

1953

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Recommended Citation

K. M. Beaumont, *The Proposed Protocol to Warsaw Convention of 1929*, 20 J. AIR L. & COM. 264 (1953)
<https://scholar.smu.edu/jalc/vol20/iss3/2>

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THE PROPOSED PROTOCOL TO WARSAW CONVENTION OF 1929

By K. M. BEAUMONT, C.B.E., D.S.O., M.A. (Oxon)

AT its Eighth Session in Madrid in 1951¹ the Legal Committee of I.C.A.O. reached a number of decisions on matters of principle in connection with the proposed revision of the Warsaw Convention of 1929 governing the liability of air carriers towards passengers and owners of cargo, which had been under discussion in various spheres since the early thirties of this century. At the end of the Eighth Session a sub-committee was constituted with a mandate to prepare a new draft Convention which should incorporate the principles which had been adopted in Madrid. The sub-committee, consisting of Messrs. J. B. Pereira (Brazil), C. S. Booth (Canada), A. Garnault (France), H. Drion (Netherlands), E. Garcia (Philippines), C. Gomez-Jara (Spain), K. Sidenbladh (Sweden), K. M. Beaumont (United Kingdom), E. J. Nunneley (U.S.A.) and L. Clerc (Switzerland), met in Paris in January 1952. It produced an annotated new draft Convention,² incorporating the Madrid decisions, which could be substituted for the Warsaw Convention, which experience had shown to contain a number of features which had caused trouble, doubts and difficulties, besides omitting certain things which seemed desirable, although it has been ratified by many States.

The Paris draft had been circulated for consideration in the early part of 1952 to all States and International Organizations concerned, and constituted the principal item on the Agenda of the Ninth Session of the Legal Committee convened in Rio de Janeiro on 25th August 1953. The writer, who had been the Reporter at the Madrid meeting, was again appointed Reporter and came to the meeting prepared to explain and defend the new draft Convention prepared by the sub-committee of which he was Chairman. Most of the delegations had been briefed by their Governments upon the supposition that the Paris draft would be considered in detail by the Committee, and certain written observations thereon had been submitted, some of which had been circulated before the meeting. However, the Committee, reversing the policy decided upon in Madrid, resolved not to consider the formulation of a new Convention based upon the Paris draft, but instead to take the French text of the Warsaw Convention (the only official text) Article by Article and paragraph by paragraph, with a view to ascertaining what, if any, revisions of this were considered to be essential, and thereafter to decide whether any such revisions could be suitably included in a Protocol to the existing Convention.

¹ For Excerpts from Report of U.S. Delegation see 19 J. Air Law & C. 70.

² See 19 J. Air Law & C. 85.

The main reason advanced for this decision was that the Convention had already received wide acceptance and that it was probable that a Protocol, including only limited revision of certain provisions of the Convention, was more likely to be accepted by a substantial majority of the existing contracting States than an entirely new Convention, although it was generally admitted that the Paris draft constituted a substantial improvement upon the existing Convention.

This change in the method of approach to the subject caused some difficulty and confusion in the early stages of the Conference, because most of the delegations had been briefed under the impression that the Paris draft would form the basis of discussion, and these had received no instructions concerning the new method of approach, which involved limited revision in the form of a Protocol. It also placed the Reporter in a difficulty because he also had been under the impression that it would be his duty to explain and defend the Paris draft, rather than to suggest possible revision of the existing (French) text of the Convention, as he had done in Madrid and on numerous previous occasions before the Committee and various other bodies.

The early stages of the meeting were also characterized by a certain lack of co-operation due to the fact that apparently some delegations had been instructed to oppose any revision at all, and some others to oppose any revision except an increase in the limit of liability for damage caused to passengers, whether or not resulting in death. It is only fair to say that, as the Conference proceeded and as it became obvious that the majority of the delegates were in favor of very substantial revision of certain features of the Convention, the spirit of co-operation normally associated with meetings of the Committee developed, although it frequently happened that the actual form of revisions proposed was adopted only by a narrow majority. Admittedly some proposals for revision, whether or not based upon the Paris draft, were rejected for reasons of expediency based upon national or political, rather than legal, considerations.

In the upshot the draft of a Protocol (in the three official languages) was adopted for submission to the Council of I.C.A.O., with a view to this being circulated to all States concerned, so that it might receive consideration and thereafter, if considered necessary and desirable, be made the subject of discussion, revision if necessary, and finalisation at a Diplomatic Conference to be summoned if and when the States concerned deemed that such a procedure was desirable.

MAIN FEATURES OF DRAFT

The main features of the draft Protocol are as follows:

In Article 1 (2) the references to "souveraineté," "suzeraineté," "mandat," and "autorité," were omitted from the new draft, and the word "territory" was substituted, and defined in the manner adopted for Civil Aviation Conventions since 1948.

In the draft Protocol paragraphs (2) and (3) of Article 1 were amended to read as follows:

"(2) For the purposes of the Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a trans-shipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another State, even if that State is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another State is not international carriage for the purpose of the Convention.

(3) A carriage to be performed by several successive air carriers is deemed, for the purposes of the Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether or not it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or series of contracts is to be performed entirely within the territory of the same High Contracting Party."

And this was clarified by a new Article 42, as follows:

"42 (1) In Article 37 (2) and Article 40 (1), the expression "High Contracting Party" shall mean "State." In all other cases, the expression "High Contracting Party" shall mean a State whose ratification of or adherence to the Convention has become effective and whose denunciation thereof has not become effective.

(2) For the purpose of the Convention the word "territory" means not only the metropolitan territory of a State but also all other territories for the foreign relations of which that State is responsible."

Scope of Convention

Reversing the decisions taken in Geneva and Madrid to widen the scope of the Convention as much as possible, the Committee decided not to widen the scope in the manner suggested in the Paris draft or in the manner suggested alternatively in proposals made by the United Kingdom, or in any other way. The main reason advanced for this was because so many States had already ratified the existing Convention that the necessity for widening its scope had lessened. It is possible that if this matter had been considered later during the session, when the spirit of co-operation was more apparent than it was at the beginning, approval might have been given to one of the two formulae which had been suggested, by means of which the scope of the Convention could have been widened without creating any more difficulty concerning jurisdiction than already exists under the Convention.

It should be noted that, although Article 1 (1) refers to "personnes" and other Articles refer to "voyageurs," the Committee decided not to assimilate the two expressions which appear to mean the same thing.

It was also pointed out that in Article 1 "les stipulations des parties" is used, whereas in other Articles "contrat de transport" is used. The French delegate explained that the effect was the same, and in the English text it was decided to use the word "agreement" in Article 1 (2). The Committee decided not to define "entreprise de transports aériens" or "transporteur," although various interpretations can be placed upon both these expressions; and an amusing discussion occurred between the delegates of Spain and the Dominican Republic as to how "transporteur" should be translated into Spanish. This problem was left unsolved.

Article 2 was deleted and replaced by provisions similar to those in Article 2 (5) (a) and (c) of the Paris draft, reading as follows:

"(2) The Convention shall not apply to:

(a) Carriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.

(b) Carriage of mail and postal packages on behalf of postal authorities."

Chapter II was wholly remodelled. All references to detailed particulars in traffic documents were omitted.

Article 3 in the Protocol reads as follows:

"(1) For the carriage of passengers a ticket shall be delivered containing particulars which show that the carriage is international in the sense of Article 1, and a statement that the carriage is subject to the rules relating to liability established by the Convention.

(2) The passenger ticket shall constitute prima facie evidence of the conclusion and conditions of the contract of carriage. The absence, irregularity or loss of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall, none the less, be subject to the rules of the Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered or if the ticket does not include the statement that the carriage is subject to the rules relating to liability established by the Convention, he shall not be entitled to avail himself of any provisions which limit his liability in respect of the passenger."

Effect on Ticket Issuance

It has been suggested that this may necessitate having to issue different tickets for flights which are not "international"; but the Committee, and the Observer for I.A.T.A., appeared to be satisfied that this would not be necessary and that a formula could be devised in a uniform ticket which would comply with the Convention and which would still enable carriers to make special provisions governing carriage which is not "international" and subject to the rules of the Convention. On practical grounds it is essential that uniform tickets governing all carriage, whether "international" or not, should be available. It should be noted that, under the new formula, the de-

fenses of the carrier are not taken away from him, as they are under the present Convention. The view was expressed that the new formula would permit of group tickets being issued.

Article 4 concerning the baggage check was modified in exactly the same way, *mutatis mutandis*, as Article 3.

No change was made in Article 5, but in Article 6 paragraph (3) was deleted and replaced by:

"The carrier shall sign prior to the commencement of carriage of the cargo."

It should be noted that throughout the Protocol the word "cargo" was used to translate "marchandises," which the French delegate explained would include live animals but not corpses.

Articles 8 and 9 were redrafted in the Protocol as follows:

"8. The air waybill (consignment note) shall contain particulars which show that the carriage is international in the sense of Article I and a statement that the carriage is subject to the rules relating to liability established by the Convention."

"9. If the carrier carries cargo without an air waybill (consignment note) having been made out or if the air waybill (consignment note) does not include the statement that the carriage is subject to the rules relating to liability established by the Convention, he shall not be entitled to avail himself of any provisions which limit his liability."

Paragraph (2) of Article 10 and paragraph (2) of Article 11 were re-drafted as follows:

Article 10. "(2) The consignor shall be liable for all damage suffered by the carrier, or any other person to whom the carrier is liable, by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements."

Article 11. "(2) Any statements in the air waybill (consignment note) relating to the weight, dimensions and packing of the cargo, or relating to the number of packages, are *prima facie* evidence of the facts stated; and any statements relating to the quantity, volume or condition of the cargo do not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill (consignment note) to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the cargo."

Air Waybill Negotiability

The Committee considered whether provision should be made in Chapter II for negotiability of the Air Waybill on the lines of Article 10 of the Paris draft, since it had been suggested at the Madrid meeting that provision for this principle was important. However, it was decided not to insert in the Protocol an Article of this character because no urgent demand for it had been expressed, but to leave the question on the Agenda of the Committee for further consideration.

No revision of Articles 17, 18 and 19 of the Convention, on the

lines suggested in Articles 12, 13 and 14 of the Paris draft or otherwise, was proposed, although these Articles contain obscurities and lack certain elements which have created difficulties. Article 19 concerning delay is particularly vague, since it contains no information as to the basis upon which delay should be assessed, and leaves the limit of liability for delay the same as that for the death or injury of a passenger or the total loss of cargo or baggage.

It was decided to delete altogether paragraph (2) of Article 20. But, although it was generally admitted that paragraph (1) of this Article was nonsensical if strictly interpreted, it was not found possible to obtain a majority for any of the many proposals made for substituting other words for the words "nécessaires" and "impossible."

Article 22, (1), concerning the limit of liability towards passengers, was the subject of much discussion. In the first place it should be observed that the word "personnes" is used, as in Article 1 (1), although in other cases the word "voyageurs" is used. Apparently the two words are intended to mean the same thing, although in a legal document the use of different words usually implies a different meaning.

Amount of Liability

Concerning the limit of liability the United States delegation proposed that the figure of 125,000 Convention francs should be tripled, i.e. an increase of 200%. On the other hand a number of delegations were opposed to any increase in the existing limit. A proposal to increase the existing limit by 100% was defeated. Finally a proposal to increase the limit by 50% obtained a majority vote and thereafter, on the proposal of the Canadian delegate, the figure was rounded off to 200,000 Convention francs, representing an increase of 60% upon the existing figure.

At the end of paragraph (2) of Article 22 it was decided to insert a new paragraph dealing with partial losses as follows:

"In the case of loss, damage or delay of part of registered baggage or cargo, or of any article contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned [meaning presumably those actually lost, damaged or delayed]. Nevertheless, when the loss, damage or delay of a part of the registered baggage or cargo, or of any article contained therein, affects the value of other packages covered by the same baggage check or the same air waybill (consignment note), the total weight of such package or packages shall also be taken into consideration in determining the limit of liability."

It would seem that the drafting of this provision might be improved.

Paragraph (4) was deleted and replaced by the corresponding paragraph in the Rome Convention of 1952.

It was decided not to incorporate in the Protocol any provision concerning deviation, etc., as suggested in Article 16 (1) (b) of the Paris draft; but it was decided to add a new paragraph (2) to Article 23 as follows:

“(2) Paragraph (1) shall not apply to provisions governing loss or damage resulting from the special nature, latent defect or inherent vice of the cargo carried.”

This was intended to cover the case of perishables, specially fragile articles, live animals, etc.

Problem of “dol”

Article 25 concerning “dol” and its equivalent naturally gave rise to considerable discussion. Eventually it was decided to delete the whole of the existing Article 25 and to substitute the following provisions which correspond almost exactly with the formula in the Rome Convention of 1952:

“The limits of liability specified in Article 22 of the Convention shall not apply if it is proved that the damage resulted from a deliberate act or omission of the carrier, his servants or agents, done with intent to cause damage; provided that, in the case of a deliberate act or omission of a servant or agent, it is also proved that he was acting in the course of his employment.”

It is believed that the effect of this would be the same as the corresponding provision in the Rome Convention. It is more favorable to the carrier than the formula suggested in Article 15 (7) of the Paris draft, and some of the delegates considered it to be too favorable.

After Article 25 it was decided to insert in the Protocol an entirely new article as follows:

“25A. If under applicable law, a servant or agent of the carrier is liable for any damage contemplated in the Convention, he shall be entitled, in an action brought against him before a Court in the territory of a High Contracting Party, to avail himself of all defenses and limits of liability which are available to the carrier under the provisions of the Convention. The total amount recoverable from the carrier, his servants and agents together, shall not exceed the amount which could be recovered from the carrier under the provisions of the Convention. The provisions of this Article cannot be invoked by a servant or agent who has acted with intent to cause damage.”

This is a longer and a more detailed formula than that last comprised in Article 13 (3) of the Paris draft, but it would set at rest serious doubts which have been expressed in connection with Article 25 concerning the position of servants and agents of the carrier.

It was decided to leave untouched Articles 26 to 33, although Articles 18 to 23 of the Paris draft include more detailed and comprehensible provisions relating to the matters concerned, especially in connection with times for notice of claims. In this connection it should

be noted that the existing Convention prescribes no period within which notice of a claim must be made in the case of the death, wounding or bodily injury of a passenger, and this has caused doubts and difficulty.

It was decided that Article 34 should be deleted and replaced by the following:

“The Convention does not apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier’s business.”

It was also decided to delete Article 35 and to substitute the following:

“The expression ‘days,’ when used in this Convention, means calendar days not working days, except in Article 26 where, in the case of damage, the expression shall mean ‘working days.’”

If the Conference had not been somewhat confused in the early stages, for reasons above mentioned, it seems possible that certain other revisions might have been incorporated in the draft Protocol, for instance the widening of the scope of the Convention under Article 1 (2), and it is possible that this matter, and certain others, may be the subject of further study at any Diplomatic Conference which is convened to carry the matter further. It was also curious that on one point the Conference rejected a principle which had been unanimously approved at the previous meeting in Madrid. However, the draft Protocol includes a number of important and practical principles, the incorporation of which in the Convention would undoubtedly help towards simplification of procedure and eliminate a number of problems which have caused doubts and difficulties for air carriers and their clients, and their respective legal advisers, and the insurers of the risks involved.

RECOMMENDATIONS FOR CONSIDERATION

The writer feels that it might be wise to consider amplification of the draft Protocol with a view to the inclusion of some, if not all, of the following items, namely:

Widening the scope of the Convention on the lines suggested in Article 2 of the Paris draft or in the amendment proposed by the United Kingdom delegation; the inclusion of certain definitions: e.g. of passenger, carrier, registered baggage, cargo, air transport undertakings, place of departure and place of destination; specific provision to enable “international” documents of carriage to be used for “non-international” carriage, which could be made the subject of special conditions; negotiability of the air waybill; clarification of the exact period during which the provisions of the Convention are applicable, on the lines of Article 12 of the Paris draft; provisions relating to delay of passengers on the lines of Article 12 (3) of the Paris draft; provision for hand baggage on the lines of Article 12 (4) of the Paris draft, and

for cargo and registered baggage on the lines of Article 12 (5) of the Paris draft; provision for deviation; realistic revision of Article 20 (1); revision of times for notice of claim and the inclusion of a definite period in the case of claims for death or personal injury, on the lines of Article 18 of the Paris draft.

The writer personally also feels that it would be practical, and avoid complication over different laws, if the provisions of the Convention could be extended to cover the whole period during which cargo is in the custody of the carrier, which would involve material revision of Article 18. The wording of Article 22 (1) also is not very happy in making reference only to the "voyageur," without making it clear that the limiting provisions of the Convention extend also to the dependents of the individual concerned and others, such as employers, who may sustain damage by reason of the death or injury of the "voyageur." Article 29 also makes no reference to the suspension or interruption of the period during which actions may be brought, and provides no final period for the extinguishment of claims.

Finally the draft Protocol makes no reference to the additional Protocol referring to Article 2 which is annexed to the present Convention. It would seem desirable that some reference to this should be made, especially since the draft Protocol includes a new Article 2 to be substituted for the existing one.

If, however, the draft Protocol were amplified to include all the provisions suggested above, it might be more practical to deal with the matter by means of an entirely new Convention, as originally suggested, rather than through the medium of such an extensive Protocol.