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# INTERNATIONAL ASPECTS OF AVIATION

BY CARL H. FULDA†

## I. THE NATURE OF OUR INQUIRY

ALL THE NATIONAL REPORTERS<sup>1</sup> have stressed one fact of overriding importance: Aviation is, by its very nature, an international activity. They also have emphasized that the aviation law is built on the premise expressed in Article 1 of the Chicago Convention which provides: "The contracting States recognize that every state has complete and exclusive sovereignty over the air space above its territory." Our inquiry thus must recognize at the outset the paradox of a nationalistic principle governing an industry which cannot be hemmed in by national boundaries. It is true, as Professor Pourcelet points out, that aviation solely within the national territory is vitally important in large countries of continental size such as the United States, the Soviet Union, Canada, and India. Even in smaller countries internal commercial air transport may be sufficiently significant to require national regulation. Nevertheless, no country engaged in commercial aviation can be expected to renounce flying beyond its frontiers, where its national laws do not apply. Hence, international arrangements are needed in order to reduce, insofar as possible, what Professor Rinck calls "the citadel of sovereignty over airspace." Considerable analysis of these efforts, reflected in multilateral and bilateral treaties and conventions, is to be found in most of the national reports.

The promotion of international commercial aviation by treaties required the establishment of rules permitting the airplanes of one nation to fly

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<sup>1</sup> Ten National Reports were filed. Their authors, listed in the alphabetical order of their countries, were:

*Belgium*: Max Litvine, Chargé de Cours, Faculté de Droit, Free University of Brussels and Belgian Representative on the Legal Committee of the United Nations for the Peaceful Uses of Outer-Space.

*Canada*: Professor Michel Pourcelet, Professor, Faculté de Droit, University of Montreal.

*France*: Maître André Garnault, Paris.

*Germany*: Professor Dr. Gerd Rinck, University of Goettingen.

*Netherlands*: Dr. J. M. Ph. de Rode-Verschoor.

*Poland*: Professor Cezary Berezowski, Professor of Law, University of Warsaw.

*Spain*: Dr. Jose Bonet-Correa, Institute of Comparative Law, Barcelona.

*Sweden*: Professor Jacob Sundberg, University of Stockholm.

*U.S.A.*: Professor Oliver J. Lissitzyn, Columbia University Law School.

*Yugoslavia*: Djurica Krstic, Doctor of Law, Yugoslav Association of Comparative Law, Belgrade.

In addition, a report on our subject from the point of view of the Treaty of Rome, which created the *European Economic Community*, was submitted by Dr. Wolfgang Stabenow, principal administrator, EEC.

over or into the territory of another nation.<sup>2</sup> This calls for the exercise of the regulatory powers of governments over commercial aviation as a private or public undertaking. Also involved are questions as to the desirability of allowing the airlines freedom to determine rates and conditions of transportation and of possible conflicting treatment of national and international activities. Specifically, the attitudes of governments toward the International Air Transport Association (IATA) and other cooperative ventures on a regional basis demand elucidation. Accordingly, the articles presented here deal with these important problems.

The matters mentioned up to this point may all be classified as pertaining to the public law of international aviation since they refer to the conditions of admissibility of foreign airplanes established unilaterally by governments or by bilateral or multilateral treaties. This is, however, only one part of our subject. The other is the private law which is concerned with the relation between international airlines and their passengers and shippers, particularly with the crucial questions of liability for death, personal injury, and loss or damage to property suffered on international flights. In this field, the center of the stage is occupied by the Warsaw Convention, which is discussed in all of the articles.

## II. THE PUBLIC LAW OF INTERNATIONAL AVIATION

### A. *Conditions Of Admission For Foreign Airlines*

Article 1 of the International Air Services Transit Agreement provides that each contracting State grants to the other contracting States the so-called first and second freedoms of the air for scheduled international services, that is "the privilege to fly across its territory without landing" and "the privilege to land for non-traffic purposes."<sup>3</sup> Obviously, this is hardly a workable basis for international commercial air traffic. The crucial elements are represented by the third and fourth freedoms (to put down passengers, mail, and cargo taken on in the State of the aircraft's nationality and to take on passengers, etc. destined for the State of the aircraft's nationality) and, to a lesser extent, by the more controversial fifth freedom to embark and disembark passengers, mail, and cargo destined for or coming from the territory of any other State. These third, fourth, and fifth freedoms were granted on a multilateral basis by the International Air Transport Agreement, but that agreement is obsolete for lack of sufficient ratifications. Hence, as a practical matter, commercial landing rights must be negotiated separately with each interested nation. This explains the emphasis on the bilateral treaties by Professors Lissitzyn, Pourcelet, and Rinck.<sup>4</sup>

<sup>2</sup> Convention on International Civil Aviation (Chicago Convention), 7 Dec. 1944, art. 6, 61 Stat. 1182, T.I.A.S. 1591 (effective 4 April 1947) [hereinafter Chicago Convention]. "No scheduled international air service may be operated over or into the territory of a contracting state, except with the special permission or other authorization of that state, and in accordance with the terms of such permission and authorization."

<sup>3</sup> Most of the nations represented by the National Reports have ratified this Agreement.

<sup>4</sup> For a comprehensive study of the Bilateral Agreements to which the United States is a party see Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 248 (1964).

The major features of the bilaterals are sketched by Professors Lissitzyn, Pourcelet, and Rinck. These agreements provide for grants of the commercial freedoms which the parties accord to each other on the basis of reciprocity. The majority seem to follow the model of the Bermuda Agreement which permits restrictions on fifth freedom traffic subject to the principle that "capacity should be related . . . to traffic requirements of the area through which the airline passes after taking account of local and regional services."<sup>5</sup> All agreements contain a description of the routes and landing places which the airlines of each contracting party may exploit, and most of them provide for arbitration of disputes.

Nevertheless, there are divergencies between the attitudes of the various governments even when the bilateral agreements are on their face similar. Professor Lissitzyn points out that the United States follows a liberal interpretation of the Bermuda capacity clauses, while some other governments interpret them more restrictively. The published agreements are often supplemented by informal arrangements which sometimes impose additional restrictions.

Inevitably, a Bilateral Air Transport Agreement will be a major factor in persuading the governmental authorities of the contracting nations to grant admission to the foreign airline. The requirement of a governmental license to engage in commercial flying is embodied in the national legislations with respect to domestic aviation. It is based on the theory that the public interest requires appropriate measures of protection against unsafe and unreliable transportation. Permits for foreign air carriers usually contain some restrictive conditions which would not be imposed on domestic carriers; regulation of foreign air carriers is usually designed to help obtain the most favorable reciprocal operating rights. In any event, the existence of a Bilateral Agreement with the nation of the applicant for the foreign permit supplies a practically unanswerable affirmative argument that a grant of the application would be in the public interest.

#### B. *The Special Problem Of IATA Resolutions*

The rates and fares charged by air carriers, and their time tables, conditions of transportation, and other practices are, obviously, most relevant as to their admissibility for service to and from a foreign nation. Since these matters are the subjects of IATA Resolutions, the status of that organization in international aviation is an important element of our study.

IATA's membership includes more than one hundred airlines representing ninety percent of all scheduled international commercial aviation in the world.<sup>6</sup> It is divided into Regional Traffic Conferences, which reach their decisions by unanimous vote. Violators may be fined by the organization's enforcement office.

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<sup>5</sup> Capacity should also be related to traffic requirements between the country of origin and the countries of ultimate destination of the traffic. See McCarroll, *The Bermuda Capacity Clauses in the Jet Age*, 29 J. AIR L. & COM. 115 (1963).

<sup>6</sup> IATA, 1965 World Air Transport Statistics No. 10, p. 2. Among the non-members of IATA, Aeroflot, the Soviet airline, is probably the largest.

Professor Rinck states that German law and IATA Resolutions fit together perfectly. The German law against Restraints of Competition explicitly allows cartels among international airlines, subject to the authority of the Federal Cartel Office to prevent abuses which has not been exercised to date. This view, which is undoubtedly shared by the majority of the nations involved, seems to reflect the conviction that there is little, if any, room for competition in commercial aviation, at least insofar as rates are concerned. Hence, a world-wide cartel like IATA performs a wholesome and necessary function in eliminating disorderly competition that could upset the sound financial management of air transport.

This conclusion appears to be particularly plausible because in most countries airlines are organized in a manner which gives them a special status. In the Soviet Union, Poland, Romania, and Czechoslovakia, airlines are run by the government; only Poland seems to permit international aviation by nongovernmental enterprises with permission of the Communications Ministry. Sabena's stock is owned by the Belgian Government (sixty-five percent) and the Governments of former Belgian colonies (twenty-five percent), thus leaving only ten percent in private hands.<sup>7</sup> Similarly, private participation in Air-France is negligible, while KLM, on the other hand, has privately owned shares traded on European and American stock exchanges. The Greek airline is privately owned, and there are some privately owned airlines in France and the United Kingdom. Professor Rinck states that most other European Airlines are owned by their governments, except Swiss-Air and SAS which have seventy percent and fifty percent private ownership respectively. This seems to imply that airlines customarily must rely on governmental subsidies because they cannot attract sufficient private capital assuring satisfactory yields to investors. In this view, airlines are predominantly regarded as official or quasi-official public services which serve the national prestige and are not expected to make profits.

This attitude, however, is no longer universal. Indeed, France and Germany seem to have abandoned it. Lufthansa has earned profits for the first time in 1964 and is now described as "a stock corporation almost entirely owned by the State, but managed like a commercial enterprise."<sup>8</sup> Air-France has been profitable in 1965, and has been told by its government that it is expected to continue to be self-supporting. The contrast between the traditional European status of airlines and the American air carriers is, therefore, diminishing, if not altogether disappearing.

In the United States all airlines are entirely privately owned. They are entitled to compensation from the federal government for carrying air mail, and since the beginning of federal regulation of aviation in 1938, the Civil Aeronautics Board has been authorized to grant additional subsidies to airlines in order to enable them to "maintain and continue the

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<sup>7</sup> Belgian National Report. See also Litvine, *La Nature Juridique de la Société Anonyme Belge d'Exploitation de la Navigation Aérienne Sabena et la loi du 23 Juin 1960 l'Autorisant A Modifier Ses Statuts*, 1961 REVUE FRANCAISE DE DROIT AERIEN 103.

<sup>8</sup> German National Report.

development of air transportation to the extent . . . required for the commerce of the United States. . . .”<sup>9</sup> However, “no American air carrier with major international services has actually received a subsidy . . . since 1958.”<sup>10</sup> In other words, airlines, like all other modes of transportation, are regarded as private commercial enterprises. The Government does not own them, but it subjects them to economic regulation by prescribing that no commercial operations may be carried on without prior governmental approval. The routes and landing stops which the carrier shall use are designated in the document expressing such approval. Finally, the Government (through the CAB), may prescribe rates and other conditions of transportation.

This hybrid status of American airlines is similar to that of Western European highway and inland waterway carriage, which is also predominantly privately owned but which is subject to governmental supervision and regulation.<sup>11</sup> However, the peculiarly American feature of this system is its emphasis on competition. The American statute enumerates the matters the CAB must consider in its regulatory task as being in the public interest (development of air transportation, safety and sound economic conditions, efficient service at reasonable charges, and “competition to the extent necessary to assure the sound development of an air transportation system properly adapted to the needs of the foreign and domestic commerce of the United States. . . .”).<sup>12</sup>

Accordingly, the Civil Aeronautics Board has allowed extensive competition not only between the eleven major airlines in domestic transportation, but also on many international routes, especially on the North Atlantic, where two American carriers compete with each other and with numerous foreign airlines.<sup>13</sup> In addition, American law requires approval of the Board for agreements between airlines involving “cooperative working arrangements,” including the establishment of rates.<sup>14</sup> In the absence of such approval, agreements of this kind are subject to the antitrust laws.<sup>15</sup> In short, American aviation is living under a legal regime of regulated competition. The Government decides the extent of competition for the industry. As to the rates of individual air carriers, it insists on individual managerial initiative as the primary motivation.

This may explain why in the United States IATA is not considered

<sup>9</sup> Federal Aviation Act of 1958, 72 Stat. 754, 49 U.S.C. § 1376(b) (1964), amending Ch. 601, 52 Stat. 973 (1938) [hereinafter cited solely to 49 U.S.C.].

<sup>10</sup> National Report for the United States. The only airlines which still receive some subsidies are the local service carriers which serve smaller cities or link large centers with small cities. See FULDA, *COMPETITION IN THE REGULATED INDUSTRIES, TRANSPORTATION* 193 (1961).

<sup>11</sup> See Fulda, *The Regulation of Surface Transportations in the European Economic Community*, 12 AM. J. COMP. L. 303, 306-18 (1963).

<sup>12</sup> 49 U.S.C. § 1302 (1964).

<sup>13</sup> The American lines are Pan-Am and T.W.A. In the Pacific area Pan-Am competes with Northwest, and American Airlines has applied for permission to enter this market. A comparable situation prevails in South America.

<sup>14</sup> 49 U.S.C. § 1382 (1964).

<sup>15</sup> 49 U.S.C. § 1384 (1964). See FULDA, *op. cit. supra* note 10, at 244 for a discussion of the Board's practice to permit agreements as to joint rates (rates for a journey which begins on one and ends on another airline), but to prohibit agreements as to rates each carrier may charge on its own line.

with the same enthusiasm it seems to encounter elsewhere. The American attitude is epitomized in the *Statement on United States International Air Transport Policy* prepared by a governmental committee and approved by the President on 24 April 1963, which refers to IATA as follows:

[T]his multilateral mechanism, though it has some drawbacks, seems to be the most practical one we can achieve, and it should be maintained. We cannot, however, abdicate our responsibility to protect the traveller and the shipper; we will continue to press for rates we consider reasonable. To provide for more effective governmental influence on rates, Congress should adopt legislation which would give to the Civil Aeronautics Board authority, subject to approval by the President, to control rates in international air transport to and from the United States.

Our efforts to secure reasonable rates can also be furthered by direct government-to-government discussions, initiated by the United States concerning general rate levels; by continued United States support of practicable means which help to achieve reasonable rates, such as charter services; and by disapproving recommended IATA rates if they are clearly unreasonable.<sup>16</sup>

Although the American Congress has not yet enlarged the Board's power over international rates (which is limited to the removal of unjust discriminations), the history of the Board's relations with IATA is one of continuous pressure and attempts at persuasion to adopt reasonable rates.<sup>17</sup> In most cases the Board has accepted, albeit reluctantly, the IATA Resolutions, probably on the ground that disapproval was not a practical alternative.<sup>18</sup>

The Board's attitude expresses the philosophy of the American carriers that lower fares would create a mass market yielding high returns, while IATA's reflects the economic concepts of state-owned public services.

### C. Prospects Of Multilateral Integration

At this point the article by Dr. Stabenow for the European Economic Community must be considered. The achievements of the Community to date with regard to the establishment of a Common Transport Policy do not include aviation. It is true that the Treaty of Rome authorizes the Council of Ministers of the Community to make appropriate provisions for air transport, but this power has not yet been used. In fact, it is disputed whether the provisions of the Treaty other than those on Transport are applicable to the aviation industry.<sup>19</sup> Nevertheless, the European Assembly has given strong support to the EEC Commission's declaration of 20 October 1964, which called for Community action with regard to integration of air transportation. Both bodies stressed the desirability of developing air traffic through low fares based on costs and eliminating state subsidies for airlines, thus allowing the airlines to rely primarily on their own management initiative. Particular attention was called to the

<sup>16</sup> 30 J. AIR L. & COM. 76, 79 (1964).

<sup>17</sup> Keyes, *The Making of International Air Fares and the Prospects for their Control*, 30 J. AIR L. & COM. 173 (1964).

<sup>18</sup> FULDA, *op. cit. supra* note 10, at 248-51.

<sup>19</sup> Dr. Stabenow reports that the European Assembly, the EEC Commission, and the governments of Italy and the Netherlands answer this question in the affirmative, while the remaining four member states answer in the negative.

prolonged negotiations for the establishment of Air-Union which would permit improvement of the competitive position of its members (originally Air-France, Lufthansa, Sabena, and Alitalia; subsequently joined by KLM and Luxair) vis-à-vis its American competitors. Professor Pourcelet states that most European experts are unanimous in their conviction that further integration of the various European airlines is necessary in order to achieve better economic results; and he attributes the failure to achieve "Air-Union" to the fact that most of the governments concerned do not share this conviction or, at least, are unwilling to renounce their sovereignty in aviation matters.<sup>20</sup> This attitude contrasts with that prevailing in commerce and industry where important mergers are taking place.

Dr. Stabenow's article outlines in detail the various measures which could, and in the opinion of the EEC Commission and the European Assembly, should be taken, pursuant to the Treaty of Rome,<sup>21</sup> to establish a common aviation policy for the European Economic Community, including appropriate rules for the relationship of the Community with third countries. No one knows if or when these efforts will be successful. Yet, it would seem that the economic conditions of international flying have changed since the fifties to such an extent as to make possible self-supporting air services which are efficiently operated.<sup>22</sup> Hence, it is hoped that a private or inter-governmental machinery can be established to encourage price-cutting and traffic-increasing rate initiatives, at least in high density markets like the North Atlantic.<sup>23</sup>

There are, of course, a number of arrangements for international coordination and cooperation in economic matters such as pooling agreements for joint operation of the same routes in order to achieve lower fares by substantial cost reductions, and regional organizations such as Air-Afrique created by a multilateral treaty among eleven republics.<sup>24</sup> Perhaps these will be regarded as precedents for future, more far-reaching multilateral efforts.

### III. THE PRIVATE LAW OF INTERNATIONAL AVIATION

#### A. *National And International Rules*

In the public law sector, modern international commercial aviation is still in what a member of the European Assembly quoted by Professor Pourcelet has called "the stone age of bilateral negotiations." By contrast, in the private law sector multilateralism has prevailed since the signing

<sup>20</sup> *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 22, pt. 1 (Airlines) at 1054 (1956). The Director-General of IATA told a Committee of the American Congress in 1956 that Governments want "the prestige of a flag line" and that all the different nations have "different points of view" and are "all nationalistic."

<sup>21</sup> Primarily involved are Arts. 48 & 49 (free movement of salaried workers), Arts. 52-58 (freedom of establishment), Art. 221 (national treatment with respect to financial participation in corporate enterprises), Art. 85 (rules of competition), Art. 92 (state subsidies), and Art. 99 (fiscal harmonization).

<sup>22</sup> Keyes, *supra* note 17, at 191. Lufthansa and SAS are cited as leaders in cost cutting.

<sup>23</sup> *Id.* at 192. "National-interest" routes, *i.e.*, routes flown because this is considered necessary in the national interest regardless of commercial unattractiveness, may continue to be subsidized, according to the Chairman of the Civil Aeronautics Board.

<sup>24</sup> Mankiewicz, *Aircraft Operated by International Operating Agencies*, 31 J. AIR L. & COM. 304 (1965).

of the Warsaw Convention in 1929. That Convention is applicable to international flights as defined in Article 1. National flights (those beginning and ending within one country), are governed by the national law of that country whose laws may or may not differ from the rules of the Convention.

The internal law of the United States and of Canada, due to their federal structure, varies from state to state or province to province. The American law is particularly complex because of the absence of uniform legislation and uniform conflict rules. Approximately a dozen American states still have statutes which limit the liability of an air carrier in actions brought by the survivors of air crashes. These limitations range from \$20,000 to \$30,000 per person.<sup>25</sup> They are remnants of the past when actions for wrongful death were either not recognized or were admitted only with restrictions. In three-fourths of the states there are no limitations, and verdicts in six figures are not unusual.

In most other countries discrepancies between the international and internal law have been eliminated or reduced. In Belgium and France the rules of the Convention have been incorporated into the internal laws by specific reference. In Germany, the statute governing domestic aviation has re-enacted the Warsaw rules, with some significant exceptions and additions.<sup>26</sup> However, such uniformity is desirable and practicable only if the uniform international rules satisfy all those who are expected to live under them. This goal is difficult to achieve. There have been, until recently, three groups of countries with different regimes governing international civil aviation: Those who adhere to the Warsaw Convention in its original form; those who have ratified The Hague Protocol of 1955, amending the Warsaw Convention; and those who have never adhered to the Convention. Recently, a fourth category has been added. The United States gave notice of denunciation on 15 November 1965, but withdrew that notice on 14 May 1966, after an informal agreement had been reached with the airlines flying to and from the United States for a substantial change of the Convention rules.<sup>27</sup>

Under these circumstances, the divergencies between national and international rules constitute only one aspect of our problem. The other, more serious aspect is the present disarray in the international field.

### B. *Air Carriers' Liability Under The Warsaw Convention*

Article 17 of the Convention provides that,

The carrier shall be liable for damage sustained in the event of the death or

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<sup>25</sup> Sand, *Air Carriers' Limitation of Liability and Air Passengers' Accident Compensation under the Warsaw Convention*, 28 J. AIR L. & COM. 260, 264 (1961).

<sup>26</sup> German National Report. The exceptions relate to liability for delay and to unlimited liability for misconduct. As to the latter topic, the German law is more severe than the Convention as amended by The Hague Protocol. The German law added a provision requiring the German Air Line to provide its passengers with accident insurance in the amount of \$8,750 which is due even if the air carrier can prove lack of fault.

<sup>27</sup> See Kreindler, *The Denunciation of the Warsaw Convention*, 31 J. AIR L. & COM. 291 (1965). The documents accompanying the withdrawal of the denunciation are reprinted in 32 J. AIR L. & COM. 243-48 (1966).

wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

This presumption of liability may be rebutted if the carrier proves "that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Absent such proof, the carrier's liability is limited to \$8,300. This amount has been doubled by The Hague Protocol. Higher limits may be agreed upon by special contract between the carrier and the passenger.

The limitations of liability do not apply if death or injury is caused by "wilful misconduct or by such default . . . as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct." In that event, the carrier will be liable in the full amount of the damage as found by the court. The Hague Protocol changed this to provide for full recovery of all damages proven by plaintiff if it is shown "that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result."

In Germany, which, unlike the United States, ratified the Hague amendments, the new language has been interpreted as requiring intentional or conscious negligence as a prerequisite for unlimited recovery, while the original language was construed as allowing full recovery in cases of gross negligence. In the United States wilful misconduct has been defined as including "reckless disregard of the consequences of [the carrier's] . . . performance"<sup>28</sup> or "carelessness without regard to the consequences." The difference between these two formulations may be hardly perceptible; yet, it has been said that only under the latter interpretation would it be enough for the pilot to "realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless."<sup>29</sup> Thus, these two interpretations of the original text may not be consistent. The second one, which coincides with the German concept of gross negligence, would not be admissible under The Hague Protocol. More important, the notion that pilots may be so reckless or bent on suicide as not to care whether they will crash is not very plausible.

If the original language may be subject to conflicting interpretations by courts in the same jurisdiction, this is even more likely when courts of different countries are called upon to interpret the same Treaty provision. Differences in language and legal concepts increase the possibility of varying readings, particularly when courts must struggle with the appraisal of complicated facts. Thus, there has been controversy as to whether "wilful misconduct" is a correct translation of the French term "dol" in the original Warsaw text. The latter may be more accurately expressed as intentional harm. Yet, even the higher courts in France have

<sup>28</sup> *KLM v. Tuller*, 292 F.2d 775 (D.C. Cir. 1961). See also *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955).

<sup>29</sup> *Berner v. British Commonwealth Pac. Airlines*, 346 F.2d 532, 537 (2d Cir. 1965).

followed a tendency of imposing unlimited liability on air carriers which the French National Report deploras as contrary to the spirit of the Convention and of The Hague Protocol.

Similar difficulties arise with regard to the interpretation of Article 19 which imposes liability on the carrier for damages "occasioned by delay in the transportation by air of passengers, baggage or goods." Questions have been raised whether cancellation of a flight, or a detour, could or should be treated in the same manner as non-observance of a pre-arranged time schedule, and the effect of national legislation and jurisprudence on the interpretation of the international Treaty.

### *C. The Search For A Uniform Principle*

The search for a new approach appears to be particularly urgent in view of the American insistence that \$8,300, or even twice that amount, as a limit of recovery for air-crash victims is intolerable. The liability limitation of the Warsaw Convention was acceptable in 1929 as a protective device for an infant industry. This approach, perfectly reasonable at that time, appears now as antediluvian. But it does not necessarily follow that there should be no limitation whatever. A reasonable limitation which would still protect the industry against extraordinary risks but, at the same time, be fair to the average passenger may well be acceptable. The difficulty would then be to find the correct figure.

Possibly, this task could be simplified if there were some general commitments about insurance arrangements. Although the Convention does not require it, there is a general usage of airlines to secure insurance for their passengers. A number of countries, including Spain and Germany, have filled this gap by supplementary national legislation. Similar proposals in the United States have been defeated.<sup>30</sup> Passengers can, of course, secure insurance for themselves at relatively low cost, but this should not relieve the airlines. Availability of insurance, whether on a voluntary or compulsory basis,<sup>31</sup> would not solve the vexing problem of Article 25 of the Convention with its tendencies to bring about contradictory results.

At this point the "provisional arrangement" concluded by the United States Department of State with numerous foreign and domestic airlines "carrying well over ninety percent of Americans in international travel" must be considered.<sup>32</sup> It provides that "airlines in international travel will be absolutely liable up to \$75,000 per passenger regardless of any fault or negligence." There will be no limit if the carrier is guilty of wilful misconduct, but those guilty of sabotage or persons claiming on their behalf may not recover.

The idea of liability without fault, which thus becomes for the first time a controlling part of international air law, is no longer as revolu-

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<sup>30</sup> Sand, *supra* note 25, at 270-72.

<sup>31</sup> It should be noted that compulsory liability insurance for automobile accidents, which are infinitely more numerous and claim many more victims than airplane accidents, is in general use in Europe but exists in only three states of the United States.

<sup>32</sup> See 32 J. AIR L. & COM. 247 (1966) for a list of these carriers.

tionary as it once was believed to be on both sides of the Atlantic. It has gained universal acceptance in the field of industrial accidents on the ground that a fair distribution of risks requires liability on the part of the enterprise. As for automobile accidents, French case law recognizes strict liability.<sup>33</sup> Article 7 of the German Law on Automobile Traffic recognizes the same principle, but only up to \$62,500 for death, allowing the plaintiff to prove fault if he wishes to obtain a higher judgment.

American law now recognizes strict liability in complaints brought by retail buyers against manufacturers of food and other products which, if defective, are dangerous to their users. The highest court of New York recently allowed the heirs of a person killed in an air crash to recover against the manufacturer of the plane which had a faulty altimeter.<sup>34</sup> These decisions reflect the philosophy that "the humanitarian social conscience of today is much more concerned with the victims who get hurt by our modern devices than was the social conscience of the Victorian period"<sup>35</sup> when liability without fault appeared to be inconceivable. Under the modern view the losses of the few should be distributed to the many by the enterprises which engage in potentially hazardous activities. Strict liability is the price they must pay to society<sup>36</sup> for foreseeable harm which may result from their activities. This is particularly pertinent with regard to common carriers.

It follows that strict liability, with an adequate limitation, would fit into the legal systems of the nations engaged in international flying and should, therefore, be acceptable to all of them. It is well adapted to the exigencies of modern life and to the attainment of a truly international order, where justice is not crippled by forum shopping or by the impossibility of proving wilful misconduct<sup>37</sup> or by conflicting notions as to what amounts to such misconduct.

Nevertheless, the "provisional arrangement" of May 1966 is not the answer to all our problems, but merely points the way to uniform solutions yet to be reached. In the first place, the arrangement is an agreement between the United States Department of State and numerous airlines modifying the terms of an international treaty. Obviously, this unorthodox, if not unique, procedure could only be a temporary measure which must be replaced by formal amendments to the Warsaw Convention. Accordingly, the United States Department of State announced that a new diplomatic conference must be held "at some future date, at which

<sup>33</sup> *Jandeur v. Galeries Belfortaises*, 13 Feb. 1930, [1930] *Sirey Jurisprudence I.* 57 (Fr.). It should be noted that "force majeure" has been recognized by the French courts as a defense to automobile accident damage claims, while in the "provisional arrangement" the participating air carriers have waived any defense under Art. 20 of the Warsaw Convention. 32 *J. AIR L. & COM.* 248 (1966).

<sup>34</sup> *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963).

<sup>35</sup> Keeton, *Products Liability—The Nature and Extent of Strict Liability*, 1964 *ILL. L. F.* 693, 694.

<sup>36</sup> *Id.* at 695. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* 54 (1951).

<sup>37</sup> *Berguido v. Eastern Air Lines, Inc.*, 317 F.2d 628 (3d Cir. 1963), and *Grey v. American Air Lines*, 227 F.2d 282 (2d Cir. 1955) emphasize the difficulties of such proof. In the *Berguido* case a decision based on a finding of wilful misconduct of the airline was reversed on the ground that it was based on inadmissible testimony.

time appropriate modifications to the arrangement can be made. Prior to the conference, all interested parties will be invited to present their views on all aspects of the issue.<sup>38</sup>

It is to be hoped that this conference will take place soon because the provisional arrangement has increased the fragmentation of the law of liability for accidents in international aviation. As noted above, it applies only to flights which include points in the United States. Consequently, international flights are now governed by more different regimes than ever before: The rule of the provisional arrangement, The Hague Protocol, the original Warsaw Convention, and the rules of the non-member States. This situation should not be permitted to endure, and a permanent special rule for the United States would be most undesirable and, indeed, indefensible.

The efforts of the future should therefore be directed to restoration of international uniformity on a new basis. It is respectfully submitted that the provisional arrangement offers such a basis, and that its principles may well be generally adopted. The philosophical, legal, and moral justifications of liability without fault, particularly when limited by a reasonable ceiling, have been explained above. The only serious objection may be directed against the particular figure of \$75,000.<sup>39</sup> It will be argued that this divides the world into have and have-not nations because air travelers from less developed countries are not "worth" that much in monetary terms, and, therefore, air carriers will litigate claims for the purpose of proving that the claimants are entitled to less than the maximum amount.

This does not appear to be convincing. In the first place, persons in underdeveloped countries who can afford to travel by air are likely to be "worth" more than the present low limits, particularly when they can look forward to many years of gainful employment. Moreover, these people have an interest in air travel but may be deterred by lack of adequate insurance facilities. Universal application of the provisional arrangement would remove this obstacle because these travelers would then no longer need insurance. All claimants are on notice that, within the limits of absolute liability, they must prove damages. Hence, excessive claims should be rare, and a reasonable settlement policy of the airlines should take care of most of them. Certainly, the burden on the airlines, which can easily protect themselves by insurance, is minimal, while the benefits for the victims of accidents or their survivors, who need compensation most urgently, are immense. In most cases, they will receive adequate awards without the delays of accident investigation and litigation.<sup>40</sup>

All told, it is hoped that at the next International Congress in 1970 the successor of the present general reporter will be able to record substantial progress along the lines indicated above.

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<sup>38</sup> 32 J. AIR L. & COM. 246 (1966).

<sup>39</sup> *Id.* at 248. This includes legal fees and costs. In countries where fees and costs are separately awarded, the limit of liability is \$58,000.

<sup>40</sup> *Id.* at 245.