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INTERNATIONAL REVIEW†

I. INTERNATIONAL CIVIL AVIATION ORGANIZATION

REPORT OF THE LEGAL COMMISSION

I. Introduction

1. Between 23 August 1962 and 8 September 1962, both dates inclusive, the Legal Commission held seven meetings over which the undersigned had the honour to preside.
2. During its second meeting, the Commission elected Mr. B. S. Gidwani (India) as Vice-Chairman.
3. A summary of the discussions will be found in the minutes of the meetings.
4. The delegates of nearly every Contracting State attended all or some of the meetings of the Commission.
5. Observers from the Intergovernmental Maritime Consultative Organization, the International Air Transport Association, the International Chamber of Commerce, the International Law Association and the International Union of Aviation Insurers attended the meetings.
6. The Secretariat of the Commission was composed of Messrs. P. K. Roy, G. F. FitzGerald, G. Bonilla, R. Mankiewicz and R. Lemaître.

II. Consideration of agenda items referred by the Assembly to the Legal Commission

General review of the legal work of the Organization

7. The Commission noted the information paper presented by the Council which reviewed the legal work of the Organization.

Programme of future work of the Organization in the legal field

Work programme of the Legal Bureau

8. The Commission noted the information set forth in paragraphs 1 and 1.1 (Work programme of the Legal Bureau) of the paper presented by the Council concerning the future work of the Organization in the legal field (1963-1965).

Work programme of the Legal Committee

9. The Commission, having noted the information set forth, undertook a general examination of the subjects in the Work Programme of the Legal Committee prior to the Fourteenth Session of the Assembly.
10. These subjects were as follows, arranged according to the degree of urgency, into categories A and B:

Part A:

Subjects on the current programme:

Legal status of the aircraft

Aerial collisions

Carriage of nuclear material by air

Legal status of the aircraft commander

Liability of air traffic control agencies.

Part B:

Subjects on the non-current work programme:

† Compiled by Julian Gazdik in co-operation with ICAO Officials G. F. Fitzgerald (on legal matters), A. M. Lester (on economic/statistical matters) and Mrs. M. A. Dowling.

Study of a system of guarantees for the payment of compensation in pursuance of the Warsaw Convention

Study with a view to unifying the rules relating to procedure in cases arising under conventions on air law and of the rules of procedure applicable to the execution of judgments

Research in regard to measures for promoting the uniform interpretation of international private air law conventions, and research in regard to measures to be taken in order to ensure (a) the international authority of judgments by competent tribunals on conventions in force on air matters and (b) the distribution and allocation of awards in pursuance of such conventions

Consideration of problems concerning assistance on sea and land and remuneration therefor

Problems of nationality and registration of aircraft operated by international agencies.

11. The Commission's attention was drawn to the following subjects which were not included in the Work Programme mentioned in paragraph 10:

- (i) Legal problems affecting the regulation and enforcement of air safety which have been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State. (Resolution B of the Guadalajara Conference.)
- (ii) New problems of private air law arising in connection with hire, charter and interchange of aircraft, particularly in relation to the liability of a person who makes available to another an aircraft without crew. (Resolution D of the Guadalajara Conference.)

12. Having made an examination of the items mentioned in paragraphs 10 and 11, the Commission undertook to draw up a Work Programme, taking into account developments relating to these subjects, their importance and urgency.

13. The Commission drew up a programme dividing the subjects retained for study by the Legal Committee into two categories:

- A. Subjects on the Work Programme on which work should be done at present.
- B. Subjects on the Work Programme on which no work should be undertaken or directed by the Legal Committee, unless and until a report had been submitted to the Council by the Secretary General or by the Chairman of the Legal Committee indicating the need for such work and Council had approved, or unless the Assembly or Council otherwise directed that active work should be undertaken.

14. The Commission decided to include, in Part A of the Legal Committee's General Work Programme, the following subjects in the order of priority appearing hereunder:

- 1. Legal status of the aircraft;
- 2. Resolution B of the Guadalajara Conference:
Legal problems affecting the regulation and enforcement of air safety which have been experienced by certain States when an aircraft registered in one State is operated by an operator belonging to another State.
- 3. Aerial collisions;
- 4. Liability of air traffic control agencies:
Despite the place of this subject on the list, the Legal Commission recommended that the Legal Committee should study the subject through a subcommittee prior to the next meeting of the full Committee.

In addition, the following subjects were included in Part A of the Work Programme:

Liability in respect of nuclear material in relation to civil aviation: This subject was not assigned any specific rank in Part A; but the Commission noted that early action was desirable, particularly in regard to ensuring proper representation of ICAO at meetings which are soon to be convened by the International Atomic Energy Agency in respect of civil liability for nuclear damage.

Problems of nationality and registration of aircraft operated by international agencies: This subject was not assigned any specific rank in Part A but the Legal Commission desired it to be recorded that, if the Council received a request concerning the legal aspects of this subject, it should transmit the request to the Chairman of the Legal Committee who should appoint a subcommittee to study the matter and report thereon to the Legal Committee.

14.1 The Commission also recommended that the subject "Legal status of the aircraft commander" be moved from Part A to Part B when the Legal Committee had finished its work on the draft convention on offences and other acts occurring on board aircraft.

15. The Commission decided to recommend for retention in Part B of the Work Programme of the Legal Committee the items listed under the heading "Part B" in paragraph 10 above, save for the last item¹ which the Commission recommended for transfer to Part A. (See para. 14 above.)

15.1 In addition, the Commission decided to include in Part B of the Work Programme of the Legal Committee the subject "Resolution D of the Guadalajara Conference" which was concerned with new problems of private air law arising in connection with hire, charter and interchange of aircraft, particularly in relation to the liability of a person who makes available to another an aircraft without crew.

Status of International Conventions on Air Law (Resolution A12-23)

16. The Commission considered the status of international conventions on air law which had been adopted under the auspices of ICAO.

16.1 It noted that, since the Twelfth Session of the Assembly, progress had been made in the ratification of the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948) and was of the opinion that it was not necessary for the Commission to recommend any further action by the Assembly as to this Convention at this time.

16.2 The Commission had before it a number of proposals concerning action that might be taken in relation to securing wider acceptance of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952). Some States were of the view that the Convention should be examined by the Legal Committee to see if possible amendments could be developed which might make the Convention acceptable to a greater number of States. Other States felt that perhaps this could best be done by the Council and Secretariat. Still others felt that no attempt to change the Convention should be made and that the Assembly should again request all States to ratify or adhere to the Convention as soon as possible. No one of these possible courses of action obtained a majority within the Commission and none was adopted.

16.3 The Commission recommends for adoption by the Assembly the draft Resolution set forth in Appendix A hereto concerning ratification of the Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 (The Hague, 1955).

Proposed Repertory of Practice of the Assembly, the Council and other organs in relation to the Convention on International Civil Aviation

¹ Problems of nationality and registration of aircraft operated by international agencies.

17. The Commission noted the information presented by the Council in relation to the preparation of the proposed repertory of practice.

R. P. Boyle, Chairman

APPENDIX

Draft Resolution A14-

Participation of States in International Conventions on Air Law—Protocol to Amend the Warsaw Convention

THE ASSEMBLY

CONSIDERING that with the entry into force of the Warsaw Convention as amended at The Hague in 1955, the unamended Warsaw Convention will not cease to be binding on certain States, and

CONSIDERING that after the entry into force of the said amended Convention, the responsibility of the air carrier might be subject to differing international regimes,

EXPRESSES the hope that the States concerned will, as soon as possible, ratify or adhere to the Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929.

II. INTERNATIONAL AIR TRANSPORT ASSOCIATION

Introduction

1. Since the last AGM the Legal Committee has met only once, from 1st to 4th of May, 1962, in the premises of the New York University Law School, New York.
2. During this meeting, we reviewed the present status of ratification of the Rome and Warsaw Conventions and the Hague Protocol. We examined the recently drawn up Guadalajara Convention, and we also studied the Draft Conventions dealing with Offences Committed on Board Aircraft, and Aerial Collisions, which are presently under consideration by the ICAO Legal Committee. We also scrutinized the draft convention on Civil Liability for Nuclear Damage which is being developed by the International Atomic Energy Agency.
3. Additionally, we discussed the possibility of adopting a Standard Liability Clause in Ground Handling Agreements; and we examined the proposed amendments to Traffic Conference resolutions for regulating Interline Agreements with non-IATA carriers. At the request of the Medical Committee, we also examined a document entitled "Fitness for Air Travel—Medical Information".
4. In conjunction with our New York meeting, we met the Special Committee on the Conditions of Carriage, in order to formulate future plans for bringing about as much uniformity as possible in the Conditions of Carriage used by IATA Members.
5. All these matters are more fully dealt with hereafter.

Rome Convention

6. We reported last year that the ratification by States of the Rome Convention of 1952 had been very slow and that certain countries had shown little or no interest in ratification. To date only 11 States have ratified or adhered to the Convention. Some 14 others have indicated that ratification has been considered but has been delayed owing to administrative difficulties.
7. We noted, however, with disappointment, that many important States

had advised ICAO that for various reasons they found the Convention unacceptable and had no present intention to ratify it.

8. Under these circumstances we fear that the desired degree of uniformity in the rules governing liability for damage caused to Third Parties on the Surface, which would be very important in the event of a major catastrophe, would not be achieved.

9. Whilst IATA is on record as supporting the Rome Convention of 1952 and still hopes that States will make every effort to ratify it, we envisage the possibility that ICAO may, under the circumstances, decide to re-examine the rules embodied in the Rome Convention. It is our recommendation that, should ICAO undertake such a study, IATA should co-operate in order to assist in developing a revised Convention which would be more acceptable to all concerned.

Warsaw Convention and Hague Protocol

10. We noted that the Warsaw Convention has recently gained three further adherents, namely Mali, Guinea and the Korean Popular Democratic Republic, and that some 23 States have so far ratified the Hague Protocol, which will become effective upon ratification by 30 States.

11. We were also fully informed by U.S. Members regarding the review of the Warsaw Convention and the Hague Protocol which is now under way in the United States. We are very much interested in the results of this review, which can have a profound effect upon international air transport, and will continue to follow developments closely.

Guadalajara Convention

12. Your Committee reported last year that a Diplomatic Conference, held in Guadalajara during August-September, 1961, had drawn up a Convention, supplementary to the Warsaw Convention, the purpose of which is to regulate international carriage by air performed by a person who is not a party to the contract of carriage. The new Convention expressly extends the standard rules of the Warsaw Convention and its limitation of liability provisions to any carrier who, with the authority of the carrier who entered into the contract of carriage with a passenger/shipper, carries the passenger/shipment over the whole or part of a journey which is governed by the Warsaw Convention.

13. The new Convention does not purport to deal with all aspects of Hire, Charter and Interchange, but it does contain valuable clarification of certain ambiguities inherent in the Warsaw Convention as regards international carriage performed by a person who is not a party to the contract of carriage. Accordingly, wide acceptance of the new Convention would be to the advantage of carriers, and we recommend that IATA take such action as lies within its powers to induce Governments to ratify the Guadalajara Convention.

Offences and Certain Other Acts Occurring on Board Aircraft

14. This important subject will be the main item on the agenda of the Fourteenth Session of the ICAO Legal Committee, scheduled to be held in Rome during the coming fall.

15. The draft Convention on Offences and Certain Other Acts Occurring on Board Aircraft embodies principles of importance in the day-to-day operations of commercial air carriers and, therefore, merits careful consideration.

16. We had before us the report of the ICAO Legal Sub-Committee which, in the spring of 1962, in Montreal, reviewed the comments made by States and international organizations on a previous "Munich Draft" and considered certain new proposals relating to hi-jacking (unlawful seizure) of aircraft and the problem of chartered aircraft.

17. While we believe that the recommendations of the ICAO Legal Sub-Committee would generally improve the "Munich Draft", we have objections to

certain features of the proposals, with the details of which it is not necessary to burden this Report. Our criticisms will be conveyed in detail to the proper quarters. For present purposes it is sufficient to say that our main difficulties relate to the following:

- (a) We are opposed to any extension of the rights which States now have, under the Chicago Convention, to compel aircraft flying over their territory to land. It seems to us that by implication, at least, Article 3 of the Sub-Committee's text would bring about such extension for the purpose of enabling a State to apprehend a person on board an aircraft who has committed, within its airspace, an offence of a specified nature.
- (b) We consider unsatisfactory any provisions which would require an aircraft commander, in exercising the powers (which the Convention grants him) to take steps for the preservation of the safety of his aircraft or its load, or for the maintenance of good order and discipline on board, to decide what may turn out to be difficult legal questions or to draw fine legal distinctions. Such requirements seem to us to be necessarily involved in Articles 5, 6 and 7 of the draft.

18. The ICAO Sub-Committee, in its report, also drew attention to the problems that may arise under the proposed Convention when an aircraft registered in one State is chartered to an operator domiciled in another State. We believe that these problems will have to be faced and that the proposed Convention, if it is to be fully effective, will have to provide a solution to them.

19. The report also mentions a suggestion by the United States to include in the draft Convention provisions dealing with the hi-jacking (unlawful seizure) of aircraft. We are not quite convinced that much can be gained by attempting to deal with this problem in an international convention. However, as IATA will have full opportunity to express its views at a later date, after ICAO has further examined the subject, we did not consider it necessary to take up a final position now.

20. Before leaving the draft Convention, we must make mention of two related matters. The first of these, which had been referred to us by the Technical Director of IATA, concerned the "Carriage of Abnormal Passengers" and arose out of an IATA carrier's unfortunate experiences with an intoxicated and disorderly passenger. We are satisfied that the draft Convention confers ample powers on an aircraft commander to cope with a situation such as that with which the carrier was confronted. In regard to the airline's further suggestion that the supply of intoxicating beverages to passengers should be limited "by law or convention" our attitude is that this is a matter for carriers' own domestic regulations and/or conditions of carriage.

21. The second matter concerned the Arming of Crews. This involved an examination of the extent to which States are entitled, under Article 35 of the Chicago Convention, to prohibit the carriage of ordinary sidearms by persons on board foreign registered aircraft. Certain States do in fact impose such a prohibition with respect to aircraft flying over their territory, unless the prior consent of the appropriate national authority has been obtained.

22. It is not for us to decide upon the necessity or advisability of crew members carrying side-arms. Should IATA decide to intervene on behalf of the Members, we consider that the best way to set about it would be to persuade ICAO to:

- (a) recommend to States, in terms of Article 35(a) of the Chicago Convention, that side-arms carried by crew members are not to be treated as "munitions of war or implements of war" for the purposes of that paragraph;

- (b) urge States not to prohibit the carrying of such arms by crew members pursuant to any regulatory powers that may be derived from Article 35(b).
23. Alternatively it might be possible to achieve this objective by urging the ICAO Legal Committee to incorporate appropriate provisions in the draft Convention dealing with Offences and Certain Other Acts Occurring on Board Aircraft.

Aerial Collisions and Liability of Air Traffic Control Agencies

24. The agenda of the ICAO Legal Committee also includes the subject of a draft Convention on Aerial Collisions, which subject, in our view, is closely bound up with that of the liability of Air Traffic Control Agencies. Our Sub-Committee, under the Chairmanship of Mr. Lionel Cooper, brought up a very useful interim report regarding the liability of agencies providing Air Traffic Control Services. After consideration of this report, the Committee decided that the Sub-Committee should continue with its work and that, in order to provide it with more material on which to base a comparative study, the members of the Committee should individually prepare, for the guidance of the Sub-Committee, memoranda on the legal position in their respective countries as affecting the liability of such Agencies.
25. Until our own investigations have been further advanced, we do not feel justified in formulating a conclusive recommendation on the necessity for bringing the liability of Air Traffic Services within the ambit of the Aerial Collisions Convention.
26. For the time being, however, we wish to reiterate our previous position that it is important to achieve uniform rules governing Aerial Collisions, and that the proposed Convention would be greatly improved if it contained clarification of the liability of Air Traffic Control Agencies. We noted with satisfaction that ICAO has inaugurated a special study of the liability of such Agencies, and we welcome this as an important step in the right direction. We recommend that ICAO be urged to proceed with this study concurrently with the further development of the Aerial Collisions Convention.

Convention on Civil Liability for Nuclear Damage

27. A Diplomatic Conference is planned for early 1963 in Buenos Aires for the purpose of finalizing the Draft Convention on Civil Liability for Nuclear Damage which has been developed under the auspices of the International Atomic Energy Agency. This proposed worldwide Convention, to which we referred in our Report last year, seeks to establish uniform rules governing the liability of the operators of nuclear installations.
28. We found the principles embodied in the draft to be generally satisfactory from the carriers' point of view. Our main concern at this time was with the recourse action that may be allowed to such operator against an air carrier where damage has resulted from a consignment of nuclear materials in transit. In our opinion IATA should express a very decided preference for Alternative A of Art. VII in accordance with which such recourse action would, apart from the case where it is expressly provided for by contract, be limited to acts or omissions done with intent to cause damage, and would in any event lie only against the individual who acted or omitted to act with such intent.
29. A Convention dealing with the same subject having been finalized last year by the European Nuclear Energy Agency of the Organization for European Economic Co-Operation (OEEC), we consider it important, in order to avoid confusion, that the rules embodied in the proposed world-wide Convention should not be inconsistent with those of the already existing European Convention.

30. Since it is important to guard against the inclusion, in this draft Convention, of provisions that may prove prejudicial to air carriers, we hope that it will be possible for an IATA Observer to attend the Diplomatic Convention referred to in para. 27 above.

Standard Liability Clause in Ground Handling Agreements

31. You may recall that for the last year or two your Committee has had under consideration the possibility of drawing up a Standard Liability Clause for incorporation in Ground Handling Agreements.

32. We must now report that our efforts have proved unavailing. The draft liability clause which we had prepared was submitted to the IATA Insurance Subcommittee and the Ground Handling Advisory Group for comment. From the comments of members of these groups, it has become clear to us, first, that there are considerable divergencies in the liability clauses at present in use and, second, that airlines for various reasons are reluctant to abandon their present systems. We have, therefore, concluded that, for the present at any rate, the attainment of uniformity in this area is not practicable.

Interline Agreements With Non-IATA Carriers

33. During the year we were advised that the Traffic Conferences planned to consider amendments to certain IATA resolutions regulating interline relationships between IATA Members and non-IATA carriers. We fully appreciate the desirability of finding a solution to this problem and have communicated our observations regarding the suggested draft Traffic Conferences resolutions to the Traffic Director.

Interline Medical Certificates

34. We were asked to examine a form entitled "Fitness for Air Travel—Medical Information", which was drawn up by the Medical Committee of IATA.

35. This form is intended to provide confidential information to enable the airlines' Medical Officers to assess the fitness of an intending passenger to travel.

36. From the legal point of view, we find no objection to the contents of this form and have so advised the Medical Committee.

Conditions of Carriage

37. At the joint meeting with the Special Committee on the Conditions of Carriage, under the Chairmanship of Professor John C. Cooper, we reviewed the present situation. By Conference resolution there has been established a set of Uniform Conditions of Contract for the passenger ticket and a set of Uniform Conditions of Contract on the airwaybill but there are no Uniform Conditions of Carriage forming the subject either of a mandatory resolution or of a recommended practice.

38. It will be recalled that in 1953, in Honolulu, the Traffic Conferences did adopt a set of Uniform Conditions of Carriage against which, however, considerable objections were raised by certain States. Having regard to these objections, the Traffic Conferences considered it advisable to delete the relevant resolutions.

39. Since then, divergencies have crept in in the Conditions of Carriage, tariffs, rules and regulations of individual airlines and if this tendency continues it may become increasingly difficult to obtain uniformity. Further, many carriers have not brought their existing General Conditions of Carriage into line with the mandatory IATA Conditions of Contract on the ticket and airwaybill and this has resulted in certain inconsistencies in the various sets of conditions.

40. We are of the opinion, along with the Special Committee, that an effort should be made to achieve practical uniformity in airlines' Conditions of Carriage

and, should the Traffic Conferences share this point of view, we suggest that this project be undertaken without delay.

41. As to the method of treating this subject, we recommend as a first step that, under the supervision of the Special Committee, a study should be carried out to determine to what extent general agreement amongst airlines can be attained at this stage. The study should include a review of the most recent draft of the Conditions of Carriage, in the light of the present resolutions, to establish which procedures and rules laid down therein have already become uniform by virtue of existing Traffic Conferences resolutions and which procedures and rules require further Traffic Conference action to secure general adoption.

42. The Conferences would then have to determine in what manner uniformity could best be achieved, namely by separate resolutions covering specific subjects or by a package plan combining the entire Conditions of Carriage as a unit. Once the preparatory work is completed, we visualize a joint effort with the Special Committee and the Traffic Advisory Committee to bring forward a project acceptable to the Traffic Conferences.

43. The second step would be to explore the disposition of the government agencies interested in this matter so as to ensure their approval once Conference action is taken.

Conclusion

44. So much for our work and plans. I would now like to record my indebtedness and thanks to the members of the Legal Committee, to Professor John C. Cooper and to our Secretary, Mr. Julian Gazdik, without whose esteemed assistance, advice and co-operation my task as Chairman would not have been nearly as agreeable as it in fact was. To the Chairman and members of the Sub-Committee on the Collisions Convention must also go a special word of appreciation for the considerable time and energy they devoted to the task entrusted to them.

A. M. Conradie