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The Warsaw Convention and Where We Are Today

Allan I. Mendelsohn

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ALLAN I. MENDELSOHN*

Introduction by George Tompkins: Our next speaker will be Allan I. Mendelsohn who is a practicing attorney in Washington, D.C. In the 1960s, Mr. Mendelsohn was in the eye of the storm that led to the withdrawal of the denunciation of the Warsaw Convention[1] *by the United States and the entry into force of the 1966 Montreal Agreement. Between 1963 and 1968, he was a delegate from the United States to the ICAO*[2] *Legal Committee. He also attended the Montreal Conference in 1966. I am sure he will have some very interesting and provocative remarks. He has already told me that he disagrees with much of what I have said.*

THANK YOU very much George. First, I want to say to Professor Milde and all of the students here that it is a great pleasure to be with you. We are all students of the Warsaw Convention, no matter how long we have been involved with it. It is a wonderfully interesting document. It is also a very malleable document. Speakers before me have characterized our meeting today as a requiem on the Convention. Others have referred to the Convention as a concerto. I like to think of it as a wonderful symphony, and I like to think of what we are doing today as playing just the next movement of this symphony. I do not think it will be an unfinished symphony, and I do not think of what we are doing today as a requiem. If anything, the Convention is most like a Wagnerian opera, and we are just in the first act.

I also want to point out something I think is extraordinary. With all the musical references we have heard until now, I began to wonder if the real reason why I was invited as a speaker is

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* This Article was adapted from a speech Mr. Mendelsohn gave in Montreal, Canada on October 26, 1996, before an international synmposium convened by McGill University's Institute of Air and Space Law. The title of the conference was *Warsaw Requiem or Unfinished Symphony.*

[1] Convention for the Unification of Certain Rules Relating to International Carrage by Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S 11 (codified at 49 U.S.C. § 40105 (1994)) [hereinafter Warsaw Convention].

[2] International Civil Aviation Organization.

because of my name. I began to really worry about this possibility when I glanced at the fourth page of our program and discovered that there is a later speaker whose name is Schubert.

Whatever the case might be, and before I speak my piece on the Convention, I want to say a word of thanks not just to McGill and its fine air law institute, but also to a group of people I met in this city who taught me most of the aviation law I know today. These were several of the members of the ICAO Legal Committee during the 1960s, when I played a very modest role. I do not think we will ever find a group of intellectual giants similar to those who were here then. With the famous French representative, Andre Garnaux, and his wonderful assistant, Marie Annic Martin-Sane, and his almost omnipresent colleague, the Spanish delegate, Carlos Gomez Jara, and then the Swiss Delegate, Werner Guldimann, who was almost with us this weekend and who I would have been delighted to see again. He was a super chairman of all types of ICAO legal committees and subcommittees, appreciated by everyone. And last but not least was the very famous and articulate U.K. representative, Arnold Kean, who made such immense contributions to all of the discussions and to my own knowledge and understanding of air law. These friends saw the progress from the Hague Protocol in 1955 to the Montreal Agreement in 1966. And of one thing we can all be certain: If they were here today, they would devise a system, some method by which we would be able to prolong the life of this Convention.

Our object now is to figure out some way by which the Convention can be continued, and I am well aware that there are many people here today who, like their predecessors in the 1960s, are up to the task of doing just that. But to reach that goal, I think I should tell you that the best way of doing so is not by bashing the United States. For those of you who might not know, the United States is really a hundred-pound gorilla. Speakers like several of those we have heard earlier may try to criticize it, but that just falls off its back; most of the bashing we never even hear. But the U.S. government, today as it was in the 1960s, is open to favorable suggestions and to new ideas. IATA[3] has certainly come up with some very interesting new ideas, and they are to be congratulated for doing so. But whether bashing the United States at this point helps to put those ideas into practice, I am not at all sure.

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[3] International Air Transportation Association.

Before getting into my substantive comments, I would like to also thank some other people with whom I worked closely during the 1960s. One of those is Professor Michael Milde. We worked very closely and successfully together in 1967 and 1968 on amending Article 77 of the Chicago Convention so as to facilitate the appearance of what we now think of as multinational airlines. It was a great pleasure working with him then, as now. Neither of us had any gray hair at the time. And as you can see from both of us today, we have continued for all too many years to be dedicated students of these subjects. There are two others who I would like to mention, who have remained dear friends of mine. One of those is Professor Andy Lowenfeld, with whom I continue to consult on these subjects, and the other is our good friend, Julian Gazdik, who is a former general counsel of IATA and who contributed in such a major way to where we are today.

There is an interesting story I would like to tell you about the 1966 events. I should preface it by saying that I was not only one of those in the eye of the storm when the U.S. government withdrew the denunciation of the Convention in 1966, I was also one of those in the eye of the storm when we submitted the denunciation in 1965. As an American, I have never been afraid of denouncing the Warsaw Convention. And I think there are many Americans out there—I hate to tell you this—who join me in having no fears of doing so. It will not be a disaster for the United States, and nor will it be a disaster for the world. On the other hand, to the extent we can work to save this venerable document and keep alive some semblance of uniformity of law, I am all in favor of doing so. And that is mainly why the U.S. government both submitted the denunciation in 1965 and then withdrew it in 1966.

But there is some very interesting history about how we came to withdraw that denunciation. I think what happened is truly a testimonial to the historic role IATA played in those days, a role I would like to see IATA play again. I do not remember whether it was IATA's general counsel, Julian Gazdik, or IATA's director general, Sir William Hildred, who called up the State Department one day—after the Montreal Conference and when so many reams of criticism had been leveled against the United States whether it was a grand elephant or a lowly donkey—they called up and asked whether the United States would be interested in accepting absolute liability and a limit of, say, $50,000. It was the introduction by IATA of that element of absolute liability that intrigued the U.S. government. It was because of that

suggestion by IATA that the world ultimately came around to adopting the so-called Montreal Agreement of $75,000 and absolute liability. I want to also tell you that adopting absolute liability was a very major development in international law. I do not know of any other transportation industry, or any other industry for that matter, that operates under absolute liability—where the claimant need prove nothing beyond damages to automatically receive an amount of money. Now to be sure, $75,000 is not a lot of money today. We thought it was modestly adequate in 1966, but that was thirty years ago, when our hair was a good deal darker than it is today. We knew it was not totally adequate, but we accepted it nevertheless, mainly because it was accompanied by the introduction of absolute liability.

The United States' enthusiastic acceptance of absolute liability under the Warsaw Convention has continued even until today. You probably all noticed in the Department of Transportation's (DOT) recent show cause order[4] that the United States remains pleased with the doctrine. While the U.S. government said that it would rather have unlimited absolute liability, they were certainly willing to accept the absolute liability up to the first tier of U.S. $150,000. That limit may not be high enough for the first tier—I am not sure about that—but absolute liability is now an integral part of any two-tier system. If the TWA 800 disaster was caused by a missile, for which no one could conceivably claim there was gross negligence or even negligence, the passengers or their survivors will receive at least some monetary recoveries because there is absolute liability today. It may not be an adequate amount, but it is more than they would recover if the Convention were not here or if the United States had denounced the Convention back in 1966. If we had denounced the Convention then, we would have lost absolute liability, and it is that element of absolute liability, in my view and in the view of other Americans, that is one of the main reasons why the Convention is worth preserving.

Now, I know I only have twelve minutes, and I am going to do my best. What I would like to say is that there are four elements to the present controversy with the DOT's show cause order, and each has been at least mentioned by previous speakers. But I believe that just listing these four elements helps to show the flexibility of the U.S. government in moving towards a solution. I also want to say that, given the opinions of some of the prior

[4] D.O.T. Order No. 96-10-7 (Oct. 7, 1996) (show cause order).

speakers, I am not even sure we are reading the same show cause order. I mean, I read that order very carefully and I have never been a Warsaw apologist. Even though I no longer play a major role in the controversy, when I read the order, I said to myself, that is a very clever order.

As to three out of the four elements, the United States went along and willingly accepted IATA's position. First, unlimited liability is obviously something the United States has been seeking for a very long time. So the United States accepted quickly. Second, the United States also accepted the second element, the limit of $150,000 on the second tier under absolute liability. The United States could have demanded a higher limit, but they did not. Third, the United States was clearly pleased with IATA's willingness to adopt *lex loci domicilii*—even though it was on a voluntary basis. The single and only remaining element that separates the United States from the rest of the world—and it is really only a part of the rest of the world—is the fifth forum. That, in truth, is the only controversial area left, and it is a small one at that. Now, if that is the only area left, it seems to me that this meeting at McGill might well help the world to find some solution, because that solution ought not be very difficult to find.

IATA says it hired a very prominent, even if anonymous, international lawyer and that lawyer came up with the conclusion that adopting a fifth forum voluntarily and by carrier agreement would violate Article 32 of the Warsaw Convention. IATA now says it filed a seventy-five page brief that supports this conclusion of illegality. Now, I was always taught in law school that before reaching any conclusions about a text, one should always look carefully at that text, and I would like all of us now to take a look at Article 32. I commend it to your attention; it is on page 66 of the documents that McGill has been so good as to provide for us. Let us take a look.

By the way, what I am speaking about now is all in my prepared remarks. As some of you know, I have prepared and submitted to McGill for publication a text of some thirteen pages. Unlike this speech, that text was very carefully prepared, and I commend it to your attention when it is published because it is more of a legal article than a speech.[5] As most of you know, however, given the nature of the criticism by most of the prior

[5] This text will appear as an article in McGill University's April 1997 issue of its *Annals of Air and Space Law.*

speakers, I felt I had little alternative but to put aside the prepared text and speak to you as I am now.

So let us take a look at Article 32. It reads, and I am quoting:

> 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 convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.[6]

Now, I agree with you that when we adopt a fifth forum or *lex domicilii* by special agreement, we are in fact altering the rules as to jurisdiction and deciding the law to be applied. The point I want to make forcefully is that when we do so, we are not infringing the rules laid down by the Convention. Whatever the English term "infringe" means, it does not mean merely "to change." There must be something adverse about the change. The French text for the English word "infringe" is "derogeraient," which really means "derogate from." The French text, thus, makes the case even stronger. Adopting a fifth forum would not violate Article 32 because there is no infringement; there is no derogation. You are adding something that is a real benefit to passengers. You are enhancing the rights and the benefits that passengers enjoy under the Convention.

Under those circumstances, it seems inconceivable to me that a lawyer, not to mention a prominent international lawyer, could seriously come up with a conclusion that adopting the fifth forum violates the Convention. Lawyers of course are only human. I suggest that if you want to retain a lawyer to write a legal memorandum and you tell that lawyer in advance what conclusions you want in the memo, you can probably produce exactly the conclusions you want, especially if the fee is right. You can just as easily come up with a sixty or seventy page brief in opposition to the DOT's show cause order. But if you hire another lawyer, such as Professor Andy Lowenfeld or Professor Bin Cheng, both of whom have been involved in this controversy for longer, I daresay, than those who solicited or wrote the legal opinion for IATA, both Lowenfeld and Cheng would clearly conclude that adopting the fifth forum does not infringe the rules laid down by the Convention and, therefore, does not violate Article 32.

George Tompkins or others might suggest to us, well this is not really "voluntary." I do not remember exactly the words that

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[6] Warsaw Convention, *supra* note 1, art. 32.

George used, but he suggested something to the effect that the United States was holding a gun over the rest of the world in 1966, when it forced the rest of the world into adopting the Montreal Agreement limit and absolute liability. Well, maybe there was some element of forceful policy at that time. I am not going to suggest that there were no pressures. But from our vantage point, we were a country that said, "Look we'll denounce the Convention, it's not such a great document after all. But if you don't want us to denounce the Convention, then please accept this package." IATA was the organization that not only made the package possible, but did all the work to arrange its acceptance. It was our good friends, Sir William Hildred and his general counsel, Julian Gazdik. Because of their efforts, the aviation world accepted the package and did so, I would have to say, voluntarily.

And the DOT, even today, when a foreign carrier files under Section 402 for a Foreign Air Carrier Permit, that carrier is asked to sign a counterpart of the Montreal Agreement so that by its signing, the carrier then agrees to adopt the Montreal Agreement limits and absolute liability. So, in a sense it is still voluntary. I will not suggest to you what will happen if the foreign carrier does not voluntarily sign that agreement. Let us just say that if they want to operate in the United States, they will sign. Although nothing in the last sentence of Article 22(1) necessarily mandates that the special contract be "voluntary," I think the United States has always tried to preserve the idea that this is a voluntary system.

In any event, there is absolutely no reason why a comparable system, voluntary or otherwise, cannot be worked out today for all the four elements we discussed, including the fifth forum. We already have three of the elements in place. The United States is now asking only that the fourth element, the fifth forum, be added. If most of the foreign carriers will accept the fifth forum, you will have a total solution to the problem. Even more important, you will be able to ignore those four or five alternatives that the DOT suggested in its show cause order, which have been roundly criticized, and probably with some good cause, by prior speakers.

Now, IATA and others seem to say that they will not accept the fifth forum—first because it is illegal, second because it might cost too much money, and third because we do not like to be pushed into the fifth forum as its only purpose is to protect the famous "wandering American." We have already addressed

the question of its legality. Now let us look at this argument about the "wandering American." Please forgive me for saying so, but the "wandering American" is in fact a shibboleth. One would think that Americans are the only ones who wander and who might not be able to sue in their home country under Article 28. This is patently wrong.

There are wandering Germans, wandering Swiss, wandering British, and wanderers of every nationality. There are no greater number of Americans who live in Hong Kong and fly Hong Kong-Moscow-Hong Kong than there are Germans or Frenchmen or British. These same foreigners probably also fly Hong Kong-United States as often as Americans. If they fly on a third country airline, are we going to say that none of these foreigners will be able to sue in their home countries? Are the governments of Germany and France really going to say that they do not want their citizens to be able to sue at home? Are they going to say that their citizens should be able to sue only in one of the often very fortuitous and faraway Article 28 forums? I believe they will not and that it would be a great mistake if they did.

But more important, when you talk about wandering Americans, you have to understand you are talking about the wandering travelers from every single country around the world. In today's travel market, it is not just an American problem. With the kind of travel that is so regular today, it is a worldwide problem. The number of travelers who fly by air from Germany, France, and so many of the developing countries is extraordinary. This is not 1966 when Americans traveled so much more than everyone else. So it is totally wrong to argue that the fifth forum benefits only wandering Americans and, as prior speakers have asserted, it should not therefore be adopted, even if it were legal to do so.

Now, I also want to say a word about cost. I have always been very intrigued with insurance statistics. In this area, we have rarely had any that are exactly correct. No one really knows the cost of added insurance to cover the unlimited liability, or to cover the second tier of absolute liability, or to cover *lex domicilii*, or the fifth forum. But the cost might not be that great, because I have the feeling that most airlines today, at least most airlines that operate to and from the United States, already have their premiums determined not on the basis of the Warsaw Convention, or even the Montreal Agreement limit of $75,000, but on the reality of the situation. If their aircraft happens unfortu-

nately to crash and if it is an American manufactured aircraft, no matter the nationality of the airline or the passengers, most of the lawsuits will more than likely be filed in the United States.

The lawsuits will be brought in the United States against the manufacturer, mainly on products liability. Or if the accident happened in or near the United States and involved U.S. air traffic control, the suits will be brought on that basis. The aviation underwriters are well aware of the fact that they will not be able to enforce the $75,000 liability limit. I do not think there has been a recent crash case—correct me, George, if I am wrong because you are usually directly involved in many of these cases—but I do not think there has been a crash case in the United States where the $75,000 limit has been enforced, almost since the day it was first introduced. Even more important, I daresay that most of the cases around the world—the Japanese crashes, the Korean Airlines crash, the Saudi Arabian Airlines crash, cases that occurred abroad and where the lawsuits were not brought in the United States—have rarely been settled for $75,000. The underwriters have always gone to their local lawyers in the country where the victims mostly live, and they ask those lawyers for an average or approximate or reasonable value of life for purposes of settlement. Those settlements have almost always gone at least up to $150,000. Mr. Chen, our eloquent speaker from Taiwan, said earlier that Taiwanese settlements were between $150,000 and $240,000. I personally know of many instances where the settlements have been over $200,000 and often over $300,000.

All I am saying to you is that the aviation underwriters know what they are doing; they are a very sophisticated group, and they are not today basing their premiums on Montreal's $75,000 limit. They have estimated and based their premium calculations on the fact that passengers on these airlines may bring their suits in the United States no matter the limitations of Article 28. Therefore, I really wonder how much more expensive premium cost might be—if we now just admit that we are really going to have unlimited liability rather than, as we have said in the past, $75,000 but always breakable. I have no doubt that the underwriters will raise premiums simply because of the changes. But I also believe that the increases will be in reasonable amounts just because of the practical experience the underwriters have had during the past thirty years.

Let me just add two points. The interesting question before us is whether or not adopting *lex domicilii* or the fifth forum will

of themselves work to increase premiums. I suggest to you that adopting these concepts internationally might even work to decrease premiums—because as I said in my prepared remarks, when these cases come to a U.S. court in the future, to the extent that the victim could have brought his case in the courts of his domicile, it is quite likely that the U.S. court will transfer that case to that court. I use the word "transfer" in quotes because it is really a reference of the case to the victim's home court on what we call a *forum non conveniens* basis. Our courts will be moved to say: "Let the case be decided for purposes of calculating the victim's damages in the courts of the victim's domicile and under that domicile's law and practice." In all frankness, that is the way these cases ought to be decided. That is, in fact, the only fair system.

People grow up in particular countries and they base their lives, their wills, and their estates upon the laws of those countries. They know pretty well what their death benefits, their social securities benefits, or their pension benefits will be. They know the value of their estates and the needs of any dependents they may have. So do their courts. Therefore, when you think of suing, the right place to sue should not always be the United States. In the years I have spent on the Warsaw problem, the major complaints from all non-Americans have been against American lawyers and the American jury system. I personally think these are wonderful institutions. But if everyone is still complaining about these institutions, the best and most effective way to deter forum shopping in the United States—and thereby avoiding American lawyers and American juries—is by adopting *lex domicilii* and the fifth forum.

What then will happen? A passenger who happened to have been on a U.S. airline or who happened to have been on a trip between a foreign country and the United States will bring his suit in the United States. The U.S. courts will be aware, or will be made aware, that the U.S. airline would be pleased to see that person or his survivors compensated in accordance with the law of his domicile, for that person's damages to be based upon the law and practice of his domicile and determined by his domiciliary court. The U.S. airline—and you should keep in mind that it may just as well be any foreign airline making precisely the same argument before the same U.S. courts—would go into the U.S. court and say: "We have admitted liability; now it is only a question of damages; let us have a *forum non conveniens* transfer or dismissal to the courts of the victim's domicile."

Now, I suggest to you that this approach will more than likely work to decrease the amount of damages that would be obtained if the damages were determined by the U.S. court. If I am right about this, which I believe I am, then it also ought to work to decrease underwriter premiums. Need I add that adopting *lex domicilii*—which has been one of my favorite theories since 1967[7]—and the fifth forum might work to satisfy several of our objectives: not just financial fairness, but the fairness of letting the German passenger sue in Germany and the French passenger in France and both having their laws apply and their courts making the decisions.

I was very intrigued by the comments of our insurer speakers, Mr. Brise and Mr. Chrystal, who seemed to say that insurance premiums today amount to only about one-half of one percent of the operating costs of an average airline. It would seem to me that we could probably afford to raise premiums as much as even one percent. Maybe fares are too low; maybe we should increase them so that we could pay a proper dollar's worth of damages. Since it is the users who will pay a higher fare but also benefit in the event of a disaster, I do not see any inequity.

The last thing I want to say is that we have heard several references earlier today about the elephant and the elephant trainer—whether the United States is the elephant or the trainer. I doubt it is either, but the reference reminds me of a story that is supposed to have happened in the Middle East. This was an elephant and a scorpion. The elephant is standing on the banks of the Suez Canal, the then Israeli side, and there is a scorpion right next to him. The scorpion says to the elephant, "Will you take me across the Canal?" The elephant looks at the scorpion and says, "I wouldn't take you to the other side of the Canal because I'd have to put you on my back, and if I did so, you might sting me, and I would then drown." To which the scorpion quickly replied, "But, Mr. Elephant, if I sting you and you drown, I would drown too; so why would I ever sting you. It would be absurd for me to do that." The elephant then says, "You know, that's logical; come on, climb on my back and I'll take you across." And they get into the canal and they are right in the middle, and the elephant is sweating to get across. And all of a sudden, he feels a sting on his back and he says, "Oh, you did it! I'm going to drown," and as he begins to sink, he says to

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[7] *See* Allan I. Mendelsohn, *A Conflict of Laws Approach to the Warsaw Convention*, 33 J. AIR L. & COMM. 624 (1967).

the scorpion, "Why did you ever do it? It is so illogical, and now we will both die." The scorpion looks at the elephant and says, "Hey man, this is the Middle East!"

Now, all I want to do is compare that story with our present circumstances. You have to all appreciate just how close the aviation world is to a successful conclusion. Three of the elements are already in place, and only the fifth forum remains in contention. We must reach a conclusion that has all four of the elements and that is fair for everyone. What a pleasure it would be if we could work together and reach that conclusion; what a shame it would be if we began to fight with each other and failed.

Let me only add that I believe there are many ways to reach a successful conclusion. Just as I was listening to earlier speakers, I came up with an interesting idea. We should compile a list of countries or airlines that will voluntarily accept the fifth forum. We do not have to make it applicable to everybody, at least for the time being. The European Union has already more or less agreed that a fifth forum should be adopted, and that represents at least ten countries who agree with the United States.[8] I think the Canadian government would want its citizens to be able to sue in Canada, and I would bet there are many other governments and airlines that would want to treat their citizens with equal fairness. It might surprise all of us to see how many carriers might sign that list, with or without pressure from their governments, just so their citizens would know that in the event of a disaster, no matter where in the world, they or their survivors could always bring their lawsuits and recover their damages at home. So a list is at least one way to begin; there are probably many other and better ways too. None of us has had the chance or the encouragement to give it the thought it clearly deserves. But I would like to conclude by saying that at this point, what we should fear most is that we become scorpions and elephants and lose sight of what is best for all of us. Thank you very much.

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[8] On February 24, 1997, the European Union Council, alluding to "very complex and factual issues," but curiously not discussing these issues in any way, abandoned its long held support for the fifth forum. *See* Common Position (EC) No. 97.