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THE RIO REVISION OF THE WARSAW CONVENTION — PART I

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THE rapid development of air commerce and the important place it has assumed in our modern civilization should challege the interest of all lawyers. Few otherwise well informed men realize the extent of this development, either in magnitude or in safety. The world's scheduled airlines, for instance, flew almost 24 billion passenger miles in 1952 — enough to transport 7 million people, nearly the population of New York or greater London, from New York to Western Europe, or to the Valley of the Amazon.[1] One-third of this immense traffic was international.

United States airlines exceeded the first-class (Pullman) service on railways by 20% in 1952 and carried about a third of the total common carrier passenger traffic (all classes of railway, motorbus and airline accommodation combined) moving over a distance of 120 miles. Over 27 million passengers were carried more than 16 billion passenger miles with passenger fatalities reduced to 0.9 per one hundred million passenger miles — less than one passenger fatality for each 100 million passenger miles flown![2] 1953 will bring the passenger total to about 31 million, the passenger mileage to 19 billion and reduce the death rate to 0.6 per 100 million passenger miles.[3] United States overseas air routes (excluding air traffic with Canada, Mexico, Alaska or Puerto Rico) carried more passengers than travelled by ship in 1952. An international treaty which regulates certain liabilities of our international air carriers, such as the Warsaw Convention, is therefore of general interest and importance.

A movement to codify international air law began with a conference in Paris in 1925 which set up a continuing commission, called Comité International Techinque d'Experts Juridiques Aeriens (CITEJA)[4] to prepare draft conventions for consideration by future international conferences. They created about a dozen, only one of

[1] ICAO Bulletin, June-July, 1953, p. 6.
[2] C.A.B. Comparison of Accidents in Scheduled Operations 1951-1952.
[3] Estimate C.A.B. Bureau of Accident Investigation, Jan. 14, 1954.
[4] C.C.H. Aviation Law Reports, §27,040.

which, the Warsaw Convention,[5] received general adherence by most important nations of the world. That Convention was signed in Warsaw in 1929. The United States adhered in 1934. Briefly, the Warsaw Convention is a "Convention for the Unification of Certain Rules Relating to International Transportation by Air" (its proper name); its application is determined by the contract of transportation and not by the place of accident – when between two nations adhering to the treaty, or from one adhering nation to a destination in that same nation, if there has been an agreed stopping place in another nation whether an adherent or not. It imposes liability on the carrier for injury to passengers, baggage and/or goods unless the carrier can affirmatively prove that it and its agents have taken all necessary measures to avoid the damage (or in the case of baggage and goods that the damage was caused by an error in piloting or navigation) and limits recovery: for death or injury of passengers to the present U.S. currency value of $8,291.87; baggage and goods to $16.58 per kilogram (2.2046 lbs.); and $331.67 for objects of which the passenger takes charge himself, unless the passenger affirmatively proves that the damage was caused by wilful misconduct, in which case there would be no limit. The limitation for bringing an action is two years.

The work of CITEJA was assumed by the International Civil Aviation Organization (commonly referred to as ICAO) which grew out of the Chicago conference in 1944. The drafting of international conventions comes under the jurisdiction of the ICAO Legal Committee. This Committee, among other things, has been studying the revision of the Warsaw Convention for several years, more recently in Madrid in 1952, Paris and Rio in 1953. At the latter Session, it completed a draft and submitted it to the ICAO Council for probable reference to an international diplomatic conference.

The revised text of the Warsaw Convention adopted in 1953 by the Legal Committee at its meeting in Rio de Janeiro is a real improvement over the existing text, and with a few minor but tremendously important corrections, would create a more desirable treaty than the one presently in effect. Based upon my actual experience with aviation claims – foreign and domestic – and litigation growing out of such claims, which I believe to be more than any other man in this hemisphere, it is my considered opinion that the Warsaw Convention has been of real value to both the claimants seeking damages growing out of flights subject to the treaty and to the carriers operating those flights.

Although a lawyer for Underwriters insuring aviation risks, I do not consider myself biased or serving self-interest, since it is the job of insurance companies to insure the risk presented. Whether loss payments are large or small does not particularly affect the insurer's welfare – except that the greater the loss, the larger the premium must

[5] See 5 JRL. OF AIR LAW & COM. 486. 49 Stat. 3000 (1934). Available from Supt. of Documents, Washington, D. C. as Treaty Series No. 876, at ten cents per copy.

be to absorb that loss as well as other expenses and profit, and the amount of profit permitted the highly competitive and closely regulated insurers is largely determined by the premium volume. The final burden of liability falls upon the carrier, whether insured or uninsured, and it is that industry that is primarily affected. My interest in attempting to assist in drafting sound liability legislation, including treaties, is to contribute anything I can that will be to the interest of both the airline and the public, not to give special privilege either to one party or the other. Anything that is good for the carrier and just for the public will ultimately be to the benefit of aviation insureres and to the nation.

The ICAO Legal Committee is to be commended for choosing to use the existing Convention as the basis for amendment rather than the Paris text. There were improvements in the Paris text that are not included in the protocol text, but there were also many ill-advised provisions that in my opinion outweighed the improvements. I personally am still fearful that any action that brings up before the U. S. Senate the present adherence to the Warsaw Convention[6] might result in denunciation of the Convention as now in effect, rather than adoption of the legislation submitted, but of the two approaches, I believe that a short simple protocol, along the line of the proposed text amending the present Convention, would have a better chance of ratification by the U. S. Senate than a completely reformed substitute text.

In this discussion, I will comment upon the protocol text, and then offer what I consider a very important provision that should be advanced by the United States in connection with any action on the Warsaw Convention, or perhaps independently. The objective of the provision would be to cure a deficiency that now exists and which I have not heard discussed in this connection — the creation of a right of action for accidents in foreign jurisdiction. My views and comments, as well as suggested improvements, follow in the order of the Rio draft protocol.[7]

Agreed Stopping Place Should Be Defined

Article I, 2 of the Rio Draft:

> "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 transshipment, 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

[6] *Ibid.*

[7] 20 JRL. OF AIR LAW & COM. 326 (Summer, 1953). DOC. 7425 LC/135 1/10/53 (October 1, 1953).

> place within the territory of another State is not international carriage for the purpose of the Convention."

The phrase "agreed stopping place" is retained in the definition of "international carriage" and the phrase is not defined. This is one of the potential danger spots as a cause of confusion and expensive litigation. Different courts can interpret the phrase differently and this lack of uniformity will cause injustice as between claimants. Agreement means a meeting of the minds of two contracting parties. It is difficult to prove, if literal proof is required by any court, that there was actually a meeting of the minds on a point entirely incidental and otherwise unessential to the journey being arranged. A passenger from Miami to San Juan may not be interested in whether or not his plane stops in Cuba or Haiti, and the matter may not even be discussed. It becomes of interest only in interpreting Article 1, 2. Then it becomes crucial. It seems the height of folly to set up such a trap for expense and delay. An honest effort to make the "international carriage" definition as clear as possible is assumed.

It would certainly clarify the basic definition of scope to define just what "agreed stopping place" means. My suggestion is that it be defined, perhaps as a (b) addition to the revised Article 1, Paragraph 2, to the following effect:

> (b) The agreed stopping place or places, if any, shall be the intermediate landing places indicated by the contract of carriage or the schedule or time table of the carrier or successive carriers involved in the carriage.

Such decisions as we have in the United States indicate that it is sufficient to incorporate by reference the stopping places in the schedule. The object of this protocol, however, is to simplify the carriage documents, as well as to avoid uncertainties and ambiguities necessitating litigation. A definition along the line suggested should accomplish the objective without detracting from the passengers' interest.

Scope of Treaty Should Be Broadened

It is unfortunate that the ICAO Committee, against considerable opposition, decided to recommend no change in Article 1 which defines the scope of the Convention. The reasons given are: (1) that certain additional states intend to accede to the Convention, which makes the definition of the scope of the Convention of diminishing practical importance; and (2) that the provisions would not be binding on non-member states. This reasoning illustrates the theoretical and impractical thinking of some learned lawyers.

As to reason (1) the mere fact that certain national representatives in this changing world have indicated a future intention to accede to the Convention does not justify the decision that the matter is of diminishing practical importance as the Committee asserted.

The statement in reason (2), that the provisions of the Convention would not be enforceable in non-member nations, is quite true. How-

ever, this does not justify the conclusion that such a provision is of little value. If, as proposed in the Paris text, "international carriage" is defined as all carriage between nations or with a stopping place in another nation, it would undoubtedly be of tremendous practical importance to make the provisions of the Convention applicable to claims growing out of such international carriage which are litigated in any member nation.

In a flight, for instance, from U. S. to Afghanistan (assuming the United States to be an adherent and Afghanistan a non-member), it is true that the Convention would not be enforceable in Afghanistan but it would nevertheless be enforceable in the United States. Therefore, a person prosecuting a claim in the United States would be controlled by the provisions of the Convention even though he could avoid the Convention by suing in Afghanistan. From my experience the latter course would seldom be chosen and, therefore, since most major nations are adherents and most passengers come from such nations, most of the claims would be brought in member nations and thus the influence and scope of the Convention would be tremendously broadened. If the Convention is good for the public of adhering nations when the journey is between members, it should be equally good if between a member and a non-member. I suggest that a definition similar to that recommended in the Paris text be used, such as:

> "2. For the purpose of this Convention the expression 'international carriage' means any carriage by aircraft of passengers, cargo or baggage for remuneration when, according to an agreement to carry, the places of departure and of destination are situated either in the territories of different States of which one at least is a Contracting State, or in the territory of the same Contracting State when an intermediate landing has been agreed in the territory of another State, even if the latter is a non-Contracting State."

Should Apply to Carriers in Military Service

Article II, 2, of the Rio draft is revised so that 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."

There is no valid reason why the passenger or the carrier should not be given the advantage of the Convention just because the whole capacity of the aircraft has been reserved by military authorities. Perhaps the most important consideration for encouragement of aviation by governments is the tremendous value of an aeronautical industry ready to serve the public interest in time of emergency. The extensive use of privately owned aircraft and government aircraft operated by the flying crews of private air carriers in the Korean incident illustrates this increasing role of private aviation. While some governments may wish to avoid entirely any responsibility in such circumstances, and

may do so under governmental immunity when such exists, the private carrier has no such protection. It is realized that the requirements of the existing Convention are not always complied with in connection with this governmental use but with more realistic and practical requirements for compliance, this may be a matter of diminishing importance. I suggest that the subject sub-section (a) be deleted or preferably redrawn to relieve the government of the liability imposed by the Convention, if desirable, but retaining the application of the Convention to the carrier and his agents.

Notice of Limitation Must Be Alternative

Article III of the Rio draft carries a provision in both 1 and 2, as well as similar requirements in later Articles affecting baggage and cargo, that must be corrected.

> "1. For the carriage of passengers a ticket shall be delivered containing particulars which show that the carrage 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 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."

These provisions, as well as similar ones with respect to baggage and cargo, carry the requirement that I think may be extremely important and certainly should be corrected to avoid needless litigation, delay and expense. That requirement is the provision that the carriage document must contain a definite and unequivocal statement that the carriage is subject to the rules relating to liability established by the Convention. I am thoroughly in agreement with a requirement that the passenger must have notice that the carriage, when Warsaw, is subject to the rules relating to liability. That is not the point. The practical situation is that all international journeys or shipments are not subject to the Convention. Tickets or other contracts for carriage are made out by clerks of airlines, travel and other agencies. They are required to make, not an alternative statement, but the positive statement that the carriage he is selling is subject to the rules relating to liability established by the Convention. This is a legal decision that ticket sellers could not be expected to make. They are not required to give legal advice on the passengers' other legal problems of travel. In some instances, experienced lawyers have disagreed as to Convention applicability to the point that litigation was necessary to determine the issue. It is certainly not fair to expect a clerk to make such a de-

cision or to penalize the carrier with the loss of limitation if he makes a mistake.

While Article 3, Paragraph 1, might be interpreted to require only that the ticket contain particulars which show that the carriage is international and that the required statement about liability depends upon applicability, Paragraph 2 states quite definitely that "if the carrier accepts the passenger without a ticket having been delivered *or* if the ticket does not include the statement that the carriage is subject to the rules relating to liability . . ." the carrier shall not be entitled to avail himself of the limit. The carrier's only defense would be to place a notice in the ticket that, if the journey is international in the sense of Article 1, it is subject to the rules relating to liability, etc. Whether or not this would be a sufficient compliance would depend upon judicial ruling and there is bound to be a lack of uniformity in the interpretations by courts of various nations. The ambiguity will encourage litigation in all nations and, hence, the exorbitant costs and long delays incident to litigation.

The remedy is very simple. Instead of requiring a positive statement that the Convention rules relating to liability apply, it should be sufficient to state that if the Convention applies to the journey, then the rules relating to liability would also apply. The last phrase following the words in Article 3, Paragraph 1, must be changed to read: "And a statement that if the carriage is international in the sense of Article 1, it is subject to the rules relating to liability established by the Convention."

The last sentence of Article 3, Paragraph 2, must be changed to read as follows:

> "Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered, or if the carriage is international in the sense of Article 1 and 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."

Similar appropriate changes must be made in the baggage and air waybill requirements. The notice could then be placed on all tickets, whether Warsaw or not.

Defense Should Be Made More Realistic

The deletion of Paragraph 2 in Article 20, which exempts liability caused by error of piloting or navigation, seems appropriate as it is sort of an imposition of admiralty rules upon an otherwise tort instrument. Paragraphs 1 and 2 really clash in legal theory.

I was disappointed, however, that Article 20 was not amended to more realistically implement the justice involved in the theory of fault as the basis of liability. Paragraph 1 provides:

> "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it is impossible for him or them to take such measures."

This is the only provision that saves the Warsaw Convention from imposing absolute liability without fault — a doctrine completely repugnant to the American concept of law and justice in connection with passenger-carrier liability. The carrier is not the insurer of his passenger.[8] While extremely valuable in controlling the excessive demands incident to absolute liability, even in its present form, it has proven itself to be most impractical and unrealistic except for such purposes. In all Warsaw litigation that I recall, there has been only one successful defense under this section and that claim was settled before appeal and at the full Warsaw limit. This is because it is difficult to conceive of an accident happpening when all necessary measures to avoid the damage were taken. If everything necessary to avoid the damage had been done, how could there be damage?

As now worded, this provision appears to be an almost meaningless gesture by adherents of imposed liability to our established doctrine that fault must be the basis for liability. It could be easily corrected to more honestly reflect the theory of fault as the basis of liability in connection with the liability automatically imposed by Article 17, and with entire justice to the passenger. I suggest that the paragraph be changed to read:

> "The carrier shall not be liable if he proves that he and his agents have exercised the highest practicable degree of care to avoid the damage."

This would assure to the passenger the ultimate in care, but also would not impose liability upon the carrier to do the impossible in either taking measures he could not take or assuming liability for events he could not control.

Limit for Passenger Liability Increased 60%

Article 22, Paragraph 1. The limit for fatal or non-fatal injury is increased from 125,000 gold francs ($8,291.87) to 200,000 frs. ($13,267) or 60%.

Because of social thinking, but definitely not because of economic inflation, there undoubtedly has been considerable pressure in the United States, in particular, and a few other nations, for a considerable increase in the Warsaw limit, although the official ICAO Report and the final Rio action indicates that the governments of many nations considered the existing maximum limits to be satisfactory. The United States delegation is reported to have been the leader in this movement. This is not surprising, since the U. S. Air Coordinating Committee had previously indicated its position that the United States regarded the question of a substantial increase of liability limits as the only one of major importance.

[8] Allison v. Standard Airlines, 1 Avi. 462; 1930 USAvR 292.

Regardless of the unquestioned importance of the question of limits, such a position shows a lack of proper appreciation of other practical considerations involved. I am reliably informed that the U. S. delegation went so far as to vote against the adoption of obviously needed changes — like the Escape Clause that was responsible for most of the litigation, expense and delay to claimants under the existing Convention. The chairman of the U. S. delegation is quoted[9] after the conference as reiterating the position that, while there were some defects in the Convention, they were not serious, except the one case of the limit. He was said to state that raising the limits is not a legal but an economic problem, and I got the distinct impression that he would be quite happy to change only the limit by protocol, leaving the airlines without relief from the confusion and inequities of the other provisions that need clarification and correction. I regret that I can find little evidence in either the attitude of the U. S. delegation or the ICAO Legal Committee membership as a whole that justice to the airline is to be considered when it conflicts in any way with the privileged position of a claimant for damages.

Limit on Recovery an Economic, Not a Social Problem

It is true, of course, that the amount of the limit is an economic problem, as our delegation chairman says, but our delegation refuses to subject it to economic reasoning. They insist upon political reasoning. I shall discuss this more at length later, but for the moment give the "economic" reasons for increase as stated in the official ICAO Report of the Rio meeting.[10] It will be noted that these are not economic reasons at all except perhaps in the socialistic sense.

Reason (1) is that judicial awards of damages in non-Warsaw cases are often much higher than the Warsaw maximum. That is just as silly as stating that a few men in the United States are 7 feet tall; therefore, the standard height of men is 7 feet. There have been a few — a very few — runaway verdicts for passengers in non-Warsaw cases. Such instances are fractional as compared with the hundreds of non-Warsaw cases settled in relative comparison to the Warsaw limit. This sage economic basis does not also say that there have been a few cases also in which the plaintiff received no award at all. Does it follow, as an economic conclusion, that the Warsaw limit should be decreased to zero?

Reason (2) was that the record of air safety had vastly improved since 1929 and, therefore, the carrier is now involved in lower risks. Consequently, he should be prepared to pay higher amounts on fewer accidents. That is most questionable as an economic reason to indicate a proper limit on recovery.

The improvement in the safety record would (as it has) cause a reduction in the premium rate, but there is no legitimate connection

[9] American Aviation Daily, September 30, 1953.
[10] ICAO DOC. 7425.

whatever between the premium rate paid for insurance and the economic consideration of a proper limit for damages. What interest could a passenger or his heirs have in the amount of premium paid by the airline? How could it affect the economic factors involved in an amount that would be fair as a limit, completely without regard to what airline caused the injury or what that airline was paying in insurance premiums? This and other reasons advanced by the U. S. delegation, apparently relying upon a report of the Air Coordinating Committee's Economic Division,[11] discussed later, can only be based upon the highly socialistic theory of "ability to pay" as a criterion for liability.

Reason (3) argued that the cost of an increase reflected in the additional insurance premiums payable, in relation to the cost of all air transport generally, was small. Again, the economic considerations affecting "ability to pay" are confused or deliberately substituted for an economic consideration of what would constitute a proper limit of liability. Again, it must be said that the claimant is not interested in the slightest in the relative cost of insurance or the cost of air transport generally. The defense is that the Legal Committee and the delegates are concerned also with the economics of the airlines and do not wish to put a greater burden on the airlines than they can bear. I regret that I have been unable to find any solicitude for the airlines in the past Sessions of the Legal Committee, or in the Rome 1952 conference, when Rome and Warsaw revisions were being discussed. I have the distinct impression that the decision was first made to substantially increase the limitation for social reasons and then the interest, both of the U. S. delegation and ACC Economic Division, was to prove that the higher limits could be paid without economic disaster to the airlines.

The ACC Economic Division Report

Let us look briefly at the contribution of the ACC Economic Division in its effort to justify an increase in the present Warsaw limit. In the report just referred to, the only relevant statistic produced by that report fully substantiated the fact that the limit presently provided in the Warsaw Convention had more than kept economic pace with rising costs. In its attempt to determine the "real value" of the present Warsaw limit, the ACC Economic Division states:

> "The liability limit (125,000 gold francs) in terms of U. S. dollars increased from $4,898 in 1929 to $8,292 at January, 1953. Thus, the gold value in currency was increased 169% of the 1929 level while the cost of living index has gone up to 156% of its earlier level, *resulting in an 8% increase in the buying power of the gold franc within the United States.*"

Proponents of increase contend that there is no evidence that the limit fixed in 1929 was right. The fact is that I know of no proposition that has been so overwhelmingly proven. That the limit was right in 1929 and is right today in most of the nations now adhering to the

[11] ACC 51/22, 14A.

Warsaw Convention is amply proven by the fact that most leading nations have adopted the Warsaw standard as their non-Warsaw and domestic standard and in some cases have established lower standards. My information is that such nations include Belgium, Brazil, Denmark, Finland, Germany, Greece, Holland, Hungary, Italy, Luxembourg, Mexico, Norway, Poland, Spain, Sweden, Switzerland and — to prove that the limit is still in line with the standards of the times — the great nation of the United Kingdom adopted the Warsaw standard of liability for its domestic standard in 1952. The ICAO official report of the Rio conference, itself, admits that "some members of the Legal Committee stated that their governments considered the existing maximum limits of the Warsaw Convention to be satisfactory." It seems quite evident that these proponents of increase want more money for the claimant, not evidence that the Warsaw limit is economically insufficient. The objective of an international convention, intended to be appplicable to all parts of the world, must take into account the different economic and monetary conditions in different nations.

In this connection, a brief look at the "economic conclusions" of the U. S. Air Coordinating Committee's Economic Division is revealing. It is apparent that the economists making the report are confused as to the difference between accident and liability protection. In any event, they appear to forget that the Warsaw Convention and the revision of same deals with liability, not accident insurance. They appear to ignore the fact that the carrier is not the insurer of his passengers and should not be, according to American law. His legal obligation to the passenger is to use the highest degree of care, not to guarantee safe passage regardless of conditions beyond his control.

Next, not one of their conclusions — except that the real or economic value has increased since 1929 more than the cost of living — has anything to do with the adequacy of the limit. They go about justifying an increase by the use of the most amazing figures.

They show that insurance cost has gone down and that the cost of insurance is less than the cost of passenger food. What possible connection does insurance cost or the cost of passenger food have with respect to the adequacy of the liability limit? It would be just as reasonable to say that ability to pay is the proper criterion for setting a limit.

(TO BE CONTINUED)