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# "APPLICABLE LIMITS OF LIABILITY" UNDER ARTICLE 8 OF THE 1964 DRAFT CONVENTION ON AERIAL COLLISIONS

By MASAKO MIYAGI†

## I. INTRODUCTION

THE International Civil Aviation Organization and its predecessor established the Warsaw Convention<sup>1</sup> and The Hague Protocol<sup>2</sup> which deal with the responsibility of the carrier to passengers or the consignee; the Guadalajara Convention<sup>3</sup> supplementing the Warsaw Convention; and the Rome Convention<sup>4</sup> which deals mainly with the responsibility of the operator of a foreign aircraft for the damage caused to a third person on the surface. The Warsaw Convention, as modified, limits the liability per injured person or per kilogram of the thing which has sustained damage, on a system which is based upon fault and which shifts the burden of proof. The Rome Convention, on the other hand, adopts the principle of absolute liability from the standpoint of protection of persons not using aircraft and stipulates the aggregate liability for one accident based on a sliding scale determined by weight of the aircraft.

ICAO is now preparing a collisions convention providing for the liability of operators for loss or damage resulting from aerial collisions. The first draft convention was initiated in 1930<sup>5</sup> and since that time several drafts have been drawn up and examined. As many problems remain unresolved, it is difficult to determine the prospect of the completion of the convention.

Generally speaking, where the damage is caused by a collision, it is inevitable that claims made under the convention or national laws will result in numerous intricacies. Consequently, the collisions convention

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<sup>1</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air, 12 Oct. 1929, 49 Stat. 3000, T.S. 876 (effective 29 Oct. 1934).

<sup>2</sup> Protocol to Amend the Convention for Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 Oct. 1929, 28 Sept. 1955, ICAO Doc. 7686—LC/140 (1955), 1955 U.S. & Can. Av. 521.

<sup>3</sup> Convention Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other Than the Contracting Carrier, 18 Sept. 1961, ICAO Doc. 8301—LC/149-2 (1963), 1963 U.S. Av. 313.

<sup>4</sup> Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, 7 Oct. 1952, 310 U.N.T.S. 181 (1958).

<sup>5</sup> Draft Convention Concerning Liability for Damage Caused to Third Parties on the Ground, Oct. 1930, (CITEJA), reprinted in 3 J. AIR L. 27, 46 (1932).

possesses the special characteristic of covering not only claims between the victim and the operator (or the carrier) and those between operators, but also recourse claims between operators.<sup>6</sup> It is this peculiarity that gives rise to very difficult problems in relation to the limitation of liability.

The 1964 Montreal Draft Convention on Aerial Collisions [hereinafter 1964 Draft] takes the following position in Article 8:

Notwithstanding the provisions of Article 7, an operator shall not be liable in any action in recourse by another operator or by any other person for the payment of any sum which would result in his liability exceeding any applicable limits of liability under this Convention or any other international convention or depriving him of any defence or benefit which he would be entitled to invoke under such conventions in respect to persons or property on the surface or carried on his aircraft.<sup>7</sup>

The present paper is written to examine the meaning of the words "applicable limits of liability" used in Article 8. This expression would seem to involve several rather important problems which will be examined below.

## II. MAJOR PROBLEMS

Article 8 of the Montreal Draft, stipulates, in effect, that an operator who is the defendant in a recourse action shall not be liable to pay any sum exceeding any applicable limits of liability under the Convention on Aerial Collisions or other international convention (*e.g.*, the Warsaw Convention, The Hague Protocol, the Rome Convention) and that he shall not be deprived of any defense or benefit to which he would be entitled under such conventions. Therefore, it goes without saying that the discussion in connection with this Article should include an examination of the provisions of Article 10 of the 1964 Draft; provisions of paragraph 1, 2, and 3 of Article 22 of the Warsaw Convention; paragraphs 1, 2, and 3 of Article 22 of The Hague Protocol; and all sub-paragraphs of paragraph 1, Article 11 of the Rome Convention concerning the limitation of liability of the operator or the carrier as well as other provisions relating to "defense or benefit." In addition, the question of the apportionment of liability in a recourse action in the case of an aerial collision and the above-mentioned "applicable limits of liability" are interrelated. Thus, it will be necessary to examine the provisions dealing with the apportionment of liability.

The 1964 Draft stipulates in Article 7 that, with respect to the apportionment of liability between operators in a recourse action:

If a collision or interference gives rise to liability under this Convention or under any other legal rules of two or more of the operators of the aircraft involved for damage other than damage contemplated in Article 4, the liability for such damage shall, as between the operators liable, be borne in proportion to the degrees of fault respectively committed, or, if the degrees

<sup>6</sup> Draft Convention on Aerial Collisions, ICAO Doc. 8444—LC/151, Art. 3 (1964) (reprinted in 30 J. Air L. & Com. 375, 385 (1964)).

<sup>7</sup> *Id.*, art. 8.

of fault cannot be ascertained, in equal parts, or if none of the operators has been proved to have been at fault, in proportion to the weight of the respective aircraft.<sup>8</sup>

Essentially, the question in the apportionment of liability in a recourse action is how the claimant should divide the sum he has paid upon the direct claim of the person who suffered the damage between himself and the defendant in the recourse action. In the context of a system of liability based on fault, it is natural that the existence or non-existence or the degree of fault of both parties should come into question. However, the Draft Convention on Aerial Collisions stipulates this with reference to the proof thereof. Therefore, we will first consider a recourse action with reference to the proof of the existence or non-existence of fault of both parties and then see how the apportionment of liability is stipulated in the respective cases. Consider the following cases:

(1) One of the two parties, namely, the claimant or the defendant in the recourse action, was at fault but the other was without fault. (For the sake of convenience this will be called the case of "one at fault, or other without fault").

(2) One of the two parties was at fault, but it is not proved that the other was either at fault or without fault ("one at fault, the other unknown").

(3) Both the claimant and the defendant were at fault ("both at fault").

(4) Both the claimant and the defendant were without fault ("both without fault").

(5) Where it is not proved that both parties were either at fault or without fault ("both unknown").

(6) Where it is proved that one of the two parties was without fault, but it is not proved that the other was either at fault or without fault ("one without fault, the other unknown").

First, we shall deal with the case of "one at fault, the other without fault." In the 1964 Draft, subparagraph (d), Article 4, in the 1961 Draft was deleted.<sup>9</sup> Therefore, there is some room for doubt; however, it should follow that the operator at fault should be liable for the entire amount.<sup>10</sup>

With respect to the case of "both at fault," it may be noted that the first part of paragraph 2, Article 7, of the 1964 Draft provides that if the degrees of fault are equal or if the degrees of fault cannot be ascertained, both parties shall bear the liability in equal parts, and that if the degrees of fault [hereinafter referred to as "the ratio in contributory fault"] are clear, they shall bear the liability in proportion to such degrees.

There is not much doubt that the case of "both unknown" corresponds

<sup>8</sup> *Id.*, art. 7.

<sup>9</sup> The 1961 Draft, stating in its Article 4 that "In the case of a collision or interference the operator of each of the aircraft involved shall, if it is proved that the collision or interference was caused by his fault," provides, in (d) of the same Article, that the operator shall be liable "for any amount the operator of the other aircraft has paid under a legal obligation as compensation for damage caused by the collision or interference."

<sup>10</sup> Needless to say, it is possible to invoke "applicable limits of liability."

to the case where "none of the operators has been proved to have been at fault" in the latter part of paragraph 2, Article 7, and that in this case the liability shall be borne in proportion to the weight of the respective aircraft.

The cases of "both without fault" and "one without fault, the other unknown" are open to question, but it may be reasonable to assume that both cases should be covered by the provisions in the latter part of paragraph 2, Article 7, of the 1964 Draft in the same manner as (5) above. Finally, there is much room for doubt as to the case of "one at fault, the other unknown" under (2) above, and this uncertainty makes it difficult to draw a conclusion. Therefore, treatment of the latter case will not be made in this article.

The foregoing is a general description of the apportionment of liability. However, as noted above, what is important is how the question of the apportionment of liability and the question of "applicable limits of liability" are related to each other. No one has ever given a detailed examination to this particular problem. The writer will take up, from among various points to be mentioned later, what would seem possible in the interpretation of the 1964 Draft. In addition, it will be necessary to examine fully some of the views which will be assumed to have become actuality. The conclusion will be the author's opinion on the proper method of drafting the collisions convention in relation to this problem.

There are two different types of direct claims which constitute the basis for a recourse action: where it is intended to obtain a compensation for "on-board" damage and where it is intended to obtain a compensation for "surface" damage.<sup>11</sup> For convenience of explanation, we shall consider the matter with exclusive reference to a recourse action resulting from the compensation for on-board damage because of the death of a passenger caused by an aerial collision of the two aircraft of equal weight.

In the examples used throughout this article, the operator of the aircraft which carried the injured party will be designated *A*; other aircraft involved will be designated *B*, *C*, etc.; the injured party, or his successor, will be designated *P*; third persons (on the ground or otherwise) will be designated *T*.

In interpreting Article 8 of the 1964 Draft, there is room for doubt whether the term "applicable limits of liability" involves the limitation of liability under national laws as well as under other pertinent conventions. However, we will treat this matter by assuming a case where it is held to cover the limits of liability under the national laws (or where Article 8 is amended so as to include the limitation of liability under national laws). If the opposite is assumed, this may give rise to difficulty in that the liability of the same operator for the same damage differs, according to whether the operator receives a direct claim from the person suffering the damage or a recourse claim from the operator of another aircraft.

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<sup>11</sup> In a recourse action resulting from compensation for surface damage as well, entirely the same question may arise, theoretically, as mentioned herein.

### III. GIST OF POSSIBLE VIEWS

As noted above, the relationship between Article 7 and Article 8 may first come into question when we form possible "views" for the interpretation of the 1964 Draft. First, it may be asked whether the provisions of Article 7 concerning the apportionment of liability should apply in a recourse action and Article 8 should apply to the sum allocated to the defendant under Article 7; *i.e.*, whether Article 8 should be construed to mean that the amount allocated under Article 7 should not exceed the "applicable limits of liability." Or it may also be asked whether the provisions of Article 8 have primary importance in a recourse action, with the provisions of Article 7 concerning the apportionment of liability secondary—in other words, whether the "applicable limits of liability" under Article 8 should be relevant to the fixing of the sum as the basis of apportionment.

Next, when the former position is tentatively followed, it may be asked what amount is meant by the "applicable limits of liability" under Article 8.<sup>12</sup>

For example, assume that the limits of liability which the defendant in a recourse action is entitled to invoke are the limits of liability under the 1964 Draft. Then, in the case of "one at fault" in which it is proved that the aerial collision occurred solely on account of the fault of the operator who is the defendant in a recourse action or his servant or agent, there is no doubt that the limits of liability of which he can avail himself against the claimant should be those specified in Article 10 of the 1964 Draft (250,000 francs in a case of the death of a passenger). On the other hand, in a recourse action in which the liability is apportioned between both the claimant and the defendant, *i.e.*, a case coming under paragraph 2, Article 7, a question arises as to exactly what is meant by the limits of liability which the defendant is entitled to invoke.

Suppose A, who was at fault, paid P 600,000 francs for wrongful death under a national law providing for unlimited liability.<sup>13</sup> Then A made a recourse claim to B, who was equally at fault. In this case, B is liable to accede to the recourse claim, in proportion to the degree of fault, with respect to the sum paid to P by A; *i.e.*, to pay in equal parts, under paragraph 2, Article 7, of the 1964 Draft if the degrees of fault are equal. In addition, B can assert the limits of liability he is entitled to invoke against P against the recourse claim made by A. Accordingly, there emerge two opposing views, namely, that the "applicable limits of liability" here signify 250,000 francs, the limit specified in Article 10, and that, since 250,000 francs is the limit of liability in the case of "one at fault," if the liability is to be shared equally by both parties, the limit to each of the two parties is 125,000 francs or half the total limit.

The aforementioned views may be divided into three categories. The

<sup>12</sup> According to the latter view, it may be almost beyond doubt that the "applicable limits of liability" under Article 8 should signify, *e.g.*, the very limits of liability specified in Article 10 of the 1964 Draft (250,000 francs in a case of the death of a passenger).

<sup>13</sup> For explanation of letters designating parties, see p. 198, *supra*.

First View is the position that the provisions of Article 7 concerning the apportionment of liability are primarily applicable in a recourse action. Therefore, the "applicable limits of liability" acquires importance with respect to the sum assigned to the defendant, and the applicable limit of liability in the above example is 250,000 francs. The Second View,<sup>14</sup> while taking a similar position, holds that the applicable limits of liability in the example should be 125,000 francs. Finally, the Third View holds that in a recourse action, Article 8 is of primary importance with the apportionment of liability following. Each of these views will be examined. [Editor's note: Appendix A at the end of this article is an outline form of the three major views and their subdivisions.]

The very expression of Article 8 would seem to admit of any of the three views. Undoubtedly, when the original sum of damage is small, neither view may lead to much difference. Yet when it is large, very serious differences will result with respect to the claimant's liability as well as with respect to that of the defendant. It is therefore to be anticipated that the claimant and the defendant will be in dispute as to which view they should adopt, because a view favorable to one will be unfavorable to the other. The First View is in the interests of the claimant, while it is against the interests of the defendant. The reverse is true of the Second and Third Views.

Besides the problem of correlation between Article 7 and Article 8, two problems may be considered. One is the limit of liability between direct claims and the other is what effect the payment relationship in a recourse action may have on a direct claim.

The first problem boils down to this: assuming *P* has, in his direct claim, obtained compensation from *A* up to the limits of the latter's liability, whether

(A) *P* may, as long as the damage still exists, demand payment from *B* up to the limits of his liability, or

(B) *B* may be relieved of his payment by *A*'s payment, within the limits of his liability.

Suppose two aircraft operated by *A* and *B* collided, with the result that The Hague Protocol became applicable between *A* and *P* and the 1964 Draft between *B* and *P*. In this case, a question may arise as to whether *P*, after obtaining 250,000 francs compensation from *A* for damage worth 600,000 francs caused by the death of a passenger, may also receive further compensation of 250,000 francs from *B*, or whether *P* may not receive compensation from *B* after he has obtained compensation of 250,000 francs from *A*.

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<sup>14</sup> Conceivably, there might be a view that extends the relationships between the operators and the claimant or injured party. This view would hold that the limits of liability of each of the operators may be modified according to the existence or degree of fault, even in a situation involving a direct claim by the claimant against each individual operator. However, this view is not only theoretically incompatible with the position taken in Article 5 of the 1964 Draft, but it is also an untenable interpretation of Article 7. This view would so shift the burden of proof of fault in a direct claim against the operator of another aircraft that the person having a right to compensation would not be required to prove the fault of the defendant operator.

The provisions of the 1964 Draft which are important in this respect are Article 13<sup>15</sup> and Article 19.<sup>16</sup> Someone may contend, on the basis of the provisions of Article 13 (especially paragraph 2), that the position taken in (A) above can scarcely be held and that position (B) is alone possible. However, the problem is not entirely so clear.

First, paragraph 2 of Article 13 states in part that "a claimant may not recover more than the maximum amounts specified in paragraph 1 of Article 10 *in the cases therein referred to*" (emphasis supplied). Paragraph 1 of Article 10 specifies the limits of liability of operators with respect to damage caused to another aircraft or to persons or property on board, but not those of the operator of the aircraft. Therefore, paragraph 2 of Article 13 may be held to stipulate the mutual relationship between direct claims, in the case of a collision between three or more aircraft subject to the application of the 1964 Draft. For example, it stipulates the mutual relationship in the case of collision between three aircraft operated by A, B, and C, as between the direct claim brought by P against B and the direct claim by P against C. To be more specific, the paragraph provides, in effect, that P cannot possibly recover more than the maximum amounts specified in paragraph 1 of Article 10, regardless of whether P makes a direct claim against B alone or against both B and C. This provision admits of an interpretation that this paragraph is not applicable between the direct claim brought against A, the operator of the aircraft, and the direct claims against B and C, operators of other aircraft. Moreover, this interpretation would seem to be in accord with what Article 19 stipulates. Let us take paragraph 2 of Article 13 in the light of (B) above and consider the paragraph as governing the mutual relationship between the direct claim by P against A and the direct claim by P against B—in other words, the mutual relationship between the direct claim subject to application of other conventions and the direct claim subject to application of the 1964 Draft. Then we should have to acknowledge that the rights under other conventions will become extinct or diminish by the exercise of the claim under the 1964 Draft. If the position under (A) above is taken, a claim under other conventions will not diminish or become extinct by the exercise of the claim under the 1964 Draft, because its provisions will not affect those of other conventions.

<sup>15</sup> Paragraph 2 of Article 13 of the 1964 Draft states: "Except as provided in Article 11, a claimant may not recover more than the maximum amounts specified in paragraph 1 of Article 10 in the cases therein referred to, regardless of whether the claim is brought against one or more of the operators or owners liable or their servants or agents." Further, Article 11 states to the effect that the limits of liability provided in Article 10 shall not apply, if the operator and certain other persons have been guilty of wrongful intent or gross negligence, or if the person liable has wrongfully taken the aircraft.

<sup>16</sup> Article 19 of the 1964 Draft convention states that:

Nothing in this Convention shall affect any of the provisions of the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at Warsaw on 12 October 1929 or of the Protocol to amend the said Convention, done at The Hague on 28 September 1955, or of the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, done at Guadalajara on 18 September 1961, or of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, done at Rome on 7 October 1952, in a case where any of these instruments is applicable.



As may be clear from the foregoing statement, there is ample room under the 1964 Draft for the interpretation mentioned in (A) above to be put on each of the First, Second, and Third Views. This position is therefore considered to merit an examination as a possible view.

Second is the question of how the payment relationship in a recourse action will affect a direct claim. For example, suppose *A* has paid 125,000 francs to *P* upon his direct claim in accordance with the Warsaw Convention, and recovered in recourse claim half that sum from the operator of another aircraft. Let us assume that *P* has thereafter demanded compensation from *B* for the remainder of the damage. In that case,

(a) can *B* reduce the limits of his liability within the limits of payment, pleading that he has already paid 62,500 francs upon *A*'s recourse claim?

(b) or is it that the payment relationship between *A* and *B* will not affect *P*'s rights, and *P* accordingly may obtain further compensation of 250,000 francs from *B*, the maximum amount of his liability under Article 10?

With respect to the problem of the limits of liability between direct claims, if position (A) is taken, the position can be divided in all cases into (a) and (b). If position (B) is taken, there may arise a case where division into (a) and (b) is not applicable, because, according to position (B), when the maximum amounts of liability are equal for both operators<sup>17</sup> the maximum amounts of liability will be equal. Hence, if *P* obtains compensation from one of the operators equivalent to the limit of his liability, another operator's obligation will become extinct, and consequently the payment relationship, under recourse claim between *A* and *B* cannot in any way affect the direct claim. Again, this applies where the two operators are assigned different limits of liability, as where the limits of liability under the Warsaw Convention apply as between *A* and *P* and those under the 1964 Draft as between *B* and *A*. In this case, too, when claimant *P* obtains a compensation from *B*, who is assigned a higher amount of liability, the compensational obligation of *A*, whose limit of liability is smaller, will become extinct. Thus, as has been noted above, the payment relationship under recourse claim between *A* and *B* cannot affect the direct claim.

However, when the two operators' maximum amounts of liability are different, and when the claimant obtains compensation from the operators whose liability limits are smaller, the claimant should be enabled to make a direct claim against another operator within the difference of liability limits between the two operators. Therefore, the question arises as to whether the payment relationship under recourse claim may affect the direct claim. In this case, adoption of position (B) may possibly lead to its division into (a) and (b).

#### *A. Examination Of The First View*

As stated above, the First View takes the position that in a recourse

<sup>17</sup> If, for example, the limits of liability under The Hague Protocol are applicable as between *A* and *P*, while those under the 1964 Draft are applicable between *B* and *P*.

action the provisions of Article 7 concerning the apportionment of liability are first applicable and then, the "applicable limits of liability" have importance in respect of the sum fixed thereby—the limits of liability having nothing to do with the existence or the degree of fault of the operators involved. This View may be further divided into two approaches: (1) Approach A—the limits of liability under the legal obligation for compensation of A to P and those of B to P are two separate and independent matters and the payment up to the maximum amount of liability by one operator will not affect those of another operator. (2) Approach B—the limits of liability under the legal obligation for compensation of A to P and that of B to P are related to each other and, in the event of payment by the operator of one aircraft up to the amount of limits of liability, the legal obligation for compensation of the operator of another aircraft will be extinguished or diminished within the amount of limits of liability.

According to Approach A of the First View, the provisions of (c), (d), and (e) of Article 10 stipulate the limits of liability of *one operator* per injured party, or per kilogram of the damaged property for each accident. It follows, therefore, that if the sum of compensation received from the operator of "the aircraft"<sup>18</sup> falls short of the amount of actual damage owing to the invocation of (1) the limits of liability, (2) a defense, or (3) a benefit, the injured party may make a further direct claim against the operator of the other aircraft involved in the aerial collision, and the operator of the other aircraft against which this direct claim has been made will have to comply with this claim.

With respect to this Approach, the injured party may obtain compensation from either of the operators of the two aircraft involved up to their respective limits of liability. For example, when the amount of actual damage due to the death of a passenger is valued at 600,000 francs, even after A, the operator of "the aircraft" upon whom a direct claim was made, has paid 250,000 francs to P (who has a right of compensation in accordance with The Hague Protocol), P may further claim the payment of the difference against B; B on his part will have to accede to the direct claim within the limit of 250,000 francs, unless and until he can prove his (or his servant's or agent's) lack of fault.

Assuming this Approach, if, in the foregoing example A has paid P 250,000 francs, while B (complying with the recourse claim) has paid 125,000 francs, a question may be posed as to whether this payment may affect the direct claim by P against B. In this respect, two variations may be possible: Variation (a)—if the defendant in the recourse action has made the payment to the claimant, the relationship of payment between them will affect the direct claim, and the defendant may offset this recourse payment against the direct claim by the injured party; Variation (b)—the relationship of payment between the claimant and the defendant in a recourse action will not affect the direct claim by the injured party.<sup>19</sup>

<sup>18</sup> Meaning the aircraft which carried the person or property sustaining damage. Hereinafter the same definition will be applicable.

<sup>19</sup> Paragraph 2, Article 13, of the 1964 Draft stipulates that except as provided in Article 11,

According to Variation (a), in a case where the limits of liability under The Hague Protocol are applicable between A and P, and those limits under the 1964 Draft are applicable between B and P, and A and B are equal in the ratio of contributory fault<sup>20</sup> the following should result. Let us assume that A first pays 250,000 francs to P with respect to 600,000 francs damage caused by the death of a passenger aboard A's aircraft, and A then makes a recourse claim against B. Assume also that P makes a direct claim against B, who has paid 125,000 francs to A (half of 250,000 francs). Then, B will have to pay only 125,000 francs to P. This figure is obtained by deducting the 125,000 francs already paid to A upon his recourse claim from 250,000 francs, the limit of liability specified in Article 10.

By contrast, according to Variation (b), B's position in the preceding example will come to this: even after paying 125,000 francs or the recourse claim by A, B will be liable further to pay to P, upon the latter's direct claim, 250,000 francs, the limit of his liability. This is so as long as a balance of the amount of damage remains.<sup>21</sup>

Now, we shall take up Approach B of the First View. For example, where the limits of liability under The Hague Protocol are applicable between A and P, and those under the 1964 Draft between B and P (*i.e.*, the limits of liability in both cases are equal in amount), payment of compensation by one of the two operators will extinguish the legal obligation on the part of the other operator. The result is similar where there exists a difference in the amount of limits of liability between both operators. For example, the Warsaw Convention, with limits of 125,000 francs, may apply between A and P with respect to the death of a passenger on board A's aircraft, while the 1964 Draft limits of 250,000 francs may apply between B and P. In this case, if A, whose liability limit is smaller than B's, pays the compensation to P, B's legal obligation for compensation to P will be diminished to 125,000 francs. Where A makes a recourse claim against B and obtains compensation of 62,500 francs, before P makes a direct claim against B, according to Variation (a) of this Approach, B need only pay P 62,500 francs. Whereas, according to Variation (b) of Approach B, B cannot set up, as defense against P, the amount he has paid in compliance with A's recourse claim, and consequently he will have to pay 125,000 francs.

The following discussion will consider variations of the two approaches of the First View. First of all, according to Variation (a) of Approach A of the First View, if the limits of liability under The Hague Protocol are applicable between A and P and those under the 1964 Draft between B

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a claimant may not recover more than the maximum amounts specified in paragraph 1, Article 10, regardless of whether the claim is brought against one or more of the operators. But paragraph 2, Article 13, stipulates only the claims under the collisions convention. It is not applicable between a claim under the collisions convention and a claim under other conventions or national laws. Therefore, notwithstanding this Article, the view stated here seems to be possible. In this respect, reference is requested to be made to the criticism against approach (B) to be mentioned later.

<sup>20</sup> "Ratio in contributory fault" is defined *supra*. See text immediately following note call 10.

<sup>21</sup> Note 19 *supra*.

and *P*, even after obtaining a compensation of 250,000 francs from *A* (who is unable to prove no fault on his part), *P* may have a further compensation of 250,000 francs from *B*, and thus *P* may have a total compensation of 500,000 francs. Therefore, so far as it goes, this View does not seem to give rise to any particular problem and from the viewpoint of protection of the injured party, it appears to be appropriate. However, when a recourse claim between *A* and *B* is taken into account, a question arises. Suppose *A* makes a claim in recourse against *B* in respect to the 250,000 francs which *A* paid to *P* (and before *P* sues *B* for the balance of actual damage) and *B* pays *A* 125,000 francs in settlement of this recourse claim. It follows that *B* must pay *P* only 125,000 francs, the amount obtained by deducting 125,000 francs paid on *A*'s recourse claim, from 250,000 francs, the Article 10 limit of liability. The payment of 125,000 francs by *B* to *A* on the recourse claim is, after all, the same as payment of the sum to *P* through claimant *A*.

Now we proceed to the more important part of the problem. *B* has compensated *P* for damages (125,000 francs) on the direct claim, and, undoubtedly, *B* can make a recourse claim against *A* for 62,500 francs—half the sum of his payment. *A* should meet this recourse claim up to the extent of his own share (in the aggregate, the limit of his liability to *P*). To be more specific, while *A* has paid *P* 250,000 francs, he has recovered half this sum from *B*. Accordingly, *A*'s actual financial burden is only 125,000 francs. Even if he pays 62,500 francs to *B* upon the latter's recourse claim, the total of 187,500 francs still falls short of 250,000 francs, the limit of liability under The Hague Protocol. *A*, then, is bound to accede to *B*'s recourse claim for 62,500 francs. Moreover, *B* has received the payment of 62,500 francs, therefore his actual financial burden is 187,500 francs, or 62,500 francs less than his liability limit of 250,000 francs. On the other hand, *P*, who suffered actual damage of 600,000 francs, has received a total compensation from *A* and *B* of 375,000 francs which leaves a balance of 225,000 francs in uncompensated damages. Thus, *P* may again make a direct claim against *A* or *B* to recover the balance, and *A* or *B* may pay up to 62,500 francs upon the direct claim of *P* and after so doing, make a recourse claim against the other for payment of 31,250 francs (half the amount paid).

Thus, if we adopt this Approach, *P* can eventually obtain a compensation of 250,000 francs from both *A* and *B* (their limits of liability), or 500,000 francs in the aggregate, only by following a circular series of processes. This would require a direct claim by *P* against *A* followed by a recourse claim by *A* against *B* for half the sum paid upon such direct claim, then a direct claim by *P* against *B*, followed by a recourse claim by *B* against *A* for half the sum paid upon such direct claim,<sup>22</sup> and so on. If one takes the relationship of recourse claims into consideration, com-

<sup>22</sup> If, in a case where either of the operators involved is held to bear absolute liability for a direct claim by the injured party, and the claimant first makes a direct claim against such operator and receives compensation sufficient to cover the actual damage sustained, a question such as mentioned here will not arise.

pensation cannot be obtained without this complicated procedure, unless special legislative measures are adopted. In actual practice, it would be extremely difficult for the claimant to become involved with such a troublesome procedure. Therefore, the particular operator against which *P* chooses to make a direct claim will, in effect, have a different liability than the other operator.

Furthermore, a criticism exists as to Variation (a), Approach A of the First View. In a case where liability is apportioned between *A* and *B* in a recourse action, the situation is bound to arise where *B*'s liability is not in direct proportion to the degree of fault, according to the amount of *A*'s liability to *P* and according to ratio of *A* to *B* in contributory fault. An example will be given by way of explanation. Assume that the limit of *A*'s liability to *P* is 500,000 francs under the applicable national laws, and that the respective shares of *A* and *B* in the ratio in contributory fault are equal. In this case, *A* can make a recourse claim against *B* for 250,000 francs, half of what he has paid to *P*. On the other hand, the limit of liability which *B* can invoke against *A* is, according to this view, 250,000 francs. Thus, *B* will have to pay 250,000 francs. However, even in a case where he is solely at fault, *B*'s liability is limited to 250,000 francs. Then, *B* will have to bear the same liability when his share in the ratio in contributory fault is one-half, as he will when he is alone at fault. In other words, *B*'s liability will not be directly proportional to the degree of his fault. The possibility of this difficulty emerging will be greater with the increase in the limits of the liability of *A* to *P* (unlimited liability as its maximum), while the scope not directly proportionate to the degree of fault will be widened. For example, where *A* pays *P* 2,500,000 francs, whether *B*'s share in the ratio in contributory fault is one-tenth or if *B* alone is at fault will make no difference as to his liability. Viewed in the light of the procedural code, the degree of *B*'s fault may not, to a certain extent, become a matter of importance. Therefore, insofar as his own fault has been proved, it will be of little importance for *B* to prove the fault of the other operator. On the other hand, *A*, even if his own fault is proved, may cause *B* to bear the same liability as if *B* were alone at fault.

Next, we shall examine Variation (b) under Approach A of the First View. According to Variation (b), the injured party may receive payment up to the limits of liability from each operator without following the troublesome procedure of repetitive direct claims against the operators. Thus, the difficulty involved in Variation (a) will not arise. In the case cited, *P* may obtain an aggregate compensation of 500,000 francs by making direct claims only once against both *A* and *B*. Furthermore, *A* and *B* may each make a recourse claim against the other with respect to the compensation paid to *P* and recover 125,000 francs, so that their ultimate financial burdens will be 250,000 francs each. So far as it goes, this approach seems to be appropriate. However, this approach appears simple because in the example the limits of liability of *A* to *P* and of *B* to *P* are equal, and because the liability is shared in equal parts by both operators.

Even if the limits of liability are equal, if the liability is not shared in equal parts (that is, the respective shares of *A* and *B* in the ratio in contributory fault are different), or if the limits are different, a difficulty is bound to result in that the financial burden of *A* or *B* will exceed the limits of their respective liability. Take an example in which The Hague Protocol is applicable between *A* and *P* and the 1964 Draft between *B* and *P*. To be more specific, even where the limits of liability of both operators are 250,000 francs, if the ratio of *A* to *B* in contributory fault is three-to-seven, *B* will be liable for 350,000 francs. (This figure is determined by multiplying the ratio (7/10) by 250,000 francs (the amount paid by *B* to *P*) plus the result of again multiplying this ratio by 250,000 francs (the amount paid by *A* to *P*). Thus, *B*'s limit of liability will be exceeded by 100,000 francs. Similarly, if the maximum amounts of liability under the Warsaw Convention are applicable between *A* and *P* and those under the 1964 Draft between *B* and *P*, *B*'s financial burden will be 262,500 francs (assuming the same three-to-seven ratio in contributory fault).

Thus, in the cases mentioned above, *B* will be liable for sums exceeding the 250,000 francs limit of liability of *B* to *P* under Article 10. This will produce a result which is not only contradictory to the *provisions* of Article 8, but is also contradictory to the *intent* of Article 10 (that the liability of the operator for the damage done to the persons or property on board the other aircraft involved should be subject to subparagraphs of the same Article). In brief, even the adoption of this Approach would seem to leave an important problem which is difficult of solution.

Now, one can consider Approach B which emerges against Approach A (both being within the First View). According to Approach B, where *A* may invoke against *P* the limit of liability under The Hague Protocol, this will lead to the same solution as that intended by the lawmaker in providing Article 13, because the limit of liability under the 1964 Draft which applies between *B* and *P* is equivalent to that under The Hague Protocol. According to this Approach, if *P* obtains compensation from either operator up to the limit of his liability, *P* may not receive further compensation from the other operator. In a recourse claim, liability is apportioned according to the degrees of fault of the persons liable, on the basis of the amounts under Article 10, namely, The Hague limit.<sup>23</sup>

<sup>23</sup> The language "under the convention" is also used with respect to the interpretation of Article 13 in Secretariat Commentary on the Draft Convention on Aerial Collisions, ICAO Doc. LC/SC/Aerial Collisions No. 72, 25/8/61 Subcommittee on Aerial Collisions, at 8.

In a recourse action resulting from compensation for surface damage in which the Rome Convention should apply between *T*, and *A* or *B*, it is somewhat doubtful whether such a position may remain good. Article 7 of the Rome Convention states that:

when two or more aircraft have collided or interfered with each other in flight and damage for which a right to compensation as contemplated in Article 1 results, or when two or more aircraft have jointly caused such damage, each of the aircraft concerned shall be considered to have caused the damage and the operator of each aircraft shall be liable, each of them being bound under the provisions and within the limits of liability of this Convention.

This Article admits of two different interpretations. According to one of them, it merely states that the injured person may make a claim for compensation against the two operators. The other interpretation holds that the injured person may obtain compensation from both operators; in other

However, what comes into question with respect to Approach B is where *P* may sue *A*, alleging unlimited liability or at least alleging limits higher than the limits of liability under Article 10. To be more specific, in this case, if *P* first obtains compensation from *B* up to the maximum amounts specified in Article 10, even where that compensation still falls short of damage, will he be not able to obtain additional compensation from *A*? Or will he still be able to recover from *A* the balance between the compensation and the damage? These are the questions which may be posed in regard to Approach B.

If the former position is taken, even where The Hague Protocol prohibits the operators from invoking the limits of liability because of non-issuance of or defective entry in the ticket,<sup>24</sup> baggage check,<sup>25</sup> or air waybill,<sup>26</sup> *P* will not be able to sue *A* for unlimited liability. Moreover, if the national law stipulating higher limits of liability than those provided for in Article 10 of the 1964 Draft is to apply between *A* and *P*, it will follow that *P* is not able to obtain compensation from *A* exceeding the limits of liability specified in Article 10, insofar as the 1964 Draft is applicable as between *P* and *B*. However, if in those cases the damage has been caused by a unilateral accident, *P* may pursue unlimited liability or liability higher in amount than the maximum sums specified in Article 10. Under other conventions or national laws, *P* may, in the case of a collision, obtain a payment of the maximum sum under Article 10. This would only affirm that the provisions of the 1964 Draft have an improper effect on other conventions and national laws. It is assuredly contra to the intent of Article 19 of the 1964 Draft. Should we accept the latter position? So long as we deem it to be acceptable, there will arise no such impropriety as has been noted above. However, it is doubtful whether this interpretation can be made in the context of Article 13 because paragraph 2 of Article 13 states in part that "a claimant may not recover more than the maximum amounts specified in paragraph 1 of Article 10."

The foregoing are the major points common to Approach B of the First, Second, and Third Views. Now, we shall consider the question of what result the application of Approach B of the First View will actually produce.

First of all, as regards the on-board damage, if the limits of liability which may be invoked by both operators are equal, as where The Hague

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words, the injured person may receive compensation from both operators in the aggregate amount of their respective limits of liability. It is difficult to decide either way in the light merely of the wording of Article 7. If the latter interpretation is accepted, the position taken in (B) above that the payment by one of the operators will affect the other operator's compensation obligation within the limits of his liability can hardly hold, insofar as the Rome Convention applies as between *A* and *T* and between *B* and *T*, respectively. However, even if Article 7 of the Rome Convention is taken in the above light, in case the Rome Convention applies to either *A* and *T*, or *B* and *T*, and national laws to the other, in a recourse action resulting from the compensation for surface damage the 1964 Draft should apply. There may undoubtedly be cases where national laws apply to both groups. Therefore, in these cases, the position mentioned in (B) may be of importance with respect to the meaning of the "applicable limits of liability," as in the case of a recourse action resulting from the compensation for on-board damage.

<sup>24</sup> The Hague Protocol, para. 2, art. III.

<sup>25</sup> *Id.*, para. 2, art. IV.

<sup>26</sup> *Id.*, art. IX.

Protocol (or a national law with similar provisions) is applicable between *A* and *P* while the 1964 Draft is applicable between *B* and *P*, no undesirable situation will result. This will be so where both operators are at fault as well as where one operator alone is at fault, regardless of which operator has a direct claim made against him by the injured party.

On the other hand, even where The Hague Protocol is applicable between *A* and *P* and the 1964 Draft between *B* and *P*, both conventions preclude the operators from invoking the limit of liability if it has been proved that there has been wrongful intent or gross negligence<sup>27</sup> on the part of each operator or his servants or agents. Therefore, if it is assumed, for example, that *A*'s gross negligence concurs with *B*'s fault and that *A* makes a recourse claim against *B* for the amount he has paid to *P* by accepting unlimited liability, *B* (who is entitled to invoke the limits of liability) will always be liable in the same amount as when the collision was his sole fault, however small his share in the contributory fault may be. An entirely similar situation will arise when *A* should accept unlimited liability by virtue of the national laws which apply as between *A* and *P*. Also, the direct claim which is the basis for the recourse claim to which the 1964 Draft is applicable may also be subject to the Warsaw Convention, The Hague Protocol, the Rome Convention, and national laws. Therefore, the limits of liability which may be invoked by each operator may vary in some cases. In a recourse action resulting from the payment of compensation by the operator assigned a maximum liability higher than another operator, the amount or amounts to be borne by either the claimant or the recourse action defendant or both will not be in proportion to the degrees of fault, according to the difference between their respective limits of liability and the proportion of ratio of one operator to another in contributory fault. In other words, an unfavorable situation is bound to arise in which the actual advantage of proving the degree of fault is partially lost.<sup>28</sup> In this connection it is recalled that an entirely similar situation resulted from the adoption of Variation (a) under Approach A of the First View.<sup>29</sup>

Approach B is to be subdivided into Variations (a) and (b) after *P* has obtained compensation from the operator whose limits of liability are smaller. With respect to Variation (a), Approach B of the First View, we can point out the impropriety, as in Variation (a), Approach A of the First View, that one is compelled to repeat direct and recourse claims. Let us assume, for example, that the respective shares of *A* and *B* in contributory fault are equal and that *P* has first obtained compensation of 125,000 francs from *A* under the Warsaw Convention with respect to actual damages of 600,000 francs created by the death of a passenger. In

<sup>27</sup> See Article 11 of the 1964 Draft and The Hague Protocol, para. 3, art. 25A.

<sup>28</sup> In a case where the limits of liability which the two operators may invoke are different, as long as we support the position (b) according to which, even if the claimant for compensation obtains a compensation from the operator whose limits of liability are smaller in amount, the payment relationship under his recourse claim will not affect the direct claim, an unfavorable outcome may inevitably be produced which is almost identical to the one resulting from the case contemplated herein.

<sup>29</sup> See text accompanying note 19 *supra*.



this case, *P* can make a further claim against *B* for 125,000 francs (*B*'s original limit of liability being 250,000 francs, reduced by *A*'s compensation of 125,000 francs). Yet if *B* has paid half that sum (62,500 francs in compliance with *A*'s recourse claim) *B* will have only to pay the remainder of 62,500 francs. This creates a situation identical to that mentioned in respect to Variation (a), Approach A of the First View and the direct claims between *A* and *P* and between *B* and *P* will be repeated. This position, while being entirely similar to Variation (a), Approach A, in that the payment relationship in a recourse claim affects the direct claim, is different in that each operator's compensational obligation is mutually related and payment of a compensation by one operator will affect another operator's compensational obligation within the limits of his liability.

### *B. Examination Of The Second View*

According to this view, the limits prescribed in (c), (d), and (e), of Article 10 of the 1964 Draft or the sums prescribed in the Warsaw Convention, The Hague Protocol, the Rome Convention, and relevant national laws, always become the limits of liability as they originally stand between the operators concerned and the injured party. On the other hand, in the recourse claim between the operators, the limit of liability of the operator, the sum to be borne by the operator or the defendant or both, is not proportionate to the degree of his fault according to the limits of liability each of them may invoke or according to the ratio of contributory fault between them. In other words a situation is bound to arise in which there is no actual advantage, to a certain extent, in proving the degree of fault.<sup>30</sup> The provisions of paragraph 2 of Article 7 stipulate not only the manner of apportionment of the sum paid by one of the operators under his legal obligation, but, at the same time, that the limits of liability that may be invoked by each operator should be modified in accordance with the rule of apportionment provided therein, solely in relation to the claimant. It is held here that the "applicable limits of liability" under Article 8 mean such limits of liability. Therefore, according to the Second View, if it has been proved that the aerial collision occurred solely due to the defendant's fault, the original limits of liability are applicable with respect to the liability of the operator who is the defendant in a recourse action. However, where the liability is to be borne equally by application of the first or second part of paragraph 2, Article 7, of the 1964 Draft, such operator will bear only half the sum of the original limit of his liability. If the degrees of fault have been ascertained, the operator will bear the sum obtained by multiplying one-tenth of his (or his servant's) share in the ratio in contributory fault by the original limit of his liability. For example, suppose the aircraft of operators *A* and *B* are involved in an aerial collision in which a passenger on aircraft *A* is killed. If The Hague Protocol is applicable between claimant *P* and *A*, while the 1964 Draft is applicable between *P* and *B*, then the limit of *A*'s

<sup>30</sup> The occurrence of such a difficulty is the same as in the case contemplated in Variation (a), Approach A of the First View. See text accompanying note 19 *supra*.

liability to *P* should be 250,000 francs and that of *B* to *P* should be 250,000 francs. On the other hand, if *A* has made a recourse claim against *B* on the basis of his payment to *P*, the "applicable limits of liability" under the 1964 Draft (which *B* may invoke by virtue of Article 8 thereof) should be: 250,000 francs where *B* alone is at fault; 125,000 francs where both *A* and *B* are at fault and the degrees of fault equal; 75,000 francs where the ratio of *A* to *B* in contributory fault is seven-to-three. Again, where *B* has made a recourse claim against *A* on the basis of his payment to *P*, the "applicable limits of liability" under The Hague Protocol (which *A* is entitled to invoke under Article 8) should be: 250,000 francs where *A* alone is at fault; 125,000 francs where the degrees of fault are equal; 175,000 francs where the ratio of *A* to *B* in contributory fault is seven-to-three.

The Second View may be divided further into Approaches A and B. Approaches A and B each may be subdivided into Variations (a) and (b), in the same manner as under the First View.

To begin with, we shall examine Variation (a) of Approach A of the Second View. The Approach is free from any defect where the sum to be borne by *B* is not in proportion to the degree of his fault, in contrast to Variation (a), Approach A of the First View. In any case, the sum to be borne by the defendant operator is to conform with the rule of apportionment under Article 7. Accordingly, the claimant cannot reduce the sum paid by him to the injured party upon the latter's direct claim, unless upon proof of the existence or degree of fault on the part of the defendant. On the other hand, the defendant has the actual advantage in proving the existence and also the degree of fault of the other operator who is the claimant, even if his own fault (or his servant's or agent's) has been proved.

If we suppose the following case, a question arises about this Approach. When the amount of *P*'s damage is large and *P* makes an additional direct claim against the second operator, expressing discontent with the amount of compensation received upon his direct claim against the first operator, the second operator may set up against *P*, as defense,<sup>31</sup> the sum paid upon the recourse claim. However, he will have to pay the compensation up to the limit of his liability against *P*. Moreover, *P* will have to repeat direct claims against the two operators up to their limits of liability (as in the case of Variation (a), Approach A of the First View). Under this Ap-

<sup>31</sup> Unless we take the view that the operator may set up the sum paid upon a recourse claim as defense against the direct claim, an unreasonable result will arise, as discussed in detail in connection with Variation (a), Approach A of the First View.

The view might be conceivable that extends the relationships between the operators such as are mentioned here to those between them and the claimant. This would hold that the limits of liability of each of the operators may be modified according to the existence or degree of fault, even in a direct claim between the person having the right of compensation and each operator. However, this position is not only incompatible, theoretically, with the position taken in Article 5 of the 1964 Draft (shifting the burden of proof of fault in a direct claim against the operator of the other aircraft by the person who suffered the on-board damage so that the person who has the right of compensation is not required to prove the fault of the operator/defendant), but also untenable as the interpretation of Article 7. It is also certain to give rise to an improper outcome.

proach, the "applicable limits of liability" modified by Article 7 apply insofar as a recourse action between both operators is involved, but it is the same as Variation (a), Approach A of the First View, in that the payment relationship in the recourse claim affects the direct claim.

We shall find that if the claimant makes a direct claim against only one of the operators, there will be no unfavorable result with respect to the sum to be borne by the defendant in a recourse action resulting from the payment on the direct claim. However, in case the claimant makes a direct claim against both operators, the sum or sums to be borne by either A or B or by both of them will exceed the "applicable limits of liability," according to the difference between the limits of liability of the two operators or according to the ratio in contributory fault between them. It thereby runs counter to the intent of Article 8. Furthermore, the sum to be borne by either one of the operators will exceed the limits of liability which he is entitled to invoke against the claimant, in the same way as in the case of Variation (b), Approach A of the First View. A result contrary to the provisions of Article 10 and those for the limits of liability under other conventions is therefore bound to arise. This position is at variance with Variation (b), Approach A of the First View in that it holds that the applicable limits of liability are, insofar as the recourse claim relationship is concerned, modified by the degree of fault on the part of the operator who is the defendant. Otherwise, the two positions are identical.

With regard to the Second View, we shall lastly examine Approach B. It has already been noted with reference to Approach B of the First View that this Approach is unacceptable in the interpretation of the 1964 Draft. Yet we shall consider here whether the interpretation of the meaning of the "applicable limits of liability" in the light of this Approach will result in any impropriety. According to this Approach, where the invocation of equivalent limits of liability between the injured person of an aerial collision and operators of the aircraft involved is to be recognized, no impropriety will actually result. However, where other conventions or national laws providing for limits of liability lower than those under Article 10 of the 1964 Draft are to be applied between A and P, this will necessarily cause an improper result. For example, let us assume that the 1964 Draft is applicable between B and P, who has a right of compensation of 600,000 francs because of the death of a passenger on board aircraft A. The Warsaw Convention is applicable between P and A, and both A and B are entitled to invoke their respective limits of liability. In addition the respective degrees of fault of A and B are assumed to be equal.

First, let us consider a case where P has obtained 250,000 francs from B.<sup>32</sup> The "applicable limits of liability" which A is entitled to invoke in the resulting recourse action brought by B are—insofar as this position is taken—half the 125,000 francs, the limits under Article 25 of the Warsaw

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<sup>32</sup> In this case, there is no possibility of Approach B being further divided into Variations (a) and (b).

Convention, *i.e.*, 62,500 francs. Then the sum to be borne by *A* is 62,500 francs, while that to be borne by *B* is 187,500 francs. In this example, even assuming that *P* first obtained 125,000 francs from *A* and then demanded payment of the remainder from *B*, the sums to be borne by *A* and *B* will be the same as before.<sup>33</sup> Thus, regardless of whether *P* first makes a direct claim against either *A* or *B*, the sum which *A* should bear corresponds with the amount of "applicable limits of liability" calculated on the basis of this position, whereas the sum to be borne by *B* works out, eventually, at 187,500 francs. Furthermore, the "applicable limits of liability" which he may invoke in the recourse action is, according to this position, 125,000 francs and therefore an improper result is produced in that this sum is exceeded by 62,500 francs.

This result may well be said to be contrary to the intent of the provision of Article 8 which states, with reference to the liability of the operator who is the defendant, that he shall not bear a sum exceeding the "applicable limits of liability" he is entitled to invoke.

Of this position, we may further point out an irrationality in that the sum to be borne by *B* is affected not by the proportion of his share in contributory fault, but by the amount of *A*'s limits of liability. As stated above, where the respective shares of *A* and *B* in contributory fault are equal and *A* may invoke the limits of liability under the Warsaw Convention, the sum of *B*'s financial burden is to be 187,500 francs. However, where the national law (under which the maximum amount of liability is 200,000 francs) applies between *A* and *P*, even if the respective shares of *A* and *B* in contributory fault are the same as above, *B*'s financial burden is reduced to 150,000 francs. In other words, the amount of compensation *P* may obtain in either of the cases contemplated above is 250,000 francs, the limit under Article 10, while notwithstanding the fact that the respective shares of *A* and *B* in contributory fault do not vary, *B*'s financial burden varies: the nearer *A*'s limits of liability come to those under Article 10, the smaller becomes the portion exceeding the "applicable limits of liability" worked out under this portion.

This unreasonable outcome may be held to be counter to the intent under which the financial burden of each of the operators shall be modified solely by the existence or otherwise of degree of fault, or by the weight of the aircraft.<sup>34</sup>

### *C. Examination Of The Third View*

The Third View is similar to the First View in holding that the "applicable limits of liability" under Article 8 always have for their substance the

<sup>33</sup> It is possible that this position will be further divided into Variations (a) and (b) and either of such subdivisions will produce a similar result. The only difference is that, according to Variation (a), *P* may not receive a compensation of 250,000 francs unless he makes a direct claim several times, while according to Variation (b), he will only have to make a direct claim twice to obtain the maximum compensation.

<sup>34</sup> The example given here concerns a case where *A*'s limits of liability are lower in amount than *B*'s. By contrast, where *B*'s limits of liability are smaller, *A*'s financial burden is bound to exceed the "applicable limits of liability" calculated under this position. In short, when the limits of liability are different for each operator, an impropriety results with respect to the financial burden of the operator having the higher limits.

liability limit which the defendant operator in a recourse claim is entitled to invoke against the claimant. Also, this View is entirely the same as the First and Second Views in that it is divided into Approaches A and B, each subdivided into Variations (a) and (b), in relation to the mutual relationship between direct claims or in relation to whether the payment relationship under a recourse claim may affect the direct claim. However, it is entirely different from the First and Second Views in holding that Article 8 is first applicable in a recourse action. In other words, the Third View takes the position that the invocation of the limits of liability has its significance in fixing the amounts as the base for apportionment of liability. An explanation will be given by way of example in order to make this point clear.

Suppose *P* has made a direct claim first against *A*, and *A* must bear unlimited liability with respect to actual damages of 600,000 francs resulting from the death of a passenger. Then it is almost beyond doubt that the claim right involves 600,000 francs. According to this View, in a recourse action on 600,000 francs, *B* may limit the basic sum for apportionment of liability to 250,000 francs by invoking the limit of his liability to *P* as specified in Article 10 of the 1964 Draft. Only then does the question of apportionment of liability arise. Where the degrees of fault of *A* and *B* are equal, it is stipulated in paragraph 2, Article 7, of the 1964 Draft that the liability is to be shared equally between the operators. Accordingly, the equal sums to be borne by *A* and *B* should be 125,000 francs. Where the degrees of fault of *A* and *B* are clear, the sum to be borne by each should be the sum obtained by multiplying one-tenth of the share of contributory fault by 250,000 francs, the basic amount of apportionment. Again, where *B* alone is at fault, he should bear the entire sum of 250,000 francs.

The Third View may be said to be superior, theoretically, to the Second View in that it organically relates limitation of liability and apportionment of liability with each other, while making a rigid distinction between them. The Second View is theoretically subject to some defects in that it holds that the material substance of the "applicable limits of liability" under Article 8 may be modified in accordance with the rule of apportionment of liability, combining the two essentially different legal concepts, apportionment of liability with limitation of liability.

The Third View appears to be superior, theoretically, to the First and Second Views. However, it gives rise, in terms of the actual result of its application, to an impropriety entirely similar to that noted in respect to the Second View. In the Second View, contributory fault is made to work directly on the very limits of liability, while in the Third View it is made to work in relation to the way in which the basic amount defined by invocation of the limits of liability to be shared between operators. The difference in theory or thinking between these views lies only here, and neither view will make any difference as to the sum actually to be borne by the defendant in recourse. Furthermore, regarding Approach B of the

Third View, it is open to doubt, as in the case of Approach B of the First and Second Views, whether it may be accepted in the interpretation of the 1964 Draft or in relation to the provisions of other conventions.

After all, even if any of these views are adopted with respect to the meaning of "applicable limits of liability," it will not be possible to avoid an improper result in determining the liability of the claimant and the defendant in a recourse action.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

In this writer's opinion, the fundamental causes of the various improprieties noted above are: (1) that the authors of the 1964 Draft, in providing for the invocation of the limits of liability, neglected to examine closely the connection between this Convention and other conventions or national laws and held, rather carelessly, that the limits of liability under the 1964 Draft or other conventions or national laws are capable of invocation without probing into the substance of the "applicable limits of liability"; and (2) that they failed to give full consideration to the relationship between the limitation of liability and apportionment of liability.

As stated previously, the legislative intent of Article 8 would seem to attempt to prevent the dissimilarity which a direct claim and a recourse claim may cause in the liability of the operator for the same damage. The solution which may meet this legislative intent would be only possible by properly adjusting the relations between each direct claim. The 1964 Draft provides that in some cases involving direct claims for compensation, the Convention on Aerial Collisions should apply, while other conventions or national laws, entirely separate and independent of the collisions convention, should apply in other cases. The 1964 Draft also provides that a recourse claim under the collisions convention is recognized even with respect to payment made for a direct claim under either conventions or national laws, and that the limits of liability under these conventions or laws may be invoked in any recourse claim under the Convention on Aerial Collisions. No consideration is given to the question of how to adjust direct claims, the resulting recourse claims, and the limits of liability. In this context, the proposed adjustment of each direct claim against operators of the aircraft involved in an aerial collision should be effected on an organic basis, and the mere time-serving method of making the limit of liability equal will not lead to a satisfactory solution of the problem. Therefore, this writer advocates the following proposals.

First, insofar as compensation for damage resulting from an aerial collision is concerned, it is necessary that a unified convention covering all legal relationships should be enacted on aerial collisions. In other words, insofar as compensation for damage caused by a collision is concerned, common obligation and common limits of liability<sup>35</sup> should be stipulated

<sup>35</sup> These are the charterer of aircraft, aircraft owner, air traffic control agency, and servants or agents, as well as each operator of the aircraft involved and their servants or agents. Cases where no limits of liability are made with respect to these persons are beside the question.

for responsible persons with respect to the damage resulting from an aerial collision. This is to be effective regardless of whether it concerns compensation for damage to persons or property on board one's own aircraft, whether it concerns compensation for such damage to persons or property on board another's aircraft, or whether it concerns the compensation for damage sustained by the third party on the surface.

Secondly, the provision should be made that the claimant may not recover more than the maximum limit under the Convention on Aerial Collisions, regardless of whether he makes a direct claim against one person or against several persons. In order to recognize the recourse claim relationships between defendants, to have their liability apportioned according to the existence or the degree of their respective faults, and to make the sum apportioned to one defendant equivalent to the sum obtained by multiplying the fixed maximum sum by one-tenth of his contributory fault (or his servants' or agents'), the compensation to which one injured party is entitled must be defined.

Essentially, there are two ways of doing things where there are a plurality of obligors with respect to a single, divisible liability. One possibility is that the liability of one obligor to the claimant is divided, and that each obligor has to pay only his divided share of liability in his relation to the obligee. Another possibility is that each obligor is required to pay the entire claim, so far as it concerns the claimant, provided that the obligor who pays the claim may sue other obligors for contribution within the scope of their obligations. With respect to the compensation for damage resulting from an aerial collision, it should be so stipulated from the viewpoint of protection of the injured party, as under the latter method, that the liable person receiving a direct claim from the injured party should pay compensation up to the limit of his liability under the Convention on Aerial Collisions, unless he can prove that he or his servants or agents were not at fault. The person who has paid such compensation should be able to bring a recourse claim against other liable persons, and they should bear their respective shares according to the existence of or degrees of their fault, and in conformity with the rule of apportionment of liability prescribed in the Convention on Aerial Collisions. On the other hand, insofar as the direct claim for compensation is based on the Convention on Aerial Collisions, there should be a provision in line with the one mentioned above. In other words, the claimant should not recover more than the maximum sum specified in the convention, regardless of whether he makes a direct claim against one of the persons liable or against several.

However, if there is wrongful intent or gross negligence<sup>36</sup> on the part of one or several defendants, such person or persons should bear unlimited liability.<sup>37</sup> In a case where the defendant in recourse is also guilty of wrongful intent or gross negligence, the degree of fault is equal, and he should meet the recourse claim by paying half that sum paid by the

<sup>36</sup> To be more specific, this comes under the situation contemplated in para. (a), Article 11, of the 1964 Draft.

<sup>37</sup> *Id.*, para. (b).

claimant in recourse bearing unlimited liability. Also, when the defendant in recourse is guilty only of fault, he will pay the recourse claim on the basis of the original amount of liability specified in the Convention on Aerial Collisions (*e.g.*, 250,000 francs) in proportion to the degree of his fault, but he should not do so on the basis of the sum actually paid by the claimant in recourse under unlimited liability in the direct claim. In this case, even if the defendant has received a direct claim from the injured party, he will only have to pay up to the maximum of his liability under the Convention on Aerial Collisions. Further, persons liable will share the liability in proportion to the degrees of their respective fault.

As long as the Convention on Aerial Collisions is applicable, the provision should be made that the application of other conventions or national laws will be excluded. On the enactment of the collisions convention as to on-board damage, the relationships between the Warsaw Convention and The Hague Protocol governing the relations between the persons who suffered the damage and the carrier or the operator of the aircraft should be discussed, particularly in light of national laws and the collisions convention. With respect to the surface damage, the relationship between the Rome Convention and the collisions convention will be discussed, *i.e.*, the mutual relationships between claims under the respective conventions or national laws. Unless express provision is made, problems of interpretation are liable to arise.

First of all, regarding on-board damage, if a unified convention were to be enacted, the relationship between the Convention on Aerial Collisions and other conventions or national laws presupposing the existence of contract relations should be considered as if they lay somewhere between the areas of special and general laws. Insofar as the Convention on Aerial Collisions is applicable, a provision should be made therein that the application of these other conventions or national laws is to be excluded. However, in making such provision, consideration should be given to other aspects. In order to prevent occurrence of the improper result of a variation in the amount of compensation the injured party may have, according to whether the on-board damage is due to the accident of a single aircraft or whether it is due to the accident of several aircraft, the injured party should be allowed maximum compensation under other conventions or under national laws. This should be so even where the claimant is allowed maximum recovery under the Warsaw Convention and/or The Hague Protocol.

For example, suppose a collision occurs because of the fault of both A and B, and a passenger on board A's aircraft is killed with a resulting damage of 600,000 francs. If, the carriage is "Hague carriage," and the ticket lacks the stipulation that A of the aircraft shall be subject to the limits under The Hague Protocol, P may have (in case the damage results from the accident of a single aircraft), the full compensation of 600,000 francs, since A will not have the protection of the limitation of liability. In the event that damage results from a collision in which another aircraft



is involved, unless the aforesaid exception provision is included in the Convention on Aerial Collisions, the effect of The Hague Protocol is excluded by the application of the Convention on Aerial Collisions. The result would be that *P* would have compensation of no more than 250,000 francs under Article 10 of the Convention on Aerial Collisions. However, if the exception provision is included, where *P* has made a direct claim first against *A*, he may have compensation of 600,000 francs by a single direct claim. Again, if *P* makes a direct claim first against *B*, he may have compensation of 250,000 francs and thereafter receive 350,000 francs from *A* (the balance of the total damage). The relationships of the recourse claims in this case will be discussed below.

Regarding the surface damage, the provision of Article 7 of the Rome Convention should be deleted, and it should be made clear that the scope of its application be restricted to compensation for damage caused by the accident of a single aircraft. Article 7 of the Rome Convention provides for the situation where surface damage has been sustained by the aerial collisions of foreign aircraft, but if this writer's personal view is adopted (regarding liability limits in respect to damage caused by an aerial collision) such provision will be the one in the Convention on Aerial Collisions. Furthermore, the scope of application of the Rome Convention, unless provisions are made which restrict it solely to the damage caused by the accident of single aircraft, will result in an impropriety, in that the rights of compensation under both the Rome Convention and the Convention on Aerial Collisions will apply.<sup>38</sup> The right to compensation under these conventions is nothing other than the right to compensation for damage caused by the tort of the operator.

Incidentally, it is beyond dispute that the foregoing proposals exclusively concern the compensation for damage caused by an aerial collision and do not ignore the presence of the existing conventions or of conventions to be established in the future. These other conventions, in their respective areas, set limits on the liability of the carrier, the operator, or the air traffic control agencies as well as regulate their relationships in compensation claims. Even if a Convention on Aerial Collisions incorporating the above-mentioned proposals comes into being, these conventions will retain their unique justification and necessity. It is only suggested that, insofar as compensation for damage resulting from the collision, the application of these other conventions or national laws be excluded to the extent previously mentioned. However, the relationship between the Convention on Aerial Collisions and national laws relating to compensation for claims resulting from collisions (as mentioned above, they do not concern the claims for compensation presupposing the presence of the relations of agreement for carriage) is not as acute as to require an express provision. This relationship is between the Convention and the national law dealing with the same subject and, insofar as the Convention is appropriate, the

<sup>38</sup> The example given here presupposes that both the Rome Convention and the Convention on Aerial Collisions are applicable between the operator of the foreign aircraft and the person who has suffered the damage.

application of the national laws is necessarily to be excluded.

If a Convention on Aerial Collisions were to be drafted in accordance with these proposals, what posture are the limitation of liability and the invocation of the limits of liability in a recourse action to assume? In this writer's opinion, the limitation of liability must have significance not as the limit of compensation against one person liable in respect to the same damage resulting from one accident, but as the limits paid by the person liable to one injured party, *i.e.*, as the limit of the total compensation to which one injured party is entitled with respect to the damage resulting from one accident.<sup>39</sup>

On the other hand, the invocation of the limit of liability in a recourse action has significance in determining the amounts which form the basis for apportionment between the claimant and the defendant. In other words, it is reasonable to consider that what should first be applicable to the provisions concerning the apportionment of liability is the provision concerning the invocation of the *limits* of liability.

The result when we now apply this suggestion to a recourse claim where A has borne unlimited liability because of defective entry on the ticket would be as follows: A may claim in recourse against B the sum of 600,000 francs paid to P. Upon this recourse claim, B may restrict the basic sum for apportionment, by invoking his limit of liability to P (*e.g.*, 250,000 francs). In other words, of the 600,000 francs paid by A to P, the sum of 250,000 francs is halved, under the stipulation for the apportionment of liability, *e.g.*, in a case where the respective shares of A and B in the ratio in contributory fault are equal. Accordingly, the sum to be borne by B is 125,000 francs). This sum may be said to be the one apportioned on the basis of the limits of liability under the Convention on Aerial Collisions in accordance with the rule of apportionment prescribed therein. On the other hand, further consideration may be required with respect to the sum to be borne by A, the claimant. A can make recourse claim against B for no more than 125,000 francs, although he has paid 600,000 francs to P. The sum A has to bear should be 475,000 francs. Needless to say, this sum is not equivalent to the one worked out on the basis of the limits of liability specified in the Convention on Aerial Collisions and in accordance with the rule of apportionment prescribed therein. Yet, it would be premature to conclude that this amount is unreasonable, for if a Convention on Aerial Collisions is to be drafted under the afore-

<sup>39</sup> From the legislative point of view, it may be possible to make this limitation of liability the limit of compensation of one person liable, or to make it the limit of compensation which one injured party may obtain, as mentioned here. It would be a matter of legislative policy which to adopt. However, in the case of the Convention on Aerial Collisions, it would be appropriate to follow the latter position, for it may not be deemed reasonable that the compensation to be obtained by the injured party should increase or decrease according to the number of aircraft involved in a collision and number the persons who should bear liability. Nor would it be compatible with the purpose of legislation of the Convention on Aerial Collisions, which is intended for the protection of persons liable, that the sum eventually to be borne by one liable in a recourse action should be subject to change according to the number of the aircraft involved in a collision or number of persons liable. It follows that there will be no room for the relationship of a recourse claim between A and B affecting the direct claim by P and that accordingly no inconvenience is likely to be caused when P will have to repeat his direct claim against A or B several times in order to obtain compensation.

said intent, *P* may assuredly sue *A* for the payment of the balance (*i.e.*, 350,000 francs) even after he has obtained a compensation from *B* of 250,000 francs by virtue of a direct claim. Moreover, *A* will have to pay 125,000 francs if a recourse claim is made by *B*, and eventually he will have to bear the sum of 475,000 francs. To put it another way, it may be said that *A*'s bearing this sum is based on nothing other than his proper obligation.<sup>40</sup>

Furthermore, if a Convention on Aerial Collisions is drafted as suggested previously, the basic amount for apportionment may not be below 250,000 francs in any case, insofar as the claimant is entitled to invoke the limits of liability. Accordingly, no unreasonable outcome may result with respect to the amount to be borne by the defendant.

Now, we shall examine in concrete terms what amendment or supplement should be made with respect to provisions of the 1964 Draft:

(1) In paragraph 1, Article 10 of the 1964 Draft, which prescribes the limits of liability of an operator for on-board damage, the expression "his or" should be inserted, thereby making it clear that with respect to the liability of the operator of the aircraft involved in an aerial collision, the limits of liability of the Article should be applied not only to the on-board damage with respect to another aircraft, but also to that damage on board the first aircraft. Simultaneously, a proviso to that same Article should be included expressly stating that in a case where unlimited liability or limits of liability higher in amount than those under the Article are recognized under other conventions or national laws the injured party may make a direct claim against the operator of the aircraft and obtain compensation only within the scope of the limits of liability in both cases.

(2) New provisions should be included, enunciating the liability of the operator with respect to surface damage.

(3) A statement should be made to the effect that the provisions concerning the liability of operators under the Convention shall apply *mutatis mutandis* with respect to the liability of the aircraft owner, aircraft charterer, and the air traffic control agency and their servants or agents.

(4) The provisions of Article 19 should be modified and insofar as the present Convention applies (except in the case contemplated under this author's first suggested amendment), the application of other conventions and/or national laws which could apply to the parties involved should be excluded.

In conjunction with the proposed modification of Article 19, the interpretation follows that the person who has suffered the damage may claim, with respect to Article 13, against the person or several persons liable (together or one by one), compensation in whole or in part for the damage sustained. However, in the event he has obtained compensation up to the limit of liability specified in the present Convention, he may no

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<sup>40</sup> The same is the case where unlimited liability is to be borne by *A* to *P* owing to wrongful intent or gross negligence, under the Convention on Aerial Collisions, or where higher amounts of liability are to be borne under national laws than under the Convention on Aerial Collisions.

longer make a claim against any other liable person notwithstanding the proviso to paragraph 1, Article 10 and Article 11.<sup>41</sup>

As previously indicated, this writer strongly emphasizes that the Convention on Aerial Collisions, insofar as it recognizes the limitation of liability, should provide some uniformity for liability with respect to the damage caused by an aerial collision, and the author urges that only by doing so will those improprieties arising out of the recourse liability limit provisions under the 1964 Draft be solved.<sup>42</sup>

## APPENDIX A

### 1. *First View*

The limits of liability under Article 8 become important with respect to the amounts apportioned under Article 7; yet "applicable limits of liability" have nothing to do with the degree of fault on the part of the defendant operator.

a. *Approach A*—Limits of liability under the legal obligation for compensation of the operators of the two aircraft involved in a collision are separate and independent things. Payment up to the maximum amount of liability by one operator will not affect the liability of the other.

(1) *Variation (a)*—Payment relationship under recourse claim will affect the direct claim.

(2) *Variation (b)*—Payment relationship under recourse claim will not affect the direct claim.

b. *Approach B*—Limits of Liability under the legal obligation for compensation of the operators of the two aircraft involved in a collision are related to each other. Payment up to the maximum amount of liability by one operator will extinguish or diminish the legal obligation for compensation of another within the amount of limits of liability.

(1) *Variation (a)*—Payment relationship under recourse claim will affect the direct claim.

(2) *Variation (b)*—Payment relationship under recourse claim will not affect the direct claim.

### 2. *Second View*

The limits of liability under Article 8 become important with respect to the amounts apportioned under Article 7. "Applicable limits of liability" are modified by the degree of fault of the defendant operator.

*(Approaches and Variations are the same as under the First View, supra).*

### 3. *Third View*

What is first applied in a recourse action are the provisions of Article 8. The invocation of "applicable limits of liability" determines the amount as the base for apportionment, and therefore liability is apportioned by application of Article 7.

*(Approaches and Variations are the same as under the First View, supra).*

<sup>41</sup> In the provisions of Article 13, it is desirable that the expression "the proviso to paragraph 1, Article 10 and" be added by way of caution.

<sup>42</sup> An objection may be raised that there would be no need of enacting the unified convention proposed by this writer, if a provision is made in the Convention on Aerial Collisions to the effect that the limits of liability prescribed in the Warsaw Convention or the national laws presupposing the presence of an agreement for carriage which are lower in amount than those in the Convention on Aerial Collisions shall be regarded as having been raised up to the limits of this Convention, insofar as this Convention applies, and if some modification is made of paragraph 2, Article 13, and Article 19 of the 1964 Draft. However, such revision would be no solution to the problem, for this proposal is a revision merely of the limits of liability for the on-board damage. It not only leaves questions about defense or benefit with respect to such damage, but also considers no solution whatever with respect to the surface damage.