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K. M. Beaumont

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SOME ANOMALIES REQUIRING AMENDMENT IN THE WARSAW CONVENTION OF 1929

By K. M. BEAUMONT

Kenneth Macdonald Beaumont, Major, D.S.O., M.A. (Oxon), F.R.P.S.L., F.R.S.A., A.F.R.Ae.S. Solicitor, Senior Partner in firms of Beaumont & Son and Clarke Rawlins & Co., London. Legal Adviser to Imperial Airways Ltd., 1925-39; Rapporteur Général of Air Transport Committee of International Chamber of Commerce 1934-46; Member of Legal Committee of International Air Traffic Association 1926-45; British Delegate to CITEJA since 1945; Member of British Delegation to the first Interim Assembly of PICAQ, 1946; Member of Legal Committee of IATA, 1946; co-author with C. N. Shawcross of "Air Law," and author of numerous publications concerning legal and other aspects of air transport; Pilot's A. License, 1926.

IN October 1929 delegations from a number of States visited Warsaw in two capacities. They went first as members of the Comité International Technique d'Experts Juridiques Aériens (CITEJA) to finalize the draft of a Convention (which had been under discussion for some years) to regulate the contractual rights and liabilities as between air carriers and their clients on an international basis; and, secondly, as Diplomatic Representatives of the States concerned empowered, in Conference, to sign the Convention when finalized by the CITEJA. This method of signing a Convention in Diplomatic Conference provides a document which remains open for ratification by any signatory State and which becomes operative as between ratifying States (and between other States which subsequently adhere to it) as soon as the minimum number of ratifications prescribed by the Convention has been received.

By the time the delegations met in Warsaw all the principles of the Convention had been agreed, and the main work on this occasion consisted of the finalization of the document by a drafting committee. The writer had been appointed by the International Air Traffic Association as its representative to furnish the members of the CITEJA with such technical information as might be required from international air carriers and, as far as possible, to ensure that impracticable operational methods of procedure were not included in the Convention. He was consulted informally on some technical questions, and succeeded in persuading the Governmental delegates not to include standard forms of traffic documents as annexes to the Convention, because this would have precluded carriers from making changes therein which might be desired from time to time to meet changing conditions and traffic requirements.

The work of the drafting committee of the CITEJA proceeded under considerable pressure. The result was that the document as finally signed leaves a number of obscurities, one obvious mistake and some errors and omissions due to the fact that, when a revision was made in one Article, the necessary consequential revisions in other Articles were not made.

On this occasion, the writer proposes to discuss only obscurities existing in connection with Articles 3, 4 and 9. In order to understand these it is also necessary to consider Article 8. The English translation of these four Articles as annexed to the Carriage by Air Act 1932 is as follows:

ARTICLE 3 — PASSENGER TICKET

- (1). For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:
 - (a) The place and date of issue;
 - (b) The place of departure and of destination;
 - (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the carriage of its international character;
 - (d) The name and address of the carrier or carriers;
 - (e) A statement that the carriage is subject to the rules relating to liability established by this Convention.
- (2). The absence, irregularity or loss of the passenger ticket does not affect the existence or validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.

ARTICLE 4 — LUGGAGE TICKET

- (1). For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.
- (2). The luggage ticket shall be made out in duplicate, one part for the passenger and the other for the carrier.
- (3). The luggage ticket shall contain the following particulars:
 - (a) The place and date of issue;
 - (b) The place of departure and of destination;
 - (c) The name and address of the carrier or carriers;
 - (d) The number of the passenger ticket;
 - (e) A statement that delivery of the luggage will be made to the bearer of the luggage ticket;
 - (f) The number and weight of the packages;
 - (g) The amount of the value declared in accordance with Article 22 (2);
 - (h) A statement that the carriage is subject to the rules relating to liability established by this Convention.
- (4). The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of this Convention. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain the particulars set out at (d) (f) and (h) above, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

ARTICLE 8 — AIR CONSIGNMENT NOTE

The Air Consignment Note shall contain the following particulars:

- (a) The place and date of its execution;
- (b) The place of departure and of destination;
- (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;
- (d) The name and address of the consignor;
- (e) The name and address of the first carrier;
- (f) The name and address of the consignee, if the case so requires;
- (g) The nature of the goods;
- (h) The number of the packages, the method of packing and the particular marks or numbers upon them;
- (i) The weight, the quantity and the volume or dimensions of the goods;
- (j) The apparent condition of the goods and of the packing;
- (k) The freight, if it has been agreed upon, the date and place of payment and the person who is to pay it;
- (l) If the goods are sent for payment on delivery, the price of the goods, and if the case so requires, the amount of the expenses incurred;
- (m) The amount of the value declared in accordance with Article 22 (2);
- (n) The number of parts of the air consignment note;
- (o) The documents handed to the carrier to accompany the air consignment note;
- (p) The time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;
- (q) A statement that the carriage is subject to the rules relating to liability established by this Convention.

ARTICLE 9

If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Article 8 (a) to (i) inclusive and (q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

It will be observed that Articles 3, 4 and 8 respectively provide that:

- (a) The carrier must deliver a passenger ticket which shall contain certain particulars,
- (b) The carrier must deliver a luggage ticket (more commonly known as a baggage check) which shall contain certain particulars, and
- (c) That a Consignment Note (to be made out by the consignor) shall contain certain particulars.

Article 3 (2) provides that if the carrier accepts a passenger without a passenger ticket having been delivered "he shall not be entitled to avail himself of those provisions of this Convention which *exclude or limit* his liability."

Article 4 (4) provides that if the carrier accepts luggage (except hand baggage — see Article 4 (1)) without a luggage ticket having been delivered, or if the luggage ticket does not contain particulars set out at (d), (f) and (h) in Article 4 (3), he shall not be entitled to

avail himself of the provisions of the Convention which *exclude or limit* his liability.

Similarly, Article 9 provides that, if the carrier accepts goods without an Air Consignment Note having been made out, or if it does not contain all the particulars set out in Article 8 (a) to (i) inclusive and (q), he shall not be entitled to avail himself of the provisions of the Convention which *exclude or limit* his liability.

Before discussing the obvious differences existing between Articles 3 (2), 4 (4) and 9, let us see which are the provisions of the Convention which *exclude or limit* the carrier's liability. First there is Article 20 which provides that the Carrier shall not be liable if he proves that he and his agents have taken all necessary measures (construed in English law as meaning "reasonably necessary" or "all reasonable measures") to avoid the damage or that it was impossible for him or them to take such measures; followed by a provision that, in the case of goods and luggage only, the Carrier shall not be liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation. Incidentally, the effect of this is that, if both passengers and goods or baggage are being carried, the Carrier could not invoke the latter provision without admitting liability towards passengers, an obvious consequence which presumably the draftsmen overlooked.

Article 21 makes provision for complete or partial exoneration of the Carrier in the case of contributory negligence of the passenger or consignor; and Article 22 provides the limits of liability in the various categories.

It will be observed that the legal effect of Articles 3 (2), 4 (4) and 9 is that, if the prescribed requirements in relation to Traffic Documents are not fulfilled, the Carrier will be deprived not only of his rights under Article 22 limiting his liability but also of his rights under Articles 20 and 21 which exclude wholly or partially his liability, thereby depriving him of any defense at all, although in the case of the Consignment Note it is provided (in Article 6) that this document shall be made out, not by the Carrier who has to suffer from any defects therein, but by the consignor! Surely this is a feature which the CITEJA draftsmen must have overlooked. In any event it is a startling principle that because a party to an agreement has omitted a minor detail in a document forming part of the evidence of the terms of a contract, he should be deprived not only of rights limiting his liability but also of any right to defend himself against claims arising from the agreement.

Returning now to the passenger ticket, what is the effect of Article 3, which prescribes that the carrier *must* deliver a passenger ticket which *shall* contain certain particulars, and goes on to provide that, if the carrier does not deliver a ticket (contents unspecified) his liability shall be unlimited and he shall, in effect, be deprived of the right to defend any claim? If Article 3 were read alone it might be

argued that the effect of this is that, unless a ticket with all the particulars in Article 3 (1) duly filled in is delivered, the carrier is subject to unlimited liability and is deprived of all rights to defend claims, although it is contrary to the principles of all law that the defendant should be precluded from defending a claim, especially on such a trivial ground as the failure to deliver or complete in all respects a document which, after all, is only evidence of the terms of a contract of carriage.

When, however, we read Article 3 in conjunction with Articles 4 (4) and 9, it seems reasonable to conclude that, in order to preserve his rights under Articles 20, 21 and 22, all the carrier need do is to deliver a ticket, perhaps including *printed rubrics* for the particulars set out in Article 3 (1), (a) to (e), but without the necessity to have had any of these completed, except perhaps (e) which would obviously be printed in any case. In English law it is not permitted to read into a Statute, or treat as implied, anything which is not expressed therein. It is suggested, therefore, that when "a ticket" alone is mentioned in Article 3 (2), the issue of any form of ticket may comply with the Statute.

In any event it seems unreasonable that liability should be unlimited (as compared with the limits contained in Article 22) simply because a formality of this kind has not been observed. It is suggested that Article 3 (1) should be redrafted on the following lines:

"For the carriage of passengers the carrier must deliver a passenger ticket specifying the name of the carrier who enters into the contract of carriage, the places of departure and destination and a statement that the contract of carriage is subject to the rules relating to liability established by this Convention";

and that the second sentence of Article 3 (2) should be amended on the following lines:

"Nevertheless, if the carrier accepts a passenger without a passenger ticket, completed as aforesaid, having been delivered, he shall be liable for the damage which the passenger (or, in the event of his death, his representatives) shall prove to have been sustained by him (or them) consequent upon the non-delivery of a ticket completed as aforesaid."

Similarly in the case of the baggage check, it will be observed that Article 4 (3) provides for rubrics dealing with a number of particulars. But Article 4 (4) prescribes, in effect, that only rubrics numbers (d), (f) and (h) need be completed in order to preserve the carrier's rights under Articles 20, 21 and 22. This confirms the opinion expressed above about the non-necessity to complete particulars in any rubrics on the passenger ticket, because if any of these have to be regarded as essential they should be so stated in Article 3 (2), as they are stated in Article 4 (4), and also incidentally in Article 9.

It is suggested that the only essential particulars for the baggage check should be those comprised in (b), (c), (f) and (h); and that

all of these except (f) could be omitted if the number of the passenger ticket is given on the baggage check, thereby incorporating in the latter, by reference, the general provisions of the contract of carriage as indicated in the passenger ticket. In any event it is suggested (for reasons given above in connection with the passenger ticket) that the second sentence of Article 4 (4) should be amended to read on the following lines:

“Nevertheless, if the carrier accepts registered baggage without a baggage check, completed as aforesaid, having been delivered, he shall be liable for the damage which the passenger (or, in the event of his death, his representatives) shall prove to have been sustained by him (or them) consequent upon the non-delivery of the baggage check completed as aforesaid.”

It is worth considering whether there should be added:

“In this event the limiting provisions of Article 22 (2) shall not be applicable.”

though the writer personally inclines to the view that this is not necessary, either in the case of registered baggage or in the corresponding cases of cargo, or of personal injury to or death of a passenger. The main reason for this view is that, in any event, the Convention only gives the passenger or consignor a *chance* of recovery against a carrier, that is to say if the latter fails to prove that he has taken all necessary measures; whereas what a passenger or consignor requires is the certainty that he will recover the sum which he estimates will compensate him (or his dependents) for death, injury, damage or loss. This can only be provided for with certainty by the passenger or consignor effecting an insurance against the risk involved up to the amount required to be recovered in the event of the risk eventuating.

Finally with regard to the Consignment Note, Article 8 provides a long list of particulars required, only some of which are prescribed by Article 9 as being obligatory. Though Article 6 provides for the Consignment Note to be made out by the Consignor, obviously he can only supply particulars relating to the cargo and not those relating to the carriage, which can be completed accurately only by the carrier. Consequently the obligatory particulars should be divided into two categories, namely those for completion by the consignor and those for completion by the carrier. For instance, in Article 8 rubrics (d), (f), (g), (h) and (i) can only be completed by the consignor or his agents. Concerning (b) the consignor will know the places of departure and destination, but the carrier may alone know the airports concerned; (c) is normally indicated in timetables; and (e) is a matter for the carrier. Rubrics (j) to (p), the completion of which is not obligatory, come partly within the first and partly within the second category; and (q) is naturally printed on the traffic document.

Following the principles advocated above, it is suggested that Article 9 should be amended to read somewhat as follows:

“If the carrier accepts cargo without an Air Consignment Note having been made out, or if a Consignment Note does not contain all those particulars set out in Article 8 which are for completion by the Carrier as follows, namely..... the carrier shall be liable for the damage which the consignor or the consignee shall prove to have been sustained by the consignor or consignee consequent upon a Consignment Note not having been duly completed by the carrier as aforesaid.”

From what appears above it will be obvious that substantial revision of the Articles concerned is necessary in order to remove obscurity, to provide certainty and to establish practical principles. It should be emphasized that the above remarks deal only with a few of the many provisions of the Convention which call for substantial amendment in order to render it a document which is satisfactory not only from the legal aspect but also in relation to practical considerations which affect carriers and their clients, the interests of whom are sometimes apt to be overlooked by experts dealing with the technical aspects of international air carriage.