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THE ADEQUACY OF THE PASSENGER LIABILITY LIMITS OF THE WARSAW CONVENTION OF 1929

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THE Warsaw Convention¹ was drawn to regulate in a uniform manner the conditions of international transportation by air in respect to the documents used for such transportation and the liability of the carrier. It consists of five chapters:

Chapter I. Scope — Definitions, containing Articles 1 and 2:

Chapter II. Transportation Documents, which chapter is divided into Section (i) Passenger Ticket, containing Article 3; Section (ii) Baggage Check, containing Article 4; Section (iii) Air Waybill, containing Articles 5 to 16 inclusive:

Chapter III. Liability of the Carrier, containing Articles 17 to 30 inclusive:

Chapter IV. Provisions Relating to Combined Transportation, containing Article 31: and

Chapter V. General and Final Provisions, containing Articles 32 to 41 inclusive.

In these chapters there are definitions of International Transportation and there is set forth the documentation of passenger tickets, baggage checks, airway bills, the rights of the carrier, passengers, shippers, consignors, etc., and the liability of the carrier.

The Warsaw Convention has been the subject of the most intensive study for many years. This study of the matters that finally resulted in the Convention was confined, prior to its conclusion at Warsaw, October 12, 1929, principally to the interested members of the legal profession, the insurance companies, and the operators, of which there were but comparatively few in each country. The Convention's creation arose out of the necessity of those flying between various countries — principally in Continental Europe — of having some international law which would establish uniform procedure. From 1929 to the present it has become increasingly important to all air carriers everywhere, and of course particularly to the United States

¹ Convention for the unification of certain rules relating to International Transportation by Air, and an additional protocol thereto, concluded at Warsaw on October 12, 1929. Adherence advised by the Senate of the United States, with reservation, June 15, 1934 (legislative day of June 6, 1934). Adherence declared by the President of the United States, with reservation, June 27, 1934. Declaration of adherence of the United States deposited at Warsaw, July 31, 1934. Proclaimed by the President of the United States, October 29, 1934.

because of its far-flung operation of aircraft carrying our flag in international commerce.

Considerable agitation has existed during the last eleven years for a revision of the Warsaw Convention based upon further knowledge and experience not available to those who prepared the Convention when aviation was in its infancy. During these years CITEJA² has had such a revision under consideration. The distinguished English jurist, Sir Maurice Amos, was preparing a revision at the time of his death, which occurred during the war. The torch was passed to his successor, Major K. M. Beaumont, D.S.O., who became the Reporter³ and responsible for revising the Convention in its entirety.

In January 1946, at the CITEJA meeting in Paris, the countries voted overwhelmingly for a revision limited to details and minor adjustments. In July 1946, at the next CITEJA meeting in Paris, the United States Section expressed grave doubts as to whether revision should be attempted at the present time, and at the CITEJA meeting in Cairo in November 1946, the United States Section again took a strong and positive position that the revision should merely receive further study and no action should be conclusive at that meeting. The reasoning was so compelling that, as a result, the subject was merely referred to PICAQ for continuing consideration.

There are many reasons for the position taken by the United States. For example, the International Air Transport Association had not completed its suggestions at its Cairo meeting concerning technical matters, including all-important traffic documents. But in general it was because of the great and continuing growth of international air transportation, and the desire that the Convention which is an entirely useful document in its present form should not be put up for amendment or revision by all the countries until more experience had made it possible to put this in a form that would be as permanent as possible and not require another revision within a measurable time. Major Beaumont, with the various delegates from all countries, has brought his very complete revision to a useful basis for a further study which will in due time be undertaken by PICAQ.

One of the great and underlying reasons why this Convention should not be disturbed exists in Article 22⁴ which limits the liabilities

² Comité International Technique d'Experts Juridiques Aériens (International Technical Committee of Aerial Legal Experts).

³ The designated member of CITEJA who receives, digests, and collates all information on any particular subject in order that in a reasonably final form it may be presented to the other experts of CITEJA:

⁴ Text of Article 22 (Department of State Treaty Series 876) is as follows:

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

"(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary

of the carrier for death of a passenger, for loss of checked baggage and all goods and "objects of which the passenger takes charge himself." This is the very heart of the Warsaw Convention. Without it the liability of the carrier to the passenger would be unlimited except as controlled by national or state jurisdiction.

This limitation is set forth in the Convention as 125,000 gold francs with careful specifications as to their value, and definitely ties this value to the gold standard, so that at the present value of gold of U. S. \$35.00 an ounce, the limitation of liability for a passenger is U. S. \$8,291.87. It should not be overlooked that when the Convention was ratified, the value of gold was \$20.67 an ounce and the limitation of liability was therefore approximately \$5,000 as expressed in U. S. dollars.

Let us explore why it was set at this figure. The value placed on a human life varies widely in many countries of the world. In India, China, and Bolivia, for example, it is very low indeed; in Spain, Italy, and the Balkans but little higher. In the Netherlands and the Scandinavian countries it is much higher. In France, Germany as it was, and Britain it is higher still, and in the United States it is at a higher value than in any other country. It was generally agreed that a limitation of liability had to be established. At what figure should this limitation be set? It obviously had to be a practical mean which would make it possible for all countries to ratify the Convention, for otherwise it could not become international law. This led to the adoption of what we in the United States would consider a relatively modest sum, with a *quid pro quo* of putting the responsibility on the carrier and making the burden of defense rest upon him rather than on the plaintiff. In this respect Warsaw liability differs greatly from our common law. The carrier under Warsaw is liable unless he can prove either that he took all necessary steps to avoid the accident or that it was impossible to take such measures.⁵

As a result of the above compromise, it was possible to create an international convention which would be of great aid and assistance to a new but increasingly important form of international transportation. Without it there would have been no international law to rise above all the conflicting local and other laws under which claims would

sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

"(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

"(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures."

⁵ Text of Paragraph (1) Article 20 (Department of State Treaty Series 876) is as follows:

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

have been made, with the attendant confusion of the questions of jurisdiction and application of the law.

Some may ask why there should have been any limitation of liability inserted in the Convention. Would it not have been just as valuable a document regarding the many other important features that it covers without a limitation? Obviously no Convention of this importance could ignore the question of liability of the carrier, nor could it leave it in the hands of local governments. It helps the traveler, for without it it would have been necessary for many nationals to sue in foreign countries. It was most helpful to him also because in many countries, even today, the local laws would have provided considerably less than the limitations now in the Warsaw Convention. For example, Brazil in its National Code has a limit of 100,000 cruzeiros which would represent approximately \$5,000 U. S. currency, and Mexico requires insurance in the amount of only 5,000 pesos, which is supposed to relieve all liability of the air carrier, to the extent of its equivalent, namely, approximately \$1,000 in U. S. currency. That the Convention limit is not low internationally is evidenced by the fact that the adherence of almost all of the Latin American nations, and in fact Canada, has been delayed by what they consider the present high limits of the Warsaw Convention. As a result, in international air transportation where the Warsaw Convention is applicable, a passenger is guaranteed under certain conditions a fixed sum of money, liberal for most countries, and in general adequate.

We now have an excellent Convention with a reasonable limitation of liability. Since, however, several countries have not ratified the Warsaw Convention in its present form with its present liability limit, if the limitation of liability were increased it is reasonable to believe they would not sign the new Convention; and if that limit were increased to anything like what British and American practice would require, but very few of the other countries would ever ratify the new Convention. It seems better to keep a constructive international law in effect, even in what some consider an inadequate amount, rather than take a chance of losing what progress has been made, which loss would be a very real one to commercial aviation. Brigadier Wilberforce, one of the British delegates to the recent Cairo meeting of CITEJA, officially proposed that the passenger liability limit be doubled, *i.e.*, to U. S. \$16,583.74 per passenger. This would be considered excessive in most countries but still might be considered inadequate⁶ in America.

The great danger is that if the Convention is reopened the liabilities may become unlimited. Should that happen, it would destroy completely the effectiveness of this phase of the Warsaw Convention.

⁶ At present 16 of the 48 states and 2 non-state jurisdictions limit recovery for wrongful death caused by a common carrier. The limitations run from \$5,000 to \$20,000 but most of them are from \$10,000 to \$20,000. Several states prohibit limitation of recovery for wrongful death by their Constitutions.

Unlimited liability is feasible from an insurance standpoint for the size of the insurance markets is increasing very rapidly, but unlimited liability would require very high insurance rates because of the major catastrophe hazard presented by large, modern aircraft. This would naturally raise the operator's costs and consequently the cost of air transportation.

There is a tendency among laymen to confuse personal accident insurance and legal liability insurance. It is important to bear in mind that the liability of the carrier is its own responsibility, and the carrier usually solves it by a contract with an insurance company which agrees to discharge its liability and charges a consideration for so doing; while accident insurance is a contract between the passenger and an insurance company for the passenger's own protection, and a contract in which the carrier is not involved. If that fact is remembered, it is evident that there is no relation between them. If the carrier attempts to substitute accident insurance for liability insurance, he is obviously not insuring his liability but rather buying insurance for the passenger, in effect supplying any claimant with the means to prosecute a liability suit.

Attempts have been made to couple accident insurance with a release to the carrier, but if the passenger pays, even indirectly in his fare, for the accident insurance, there would not appear to be anything to prevent him from demanding his accident insurance without the signing of a release, suing for it if necessary and entirely separately from his claim or suit for liability against the carrier.

There seems to be no reason why, because verdicts are higher in the United States and to some extent in Great Britain than the limits required by the Warsaw Convention, that a voluntary step should be made to increase the limits in the Convention. From the practical insurance side each airline should carry completely adequate limits. Bearing in mind that the limitation of liability provided under the Warsaw Convention is invalidated by "wilful misconduct,"⁷ such limits might be \$100,000 per passenger with \$5,000,000 top limit, or such other as might seem wise, taking into consideration the type of equipment in use, the worth of people usually transported, countries between which operated, etc. Airlines enjoy comparatively low insurance rates by the mere existence of the Warsaw limits which have proven themselves in over one hundred and fifty claims that have been settled within the Convention limits. Obviously, if an underwriter knows that he can rely on the Warsaw Convention and that his liabil-

⁷ Text of Article 25 (Department of State Treaty Series 876) is as follows:

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

"(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

ity beyond its limit is contingent, the direct liability is reasonable in amount and hence in cost, and the contingent part of the risk can be and is charged for at exceedingly low rates.

Let us suppose, however, that the Warsaw limits should be raised to \$20,000 per person. Many planes at the present time carry in excess of forty passengers, which would give a direct liability exposure of \$800,000, the cost of which would necessarily be higher than a direct liability exposure of \$331,662.80 under existing Convention limits. When ships carry one hundred or two hundred passengers, with an enormously increased catastrophe hazard; it is obvious that instead of the insurance rates coming down because of more people flying, they will have to go up on account of the higher catastrophe exposure.

The practical problem of the Warsaw limits boils down to (a) that of the passenger who would prefer unlimited liability, and (b) that of the operator who would prefer no liability, or failing that, limited liability. Without limitation of liability the cost of aviation transportation goes higher with a consequent diminution of the number of passengers carried, since these costs must be reflected in the fares unless taken up by some Government subsidy, which seems unsound if aviation is eventually to stand on its own feet. It is, however, entirely possible to take a middle ground and keep the limitations of liability as they at present exist in the Warsaw Convention, and for the airlines to make available ticket accident insurance at all stations, ticket-offices, and agencies twenty-four hours a day, calling it to the attention of the passenger in such a way that he cannot escape his own responsibility for not taking out coverage in whatever amount he thinks he is worth. It will be appreciated that this does not alter the liability of the airline in the slightest, but it does diminish the necessity of increasing the limits.

The writer concurs in the belief of those who take the position that the Warsaw Convention in its present form has been most practical and useful. Its validity and authority has been well established in British law, *Grein v. Imperial Airways, Ltd.*,⁸ and in United States law *Wyman and Bartlett v. Pan American Airways, Inc.*,⁹ *Garcia and Alvarez v. Pan American Airways, Inc.*,¹⁰ and *Indemnity Insurance Company v. Pan American Airways, Inc.*¹¹ No one who has had extensive experience with it takes the position that it is perfect or that

⁸ 1 (1937) K.B. 50, 1936 USAvR, 184, 211 (1936).

⁹ 43 N.Y.S. (2d) 420; 1943 USAvR 1 (1943). This is presently the leading American case as it decides several points of importance. It was decided by Schreiber, J., State of N.Y., Supreme Court, New York County, June 25, 1943, affirmed unanimously without opinion by the Appellate Division and appealed to the N.Y. Court of Appeals, which unanimously affirmed the judgment of the lower courts without opinion, December 1944.

¹⁰ 55 N.Y.S. (2d) 317, 1945 USAvR 39 (1945).

¹¹ 58 F. Supp. 338, 1945 USAvR 46 (S.D. N.Y. 1944). The court held: (1) the Warsaw Convention is not unconstitutional because it encroaches on the power of Congress to regulate commerce; (2) the Convention is self-executing; (3) the treaty is not invalid on the ground that its application would deprive the plaintiff of his property without due process of law.

it could not be improved. The very important question appears to be whether it is not better to maintain what we have rather than assume the risk of a future without participation in any international convention.

The Warsaw limits should remain undisturbed. In fact, the entire Warsaw Convention should not be opened for fear the airlines would lose these very practical limits that now exist.