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# THE INTERNATIONAL FACTORS IN GERMAN AIR TRANSPORT†

BY DR. GERD RINCK††

## I. INTRODUCTION

FOR THE SMALLER, closely grouped countries such as Germany, the superiority of air travel is best demonstrated over the long distances of international transport. The question therefore arises as to the extent the States take into account the international character of aviation and more precisely if they have different rules for national and international air transport. Few fields of human activity lend themselves more readily to unification of the law than does aviation.

The preponderantly international character of aviation could shape the law in five main respects: (1) with reference to the status of the air carrier, (2) in administrative control (regulating prices of or admission to air transport), (3) in international cartels and trusts, (4) in official bilateral agreements, and, finally, (5) with reference to the system of liability between carrier and user.<sup>1</sup> The purpose of this article is to present an overview of Germany's response to these five areas.

## II. THE LEGAL STATUS OF AIR CARRIERS IN GERMANY

Neither the Aviation Act<sup>2</sup> nor the Regulations for the Admission to Aviation<sup>3</sup> provide for a specified legal status of the carrier. Since Germany is left without a specific rule, the applicant who desires to undertake transportation by air must prove his economic capacity. Experience under the relevant regulation indicates that a corporation is generally the only applicant with the requisite economic capacity to undertake the business of transportation by air. Under this regulation the applicant must submit (1) evidence of his economic capacity, (2) on demand by the authority, the by-laws of the corporation, including the most recent balance sheet, and (3) data concerning the company's capital structure. There is, however, no rule limiting air carriers to corporate enterprises. There are instances where individual businessmen have been allowed to conduct air services.

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<sup>1</sup> By this arrangement the author has followed the recommendations of the *rapporteur générale*, Professor Carl H. Fulda.

<sup>2</sup> Law of 22 Oct. 1965, *Luftverkehrsgesetz* (LUFTVG), in *BUNDESGESETZBL I*, 1729 (Ger. 1965).

<sup>3</sup> Law of 19 June 1964, *Luftverkehrszulassungsordnung*, in *BUNDESGESETZBL I*, 370 (Ger. 1964).

In order to establish the business of an air carrier, a certificate of admission is required. This must be granted unless "facts justify the assumption that public safety and order may be endangered." This formula is common in German economic law, and corresponds with the general clause which the public authorities and police utilize in securing public safety and order. Technical as well as economic inefficiency may constitute a danger to public safety. If, however, no facts to that effect can be proved, the applicant must be admitted. While the wording of the act does not clearly establish this right, the German constitution requires free access for everyone to every trade or profession unless evidence is shown that such trade or profession would violate law or public order.<sup>4</sup> Since every applicant has a right to be admitted to air transportation, there is no room for discretion by the authority<sup>5</sup> with regard to the consideration of such an application.

It is the undisputed policy of the Federal Republic that the government must provide adequate transportation facilities for everyone. Transportation is considered a public utility for which the state is responsible. This point of view is effectively applied in all European States. Scheduled common carriers, therefore, are state-owned in practically all European countries with the exception of Swiss Air and SAS, of which seventy and fifty percent respectively are held as private property.<sup>6</sup> In Germany, Lufthansa is the only enterprise which offers scheduled services in intra-state as well as in international traffic. Lufthansa is a joint stock company whose shares are seventy-five percent owned by the federal government and, to a small extent, by state agencies. In 1966, when twenty-five percent of the stock was sold to the public,<sup>7</sup> the shares experienced a remarkable increase in trading. During the first nine years of its existence, Lufthansa had suffered deficits which were covered by loans from the federal government. When, in 1964-1965, the balance sheets showed gains, the loans given by the government were transformed into capital stock<sup>8</sup> with the result that Lufthansa is no longer a debtor but a private corporation of which seventy-five percent is owned by the government. The company is managed strictly on business principles with a supervisory board consisting largely of officials and other state representatives. Aside from this board, the government has no possibility to intervene in the business of "its own" company.

Of the other fifteen carriers<sup>9</sup> presently providing non-scheduled services and charter flights in the Federal Republic, probably the largest is Condor-Flugdienst GmbH, whose shares are fully owned by Lufthansa. In essence, therefore, the air transport business in the Federal Republic is carried on as a state-owned public utility organized in a big joint stock company.

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<sup>4</sup> 3 BACHOF, GRUNDRECHTE pt. 1, at 164, 222 (1958).

<sup>5</sup> Gimbel, *Neue Juristische Wochenschrift* 19 (1963).

<sup>6</sup> *Die Zeit*, 30 April 1965, p. 33.

<sup>7</sup> *Frankfurter Allgemeine Zeitung*, 30 Sept. 1965; and 5 March 1966.

<sup>8</sup> *Frankfurter Allgemeine Zeitung*, 18 June 1965.

<sup>9</sup> See REUSS, *JAHRBUCH DER LUFTFAHRT* 286-95 (1965).

Only a small section of the non-scheduled air services is strictly in private hands.

### III. ADMINISTRATIVE CONTROL IN GERMAN AIR TRANSPORT

As an additional requirement to the general license of the carrier, scheduled services need a special permission for each route.<sup>10</sup> The permission may be denied if the scheduled service in question would be contrary to the "public interest." This rule, however, is in remarkable contrast to the section of the law dealing with non-scheduled services. Although the latter requires no license, they may, however, be subjected to certain conditions or restrictions. The supervisory authority may even forbid the establishment of some routes (but not the non-scheduled services as a whole). These restrictions are legal if such services are, in substance, judged to be contrary to the "public interest in transportation." This differentiation between "public interest" for scheduled services and "public interest in transportation" for non-scheduled services is a play on words and disappears when closely scrutinized.

#### A. Licensing Of Scheduled Services

The question arises as to whether these licensing regulations are in accordance with Article 12, paragraph 1 of the German constitution, which guarantees free access to every trade and profession. Nevertheless, every scheduled air service is dependent on previous licensing, and the license may be denied if the service in question is found to be contrary to the public interest. The requirements as to what constitutes public interest are based on allegedly objective data upon which the applicant cannot possibly have any influence. Even if the applicant possesses first-class qualifications and proves the highest efficiency, the access to air transportation will be barred unless these requirements are met. This is an absolute restriction for admission<sup>11</sup> which, according to the Federal Constitutional Court,<sup>12</sup> is of a legal nature only when applied by the competent authorities in defense against serious dangers to some overwhelming public interest. This legal doctrine, established by the highest court in Germany, is now generally accepted. Applied to transportation it must be said that the nation has a great interest in regular services by rail, bus, and air.<sup>13</sup> Moreover, adequate transportation facilities by air are a matter of such overwhelming public interest<sup>14</sup> that absolute restrictions for admission may, therefore, be legal.

With regard to the railways, it is recognized by all German courts<sup>15</sup>

<sup>10</sup> LUFTVG, § 31, para. 1 (Ger.). The federal constitution was amended in order to allow for federal administration in aviation, § 87(d) of the Grundgesetz, as amended, 6 Feb. 1961.

<sup>11</sup> Gimbel, *op. cit. supra* note 5, at 19. *But see* Graumann, *Neue Juristische Wochenschrift* 1487 (1963), where it is suggested that not the access to the trade but merely the details of trading be restricted.

<sup>12</sup> Judgment of 11 June 1958, vol. 7, p. 377, 408.

<sup>13</sup> Federal Constitutional Court decree, 8 June 1960, vol. 11, p. 168, 184 (transport by car).

<sup>14</sup> Gimbel, *op. cit. supra* note 5, at 19 n.13.

<sup>15</sup> See, *e.g.*, Federal Constitutional Court, vol. 16, p. 147, 148; Federal Administrative Court, vol. 18, p. 113, 115; and Federal Civil Court, vol. 26, p. 42, 46.

that they must serve unprofitable lines and, therefore, deserve protection on profitable ones. The losses originated from unprofitable lines are reduced by gains from the profitable services. Because the railways in Germany are owned and run by the State, it is a matter of public interest that the burden on the public budget be reduced by profits from other lines. It is, therefore, compatible with the constitution if competition is reduced or excluded by state intervention on the profitable lines. The same considerations apply to Lufthansa. It serves the public interest, hence its losses were, up to 1963, covered by the federal budget. The general interest, therefore, demands not only that adequate air transport be offered, but also that the burden on the public finance be reduced as far as possible. It is, therefore, legal that new lines be permitted only if they will not impair the financial interest of Lufthansa.<sup>16</sup>

### B. *The Public Interest In Transportation*

The public interest comprises considerations of general policy and transport policy as well as legal tradition and even aspects of social policy (*i.e.*, support of smaller enterprises).<sup>17</sup> The aviation act keeps within this large framework by allowing State intervention in non-scheduled services provided that "the public interest in transportation" is endangered.

The Federal Constitutional Court itself approved the formula of "public interest in transportation," which the legislature defined more precisely in an act regulating the transportation of persons.<sup>18</sup> According to that act, the public interest in transportation is endangered if the present means of transportation are sufficient to meet the demand or if the existing enterprises declare their readiness to establish new lines to meet a still unsatisfied demand. Those are the detailed consequences to be derived from the general concept of public interest in transportation. Lower courts have accepted these regulations as constitutional.<sup>19</sup> It must be admitted that this interpretation of the constitution and of the various acts favors those enterprises and airlines which are already in business and hampers the newcomers. This is, however, an inevitable consequence of the consideration of the public interest in transportation. To date the compliance of this interpretation with the constitution has not been questioned.<sup>20</sup>

The courts will decide in a particular case whether or not the "public interest in transportation" is rightly interpreted. If a license is denied to a newcomer, the authority must prove that the newcomer would threaten the existence of Lufthansa or at least its financial stability.

### C. *Scheduled And Non-Scheduled Services*

Since any damage to Lufthansa would be contrary to the public interest,

<sup>16</sup> Abraham, 1954 ZEITSCHRIFT FUER LUFTRECHT 151 [hereinafter ZLR]; Gimbel, *op. cit. supra* note 5, at 21 n.28.

<sup>17</sup> Federal Constitutional Court, vol. 17, p. 232, 243; vol. 13, p. 97, 113.

<sup>18</sup> Law of 21 March 1961, [1961] Personenbefoerderungsgesetz § 13, para. 2 (Ger.), which was prompted by and is in accord with the decree by the Federal Constitutional Court of 8 June 1960, vol. 11, p. 168, 191.

<sup>19</sup> FIELITZ, MEIER & MONTIGEL, PERSONENBEFOERDERUNGSESETZ § 13 n.9 (1963).

<sup>20</sup> *Contra*, BIDINGER, PERSONENBEFOERDERUNGSESETZ § 13 n.36 (1961).

non-scheduled air services may be subject to conditions or restrictions,<sup>21</sup> and some applications may even be refused. However, as a matter of legal principle, non-scheduled services need no permission. They are merely subject to State interference.<sup>22</sup>

Scheduled services may pose a more serious threat to Lufthansa. It is, therefore, appropriate that scheduled services should require a previous permission. For scheduled and non-scheduled applicants the examination must be the same: the license for scheduled services and the restriction on non-scheduled services depend on the interpretation as to what constitutes the public interest in efficient and profitable transportation facilities. This interest is prejudiced if the new service is meant to meet a demand which is already served by Lufthansa or will soon be served by it. The conclusion, therefore, is that there is no substantial difference between the "public interest" standard applied to scheduled carriers and the "public interest in transportation" standard applied to non-scheduled applicants.

In German law there is no difference between national and international scheduled services, nor between national and international non-scheduled services. The public interest in transportation, however, requires the public authority to consider the condition of the industry already existing in Germany. Foreign airlines have no absolute right to be admitted. German sovereignty and the national interest oblige the federal government to protect the profitability of national airlines rather than foreign airlines.

However, international law may create situations where the Federal Republic will have to consider foreign interests. Bilateral agreements may grant foreign airlines a right to be admitted to service within the Federal Republic. These agreements require the consent of the legislature under Article 59, paragraph 2 of the constitution. If consent is given, the agreement is the equivalent of a national act and has precedence over the special permission required for a scheduled carrier. If, therefore, a bilateral agreement conveys to a foreign airline the right to operate in Germany, then the admission may not be denied as contrary to the public interest. In this regard law and practice are less strict in Germany than in the United States.

#### D. Tariffs And Conditions

Tariffs, time schedules, and conditions of contracts must be approved for every route. This control, exercised by the Federal Ministry of Transport, has not caused any difficulty nor has it prejudiced international transportation because the authorization is always given if tariffs, time schedules, and conditions correspond to International Air Transport Association (IATA) resolutions.

Actually, all bilateral agreements entered into by the Federal Republic refer to IATA resolutions. These agreements expressly state that licenses

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<sup>21</sup> Meyer, 1954 ZLR 248; Rinck, 1954 ZLR 152; Graumann, *Neue Juristische Wochenschrift* 1488 (1963); Abraham, 1954 ZEITSCHRIFT FUER LUFTRECHT UND WELTRAUMRECHTSFRAGEN 151 [hereinafter ZLW]. *Contra*, Gimbel, *op. cit. supra* note 5, at 20.

<sup>22</sup> Darsow, 1959 ZLR 84.

and permissions shall be granted on an IATA basis. This does not mean, however, that the Federal Republic subjects itself to present and future IATA resolutions. The IATA resolutions shall merely be considered, but in practice they are followed. In this way, the Federal Republic follows the pattern of the Bermuda Agreement<sup>23</sup> and the recommendations made by the Strasbourg-European Aviation Conference of 1929.<sup>24</sup>

As for non-scheduled services, German law does not expressly provide that tariffs and conditions need previous approval by an authority. In this respect non-scheduled services are free from regulations; but if their operations prove contrary to public interest, the Federal Ministry of Transport may subject them to the conditions and restrictions discussed above. This provides a way in which tariffs and conditions of transport could be prescribed even for non-scheduled services.<sup>25</sup> However, as of now, this has not been done.<sup>26</sup>

#### IV. APPROVAL OF IATA RESOLUTIONS

The International Air Transport Association is probably the biggest international cartel in all fields of economic life with more than ninety airlines as members. In its special traffic and tariff conferences, fares, time schedules, and conditions of contract are agreed upon. Resolutions as well as recommendations require unanimity of the members concerned.<sup>27</sup> While recommendations have no binding force, disregard of resolutions carries penalties up to \$25,000. The IATA statutes take into account that an airline may, under its national law, be obliged to submit all IATA resolutions to domestic authorities for approval. Every member of IATA must inform all other members if such a domestic authorization is required. If the national authority refuses the approval, the resolution becomes void as against all IATA members. Such instance occurred in 1964, when IATA had forbidden its members to show films during flight. This resolution was not approved by the United States Civil Aeronautics Board (CAB) and, therefore, never came into force. If an IATA resolution is approved by national authorities under conditions or restrictions, the other IATA members must decide within thirty days whether the resolution shall be void or whether it shall be binding upon all members with the restrictions or conditions incorporated.<sup>28</sup> The latter attitude is the rule.

There is no conflict between German law and IATA procedure. The antitrust law of the Federal Republic does not apply, and the airlines may engage in restrictive practices or agreements as far as international air transport is concerned. With reference to national transport, the law against restrictive trade practices permits cartels in all these fields where

<sup>23</sup> Annex No. 2 (b), (d), reproduced in 3 MEYER, LUFTFAHRTABKOMMEN 302; CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 560 (1962).

<sup>24</sup> Art. 7 No. 2; CHENG, *op. cit. supra* note 23, at 244.

<sup>25</sup> RINCK, FESTSCHRIFT FUER RIESE 503 (1964).

<sup>26</sup> Rudolf, 1964 ZLW 215.

<sup>27</sup> IATA, ARTICLES OF ASSOCIATION 61 (6th ed. 1964) (art. 7(1), provisions for traffic conferences).

<sup>28</sup> IATA, MANUAL OF TRAFFIC CONFERENCE RESOLUTIONS No. 001 (1965).

the tariffs or conditions of contract are subject to government approval. Since this approval is required under German law the result is that restrictive trade practices are allowed with reference to tariffs and conditions of contract. It is sufficient that agreements of these cartels or their restrictive practices (*i.e.*, the fares and time schedules) are controlled by the Federal Ministry of Transport.<sup>29</sup> The federal antitrust authority has control over abusive practices in international, but not in national air transport. No intervention by the antitrust authorities has yet occurred.

All IATA resolutions concerning tariffs, conditions, or time schedules require government approval under German law. As a rule, this approval has been given, so that Lufthansa conducts its business exclusively under IATA tariffs and conditions of contract.<sup>30</sup> In that connection the words "conditions of contract" have a wide meaning. They include even the admission of agents and air freight forwarders.

When asked to approve IATA resolutions the Federal Ministry of Transport need only consider the public interest. The conflicting interests of competing carriers or agents cannot be considered by the government. Therefore, if approval is given, no individual, carrier, or air freight forwarder will be heard in court.<sup>31</sup> It is doubtful whether or not regulations for the transport of dangerous goods such as nuclear or inflammable matter can be regarded as conditions of contract and, therefore, subject to government approval. This problem, however, has no practical bearing since by Article 27, paragraph 1 of the constitution such dangerous goods may be carried with special permission only. Those IATA resolutions in this field that have been accepted by the Federal Ministry of Transport have become obligatory for all German services, even for those carriers who are not IATA members. Therefore, these IATA regulations are part of the German law.<sup>32</sup>

#### V. GERMAN BILATERAL AND MULTILATERAL AIR TRANSPORT AGREEMENTS

If a State subsidizes its national airline, it is only natural that the government try to shield that airline from foreign competition. This situation exists in practically every State including Germany. Foreign airlines, therefore, need permission for each service they plan. This principle is laid down in Article 6 of the Chicago Convention.

All endeavors to weaken this citadel of sovereignty in air space have failed. Some liberalization was introduced by the Transit Agreement of 7 December 1944,<sup>33</sup> which allows innocent passage through the air space

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<sup>29</sup> See RINCK, *op. cit. supra* note 25, at 502, 506.

<sup>30</sup> The conditions of carriage formulated by IATA are no longer binding; they are not even recommended. 1 SCHLEICHER, REYMANN & ABRAHAM, LUFTVERKEHRSRECHT 417 (1960).

<sup>31</sup> Administrative Court (Cologne), 4K 996/63, 24 Aug. 1964.

<sup>32</sup> Notification by the Federal Minister of Transport, 21 March 1961; Notice to Airmen, B 28/61.

<sup>33</sup> This was ratified by the federal government on 12 Oct. 1956, in BUNDESGESETZBL II, 934 (Ger. 1956).



of all contracting States and authorizes landings for technical purposes.<sup>34</sup> Foreign aircraft, however, are not allowed to debark or to embark passengers or freight. This right was to be granted by the so-called Transport Agreement which has become obsolete because the United States withdrew from it on 25 July 1946 due to its lack of general acceptance. Only non-commercial aviation is free from these restrictions. Transport is non-commercial if it carries neither passenger nor cargo or mail for remuneration, or on the basis of hire or charter. Commercial aviation on the other hand comprises scheduled and non-scheduled services for remuneration.

#### A. Non-Scheduled Services

Article 5, paragraph 2 of the Chicago Convention seems to allow the debarcation and embarcation of passengers, freight, and mail. In fact, however, all States subject this commercial transportation to conditions and restrictions. Under these practices the freedom of aviation, which should be the rule, has become the exception. Nevertheless, no State may go so far as to exclude all foreign non-scheduled aviation for that would be contrary to the spirit of article 5, paragraph 2.<sup>35</sup> The wording of the section seems to allow a general prohibition, but it must be disregarded in view of the underlying principles of the convention.<sup>36</sup> The States do, however, subject foreign non-scheduled services to discretionary permission.

The Paris Agreement<sup>37</sup> on commercial non-scheduled air services in Europe attempts to remedy the situation but its economic importance is negligible. Generally, the agreement allows:

- (1) taxi-flights only up to six seats per plane,
- (2) flights for which a person has chartered the whole capacity of the plane without hiring out parts of it,
- (3) other flights, but only once a month between the same places, and
- (4) freight transportation by air until revoked.

The agreement applies only among members of the European Civil Aviation Conference (ECAC) who are identical with the members of the Council for Europe in Strasbourg.

#### B. Scheduled Services

It appears that international scheduled aviation, by far the most important part of transport by air, remains without any general international regulation. Only the rights of transit flights and technical landings are granted by the Transit Agreement. Permission for commercial landings must be obtained for each airline from all States concerned. This permission is always a matter of intensive bargaining. Here, prestige and protectionist interests of the States combine to produce the narrow and

<sup>34</sup> Convention on International Civil Aviation (Chicago Convention), 7 Dec. 1944, art. 1, § 1, 61 Stat. 1180, T.I.A.S. 1591 (effective 4 April 1947). See also CHENG, *op. cit. supra* note 23, at 536; 1 SCHLEICHER, REYMANN & ABRAHAM, *op. cit. supra* note 30, at 81; 3 MEYER, *op. cit. supra* note 23, at 106, 108.

<sup>35</sup> RIESE, LUFTRECHT 137 (1949). 1 SCHLEICHER, REYMANN & ABRAHAM, *op. cit. supra* note 30, at 34, 239; CHENG, *op. cit. supra* note 23, at 179 (ICAO resolution of 10 May 1952).

<sup>36</sup> *Contra*, MEYER, LUFTRECHT IN FUENF JAHRZEHNENTEN 300 (1961).

<sup>37</sup> The agreement is fully discussed in 5 RIESE, SCHRIFTENREIHE DES LUFTFAHRTBEIRATS (1959).

unsystematic network of bilateral agreements.<sup>38</sup> This method leads to slow and hard bargaining for each service, and the result is a diversified and disunified law which is difficult to survey.<sup>39</sup>

As far as can be ascertained, the first bilateral agreement ever concluded was entered on 14 September 1920 between Switzerland and Germany.<sup>40</sup> The slow process of negotiation was speeded up somewhat in 1952 when the Federal Republic of Germany agreed "to pursue in its bilateral air transport agreements and arrangements a liberal and non-discriminatory policy" towards the United States, the United Kingdom, and France.<sup>41</sup> By mid-1965 the Federal Republic had concluded thirty-five air transport agreements. From the bilaterals, three models have evolved.

### 1. *The International Civil Aviation Organization Standard*

This is a relatively short model agreement. It was included in the final act of the Chicago Conference as recommendation Number VIII.<sup>42</sup> The model does not describe the commercial rights in detail but does grant exemption from customs and provide for reciprocal recognition of licenses and air worthiness certificates. The aircraft are subject to the law of the landing State.

### 2. *The Bermuda Model*

Difficult and economically important points are disregarded in the ICAO model. Problems arise with regard to the transportation capacity which may be offered, the tariffs, and the transportation between one of the contracting states in relation to third countries. These highly important questions were first discussed and partly solved in the Bermuda Convention which was concluded between the United States and the United Kingdom.<sup>43</sup> It incorporated the idea that the capacity offered shall correspond to the demand for transportation between the contracting state and the country of final destination. Moreover, the capacity should also correspond to the demand in the intermediate countries "taking into consideration" the regionally scheduled services. With regard to the tariffs, the contracting states undertake to come to an agreement for which the IATA tariffs shall serve as a non-committal basis.

This agreement was a true compromise between the two great opponents in transportation policy, the United States, who advocated free admission and unlimited competition, and the United Kingdom, who favored planned and protected air transport.<sup>44</sup> The Bermuda compromise was reached only by inserting a great number of formulae with little or no precision. Nevertheless, this agreement created a new type of pattern, and after-

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<sup>38</sup> See Schmidt, *Die wirtschaftlich-politische Ordnung des internationalen Luftlinienverkehrs* (1965) (analyzing the opposing interests and their possible solutions).

<sup>39</sup> 5 RIESE, *op. cit. supra* note 37, at 149.

<sup>40</sup> 12 FORSCHUNGSSTELLE FUER VOELKERRECHT 3 (Hamburg 1951).

<sup>41</sup> Law of 26 May 1952, 23 Oct. 1954, ch. XII, art. 3, in BUNDESGESETZBL II, 405, 456 (Ger. 1955).

<sup>42</sup> CHENG, *op. cit. supra* note 23, at 504.

<sup>43</sup> *Id.* at 554.

<sup>44</sup> *Id.* at 23, 238.

wards the great majority of all bilateral agreements, including Germany's followed suit.

### 3. *The Strasbourg Standard Clauses*

The latest model for bilateral agreements was recommended in 1959 by the European Civil Aviation Conference.<sup>45</sup> It is based on the ICAO model of 1944 and embodies the rules agreed upon in Europe over the course of years. The Strasbourg model does not mention the controversial, but decisive points concerning the transportation capacity to be offered. It follows the Bermuda Agreement only insofar as it recommends in rather cautious language the IATA tariffs.

#### *C. The Bilateral Agreements Of The Federal Republic*

Of the thirty-five bilaterals entered into by the Federal Republic up to 1 July 1965, roughly twenty-five are similar in concept, content, and wording. They follow the Strasbourg standard clauses. Note, however, that many of the agreements were concluded prior to the Strasbourg model which, apparently, they have influenced.

A second, smaller group of bilateral agreements is equally based on the German standard, but shows considerable modification from case to case. This group comprises agreements with Australia (22 May 1957), Brazil (29 September 1960), Iran (1 July 1961), India (15 June 1964), and Chile (30 March 1964). However, even these six agreements follow, to a large extent, the Strasbourg standard clauses.

Four of the agreements were apparently the result of special bargaining and do not fit any of the models. This applies to the agreements with the United States (7 July 1955), Great Britain (22 July 1955), and France (4 October 1955). Those are the oldest agreements entered into by the Federal Republic and, at the same time, they are the most important from a commercial point of view. Also out of pattern is the agreement Number 4 with Yugoslavia (10 April 1947), probably because Yugoslavia has little in common with the western economic system.

Any attempt to categorize the agreements according to their substance results in many groupings and overlapping stipulations. One central point in all of the agreements is the problem of the amount of transport capacity an airline shall be allowed to offer abroad. The German standard follows closely the Bermuda Agreement. A good example is the agreement with Belgium,<sup>46</sup> apparently the first to be based on the supposed German standard clauses. All the agreements mentioned above, except the atypical agreement with France, have accepted the Bermuda rule as to the capacity to be offered.

## VI. THE LIABILITY OF THE AIR CARRIER

With regard to the liability of the air carrier, the Federal Republic

<sup>45</sup> *Id.* at 241.

<sup>46</sup> Law of 14 April 1956, art. 9, in BUNDESGESETZBL II, 45 (Ger. 1957).

makes no distinction between national and international transportation. Germany has ratified the Warsaw Convention,<sup>47</sup> The Hague Protocol,<sup>48</sup> and the Convention of Guadalajara.<sup>49</sup> Furthermore, the Federal Republic has incorporated the substantive rules of these conventions into German law so as to apply even to transportation outside the scope of these three conventions. The rules, therefore, are the same for all national and international transportation by air.

However, German law did not incorporate the Warsaw regulation for delay in transport. If, therefore, transportation is outside the scope of that convention, the carrier may stipulate to exclude any liability for delay.<sup>50</sup> The regulations for transportation documents (Articles 3 to 16 of the Warsaw Convention) were also excluded from the German law. The competent aviation authority, however, has authorized Lufthansa to make its conditions of contract comply with those of IATA.<sup>51</sup> The result is that the transportation documents are always exactly the same as provided for under the Warsaw Convention. Therefore, only in a few instances were the rules of the Warsaw Convention supplemented by German national law.

#### A. Gross Negligence And Wilful Misconduct

The original version of the Warsaw Convention provided for unlimited liability if the carrier or its servants and agents caused the damage by conduct adjudged to be equivalent to wilful misconduct. This standard, which is much debated in other legal systems,<sup>52</sup> has always been construed as referring to "gross negligence."<sup>53</sup> The German courts, without exception, have held the same view and have imposed unlimited liability on the carrier in cases of gross negligence.<sup>54</sup>

Article 25 in the original version of the Warsaw Convention was unsatisfactory because it allowed different interpretations from country to country, and it did not undertake a substantive unification of the law, but referred to national law only. Therefore, The Hague Convention introduced a new standard by which unlimited liability arises if the carrier or its servants or agents caused damage recklessly "by a deliberate act . . . done with intent to cause a damage." This seems to be a version of wilful misconduct which the German law describes as "conscious negligence."<sup>55</sup> When the German legislature ratified The Hague Protocol and, at the same time, undertook to extend its principles for transportation outside

<sup>47</sup> REICHSGESETZBL II, 1039 (Ger. 1933).

<sup>48</sup> BUNDESGESETZBL II, 291 (Ger. 1958).

<sup>49</sup> BUNDESGESETZBL II, 1159 (Ger. 1963).

<sup>50</sup> See Rinck, 1958 ZLR 306.

<sup>51</sup> 1 SCHLEICHER, REYMANN & ABRAHAM, *op. cit. supra* note 30, at 60, 416.

<sup>52</sup> *Id.* at 366-69.

<sup>53</sup> DRON, LIMITATION OF LIABILITIES 204 (1954); Abraham, 1954 ZLR 711; Rinck, *Recent Developments in German Air Law*, 23 J. AIR L. & COM. 485 (1956).

<sup>54</sup> Bundesgerichtshof, 17 April 1958, vol. 27, p. 101, 106 (1958 ZLR 421, 424); Landgericht Koeln, 9 April 1964 (1965 ZLW 88, 89); Landgericht Frankfurt/M., 8 March 1939, Archiv fuer Luftrecht 1939, p. 180.

<sup>55</sup> Memorandum to the Hague Protocol submitted to Parliament by the Federal Republic, Bundestagsdrucksache III/220, at 32, 20 Feb. 1958; 1 SCHLEICHER, REYMANN & ABRAHAM, *op. cit. supra* note 30, at 395.

of the convention, it did not introduce the rule of conscious negligence but instead retained the concept of gross negligence.<sup>56</sup> There may be cases in which gross negligence is proved without any doubt—*e.g.*, extreme lack of knowledge, or unusual forgetfulness—but not conscious negligence as formulated in the new version of Article 25 of the Warsaw Convention. Since German national law already imposes liability without monetary limits in cases of gross negligence, domestic liability is more severe than that under The Hague Protocol.

### B. *Accident Insurance For Passengers*

All air carriers licensed in the Federal Republic are required to insure their passengers against injury and death up to \$8,750 per passenger. Thus, passengers are in two respects in a better position than under the Warsaw Convention: the sum is paid irrespective of the cause of the accident, even if the carrier could invoke the defense that neither it nor its servants and agents had been in a position to avert the accident; and the full amount is paid in cases of death without regard to the amount of damages.

For some time a controversy existed as to whether or not this obligatory passenger insurance is compatible with the Warsaw Convention. Some authors felt it amounted to a more severe liability on the carrier and was, therefore, contrary to the convention.<sup>57</sup> These objections, however, are not justified for the obligatory insurance does not change the system of liability set up by the convention. Instead, it is merely a condition imposed as an incident to the license for scheduled services. This legal point of view is now generally recognized at least as far as German carriers are concerned.<sup>58</sup>

Doubts do exist whether foreign carriers doing business in the Federal Republic are obliged to take out such accident insurance for their passengers.<sup>59</sup> However, this obligation would be in keeping with Article 11 of the Chicago Convention by which the law of each state applies to foreign aircraft operating there. In spite of decisions that the bilateral agreements of the Federal Republic forbid such obligatory insurance, the wording of Section 50 of the Air Code is imprecise and might allow the interpretation that only German carriers are bound to insure their passengers. The more recent regulations for the admission to aviation<sup>60</sup> try to alleviate this uncertainty to some extent. They require insurance for all charter flights and for other transportation, provided that the passengers travel from one point in the Federal Republic to another (cabo-

<sup>56</sup> The official bill, Bundestagsdrucksache IV/1646, at 10, 18 Nov. 1963, does not explain why this rule is not incorporated into the German law.

<sup>57</sup> RIESE, *op. cit. supra* note 35, at 493; ABRAHAM, LUFTBEFOERDERUNGSVERTRAG 77 (1955). For a general discussion of the problem see Bodenschatz, 1959 ZLR 230, 244; Rinck, 1958 DER BETRIEB 243.

<sup>58</sup> MEYER, FUENF JAHRZEHNTE 346, 443 (1953); Moeller, 1955 ZLR 251 (German National Report for the Congress of Comparative Law, 1954); Bodenschatz, 1959 ZLW 247. Resolution by the legal committee of the advisory council for aviation (Luftfahrtbeirat), reprinted in 1960 ZLW 94. The highest civil court has held the same in dictum. Bundesgerichtshof, 14 May 1963, reprinted in 1963 ZLW 296; Neue Juristische Wochenschrift 1926 (1963). The main substance of the judgment deals with the relation between social security and passenger accident insurance.

<sup>59</sup> Bodenschatz, 1959 ZLW 248.

<sup>60</sup> Bundesgesetzbl I, 370 (Ger. 1964), reprinted in 1964 ZLW 326.

tage). However, the bulk of international passenger service comprises traffic arriving, departing, or passing through the Federal Republic. These lines remain free from this obligatory insurance. In this respect, the Federal Republic has placed foreign carriers on a better footing than the German ones.

### C. Misuse Of Rights

According to German law, behavior contrary to previously demonstrated acts or omissions will be accorded no legal significance. One who does such inconsistent acts will be prevented from denying his prior conduct. This rule has been generally accepted as part of the German law for the last thirty years.<sup>61</sup> German courts have several times set aside the time limit of two years provided for in Article 29 of the Warsaw Convention. The typical situation is where the carrier assures a passenger that it will not plead the two year time limit. If the carrier is guilty of such actions, damage can be claimed and awarded after the time limit has expired.<sup>62</sup> Even if the carrier's insurance company made the assuring promise, the time limit of Article 29 will be disregarded.<sup>63</sup> The highest civil court went even further in holding that the time limit might be set aside if the carrier withheld from the passenger the names and addresses of other passengers who might be called as witnesses in court. In that way, the carrier would impede the passenger's law suit, and by doing so, forfeit its rights under Article 29.<sup>64</sup>

The Warsaw Convention is to some extent supplemented, if not amended, by national German law through these decisions. Admittedly, national law applies wherever no provisions applicable to a specific case may be found in the Warsaw Convention, as for instance with regard to details of the contract for transportation or for defining the term damage.<sup>65</sup> The question, however, is whether Article 29 contains such an omission. The law establishes a strict time limit which is more rigid than a prescription.<sup>66</sup> It is generally recognized that the parties may waive a prescription, but never a strict time limit. The court, therefore, considers a time limit irrespective of the parties' pleadings.<sup>67</sup> All courts, including Germany's, regard this time limit as a strict one as opposed to plain prescription.<sup>68</sup> It is undoubtedly the object of Article 29 to establish a time limit which shall not be influenced by what the parties do or say.

<sup>61</sup> ENNECERUS & NIPPERDEY, ALLGEMEINER TEIL 1444 (1960), SOERTEL & SIEBERT, BGB, § 242 n.141, 170 (1959).

<sup>62</sup> Bundesgerichtshof, 7 May 1963; Neue Juristische Wochenschrift 1405 (1963).

<sup>63</sup> Landgericht Koeln, 9 April 1964, reprinted in 1965 ZLW 88.

<sup>64</sup> Bundesgerichtshof, 17 April 1958, vol. 27, p. 101, reprinted in 1958 ZLR 421, 425. The court held that there was no misuse in rights.

<sup>65</sup> RIESE, *op. cit. supra* note 35, at 423, 468; 1 SCHLEICHER, REYMANN & ABRAHAM, *op. cit. supra* note 30, at 254.

<sup>66</sup> Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw Convention), 13 Feb. 1933, 49 Stat. 3000, T.S. No. 876 (effective 29 Oct. 1934).

<sup>67</sup> SOERTEL & SIEBERT, *op. cit. supra* note 61, at § 194 n.13; REICHSGERICHTSRAETEKOMMENTAR 1959, n.41 (introduction to § 186).

<sup>68</sup> Tribunal de Grande Instance de la Seine, judgment of 14 April 1961, 1961 RFDA 198; Bochorj v. Pan American World Airways, 1956 U.S. & Can. Av. 209 (N.Y. Sup. Ct.); Zuerich High Court, judgment of 23 Jan. 1958, 1959 ZLR 55.

An additional argument is found in Article 29, paragraph 2 of the convention which refers to the *lex fori* for the calculation of the time limit, but not for its consequences. The rules regarding the misuse of rights are not part of the rules of procedure.<sup>69</sup> Therefore, it cannot be argued that the concept of the misuse of rights is part of the *lex fori* and, therefore, prevailing over the Warsaw Convention. In Anglo-Saxon law the situation is different, for the problem discussed comes under the law of estoppel.<sup>70</sup> Since the law of estoppel is a rule of procedure, it certainly has priority over the time limit stipulated in Article 29 of the convention. This argument, however, is not applicable in German law. Nevertheless, the German courts went far in construing Article 29 by interpreting it according to German principles and thus limiting its field of application. It remains doubtful, however, whether the courts of other contracting States would restrict the application of Article 29 to the same extent.

Divergencies are often inevitable in the interpretation of international treaties. Apart from the remote possibility of stipulating submission to the International Court of Justice, the regrettable and undisputable fact is that the courts of each country apply their own method of interpretation.<sup>71</sup> In fact, the courts cannot do otherwise as long as there exists no international court with appellate jurisdiction. Although the Warsaw Convention is written in French, except for grammatical construction no court is bound to construe the convention according to French jurisprudence or method. The courts, therefore, are bound to interpret the Warsaw Convention in accordance with their domestic methods of jurisdiction.<sup>72</sup>

Consequently, the German courts have been correct in expounding their conception of time limit as taken from German law. It cannot be said that the doctrine of misuse of rights has had, in general, priority over the conception of time limit.<sup>73</sup> The object of the time limit must be taken into consideration. It must be distinguished whether the time limit is established in the interest of the carrier or in some general interest. If the general interest prevails and if it is desirable not to overburden the courts with too many suits, then the time limit must be applied even if the carrier had acted in an unfair way. If on the other hand the time limit is meant to serve the interest of the carrier, it then forfeits the protection of the law if, in some unfair way, the carrier prevented the passenger from initiating proceedings in time.<sup>74</sup> It is generally recognized that in the Warsaw Convention, the time limit is meant to protect the carrier.<sup>75</sup> If, therefore, the carrier or one of its agents induces the passenger by what-

<sup>69</sup> SOERGEL & SIEBERT, *op. cit. supra* note 61, at § 242 n.121.

<sup>70</sup> SCHNITZER, VERGLEICHENDE RECHTSLEHRE 417, 421 (1961); ENNECCERUS & NIPPERDEY, *op. cit. supra* note 61, at 1440, 1444.

<sup>71</sup> I ANZILOTTI, VOELKERRECHT 82 (1929); RIESE, *op. cit. supra* note 35, at 68.

<sup>72</sup> *Bochory v. Pan American World Airways*, 1956 U.S. & Can. Av. 209 (N.Y. Sup. Ct.); Zuerich High Court, judgment of 23 Jan. 1958, 1959 ZLR 55.

<sup>73</sup> This opinion, however, is put forward by SOERGEL & SIEBERT, *op. cit. supra* note 61, at § 242 n.170. PALANDT & DANCKELMANN, BGB (introduction to § 194, n.4(a)).

<sup>74</sup> Bundesgerichtshof, 14 Oct. 1959, vol. 31, p. 77, 83.

<sup>75</sup> RIESE, *op. cit. supra* note 35, at 471; Law of 7 May 1963, [1963] Bundesgerichtshof (Ger.), reprinted in *Neue Juristische Wochenschrift* 1405 (1963).

ever means to let the time limit elapse, then the carrier deserves no protection. It cannot invoke the time limit.

The restriction inserted in Article 29 of the Warsaw Convention by German courts and German doctrine is not based on an alleged priority of German rules. It is instead a consequence of the inevitable application of national doctrine in interpreting international legal concepts. This national influence will be felt as long as the international conventions cannot define their respective provisions in legal terms which would be accepted by all parties—an object which is almost impossible to attain.

As a natural result of air transport being carried on as a state-owned public utility, air transport within the Federal Republic is highly regulated by the government. This control goes far toward eliminating the diverse regulations to which airlines in the United States are subject. In addition, Germany has made great progress in applying the international character of aviation by limiting the differences between domestic and foreign air carriers.