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The Development of International Liability Rules Concerning Aerial Collisions

INTERNATIONAL REVIEW

THE DEVELOPMENT OF INTERNATIONAL LIABILITY RULES CONCERNING AERIAL COLLISIONS*

THERE are, at present, no complete international rules governing liability for damage caused by colliding aircraft. To be sure, many of the problems concerning damage caused on the surface as a result of collisions between aircraft in flight are regulated by Article 7 of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface opened for signature at Rome on October 7th, 1952,[1] but there are, as yet, no international rules concerning damage caused as the result of such collisions to the persons and goods on board such aircraft.

At the close of its Ninth Session (August 25th-September 12th, 1953), the ICAO Legal Committee recommended to the ICAO Council that the first item on the agenda of the Tenth Session be the preparation of a draft convention on aerial collisions. The Committee appointed a sub-committee[2] on that subject to prepare a draft convention for circulation to states and international organizations in advance of the Tenth Session of the Committee.

The purpose of this note is not to argue that a convention on aerial collisions is necessary or desirable, but rather to indicate, on the basis of the work done on the subject in the last few years, some of the problems that will have to be faced by those engaged in the preparation of the convention. It will be recalled that the CITEJA (*Comité internationale technique d'experts juridiques aériens*) drew up, at its Eleventh Session, in Berne, in 1936, a preliminary draft convention on aerial collisions.[3] This draft was submitted to the Fourth International Conference on Private Air Law, held in Brussels, in September 1938, but was not considered at that Conference. Further work on the draft was halted until after the war.

The CITEJA had the subject of aerial collisions on its agenda in 1946, but the matter was given no substantive study prior to the liquidation of the CITEJA in 1947. In the latter year, the newly created ICAO Legal Committee put on its work program the question of the revision of the Rome Convention (of 1933) and related matters, one of the related matters being that of aerial collisions. However, in ICAO legal circles, the subject of aerial collisions received extensive consideration only in relation to damage caused by colliding aircraft to third parties on the surface. A

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* This paper deals with the developments of international liability rules concerning aerial collisions prior to the Paris meeting in 1954 of the Sub-Committee established by the ICAO Legal Committee. It deals with the material which was considered during the Sub-Committee meeting and on the basis of which the new draft Convention was drawn up. The report of the Sub-Committee is set forth in 21 JRL. OF AIR LAW & COM., on page 90 *et seq.*

[1] See the text of this Convention in (1952) 19 JRL. OF AIR LAW & COM., page 447 *et seq.*

[2] Members of the sub-committee are: Mr. André Garnault (France), Chairman, Professor Stig Iuul (Denmark), *Rapporteur*, Dr. E. A. Ferreira (Argentina), Dr. T. Cavalcanti (Brazil) — *ex officio*, as chairman of ICAO Legal Committee, Dr. Claudio Ganns (Brazil), Brigadier C. S. Booth (Canada), Professor A. Ambrosino (Italy) — ex *officio*, as second vice-chairman of ICAO Legal Committee, Mr. A. Kotaite (Lebanon), Mr. H. Drion (Netherlands), Mr. K. Sidenbladh (Sweden) — *ex officio* as first vice-chairman of ICAO Legal Committee and Major K. M. Beaumont (United Kingdom).

[3] See the text of this draft in (1937) 8 JRL. OF AIR LAW & COM., p. 320 *et seq.*

certain amount of work was done on other aspects of the subject by a sub-committee on the revision of the Rome Convention and related matters in 1948 and 1949 and then, after the dissolution of that body, by Professor S. Iuul of Denmark, who acted as *rapporteur* from mid-1949 until early in 1951. A questionnaire circulated by ICAO in 1948 elicited information from nineteen states concerning the various principles to be included in provisions dealing with aerial collisions. At the Seventh Session of the ICAO Legal Committee, in 1951, it was decided that the question of the revision of the Rome Convention and that of provisions on aerial collisions should be taken up separately. As above stated, the Rome Convention of 1952 settled certain aspects of the question of aerial collisions in so far as damage on the surface was concerned. Early in December, 1953, Professor Iuul, who was again named *rapporteur*, this time to work with the recently established sub-committee on aerial collisions, submitted for consideration of that group a new draft convention on aerial collisions. In this draft he attempted to give the principles which are laid down in the new Rome Convention the widest possible application as regards aerial collisions, bearing in mind, however, that the Rome Convention embodies a system of absolute liability while the proposed convention on aerial collisions would be based on negligence.

Description of the CITEJA draft

The CITEJA draft represented the result of several years' work and the principles which it contains are useful. It will, therefore, be useful to give a short description of this draft.

According to the CITEJA draft, an aerial collision is any physical impact which has occurred, for any reason whatever, between two or more aircraft in flight (Article 2(1)). Even damage caused when there has been no physical impact is considered as damage arising out of a collision if it is caused by one aircraft in flight to another aircraft in flight (Article 2(3)).

The CITEJA draft provides for liability based on negligence (Article 4(1)). In this it differs from the Warsaw Convention, in which liability is based on a presumption of negligence and from the Rome Convention with the latter's system of absolute liability. Compensation for damage caused in case of a collision that has occurred between aircraft is payable by the operator of the aircraft (Article 3(1)). Defences available to the operator are cases of fortuitous event (*cas fortuit*) and *force majeure* and the fact that no negligence has been proved against the aircraft (Article 6). If a collision is caused by concurrent negligence, the liability of each one of the aircraft for the damage caused to aircraft, to persons and goods embarked or shipped thereon, is in proportion to the degree of negligence shown; however, if, according to the circumstances, the proportion cannot be determined, or if the degrees of negligence appear to be equal, the liability is shared equally (Article 5). This formula is borrowed from Article 4 of the Convention for the Unification of Certain Rules of Law Respecting Collisions Between Vessels, opened for signature at Brussels, on September 23rd, 1910.

The amount of compensation payable by the person liable is limited to the value of the negligent aircraft and this value is determined on the basis of 250 gold francs ($16.58 U.S.) per kilogram of the weight of the aircraft. However, the limit of the operator's liability is not less than 600,000 gold francs ($39,797.00 U.S.) or more than 2,000,000 gold francs ($132,656.00 U.S.) in respect of any one aircraft (Article 4(2)). In view of the fact that damage for which compensation is sought would be to property (normally, the aircraft and the goods on board) and persons (normally, the persons on board), the CITEJA draft provides for appor-

tionment of the value of the aircraft (subject, of course, to the overall limits) at the rate of one-third to property and two-thirds to persons, but, no person injured may get more than 125,000 francs ($8,291.00 U.S.) by way of compensation (Article 4(3)). If several persons have suffered damage in the same accident, and if the lump sum to be paid by way of compensation exceeds the limits applicable to the aircraft, the right of each person is proportionately reduced, so as not to exceed in the aggregate the limits (Article 4(4)).

As is the case in the Warsaw and Rome Conventions, the CITEJA draft provides for circumstances in which the operator will be subjected to unlimited liability. He is not entitled to avail himself of the provisions which limit his liability if it is proved that the collision was caused by his wilful misconduct (the familiar, but difficult, *dol* of the Warsaw Convention and of the original Rome Convention of 1933) or gross negligence (*faute lourde*) or by the wilful misconduct or gross negligence of his employees, unless he proves, where his employees are involved, that he has taken all the necessary measures to prevent the collision (Article 4(5)).

In the case of damage on the surface caused by two or more aircraft that have collided, the operators of these aircraft are jointly and severally liable to the third parties suffering the damage, each one of them being bound within the conditions and limits of his liability to third parties on the surface (Article 7(1)).

There are a variety of jurisdictions provided for bringing actions under the CITEJA draft. Thus, at the option of the plaintiff, the following judicial authorities, provided they are in the territory of a party to the convention, have the right to hear suits for damage arising out of a collision: (1) those of the defendant's domicile; (2) those of the place where the collision occurred; (3) if there has been an attachment of one of the aircraft that collided, those of the place of the attachment (Article 10(1)). If the defendant does not have his domicile in the territory of one of the parties to the convention and if the collision occurred outside the territory of parties to the convention, the suit for damage may be brought before the court of the place of registration of one of the colliding aircraft, the operator of which is being sued (Article 10(2)).

A key provision of the CITEJA draft is concerned with the applicability of the convention. The convention is to apply in all states parties to it: (a) when the collision takes place on their territory and if at least one of the colliding aircraft is registered in another state party; (b) regardless of the place of collision, if two or more of the aircraft are registered in different states parties (Article 14(1)).

Problems involved in revising the CITEJA draft and in preparing a new draft convention on aerial collisions

In its first report, in 1948, the ICAO sub-committee on the revision of the Rome convention and related matters expressed the view that liability under the convention on aerial collisions should be based on negligence, as in the case of the CITEJA draft and this view was not questioned in the replies of states to the 1948 questionnaire. Professor Iuul's 1953 draft is based on the principle of negligence.

Some of the main difficulties which arise under the draft convention are connected with the case of concurrent negligence. Sixteen of the nineteen states replying to the 1948 questionnaire favoured the formula for apportionment set out in the CITEJA draft (Article 5(1); however, two states favoured the rule of leaving the damage or loss lie where it falls except in the case where the collision results exclusively from the negligence of one

party. When the ICAO sub-committee considered this matter in mid-1949 it realized that the principle of apportionment of damages in accordance with the degree of negligence was consistent with general maritime law and the civil law of many countries. Although the principle of leaving the damage lie where it falls was in many states considered as a bygone stage of the law of torts, nevertheless it was noted by the sub-committee that the latter principle appeared to present a solution which, in the majority of cases would have the most equitable result.

The sub-committee argued that, if the method of apportionment were used in cases of collisions, the problem of evaluating the relative contributions to the final result of two technical acts occurring in a technical art, would be entrusted to a court which, in most cases would be without the technical knowledge essential to a proper evaluation. This might lead to a possible arbitrary apportionment of the loss equally. Then, again, the principle of apportionment might subject the operator of a small aircraft to a possible liability far in excess of the risk contemplated by him when he elected to fly that particular aircraft. The rule of leaving the damage or loss lie where it falls would avoid the possibility of arbitrary judgments and the parties would be left to carry a loss which would bear a reasonable relationship to the risks they assumed in electing to operate the particular aircraft involved.

Professor Iuul was not convinced by these arguments. He felt that, as apportionment of damages in case of concurrent negligence was adopted as a principle in many systems of liability based on negligence, it would probably be impossible to get a special rule (i.e., that of leaving the damage or loss lie where it falls) concerning aerial collisions accepted in such systems since it would not be admitted that the technical difficulties were greater in cases of aerial collisions than in other cases where the principle of apportionment of damages was applied. It would also be difficult, he considered, to secure general adoption of a provision that led to the result that, in the case of concurrent negligence, the loss which was to be sustained by an operator, could not exceed the value of his aircraft regardless of the degree of negligence he had shown. In line with these thoughts, Professor Iuul's 1953 draft provides for apportionment in accordance with the degree of negligence.

Once the type of liability has been established, the next step is to determine the scope of the convention. Is the scope of the convention as set out in the CITEJA draft satisfactory? The answer to this question depends on whether or not the definition of "aerial collision" in that draft is satisfactory; and before the term "*aerial* collision" can be defined, a decision has to be reached as to the period during which a collision must occur in order to be considered as "*aerial.*" There has already been a considerable amount of work done on this matter.

In the questionnaire of 1948 the following definition was proposed:

> "(i) By an aerial collision is meant any physical impact which has occurred, for any reason whatever between two or more aircraft during the period of taxiing, immediately prior to and for the purpose of taking-off, actual flight, landing and taxiing immediately after landing until the mooring or terminal parking place is reached.
>
> "(ii) It shall also be deemed to be a case of collision when damage is caused by one aircraft to another aircraft, both aircraft being in movement during the period defined in paragraph (i) above, even when there is no actual collision."

Out of the nineteen states replying to the questionnaire of 1948, three (one of which suggested an addition to cover the case of damage caused to persons or goods on board the other aircraft) expressly declared that they would accept that definition. One state said it would like to extend the application of the convention to the case of an aircraft in movement, even when such movement was not connected with flight. No express indication concerning the scope of the convention was given in the replies of the other states.

In his report submitted to the Fifth Session of the Legal Committee, early in 1950, Professor Iuul pointed out that it was not very successful to explain "collision" by "physical impact," since the latter term was very difficult to translate into other languages by exactly equivalent words. He thought it might be preferable to maintain the word "collision" in the body of the definition of "aerial collision" and define only the word "aerial." He further felt that it was advisable to give the rules of liability for aerial collisions the same scope as the provisions concerning damage caused to third persons on the surface, especially because a collision between two or more aircraft very often would also cause damage on the surface. It also seemed quite obvious to him that, if innocent persons on the surface were protected by international rules only during the period defined by the Rome Convention, there was no reason for protecting owners of aircraft for a longer period (i.e., a period comprising movements of aircraft under their own power without being in flight) by other international rules.

Later, in a report submitted to the Seventh Session of the ICAO Legal Committee, early in 1951, the *rapporteur* reconsidered his position since he believed that the advantage of standardizing the scope of the Rome Convention and that the proposed convention on aerial collisions was affected by the fact that the two conventions were based on different principles. He considered that, if both aircraft collided while moving under their own power without being in flight, it would be irrational to leave it to the national law to decide the case. The result of this might be that both operators would be found liable without proof of negligence, and that the liability would be unlimited. He could not agree with this result.

Therefore, the *rapporteur* proposed in his 1953 draft that, for the purpose of the convention, an aircraft be considered as being in flight "not only from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends, but also when it is moving on the surface under its own power." Using this broad concept of the expression "in flight" he would have the convention "apply to all collisions between two or more aircraft in flight and to other cases where damage is caused to aircraft in flight or to persons or goods on board thereon by the operating of another aircraft in flight even if no actual collision has taken place." Thus, the scope of the proposed convention would go considerably beyond that of the Rome Convention of 1952 where "an aircraft is considered to be in flight from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends."

Once the type of liability and the scope of the convention have been established, it will then have to be decided whether the liability should be limited or unlimited. In response to the 1948 questionnaire, seventeen out of nineteen states replying said that liability should be limited in the convention, while two states proposed that liability should be unlimited because it was based on negligence.

Another question that arises at this point is that of the so-called global limitation of liability of the operator. Now that the work is beginning on the completion of the third convention in the cycle of conventions concerned with the liability of those engaged in air navigation—the other two being the Warsaw Convention and the Rome Convention—there may be a tendency

to consider the limitation of the liability of the operator under the proposed convention on aerial collisions in relation to the global liability of the operator. In other words, will it be possible to establish limits of liability under the convention on aerial collisions without taking into account the fact that, if an aerial collision occurs, both Warsaw and Rome liability might also apply under appropriate circumstances?

A word concerning the limit per person may serve to illustrate one aspect of the relationship between the subject of aerial collisions, on the one hand, and the Rome and Warsaw Conventions, on the other. The CITEJA draft provides for a limit of 125,000 francs ($8,291.00 U.S.) per person suffering damage. This is equivalent to the present Warsaw limit. However, the Legal Committee at its Ninth Session included in the draft Protocol Amending the Warsaw Convention[4] a limit of 200,000 francs $13,265.60 U.S.) in respect of each passenger under that Convention. The limit per person established by the Rome Convention of 1952 is 500,000 francs ($33,164.00 U.S.). It will have to be decided whether, even in light of the different bases of liability in the Warsaw and Rome Conventions, and the proposed convention on aerial collision, there should be different limits per person in the respective conventions.

At this stage the difficult question of the circumstances in which unlimited liability will apply must be considered. The CITEJA draft excludes the limitation of liability when the collision is caused by wilful misconduct (*dol*) or gross negligence (*faute lourde*) of the operator or his employees, unless the operator proves, where his employees are involved, that he has taken the necessary measures to prevent the collision. Twelve of the nineteen states replying to the 1948 questionnaire were in favour of retaining the principle of this provision.

However, since the filing of these replies attempts have been made to redefine the circumstances under which unlimited liability will apply in the Rome and Warsaw Conventions. In Article 12(1), the Rome Convention of 1952 bases unlimited liability on a new formula in place of the old formula of unlimited liability in the case of wilful misconduct (*dol*) set out in the Rome Convention of 1933. The draft Protocol Amending the Warsaw Convention contains a provision based on Article 12(1) of the Rome Convention of 1952 and it is proposed that this provision replace Article 25 of the Warsaw Convention which, at present, provides for unlimited liability of the operator in case of wilful misconduct (*dol*). Professor Iuul has included the Rome formula in his 1953 draft. It will have to be decided whether exactly the same formula that could be applied in the case of the Rome Convention (where liability is absolute) or in the Warsaw Convention (where there is a presumption of negligence) could be applied in the case of the proposed convention on aerial collisions where liability is based on negligence. This question will require careful examination.

The CITEJA draft and the Rome Convention reach a point of contact in dealing with the question of damage to third parties on the surface caused by colliding aircraft. The CITEJA draft, in dealing with this question (see Article 7(1)), is based on the Rome Convention of 1933 and, therefore, contemplates joint and several liability of the operators of colliding aircraft in respect of damage on the surface. But, Article 7 of the Rome Convention of 1952 has introduced a change by providing for the liability of each operator when two or more aircraft collide or interfere with each other in flight in case of damage on the surface. In view of this change in the Rome Convention, the CITEJA draft may now require some modification.

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[4] See the text of the draft Protocol in (1953) 20 Jrl. of Air Law & Com., p. 326 *et seq.*

A further problem that arises in the case of damage caused by colliding aircraft to third parties on the surface relates to the apportionment of liability among the operators of such aircraft. The Rome Convention (with its system of absolute liability) has to deal with the relationship between the third parties on the surface suffering damage and the operators. In contrast with this, the proposed convention on aerial collisions (which is based on a system of negligence) is concerned with what might be called the second phase of the settlement in respect of damage caused on the surface, namely, the apportionment of the liability among the operators themselves.

Professor Iuul's 1953 draft has considerably shortened the corresponding provisions of the CITEJA draft. The new draft provides that, if an operator is held liable by a third person for damage caused on the surface as a result of a collision or other interference between aircraft in flight, he shall have a right of recourse against the person liable under the convention on aerial collisions within the limits of liability for damage caused on the surface which is applicable to that person. In case of concurrent negligence between two or more persons liable under that convention, the provisions concerning apportionment of liability are applicable.

The question of the jurisdiction in which actions arising under the convention should be brought is not an easy one. The majority of the replies to the 1948 questionnaire were in favour of omitting from the CITEJA draft the forum of the judicial authorities of the place of attachment assuming that there had been an attachment of one of the aircraft that collided). Thus, the fora would be: (a) the judicial authorities of the defendant's domicile and (b) those of the place where the collision occurred. However, some states preferred to have a single forum, that is, the judicial authorities of the place where the collision occured. In his 1953 draft, Professor Iuul has included jurisdiction provisions based on the single forum system found in Article 20 of the Rome Convention of 1952.

On the question of the applicability of the convention, eleven of the nineteen states replying to the 1948 questionnaire favoured the retention of Article 14 of the CITEJA draft. Two favoured restricting the applicability of the convention to the case where all colliding aircraft were registered in a state party to the convention. One state expressed the opinion that it would be undesirable to allow an operator from a state that was not party to the convention to benefit from the provisions of the convention, for example, those concerning the limitation of liability.

In his report to the Seventh Session of the Legal Committee the *rapporteur* proposed that the convention should apply to: (1) a collision between aircraft registered in different contracting states, if the collision took place in a contracting state; (2) a collision between aircraft registered in different contracting states, if the collision took place in the territory of a non-contracting state or on the high seas; (3) a collision between aircraft registered in a contracting state and other aircraft, if the collision took place in a contracting state; (4) a collision between aircraft registered in a contracting state and other aircraft, if the collision took place in a non-contracting state and that the suit is brought before a court in a contracting state. He proposed that the convention should not apply to: (1) a collision between aircraft registered in the same state; (2) a collision between aircraft registered in non-contracting states; (3) a collision between aircraft registered in a contracting state and other aircraft, if the case were brought before a court in a non-contracting state.

However, in his 1953 draft Professor Iuul has provided that the convention will apply "to damage . . . caused in the territory of a contracting state where at least one of the aircraft is registered on the territory of another contracting state."

Other questions which will require consideration in connection with the preparation of the proposed convention are: the definitions of "weight of an aircraft," "gold franc," "territory," "person," "Contracting State"; security for operator's liability; aircraft (i.e., military, customs. police aircraft) to which the convention will not apply; legislative measures to give effect to the convention; assistance to, and information to other aircraft, and payment of compensation in local currency.

Conclusion

The foregoing presents only some of the main problems involved in the preparation of a new draft convention on aerial collisions. The subject is a difficult one and it will be no easy task to fit the draft into the existing pattern of international rules governing liability arising out of air navigation.

Gerald F. FitzGerald

OBSERVATIONS AND COMMENTS ON FOREIGN CASES[1]

MULLER vs. AERO-CARGO

A decision of some importance both to shippers and carriers by air was decided by the Cour d'Appel d'Alger[2] under the provisions of the French Air Navigation Act of 1924. *Articles of the Act involved*:

> *Art.* 41: The carrier is liable for loss or damage of the merchandise carried except in cases of force majeure or the inherent vice of the merchandise.
>
> *Art.* 42: The carrier may, by an express clause, exonerate himself from the liability which incurs by reason of risks of the air and of faults committed by any person employed on board in the conducting of aircraft carrying either passengers or merchandise.
>
> *Art.* 43: Every clause is null the purpose of which is to relieve the carrier of liability either for his own act or for that of his employees when such act relates to the sending, preservation and delivery of the merchandise.

On October 29th, 1948, the Company "Aero-Cargo" agreed to carry 29 cases of fresh meat from Oran to Metz. During the flight, the radio apparatus was damaged by lightning and the pilot decided to land at an intermediate point for repairs. He took off again 17 hours later and arrived at his destination on October 30th. When it arrived the shipment of meat was contaminated and the civil authorities condemned it. In an action for damages, the consignor claimed the value of the meat as well as loss of profit.

In the Court of First Instance,[3] the Plantiff's demand did not prevail. The Court argued that the damage was due firstly because of the delay in transit and secondly because of the inherent vice of the merchandise. The delay was not to be imputed to the carrier: it was due to "force majeure" which, under French Law, exempts carrier from liability, (Art. 41 of the Act). Even if the damages to the radio are due to lightning and the circumstances considered as "risque de l'air," the carrier is not liable because he

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[2] Cour d'Appel d'Alger (2éme Chambre) Nov. 22nd, 1952, Revue Française de Droit Aérien 1953 p. 235.

[3] Tribunal de Commerce d'Oran, Jan. 9th, 1950, Revue Française de Droit Aérien 1950 p. 314.

has validly exempted himself from liability in such even by a clause in the contract of carriage (Art. 42 of the Act). The Court further held that, fresh meat is inherently susceptible of being contaminated and that in the present case the shipment of fresh meat was contaminated because of such inherent vice.

On Appeal[4] the Court rejected the reasoning of the Court of First Instance and held that, while the delay was not to be imputed to the carrier, it laid down the principle that the delay in this case was due to "risque de l'air." This finding which the Court of the First Instance passed over, is a very important one, as the "risque de l'air" unlike "force majeure," is not a general ground of exemption from liability for non-execution or faulty execution of the contract of carriage. The clause in the contract in this case excluding liability for such risk merely protected the carrier during the "phase nautique" of the carriage. It did not protect the carrier from liability during the "phase commerciale"[5] of the carriage, this latter was the phase in which the damage occurred. It is on this point that the court of Appeal condemned the carrier.

The Court distinctly held that the delay which was due to the "risque de l'air" was not the real cause of the damage; the damage was the direct result of the lack of ordinary foresight on the part of the pilot with respect to the preservation of the shipment of meat. This lack of foresight, the Court said, occurred in the "phase commerciale" of the carriage and against such lack of foresight the exemption in the contract did not apply. The Court further explained that after the pilot had landed at an intermediate point for reasons mentioned above and, knowing what an ordinary man should know, namely that if fresh meat is not protected by refrigeration for any length of time, it is bound to deteriorate, the carrier or his agent should have advised the consignor of this interruption of flight and ask for instructions, it was the duty of the carrier or his agent to place the meat in the refrigeration system which was available at the point where the aircraft landed and interrupted its flight. The Court further asserted that, under established jurisprudence, this was not an exceptional duty imposed on carrier.

It would appear, however, that the "established" jurisprudence does not place an absolute burden on the carrier in that respect but the obligation is commensurate with the inherent resistance of the merchandise to withstand climatic conditions, delay or other physical causes which may damage the cargo.[6]

The Court of Appeal did not follow the Court of First Instance in its holding that the damage was due to the inherent vice of the shipment. The inherent vice in this case, if any, should be appreciated not under abnormal conditions but in a normal flight. It has been shown that a similar shipment of fresh meat, from the same consignor, shipped in a plane owned by the same company, from and to the same place, in an ordinary flight arrived in excellent condition.[7]

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[4] Cour d'Appel d'Alger op. cit.

[5] For the purpose of elucidation "phase nautique" refers to acts pertaining to the conduct of the aircraft but when such acts relate to "the sending, preservation and delivery of the merchandise" we are in the presence of "phase commerciale" of the carriage. For further details thereon see: M. de Juglart: Traité Elementaire de Droit Aérien, Paris, 1952, p. 275. Lincoln H. Cha: The Air Carrier's Liability . . . in Anglo-American, French.

[6] Cour d'Appel d'Aix Jan. 31st, 1952. Revue Française de Droit Aérien 1952, p. 59.

[7] There are a number of other points raised in this case but in reviewing the case, the writer left them out for further consideration.