

Draft Order in Council laid before Parliament under section 10(5) of the Carriage by Air Act 1961, for approval by resolution of each House of Parliament

DRAFT STATUTORY INSTRUMENTS

1999 No.

CIVIL AVIATION

The Carriage by Air Acts (Application of Provisions) (Fifth Amendment) Order 1999

Made - - - - 1999
Coming into force - - 1999

At the Court at [], the [] day of [] 1999

Present,

The Queen's Most Excellent Majesty in Council

Whereas a draft of this Order has been laid before Parliament and has been approved by a resolution of each House of Parliament, in accordance with section 10(5) of the Carriage by Air Act 1961(1):

Now, therefore, Her Majesty, in exercise of the powers conferred upon Her by section 10 of the Carriage by Air Act 1961, and of that section as applied by section 5(2) of the Carriage by Air (Supplementary Provisions) Act 1962(2), and of all other powers enabling Her in that behalf is pleased, by and with the advice of Her Privy Council to order, and it is hereby ordered, as follows:—

Citation, commencement and effect

1.—(1) This Order may be cited as the Carriage by Air Acts (Application of Provisions) (Fifth Amendment) Order 1999 and shall come into force on the tenth day after the day on which it is made.

(2) Nothing in this Order shall affect rights and liabilities arising out of an occurrence which took place before the coming into force of this Order.

Amendments of the Carriage by Air Acts (Application of Provisions) Order 1967

2.—(1) The Carriage by Air Acts (Application of Provisions) Order 1967(3) is hereby amended as follows.

(1) 1961 c. 27.

(2) 1962 c. 43.

(3) S.I.1967/480 as amended by S.I. 1969/1083, 1979/931, 1981/440 and 1998/1058.

- (2) In article 2(1):
- (a) for the term “the amended Convention” which is defined in that section there shall be substituted the term “the 1955 amended Convention”; and
 - (b) after the definition of “the 1955 amended Convention” there shall be inserted:
 ““the MP4 amended Convention” means the English text of the Warsaw Convention with the amendments made in it by the Hague Protocol and as further amended by Protocol No. 4 of Montreal, 1975 as set out in Schedule 1A to the Act of 1961(4);”;
- (3) In articles 3 and 7 for the words “amended Convention” there shall be substituted “1955 amended Convention or the MP4 amended Convention”;
- (4) For Schedule 1 there shall be substituted the provisions set out in the Schedule to this Order.
- (5) In Schedules 2 and 3 for the words “the amended Convention”, wherever they appear, there shall be substituted the words “the 1955 amended Convention”.

Clerk of the Privy Council

(4) Schedule 1A was inserted by S.I. 1999/

SCHEDULE

Article 3(3)

Provisions inserted, as Schedule 1, in the Carriage
by Air Acts (Application of Provisions) Order 1967

“SCHEDULE 1

NON-INTERNATIONAL CARRIAGE AND
CARRIAGE OF MAIL AND POSTAL PACKAGES

PART I

**APPLICATION OF THE WARSAW CONVENTION AS AMENDED
AT THE HAGUE AND BY PROTOCOL NO. 4 OF MONTREAL, 1975**

The MP4 amended Convention as set out in Schedule 1A to the 1961 Act shall apply in respect of carriage described in Article 4 of this Order subject to the following exceptions, adaptations and modifications:—

(1) For “Convention”, wherever it appears, there shall be substituted “Schedule”.

(2) In Article 1(1) the word “international” shall be omitted.

(3) Article 1(2) and (3) shall not apply.

(4) Article 2(2) and (3) shall not apply.

(5) Chapter II shall not apply.

(6) In Article 22(1) for “16,600 Special Drawing Rights” there shall be substituted “100,000 Special Drawing Rights”.

(7) Article 22(6) shall not apply and the following shall be inserted:—

“(6) The value on a particular day of one Special Drawing Right shall be treated as equal to such a sum in sterling as the International Monetary Fund have fixed as being the equivalent of one Special Drawing Right—

(a) for that day; or

(b) if no sum has been fixed for that day, for the last day before that day for which a sum has been so fixed.

(7) A certificate given by or on behalf of the Treasury stating—

(a) that a particular sum in sterling has been fixed by the International Monetary Fund as referred to in paragraph (6) for a particular day; or

(b) that no sum has been so fixed for a particular day and that a particular sum in sterling has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day, shall be conclusive evidence of those matters for the purposes of this article; and a document purporting to be such a certificate shall in any proceedings be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.”;

(8) In Article 26(1) the words from “and” to the end shall be omitted.

(9) In Article 26(3) the words from “upon” to “writing” shall be omitted.

(10) Article 28 shall not apply.

(11) In Article 30(1) the words from “and” where it first occurs to “Article 1” shall be omitted.

(12) In Article 32 the words from “if” to the end shall be omitted.

(13) Article 34 shall not apply.

- (14) Articles 36 to 41 shall not apply.
- (15) The Additional Protocol shall not apply.

PART II

APPLICATION OF THE GUADALAJARA CONVENTION

The Guadalajara Convention shall apply in respect of carriage, described in Article 4 of this Order, subject to the following exceptions, adaptations and modifications:–

- (1) For “the Convention” wherever it appears, there shall be substituted “the Guadalajara Convention as applied by this Schedule”.
- (2) In Article 1, the following shall be added as paragraph (a):–
““the Warsaw Convention” means the MP4 amended Convention as applied by this Schedule”.
- (3) In Article II, the words from “according” to “paragraph (b)” shall be omitted.
- (4) In Article III.2 for “by that Convention” there shall be substituted “thereby” and for “of the said Convention” there shall be substituted “thereof”.
- (5) In Article IV, the second sentence shall not apply.
- (6) In Article VII, the second sentence shall not apply.
- (7) Article VIII shall not apply.
- (8) In Article IX, the words from “if” to the end shall be omitted.
- (9) After Article X the following Article shall be added:–

“Article XI

Nothing herein shall impose any liability on the Postmaster General or any authority for the time being established by or under any Act of Parliament to provide postal services”.

PART III

For convenience of reference the MP4 amended Convention and the Guadalajara Convention, with the exceptions, adaptations and modifications made by this Schedule are here set out:

A. The MP4 amended Convention, as applied by Schedule 1

NON-INTERNATIONAL CARRIAGE AND CARRIAGE OF MAIL AND POSTAL PACKAGES

CHAPTER 1 – SCOPE – DEFINITIONS

Article 1

This Schedule applies to all 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.

Article 2

This Schedule applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

CHAPTER III—LIABILITY OF THE CARRIER

Article 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other 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.

Article 18

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

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

(3) However, the carrier is not liable if he proves that the destruction, loss of, or damage to, the cargo 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 his servants or agents;
- (c) an act of war or an armed conflict;
- (d) an act of a public authority carried out in connection with the entry, exit or transit of the cargo.

(4) The carriage by air within the meaning of the preceding paragraphs of this Article comprises the period during which the baggage or cargo is in the charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(5) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Article 19

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

Article 20

In the case of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

Article 21

(1) In the carriage of passengers and baggage, if the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering the damage the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

(2) In the carriage of cargo, if the carrier proves that the damage was caused by or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the

person from whom he derives his rights, the carrier shall be wholly or partly exonerated from his liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage.

Article 22

(1) In the carriage of persons the liability of the carrier for each passenger is limited to the sum of 100,000 Special Drawing Rights. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments the equivalent capital value of the said payments shall not exceed this limit. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

- (a) (2) In the carriage of registered baggage, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the passenger or consignor has made, at the same time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the passenger's or the consignor's actual interest in delivery at destination.
- (b) In the carriage of cargo, the liability of the carrier is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the same time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum, if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the consignor's actual interest in delivery at destination.
- (c) In the case of loss, damage or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage or delay of a part of the registered package or cargo, or of an object contained therein, affects the value of other packages covered by the same baggage check or the same air waybill, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 332 Special Drawing Rights per passenger.

(4) The limits prescribed in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

(5) The sums mentioned in terms of the Special Drawing Rights in this Article shall be deemed to refer to the Special Drawing Right as defined by the International Monetary Fund. Conversion of the sums into national currencies shall, in case of judicial proceedings, be made according to the value of such currencies in terms of the Special Drawing Right at the date of judgment.

(6) The value on a particular day of one Special Drawing Right shall be treated as equal to such a sum in sterling as the International Monetary Fund have fixed as being the equivalent of one Special Drawing Right—

- (a) for that day; or
- (b) if no sum has been fixed for that day, for the last day before that day for which a sum has been so fixed.

- (7) A certificate given by or on behalf of the Treasury stating—
- (a) that a particular sum in sterling has been fixed by the International Monetary Fund as referred to in paragraph (6) for a particular day; or
 - (b) that no sum has been so fixed for a particular day and that a particular sum in sterling has been so fixed for a day which is the last day for which a sum has been so fixed before the particular day,

shall be conclusive evidence of those matters for the purposes of this article; and a document purporting to be such a certificate shall in any proceedings be received in evidence and, unless the contrary is proved, be deemed to be such a certificate.

Article 23

(1) Any provision tending to relieve the carrier of liability or to fix a lower limit than that laid down in this Schedule shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Schedule.

(2) Paragraph (1) of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

Article 24

(1) In the carriage of passengers and baggage, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

(2) In the carriage of cargo, any action for damages, however founded, whether under this Schedule or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Schedule without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which give rise to the liability.

Article 25

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment.

Article 25A

(1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Schedule relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is able to invoke under Article 22.

(2) The aggregate of the amounts recoverable from the carrier, his servants or agents, in that case, shall not exceed the said limits.

(3) In the carriage of passengers and baggage, the provisions of paragraphs (1) and (2) of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

Article 26

(1) Receipt by the person entitled to delivery of baggage or cargo without complaint is *prima facie* evidence that the same has been delivered in good condition.

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

(3) Every complaint must be made in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Schedule against those legally representing his estate.

Article 29

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

(2) The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.

Article 30

(1) In the case of carriage to be performed by various successive carriers, each carrier who accepts passengers, baggage or cargo is subjected to the rules set out in this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

Article 30A

Nothing in this Schedule shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person.

CHAPTER IV – PROVISIONS RELATING TO COMBINED CARRIAGE

Article 31

(1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to carriage by air, provided that carriage by air falls within the terms of Article 1.

(2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air.

CHAPTER V – GENERAL AND FINAL PROVISIONS

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Schedule, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. Nevertheless for the carriage of cargo arbitration clauses are allowed subject to this Schedule.

Article 33

Except as provided in paragraph 3 of Article 5, nothing in this Schedule shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Schedule.

Article 35

The expression “days” when used in this Schedule means current days not working days.

B. *The Guadalajara Convention as applied by Schedule 1*

NON-INTERNATIONAL CARRIAGE AND CARRIAGE OF MAIL AND POSTAL PACKAGES

Article I

In the Guadalajara Convention as applied by this Schedule:

- (a) “the Warsaw Convention” means the MP4 amended Convention as applied by this Schedule;
- (b) “contracting carrier” means a person who as a principal makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;
- (c) “actual carrier” means a person, other than the contracting carrier, who by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated in paragraph (b) but who is not with respect to such part a successive carrier within the meaning of the Warsaw Convention. Such authority is presumed in the absence of proof to the contrary.

Article II

If an actual carrier performs the whole or part of carriage which is governed by the Warsaw Convention, both the contracting carrier and the actual carrier shall, except as otherwise provided in the Warsaw Convention, be subject to the rules of the Warsaw Convention, the former for the whole of the carriage contemplated in the agreement and the latter solely for the carriage which he performs.

Article III

1. The acts and omissions of the actual carrier and of his servants and agents within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier.

2. The acts and omissions of the contracting carrier and of his servants and agents within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier. Nevertheless, no such act or omission shall subject the actual carrier to liability exceeding the limits specified in Article 22 thereof. Any special agreement under which the contracting carrier assumes obligations not imposed thereby or any waiver of rights conferred thereby or any special declaration of interest in delivery at destination contemplated in Article 22 thereof, shall not affect the actual carrier unless agreed to by him.

Article IV

Any complaint to be made under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the actual carrier.

Article V

In relation to the carriage performed by the actual carrier, any servant or agent of that carrier or of the contracting carrier shall, if he proves that he acted within the scope of his employment, be entitled to avail himself of the limits of liability which are applicable under the Guadalajara Convention as applied by this Schedule to the carrier whose servant or agent he is unless it is proved that he acted in a manner which, under the Warsaw Convention, prevents the limits of liability from being invoked.

Article VI

In relation to the carriage performed by the actual carrier, the aggregate of the amounts recoverable from that carrier and the contracting carrier, and from their servants and agents acting within the scope of their employment, shall not exceed the highest amount which could be awarded against either the contracting carrier or the actual carrier under the Guadalajara Convention as applied by this Schedule, but none of the persons mentioned shall be liable for a sum in excess of the limit applicable to him.

Article VII

In relation to the carriage performed by the actual carrier, an action for damages may be brought, at the option of the plaintiff, against that carrier or the contracting carrier or against both together or separately.

Article IX

1. Any contractual provision tending to relieve the contracting carrier or the actual carrier of liability under the Guadalajara Convention as applied by this Schedule or to fix a lower limit than that which is applicable according to the Guadalajara Convention as applied by this Schedule shall be null and void, but the nullity of any such provision does not involve the nullity of the whole agreement, which shall remain subject to the provisions of the Guadalajara Convention as applied by this Schedule.

2. In respect of the carriage performed by the actual carrier, the preceding paragraph shall not apply to contractual provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried.

3. Any clause contained in an agreement for carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by the Guadalajara Convention as applied by this Schedule, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, for carriage of cargo arbitration clauses are allowed subject to the Guadalajara Convention as applied by this Schedule.

Article X

Except as provided in Article VII, nothing in the Guadalajara Convention as applied by this Schedule shall affect the rights and obligations of the two carriers between themselves.

Article XI

Nothing herein shall impose any liability on the Postmaster General or any authority for the time being established by or under any Act of Parliament with power to provide postal services.”

EXPLANATORY NOTE

(This note is not part of the Order)

This Order further amends the Carriage by Air Acts (Application of Provisions) Order 1967 (which applies the provisions of the Carriage by Air Act 1961 and the Carriage by Air (Supplementary Provisions) Act 1962, with modifications set out in the Order, to carriage to which those Acts would not otherwise apply) to apply the provisions of Protocol Number 4 of Montreal, 1975 to domestic carriage. That Protocol amends the Warsaw Convention (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 Hague Protocol on 28 September 1955.

In the context of this Order the principal effect of Protocol No 4 of Montreal is to introduce strict liability in respect of the carriage of cargo except where the destruction, loss or damage to the cargo results solely from an inherent defect of the cargo, defective packing of that cargo by someone other than the carrier or his servants or agents, an act of war or armed conflict or an act of a public authority in connection with the entry, exit or transit of the cargo. The liability limits are maximum limits.