THE WARSAW CONVENTION: WARSAW IS EXCLUSIVE!
by Robert Lawson

Since its infancy, international air carriage has been regulated by an international convention designed to provide uniform rules for (amongst other things), the documentation of carriage, jurisdiction, liability and the period of limitation. The Warsaw Convention, as it has become known, was originally signed in 1929. Since then it has been ratified by more than 140 countries in its unamended form, most of whom have gone on to ratify the amendments made to it by the Hague Protocol of 1955 ("the Convention"), the most notable exception being the United States of America. This country is a party to the Convention. It was incorporated into English Law by Section 1(1) of the Carriage by Air Act 1961, which provides that:

> "Subject to this section, the provisions of the Convention ... as set out in the First Schedule to this Act shall, so far as they relate to the liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage ..."

The Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward and any gratuitous carriage by air performed by anyone whose businesses include air transport for reward, see Article 1(1) of the Convention. It defines "international carriage" as:

> "... any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or transhipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another state, even if that state is not a High Contracting Party ..."

The Convention is of interest to the world of insurance because of its impact upon the liability of air carriers. This is determined by Chapter III of the Convention, which provides for the following no fault liability (subject to the availability of defences such as contributory negligence and the taking of all necessary measures

to avoid the damage):

> "*Article 17*
> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.
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> *Article 18*
> (1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or cargo, if the occurrence which caused the damage so sustained took place during the carriage by air...
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> *Article 19*
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.
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> and,
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> *Article 24*
> (1) In the case covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
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> (2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

There is a counterbalance of both a ceiling on the amount of damages recoverable, which can only be broken in limited (and comparatively rare) circumstances, and an extinction of the right to damages if an action is not brought within 2 years of the date when the aircraft did or should have arrived at its destination or when the carriage stopped (see Article 29(1)). The ceiling on damages is defined by Article 22 (as interpreted by statutory instrument) as being:

(1) £13,633.40 per passenger (plus costs), unless a higher limit is agreed between the carrier and passenger; and,

(2) £13.63 per kilogramme of registered baggage or cargo (plus costs), unless a special declaration of value is made when the same is handed over to the carrier and any supplementary sum demanded paid, in which case it is limited to that declared value.

The Civil Aviation Authority imposes a condition on all air transport licences that it grants (by its standard condition H), which compels carriers serving this country to agree to raise the limit under (1) above to an amount equivalent to 100,000 Special Drawing Rights, which currently equals a sum in the region of £95,000.00.

For many years there has been debate as to whether the Convention creates an independent statutory cause of action which excludes any other cause of action which might otherwise be available to a Plaintiff. The opinion of the leading textbook being that it does not in that if any claim does not fall within Articles 17, 18 and/or 19, it can "be brought under any relevant theory of liability and is not precluded by the Convention" (see Shawcross and Beaumont Vol. 1 Chapter VIII para. (112)). The need for a resolution of this debate was of practical importance to those interested in the liabilities of air carriers because the ceiling on damages, shortened limitation period and, in the case of Article 17, necessity of an "accident" meant that Plaintiffs often attempted to sidestep the Convention by pleading common law claims in contract or tort in order to be able to make and/or better their claims.

The issue of exclusivity was not tested in the English Courts until it finally came before the Court of Appeal earlier this year in the case of *Sidhu v. British Airways PLC* 27th January 1995 (as yet unreported). The Plaintiffs in that action were three female passengers who were detained by Iraqi forces when BA's flight No. 149 was captured whilst on a refuelling stop in Kuwait. Their claims were brought after the limitation period laid down in the Convention but within that for the claims in negligence upon which they relied; the allegation being in essence that British Airways had been negligent in flying them into Kuwait as and when it did and that they had suffered both physical and psychological injuries as a result. The matter came before the Court on an application to strike out their action on the ground that the Plaintiffs' claims had been extinguished by Article 29 of the Convention. It was accepted by both sides that the Plaintiffs' claims arose out of and during the course of international carriage by air and it was also conceded by the Plaintiffs that they suffered no "accident" within the meaning of Article 17. The battle lines were thus drawn with the Plaintiffs arguing that there was (and is) no remedy under the

Convention in respect of the damage that they had sustained, that it was not exhaustive of the rights and liabilities of carriers and passengers and so they were entitled to proceed at common law; and, British Airways arguing that the Convention was both exclusive and exhaustive and hence the Plaintiffs were out of time.

After a full review of the potentially relevant authorities from other Convention jurisdictions, mostly notably from the United States and also the recent Scottish Court of Session decision in *Abnett v British Airways PLC* [1994] 1 ASLR 1 (which it followed), the Court unanimously found in British Airways' favour, on the grounds that the effect of Section 1 of the 1961 Act and the Convention is to set out an exhaustive code for the liabilities of international air carriers, with the result, per Leggatt LJ (who gave the leading judgment of the Court), that Article 17 provides "the only remedy open to a passenger who suffers injuries arising out of, or from, or in relation to an international flight on which he has been carried", which is not unjust "when it is recognised that the negligence alleged against the Respondents was concerned solely with their operations as international carriers by air". In so finding, Leggatt LJ reasoned that:

> "It would be very surprising if, in addition to damages recoverable under this regime, damages can also be recoverable for injuries which, though sustained in the course of international carriage by air, fall outside the scope of the "no fault" provisions. It would also destroy uniformity if supplementary damages were recoverable in any of the alternative jurisdictions in which, under Article 28, proceedings may be brought against the carrier."

Unless taken up and reversed by the House of Lords (there being some talk of a petition), this decision represents a welcome fillip to aviation insurers. In providing a definitive answer to a well-worn debate, it gives certainty as to the potential exposure of international air carriers: yes, Warsaw is exclusive!