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Brussels Air Law Conference

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BRUSSELS AIR LAW CONFERENCE

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The Fourth International Conference on Private Air Law (diplomatic conference) was held at Brussels, September 19-30, 1938, on the invitation of the Belgian Government, for the purpose of taking definitive action on several projects prepared in preliminary form by the International Technical Committee of Aerial Legal Experts (CITEJA)¹.

According to information furnished by the Secretariat of the Conference, delegations representing the following countries participated in the work of the Conference:

United States of America, Germany, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Denmark, Dominican Republic, Ecuador, Spain, Finland, France, Great Britain, Greece, Guatemala, Hungary, Italy, Japan, Luxemburg, Mexico, Norway, The Netherlands, Poland, Rumania, San Marino, The Holy See, Sweden, Switzerland, and Czechoslovakia.

Each of the following countries was represented by an observer: Argentina, Bulgaria, Lithuania, Siam and Yugoslavia.

A representative of the League of Nations and a representative of the International Commission for Air Navigation (CINA) were present at the Conference in an advisory capacity.

The American Delegation consisted of the following personnel:

Delegates

G. Grant Mason, Jr., Member of the Civil Aeronautics Authority, *Chairman of the Delegation*;

Stephen Latchford, Department of State, *Vice Chairman of the Delegation*;

* Chief, Aviation Section, Division of International Communications, Department of State; Chairman, American Section of the CITEJA.

1. See "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (CITEJA)" by John J. Ide, 3 JOURNAL OF AIR LAW 27. See also "The Warsaw Convention and the CITEJA" by the writer, 1 JOURNAL OF AIR LAW 79, and "Developments in the Codification of Private International Air Law" by the writer, 7 JOURNAL OF AIR LAW 202.

Denis Mulligan, Consulting Counsel on International Aviation, Civil Aeronautics Authority.

Technical Advisers

Laurel E. Anderson, Legal Adviser of the Maritime Commission at London;
Captain L. T. Chalker, Chief Aviation Officer, United States Coast Guard;
Arnold W. Knauth, admiralty lawyer;
J. Brooks B. Parker, aviation insurer.

Secretary

Edward T. Wailes, Second Secretary, American Embassy, Brussels.

Technical Assistants

John Jay Ide, Technical Assistant in Europe for the National Advisory Committee for Aeronautics;
Arthur L. Lebel, Department of State.

There were submitted to the Brussels Conference two draft international conventions and certain recommendations on aviation insurance prepared by the CITEJA. These were as follows:

Draft of Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea, CITEJA Document 319, adopted by the CITEJA at its Eleventh Plenary Session held at Bern, Switzerland, in September, 1936.²

Draft of Convention for the Unification of Certain Rules Relating to Aerial Collisions, CITEJA Document 320, adopted by the CITEJA at its Eleventh Plenary Session held at Bern, Switzerland, in September, 1936.³

Draft Protocol on Aviation Insurance,⁴ supplementing the Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface, signed at Rome on May 29, 1933.⁵

Proposals for the amendment of the CITEJA projects referred to the Brussels Conference were submitted by various delegations, including the American Delegation, which participated in the discussions conducted by the Conference with a view to including the suggested amendments in the final drafts approved by the Conference, in so far as the Conference was willing to adopt these suggestions. The American Delegation was very successful in the presentation of its proposals.

It will not be possible in the present summary of the results of the Brussels Conference to discuss all the proposals submitted by the American Delegation on each of the projects considered at Brussels.

2. For translation of draft, see 8 JOURNAL OF AIR LAW 345-350; also Department of State Treaty Information Bulletin, No. 92, May, 1937, pp. 26-30.

3. For translation, see 8 JOURNAL OF AIR LAW 320-325; also Department of State Treaty Information Bulletin No. 92, May, 1937, pp. 30-35.

4. For translation of Protocol, see 9 JOURNAL OF AIR LAW 599-601; also Department of State Treaty Information Bulletin No. 105, June, 1938, p. 202.

5. For translation of Rome Convention on Third Party Liability, see 8 JOURNAL OF AIR LAW 312-319; also Department of State Treaty Information Bulletin No. 47, August, 1933, pp. 27-36.

However, references will be made to a sufficient number of such proposals to give the reader an idea of the attitude of the Delegation with regard to many of the major questions which came before the Conference.

LANGUAGE PROPOSAL

On the opening of the Conference the American Delegation proposed the adoption of a bilingual system under which it would be permissible to use both English and French on an equal basis in all the oral discussions of the Conference, with the understanding that the statements in French would be translated into English and that any statements in English would be translated into French. The Conference decided that any delegation might present its proposals in its own language, provided it furnished an interpreter to translate such proposals into French, and that any delegation might have its interpreter translate into its own language any important statements made in French by members of the Conference or any resolutions on which the Conference might be called upon to take action. The American Delegation had interpreters who could perform these services for the Delegation.

DRAFT CONVENTION ON ASSISTANCE AND SALVAGE OF AIRCRAFT OR BY AIRCRAFT AT SEA (CITEJA Document 319)⁶

The American Delegation made an effort to have the Conference remove the obligation to render assistance, placed on commanders of aircraft under Article 2 of the CITEJA draft convention, and to have such assistance placed on a voluntary basis, with the understanding that indemnity and remuneration as provided for in the draft would be allowed in the case of voluntary assistance. The Delegation stated in this connection that Article 2 of the CITEJA draft as presented to the Conference imposed a responsibility on the commanders of aircraft in reaching a decision in an emergency in a situation in which there has been little experience to guide them; that it was true that the commander of the aircraft was not obliged under Article 2 of the CITEJA draft to endeavor to render assistance if to do so would impose serious danger on the aircraft or persons on board, but that in the present state of development of international air navigation it is probable that in the vast majority of cases there would be serious danger, especially in view of the hazards to aircraft alighting and taking off at sea, and also

6. See footnote 2.

because of the limited fuel capacity of aircraft. Although the Conference did not remove the obligation placed upon the commanders of aircraft to assist, it adopted the following new provision inserted as paragraph (3) of Article 2 of the salvage convention as finally signed at Brussels in September, 1938, which will render it possible to take into account the different conditions under which maritime navigation and air navigation operate:

"For the purposes of this Convention, assistance shall mean any help which may be given to a person who is at sea in danger of being lost, even by merely giving information, consideration being given to the different conditions under which maritime navigation and air navigation operate."

The following two methods were included in Article 3 of the CITEJA draft convention for determining the limitation of the amount of indemnity for expenses incurred by the salvor: (1) the number of persons saved and (2) the value of the aircraft assisted, as determined by its weight. The American Delegation proposed that the complicated weight formula be omitted, as being entirely unnecessary. This proposal was adopted by the Conference.

Article 3 of the CITEJA draft provided that the indemnity payable by the operator of the aircraft assisted or by the owner or armateur of the vessel assisted, based on expenses incurred and damage suffered by the salvor in the operations of assistance, could not exceed the sum of 125,000 gold francs per person saved, or, if no persons were saved, the total sum of 125,000 gold francs. Then followed the weight formula applicable to the aircraft assisted. It was further provided that the limitation of the obligation of the operator of the aircraft assisted for indemnity would not be greater than two million gold francs. The American Delegation considered that the limitation of two million francs was too high, and that it should be reduced to one million gold francs. It was pointed out in this connection that the largest salvage award on record of which the Delegation was aware approximated roughly only about two-thirds of the sum of two million gold francs.

As stated above, the Conference adopted the American proposal for the elimination of the weight formula as applied to aircraft, but it reduced the limitation of liability for indemnity as expressed in francs from two million gold francs to 500,000 instead of to one million gold francs, as had been suggested by the American Delegation. The Conference also reduced the limitation of liability for indemnity for each person saved, and in a case where no person had been saved, from 125,000 gold francs in each case to 50,000 gold francs. The right to an indemnity or reimbursement for expenses incurred by the salvor has not been specifically provided for, in

addition to remuneration, in the maritime law of salvage. This innovation may be necessary for the reason that as applied to assistance to aircraft in distress, the saving of life will result more often than the saving of property.

The American Delegation proposed that there be inserted in Article 4 of the CITEJA draft a provision which would render it possible for the personnel of the salvor aircraft, as well as the operator of such aircraft, to share in the remuneration for salvage services. Although the salvage convention as finally adopted and signed at Brussels does not specifically provide for the sharing of remuneration by the personnel of the assisting aircraft, it contains a new provision (Article 6) which renders it possible for the matter to be determined by the national laws.

As common ownership salvage has become very important in modern times, the American Delegation proposed that a provision on the subject be inserted in Article 4 (relating to remuneration) of the CITEJA draft salvage convention. The Conference adopted the substance of the American proposal by including the following new provision as Paragraph (4) of Article 4 of the convention as finally adopted and signed at Brussels:

"Remuneration is due even when the aircraft or the vessels belong to the same operator or to the same owner or armateur."

Article 7 of the CITEJA draft provided that remuneration due for the operations of assistance or salvage would be payable by the operator of the assisted aircraft or the owner or armateur of the assisted vessel; that the operator of the aircraft would have a recourse against the owner of goods for such part of the remuneration as pertained to the assistance and salvage of such goods; and that the recourse of the owner or armateur of the vessel against the owners of goods would remain subject to maritime rules. With respect to Article 7, the American Delegation concluded that so far as aircraft cargo was concerned, the principles of maritime law should not be too rigidly followed. With a view to the adoption of provisions that would be more suitable to air transportation, the American Delegation proposed that the following article be substituted for Article 7 of the CITEJA draft:

ARTICLE 7¹

"(1) The remuneration due for the operations of assistance or salvage of aircraft shall be paid to the salvor by the operator of the assisted aircraft. Such part of the remuneration as pertains to assistance and salvage of cargo

7. Footnote submitted with the proposed article: "The provision of a lien, if any, is left to the national legislations."

of the assisted aircraft shall be paid to the salvor by the aircraft operator or the cargo owners.

"(2) The operator of the assisted aircraft shall have the right to bring about an adjustment of the salvage charges and, upon payment of the same or making provision for such payment to the salvor, shall have the right to possession of the salvaged property as carrier.

"(3) The owner of the salvaged cargo, on giving notice within reasonable time to the operator of the assisted aircraft of his intentions, shall have the right to bring about the adjustment of the salvage charges against his property and, upon payment of the same or making provision for such payment to the salvor, shall have the right to possession of his property."

In submitting the above as a suggested substitute for Article 7 of the CITEJA draft the American Delegation called attention to the fact that the CITEJA proposal contemplated that the aircraft operator would pay the salvage charges on the cargo directly to the salvor, but did not state what would happen to the goods after the salvage charges had been paid. It was stated that the great advantage of air transportation being its speed, this advantage would be lost if there should be a chance for disputes about the possession of and title to the goods. It was thought that the interests of speedy transportation would be best served by giving the air carrier the full legal right to settle the salvage charges, resume possession of the goods, and continue their transportation with the least possible delay. However, Paragraph (3) of the American proposal rendered it possible for the owner of the goods to go to the salvor and take care of his own interests, if for some reason he should prefer to deal with his goods as he considered best. The American proposal merely dealt with the primary question as to who should pay the salvor. It did not attempt to determine whether the salvage charges should ultimately be borne by the carrier or the cargo owner. It was thought that there was not sufficient data available in international air navigation to solve this problem, but that the question of ultimate liability for salvage charges might be left to the national law.

The provisions finally agreed upon by the Brussels Conference as a substitute for Article 7 of the CITEJA draft, appear in Article 9 of the Convention as finally adopted and signed at the Conference. Article 9, which embodies in part some of the proposals of the American Delegation, reads as follows:

ARTICLE 9

"(1) The remuneration due for the operations of assistance or salvage shall be payable by the operator of the assisted aircraft, or by the owner

or armateur of the assisted vessel, in accordance with the national laws or with contracts governing the vessel.

"(2) The operator of the aircraft shall have a recourse against the owners of goods for such part of the remuneration as pertains to assistance and salvage of such goods. However, this recourse shall be denied or reduced if it appears that the assistance or the salvage of the goods has been rendered necessary by an act of the operator of such a nature as to render him liable to the owners of such goods.

"(3) The owner of the goods may, in all cases, by paying such part of the remuneration as pertains to assistance or to salvage of his goods, or by depositing suitable security for such payment, obtain the delivery of the goods by the operator and the release of any goods that may have been attached.

"(4) The recourse of the owner or of the armateur of the vessel against owners of goods shall remain subject to maritime rules."

Article 9 of the CITEJA draft convention provided that indemnity and remuneration actions would have to be brought within one year from the end of the operations of assistance. The American Delegation proposed that the period provided for in Article 9 be extended to two years. It was recalled in this connection that the period stipulated for similar actions under the Maritime Salvage Convention of 1910, is two years. The Delegation's proposal for the adoption of the two-year period was agreed to by the Conference.

According to Article 13 of the CITEJA draft convention, the convention would apply to Government vessels and aircraft, including military, customs and police vessels or aircraft, with the reservation of the provisions of Article 11 relating to jurisdiction, and, as regards military, customs and police vessels or aircraft, with the reservation of the provisions of Article 2, relating to the obligation of assistance and salvage. The American Delegation proposed that Article 13 be redrafted to read:

"This convention does not apply to government aircraft or ships appropriated exclusively to a public service."

The Delegation stated in this connection that no reason was seen for departing from the principle embodied in Article 14 of the Maritime Salvage Convention of 1910 to the effect that the convention does not apply to government ships appropriated exclusively to a government service. The provisions relating to the application of the convention concerning assistance and salvage of aircraft or by aircraft at sea to government ships and aircraft, as finally adopted by the Brussels Conference in September, 1938, are substantially in accord with the American proposal. These provisions

appear in Article 16 of the convention as finally approved by the Conference. Article 16 is as follows:

"This convention shall, with the reservation of the provisions of Article 13 relative to jurisdiction, apply to government vessels and aircraft, with the exception of military, customs and police vessels or aircraft, to which the rights and obligations flowing from the foregoing provisions shall not apply."

It is believed that the convention on assistance and salvage of aircraft or by aircraft at sea, as adopted and signed at Brussels in September, 1938, constitutes a great improvement over the draft salvage convention submitted to the Brussels Conference. It is also believed that the provisions of the convention as signed at Brussels will become very important in view of the progress made in the establishment of trans-oceanic air transportation.

DRAFT CONVENTION ON AERIAL COLLISIONS
(CITEJA Document 320)⁸

This draft set forth the conditions under which the aircraft operator would be liable in the event of aerial collisions.

When the CITEJA draft convention on aerial collisions came before the Conference, the American Delegation submitted a statement setting forth the reasons why it felt that the Conference should not adopt a convention on collisions, and urging that consideration of the matter be postponed to a future date. The Delegation called attention to the fact that the Conference was called for the purpose of taking action on three projects; that there was not sufficient time to consider the complicated proposals involved in the draft on aerial collisions; that definite action on this subject should be postponed until ample opportunity has been afforded to examine in the light of experience the many problems involved in aerial collisions and their complex ramifications; that regulations prematurely adopted must rest upon a largely theoretical and at times conjectural basis; and that to formulate rules without better knowledge of the risks indicated might well result in hindering rather than assisting air navigation. The Delegation also pointed out in connection with the proposed collision convention that because of a lack of sufficient aviation data and experience, a readiness to draw upon the body of maritime rules had been observed; that the same freedom of opportunity to evolve laws suitable to the operation of aircraft should be afforded as had been accorded to other forms of transportation, and that to persist in assimilating to

8. See footnote 3.

air navigation analogous principles applicable to other forms of transportation might have unfortunate results. The Delegation supplemented its statement objecting on principle to the adoption of a convention on collisions by a lengthy set of proposals for amendment of the CITEJA draft, for consideration in the event that the Conference should decide to proceed with the adoption of a convention on collisions. The final result was that the Conference decided not to proceed with the adoption and signature of a convention on collisions but referred the CITEJA draft and the proposals of the various Delegations back to the CITEJA for further consideration.

PROTOCOL ON AVIATION INSURANCE

During the consideration of the Convention Relating to Damages Caused by Aircraft to Third Parties on the Surface, signed at Rome on May 29, 1933, during the Third International Conference on Private Air Law (diplomatic conference), difficulties arose with respect to the question whether the insurance provided for in that convention for the protection of persons and property on the surface should be of an unconditional nature, or whether the aviation insurer should be permitted certain defenses against the payment of insurance claims. The Rome Conference of 1933 adopted a resolution calling upon the CITEJA to study the matter and to submit its recommendations thereon. At its Tenth Plenary Session, held at The Hague in September, 1935, the CITEJA recommended that the insurer be allowed certain enumerated defenses against the payment of insurance claims. These recommendations appear in CITEJA Document No. 275.⁹

The Italian Government, which is the depository of the Rome Convention, embodied these recommendations of the CITEJA in a proposed protocol to the Rome Convention, referred to herein, which protocol was submitted to the Brussels Conference in September, 1938.¹⁰

In the submission of its proposals on insurance at Brussels, the American Delegation stated that it had made an effort to consider the problems of all concerned: (1) the Governments which, in accepting the Rome Convention, signified their desire that their nationals be protected; (2) the operators of aircraft for whom the

9. For a translation of Document 275, see Annex "E" to report of American Delegation on sessions of the Third Commission and the Tenth Plenary Session of the CITEJA held at The Hague in September, 1935, submitted by the Delegation on November 14, 1935; Department of State Treaty Information Bulletin No. 74, November, 1935, pp. 30-31; and 1936 U. S. Av. R. 557-559. See also material on "Compulsory Liability Insurance," 8 JOURNAL OF AIR LAW 421-476 (1937).

10. See footnote 4.

problem is a financial one and to whom it is a matter of expense against benefits; and (3) the insurance companies, for which the problem is largely a financial one and to whom it is principally a matter of premiums against losses, complicated by the desire not to depart from proven insurance practices.

While no attempt will be made to enter into a detailed technical discussion of the various proposals on insurance submitted by the American Delegation, or of its attitude toward the proposals of other delegations, it may be remarked that the Delegation felt that for the most part the defenses in the draft protocol as submitted to the Brussels Conference were unnecessary or appeared to defeat the rights of the injured third party, with respect to matters over which he has no control.

The Conference decided to omit the defense for the insurer, provided for in the draft protocol, where there is no certificate of airworthiness in existence for the aircraft at the time when the damage occurs, and to omit the defense, also provided for in the draft protocol, where through the negligence of the operator there is not on board the aircraft at the time the damage occurs, the personnel required by the regulations. The draft protocol was modified in a number of other respects, as will be more clearly shown by a reference to the protocol as finally adopted and signed by the delegates to the Conference.

The Delegation called attention to an apparent ambiguity in Articles 12 and 14 of the Rome Convention referred to herein, in that while Article 12 seems to *require* the operators of aircraft to be insured, Article 14 contains a provision to the effect that if the sureties provided for in the convention *are not furnished*, the operator will not be able to claim a limitation of his liability. The Delegation made an effort to have the matter clarified in the protocol, and suggested an interpretation of the Rome Convention which would make it optional with each Contracting State as to whether it would require insurance as a condition precedent to the entry into its territory of aircraft of other Contracting States. Although it was felt by the Delegation that the matter was one with which a conference of delegates with plenary powers could deal, the Conference was nevertheless not willing to consider the matter of interpretation, apparently on the ground that it raised a fundamental question affecting the substance of the Rome Convention not contemplated when the matter of the adoption of a protocol to this convention was placed on the agenda of the Brussels Conference.

RESOLUTIONS OF THE CONFERENCE

In addition to the adoption and signature of a convention relating to assistance and salvage of aircraft or by aircraft at sea, and a protocol supplementing the Rome Convention of May 29, 1933, referred to herein, the delegates to the Brussels Conference adopted resolutions making recommendations on various subjects, as shown in the Final Act of the Conference. The more important of these recommendations appear to be: (1) That the CITEJA study the question of contribution by interested parties in the payment of remuneration in cases of assistance and salvage, particularly the extent to which such contributions should apply to postal matter; (2) that the CITEJA consider whether from the standpoint of experience obtained under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, signed at Warsaw on October 12, 1929, it would appear necessary to propose modifications or amendments to this convention; and (3) that the CITEJA draft convention on aerial collisions (Document 320) and the material thereon submitted at Brussels, be referred to the CITEJA for further consideration.