Chapter Three

Air Cargo Regulations
I. Air Cargo Development And Emerging Problems

Air transport has undergone fundamental changes since the early days of aviation in the 1920s when goods first began moving by air. That was when the transport of international cargo was identified as a key element of trade and governments began working on simplifying customs and tariff regulations. Air cargo or freight refers to any property carried by an aircraft other than mail, stores, or passenger baggage. The phrase "air cargo" is also used in a broader sense by the airline industry to mean any property, including freight express and mail, transported by air except baggage. An all-cargo service is an air service carrying only cargo, whether scheduled or non-scheduled.

With the establishment of the ICAO under the Chicago Convention (1944), air freight trade has taken a giant leap forward. Annex 9 of the Chicago Convention establishes standards and recommended practices to facilitate air travel, including regulations and procedures for the easy clearance of goods. In the early 1950s, the Customs Co-operation Council was established to harmonize and, where possible, unify customs and procedures to reduce delay in the clearance of cargo. Over the years, the introduction of more efficient aircraft has enabled the airlines to reduce progressively air freight rates, providing a great stimulus to cargo traffic. The emergence of jet age in the 1960s, which revolutionized international passenger transport, also

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gave a tremendous boost to air freight trade. The real boom in air freight business began in the 1970s, and a wide variety of high-value commodities, including perishable and seasonal goods, started to enter international trade. Today the range of commodities airlifted is almost endless.³

Speed, simplicity and reliability are important features of the world air freight system. Air freight has become increasingly important in the globalized commerce, adding a new dimension to the world's transport system and offering an indispensable service to shippers and consigners throughout the world. More and more business men are realizing the advantages offered by air freight: lighter and less expensive packing with low labour costs, minimal insurance premiums, elimination of transit warehousing and transfer charges, smaller inventories and reduced warehousing costs, low capital investment in shipments en route, and faster capital turnout.⁴ The unique characteristic of air cargo is that goods move in a matter of hours in a global network by a combination of interline services, under a single airway bill [at a known price] paid in one currency and subject to standard conditions of carriage and contract.⁵

Air freight helps develop national economies in several ways too. It makes new areas more accessible for trade and opens up new markets

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for products. It encourages new approaches in the production and
distribution of goods. Air transport, with its speed and diverse
advantages, has had a marked impact on the tempo and composition of
trade. Most progressive manufacturers, importers and exporters now
depend on air cargo to serve their markets at home and abroad. Today
air cargo is no longer confined to the speedier shipment of emergency
supplies, or high-value perishable goods. On the contrary, it is often the
most advantageous and economical means of transport for business
engaged in international trade. Air travel has had a profound influence
on modern business, in which air cargo is one of the most effective
tools to explore and serve world markets.6

The past two decades have witnessed a remarkable change in
attitudes and impulses, overriding the economic regulation of the
aviation industry. In the US the process of deregulation in civil aviation
started in the late 1970s. The US domestic cargo deregulation came into
effect in December 1977 with the passage of the Air Cargo Deregulation
Act 1977, followed by passenger deregulation under the Deregulation
Act 1978. The Air Cargo Deregulation Act has substantially deregulated
all-cargo carriers. The Act empowers the Civil Aeronautics Board
(CAB) to investigate and invalidate airline rates and practices which, in
the Board's opinion, are deemed unjust, unreasonable and discrimi-
natory.7 The Deregulation Act 1978 has since removed statutory
controls on domestic airline operations, leading to profound changes in
the airline industry. Deregulation has been vigorously promoted in the


7See E.W. Albert, "Limitations on Air Carrier Liability: An Inadvertent Return to
Common Law Principles", Journal of Air Law Commerce (Dallas, Texas), vol. 48,
international sphere by the US administration and also welcomed in principle by several countries.\textsuperscript{8}

At the same time, the global economic system has undergone a sea change following the end of the Cold War and the subsequent disintegration of the former Soviet Union. New considerations have emerged, forcing fresh economic directions in various fields - including civil aviation. Several countries have opted to remove formal and informal trade barriers through domestic liberalization, bilateral accords, and multilateral agreements. These measures have left an enormous impact on world trade, thereby accelerating air cargo transport. Between 1980-92, total world exports and imports grew at an average annual rate of 4.9 per cent. The ICAO estimates that 1 per cent increase in world exports has shown a concomitant 1.5 per cent rise in the demand for air cargo. The deepening liberalization of domestic markets, thanks to regional trading blocs - the European Union, NAFTA [North American Free Trade Agreement], the Mercosur Andean Pact, the Trans-Tasman Market, and the Uruguay Round of GATT (General Agreement on Tariffs and Trade) - has expectedly fostered enhanced growth in world trade.\textsuperscript{9}

As the industry becomes increasingly globalized, so the transport of finished and intermediate goods over vast distances in short time has inevitably raised the demand for air cargo services in preference to other modes of transport. Between 1983 and 1993, the number of aircraft departures and total tonnes carried by all-cargo flights increased on


\textsuperscript{9}Anil Kapur, Airport Infrastructure: The Emerging Role of the Private Sector (Washington, D.C., 1995), p. 60.
average at an annual rate of 3.3 per cent and 4.1 per cent respectively. The development of just-in-time distribution techniques, the re-export of intermediate goods and the expanded shipment of perishable commodities (i.e. flowers, meet, fish, vegetables, etc.), are some factors which have an impact on the air cargo industry. In particular, the demand for fresh fruit and vegetables is expected to soar over the next few years due to the elimination of import quotas and changes in dietary habits in industrialized countries.\footnote{Ibid.}

A more recent development in air cargo is the huge expansion of courier and express/small package business groups, which offer door-to-door air service for time-sensitive documents or small packages, usually with the delivery guaranteed within specified time limit (e.g. same day or next day) but subject to size or weight limitations. This is contributing more than US $30 billion a year. Some airlines have also become more involved in door-to-door courier services, than limiting themselves to the provision of air component. Air cargo transport has become increasingly integrated and globalized via cross-equity investments between airlines and co-operative tie-ups, such as co-branding and franchising.\footnote{See ICAO Manual, n. 1, p. 4.5-1.}

Air cargo carriers such as Fedex, Ups, and DHL, by utilizing regional hubs, have been able to improve their efficiency and extend operations of rapid service worldwide. According to Boeing's 20 year "World Air Cargo Forecasts", one of the biggest benefits from air freight business will be the increase in international express parcel

\footnote{Ibid.}

\footnote{See ICAO Manual, n. 1, p. 4.5-1.}
services in view of the growth pattern of these services in the US. By 2015, express services are expected to account for 40 per cent of the total international cargo business about 5 per cent increase over the present day service. The air cargo transport industry will continue to expand into new markets as new cargo hubs will open in many parts of the world.

The ICAO predicts that the average growth rate for world air cargo transport will be about 4 per cent a year between 1992 and 2003 and the Asia-Pacific region registering approximately 9.5 per cent growth rate. A more optimistic forecast is offered by Boeing, which predicts that world air cargo volumes will triple by 2013.

Boeing's 20-year "world air cargo forecast" projects a strong future for air cargo which is expected to outpace passenger traffic and double the world's freighter fleet. Today, as Boeing's forecast notes, air cargo revenue accounts for an average of 16 per cent of the total airline revenues - some carriers deriving even more than 30 per cent of their revenues from cargo service. Boeing faces the need for 2,000 freighters over the next 20 years, which could increase the world's freighter fleet from the 1995 total of 1,219 freighters to 2,261 all-cargo airplanes by 2015. Another forecast, McDonnell Duglas' 20-year forecast, "Outlook for Commercial Aircraft", looking at cargo needs predicts

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12 Cited in Oliver Sutton, "Boeing Bullish Cargo too", Intervia: Business and Technology (Geneva), November 1996, p. 3.

13 For example, Subic Bay in the Philippines and Dubai in the United Arab Emirates.

14 See Kapur, n. 9, p. 61.

15 Sutton, n. 12, p. 3.
growth at an average of 7.4 per cent per year, with a four-fold increase in air freight volume in the next 20 years. The effect will be that the total fleet may touch 2,720 aircraft by 2014. Of these, 820 will be large, long-haul freighters in the class of the MD-11F.\textsuperscript{16}

The rapid growth of the air cargo industry has several implications for airports. Airport operators will need to determine who will supply cargo handling services - airport authorities, public-private joint centres, airlines and airline sub-contractors, specialized cargo handlers, or private operators - and what level of competition will exist. Most airports have opted to contract out these services, although some airport authorities do undertake these services in-house (e.g. Vienna). Airport operators also must calculate the effect of all-cargo flights on existing capacity constraints. Memphis airport has, for example, adopted the method of using night hours for all-cargo aircraft. However, this technique may not work for some airports near residential areas because of grave noise pollution or violation of curfew hours. Moreover, additional land and increased investment will be required to build specialized facilities - such as cargo terminals, warehouses, automated handling systems, and truck ports. Part of this additional infrastructure is contingent on the involvement of the airport authorities in handling cargo services. But a basic level of investment will be necessary to accommodate the projected spurt in cargo traffic.\textsuperscript{17}

In terms of the economic regulation of international air transport, air cargo generally comes within the purview of government control

\textsuperscript{16}Ibid.

\textsuperscript{17}See, Kapur, n. 9, p. 61.
with respect to market access, tariffs, capacity, non-scheduled operations, etc. Further, there are technical, operational and safety standards to be maintained. Some of these controls are self imposed, resulting from inter-airline co-operation, but the principal agents of regulation are the governments of independent sovereign states. They control airspace above their territories and thus set their conditions under which international and domestic air services can operate. In order to bring about necessary standardization in arrangements between countries, the powers of international civil aviation have been delegated to the ICAO and the IATA but the sovereignty of states remains vital.\(^{18}\)

In domestic operations, the governments have no need to negotiate with other countries and are free to regulate their air transport industry. The control of the airlines, through ownership, awarding of contracts, or equipment, purchases, strengthens the government's power in civil aviation. The ownership of airports and participation in airport planning are other areas which the government controls.\(^{19}\)

In international operations, carriers act jointly within the IATA to determine the pricing policy, but each government retains veto, and the membership of the IATA is not compulsory. Airlines have extended their co-operation, however, beyond that required for the regulation of the tariffs. The IATA offers economic, legal, financial and technical services to its members along with its tariff rating. The airlines also co-operate, offer in groups, and settle the way in which they will provide services, even to the extent of undertaking joint operations. The effect


\(^{19}\)Ibid.
of regulation is to distort the conditions of supply and demand in air transport and hence change the operation of the industry, its size and scale, and the way it seeks to obtain profits. The level of yield, cost and load factor can all be affected.20

Most governments traditionally regard air cargo as part of passenger air services because the majority of national airlines carry cargo in combination with their scheduled passenger services, with a relatively few having all-cargo operations. Thus, in the bilateral exchange of market access rights, states typically grant rights to their designated airlines to transport passengers, cargo, and mail on the agreed scheduled international air services.21 The right to operate all-cargo services is generally considered implicit in such grant but is made more specific by some bilateral agreements, referring to "passengers, cargo and mail", separately, or in combination. Some bilateral air transport agreements assign special routes to all-cargo services. Recognizing the distinct nature of cargo, some agreements provide for special route flexibility for all-cargo services, for example, by allowing the use of intermediate points different from those authorized for passenger or combination services, while permitting such services to be operated by the designated airlines on any combination of routes.22

The government regulation of air carrier capacity also extends to all cargo operations, but tends to be less restrictive than that applied to passenger air services, as cargo is generally of less concern to national

20Ibid., p. 378.


airlines in terms of revenue generation and market share. Air transport regulators also deal with cargo rates as part of the government regulation of airline tariffs. A great number of non-scheduled international air transport activities are all-cargo charter operations, such as those operated by or for freight forwarders/consolidators, couriers, and express/small package services.23

One major problem that all-cargo operators experience is the lack of flexibility in market access rights under bilateral agreements in which air cargo is treated as part of passenger services. In such agreements, the limitations usually imposed on passenger service in respect of routes, traffic rights, frequency, etc, may also apply to all-cargo services. Since there are minimal synergies between passenger and cargo operations (e.g. different customers, different departure/arrival time requirements, directional imbalance of traffic movement), such regulatory restrictions often make it difficult for air carriers to sustain an economically viable air cargo service.24

Other regulatory problems which the all-cargo operators encounter include: (a) airport curfews which often limit the flexibility of night flight schedules, particularly courier and express services tending to wait until late in the day to receive their shipments and operate overnight for next day delivery; and (b) in some cases, limitations on airport slots used by cargo flights - especially at congested airports, where all-cargo operations are often given lower priority than passenger services.25

23 See Rosenfield, n. 21.

24 See ICAO Manual, n. 1, p. 4.5-2.

25 Ibid., p. 4.5-3.
II. ICAO - IATA and Cargo Regulations

A. Chicago Convention and Basic Market Access Rights

International air transport accepts regulation as its permanent and dominant characteristic, for sovereign states will not permit unrestricted operations in challenge to their national interests. They invariably seek to support their national carriers against foreign airlines. Agreements between states cover traffic rights, frequency and capacity, pricing and services offered and safety and technical standards.

International air transport regulations are based on multilateral treaties, bilateral agreements and national legislation. The Second World War era raised hopes that all the above aspects might be incorporated into a single multilateral treaty, providing the basis for international civil aviation. Representatives of 52 states, \(^{26}\) attending an international civil aviation conference in Chicago from 1 November to 7 December 1944, drafted, adopted and signed up one major convention, three agreements, a standard form of bilateral agreement for provisional air routes, and the texts of 12 draft technical annexes.\(^{27}\)

The main controversy at the Chicago Conference centred on the so-called "five freedoms" of air. The first two freedoms were the right of innocent passage, and the right to land for technical stops. The last three freedoms covered the commercial right of an airline to convey

\(^{26}\)Several documents state that 54 states participated in the conference. However, Denmark and Thailand were represented by their respective ministers who were invited in their personal capacity and they did not have the right to vote. See Proceedings of the International Civil Aviation Conference, Chicago, 1944, (Washington, D.C., 1945), p.13.

passengers, mail and freight -

(a) from the country of origin to any point,

(b) from any point to the country of origin, and

(c) intermediately for intermediate traffic.  

There was little difficulty over the first four freedoms. It was the fifth freedom which ignited a clash at the Chicago conference between the United Kingdom, led by Lord Swinton, and the United States, led by Mr. Adolf Berle. The US stood for the complete freedom of the air, with the unlimited rights of picking up and setting down passengers, mail, and cargo. Its belief was that England had ruled over the waters in the 19th century, and that America, too, could establish its rule over air in the 20th century.  

Great Britain presented exactly the opposite thesis: the right of picking up and setting down traffic [fifth freedom] should be incidental to the third and fourth freedoms.

The acrimony at the Chicago Convention blocked agreement on the fifth freedom traffic; the serious differences between the UK and the US were finally resolved under the bilateral Bermuda Agreement on commercial rights in 1946.  

The Bermuda Agreement was typified by a restrictive pricing regime, and liberal capacity arrangements and route description. The US compromised by dropping its opposition to the

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28Ibid.


international regulation of fares, and agreed that the primary fare-setting functions should devolve upon the IATA. The UK, for its part, agreed to restrict its earlier position that capacity should be regulated, and instead recognized that airlines should be allowed to regulate capacity by determining their frequency on a given route, provided governments were the ultimate arbiters of the control of capacity on routes relevant to their territories.\footnote{R.I.R. Abeyratne, "The Economic Relevance of the Chicago Convention - A Retrospective Study", \textit{Annals of Air and Space Law}, (Montreal), vol. 19-2, 1994, pp. 3-71, at p. 17.}

Nevertheless, the Chicago Conference enacted several provisions, which now regulate the economic aspects of international air transport. They include Article 1 [State Sovereignty]; Article 5 [non-scheduled flights]; Article 6 [scheduled air services]; Article 7 [cabotage]; Article 15 [airports and similar charges]; Articles 17 to 21 [nationality and registration of aircraft]; Articles 23 and 24 [customs and immigration issues]; Articles 37 and 38 [standards and recommended practices on facilitation]; Article 44 [aims and objectives of the ICAO]; Articles 77 to 79 [joint operating organizations]; Articles 81 and 83 [registration of agreements] and Article 96 [air transport-related definitions].

This chapter will identify and explain three basic market access rights - i.e., route, operation and traffic rights - which are perhaps the most important regulatory elements of international air cargo transport. An air transport market between any two places consists of the actual and potential traffic in persons and goods, which may move between such places by commercial air services. International air transport markets fall into four categories in a hierarchical structure: the city-pair market [i.e. the air route linking two cities]; the country-pair market [all
city pair routes linking two countries; the region-to-region market [one that includes all routes linking two regions]; and the global market, which includes all points served in the world by the airline industry. 32

Access by an air carrier to a state's domestic air transport market is typically obtained only if it is a carrier of that state and is usually acquired by licensing. Access to an international air transport market is also usually acquired by licensing or approval in each state so involved. The reason for this dates back to the earliest period of flights when states recognized that every state might exercise exclusive sovereignty over airspace above its territory. This principle is reaffirmed in Article 1 of the Chicago Convention, with the exercise of sovereignty expressed through licensing.

Commercial air transport services, when performed as non-scheduled international air services involving ICAO contracting states, are subject to Article 5 of the Chicago Convention. Under Article 5, the aircraft of an ICAO contracting state has the right to fly into or in transit non-stop across the territory of any other ICAO contracting state and to make stops for non-traffic purposes without the necessity of obtaining prior permission and subject to the right of the state flown over to require landing or to prescribe overflight route. Article 5 also extends the privilege of taking on or discharging traffic, subject to the right of any state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable. In actual practice, such impositions may result in the denial of, or various constraints on, market access by non-scheduled services, and in the absence of agreement between the states concerned, it is

regulated unilaterally - usually on the basis of reciprocity. 33

Article 6 of the Chicago Convention regulates scheduled international air services. It prohibits such services without the special permission, or other authorization, of the foreign state involved. In practice, a state extends such permission or authorization for scheduled international services by foreign air carriers through licences or permits of fixed or conditioned duration and does so on the basis of market access rights which that state has granted to the home state of the carrier. 34

A route right is a market access right, which is expressed as an agreed geographic specification, or combination of geographic specifications, of the route or routes over which an air service may operate. Generally, route rights are found in the route annex of an air transport or air services agreement between states, and the annex sets out separately a route or routes for use by the airline or airlines of each party to the agreement. 35

An operational right is a market access right, expressed as an agreed physical specification of how many carriers may be designated, or how aircraft may operate, or what aircraft types, parts of aircraft or substitute conveyances may be employed and assigned flight designators over an agreed route or routes. In practice, operational rights may be stated by transport agreements under route annexes or side understandings, or may not be implicitly included. The operational

34 Ibid., p. 291.
35 Ibid., p. 393.
rights dealing with how aircraft may operate over an agreed route include rights to overflight, technical stops, optional omission of stops, mandatory stops, flight positioning, extra-section flights, and change of gauge.36

An overflight right is the right and privilege granted to a state to fly across the territory of the granting state, without landing, on a scheduled or non-scheduled international air service. The International Air Services Transit Agreement identifies the related terms of the first freedom of air - the right or privilege, in respect of scheduled international air services, granted by one state to another state or states to fly across its territory without landing.

The right to a technical stop is the privilege granted to a state to land in the territory of the granting state for non-traffic purposes on a scheduled or non-scheduled international service. This right is most commonly exercised to refuel aircraft, to make unexpected essential repairs, or to respond to some emergency. The International Air Service Transit Agreement identifies the related terms of the second freedom of air - the right or privilege, in respect of scheduled international air services, granted by one state to another state or states to land on its territory for non-traffic purposes.37

A traffic right is a market access right, expressed as an agreed physical or geographical specification of who or what may be transported over an authorized route or parts thereof by authorized aircraft. The most basic way the traffic right is expressed as a physical


[37] Ibid.
specification is to transport passengers, cargo and mail separately, or in any combination. These freedoms of air relate to traffic - the first two freedoms being operational ones. The third freedom of air is the right or privilege, in respect of scheduled international air services, granted by one state to another state to put down in the territory of the first state the traffic coming from the home state of the carrier. The fourth freedom of the air is the right or privilege, in respect of scheduled international air services granted by one state to another state, to take on in the territory of the first state the traffic destined for the home state of the carrier. The fifth freedom of air is the right or privilege, in respect of scheduled international air services, granted by one state to another state to put down and to take on, in the territory of the first state, the traffic coming from or destined to a third state.\textsuperscript{38}

The so-called sixth freedom of air is the right or privilege, in respect of scheduled international air services, of transporting via the home state of the carrier the traffic moving between two other states. The so-called seventh freedom of air is the right or privilege, in respect of scheduled international air services, granted by one state to another state, of transporting traffic between the territory of the granting state and any third state with no requirement to include in such operation any point in the territory of the recipient state, i.e., the service need not connect to, or be an extension of any service to/from the home state of the carrier. The so-called eighth freedom of air is the right or privilege, in respect of scheduled international air services, of transporting cabotage traffic between two points in the territory of the granting state on a service which originates or terminates in the home territory of the carrier.

\textsuperscript{38}\textit{Ibid.}, p. 4.1-8.
foreign carrier, or outside the territory of the granting state (also known as consecutive cabotage). The so-called ninth freedom of air is the right or privilege of transporting cabotage traffic of the granting state on a service performed entirely within the territory of the granting state [also known as "stand alone" cabotage].

B. Economic Regulations of the ICAO

Since the establishment of the ICAO, the international community has experienced vast economic, geographic and demographic developments. The most visible of them are the emergence of a great number of newly independent sovereign states and the evolution of new mechanisms and organizations for global co-operation, multilateral diplomacy and harmonization of potentially conflicting interests. Aviation technology has evolved even more dramatically. Until the mid-1970s, the ICAO was mainly concerned with the regulation of technical matters. The economic regulation of air transport, especially the establishment of air tariffs and capacity levels, was conducted by the inter-airline IATA and governments via bilateral agreements.

During the 1950s and 1960s, the ICAO did make a few attempts to re-enter the economic regulatory arena. In the first case, the ICAO Council included the subject of air transport rates in its work programme for the years 1957-1959. This work on air tariffs was never carried out. In the second case, in 1963, at the urging of a few member states, the ICAO prepared a paper on the possible role of the organization in the field of airline tariffs. A debate occurred within the

39Ibid., pp. 4.1-10.
organization over tariffs, but no further action was taken beyond conducting studies on the development of international air passenger travel. In the third case, the 15th session of the ICAO Assembly in 1965 took a significant decision to treat economic problems on a worldwide basis.\(^{40}\)

In the late 1960s and early 1970s, the tariff-setting role played by the IATA began to decline, signalling the first major crack in the regime. This was due to both deliberate action by the US to undermine the fare-setting ability of the IATA as well as structural changes in the airline industry. The competition from new entrants into the industry - including charter carriers from developed countries and non-IATA carriers from developing countries - also contributed to the illegal discounting of IATA fares by the association's own members. The American pro-competitive policy further undermined the IATA's tariff-setting role by promoting price competition in the market. The result of these developments was a transformed regime in many parts of the world. Competitive forces replaced the IATA's tariff co-ordination as the primary means of setting prices.\(^{41}\) At the same time, the ICAO began publishing an economic review of air transport. This triennial study, which formed part of the documentation prepared for each session of the ICAO Assembly, reviewed major worldwide developments in air transport and made a long-term forecast on tariff structure over the next ten years. The IATA's weakening economic role also allowed political forces to once again promote the ICAO into the

\(^{40}\)See Resolution A15-16, ICAO Doc, 8528 (1965), at p. 59.

economic regulatory sphere.  

A special air transport conference - the first of its kind - was held in Montreal on 13-26 April 1977 under the auspices of the ICAO to consider a wide range of economic and regulatory issues concerning international civil aviation.

The second ICAO air transport conference was also held in Montreal on 12-18 February 1980. It formulated common and multilateral approaches to the worldwide capacity regulation of international commercial air services, and the mechanisms for establishing international fares and rates. The third ICAO air transport conference, held in Montreal from 22 October to 7 November 1985, was devoted to major economic issues in air transport and the application of national competition laws.

An ICAO worldwide air transport colloquium on the theme - "Exploring the future of international air transport regulation" - was

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43 The main topics discussed at the conference were the harmonization of scheduled and non-scheduled services in relation to the total demand; the regulation of capacity in international air transport services; and mechanism for the establishment of international fares and rates, including tariff enforcement. The ICAO conference proposed numerous recommendations for use by governments in order to establish a basic framework and policies for international air transport services.


45 The main issues it dealt with centred on the varying approaches of governments to regulate air carriers, particularly the number of flights and seats the carrier may offer, the rules governing charter flights, the prices charged by the carriers, and the rules applied in conjunction with these prices, such as baggage limits and compensation for denied boarding. Another important topic involved the efforts taken by governments and airlines to enforce passenger fares and cargo rates.
held in Montreal on 6-10 April 1992. It discussed various issues relating to economic regulation of air transport. The fourth ICAO worldwide air transport conference on the theme - "International air transport regulation : present and future" - was held in Montreal on 23 November-6 December 1994. The conference was significant because its principal focus was on the future arrangements for the economic regulation of international air transport.

C. IATA and Cargo Regulations

The International Air Transport Association (IATA) is the worldwide non-governmental organization of scheduled airlines [established in 1945] to promote safe, regular and economical air transport, to provide means for collaboration among air transport enterprises, and to co-operate with the ICAO, other international organizations and regional airline associations. The IATA's membership is open to any operating company which has been licensed to provide scheduled air service by a government eligible for the ICAO membership. The IATA active membership is open to airlines engaged directly in international operations, while its associate membership is open to domestic airlines. The IATA has over 250 member airlines, liaised by two main offices and four regional offices. IATA member airlines may, at their option, participate in tariff co-ordination activities

These issues relate to: (a) the bilateral versus multilateral exchange of traffic rights, and the freedom of air; (b) air services relationships involving groups of states; (c) trade concepts applied in international commercial aviation; and (d) airline ownership and cabotage.

for passenger, cargo, or both.48

The IATA regulates passenger-related activities through various conferences; its cargo service takes action to facilitate and improve the processing of air cargo through the standardization of procedures, data exchanges and systems; and its cargo agency conference co-ordinates airlines and intermediaries in the sale or processing of international air cargo but excluding remuneration levels.

Seven IATA cargo tariff co-ordination conferences which determine cargo rates and related conditions for each of the three geographical areas. The IATA's composite meetings of cargo tariff conferences deal with global rates, rate construction and currency rules, and remuneration levels for intermediaries engaged in the sale or processing of international air cargo; the IATA's composite meetings of passenger and cargo tariff conferences settle matters involving passengers and cargo tariffs.49

Over the years, air freight has increasingly become an important factor in international commerce and a source of revenue for world airlines, which carried some 18.7 million tonnes in 1994 alone. The airlines, in conjunction with the IATA's registered cargo agents and freight forwarders, offer a comprehensive door-to-door service, which is mainly realized through the co-ordination and standardization of methods provided under the IATA machinery. The IATA Cargo System and Procedures Committee (CSPC), which reports to the Cargo services Conference (CSC), is responsible to make recommendations for


49See ICAO Manual, n. 1, p. 3.8-2.
simplified and improved cargo documentation, rules and procedures, as well as automated information processing, interface manual methods, and electronic data interchange procedures standards.\textsuperscript{50}

Another essential part of the air freight system is the use of containers and pallets, commonly called unit load devices (ULDs) to ensure the efficient loading and unloading of aircraft, particularly bulky and all-cargo aircraft. The IATA ULD Technical Board (UTB) - it reports to the cargo service conference (CSC) - is responsible for the development of ULD specifications, guidelines, recommendations and other technical materials pursuant to IATA Resolution 681. The resolution includes the following subjects:

\begin{enumerate}
  \item manufacturing techniques, restraint, handling methods and uses of ULDs to encourage utilization in air transport, and ensure that members have available to them the most beneficial ULDs for technical, handling and economic standpoints;
  \item standards and methods for airline acceptance, aircraft restraints, use and handling of inter-model (air/surface) ULDs;
  \item standards for associated ground support equipment in respect of its compatibility with ULD; and
  \item the registration of ULDs and assigning of new ULD type codes.\textsuperscript{51}
\end{enumerate}

Another task assigned to the UTB is to study the development and simplification of airworthiness certification of ULDs and aircraft restraint systems so as to remove barriers to the full use of ULDs, while

\textsuperscript{50}Groenewege, n. 5, p. 280.

\textsuperscript{51}Ibid., p. 286.
maintaining the strictest safety regulations. The agreed industry technical specifications, together with illustrations, are contained in the IATA ULD technical manual.\footnote{See ULD Technical Manual (Geneva, IATA), see IATA, Ref. No. 5004.}

The use of standard codes is another basic requirement to ensure efficiency in airline cargo reservations and telecommunications, as well as in many other areas of airline operations. The agreed industry formats and procedures for the interchange of cargo information are contained in the IATA cargo interchange message procedures manual, commonly called "Cargo IMP". The Cargo IMP is the official source for message specifications - covering space allocations, airway bill information, flight manifest, accounting, status, discrepancy, embargo, proposed airline customs systems, and CASS billing. It also includes the encoding and decoding list of all approved abbreviations and codes, as well as an annex with third party message specifications.\footnote{See for details on Cargo Interchange Message Procedural Manual (Geneva, IATA), IATA Ref. No. 9073.}

The IATA Cargo Data Interchange Sub-Committee (CDISC), established pursuant to IATA Resolution 671, has the task to consider proposed amendments to cargo IMP in close consultation with the Air Transport Association of America (ATA); any meetings held in conjunction with the ATA are designed as Joint Cargo Data Interchange Sub-Committee (JCDISC) meetings. The JCDISC's agreement with proposals shall be unanimous for their subsequent submission to the cargo systems and procedures committee (CSPC) for final action. The detailed agreement among the world airlines on forms and procedures, allocation of responsibilities, establishment of interlink traffic...
agreements, and the ability to settle inter-airline accounts efficiently and quickly through the IATA clearing house have all contributed to a highly integrated and standardized world air freight system as it exists today. The standard IATA airway bill (AWB) used worldwide is one of the most important features of the simplified system of documentation for air freight shipments moving internationally.54

The Cargo Community Systems Council (CCSC) was established to address areas of common interest and concern, mainly the development of automated cargo community systems. The CCS Council is the successor of the Cargo Community System Committee and reports on its activities to the Cargo Systems and Procedures Committee (CSPC). The Council membership is open to IATA membership airlines, registered suppliers, CCS operators and developers, and other organizations interested in CCS development and implementation.

The main functions of the Cargo Community System Council are to:

(a) develop and maintain standards required for the development and operation of CCSs;

(b) determine message development, handling and conversion requirements of CCSs;

(c) develop principles for inter-CCS sharing;

(d) control, assign and publish CCSs identifier codes required for inter-CCS communication; and

54Groenewege, n. 5, p. 280.
(e) establish and promote standards for the development of open and neutral CCSs - including those in IATA cargo. STAK-functional design specification and the IATA cargo-CAP participation handbooks.55

The recommendations of the Council are submitted to the CSPC for consideration as amendments to existing resolutions and recommended practices, or for the adoption of new resolutions and recommended practices. The IATA Interline Cargo Claims Procedures Agreement (ICCPA) is an integral part of the global interline cargo system and contains uniform principles and practices for the investigation and disposition of airline cargo claims between carriers. The main purpose of the agreement is to effect prompt and equitable apportionment among the airlines of the amount paid and expenses incurred in the settlement of claims, and to provide an efficient service to the shipping public.56

D. Regulations Relating to Air Mail and Air Courier Services

The first major source of business for the airlines was the carriage of mail. Air service promised speedier delivery to the public and postal administrations. The first air mail conference held at The Hague in 1927, endorsed an agreement, deeming airline companies as officially recognized carriers of mail. Following the creation of a postal committee by the IATA, direct consultations were held with the Universal Postal Union (UPU) on questions of mutual interest. In the

56Groenewege, n. 5, p. 282.
1930s attention was drawn to the organization of European night mail services. A year-round network linking eight countries had been established by 1935. One landmark achievement of the UPU was the abolition of the special airmail surcharge on the basis that the aeroplane was no longer a mode of transport to be used only in emergency or special urgency, considerable progress was also made in establishing standard air mail documents and procedures through the use of a new bill of landing and bill of delivery. 57

As early as of 1945, the Provisional International Civil Aviation Organization (PICAO) took active interest in the economic aspects of air mail, an issue which became the subject of several studies well into the early 1970s. In those days air mail was a significant source of revenue to air carriers and was also seen as an instrument of government policy. 58 The ICAO Assembly, in its Resolutions A1-44 and A10-33, gave directives regarding the ICAO's work in the field of international air mail. The Assembly, in Resolution A25-2, instructed the ICAO Council to study and submit a new text classifying and consolidating the resolutions in force. The ICAO should, the Assembly mandated, continue its studies in the field of international air mail, taking into consideration views expressed by the contracting states. It directed the Council to keep the contracting states fully informed of developments in the field of international air mail. 59

57 Ibid., p. 53.

58 See ICAO Secretariat, n. 42, p. 50.

59 Policy and Guidance Material on the Regulation of International Air Transport, ICAO, Doc. 9587, p. 50.
Air mail rates are set for countries under the auspices of the UPU. Yet the UPU has to negotiate airline rate of carriage with the IATA. In the negotiations, the ICAO acts as the intermediary seeking a compromise. The basis of a new rate system was established with the ICAO's help in 1983 and approved by the UPU Congress in 1994.60

One of the exceptional developments in air mail business is the breathtaking growth of the courier express carrier industry. The air courier service began in the late 1960's in North America and Europe as a fledgling business in which couriers travelled as passengers by scheduled fights. They usually carried sensitive documents such as bank, shipping or engineering contracts and delivered them door to door. With the phenomenal growth of multinational corporations and international trade especially in information and other service industries the demand for fast efficient courier services has swelled dramatically. The major element of success is their ability to dovetail local express networks with international operations to provide global door-to-door service.61

As business boomed, so some of the companies persuaded the airlines to give them expedited air freight services. Even more significantly, they also secured speed customs processing at several airports. Other companies began to charter aircraft, or operate their own, to carry express mail, usually small parcels. What is some cases started as shoe-string operations have mushroomed into a multi-billion dollar industry. Today such giants as DHL, United Parcel Services (UPS), Federal Express, and TNT are flying everything from small

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60 See Groenewege, n.5, 224.

parcel to car parts. The air courier business became so profitable that postal agencies and airlines jumped into the act. Several postal services, such as Canada post, brought courier companies to get into action. Conversely, major airlines, such as Lufthansa and Air France, have set up express cargo services to take advantage of the growing business.\textsuperscript{62}

Several countries have modified their customs regulations to give special concessions to courier and express services. In 1986, Canada adopted a new customs courier imports policy, making the processing easier. In 1983, France introduced simplified paper work for courier shipments. A 24-hour service was introduced at Paris airport for couriers. Special facilities where couriers can tranship consignments without customs clearance have been established at Amsterdam's Schipoll airport. Heathrow airport in London also has a special courier clearance facility. Special courier facilities have been provided at New York - JFK and Miami airports. The US adopted a regulation permitting courier and air express services to expedite the clearance of most shipments valued at less than $1,000 in 1986.\textsuperscript{63}

International organizations - such as the customs co-operation council and the ICAO - have all modified their regulations to accommodate the courier business. The ICAO's secretariat has made several suggestions to simplify the volume of documents required for the customs clearance of goods. It backs separate clearing facilities for courier shipments. The ICAO is also working to eliminate constraints which add to the delay.

\textsuperscript{62} Ibid.

\textsuperscript{63} Ibid., p. 136.
One of the exciting developments in air travel is the use of computers to check the contents of air cargo. Computers using advanced technology, transmit information about passengers, baggage, or cargo, to the point of travel long before the aircraft touches down. This increases efficiency and speed of clearance, and those carrying or exporting illegal goods can be identified much more easily. Called the electronic data interchange (EDI), it is a computer transmission of information on air cargo movement. The ICAO, the airlines, and civil aviation authorities look to a day when "paperless" clearance formalities will be the norm.64

E. Regulations Relating to Dangerous Goods and Live Animals

More than half the cargo carried by all modes of transport throughout the world is classified as dangerous cargo - articles or substances capable of posing significant risk to health, safety or property when transported by air. These dangerous goods are essential for a wide variety of global industrial and commercial requirements as well as for medicine and research. A significant and increasing volume of dangerous cargo is carried by aircraft.65

To ensure that such cargo can be carried safely, the ICAO has adopted the Annex 18, together with the associated document - Technical Instructions for the safe transport of dangerous goods by Air - which became effective on 1 January 1983. The Annex 18 specifies the broad standards and recommended practices to follow for dangerous goods to

64Ibid., p. 137.

be carried safely. The ICAO's requirements for the transport of
dangerous goods have been largely developed by a panel of experts,
constituted in 1976. The ICAO panel meets regularly and recommends
the necessary additions and revisions to Technical Instructions, which
requires frequent updating as new developments occur in chemical,
manufacturing and packaging industries. A special procedure has been
established by the ICAO Council to revise and re-issue Technical
Instructions regularly to keep pace with new products and advances in
technology.66

In order to achieve compatibility with the regulations covering
the transport, the provisions of the Annex 18 and associated Technical
Instructions are based on, and kept aligned, with recommendations of the
UN committee of experts on the transport of dangerous goods and
regulations for the safe transport of radioactive materials of the
International Atomic Energy Agency (IAEA). Additional requirements
and restrictions have been introduced, where appropriate, as a result of
the special conditions prevailing in air transport. An instance where the
conditions, rules and regulations for the acceptance and carriage of
dangerous goods by surface modes are less restrictive than by air, the
transfer of such consignments by air is not permitted.67

In 1950, the IATA traffic committee initiated a programme to
develop detailed regulations for the acceptance/transport of dangerous
goods, commonly called "restricted articles". This complex task was
assigned to the IATA Restricted Articles Board pursuant to IATA

66Ibid.
67Groenewege, n. 5, p. 559.
Resolution 619, now called the IATA Dangerous Goods Board (DGB). The first edition of the IATA restricted articles regulations, which became effective on 1 January 1956 for worldwide application, provide the basis for day-to-day work by manufacturers and shippers of dangerous goods, IATA registered cargo agents, freight forwards, and airline acceptance and handling staff. The IATA has also adopted the term "dangerous goods", and its safety regulations are known as IATA dangerous goods regulations following the passage of the ICAO Annex 18.68

The main functions of the IATA Dangerous Goods Board, which reports to the cargo service conference (CSC), are as follows: to publish rules and procedures by which dangerous goods shall be carried by air safely and uniformly worldwide; to co-ordinate the airline industry in all matters submitted to the ICAO Dangerous Goods Panel (DGP); to assist the IATA secretariat in formulating submissions to, and in providing effective membership of, that panel; to update and maintain the IATA DGR; and to ensure the continuing status of that publication as a worldwide field document used by the airline industry for the carriage of dangerous goods. It also serves to: develop and approve documentary requirements and procedures for the handling and processing of dangerous goods; develop and issue educational and training material and any other services to enhance full compliance with the detailed provisions of the IATA dangerous goods resolutions; evaluate and promote the development of dangerous goods information systems; and liaise with manufacturers and shippers of dangerous goods and

68 See IATA Dangerous Goods Resolutions (originally called Restricted Articles Regulations), IATA, Ref. No. 9065.
national and international organizations involved in the transport of dangerous goods.\textsuperscript{69}

In the mid-1960s, IATA member airlines decided that there was a need to develop universal standards, rules and regulations for the safe carriage of live animals by air on a worldwide basis. As a result, the IATA cargo traffic procedures committee (CTPC) established in 1967, the IATA Live Animals Board (LAB) pursuant to IATA Resolution 511a and now covered by IATA Resolution 621. Following an extensive research carried out by the LAB, the first edition of the IATA Live Animals Regulations (LAR) became effective on 1 January 1969.\textsuperscript{70} The regulations contain specific guidelines for the handling of live animals and the design and construction of suitable types of cages and containers; they have the status of recommended practices for use by the IATA member airlines. In the light of growing interest by governments and international organizations concerned with the welfare of animals, the IATA Cargo Traffic Procedures Committee (CTPC), at its meeting in 1974, made the provisions of the LAR mandatory. The main tasks assigned to the LAB, which reports to the cargo services conference (CSC), are:

(a) to establish criteria applicable to the acceptance, handling and loading of live animals in air transport, as outlined in the LAR, which shall include provisions for their welfare while in the custody of the member airlines;

\textsuperscript{69}A.D. Groenewege, "Dangerous Goods : A History (Part II)", INSIGHT (a bi-monthly publication of IATA News and Events), November-December 1996, p.43.

\textsuperscript{70}See Brancker, n. 48, p. 48.
(b) to consider all aspects of the specifications, rules and procedures by which the animals shall be carried safely worldwide;

(c) to consider all proposals made by the IATA member airlines and other interested parties;

(d) to ensure that new amendments take into account the characteristics peculiar to air transport;

(e) to develop and propose additions, changes and deletions to the LARs, and ensure that all agreed changes to the regulations are suitably included in the corresponding issue of LAR;

(f) to develop and approve documentary requirements and procedures for the welfare, control, handling and processing of live animals and their loading on to and unloading from aircraft;

(g) to develop and issue educational and training material in order to enhance full compliance with the detailed provisions of the LARs, and

(h) to maintain close contact with shippers of live animals and national and international organizations concerned with the establishment of uniform and intermodal standards and requirements for the safe transport and welfare of animals.\(^7\)

The UN Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Office International des Epizooties (OIE), and a number of governments have adopted the LAR as guidelines for the transport of live animals by air, whereas the Council

\(^{7}\)Groenewege, n. 5, p. 282.
of Europe has used the LAR as the basis for its code of conduct to transport animals. Nearly five decades of continuous and dedicated effort by the IATA and its DGB have brought about an extremely important and most valuable set of safety regulations.72

III. Conventions Relating to the Regulation of International Air Cargo


(A) The Warsaw Convention 1929 As Amended by the Hague Protocol 1955

The Warsaw Convention 1929 - formally entitled "Convention for the Unification of Certain Rules Relating to International Carriage by Air" - was signed in Warsaw on 12 October 1929 and came into force on 13 February 1933. It enjoins a code laying down conditions of contract for international carriage. It defines, limits and enforces the rights of passengers and cargo owners in such carriage, and the corresponding liabilities of the carrier. It imposes on the carrier a

72Ibid., p. 593.
limited liability in most cases of accidents or delay, and an unlimited liability in some.\textsuperscript{73} The Convention also establishes uniform rules on such matters of documentation as tickets, airway bills, baggage checks and the like by designating the fora in which action could be initiated under the convention and by establishing substantive rules of law on the rights and duties of consigners and consignees as well as the principles and limits of liability.\textsuperscript{74}

Article 1 of the Warsaw convention requires three basic elements to be necessary for a plaintiff to bring action against a cargo carrier: the carrier, the contract of carriage, and goods. Article 1(1) of the Convention applies to the international transport of persons, baggage and cargo performed by aircraft for hire and to gratuitous transport by aircraft belonging to an air enterprise transport.

The international character of air transport depends on agreement between parties to a contract of carriage, not the factual crossing of borders where the points of departure and destination are placed within two states [which are parties to the convention], nor the carriage within one state if there is an agreed stopping place in the territory of another state.\textsuperscript{75} The transport performed by several successive air carriers is treated as one single operation if so agreed by the parties to the contract and will be considered as international carriage even if one part of the journey is performed entirely within the territory of the same state.\textsuperscript{76}

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\textsuperscript{73}See, Peter B. Keenan, ed, Shawcross and Beamount on Air Law (London, 1966), p. 43.


\textsuperscript{75}See Article 1(2) of the Warsaw Convention, 1929.

\textsuperscript{76}Ibid., Article 1(3).
1. Airway Bill or Air Consignment Note

The documentary system is of enormous importance for the development of trade. Documents regulated by international conventions have such great advantage that their affects are stated in the convention and will therefore be generally accepted. The Warsaw convention gives much attention to the airway bill, devoting its entire chapter II, section 3 [Articles 5-16] to the bill itself.

Under Article 5(1), every carrier of goods has the right to require a consigner to make out and hand over if a document called "...airway bill". The absence, irregularity or loss of this document shall not affect the existence or validity of the contract of carriage which is subject to the provisions of Article 9, but nonetheless, governed by the rules of the Convention.\(^77\)

Under Article 6 of the Warsaw Convention, the airway bill shall be made out by the consigner in three original parts and handed over with the goods. The first part shall be marked "for the carrier" and signed by the consigner. The second part shall be marked "for the consignee", signed by the consigner and the carrier, and shall accompany the goods. The third part shall be signed by the carrier and handed by it to the consigner after the goods have been accepted. The carrier of goods has the right to require the consigner to make out a separate airway bill when the package is more than one.\(^78\)

\(^{77}\)Ibid., Article 5(2).

\(^{78}\)Ibid., Article 8.
The airway bill contains the following particulars: (a) the place and date of its execution; (b) the place of departure and destination; (c) the agreed stopping places, provided the carrier reserves the right to alter the stopping places in case of necessity; (d) the name and address of the consigner; (e) the name and address of the first carrier; (f) the name and address of the consignee; (g) the nature of goods; (h) the number of packages, methods of packing, etc; (i) the weight, quantity and volume of goods; (j) the apparent condition of goods and packing; (k) the freight, if it has been agreed, the date and place of payment, and the person to receive the payment; (l) the price of goods, and expenses incurred if the goods are sent for payment on delivery; (m) the amount of value declared in accordance with Article 22(2); (n) the number of parts of the airway bill; (o) the documents handed to the carrier to accompany the airway bill; (p) the time fixed for the completion of carriage, followed by a brief note of the route; and (q) a statement that the transport is subject to the rules of transport liability established by the Warsaw Convention.79

If the carrier accepts goods without an airway bill ever made out, or if the airway bill does not contain all the particulars set out in Article 8, the carrier shall not avail itself of the provisions of the convention, which exclude or limit his liability.80 The consigner is responsible for the correctness of the particulars and statements relating to goods, which he claims in the airway bill. The consigner shall be liable to all damages suffered by the carrier, or any other person, by reason of the irregularity, incorrectness, or incompleteness of the said particulars and

79 Ibid., Article 8.
80 Ibid., Article 9.
The drafting of the Convention initially ran into uncertainty, whether to create a bill of landing or a waybill i.e. whether to use the maritime law, or the railway law as model. The railway pattern finally prevailed as revealed by Article 11. "The airway bill", according to it, "shall be prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportatiation." Article 12(1) provides that the consigner shall have certain rights to dispose of goods even during international air transport. Article 12(1) gives the consigner the right of stoppage in transit. The consigner may also withdraw goods at the airport of departure or destination, or stop them in the course of journey or on landing. The consigner is, however, precluded under Article 12(1) from exercising his right of stoppage in manner prejudicial to the carrier, or other consigners. Also the consigner is required to pay the expenses occasioned by the exercise of the stoppage rights. If the carrier admits the loss of goods, or if the goods have not arrived at the expiry of seven days after the delivery date, the consignee is entitled to put into force against the carrier the rights flowing from the contract of carriage. The consignor and the consignee can enforce all the rights given to them under Article 12 and 13 of the Convention.

According to Article 15, Articles 12, 13 and 14 do not affect either the relations of the consigner and the consignee with each other,

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81 Ibid., Article 10.
82 Ibid., Article 13(3).
83 Ibid., Article 14.
or the mutual relations of third parties whose rights are derived from either the consignor or the consignee. Moreover, the consigner must furnish such information and documents as deemed necessary to meet the formalities of customs, octroi or policy before the cargo can be delivered to the consignee. The consigner is liable to the carrier for any damage caused by the absence, insufficiency or irregularity of any information or documents unless the damage occurs due to the fault of the carrier, its servants, or agents.84

2. Liability of the Carrier

The current basis for the legal liability of a carrier for the loss, damage or delay of cargo is founded on three basic elements: (a) the law of bailment which imposes obligations on a carrier, which is in possession of cargo belonging to another; (b) the law of contract - the contract of carriage on the presumption of responsibility by the carrier; (c) the statute law on international carriage, which means statute giving legal force to private law conventions for the international carriage of cargo. Articles 17 to 30 in chapter 3 of the Warsaw Convention deal with the liabilities of air carriers.

The carrier is liable to damage sustained in the event of the destruction or loss, or damage, to any registered luggage or goods if the occurrence which caused the damage takes place during the carriage by air. The carriage of cargo by air comprises the period during which the cargo is in the charge of the carrier - at an aerodrome, on board an aircraft, or [in the case of a landing outside an aerodrome] at any place whatsoever. The period of carriage by air does not extend to any

84Ibid., Article 16.
carriage by land, sea, or river performed outside an aerodrome. 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 taking place during the carriage by air.\textsuperscript{85}

Speed is a basic characteristic of air transport. It is not surprising therefore that the principle of liability for delay should be given far too greater importance in the air law. Under Article 19 of the Warsaw Convention, the carrier is liable to damage occasioned by delay in the carriage by air of passengers, luggage, or goods. A condition precedent to the carrier's responsibility to the passengers is that the damage must take place on board an aircraft, or in the course of any operations of embarkation or disembarkation, unless, under Article 20(2), the carrier establishes that the damage has been occasioned by negligent pilotage or negligence in the aircraft navigation handling, and that it and its agents have taken all necessary measures to avoid the damage in all other aspects. The rudiments of the present Article 20 of the Warsaw convention were anticipated and echoed by the draft convention drawn up by the First International Conference on Air Law held in Paris way back in 1925. Articles 5(1), 5(2) and 6 of the draft indicate that the liability of the carrier is to be based on fault.\textsuperscript{86}

If the carrier proves that the damage has been caused or contributed by the negligence of the injured person, court may, in

\textsuperscript{85}\textsuperscript{85}Ibid., Article 18(2) and (3).

accordance with the provisions of its own law, exonerate the carrier wholly or partly from the liability.\(^{87}\) The liability of the carrier in cases where it cannot prove any of the exceptions which could absolve it partially or wholly of the damages is limited to 250 francs per kilogram of checked baggage and goods, and 5,000 francs for objects of which the passenger himself takes charge.\(^{88}\) Article 22 of the Warsaw Convention limits the liability of international air carriers for injury to passengers, and damage to cargo. Although the carriers have received the primary benefit from the convention of liability limits, the treaty also provides a \textit{quid pro quo} to the passengers by making the carriers presumptively liable.\(^{89}\)

The carrier may lose its right to the limited liability and be liable to unlimited costs in two cases. The first is when the damage is caused by its wilful misconduct or by such default on its part as, in accordance with the law of court, considered equivalent to the wilful misconduct of the carrier, or its servants and agents.\(^{90}\) The second exclusion is provided in cases where the documents of carriage, namely passenger's ticket, baggage check and airways bill, are not delivered to the passenger or the consigner. In these cases, the carrier cannot avail itself of the provisions which exclude or limit its liability.\(^{91}\) The documents should contain various obligatory particulars; the failure to include such

\(^{87}\) See Ibid., Article 21, of the Warsaw Convention, 1929.

\(^{88}\) Ibid., Article 22.

\(^{89}\) Ibid., Articles 17, 18, 20 and 21.

\(^{90}\) Ibid., Article 25.

\(^{91}\) Ibid., Article 3, 4 and 9.
particulars results in the carrier's unlimited liability.

Special contracts, ticket conditions or other provisions designed to reduce or limit the liability are declared void by Article 23; under Article 24, all claims arising out of liability disputes, no matter how well founded, are subject, to the terms of the Convention.

In the American Airlines Inc. v. Vlen case, wilful misconduct was proved in the chartering of a flight less than 1,000 ft above the highest obstacle (a mountain) in the course to be flown. The KLM Royal Dutch Airlines v. Tuller case established four instances of wilful misconduct: (a) failure to instruct passengers about the location and use of life vests; (b) failure to send a distress signal; (c) failure to take appropriate steps to rescue the deceased from the trail of the plane after the crash; and (d) failure of the ground agent to record radio contact loss with the airplane and to institute and a prompt search and rescue operation.92

The Insurance company of North America v. Royal Dutch Airlines (KLM) dispute has opened the question of liability limits over the declared value of package under Article 22 of the Warsaw Convention 1929 as amended by the Hague protocol 1955. Is, the case ponders, the carrier bound to compensate the actual damage caused by wilful misconduct, or an act of carelessness as stated by Article 25 of the convention?

The Supreme Court of the Netherlands, Judgement of 6 January 1978

Facts of the Case: In a case, the plaintiff (hereafter mentioned INA), claimed from the defendant (KLM) complete compensation for the loss of a box containing about seven kilos of platinadental gold, accepted for transport by KLM and apparently stolen by one of the carrier's employees. KLM contended that the sender did declare, on the delivery of the package, a value of 1,200 DM, and that for this reason it only owed this amount. The Court of Appeals held the defence justified and rejected the appeal of INA under Article 25 of the Warsaw Convention. Under Article 25, however, the carrier cannot claim liability limitations as intended in Article 22 when the damage is caused by misconduct or an act of carelessness by an employee, performed either with the intent or cause to damage or with negligence, but knowing that the performance of that act will probably result in damage. The Court of Appeals saw the limits of liability under Article 22 of the convention to encompass the maximum amount of liability, not the declared amount of value on delivery, and so replaced the liability limits of 250 DM per kilo under Article 22(2).

INA appealed against the Court of Appeals decision to the Supreme Court and won. The fact that the convention does not include an obligation for the carrier to transport does not imply that, according to the wording and intention of Article 22(2), a sender of goods cannot, by a unilateral declaration of his interest, when offering goods for transport on delivery, raise the applicable limits of liability to the declared amount of value. The carrier must then decide if it accepts the goods for transport with the increased limits of liability. There exists no reason to assume that Article 25 should not also refer to the increased limits of liability in accordance with Article 22(2).
The carrier, when accepting for transport goods with such a declaration of value, stipulates either in the transport agreement or in another way to restrict his liability to the declared amount of value; the validity of such restricted liability - equal to the applicability of liability limitations under Article 22(2) of the convention - must find its limits under Article 25 of the convention.93

In another case, the plaintiff Franklin Mint Corporation delivered to the defendant Trans World Airlines (TWA) for the carriage of four packages weighing some 714 pounds from Philadelphia to London's Heathrow airport. Although the packages are said to have contained a large quantity of valuable coins, Franklin made no special declaration of value at the time of delivery. TWA charged Franklin $ 544.96 for the shipment. The four packages never arrived at their destination, and Franklin brought action to recover their full value, which it fixed at $ 250,000.

TWA was liable to the loss, but claimed limited liability under the convention. The lower court granted TWA partial summary judgement to the extent of its liability to pay $ 6,475.98, holding that the limits on liability for the loss of cargo were unenforceable. The court said that the US Congress had abandoned the unit of conversion specified by the conversion and did not substitute a new one. The Montreal Protocol had not been ratified by the US, it pointed out and therefore the value of SDR should not be used. Nor were other bases of calculation acceptable to the Court.94

B. The Montreal Protocol No. 4 of 1975 and New Cargo Regulations

A diplomatic conference on air law, held in Montreal under the auspices of the ICAO, reviewed the limits of liability and adopted four protocols on 25 September 1975.Originally, the conference was convened to change only provisions relating to the carriage of cargo, which it eventually did under the protocol No. 4.

The Montreal Protocol No. 4 seeks to amend the 1929 Warsaw Convention, which was already amended by the Hague Protocol on 28 September 1955. The Montreal Protocol mainly changes the provisions relating to the transport of cargo, since the 1971 Guatemala City Protocol has only introduced amendments over passengers and baggage. This protocol simplifies cargo documentation. The traditional airway bill may be substituted, with the consent of the consigner, by any other means which will preserve the record of carriage to be performed; thus enabling electronic or computerized data processing. The carrier, if the airway bill is not issued, has to issue on request by the consigner a receipt for the cargo permitting the identification of the consignment and access to the record preserved by "other means". The protocol also introduces strict liability for cargo and replaces its currency unit by the

special drawing rights (SDR) without increasing the actual limits of liability.96

Some Important Provisions of Protocol No. 4

The Warsaw Convention as amended by the Hague and Montreal Protocols shall apply to international carriage as defined in Article 1 of the Convention, provided the places of departure and destination referred to in the Article are situated either in the territories of two parties to this protocol, or within the territory of a single party to this protocol, with an agreed stopping place in the territory of another state.97 In the carriage of postal items, the carrier shall be liable only to the relevant postal administrations in accordance with the rules applicable to the relationship between the carriers and postal administrations and not by the Convention.98

The new provisions on the description of the airway bill omit the requirement that the carrier shall sign the airway bill prior to the loading of the aircraft. Where there is more than one package, the consigner has the right to require the carrier to issue a separate airway bill, or receipt for the cargo, as the case may be.99 The airway bill or the receipt for the cargo is the *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo, and of the conditions of carriage mentioned

96Montreal 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. ICAO Doc. 9148.

97Ibid., Article 14.

98Ibid., Article 4.

99Ibid., Article 7.
therein. It shall contain (a) an indication of the places of departure and destination, (b) an indication of at least one stopping place if the places of departure and destination are within the territory of a single contracting state, and also one or more agreed stopping places are within the territory of another state; and (c) an indication of the weight of the consignment.\textsuperscript{100} Under Article 9, non-compliance with the provisions of Articles 5-8 shall not affect the existence or validity of the contract of carriage.

The consigner is responsible for the correctness of the particulars and statements relating to the cargo claimed by him or on his behalf in the airway bill, or furnished by him or on his behalf to the carrier for insertion in the receipt for the cargo.\textsuperscript{101} The provisions concerning the right to cargo disposal have been modified to include a mention of the receipt for the cargo in addition to the airway bill. The provisions concerning the arrival of cargo at its destination have been amended so as to delete reference to documentation because, if the other means are used, it is possible that no documentation may be issued.\textsuperscript{102} According to Article 14, the consigner and the consignee can respectively enforce all the rights given to them under Articles 12 and 13.

The Warsaw/Hague regime of presumed liability of the carrier in the Carriage of Cargo has been changed by the Montreal Protocol No. 4 to a regime of strict liability based on the common law doctrine of \textit{res

\textsuperscript{100}Ibid., Article 8.

\textsuperscript{101}Ibid., Article 10.

\textsuperscript{102}Ibid., Article 12.
ipsa locutur\textsuperscript{103} [i.e. the thing speaks for itself] Thus under the new regime, the carrier is liable to damage sustained in the event of the destruction, loss, or damage to cargo only on conditions that the occurrence which causes the damage so sustained has taken place during the carriage by air. However, as per this protocol, the carrier is not liable if he proves that the destruction, loss or damage to the cargo has resulted solely from one or more of the following reasons:\textsuperscript{104}

(a) inherent defect, quality or vice of the cargo;

(b) defective packing performed by a person other than the carrier, or its agents;

(c) an act of war, or armed conflict; and

(d) an act of public authority carried out during the entry, exit or transit of the cargo.

It is also provided that the carrier will be wholly or partly exonerated from liability to the claimant to the extent that it proves that the damage has been caused or contributed to by the negligence or other wrongful act or omission of the claimant or the person from whom he derives his rights.

The major change brought in by the protocol is the omission from Article 25 of the reference to cargo. The effect of this is to ensure that in view of the strict liability regime now established for the carriage of cargo, the limit of liability will be unbreakable. The limit of liability is expressed in SDR as defined by the International Monetary Fund (IMF)

\textsuperscript{103}Ibid., Article 18.

\textsuperscript{104}Ibid.
and the amount of the limit has not been increased from its 1929 level i.e. 17 SDR per kilogramme corresponding to 250 francs. However, some argue that the liability should not be unbreakable because the strict liability regime under the protocol gives little advantage to the claimant over the old Warsaw/Hague regime's presumed liability.

The US National Commission to ensure a strong competitive airline industry believes that the Montreal Protocols 3 and 4 and a supplemental compensation plan should be ratified by the Senate. Nevertheless, the Montreal Protocol No. 4 hopes to establish a modern, strict liability for air cargo and streamline the cargo documentation requirements. It will be preferable, it believes, to include protection for both airlines and aircraft and component manufacturers in a supplemental compensation plan. It recommends that "the US amend the Warsaw Convention by ratifying Montreal Protocols Nos. 3 and 4 and approve a supplemental compensation plan".106

The enforcement of the Montreal Protocol No. 4 will modernize the cargo provisions of the Warsaw system. It will remove inter alia the present mandatory requirement for an airway bill in order to assert the limit of liability for cargo.


This draft convention aims to modernize and consolidate the

105 Ibid., Article 7.

Warsaw system of an air carrier liability to the requirements of present day air transport environment on cargo, the draft convention incorporates the provisions of the Montreal Protocol No. 4 permitting the use of an electronic airway bill for air cargo shipment. In the same manner, the provisions of the Guadalajara Convention have been incorporated into the draft in order to take into account the airline practice of code sharing and related concerns over liability. The existing legal instruments have been consolidated and, where necessary, brought up to date to reduce the current multiplicity and complexity of conventions, protocols and protocol amendments which make up the Warsaw systems.107

The draft convention, like the earlier conventions, applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.108 However, the Convention will not apply to the carriage of air mail.109 In the carriage of air cargo, an airway bill shall be delivered.110 The airway bill shall be made out by the consigner in three original parts.111 Under Article 5 of the draft, the airway bill of the cargo receipt shall include an indication of the places of departure, destination, stopping places, and the nature and weight of

107To modernize Warsaw system of air carrier liability, the 30th Session of the ICAO legal committee, held from 20 April to 9 May 1997, at Montreal and approved the Draft Convention for the unification of certain rules for international carriage, May 1997, see ICAO, Doc. 9693-LC/190.

108Ibid., Article 1.

109Ibid., Article 2.

110Ibid., Article 4.

111Ibid., Articles 5-6.
the consignment. The airway bill or the cargo receipt is the *prima facie*
evidence of the conclusion of the contract, of the acceptance of the
cargo, and of the conditions of carriage mentioned therein.\textsuperscript{112}

Under the draft convention, the air carrier's liability for checked
baggage and cargo is based on the principle of strict but limited liability.
Under Article 17 of the Draft Convention, the carrier is liable to damage
sustained in the event of the destruction, loss, or damage to cargo only
on conditions that the event causing the damage has taken place during
the carriage by air. However, the carrier is not liable if it proves that the
destruction, loss, or damage to the cargo has resulted solely from one or
more of the following:

(a) inherent defect, quality or vice of that cargo;
(b) defective packing of that cargo performed by a person other than
the carrier, or its servants or agents;
(c) an act of war or an armed conflict; and
(d) an act of public authority carried out during the entry, exit or
    transit of the cargo.

The carrier is also liable to damage occasioned by delay in the
carriage by air of passengers, baggage or cargo. Nevertheless, the carrier
shall not be liable to damage occasioned by delay if it proves that it and
its servants have taken all measures reasonably required to avoid the
damage, or that is impossible for it or them to take such measures.\textsuperscript{113}

\textsuperscript{112}Ibid., Article 10.

\textsuperscript{113}Ibid., Article 18.
The liability of the air carrier, in contrast to the current rules, will no longer be determined by the weight of an item but rather by a limit per passenger [the amount is yet to be determined]. The claim to make a special declaration of value for baggage and cargo, as provided in Article 22(2) of the Warsaw Convention, remains possible for both passenger and consigner respectively. The declaration makes it possible for the passenger or the consigner to recover an amount not exceeding the declared sum. Of the carry-on baggage, including personal items, the rules of liability will be different because the passenger will be required to produce evidence that the damage or loss has been caused by the carrier. 114

The draft convention incorporates a procedure designed to ensure that the remaining limits of liability provided under the convention retain their value against inflation. The procedure, a virtual updating clause, allows the ICAO Council and the parties to the new instrument to make adjustment when certain economic conditions prevail. 115

IV. Open-Skies Policy And Cargo Regulations In India

The past two decades have witnessed a remarkable change in attitudes to the economic regulation of the aviation industry - with air transport, perhaps more so than any other industry, liberalized for global

\[114\] Ibid., Articles 3, 17 and 18.

integration. In the US, air transport deregulation has started in the late 1970s, beginning with air cargo, resulting in the passage of the Air Cargo Deregulation Act 1977. Incidentally, in India, too, aviation liberalization (the open-skies policy) was first started in the air cargo sector in the late 1980s when popular phrases like "open-sky" and "air taxi" gained currency.

From its rather humble beginnings in the 1940s of carrying a few kilos of betel leaves to Karachi, the Indian air cargo industry has grown strong enough to ferry hundred of tonnes of diverse varieties of commodities today. The industry has come a long way and spread its operations in tandem with export proliferation. Though the growth has since the 1970s been at a staid 10 to 15 per cent per annum, the dynamics of the air cargo industry has changed significantly only since 1990. The beginning of the open-skies policy has brought about a fresh momentum to aviation in India: cargo is the first to benefit. The capacity gap in the Indian market is by a mushroom of airlines like Lufthansa, KLM and British Airways flying into and out of various Indian cities with wide-bodied freighters. The momentum is still strong, and the foreign airlines are flying to many new destinations.116

A. Air Cargo Liberalization

In India, the open-skies policy has found favour in recent years due to various factors: the strong consumer demand, constraints on the rapid expansion of the national carriers, vast tourism potential, and the overall liberalization environment. And then: the real breakthrough came with Government of India’s new economic policy in 1991, more

significantly so after the passage of the Air Corporations (Transfer of Undertakings and Repeal) Act in 1994. Truly, the Act has changed the liberalized open-skies policy completely in that domestically Indian Airlines now competes with private operators, and Air India faces new foreign airlines - who have been given traffic rights as well as additional destinations. \footnote{See Baldev Raj Nayar, The State and International Aviation in India: Performance and Policy on the Eve of Aviation Globalization (New Delhi, 1994).}

One of the earliest circulars, issued by the DGCA as A/C 26 of 1986, limited the size of aircraft for private operators to a maximum seating capacity of 19; the seat limit was raised to 50, but subsequently removed. Further change in government policy came in January 1987 when the Indian and foreign carriers were given freedom to operate cargo flights in and out of the country without complicated bilateral agreements, which is the norm for passenger carriage. The government adopted the open-skies policy for only cargo flights. \footnote{Rajya Sabha Committee on Transport and Tourism (1993-94), Second Report on Government Policy on Private Air Taxi Operators and Matters Connected therewith. (Rajya Sabha, Secretariat, New Delhi, 1993), p. 25.} It first attempted to deregulate the domestic sector in 1989 by route access and also deregulated fares - though the fares are still subject to government approval. The move led to more than 60 applications from prospective private operators, but only East-West Airlines actually started operations. \footnote{See Airline Business, October 1992, p. 59.}

A \textit{suo moto} statement made in the Rajya Sabha on 11 April 1990 by the Minister for Civil Aviation reaffirming the deregulation of cargo operations, air charters, and air taxies helped boost export and tourism
earnings and enhance the air cargo and passenger capacity of airlines.\textsuperscript{120}

In view of the liberalization, India has worked for more deregulation in cargo handling. The Department of Civil Aviation, through Order A/C No. 18/92 dated 11 May 1992, issued the following conditions of the open-skies policy for cargo flights from India.\textsuperscript{121}

1. An "open-skies" policy for foreign cargo carriers was declared for a period of three years ending December 1992. In order to facilitate cargo carriers to make their investment decisions and undertake commitments on a long-term basis, it was decided to place this open-skies policy for cargo operations on a permanent basis.

2. The cargo flights may be cleared freely from airports, where customs/immigration facilities are available. Scheduled and non-scheduled operators, Indian and Foreign, may submit applications/proposals to the DGCA for clearance to such flights.

3. The government will give favourable consideration to private operators, associations of operators, etc, to run air cargo operations on their own, or on a consortium basis, through purchased or leased freighter aircraft.

4. Carriers are free to charge rates according to the demand and supply situation.

\textsuperscript{120}See n. 118, p. 1.

\textsuperscript{121}Ibid., Annexure II, at p. 44.
5. Operators are required to meet the operational and safety requirements while operating such *ad hoc* cargo flights.

The government's "open-skies" policy has led to the emergence of all-cargo airlines in India. Private operators could, subject to the fulfilment of conditions, apply for permits to operate domestic or international cargo flights. Prior to the "open-skies" policy in 1991, the major export and import gateways were Delhi and Mumbai. Shipments from/to other airports like Bangalore, Calcutta or Chennai necessarily had to be routed by Indian Airlines, or through surface transport, to these two gateways. Large backlogs existed in air\freight clearance, while it was also a boom time for Indian Airlines on trunk routes.

**B. Current Air Cargo Operations in India**

In India, Blue Dart Aviation and Elbee Airlines were the first airlines registered to start all-cargo flights in the domestic sector. Elbee acquired three F-27 freighter aircraft to operate on the Chennai-Bangalore-Mumbai-Delhi sectors. The other company, Blue Dart Aviation, invested in two B-737-200 aircraft - purchased from Indian Airlines and converted to freighters - to operate on the crescent route system of Chennai-Bangalore-Mumbai-Delhi-Calcutta. Major cargo traffic was identified to be confined to these routes; over the past two years' period most sectors have been operating to full capacity, and on some sectors the demand has even exceeded the capacity. Apart from the growth of document and non-commercial package services, the largest growth in cargo freight in India has been in the commercial door-to-door package segment. Commodities have varied from electronics, pharmaceuticals, computers and peripherals to office
automation and supplies.\textsuperscript{122}

The first international all-cargo airline licensed in India is Lufthansa Cargo India (LCI), which has commenced operations since May 1997. It functions as the extended arm of Lufthansa Cargo, with 95 per cent share of the company held by Hinduja Lufthansa Cargo - a partnership concern of Lufthansa Cargo. The LCI has a fleet of four B-727-200 F aircraft, a fifth aircraft programmed to join service later in 1988. It operates an average of 30 flights per week from air porters in India to Sri Lanka, Pakistan and Sharjah and has plans to operate to Nepal and Bangladesh subject to the grant of traffic rights in near future. The cargo going to Europe, America and Africa from India and the neighbouring countries changes over in Sharjah to Lufthansa cargo for onward transportation.\textsuperscript{123}

C. Air Cargo Problems and Prospects in India

The implementation of the open-skies policy in the cargo sector was not without its share of hiccups. Initially, the demand for cargo space increased significantly and the supply-demand imbalances led to sharp increase in cargo rates by as much as 200 per cent between 1989 and 1992. This resulted in a substantial increase in air freight capacity in 1993, beating down freight rates in the following years. An increase, it was feared, in freight capacity following the entry of smaller carriers and charter operators would lead to a price war. but in 1994 almost all carriers operated at full capacity, and in some cases unscheduled freight

\textsuperscript{122} Paper presented by India on "Advent of Cargo Operations in India" in the 33rd Conference of Directors General of Civil Aviation, Asia and Pacific Regions, New Delhi, India, 27-31 October 1997, DGCA-97/1P/E/3, p. 2.

\textsuperscript{123} Ibid.
aircraft operated to cater for the higher demand. A sharp increase in capacity in 1995 forced most cargo airlines to operate at less than full capacity, and freight rates against dropped by as much as 30 per cent in some cases. The fluctuations in freight rates forced the government to ask the airlines to maintain the floor level set by the IATA. 124

Though the new initiatives may avert future bottlenecks in the Indian air cargo segment, the present situation leaves much to be desired. The increased opportunities also have their own share of problems, such as adequate airport infrastructure, parking bays, night parking facilities, counter space, dedicated cargo storage, inadequate aircraft maintenance facilities, catering, etc. The other issues requiring attention are wasteful competition, pooling arrangements, safety standards, rates and fares and extension of run ways and domestic airports, including terminal expansions. 125

The absence of world-class cargo terminals in India has been one of the reasons for the under-utilization of cargo handling capacity. The lack of uniformity in custom clearance procedures, insufficient space for custom clearance, high incidence of pilferage and damage, poor storage and security clearance facilities, including cold storages, and poor customer consciousness are other factors constricting the growth of the air cargo industry. Lengthy customs procedures and absence of EDI also contribute to low turnover.

124 "Vital Strides by the Air Cargo Sector", Skyflier (New Delhi), August-September 1995, pp. 31-36, at p. 33.

125 See Dinesh Kumar, "Changing Domestic Skies", Air Cargo World (New Delhi), June 1996, pp. 18-19.
In 1995, the Board of Airlines Representatives - India (BAR) constituted a separate body of airlines for cargo. With the growing importance of cargo as a source of airline revenues and varied problems, the cargo industry felt the need for an airline representation to deal with its various aspects, involving the Air cargo Association of India, the Ministry of Civil Aviation, the Ministry of Commerce, and the AAI. Almost all airlines operating freight to and from India complain of inadequate facilities at air cargo complexes. There has been a marked rise in the movement of goods by air both in bound and out bound, but the facilities at the cargo complexes have not expanded apace. The BAR-India Cargo hopes to tackle issues such as inadequate infrastructure at cargo complexes, rationalization of capacities, and unrealistic airport handling charges.126

The failure to beef up cargo terminals to international standards is manifest in low cargo handling capacity, insufficient space for customs examination, unsafe and inadequate storage, lack of uniformity in custom clearance procedures, and slack customer consciousness. This note of warning has been struck by the task force set up by the standing committee on the promotion of exports by air127 in its report on the adequacy of infrastructural facilities at major airports of the country.

The task force convened by Prakash H, Mahtani, Chairman of the Federation of Indian Export Organization (FIEO), has stated that

126See Financial Times (New Delhi), 30 April 1995, also see Business Times (New Delhi), 16 May 1995.

127The 24 member task force comprises representatives from the Commerce Ministry, Central Board of Excise and Customs (CBSE), Airports Authority of India (AAI), Air Cargo Agents Association of India (ACAAI), Apparel Exports Promotion Council (AEPc), Agricultural and Processed Food Products Export Development Authority (APEDA), Air India and Exports Promotion Council.
the problem areas in air cargo facilities relate to high dwell time, uneven export intake, thefts and pilferage, disposal of uncleared and unclaimed cargo, lack of proper X-ray facilities, and poor provision. Cargo should be consolidated, the task force notes, at agents' terminals at a little distance from airports, and on the premises of known shippers and cargo agents to decongested airports.

The task force, in its report to the government, states that in spite of simplification in procedures by various cargo export agencies, there is still a scope for uniform procedures. All shipping bills may be allowed, it suggests, to be presented and processed by customs up to 15 days prior to the proposed date of export; the power of the appraiser in respect of export samples should be suitably enhanced by the CBEC keeping in view the trend of trade as well as price escalation. The authorities managing a cargo terminal should make its rules and procedures on free period, demurrage transport by making the informational available to trade through public/trade notices and collectors and additional collectors; the director (airport) should hold joint meetings periodically with traders and discuss procedural problems for on-the-spot decisions.\footnote{See Skyflier, n. 124, p. 33.}

The present dwell time for exports and imports at cargo terminals varies, and at some terminals for import cargo it is as high as 15 days. Given this scenario, the task force suggests, the dwell time should be brought down to a maximum of two days, both on the export and import side including the cooling period of 24 hours, if involved; and the airline and the authority managing the air cargo terminal should establish a standing task force to recommend and regulate procedures to
narrow down the dwell-time (and hasten procedures for perishable). This should, it says, result in reduction in free period and may necessitate prohibitive demurrage charge for the late clearance of cargo. It is imperative, the task force says; that air transport should be included in the multi-modal transport of goods Act. Given that the customs inspection bounding facilities would be available at smaller airports and agents' terminals, and pack houses for perishable cargo, the agency managing the exporting unit should take note of the requirements for the transportation of cargo on specifically designed trucks; other cargo terminal authorities should plan arrangements outside the terminal for the movement of pellestised load to and from trucks towards the air cargo terminal.\textsuperscript{129}

Calling for well-published identical rules and procedures at all air cargo terminals, the task force points out that the AAI should be made a more transparent body. All its public and trade notices issued at various air cargo complexes should be widely circulated through the FIEO and other export promotion councils for the benefit of trade.

Not only are cargo terminals at major airports facing problems, even the complexes at domestic airports, run mostly by state agencies, share the same fate. Several of these remain congested. The equipment employed is either inadequate or obsolete. Their linkages with gateway airports - Delhi and Mumbai - are poor. The quality of service at the terminals is admittedly poor, for they are run as government departments with high charges. There is a lack of co-ordination between domestic and international airlines in matters of tariff. Facilities for special cargo or perishables are lacking. Procedures,

\textsuperscript{129}Financial Express (New Delhi), 20 February 1995.
working hours and other conditions are found wanting. There are no effective users' fora to mitigate their problems.¹³⁰

The cargo dwell time for exports in Delhi is the longest. This is on account of: cooling period - an outdated security requirement. Unduly long free time given by the AAI; the illogical customs practice of clinging on to cargo even after its examination; and over-booking by various airlines to fill their bellies. In Mumbai which handles maximum perishables, thousands of small packages weighing 3/5 315 kgs each are worked upon individually because the two x-ray machines can take small packets only. Cool rooms are badly maintained. Organized thefts are common. Uncleared cargo abounds. In Chennai large-scale thefts and pilferage of leather products are common. In Calcutta space is inadequate and clumsy. In summer the whole covered area turns into a virtual 'black hole', with no cooling arrangements. The storage of goods is even done in hangers which are exposed to vagaries of weather.¹³¹

Even in a frontline business city like Bangalore, for instance, the airport facilities are woefully inadequate. The runways are too small, the handling facilities deficient, and the warehouse capacities lacking. Smaller airports are predictably worse off. Against that ground reality, it is a fact that cities like Hyderabad, Varanasi, Kanpur, Jaipur and Coimbatore are rapidly asserting themselves over export facilities. Clearly, there is a need to expand and extend infrastructure at these newly emerging corporate centres of the country. But, it will not be attractive for airlines to set up fully fledged facilities in such cities till the

¹³⁰B.L. Malhotra, "Cargo Retrading Air Terminals of India", The Economic Times (New Delhi), 4 December 1995.

¹³¹Ibid.
volumes of trade increases to commercially viable levels.\textsuperscript{132}

Wilhelm Althen, chairman of the world's biggest air cargo carrier, Lufthansa Cargo AG, in an interview, said: "When I arrived at Bangalore airport and was driving to the city I was shocked to see cargo lying out in the open on the both sides of the road. Nowhere in the world do you see this. If I was a multinational investor arriving in Bangalore and saw that this was the way my products would be treated, I would take the next flight out. Your industries are booming. The problem lies with the infrastructure, or the lack of it. What is the point in flying in cargo to India within 24 or 28 hours if it has to lie there for another four or five days."\textsuperscript{133}

In spite of all these problems, there is a bright future for air cargo in India. The reason for this boom is - air freight, being fast, flexible and cost-effective, is the ideal mode of shipping out high-value goods, specially the perishable category. Put simply, air freight makes better business sense to the exporter who wants to do everything just in time - procure, produce, and position with precise timing. Deepak Dadlani, ACAAI president, explains: "It best meets the needs of the fast changing global market place, for it not only preserves the value of products but adds value by delivering a superior product, making for a quick turnaround of funds and reducing inventory costs."\textsuperscript{134}

\textsuperscript{132}See Sridhar Raman and Neena Samota, "Cargo Overload", \textit{Indian Express} (New Delhi), 13 March 1994.

\textsuperscript{133}See \textit{The Economic Times}, 27 November 1995.

\textsuperscript{134}See Raman and Samota, n. 132.
The surging economic development in India is a very important factor which has helped in greater exploitation of air transportation potential through the carriage of cargo. India has been in a transition to be an exporter of finished goods of high value, not merely of raw materials. This has opened up many opportunities for export by air. The economic boom in the Persian Gulf consequent upon escalation in oil prices has resulted in a large demand for consumer goods including meat and vegetables. The geographical location of India, particularly Mumbai, vis-a-vis the gulf countries will greatly accelerate air cargo traffic in future. \footnote{See Kesharwani, n. 3, p. 32.}

D. Air Cargo and Economic Regulations of Air Transport in India

India's cargo trade, despite the early beginning of commercial air transport in 1911, once remained grounded for decades, thanks to a shifting regulatory structure and an overprotected market which kept out competition. With foreign carriers forbidden from ferrying goods out of the country and Air India being largely unresponsive to the emerging market needs, the ground facilities for exclusive freight operations remained underdeveloped. Besides, the small volume of exports made exclusive freight operations unviable even for the national carriers. The result: unbalanced cargo movement, uneconomic freight rates, and huge backlogs of export cargo during peak periods - which languished endlessly in airport sheds. The acute crunch often drove the exporter to resort to the logistically complex route of first shipping the merchandise to countries like Dubai and then flying it out from there to its final
However, the industry entered a new era of liberalization with the coming of the open skies policy in 1991. There has since been a great deal of increase in air cargo activities in India. The government has liberalized the air transport industry, permitting several private airlines to operate scheduled and non-scheduled transport services. During this period, more than 200 additional aircraft have come into the country for the carriage of freight and passengers. In addition, several international airlines are operating in India for the movement of freight and passengers. This policy shift has resulted mainly from the inability of Air India to cater for the growing demand of passengers and export market.\textsuperscript{137}

The Union Government, by an amendment to section 5 of the Aircraft Act 1934 [enacted in 1983], has made rules to provide for "the economic regulation of civil aviation and air transport services - including the approval, disapproval or revision of tariffs of operators of air transport services". It further empowered officers or authorities to exercise powers in this behalf, devised the procedures to be followed by such officers or authorities, and provided for appeals to the Central Government against the orders of such officers or authorities even over other matters connected with tariffs.\textsuperscript{138}

\textsuperscript{136}See A.W. Nawab, \textit{Economic Development of Indian Air Transport} (New Delhi, 1967).
\textsuperscript{138}For the purpose of this clause, tariff includes fares, rates, valuation charges and other charges for air transport of passengers or goods, the rules, regulations, practices or services affecting such fares, rates, valuation charges and other charges and rates, terms and conditions of commission payable to passenger or cargo sales agents.
Under Rule 133A of the Aircraft Rules 1937, the Director-General of Civil Aviation may issue special directions not inconsistent with the Aircraft Act 1934, or these rules, relating to the operation, use, possession, maintenance or navigation of aircraft flying in or over India, or of aircraft registered in India. Part XIII (Rules 134 to 141 and 153) and scheduled XI of the Aircraft Rules 1937 deal with various provisions relating to the regulation of air transport, including air cargo, in India. Under Rule 134, no person shall operate any scheduled air transport services from, to, in or across India except with the permission of the Central Government, granted under and in accordance with and subject to the provisions contained in Schedule XI. Under schedule XI, the permission may be granted to either (i) a citizen of India, or (ii) a company or a body corporate, provided that - (a) it is registered and has its principal place of business within India; (b) that the chairman and at least two-thirds of its directors are citizens of India; and (c) that its substantial ownership and effective control is vested in Indian nationals.

Rule 135 provides for the filing of tariffs to the Director-General of Civil Aviation in respect of air transportation to/from India. No change shall be made in fares, rates and charges or in classifications, rules, regulations, practices or services affecting such fares, rates and charges or value of the services except after previous approval of the DGCA.139

Under the open-skies policy relating to cargo services, India has deregulated air cargo rates and air cargo capacity since April 1990. The

carrier can, so the government decided, apply rates according to the demand and supply situation. Hence, in the case of Cargo tariff, the carriers have been charging rates depending on the quality of their product and services, and the same are determined by market forces. The tariff to be charges by air taxi operators in India is also not subject to regulation.

Tariffs for scheduled international air services are regulated by three mutually exclusive regimes: the double approval approach; the country of origin approach; and the dual disapproval approach.140

Under clause 5, subs-clause (a), of the conditions of contract of the Indian Airlines relating to non-international carriage (passenger and baggage),141 a company is liable, subject to sub-clause (e) to damages sustained in the destruction, or loss, or damage of any registered and unregistered baggage if the occurrence causing the damage so sustained takes place during the carriage by air. The liability of the company shall be limited to Rs. 450 per kilogram for registered luggage, and Rs. 4,000/- in respect of entire unregistered baggage, of which the passenger takes charge himself.

According to sub-clause (e) of Clause 5, in the carriage of baggage a company will not be liable if it proves that the damage has not been occasioned by neglect, pilferage or negligence in the handling of the

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aircraft, or in navigation, and that in all other respects it and its agents have taken all necessary measures to avoid the damage, or that it is impossible for it or them to take such measures. Further, under clause 11, any action to enforce liability against a company may be brought by a duly authorised representative of the passenger, or by any person, who would be the legal heir of the passenger according to law.

V. Conclusion

This chapter in essence discusses the problems relating to the regulating of air cargo, particularly in the context of aviation liberalization. To sum up: the ICAO has a prominent role in providing basic market access rights, including traffic and transit rights, and in enforcing air cargo regulations. Both the ICAO and the IATA are committed to the regulation of air mail, carrier services, dangerous goods, and live animals. The liability provisions are covered under the Warsaw system, including the Warsaw Convention 1929, as amended by the Hague Protocol 1955, and the Montreal Protocol No. 4 of 1975, which introduced new cargo regulations. More recently, the Draft Convention of the Unification of Certain Rules for International Carriage by Air 1997 introduced electronic airway bill for air cargo shipment and code sharing and related liability issues. The development of air cargo has been facilitated in India by regulations under the Aircraft Act 1934, Aircraft Rules 1937, and other relevant Acts in the cargo sector.