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## Insurance, Warsaw Convention, Changes Made Necessary by the 1966 Agreement and Possibility of Denunciation of the Convention

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# INSURANCE, WARSAW CONVENTION, CHANGES MADE NECESSARY BY THE 1966 AGREEMENT AND POSSIBILITY OF DENUNCIATION OF THE CONVENTION

BY HAROLD CAPLANT†

## I. PERSONAL INTRODUCTION

THE TITLE OF THIS paper was the heading given by the organisers to that section of the Symposium in which I was invited to speak. I gladly accept the challenge on the understanding that my remarks are peculiar to myself and are not necessarily those of any of my compatriots, my employers or any section of the aviation insurance market.

First—may I add my congratulations to the *Journal* and Southern Methodist University for their initiative in providing an all-too-rare forum for all shades of opinion and for most of the interested parties to discuss the Convention in depth and in public. Far too much of the debate on this subject is behind closed doors in ludicrous secrecy with a complete absence of genuine spokesmen for passengers and an alarming scarcity of those with practical experience of handling claims.

For the sake of the record—I have never personally handled a passenger death or injury settlement or trial in my life and it is not my ambition to do so. My main function is to try and keep in touch with legal developments in aviation all over the world and to be ready to give objective advice to my colleagues in Underwriting and in Claims which may help them to assess risks or to control the strategy of claims or generally to avoid or solve legal problems. Occasionally, I am invited to become deeply involved in the investigation or settlement of particular claims (but never so as to deal direct with members of the travelling public or their lawyers) and for this purpose I am allowed to become passionately partisan—which is a little more exhilarating than being objective. The aviation insurance market in London is truly international in its coverage—so we have good opportunities to observe a variety of national temperaments at work on aircraft operation and aviation litigation.

That is the background from which my experience springs and I am honoured to have been asked to contribute this paper.

## II. INSURANCE

The branch of aviation insurance relevant to this Symposium is generally called Passenger Legal Liability Insurance—the essence of which is the transfer of the financial burden of passenger claims to Insurers in exchange for an agreed premium. In policies common in North America it is also usual for Insurers to accept an absolute obligation to defend claims

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made against their clients. In other policies, Insurers undertake the defence just as certainly but the promise is expressed in different terms.

From this it is apparent that the purchase of insurance is really the purchase of a complete claim service: it is not merely the business of paying bills when presented, it is also the expertise of selecting competent lawyers in any part of the world, guiding them where necessary, judging when to settle and when to fight. All of this is the everyday responsibility of busy Insurers and from this steady exposure to claims and their disposal it is sometimes assumed that Insurers manipulate claims for their own purposes and have mysterious agreements between themselves which are independent of the needs or wishes of their clients. In aviation insurance there is no foundation whatsoever for this impression—even in those cases (which often occur in London) where many Insurers will find themselves involved on both sides of a lawsuit. The paramount interests are those of the individual insured client—who on one policy may be an airline and on another might be the aircraft manufacturer. It is simply not practical politics for an Insurer to attempt to manipulate claims as between various policies purely to satisfy some interest or administrative convenience of the Insurers. For example, it is sometimes right and proper for one of our offices to authorise legal proceedings on behalf of an Insured client against a company insured with another of our offices—simply because that is the only way to ensure a result which is fair to each client. The only advantage to the clients is that if it is in the interest of two or more clients to reach some agreement instead of fighting, then the fact that the leading Insurers or a substantial number of the Insurers are the same can facilitate such an agreement. I can only speak of “a substantial number,” because in the London Market, large risks are invariably spread over a large section of the market involving many Insurers (companies and Lloyd’s Syndicates.)

Another seemingly inevitable source of misunderstanding between Insurers and their clients is in the assessment of premium. Everyone, from the man in the street insuring his automobile to the airline treasurer with an insurance budget of \$10 million will get to the point sooner or later where he thinks that Insurers are crazy. Even Insurers think this way sometimes. A classical example of misunderstanding occurred in May 1966, when the Montreal intercarrier agreement (CAB 18900) came into force for the first time. Such a large change in liability limits was unprecedented in the history of aviation. Millions of passengers—many of them the world’s wealthiest and most litigious—were suddenly elevated from \$8,300 or \$16,600 to \$75,000 overnight on 16 May 1966. All airlines who asked for it were immediately “held covered” at rates to be agreed because initially no one had any idea how many passengers were affected by the new limits. For the first time, Insurers had to ask the airlines to complete a questionnaire designed principally to reveal exposure to the new limits. Gradually it emerged that the picture for each carrier was unique to that carrier and as a result some suffered quite small rate increases and others found their liability insurance budget increased by several hundred percent—but in no case was it a simple change proportional to the limits of liability—that would have been astronomical.

Why should Insurers increase rates *prospectively* before any claims

occurred? Could it not have been done retrospectively? The short answer is that in the special circumstances of nearly universal revolutionary change premium income geared to losses under the old limits could not possibly be adequate to meet claims under the new system—whose basic limits were four hundred fifty percent to nine hundred percent greater. It would also have been unfair in the long run to indulge in retrospective rating because this would tend to operate most harshly against the airlines who did in fact suffer the heaviest claims. Most important of all, it would do nothing to increase the *overall* level of insurance funds which are essential to provide a market which can, if necessary, absorb a succession of possible catastrophes without showing signs of strain. But there is a practical factor of equal significance: with premium estimated in 1966 and perhaps received in 1967 Insurers have to be prepared to pay claims which come to trial in 1969/1970—by which time damage awards will assuredly have escalated both within and outside the new limit system. This is what liability insurance is all about. Without adequate funds allocated to 1966 the market saw no chance of facing such a future. It became a dire necessity to raise premiums promptly and prospectively in response to the explosion of the limit system. There was no way of knowing in advance whether a test of the limits would begin on 16 May 1966 or 16 May 1970. Practical Insurers perceived all these factors intuitively and increased their rates after examining the airline replies to the questionnaires, and making adjustments for individual claims records, fleet size, area of operations, type of passengers, etc. Many airlines undoubtedly felt that Insurers were “cashing-in” at a difficult time and very few Insurers had an opportunity to explain their reasoning—it was physically impossible. There are only a few “leaders” in any market capable of setting rates which the rest of the market will support, whereas, at one time there were (in London for example) nearly one hundred risks to rate individually and virtually simultaneously; and, at the worst possible time, some wholly impractical questionnaires began to arrive again from ICAO!

Unfortunately, there was not time for expansive communications. It was a time for hard calculations and continuous meetings between underwriters (sometimes with and sometimes without Brokers and their clients) everyday, every morning, every afternoon for months on end. The miracle is that the system did not break down completely and the reason it did not is a tribute to a small group of dedicated men whose history has yet to be written. Only time can tell whether they were over-optimistic or over-pessimistic. Meanwhile, there are undoubtedly many airlines who may believe that the words “underwriter” and “extortionist” are interchangeable. It is often overlooked that the market was able to provide the necessary expansion of cover virtually *on demand* and would have been able to pay claims on the day that the new limits came into force. This deserves some recognition. But it may take many years before the historical significance of the market response can be fully assessed.

It is as important to the aviation industry as to the insurance industry that a strong market should always be available—to take one hundred percent of the risk if necessary for those who need it. That is the real test of an insurance system and it requires continuity of coverage and substantial reserves to make this possible. Many airlines sincerely believe that Insurers

must be making a profit when the premium paid over a few years exceeds the claims paid. After brokerage, administration, claims expenses and re-insurance has been paid for, and proper reserves made for known and outstanding claims, the Insurers' first thought for any surplus is a transfer to general reserves and it is only after this that there might be some true profit available for distribution. Those airlines whose own finances have been well-managed for many years have no difficulty in understanding the essential problems faced by Insurers.

In short, insurance is a service industry and its prosperity is tied to that of the industry it serves. Collectively, the insurance market must be able to pay for *all* the insured aircraft which are destroyed or damaged and for *all* passengers who are killed or injured by the insured airlines and aircraft manufacturers. This task needs as high a level of risk assessment and financial control as the aviation industry itself with one salient difference: the cost of passenger claims is the product of many factors all of which are outside the control of any Insurer and can never be known for certain in advance. For example—the incidence of fatal accidents, the number of casualties, the family and fortune of individual passengers, the law in each country where claims may be brought, the general level of awards and the skill of lawyers are all contributing factors.

Traditionally, Insurers have regarded it as their function to provide cover for their clients' legal liabilities and to refrain from any opinion as to what the law ought to be. But in response to insistent questions from the United States, ICAO and individual governments, this traditional attitude has had to be modified. Insurers have world-wide experience of claims and they are accustomed to translating risks into dollars and cents: they have therefore tried to assist their respective governments by providing analyses, in broad terms, of the effect on *total claim costs* of various limit systems which have been proposed from mid-1965 onwards. However, the latest report<sup>1</sup> of the ICAO Panel of Experts defies this type of economic analysis because of the range of options available to contracting States.

Clearly, Insurers have their own problems and no one outside the industry can be expected to be very interested in them. This would not matter if so many commentators in government and academic circles did not think that "insurance" somehow is the answer to all their problems. Probably the most absurd suggestion in recent years was that placed before the United States Government recommending that United States airlines should purchase \$50,000 *accident* insurance for each adult passenger on Warsaw trips—regardless of the needs of individuals. Fortunately the idea died, but no doubt it may be resurrected from time to time to obscure progress. No attempt was made to suggest that the accident insurance should be taken into account in concurrent legal liability claims and very few seemed seriously concerned as to whether it was compatible with the international Convention. Most surprising of all, it was an idea without any backing in custom, practice, law, social theory or political background in the United States. Perhaps it was an early warning that the views of one of the greatest nations on earth are not necessarily a distillation of its wisest men but may more accurately reflect a few strategically-placed

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<sup>1</sup> PE - Warsaw Report - 2 18/7/67 *Restricted*.

theorists. It is also astonishing that the only argument *against* the accident insurance proposal which gained any strength or credence was the preposterous notion that free accident insurance would increase the risk of sabotage. At the \$100,000 level this might be just credible, but to suggest that there is a serious risk of criminal lunatics killing a whole plane-load of people solely for \$50,000 is to suggest to the rest of the world that American society as a whole must be truly suffering from an endemic form of pathologically-materialist insanity. I simply do not believe it.

### III. WARSAW CONVENTION

The 1929 Warsaw Convention first came into operation in 1933 and in 1967 has nearly one hundred adherent nations, of which over one-half have also ratified the 1955 Hague Protocol, and less than one-fifth have adopted the supplementary 1961 Guadalajara Convention.

The widespread nature of the basic Convention suggests that it should not be lightly discarded and that it will be very resistant to change despite the efforts of one aberrant nation. The comparatively large number of parties to the Hague Protocol indicates that it is gaining acceptance as a desirable amendment and the United States is now the *only* nation which has signed but not ratified the Protocol. The valuable supplementary convention of Guadalajara is still too "young" to be certain that it will gain wide acceptance, but as it brings a reasonable balance of benefits both for passengers and airlines, the prospects of wider ratification should be good.

The fundamental purpose of the Convention in 1929 was to minimise conflicts-of-law problems and provide a uniform system of law which would apply universally without haphazard differences caused by the differing jurisdictions in which accidents can occur and suits may be brought. With the hindsight which is only possible more than thirty years later, it is now apparent that the basic rules of Convention applicability (in Article 1) could have been drawn more widely—but that is a decreasing problem as Convention acceptance grows. Nearly one-third of the Warsaw nations have adopted the Warsaw scheme of liability (with or without modifications) as the basis of national law for non-Convention carriage by air. Of course, the Convention does not *eliminate* conflicts-of-law problems, but everywhere except the United States, it has reduced these matters to negligible proportions. If the Convention was justified in 1929 on the grounds of providing uniformity in international private air law, then it is even more necessary today when the number of active jurisdictions has more than tripled. This is the real and continuing purpose of the Convention, but unfortunately the fact that the uniform system of liability which it embodies contains a *limit* of liability has completely obscured the basic purposes. As Mr. Arnold Kean said recently, "The object of the original Convention was to avoid conflict of laws and it might even be worth preserving *without limits*!"<sup>2</sup> [Emphasis added.].

It is no exaggeration that all of the *serious* problems raised in connection with the Convention have arisen in the United States:

- (1) Conflicts-of-law problems exist in the United States mainly because of

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<sup>2</sup> At a public discussion in London on the future of the Warsaw Convention. 1967 J. ROYAL AERO. Soc'y 503.

the Court's ancient predilection for the *lex loci delictus* (now gradually changing).

(2) To the amazement of the rest of the world, in two leading cases (*Komlos*<sup>3</sup> and *Noel*<sup>4</sup>), it appeared that the Convention did not create a cause of action. "Clearly one of the main props in the argument for the Warsaw Convention had been knocked down" commented Messrs. Lowenfeld & Mendelsohn.

(3) The ticket *delivery* provisions of Article 3 have been judicially used to provide a system of absolute and unlimited liability (*Lisi*<sup>5</sup>).

(4) The limits of liability are grossly inadequate.

Whilst it is possible that problems (1) and (2) could be cured by supplementary legislation (as many States have done) it is important to realise that the real motive power behind all the trouble is item (4)—caused by the vast disparity between the standard of living in the United States and the rest of the world. This, together with a particular constitutional, judicial and legal system, has produced litigation on a scale undreamt of elsewhere, with damage awards comparable to the ransom of princes and inevitably, a numerous and prosperous legal profession to administer the system. To admit this is not to criticise the results in the United States—it is to accept this as a fact of life. It is legitimate for the United States to consider whether it is correct to remain within a system which produces such different results from a majority of its domestic laws (although it must not be forgotten that there are still limits of liability for wrongful death (but not personal injury) in ten of the United States ranging from \$25,000 to \$110,000).

It is also legitimate for the rest of the world to consider whether it is worth keeping the United States within the system if the cost is too high, for example—by reason of factor (3) above.

The price for keeping the United States within Warsaw seems to be going up:

(a) Sept. 1955 at the Hague—asking price: \$25,000; settled for \$16,600.

(b) Nov. 1965—asking price: around \$100,000 (long-term), \$75,000 (interim); settled for an interim arrangement of \$75,000 (including costs)/\$58,000 (plus costs) and a waiver of Article 20(1) for travellers to, from or via the United States (The Montreal Agreement<sup>6</sup>).

(c) 1967—asking price: something *greater* than either of the ICAO Panel of Experts' Solutions I (\$100,000 including costs) or II (\$75,000 including cost and a modified deletion of Article 20). To be settled for?

Even if agreement could be reached on something satisfactory to the United States and compatible with the rest of the world, the effect of *Lisi v. Alitalia* (Item (3) above) must undermine the confidence of all the contracting Parties. It is no use pretending that notices to passengers

<sup>3</sup> *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953).

<sup>4</sup> *Noel v. Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957).

<sup>5</sup> *Lisi v. Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1967) (now subject to appeal to the Supreme Court). This case has aroused a great deal of international interest. Briefs as *amici curiae* have been filed by the Air Transport Association of America, the International Air Transport Association and the governments of Italy, Canada and the United Kingdom, in addition to Mr. Arnold Holtzman. The governments of Australia, Brazil, Canada, Federal Republic of Germany, Netherlands and United Kingdom are understood to have made representations to the State Department.

<sup>6</sup> CAB Agreement No. 18900. The full text is shown in 1966 J. ROYAL AERO. Soc'y 1064.

prescribed or approved by the CAB will satisfy the *Lisi* doctrines (or foreseeable developments of them). The CAB is not a defendant in passenger suits against the airlines; the CAB is not the court before which the liability suits are fought; the CAB cannot guarantee that the notices of which it approves will satisfy the courts of the United States or any other country; the CAB is not faced with the costs of passenger claims. To a large number of observers in the rest of the world it is a complete mystery why the CAB decided that they should prescribe the form of notices to international passengers: they have never been interested in advising United States domestic passengers that one-fifth of the States have liability limits and not all of the courts will recognise those limits. The original and the amended Convention both contain adequate internationally-agreed provisions relating to passenger tickets: the CAB evidently feels the need to supplement these provisions and it is somewhat remarkable that the CAB attitude is modeled on the Hague Protocol to which the United States is *not* a party! It could be of interest if some competent lawyer can say whether the CAB is within its powers to prescribe notices for United States and foreign carriers and if so, what are the penalties for failure to give notice and in the form approved by the CAB? If the penalty is less than that of absolute and unlimited liability, the airlines might seriously consider whether there is any point in complying with the CAB rules and whether efforts should be more usefully aimed at (1) complying with Articles 3 & 4 of the original and amended Conventions and (2) persuading the United States to withdraw from the Convention if the *Lisi* doctrines persist.

The real difficulty about *Lisi* is that even if the particular case is reversed by the Supreme Court, the doctrines which it represents may very well persist and are likely to produce virtually insoluble problems for the airlines. Therefore, unless *Lisi* is reversed in such a way as to inhibit further irrational developments based on the otherwise unexceptionable cases on ticket *delivery* (*Mertens*<sup>7</sup> and *Warren*<sup>8</sup>) it is quite clear that the airlines of the world would be better off if the United States finally withdrew from Warsaw.

Despite some of its alarming manifestations on the international scene, I am an avowed admirer of many of the institutions of the United States (even the much-maligned contingent fee<sup>9</sup>—which seems to produce better net results for middle class litigants than any other method of which I am aware) and above all—the comparatively open system of government which, by means of open and informed dialogue with official agencies, can increase the chance of reason prevailing in the long run. For example, I admire the CAB which is unequalled anywhere in the world for its efforts on behalf of the travelling public. Therefore, I have faith that reason may triumph in the end and that in due course the Supreme Court and the CAB will find ways to assuage the fears of the world outside on the vexed and intractable problem of notices to passengers. The aims of the Convention and the CAB are both laudable—to convey meaningful in-

<sup>7</sup> *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965).

<sup>8</sup> *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965).

<sup>9</sup> Lord Denning, Master of the Rolls, is reported to have said that in England "The matter is being reconsidered now . . . \*\*\* It is in the air: I will not say more." 29 LAW GUARDIAN 18 (1967).

formation to passengers concerning limits of liability—but as air transport continues to explode as an everyday mode of travel for everyone—these older ideas will be seen to be increasingly unnecessary and impracticable.

#### IV. CHANGES MADE NECESSARY BY THE 1966 AGREEMENT

Almost all the litigation in the United States concerning the Warsaw Convention is in effect a struggle against the limits of liability. The United States denunciation of 15 November 1965 was given "solely because of the Convention's low limits of liability." When sufficient international airlines agreed to new limits by "special contract" in accordance with the Convention, the United States note of 14 May 1966, to the Polish Government, formally withdrawing the denunciation notice stated: "[T]he United States of America believes that its continuing objectives of uniformity of international law and adequate protection for international passengers will be best assured within the framework of the Warsaw Convention. \* \* \* Further, the Government of the United States looks forward to continued discussions looking to an up-to-date and permanent international agreement on the important issues dealt with in the Warsaw Convention." These are sincere and worthy motives whose reality will be tested in the coming years.

So, in 1966, the problem was solved by an interim agreement on limits of liability in accordance with provisions which had lain unused in the Convention since 1929. The surprising thing is that the "special contract" solution was not prominent at an earlier stage: it was apparently suggested at the 58th Meeting<sup>10</sup> of the Legal Division, Air Coordinating Committee (13 Dec. 1955). It reappeared as one of four 1962 IGIA recommendations; it was advocated by an attorney (Mr. Brackley Shaw) in hearings before the Senate Foreign Relations Committee in May 1965; but did not emerge in its final form until the State Department's proposals of 14 March 1966. Probably one of the first public advocates of the "special contract" was Lord Denning who said in the House of Lords during a debate on the United Kingdom Carriage by Air Bill:

There is a clause defined in Article 22 which says that by special contract the carrier and the passenger may agree to a higher limit of liability. I should like to see the aircraft companies, by special contract, if need be, showing the way to a higher limit of liability [1 June 1961, Col. 955].

The Montreal Agreement, as is well known, went far beyond the contemplation of Article 22(1). In addition to the higher limits for which the Convention makes provision, the Montreal Agreement requires the carriers to take two additional steps: (1) To waive the defence of Article 20(1), and (2) To give a particular form of notice to passengers.

Both of these steps involve unnecessary problems in addition to any objections to their intrinsic features. But an adequate analysis of the problems created by the Montreal Agreement would demand a separate paper—so I merely summarize some of the main objections:

- (a) The waiver of Article 20(1) is a premature social experiment which

<sup>10</sup> Referred to in Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 Harv. L. Rev. 497, 511 n.58 (1967).

should be achieved (if at all) by alteration of law and not by special contract. It will increase total claims costs and will facilitate litigation. It is expected to prove a serious obstacle to airline recourse actions against responsible third parties.

(b) The notice is of negligible practical value to passengers and is inconsistent with the original Warsaw Convention. Airlines cannot rely on the notice to give them the protection of the limits of liability in the original or amended Convention or in the Montreal Agreement.

(c) Outside the United States there is a risk that carriers who are not parties to the Montreal Agreement may involuntarily become parties to the Special Contracts by operation of Article 30(1) of the Convention.

All of these are avoidable problems and, hence, it cannot be said that any thing beyond the limits themselves was a *necessary* part of the 1966 Agreement.

Despite all these defects there are now over one hundred airlines who have accepted the limits and conditions of the Montreal Agreement and most of these are formally parties to the Agreement. BEA *by special contract* has extended the scope of the Agreement to *all* Warsaw or Hague passengers traveling on its aircraft. Lufthansa and many other airlines operating in Germany have adopted *Special Conditions of Carriage* embodying the lower limit (equivalent to \$58,000 plus costs) for all purely *domestic* passengers within Germany together with a modified form of the waiver of Article 20(1). The United Kingdom Government *by operation of law* from 1 June 1967 has extended the lower limit (875,000 gold francs) to all domestic and international non-Convention carriage in the United Kingdom, Channel Isles, Isle of Man and twenty overseas territories (including some that are uninhabited!).<sup>11</sup> Other governments and airlines are known to be interested in extensions of the "special contract" and in the United Kingdom system. New Zealand has just followed the United Kingdom example.<sup>12</sup>

The success of the "special contract" system therefore seems assured for the foreseeable future but there is still a marked reluctance to regard it as providing the seeds of a *permanent*, as distinct from an *interim*, solution.

At a discussion in London on 1 June 1967 at the Royal Aeronautical Society, Mr. Michael Lester (Secretary and Solicitor of BEA) said:

It might have been wrong to enter into this Agreement—but now that it is in existence it could be used sensibly. The present mixed treatment of passengers should be redressed by perpetuating the Montreal Agreement and securing its adoption by all international carriers as a Special Contract for *all* passengers.<sup>13</sup>

In closing the discussion, the Chairman (Sir William Hildred<sup>14</sup>) said "that the consensus appeared to be that Warsaw was worth preserving

<sup>11</sup> For a summary and discussion see *Compensation for Airline Passenger Death and Injury: the Future of the Warsaw Convention*, 1967 J. ROYAL AERO. SOC'Y 499-508.

<sup>12</sup> *Carriage by Air Act 1967* [No. 151]—operative 24 Nov. 1967, embracing New Zealand, the Cook Islands, Niue and the Tokelau Islands and applying a limit of NZ \$42,000 to domestic (but not international) non-Convention carriage.

<sup>13</sup> *Supra* note 11, at 501.

<sup>14</sup> Who, when he was Director General of IATA, launched the initiative which finally led to the Montreal Agreement.

subject to some amendments by way of 'special contracts.'” In a paper appended to the record of the discussion I voiced by opinion.<sup>15</sup>

Therefore, the changes made necessary by the 1966 Agreement are in the first instance those of ensuring adequate public discussion in each country to ascertain the appropriate level for local limits (if they are to be different from those of the Montreal Agreement). The stages of implementation thereafter also need the most careful consideration as it is by no means certain that every nation would wish to perpetuate the waiver of Article 20(1) and the provisions for notice to passengers. The United Kingdom, for example, has taken *neither* of these steps in its 1967 legislation referred to above. If there are doubts whether all international carriers will adopt appropriate “special contracts” then the solution in each country may very well be different: State X may enact local legislation whilst State Y may merely insist on “special contracts” as a condition for the operation of international services by its own nationals.

It is certainly outside the scope of the Convention for any one nation to insist on “special contracts” as a condition for approval of foreign carriers—but it may very well be permissible as a consequence of specific bilateral air service agreements—which no doubt is part of the secret of the CAB's success with foreign carriers. At the time of writing, the most notable exception to the CAB success story may be Aeroflot which is reported<sup>16</sup> to be prepared to accept the Montreal limits but not the waiver of Article 20(1). Will Aeroflot conform or continue to be a symbol of the resistance movement? The concept of “absolute liability” is sometimes referred to as a socialist theory of enterprise liability: it would be strange if Aeroflot proved to be a bulwark against its premature and inappropriate adoption by an aggressively non-socialist State.

#### V. POSSIBILITY OF DENUNCIATION OF THE CONVENTION

Following the success of the Montreal Agreement there seems no immediate risk of a fresh notice of denunciation by the United States, but this spectre must inevitably be resurrected if the United States is called upon to do even the most harmless act in relation to the Convention, *e.g.*,

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<sup>15</sup> Above all, the “special contract” is a flexible method of adjusting to new situations. It does not require diplomatic conferences, or new legislation. It can be brought into operation quickly, with a minimum of fuss and without reprinting tickets. It can be raised or extended to a limited or unlimited class of passengers in a variety of ways.

The weakness of “special contracts” is said to be that (a) the airlines can withdraw at any time, and (b) not all airlines have so far copied the pattern of BEA, for example. The United States and Germany have undoubtedly induced carriers to adopt “special contracts” in a manner which the majority of carriers have resented and of which the travelling public is probably unaware.

The answer to this is that the question of appropriate limits of liability should be the subject of frank and vigorous public debate in each air transport country and a limit determined which is felt to be appropriate to the typical local passenger and airline. If Europe feels that \$75,000 is as appropriate for European travellers as for United States travellers, then there is no valid reason why steps should not be taken to universalise the “special contract” in Europe. At the moment, the subject has been insufficiently debated in public and it is doubtful whether there is sufficient consensus to move to the next stage. Since the above was written it has been reported that Aeroflot has accepted the waiver of Article 20(1). N.Y. Times, 1 Dec. 1967.

The next stage could be regional agreements—perhaps based on the IATA Traffic Conferences—using the form of “special contract” appropriate to a particular conference area. The IATA Traffic Conferences provide a well-proved machinery for evolving international fares and these are enforced by governments on members and non-members of IATA. Similar methods could be applied to “special contracts” if necessary. 1967 J. ROYAL AERO. Soc'Y 507-08.

<sup>16</sup> N.Y. Times, 17 May 1967.

ratification of the Hague Protocol or the Guadalajara Convention. No one should ever forget that in the last few hectic days before 14 May 1966, no less than twenty-six (later twenty-nine) Senators (out of a total of one hundred) signed a resolution calling on the Administration not to withdraw the denunciation notice "until full public hearings are held." Prompted no doubt by the well-organized American Trial Lawyers Association, one may be certain that the public will not be allowed to forget this support in the Senate and the prospect of public hearings if any opportunity arises to reconsider the Convention or the Hague Protocol or some as-yet-unknown new convention or protocol.

Other nations may not like to be reminded of this, but the risk of a new denunciation attempt is a potent reason for not embroiling the United States in any serious moves for a new convention or protocol. Not only is it an unnecessary risk but it is an unnecessary step if the Montreal Agreement can be revised and extended as the nations see fit. The chances of withdrawing a *second* notice of denunciation must be regarded as negligible.

It may not be generally known that at one time the official view of the United Kingdom was that it would be necessary to denounce the Warsaw Convention when ratifying the Hague Protocol so as to avoid conflicting treaty obligations.<sup>17</sup> The Carriage by Air Act 1961 was drafted on this basis and was passed by Parliament—but following the international furore caused by the United States denunciation, the official view in the United Kingdom was modified and the current 1967 United Kingdom legislation succeeds in giving continued recognition to the unamended Convention whilst concurrently giving effect to the amended Convention. So far, no nation has found it necessary to denounce Warsaw when ratifying the Hague.

Therefore, *if* one can ignore *Lisi* and *if* "special contracts" can be revised, extended and perpetuated as necessary, there is no reason to fear new denunciations by the United States or any other nation. But these are very big "ifs." One cannot ignore *Lisi* and the ICAO machinery seems to be grinding remorselessly and irreversibly towards some new convention or protocol based on the recommendations of the Panel of Experts.

Is there no hope?

I suggest there is some hope:

- (1) If the Supreme Court reverses *Lisi* and confines the concept of ticket delivery to its proper scope as expounded in the true *rationes* of *Mertens* and *Warren*, then other nations can tolerate the United States as a partner in the Warsaw Convention, and
- (2) If the ICAO machinery can be halted until sufficient experience is gained with the Montreal Agreement or some revision or extension thereof.

Again these are big "ifs"—but they seem to represent the only visible hope of an international liability Convention continuing for the foreseeable future with the United States as a party.

If either of the two hopeful "ifs" is not realised, then the future is dark indeed. For example:

- (1) If *Lisi* is not reversed, the international airlines would be better off *if*

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<sup>17</sup> See Bin Cheng, *The Law of "International" and "Non-International" Carriage by Air*, 60 LAW SOC'YS GAZETTE 450-53, 750-53 (July & Nov. 1963).

the United States was outside the Warsaw system, and *if* a reasonable number of carriers perceive this forcefully enough—they may wish to precipitate a fresh denunciation by withdrawing from the Montreal Agreement.

(2) If the ICAO machinery produces a new convention or protocol it will invite the risk of complete United States withdrawal when submitted for the advice and consent of the Senate.

It is my sincere hope that the future is not as dark as I have painted it: I am, after all, an analytical pessimist by profession. If there are rays of light on the horizon—many have been revealed by this pioneering Symposium organised by the *Journal* and Southern Methodist University.