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AIR CARRIERS' LIABILITY: SIGNIFICANCE OF THE WARSAW CONVENTION AND EVENTS LEADING UP TO THE MONTREAL AGREEMENT†

BY SIR WILLIAM HILDRED††

IT IS A PRIVILEGE and a pleasure for me to visit Dallas and play a small part in the Symposium on the Warsaw Convention. Apart from wanting to see Dallas, the persuasive words for me were in Professor Larsen's first letter when he said the Symposium would provide an unbiased setting for airing diverse points of view and for allowing the opinions of foreign scholars and governments to be forcibly and articulately presented; an opportunity not to be missed.

Millions of words have been uttered and written over the last twenty months about what is called the Montreal Agreement. At a meeting of the Air Law Group of the Royal Aeronautical Society last June we had a lucid speech from Professor Bin Cheng of the Faculty of Law, University of London. Bearing in mind the key words in the Convention, "for the unification of certain rules relating to international air transport," he showed how far we fell short by speaking of five pop singers in the same aircraft between London and Glasgow who would receive widely differing amounts of compensation if incapacitated for life, according to whether the ticket issued was Warsaw pure and simple, or Hague Protocol, or issued by an airline party to the Montreal Agreement. At my age the sudden incapacitation of five successful pop singers is something I can face with equanimity, but I do feel that they should receive, *mutatis mutandis*, the same compensation and not widely different amounts. Professor Cheng also brought out that absolute liability went beyond the normal concept of enterprise liability, and had been secured so far as the Montreal Agreement was concerned by a virtually unilateral amendment in the manner of a shot-gun wedding.

BEA's solicitor took the view that all passengers should receive their due with promptitude, with a minimum of formality, and not too much for the lawyers. He wanted to perpetuate the Montreal Agreement and secure it for all international passengers by special contract. He added that in England, passengers were expected to read the conditions printed on their tickets and could not plead that because the print was small, it therefore wasn't there. This reference to the *Lisi* case reminds us that we have not heard the last of it for it has a bearing on the Montreal Agreement. Words in a treaty presumably mean what they say. Sometimes, however, words mean different things to different people. But I go back to the word "forcible," and it was here that the fourth speaker, Mr. Lee Kreindler,

† Opening address made to the Symposium delegates 16 August 1967.

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sparked off controversy. He had no time for a limit, any limit, of liability. He promised that no matter how tightly Conventions or tickets were drawn, he would do anything possible to break any limits of liability. You need force to break anything and having heard him, I know what he means.

The Warsaw Convention was created in 1929. It is, therefore, nearly forty years old, the dangerous age. If it gets through its forties, it will assuredly go ahead to a respectable and honourable old age. It is significant because it is a rare example of the uniformity in international law. It is the most universal of all international treaties. It has formed the basis for the national laws on aviation liability in many countries. The United States joined in 1934. Russia is a member. It is beneficial to carriers, shippers, passengers and governments alike. Without it, airlines and plaintiffs would be perpetually involved in difficult conflicts of law. This would be a bonanza for the lawyers, but it would produce a desperate situation for those who have to bear the costs, and would assuredly keep claimants out of their rightful compensation for a very long time. And the claimants need is greatest just after the event, when so often the breadwinner has gone up in smoke. Its real significance is its uniformity; its overriding of all systems of law. It provides a point of reference for drafting uniform documents for use throughout the world. After twenty years of IATA, I know the difficulty of securing unanimous agreement amongst one hundred international carriers. Some stimulus is needed and the Warsaw Convention has provided it. The resulting uniformity in documentation is worth a great deal to the carriers and to the travelling and shipping public.

It has over ninety-two participating governments and the loss of the Convention, or its denunciation by one immensely powerful government, would be a very bad setback to international air transport which, above all other systems of transport, depends and grows upon, the existence of uniformity. To mention my previous Association, it is the IATA passenger ticket, the IATA waybill and the IATA baggage check which make possible international travel by air. These simple pieces of paper universally accepted, carrying passengers, baggage and freight with a minimum of trouble, lie at the heart of it.

I was at the Hague in 1955 when discussions were going on which led to the Hague Protocol, and I sensed the grievance and frustration of the American delegates at the figure which subsequently came out of it. Nor can it be said that I was surprised or that the airlines were surprised. The average income of the American today is, I understand, \$13,000; and it is indefensible that an air carrier who kills him should get away with just over a year's pay (Hague) and less than a year's pay if he is killed on a Warsaw flight.

However, he is not expected to do so now; the 1966 Agreement secures an upper limit of \$75,000 (to include lawyers' fees) or \$58,000 if lawyers' fees are excluded. If there happen to be any lawyer listening, I hope they will forgive me if I say that the difference between the two figures comes as a shock; and no less a shock to realize that the lawyer's fee is a recognized percentage of the amount successfully claimed. I think I am right in saying that in England such a practice is called champerty and is an offence against the law. Dodson and Fogg tried it in *Pickwick Papers*

and were only temporarily defeated by Mr. Pickwick going to a debtors' prison rather than pay out to Messrs. Dodson and Fogg.

I must make this point. The higher the limit, the higher the insurance costs. This does not matter with the large carriers; but there are many small airlines who resent the fact that their passengers have to pay the bill for the higher insurance costs which can benefit only a few passengers of the wealthier nations. The continuing effort to increase the limits is not based on a desire to protect the average traveller but to aid a very few who are the ones most likely to have protected themselves with adequate insurance. Not only that—every increase in maximum liability means a whacking proportion for the trial lawyer. I impute no motives, but it is the trial lawyers who are in the forefront of the battle for increased or unlimited liability.

As regards the events leading up to the Montreal Agreement of May 1966, I would go back to 1959 when the CAB approved the new Hague limit and recommended its ratification, adding that the new limit was far in excess of that usually in force in foreign countries. But the Senate did not ratify the Hague Protocol when asked to do so by President Eisenhower.

In 1961, the new Administration instructed the Inter Agency Group on International Aviation to review the United States interest in the Warsaw and Hague Systems. That group recommended ratification of the Hague Protocol but added that United States carriers should be required to provide \$50,000 of automatic accident insurance for all international passengers ticketed to or from the United States. The group also expressed the view that it could not be in the interest of the United States to withdraw from the Warsaw Convention.

In April 1964, the compulsory insurance bill and the recommendation to ratify Hague were transmitted to Congress. Although, I understand, the two propositions could not be kept legislatively together, Congress failed to act on the compulsory insurance bill; and the Administration re-submitted the package in April 1965.

The Senate Foreign Relations Committee held hearings in 1965 and the compulsory insurance legislation was strongly resisted. The Senate Committee Report upheld the value of Warsaw, recommended ratification of Hague, but added that if the Compulsory Insurance Bill were not enacted, the Department of State should take immediate steps to denounce the Warsaw Convention and the Hague Protocol.

This is where we sat up and took notice. The Department of State proposed a "carrier" solution, suggesting that United States carriers should commit themselves to assist the United States Government in bringing about an early diplomatic conference to increase Warsaw limits to \$100,000; and in the meantime voluntarily waive the Warsaw limits to that figure (including legal expenses). The State Department alleged justification for \$100,000 with the astonishing statement that an award should be "grossed" to provide for the customary attorney fee of 50 percent. Talk about battering upon corpses.

The United States carriers studied this astonishing proposition and finally said they could swallow \$50,000 provided the principal foreign carriers did the same. Their reasons for regarding \$100,000 as excessive, though

apparently kind to the passenger, were set forth with clarity and force. I should have called them incontrovertible. One can try to be kind and be the opposite.

The CAB's own statistical survey over a fifteen year period gave an average compensation of \$38,000. Mr. Kreindler has applied a Nelsonian telescope to his eye and said he had never seen that figure. ICAO, about the same time, estimated that for the world as a whole, the average non-Warsaw situation death settlement (including the United States) was \$15,000. The United States average is therefore two and one-half times the world average. If two and one-half is taken as the correction factor and applied to the Hague Protocol figure, one reaches \$40,000. And this \$40,000 is \$10,000 less than the carriers' offer of \$50,000.

The Under Secretary of State for Economic Affairs had discussions with the Foreign Relations Committee from which emerged the conclusion that the compulsory insurance was dropped. The United States ratification of the Hague Protocol was indefinitely tabled and the State Department was given *carte blanche* to decide when and whether to give notice of United States denunciation of Warsaw.

Through September 1965 I was occupied in seeking individual carrier acceptance of \$50,000. So far only the United States carriers had accepted that figure. During that month at a North Atlantic Conference in Bermuda, I sedulously collected confidential opinions on an individual basis and felt able to issue a worldwide mail vote designed to secure worldwide carrier agreement at \$50,000 for all traffic to and from the United States. At the same time I asked my friend, Walter Binaghi, President of ICAO, if he would call an emergency meeting of member states. Before these actions could mature, the State Department said that our mail vote was no good and announced that they would file United States denunciation on 15 November unless a satisfactory interim solution increasing the limits could be arrived at.

Nevertheless we went on counting the votes as they came in and we got worldwide agreement at the carrier level to waive the limit to \$50,000. The CAB followed this up by finding the agreement to be contrary to the public interest. ICAO also went ahead with its plan for a meeting on 1 February 1966, and passed a resolution expressing the hope that no member state would denounce Warsaw in the interim.

But the State Department went ahead and filed notice of denunciation on 15 November 1965. Under Article 29, denunciation takes effect six months from the date of notice. The ICAO meeting took place as scheduled on 1 February and was inconclusive. And on 7 March 1966, the State Department, out of the blue, said that carriers must accept "absolute liability" (waiving any legal defenses under Article 20(1) of the Convention).

Ours not to reason why. Efforts continued to be made. Walter Binaghi tendered his personal offices to the United States Government in seeking an interim solution. But we were left with 15 May coming nearer with no further result, no change of heart.

Finally on 5 April I felt I had a dying cause and could not make things worse by direct action. I felt I must risk a snub and cabled Thomas Mann of the State Department asking whether his government would withdraw

their notice of denunciation if I could secure agreement before 1 May, of all United States and major foreign air carriers operating to or from the United States, to raise the liability limit to \$75,000, including legal costs; and in respect to passengers the waiver by the carrier of defenses under Article 20(1) which the State Department had called for without warning on 14 March. Mr. Mann replied saying that if I could achieve these two things, the United States Government would give serious consideration to withdrawing its notice of 15 November. He added that it would be difficult at this late hour as the matter had been decided at the highest levels, but he would make every effort to do so if my efforts were successful. The agreement would, he said, have to include all United States trunk international carriers, scheduled and unscheduled; and amongst foreign carriers, it must include all carriers flying to and from the United States, plus those carrying substantial United States origin or destination traffic.

Some of these were not IATA members. With them IATA had no official contact, but I sent out a cable asking all of them to weigh the consequences of United States denunciation against the price asked for withdrawing it. Replies began to come in during the succeeding days. All were affirmative except five United States carriers who could swallow \$75,000 but could not swallow absolute liability. I said, "Let not the Lord be angry for lack of five." We collected replies up to 15 April at 6:25 p.m. At that moment I retired from the post of Director General of IATA, but by then there were sufficient replies to indicate that we could meet the Department's deadline of 15 May. The running was taken up by my successor, Knut Hammarskjöld, who took over at 6:26 p.m. that evening. He and IATA's General Counsel, Julian Gazdik, went ahead with the greatest pertinacity and the result was what is known as the Montreal Agreement. It was not an IATA agreement as several signatories were not members of IATA. The State Department's insistence on the carriers they expected to sign gave us cover from the State Department's readiness, in other circumstances, to subject the American carrier members of IATA to an anti-trust suit and walk them up Capitol Hill.

The Agreement will figure largely in the discussions of the next few days and this is not the moment to outline its terms or its weaknesses. Suffice to say that it did enable the United States Government to withdraw its denunciation of the Warsaw Convention and for that we can all be truly thankful.

I am obsessed with the thought that in these days of rabid nationalism with new states coming into being every twenty minutes, there is immense virtue in any international agreement, any international body, any international convention or treaty. These activities bring together, in their objectives, in their multiracial staffs, in their use of several languages, a great and beneficial concentration of cooperation. They constitute, in my opinion, the best hope of enduring worldwide friendship. I long for the day when all the ethnic groups of the world can like each other and tease each other.

After twenty years as an international maid-of-all-work, I am strong for international cooperation in every field of thought and activity. The Warsaw Convention must not die. It must be given a face lift with a higher limit of liability and other amendments done by way of special contract.