>15</sup> *Karfunkel v Air France*, (1977) 14 AvI 17,674

<sup>16</sup> *MDSI v Fedex*, [2001] B.C.S.C. 1411, at para. 14, *affd.* on appeal [2003] B.C.C.A. 9

consignor and consignee can enforce these rights in their own name.

Case law has addressed the lacuna in the Conventions/Protocols. In *Vassallo et al. v Trans Canada Air Lines*<sup>17</sup> (a Warsaw Convention case) it was held that the consignee had the same rights of suit as the consignor. Additionally in *Gatewhite Ltd. v Iberia Lineas Aeras de Espena S.A.*,<sup>18</sup> it was held that the owner of the goods who is neither consignor nor consignee similarly has a right of action against the carrier. This position was adopted in the British Columbia case of *George Straith Ltd. v Air Canada*<sup>19</sup>:

Further, the Warsaw Convention explicitly states that the air carrier is liable for loss, damage or delay of cargo (Articles 18 and 19). The Convention is silent as to whom the carrier is liable and the *lex fori* applies (*Gatewhite, Tasman*). To restrict the plaintiff to consignor or consignee only would be to allow a carrier to avoid liability in some circumstances. This is an unjust result that could not have been intended by the drafters of the Convention. The silence in the Convention with respect to owner's right to sue does not abrogate from rights that would otherwise exist. Without express provisions to the contrary the Convention should not be interpreted so as to interfere with this common law right. The owner of goods is the real party in interest and is someone to whom the carrier ought to be liable.

Therefore, the persons with a right of suit in an international air carriage case are the consignor, the consignee and the owner of the goods.

## **Waybill Requirements**

The requirement to issue an air waybill, the contents of the air waybill and the consequences of failure to issue a waybill in proper form are dealt with differently in the various Conventions/Protocols.

Under the Warsaw Convention Articles 5 through 11 deal with air waybill requirements. Article 5 provides that every carrier and consignor have the right to require an air waybill (although the lack of one does not affect the applicability of the rules). Article 8 enumerates 17 particulars that must be included in the air waybill. The issuance of an air waybill and the particulars it contains are important because art. 9 provides that a carrier will not be entitled to the benefit of the exclusion and limitation provisions in the Convention if it accepts cargo for carriage without an air waybill or without including certain of the particulars required by art. 8. Specifically, the carrier will not be entitled to the benefit of the exclusion and limitation provisions if the following particulars are omitted from the waybill:

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<sup>17</sup>[1963] 2 O.R. 55, 38 D.L.R. (2d) 383; see also *Newell v Canadian Pacific* (1977), 14 O.R. (2d) 752

<sup>18</sup> [1989] 1 All ER 944

<sup>19</sup> (1991) 59 B.C.L.R. (2d) 241

- (a) the place and date of its execution;
- (b) the place of departure and of destination;
- (c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) the name and address of the consignor;
- (e) the name and address of the first carrier;
- (f) the name and address of the consignee, if the case so requires;
- (g) the nature of the cargo;
- (h) the number of the packages, the method of packing and the particular marks or numbers upon them;
- (i) the weight, the quantity and the volume or dimensions of the cargo;...
- (q) a statement that the carriage is subject to the rules relating to liability established by this Convention.

The Hague Protocol significantly reduces the air waybill requirements. Article 8 of the Warsaw Convention as amended by the Hague Protocol requires only three particulars be included in the air waybill in place of the 17 previously required. Under the Hague Protocol the only particulars required are:

- the place of departure and destination;
- an indication of any one agreed stopping place (if the country of departure and destination are the same and there is an agreed stopping place in another state); and
- a notice that the Warsaw Convention may be applicable and limits the liability of the carrier.

Additionally, under the Hague Protocol art. 9 is replaced with a new provision which provides that a carrier will only lose the benefit of the exclusion and limitation provisions in the Convention if it accepts cargo for carriage without an air waybill or if the air waybill fails to contain the notice that the carriage may be subject to the Convention which limits liability.

It is important to note that although neither the Warsaw Convention nor the Hague Protocol

impose an obligation on the carrier to issue an air waybill the carrier does, in fact, have this obligation if it wishes to take advantage of the defenses and limitations provided in the Convention/Protocol.

The Montreal Protocol and the Montreal Convention deal similarly with air waybill requirements and effect significant changes. Article 5 of the Warsaw Convention as amended by the Montreal Protocol (art. 4 of the Montreal Convention) requires that an air waybill, or similar document, be delivered. Article 6 of the Warsaw Convention as amended by the Montreal Protocol (art. 7 of the Montreal Convention) requires that the consignor make out the air waybill and requires that both the consignor and carrier sign the waybill. Article 8 of the Warsaw Convention as amended by the Montreal Protocol (art. 5 of the Montreal Convention) requires that the air waybill contain:

- the place of departure and destination;
- an indication of any one agreed stopping place (if the country of departure and destination are the same and there is an agreed stopping place in another state); and
- the weight of the cargo.
- (Note that the requirement that there be a notice that the Warsaw Convention may be applicable has been removed.)

Article 9 of the Warsaw Convention as amended by the Montreal Protocol (also art. 9 of the Montreal Convention) is substantially changed. Under the new art. 9 non-compliance with the air waybill requirements no longer affects the ability of the carrier to exclude or limit its liability pursuant to the Convention. The new art. 9 is as follows:

*Article 9 -- Non-compliance with Documentary Requirements*

Non-compliance with the provisions of Articles 4 to 8 shall not affect the existence or the validity of the contract of carriage, which shall, nonetheless, be subject to the rules of this Convention including those relating to limitation of liability.

Therefore, for air carriage governed by either the Montreal Protocol or the Montreal Convention, there are no consequences to the air carrier if the air waybill is not issued or fails to contain the required particulars.

### ***Evidentiary Value of the Waybill***

The evidentiary value of the air waybill is set out in art. 11 of the Warsaw Convention as follows:

#### Article 11

(1) The air waybill is *prima facie* evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage.

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

The air waybill is *prima facie* evidence only in respect of those statements relating to weight, dimensions, packing and number of packages. With respect to the condition of the cargo, only statements as to the “apparent condition” of the cargo are *prima facie* evidence. Other statements relating to condition do not constitute evidence against the carrier unless the condition has been checked by the carrier and this is stated in the air waybill.

The Hague Protocol, Montreal Protocol and Montreal Convention<sup>20</sup> do not implement material changes to art. 11.

### **Liability**

The key provisions of the Conventions/Protocols regulating the liability of the air carrier are articles 18 and 19. The provisions of art. 18 deal with loss of or damage to cargo and the provisions of art. 19 deal with delay.

#### *Loss of or Damage to Cargo*

Article 18(1) of the Warsaw Convention and of the Warsaw Convention as amended by the Hague Protocol establishes *prima facie* liability for loss of or damage to cargo.

#### Article 18

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

Article 18(2) of the Montreal Protocol and 18(1) of the Montreal Convention are the provisions

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<sup>20</sup> The provision in the Montreal Convention is art. 11 which is as follows:

#### Article 11 -- Evidentiary Value of Documentation

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

establishing the *prima facie* liability of the carrier for loss of or damage to cargo. The wording of these provisions is slightly different and cargo is considered separately from baggage. The wording in the Montreal Protocol and Montreal Convention is as follows:

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

The important point to note is that under all Conventions/Protocols the only condition imposed is that the occurrence which caused the loss or damage took place during the carriage by air. The Conventions/Protocols provide some guidance as to what constitutes the period “carriage by air”. Article 18(2)<sup>21</sup> of the Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol defines the period “carriage by air” as the period during which the cargo is in the charge of the carrier whether in an airport or on board an aircraft. Hence, unlike carriage of goods by water, the period of liability is not limited to the period during which the cargo is actually on board the aircraft. Article 18(3)<sup>22</sup> specifically provides that the period “carriage by air” does not extend to include the time period after the goods have left the airport, however, if there is carriage by land or water for the purpose of loading, delivery or transshipment any damage will be presumed to have been caused during air carriage, unless proof to the contrary is made.<sup>23</sup>

Identical provisions are contained in the Montreal Protocol but renumbered as art. 18(4) and art. 18(5). Similar provisions are also contained in the Montreal Convention as art. 18(3) and 18(4). The wording of art. 18(3)<sup>24</sup> of the Montreal Convention is slightly different in that it merely defines the period of “carriage by air” as the period during which the cargo is in the charge of the carrier and omits the references to places outside an airport. It is doubtful that this difference in wording is material. Article 18(4)<sup>25</sup> of the Montreal Convention expands slightly on the expanded definition of air carriage

<sup>21</sup> Warsaw Convention, Art. 18(2) “The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is 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.”

<sup>22</sup> Warsaw Convention, Art. 18(3) “The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.”

<sup>23</sup> *Green Computer v Federal Express*, [2003] F.C.T. 587, is a case in which the presumption was applied.

<sup>24</sup> Montreal Convention, Art 18(3). “The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.”

<sup>25</sup> Montreal Convention, Art 18(4). “The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within

in art. 18(3) of the Warsaw Convention by stipulating that where the carrier, without the consent of the consignor, substitutes another mode of transport for carriage by air such transport is deemed to be carriage by air.

The important points to note from the above provisions is that the plaintiff must prove both that the damage to the goods occurred while they were in the charge of the carrier and were at the airport. If the goods were damaged while at the airport but not in the charge of the carrier the carrier is not liable.<sup>26</sup> Also, if the goods were damaged while in the charge of the carrier but not at the airport the carrier is not liable.<sup>27</sup> The plaintiff can rely upon the presumption in art. 18(3) of the Warsaw Convention (18(4) of the Montreal Convention) to prove the damage occurred during carriage by air but this presumption is rebuttable.

### *Delay*

The carrier's liability for delay is established in art. 19 of the Warsaw Convention as follows:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

The same provision is contained in the Hague Protocol and Montreal Protocol. The provision in the Montreal Convention is somewhat different in that defenses applicable to claims for delay are also specifically set out in art. 19. These defenses are considered below.

## **Defenses**

### *Statutory Defences*

Under the Warsaw Convention the defenses available to a carrier regardless of the nature of the claim are set out in art. 20 and art. 21 as follows:

#### Article 20

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

(2) In the carriage of cargo and baggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all

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the period of carriage by air.”

<sup>26</sup> *Swiss Bank v Brinks Mart*, [1986] 2 Lloyd's Rep. 79

<sup>27</sup> *Bart v British West Indian Airways*, [1967] 1 Lloyd's Rep. 239

necessary measures to avoid the damage.

#### Article 21

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

Article 20(1) provides the carrier is not liable if it proves that all necessary measures were taken to avoid the damage or that it was impossible to take such measures. The case law has generally interpreted this provision as requiring only that all “reasonable measures” were taken.<sup>28</sup> However, in order to meet this test the carrier will probably be obliged to prove the cause of the loss or damage.<sup>29</sup>

Article 20(2) of the Warsaw Convention provides the carrier is not liable if he proves the damage was caused by negligence in pilotage or navigation and that in all other respects all necessary measures were taken to avoid the damage. This defence is similar to “error in navigation” in maritime law. It is, however, rarely invoked.<sup>30</sup>

Article 21 of the Warsaw Convention provides that the carrier can exonerate itself from liability, wholly or partly, by proving contributory negligence. In order to rely upon this provision the carrier must establish both that the plaintiff was negligent and that the plaintiff's negligence caused the loss or damage.<sup>31</sup>

The defenses under the Hague Protocol are the same as those under the Warsaw Convention with the exception that the Hague Protocol deletes art. 20(2) and thereby removes the defence of negligence in pilotage or navigation.

Under the Montreal Protocol and Montreal Convention the defenses available to a carrier are more limited and depend on the nature of the claim. Article 18(2) of the Montreal Convention (art. 18 (3) of the Montreal Protocol) lists the following defenses as being available to the carrier in respect of claims for loss of or damage to cargo.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:
  - (a) inherent defect, quality or vice of that cargo;
  - (b) defective packing of that cargo performed by a person other than the carrier or its servants or agents;
  - (c) an act of war or an armed conflict;
  - (d) an act of public authority carried out in connection with the entry, exit or transit of

<sup>28</sup> See for example *Grein v Imperial Airways*, [1937] 1 K.B. 50; *United International Stables v Pacific Western Airlines* (1969) 68 W.W.R. 317

<sup>29</sup> Magdelenat, J.L., *Air Cargo Regulation and Claims*, p.95.

<sup>30</sup> Diedricks-Verschoor, I.H., *An Introduction to Air Law*, p.69.

<sup>31</sup> Magdelenat, J.L., *Air Cargo Regulation and Claims*, p.96-97.

the cargo.<sup>32</sup>

The defenses available to a carrier in respect of claims for delay under the Montreal Convention and Montreal Protocol are contained in art. 19 of the Montreal Convention (art. 20 of the Montreal Protocol):

*Article 19 -- Delay*

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

In addition, pursuant to art. 20 of the Montreal Convention (art. 21 of the Montreal Protocol) the defence of contributory negligence is available to the carrier regardless of whether the claim is for loss of or damage to cargo or delay.

Thus, under the Montreal Protocol and Montreal Convention the carrier is entitled to the “all necessary measures” defence only in claims for delay. For claims for loss of or damage to goods the carrier's defenses are limited to contributory negligence and the items listed in art. 18(4) of the Montreal Convention (art.18(3) of the Montreal Protocol). In all case, the onus is on the carrier to prove the defence.

### *Contractual Defences*

Article 23<sup>33</sup> of the Warsaw Convention prohibits the carrier from contracting out of the liabilities and limits set by the convention and provides that any provision purporting to do so is null and void. This provision is amended by the Hague Protocol which adds art. 23(2)<sup>34</sup> clarifying that the prohibition against contracting out does not apply to loss or damage resulting from inherent defect, quality or vice of the cargo. The Montreal Protocol makes no changes to this provision.

The Montreal Convention reintroduces the original unamended version of art. 23 as art. 26 and includes a new art. 27 as follows:

*Article 27 -- Freedom to Contract*

<sup>32</sup> These defenses were also available to the carrier under the Warsaw Convention and the Hague Protocol as coming under art. 20 or art. 21 or as contractual exclusions; see: Palmer, opcit. p. 1192; Magdelenat, J.L., Air Cargo Regulation and Claims, p.97.

<sup>33</sup> Warsaw Convention, Art. 23 - “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.”

<sup>34</sup> Hague Protocol, Art. 23(2) - “Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.”

Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage, from waiving any defences available under the Convention, or from laying down conditions which do not conflict with the provisions of this Convention.

Article 27 of the Montreal Convention clarifies that matters not governed by the Convention may still be the subject of private contract. This is a codification of existing case law which recognized the validity of contractual terms which were not inconsistent the Convention.<sup>35</sup> Such contractual defenses might include, for example, clauses limiting consequential damages. As with any contractual provisions that limit or exonerate liability, the carrier would have to prove the terms were properly brought to the attention of the plaintiff and would have to satisfy the requirements of strict construction.

## ***Limitation of Liability***

### ***Limits***

Article 22 of the Warsaw Convention gives the carrier a right to limit liability. Specifically, by art. 22(2)<sup>36</sup> the carrier can limit its liability to 250 francs per kilogram. Through the application of section 2(7) of the *Carriage by Air Act*, gold francs are converted to Standard Drawing Rights (“SDRs”) at the rate of 15.075 gold francs per SDR which gives a limitation amount in SDRs of 16.58 SDRs per kilogram. SDRs can, in turn, be converted to Canadian dollars or any other currency by looking at the prevailing exchange rate. (These can be obtained at [http://www.imf.org/external/np/tre/sdr/db/rms\\_five.cfm](http://www.imf.org/external/np/tre/sdr/db/rms_five.cfm)) At current exchange rates the limitation amount is approximately Cdn \$31.50 per kilogram.

The Hague Protocol rewords the limitation of liability provisions and implements some noteworthy changes but does not change the amount of limitation. Article 22(2)(b) as amended by the Hague Protocol clarifies that in cases where only part of the cargo is lost or damaged the weight upon which the limitation is calculated is the weight of the lost or damaged cargo. However, if the value of the other cargo is also affected then the total weight of the cargo is used. Article 22(4) as amended by the Hague Protocol makes it clear that litigation costs awarded by a court are in addition to the limitation amount unless the carrier has made an offer in writing within 6 months of the occurrence in

<sup>35</sup> See for example *MDSI v Fedex* [2003] B.C.C.A. 9, wherein the British Columbia Court of Appeal held that a contractual provision could limit the amount of the special declaration of value.

<sup>36</sup> Warsaw Convention Art. 22(2) “In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.”

an amount equal to or greater than the damages awarded. Article 25A as amended by the Hague Protocol clarifies that the servants and agents of the carrier acting within the course of their employment are entitled to rely upon the limitation provisions.

The limitation provisions are reworded by the Montreal Protocol and Montreal Convention but remain essentially unchanged.<sup>37</sup> The amount of the limitation in relation to cargo claims is restated to be 17 SDRs per kilogram. Otherwise the limitation provisions remain unchanged. In the case of loss, damage or delay to part of a cargo the weight to be taken into account for limitation purposes is the weight of the packages lost, damaged or delayed unless the value of the remainder of the shipment is affected, in which case the weight of the total shipment shall be used.

### *Special Declaration of Value*

Pursuant to art. 22(2) of the Warsaw Convention the right of a carrier to limit, or the amount to which a carrier can limit its liability, is dependent upon whether the consignor has made a declaration of value at the time of delivery and has paid a supplementary sum “if the case so requires”. The declaration of value ought to be in writing on the air waybill. It has been held that a verbal statement of value made on the telephone is not a special declaration of value within the meaning of the convention.<sup>38</sup> Where the consignor has made a declaration of value, the carrier is liable to pay the declared sum unless it is greater than the actual value. However, the carrier may be able to avoid the effects of a declaration of value by a properly worded contractual term limiting the amount a shipper can declare.<sup>39</sup>

The Hague Protocol, the Montreal Protocol, and the Montreal Convention all provide for declaration of values in virtually identical terms to the Warsaw Convention.

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<sup>37</sup> The provisions are contained within Art. 22(3) and (4) of the Montreal Convention as follows:  
“3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.”

<sup>38</sup> Rembrandt Jewellery v Air Canada, [1985] O.J. No. 1382

<sup>39</sup> MDSI v Fedex, 2003 BCCA 9

### *Loss of Limitation*

There is a profound difference between the Warsaw Convention and the Hague Protocol, on the one hand, and the Montreal Protocol and Montreal Convention, on the other hand, in relation to the loss of the right to limit. Under the Warsaw Convention and the Hague Protocol the carrier can lose the right to limit. Under the Montreal Protocol and Montreal Convention the right to limit is absolute and cannot be lost.

Article 25<sup>40</sup> of the Warsaw Convention provides that the carrier is not entitled to rely on those provisions of the Convention that limit or exclude liability if the damage is caused by wilful misconduct of the carrier or of his agents acting within the scope of their employment. In general, “wilful misconduct” has been held to mean something far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do something which he knows and appreciates is wrong.<sup>41</sup>

Under the Hague Protocol the test was changed in an effort to make it more precise. Under the Hague Protocol<sup>42</sup> the carrier loses the right to limit if it is proved that the damage resulted from an act or omission of the carrier, or his servants or agents acting within the course of their employment, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

It is beyond the scope of this paper to canvas the cases which have considered the circumstances under which the carrier will lose the right to limit liability. Many of the cases in which it has been held that the carrier was not entitled to limit liability involved theft,<sup>43</sup> although not every case of unexplained loss of valuable cargo is held to be theft.<sup>44</sup> Moreover, there are other cases not involving theft where the carrier has also been refused the right to limit liability.<sup>45</sup> Nevertheless, what is clear from the jurisprudence is that the onus is on the plaintiff to establish that the conduct of the defendant

<sup>40</sup> Warsaw Convention, Art. 25 - “(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct. (2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.”

<sup>41</sup> *Diedricks-Verschoor, I.H.*, *An Introduction to Air Law*, p.89; *Horabin v BOAC* [1952] 2 Lloyd's Rep 450; *Rustenberg Platinum Mines Limited v South African Airways* (1977) 1 Lloyd's 564; *Thomas Cook v Air Malta* [1997] NLOR No 371

<sup>42</sup> Hague Protocol, Art. 25 - "The limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment."

<sup>43</sup> *Swiss Bank Corp. v Air Canada*, [1988] 1 F.C. 71;

<sup>44</sup> *Harry Richer Furs Inc. v Swiss Air*, [1988] 2 F.C. 117

<sup>45</sup> Recent cases addressing these issues are: *Nuvo Electronics v London Assurance* (2000) 49 O.R. 3D 374; *Connaught Laboratories v British Airways*, [2002] O.J. No. 3421; and *World of Art Inc. v Koninklijke Luchtraart Maatschappij N.V.*, [2000] O.J. No. 2364 (Ont. S.C.) affirmed [2000] O.J. No.4567 (Ont. C.A.)

was such as to come within Article 25. To break limitation under the Warsaw Convention the plaintiff must prove that the damage was caused by the “wilful misconduct” of the carrier or of the servant's agents acting within the course of their employment. To break limitation under the Hague Protocol the plaintiff must prove the damage was caused by an act or omission either done intentionally or recklessly and with knowledge that damage would probably result. That this is the plaintiff's onus is succinctly set out in *Harry Richer Furs Inc. v Swiss Air*:

In this case, therefore, the central issue to be resolved is whether or not the loss of the carton resulted from an act or omission on the part of the carrier (the defendants), his servants or agents (while acting within the scope of their employment) with intent to cause damage or recklessly and with knowledge that damage would probably result. The onus, therefore, is on the plaintiff to establish, not merely that the defendants were negligent, but that they acted with intent to cause damage or recklessly while knowing that damage would probably result from their action or omission. It is clearly an onerous burden to overcome.<sup>46</sup>

The onus on the plaintiff is a heavy one, under both the Warsaw Convention and the Hague Protocol. It requires not only proof of how the loss or damage occurred but also proof of the state of mind of the person who caused the damage. The plaintiff must prove the person who caused the damage knew that damage would probably result.<sup>47</sup>

The burden of proof on the plaintiff would seem to be almost insurmountable given that the plaintiff will often have very little information regarding what transpired to cause the loss. It is perhaps for this reason that the courts have made liberal use of inferences in cases involving limitation of liability. For example in *World of Art Inc. v Koninklijke Luchtraart Maatschappij N.V.* the court drew an adverse inference from the failure of the air carrier to call as a witness the person who was responsible for re-routing goods through the United States and that were confiscated as a result. Similarly, in *Connaught Laboratories v British Airways*<sup>48</sup> the plaintiff's cargo of vaccines was damaged because it was left on the tarmac rather than being placed in a refrigerated area. The Judge noted that this may have happened due to mere inadvertence or that relevant person might have thought no damage would come to the vaccines if not refrigerated. On the other hand, the Judge also noted that it could have been that the relevant person knew there was a risk of damage but simply did not want to bother storing the cargo as directed. The Judge resolved the matter by drawing an adverse inference from the carrier's failure to explain exactly how the loss came about.

<sup>46</sup> *Harry Richer Furs Inc. v Swiss Air*, [1988] 2 F.C. 117

<sup>47</sup> It arguably remains an open question as to whether the test is subjective or objective. See: *Connaught Laboratories v British Airways*, [2002] O.J. No. 3421 in which the various authorities are reviewed and which held that the test was subjective. See also *Goldman v Thai Airways*, [1983] 1 W.L.R. 1186.

<sup>48</sup> [2002] O.J. No. 3421

The cases involving adverse inference, and in particular *Connaught Laboratories v British Airways*, have important ramifications for air carriers and the burden of proof in limitation cases. These cases suggest that even though the plaintiff has the burden of proof on this issue, the carrier will be well advised to present all available evidence that explains how the loss or damage occurred. Alternatively, if the evidence is not available, that too should be explained. Failure to do so could well result in an adverse inference and the loss of the right to limit under the Warsaw Convention or the Hague Protocol.

Finally, it should also be remembered that under the Warsaw Convention and the Hague Protocol the carrier will not be entitled to limit liability if the air waybill requirements discussed above are not met.

### **Notice Requirements**

Stringent time limits for notification of lost or damaged cargo are laid down by the various Conventions/Protocols.

Pursuant to art. 26(1) of the Warsaw Convention receipt by the person entitled to delivery of the cargo without complaint is *prima facie* evidence that the cargo was delivered in good condition. This presumption is, of course, rebuttable. However, by art. 26(2) notice in writing of damage to cargo must be given within seven days of receipt or within 14 days in the case of delay. There is no provision dealing specifically with notice for non-delivery and in *Green Computer in Sweden AB v Federal Express Corp.*<sup>49</sup> it was held that the notice requirements of the convention did not apply to cases of non-delivery.

The Hague Protocol increases the notice requirements in art. 26. The seven day notice requirement in cases of damage to cargo is increased to fourteen days and the fourteen day notice requirement in the case of delay is increased to twenty-one days.

Pursuant to art. 31<sup>50</sup> of the Montreal Convention, notice in writing of damaged cargo must be

<sup>49</sup> 2002 FCT 1015, affd. [2003] F.C.T. 587

<sup>50</sup> Montreal Convention, Art. 31- "1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

given within 14 days of receipt. In the case of delay in delivery notice must be given within 21 days.

The consequences of failure to give notice are set out in art. 26(4) of the Warsaw Convention (art. 31(4) of the Montreal Convention) and are dire. If notice is not given within the time required “no action shall lie against the carrier, save in the case of fraud on his part”.

### **Prescription**

The prescription period for bringing proceedings against the carrier is the same in all Conventions/Protocols and is two years.

The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.<sup>51</sup>

### **Order of Proof Summarized**

The order of proof in an air carriage case is not unlike the order of proof in a sea carriage case in that there is an ever shifting onus. The plaintiff must first prove its loss and a *prima facie* case of liability. The onus then shifts to the carrier to either (a) rebut any presumption that the loss or damage occurred during carriage by air, (b) prove an affirmative defence, (c) prove failure to give notice or prescription, or (d) invoke limitation. Assuming the carrier invokes limitation the onus shifts back to the plaintiff to defeat limitation by proving a declaration of value or, if the case is governed by the Warsaw Convention or Hague Protocol, that the carrier is not entitled to limit.

#### **The Plaintiff must prove all of the following:**

1. Title to sue (consignor, consignee or owner)
2. Receipt by carrier in good condition (waybill is *prima facie* evidence only of apparent condition unless carrier has inspected)
3. Damage during carriage by air (ie. while in the charge of the carrier and at the airport or outside the airport during land carriage for the purpose of loading, delivery or transshipment)
4. Damages<sup>52</sup>

#### **The onus then shifts to Carrier to prove:**

1. That damage occurred outside the airport and not during carriage by air;

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<sup>51</sup> Warsaw Convention, art. 29; Montreal Convention, art. 35

<sup>52</sup> Vassallo v Trans Canada Airlines, (1963) 38 D.L.R. (2d)383.

or

2. An air waybill was issued that contained the required particulars (for Warsaw and Hague carriage only), and

(a) An allowed defence (generally requires the carrier to prove the cause of the damage).

The allowed defenses are:

- i. Took all necessary measures (applies only to delay for Montreal Protocol and Montreal Convention)
- ii. Negligence in pilotage or navigation (Warsaw only)
- iii. Contributory negligence
- iv. Inherent defect, quality or vice
- v. Defective packaging by someone other than the carrier
- vi. Act of war or armed conflict
- vii. Act of public authority in connection with the entry, exit or transit of the cargo
- viii. Contractual defenses that do not offend Convention,
- ix. Failure to give required notice;
- x. Prescription;
- xi. Limitation

**To defeat limitation the onus shifts back to Plaintiff to prove:**

1. A declared value,

or

2. If the carriage is under Warsaw or Hague, that the damage was caused by wilful misconduct (Warsaw) or intentionally or recklessly (Hague). The plaintiff may rely upon inferences if the carrier fails to call available witnesses or evidence to explain the circumstances of the loss.