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SOME NOTES ON THE WARSAW CONVENTION OF 1929

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MOST of the readers of this JOURNAL may be assumed to know that the Warsaw Convention of 1929¹ regulates the ordinary relations of air carriers with their passengers (including baggage) and also with their customers who ship and receive air cargoes; and that it has been widely ratified by many states, large and small;² and governs most of the international air traffic of the world.³ They also know that it is the domestic law of Britain,⁴ and of the numerous British Colonies,⁵ and of the various parts of other colonial systems — French, Dutch, Belgian, Italian, Spanish.⁶

In effect, the Convention means that in an air disaster the air carrier is required to pay each passenger's full provable damages up to an international gold standard figure of which the 1946 equivalent in United States dollars is \$8,291;⁷ the passenger recovers up to this sum

¹ U. S. Treaty Series No. 876; 49 U.S. Stat. at L. 3000; 1934 USAvR 245; 3 JOURNAL OF AIR LAW 486; text of Convention may be found p. 87 ff., *infra*, of this issue of the JOURNAL.

² Ratifications and Adherences to the Warsaw Convention are listed in 1944 USAvR 85, to which list should be added Egypt (1945).

³ The Convention applies *proprio vigore* to "international carriage" which is defined in Article 1 to be

(a) carriage from one ratifying State to another;

(b) carriage between two points in a ratifying State via an agreed foreign stopping place.

This was deemed to be the furthest sure extent of applicability, without risking that courts of non-ratifying States could refuse to give effect to the Convention.

⁴ British Carriage by Air Act, 1932; 22 & 23 Geo. v. ch. 36; 1933 USAvR 299.

⁵ 71 British colonial enactments are listed at 1944 USAvR 86 and in SHAW-CROSS & BEAUMONT, *Air Law*, §1751.

⁶ These colonial extensions, as of 1939, are listed at 1944 USAvR 85-87. It is too soon to say with assurance what effect the current postwar modifications of colonial status will have on the effectiveness of the Convention as local law in various localities.

⁷ The Convention fixes 125,000 French gold francs of 900/1000 finess and 65½ milligrams—Article 22(4). This was the French "Poincaré" franc of 1929. Some equivalents in other currencies have been:

	1929	1933	1946
USA dollars	5,000	8,291.87	8,291.87
British pounds	1,000	1,000	2,000
French francs	125,000	250,000	1,000,000
German marks	20,000	20,000	80,000

without any showing of negligence or fault⁸ unless the air carrier can prove that it and its servants — including those in the airplane — were free from all fault.⁹ This proviso envisages that the carrier may escape liability if he proves that the accident was caused by a bolt of lightning, the unpreventable act of a maniac, an enemy attack or the like. On the other hand, the passenger may recover unlimited provable damages if he can prove that the carrier was negligent in an exceptional degree, stated in the official French text as *dol*,¹⁰ presently translated as “wilful misconduct.”

As to baggage, the passenger is similarly situated, the standard gold-value recoveries being at present \$16.58 per kilo for checked baggage¹¹ and \$331.67 for whatever the passenger carries on his person or in his hands.¹² As to cargo, the rule is similar to that for ocean vessels under the Ocean Bill of Lading Convention signed at Brussels in 1924¹³ — namely, the air carrier is responsible unless he can make out either of two defenses: proof of how the loss happened and that there was no negligence connected with it (lightning, enemy act, etc.),¹⁴ or proof that the loss occurred because of an error in piloting or navigation of the aircraft by the flying personnel.¹⁵ This useful law has governed many thousands of flights in England and from and to England since 1932, to and from the United States since 1933, and between all the states of Europe (except Portugal) for some 5 or 6 years before air traffic was disrupted by the commencement of World War II in September, 1939. During the war years, it applied to several important routes conducted for civilians. Since active shooting ended in May and August 1945, it has governed the rapidly expanded international services of the postwar era. Despite the seven-year hiatus of the war years in Europe, there is beginning to be a substantial fund of experience as to the workings of this law.

Shortly before the war, a movement was noted to “revise” the Convention. Since the war, the effort to revise it has engaged a good deal of time. The revisions discussed fall into three groups:

- (1) To simplify and abbreviate the forms of the tickets, checks and waybills issued to the public, and especially to omit many

⁸ Article 17.

⁹ Article 20 (1).

¹⁰ Article 25. Roman law, “Dolus”; German law, “Vorsatz.”

¹¹ Baggage equivalents:

	1929	1933	1946
USA	\$10.00	\$16.58	\$16.58
UK	£ 2	£ 3.31	£ 4

¹² Property in passenger's possession, equivalents:

	1929	1933	1946
USA	\$200.00	\$331.67	\$331.67
UK	£ 50	£ 80	£100

¹³ U.S. Treaty Series No. 931; 51 U.S. Stat. at L. 233. For texts and tables of ratification and legislation see KNAUTH, *Ocean Bills of Lading*, (2nd. ed. 1940).

¹⁴ Articles 18 and 20 (1). The Ocean Bill of Lading Convention also lists 17 causes of loss for which the owner (upon proof of due diligence to make the vessel seaworthy) shall not be liable; the Warsaw Convention has no similar list.

¹⁵ Article 20 (2).

of the statements now required describing the services undertaken by the contract to be performed for the patron.

- (2) To re-arrange the baggage liability provisions.
- (3) To change the cargo liability provisions.

In addition, there are numerous scattered proposals to change the text in many respects. A survey of the matter may therefore be timely.

THE PART PLAYED BY THE AIR CARRIERS

Although the air carriers lent their support to the Convention upon the occasion of its ratification at Warsaw, and in the course of numerous subsequent steps necessary for ratification by each of the 33 States which has taken such action, their association, The International Air Traffic Association (IATA), did not at first fully accept it, and drafted a uniform ticket and air waybill "based on" the Convention which, upon being tested in court proceedings, were declared to be invalid. The Convention provides that the carrier must state on the ticket and waybill that the passenger, baggage or goods are carried under the terms of the Warsaw Convention.¹⁷ The IATA's advisers thought it inconvenient to have two forms of tickets, one form for "Warsaw" business, the other for "non-Warsaw" business. They professed to fear that booking clerks would make errors in selecting the proper forms, and that a "non-Warsaw" passenger might erroneously be handed a "Warsaw" form ticket, with the result that the carrier, instead of contracting out of all liability¹⁸ would find itself contractually liable for \$8,291. And if a "Warsaw" passenger were erroneously handed a "non-Warsaw" form ticket, the error would deprive the carrier of the \$8,291 limit and leave it exposed to unlimited damages.¹⁹

In an effort to obtain the maximum advantage of both systems of law, the IATA evolved a clause designed to straddle all situations, in the following words:

"The General Conditions of Carriage of Goods are applicable to both internal and international carriage. These General Conditions *are based upon* the Convention of Warsaw of October 12, 1929, in so far as concerns international carriage within the special meaning of the said Convention."

The test case²⁰ concerned a lot of gold shipped by the Westminster

¹⁶ The prewar IATA consisted of the principal European international air transport companies: Imperial Airways (UK); Sabena (Belgian); KLM (Dutch); Air France (French); Lufthansa (German); Ala Littoria (Italian); Swissair (Swiss); CSA (Czechoslovakian); LOT (Polish); DDL (Danish); and a few other overseas companies: PAA (U.S.A.).

¹⁷ Articles 3(1) (e) (Passenger ticket); 4(1) (h) (Baggage check); and 8(q) (air waybill).

¹⁸ In England, for example, a common carrier may, by express contract be released from liability for almost any sort of negligence. SHAWCROSS & BEAUMONT, *Air Law* (1945) §§295 and 300. Public policy on this point varies widely in different countries.

¹⁹ Articles 3(2), 4(4) and 9. See Beaumont, "Some Anomalies Requiring Amendment in the Warsaw Convention of 1929," page 30, *supra*, in this issue of the JOURNAL.

²⁰ *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, [1936] 2 All E.R. 890, 1936 USAvR 39; see also, *Philippson v. Imperial Airways, Ltd.* [1939] 1 All E.R. 761, 1939 USAvR 63.

Bank from London to Paris and stolen en route. The British courts declared that the IATA clause (above quoted) did not comply with the Warsaw requirement that the air waybill shall contain "a statement that the carriage *is subject to* the rules relating to liability established by the Convention." They further found that the air carrier was carrying the gold in "international carriage" in the sense of the Warsaw Convention²¹ and accordingly concluded that the air carrier, having failed to issue an air waybill for the gold in the terms required by the Convention, was "deprived" of the defenses which "exclude or limit" its liability.²² Hence, the carrier was held liable for the full value of the lost gold, regardless of whether there was negligence, and regardless of the cause of the loss.

Thereupon the IATA revised its clauses to comply exactly with the Convention's requirements, and the airlines began using two forms: one set for "Warsaw" traffic, the other for "non-Warsaw" traffic. This practice has continued to the present day. It has become less and less onerous as the acceptance of the Warsaw Convention has spread from State to State, until today it is easier to list the countries which have failed to accept it. And today, the IATA opposes revision at this time; it finds the Convention workable.

VIEWS OF OTHER COMMERCIAL BODIES

Views on revision have been expressed by some non-carrier organizations. The International Chamber of Commerce at its 9th Congress in 1937 adopted a resolution²³ advising a redraft of the Warsaw provisions as to liability for delay "when this Convention is revised" under its Article 41. At its 10th Congress in 1939, it considered revision of the Convention and approved²⁴ the report of its Commission on Air Transport making a number of proposals for revision.²⁵ But its Air Transport Committee has, since the war, taken exactly the opposite view.²⁶ The International Union of Aviation Insurers which has re-assembled its surviving postwar membership in London, seems to favor a broad revision.²⁷ Few other public bodies appear to have looked into the matter or expressed any views.²⁸

EXPERIENCE PRIOR TO WORLD WAR II

Experience under the Warsaw Convention was limited to about 6 years in British and European interstate passenger traffic and to the

²¹ See note 3, *supra*.

²² See notes 14 and 15, *supra*; SHAWCROSS & BEAUMONT, *cit. supra*, §§40 and 370.

²³ I. C. of C., 9th Congress (Berlin, 1937), Resolution No. 9, Part IV.

²⁴ I. C. of C., 10th Congress (Copenhagen, 1939), Resolution No. 21, Part V.

²⁵ Document No. 12 of the 10th Congress (Document No. 6884 of the Commission on Air Transportation, April 13, 1939). The proposals adopted by the Commission on Air Transportation at its meeting of February 27, 1939 were based on a report by Major K. M. Beaumont, General Reporter.

²⁶ I. C. of C. (postwar) Paris, October 1946. See CITEJA Cairo Doc. No. 1.

²⁷ CITEJA Cairo Doc. 11. See PICAO Doc. 2359, LG/5, 29/11/46 at page 10.

²⁸ The PICAO does not seem to have asked *specifically* whether there is an interest in revision, and several groups have apparently considered that this question was not asked.

U. S.-Brazilian, U. S.-Bermudan and San Francisco-Hong Kong passenger lines. The business of carrying goods by air was not effectively developed before 1939, and the few claims of the period gave no useful inkling as to how the statistics of large-scale cargo transport would develop. In passenger traffic, about 150 claims were handled with substantial satisfaction.

A review of the litigated cases of the prewar period sheds some light. *Grein v. Imperial Airways, Ltd.*²⁹ concerned a return trip passenger from London to Brussels who lost his life when the plane unaccountably hit a radio mast in a dense fog during the return trip. The carrier had no witnesses who could say that the accident happened without negligence. Belgium at that time had not ratified the Convention and one of the questions was whether a ticket from Croydon to Brussels, and back to Croydon, was a contract to transport from one place in England to another place in England via an agreed foreign stopping place. The lower court said it was not, and as the carrier had not otherwise contracted out of its liability for negligence, gave the widow damages of £4,000.³⁰ But the English Court of Appeal reversed; it found that the return-trip contract contemplated a transportation from a place in England to a place in England via an agreed foreign stopping place, and hence reduced the widow's recovery to the Warsaw standard, which was then £1670. Eight years later the New York Court of Appeals adopted the same view and applied it to a passenger who bought a return-trip ticket from New York to Lisbon (Portugal not having ratified the Convention) and was killed when the plane crashed while endeavoring to land at Lisbon on the outward flight.³¹ While the courts of other States are free to take the opposite view, it would now seem reasonable to expect that these two leading cases, in courts of high renown, would in similar circumstances be followed: Hence, an amendment of the Convention to state this rule may merely be a codification of the case law.

*Noakes and Miller v. Imperial Airways, Ltd.*³² concerned the British flying boat, "Cavalier," flying between New York and Bermuda which fell on the southward flight when ice formed in the carburetors, causing the engines to fail. The passengers donned life belts and floated together in the Gulf Stream water until a rescuing vessel reached the scene; by that time, two had died of exposure. Upon preliminary motions the court decided that the U. S. Death on the High Seas Act³³ gave a cause of action in the courts of the United States (if the foreign airline could be found in that country), and also decided that a flying boat was not a "vessel" in the sense of the statutes relat-

²⁹ [1937] 1 K.B. 50; [1936] All E.R. 1258; 1936 USAvR 211.

³⁰ [1935] 53 Ll.L. R51; 1936 USAvR 184.

³¹ *Garcia and Alvarez v. Pan American Airways, Inc.*, 268 App. Div. 850, 55 N.Y.S. (2nd) 317, 526, 1945 USAvR 39, (1945) 295 N.Y. 852, 67 N.E. (2nd) 257. The U.S. Supreme Court denied a petition for *certiorari* because the action of the New York Court was not "final," 328 U.S. —, 67 S. Ct. 79 (Oct. 14, 1946).

³² 29 F. Supp. 412, 1939 USAvR 1.

³³ U.S. High Seas Death Act, 1920, 46 U.S. Code 761.

ing to the limitation of the liability of the owners of vessels.³⁴ Before a trial could be had, the claims were settled, in each case for more than the Warsaw Convention limit of \$8,921.

There was one German case³⁵ where a Deutch Lufthans transport fell in the Alps while flying from Milan to Frankfort; it lost altitude suddenly while in a lofty cloud mass and ice-formation was suspected. At the last, the plane came into a narrow valley and fell while the pilot was trying to maneuver for a forced landing. The carrier endeavored to defeat liability by showing that there was no negligence, and the plaintiff endeavored to obtain large damages by showing that there was gross negligence (*Grobe Fahrlässigkeit*). The court ruled against both parties, and hence awarded damages at the Warsaw limit, which in German money was 20,000 Reichsmarks.

There was an Italian case:³⁶ a seaplane passing from Tripoli to Rome via Malta caught fire in Malta harbor due to a fuel pipe breaking. Two passengers who suffered loss sued under the Italian domestic air transport law. The suit should have been brought under the Warsaw Convention, but the Italian law and the Convention were then substantially the same on the relevant points. The trial court gave the passengers a decree; the Corte de Cassazione reversed and sent the case back for re-trial on the issue of whether the air carrier's upkeep of the fuel pipe and fittings satisfied the requirement of "necessary measures to prevent the loss." The further outcome of this case is not reported.

REFORMS DESIRED BY CARRIERS

In 1938 there began to be complaints by air carriers that the requirements of the Convention as to compulsory statements in the ticket, baggage check and waybill were somewhat onerous, and it was suggested that these could safely be simplified by a protocol without in any way altering the basic principles or disturbing the 32 (now 33) ratifications which had been obtained. At the Fourth International Conference on Air Law held in Brussels in September 1938 — when many minds were disturbed by the Munich crisis then at its height — a resolution introduced by the British delegate, Sir Maurice Amos, was adopted in the following language:³⁷

"Considering that the Convention signed at Warsaw on October 12, 1929, for the unification of certain rules relating to international transportation by air has been in force for several years as between numerous countries,

"Considering the importance of preserving harmony between international conventions and the ever-increasing developments of aviation,

³⁴ To similar effect, see *Choy v. Pan American Airways Co.*, 1941 USAvR 93; *Wyman and Bartlett v. Pan American Airways, Inc.*, 181 Misc. 963, 43 N.Y.S. (2nd) 420, 1943 USAvR 1; *aff'd* 267 App. Div. 947, 48 N.Y.S. (2nd) 459.

³⁵ Cited as *Frankfurt a/ Main Landgericht*, 2/7.0.169/37. See *Archiv für Luftrecht*, Vol. 9, p. 180. A translation of this decision will appear in the April 1947 issue of the JOURNAL.

³⁶ *Soc. di Nav. Aerea v. Palleroni*, Court of Cassation, Rome, March 31, 1938: *Archiv für Luftrecht*, Vol. 8, p. 155.

³⁷ Resolution D, Report of the American Delegation to the Secretary of State (U.S. Gov't Printing Office, 1939), page 94.

"Considering the usefulness of the preparatory collaboration by the International Technical Committee of Aerial Legal Experts,

"Charges the International Technical Committee of Aerial Legal Experts with the duty of making a study of the Convention at Warsaw on October 12, 1929, for the unification of certain rules relating to international transportation by air, with a view to determining whether, from the experience acquired in the application of this Convention, it would be necessary to improve the text thereof, and, if so, with the duty of preparing the desired modifications or amendments in the form of a draft."

As the shadows of World War II were closing in during the early months of 1939, the International Chamber of Commerce and the IATA both adopted resolutions favoring a revision, and in May 1940, Sir Maurice Amos, who had been appointed Reporter, submitted a report commenting upon and adopting many of the proposals made by the International Chamber of Commerce.³⁸ In that position, the matter rested during the six years of World War II, in the course of which Sir Maurice died, and the IATA ceased to function, and the International Chamber of Commerce suspended its activities.

THE WAR YEARS, 1939-1945

During this period, transatlantic flying began in earnest, and transpacific flying by Pan American increased. All the European interstate lines were, however, disrupted and destroyed. Experience of the practical workings of the Warsaw Convention was in the main suspended.

The situation of Portugal attracted special attention because that neutral country became the principal outlet of numberless refugees by sea or by air. As Portugal had failed to ratify the Warsaw Convention, the outbound refugees were necessarily carried without the benefits of the Convention, and their rights, when travelling from Lisbon to America, were governed by the law of Portugal (if a suit was brought there) or by the law of the State to which they travelled. A serious accident at Lisbon emphasized the situation: a flying boat arriving from New York fell while endeavoring to land on the River Tagus causing numerous deaths and injuries. The cause of the accident was not determined. Many of the passengers were in transit to French North Africa, where the Warsaw Convention prevailed, limiting each claim to \$8,291. Some passengers had one-way tickets to Lisbon, so that they were not bound by the Convention and could recover only if they could satisfy a court and jury that there had been negligence, and if so, recover whatever damages they could show had been suffered. One passenger travelling only to Lisbon had a return ticket, and as above stated,³⁹ the New York courts held that the air carrier's liability was accordingly governed by the Convention and awarded a recovery of \$8,291 without proof of negligence. A New York court has stated the theory of the Convention in the following words:⁴⁰

³⁸ CITEJA Doc. 394, May 1940.

³⁹ See note 31.

⁴⁰ *Wyman & Bartlett v. Pan American Airways, Inc.* 43 N.Y.S. (2d) 420; 1943 USAvR 1, 2-3 (1943).

"The Warsaw Convention rules are applicable only to international flights and raise a presumption of liability on the part of the carrier for injury or death to a passenger (Articles 17 and 20) limited to 125,000 francs or approximately \$8,300 under the rate of exchange fixed (Article 22) except where the carrier is guilty of 'wilful misconduct' (Article 25)."

POSTWAR DEVELOPMENTS

When the war finally ended in the summer of 1945, numerous international organizations resumed their activities in one form or another. The IATA was wholly reorganized.⁴¹ The International Chamber of Commerce reconstituted its Secretariat, but has not yet held a Congress.⁴² The CITEJA resumed its work in January 1946, and met again in July and November.⁴³

When the CITEJA first met at Paris in January 1946, one of the new British delegates, Major K. M. Beaumont, proposed a discussion for simplifying the ticket and waybill requirements. It was indicated that there was an urgent demand by the managers of airlines for a simple reform of this character. It was, however, then understood that there was no proposal of any change in the fundamental principles of the Convention — the burden of proof, the limitation of liability, the division of cargo risks, the time limits, and the like. Mr. Beaumont was chosen Reporter on this subject and a draft Protocol of minor amendments of detail was prepared, accepted⁴⁴ and sent to the PICA0 for consideration.⁴⁵ There the matter rested until the First Assembly of PICA0 met at Montreal in May 1946.⁴⁶ It had a crowded calendar, and brought together many delegates whose approach to air law and the problems of conflict of laws (or private international law) had been tinged and shaped under the pressures and turmoils of war and the Great Alliance which eventually overthrew the Axis. Many of the prewar experts had disappeared from the scene, by death, by detention behind distant frontiers, by association with the defeated Axis nations and their collaborators. The pace of postwar airline activity was astonishingly fast, and the desire to serve, direct and ad-

⁴¹ The postwar organization consists of over 50 airlines. See, "IATA—1946 Activities," page 82, *infra*, of this issue of the JOURNAL.

⁴² A Congress is planned for the summer of 1947.

⁴³ The postwar CITEJA has simply dropped Germany, Austria, Hungary and Japan from its lists. Italian delegates, who came to its 1939 meetings, have been allowed to participate unhindered. Romania, Bulgaria and Yugoslavia appear on the lists of member States, but have sent no delegates since 1938.

⁴⁴ Resolution 143 of XIVth Session CITEJA, January 1946.

⁴⁵ In prior years, the CITEJA invariably sent its completed texts to a diplomatic conference on private air law invited by a sponsoring government: Poland in 1929, Italy in 1933, Belgium in 1938. The PICA0 in 1946 invited the CITEJA to send its texts to Montreal in the expectation that the delegates to the Assembly of PICA0 would have credentials to act also as a Conference on Private Air Law. However, many delegates were not actually so accredited in May 1946, and no "diplomatic action" was taken. The CITEJA experts particularly requested PICA0 to enlarge their group, for the purposes of diplomatic action respecting private air law texts, by inviting all States not members of PICA0. However, PICA0 did not issue such invitations and was at most willing to let non-member Italy attend on an observer basis without a vote.

⁴⁶ 1946 USAvR 73, 75. The PICA0 Secretariat thereupon prepared a draft of revision of the Warsaw Convention embodying the amendments adopted by CITEJA in January 1946, adding final provisions. See PICA0 Doc. 1561, A-11 of April 20, 1946.

vance it in the public interest, for safety and for effective service, was quite natural.

A Legal Commission was set up⁴⁷ and the CITEJA's resolution and text were referred to it, together with several other difficult problems. In the outcome, the PICA Assembly sent the matter back to the CITEJA with the following resolution:⁴⁸

"WHEREAS The First Interim Assembly of the Provisional International Civil Aviation Organization is of the opinion that consideration of more extensive revision of the Convention of Warsaw than is contained in the amendments proposed by CITEJA is desirable, in view of the rapid development of air transport in recent years, and particularly during the current period:

"And that greater ultimate good will accrue to international air transport if more extensive revision as aforesaid is considered, even at the expense of further delay,

"It is Therefore RESOLVED:

- a) That there shall not, at this first Interim Assembly, be formulated or adopted any protocol or similar document amendatory to the Convention of Warsaw;
- b) That the matter of amendment to the Convention of Warsaw should be referred back to CITEJA with a request that CITEJA, or any other body which may succeed to the functions of CITEJA, should review the entire convention for the purpose of considering the need of a more complete and extensive revision thereof in the light of recent experience in air transportation, and of technical studies now being undertaken by PICA, IATA and others;
- c) That member States and those States not members of PICA represented at this Assembly should be invited to furnish to the Council as soon as possible any additional views on the subject;
- d) That if the need for such further revision is indicated, the Council shall present to the next Assembly either appropriate amendments to the present convention, or a new draft convention on the same subject-matters as are comprised in the Convention of Warsaw; and
- e) That a copy of this Resolution shall be transmitted to the members of PICA, other States represented at this Assembly, CITEJA, IATA and such other parties as the Council deems advisable with a request that proposals for amendment of the convention may be sent to the Council of PICA as soon as practicable."

This struck the CITEJA experts meeting in Paris in July as a bomb-shell. Hastily abandoning their carefully organized agenda, they undertook to explore in what respects the Convention could be re-cast, not merely in detail, but also in principle. There was little time for a sound discussion; a Questionnaire was prepared by the Reporter⁴⁹ and a further Questionnaire was submitted by another expert.⁵⁰ These were sent to all the CITEJA experts and evoked a flood of responses.⁵¹ Meanwhile the PICA Secretariat sent the same ques-

⁴⁷ Commission No. 4 (Legal Problems).

⁴⁸ PICA Assembly Resolution No. XXX (PICA Doc. 1843, A/47 of June 13 (1946).

⁴⁹ CITEJA Doc. 438—Questionnaire on the Revision of the Warsaw Convention (19 questions) by Mr. Beaumont (U.K.), Reporter.

⁵⁰ CITEJA Doc. 439—Questionnaire concerning the Amendment of the Warsaw Convention by Mr. Georgiades (Greece).

⁵¹ List of CITEJA responses: CITEJA Cairo Doc. C-1 (International Chamber of Commerce); Doc. C-3 (Irish); Doc. C-5 (PICA memo); Doc. C-11 (IUA); Docs. C-9 & C-12 (IATA); Doc. C-16 (UK); Docs. C-17 & C-20 (U.S. Underwriters); Doc. C-23 (Belgium); CITEJA Doc. 442 (Greek); Doc. 443

tions to the 57 Governments with which it has relations; the Governments were much slower in answering.⁵² Without waiting for any of the responses, whether from CITEJA experts or from governments, the CITEJA Reporter drafted a wholly new *projet de convention* and submitted it for discussion at the Cairo meetings of the CITEJA in November 1946.⁵³ In December he prepared a further revision based on the Cairo discussions.⁵⁴

As the proposed scope of revision expanded, opposition to any revision began to become manifest. The American CITEJA Advisory Committee found that there was no American interest in disturbing the present Convention, which was regarded by representatives of many divergent interests as fair and satisfactory. The postwar IATA, meeting in general session at Cairo in October with 52 member airlines, expressed itself strongly against any revision at this time, and proceeded to draft forms of documents in full accord with the present Convention's requirements.⁵⁵ The Air Transport Committee of the International Chamber of Commerce resolved to oppose a revision.⁵⁶ The Irish and the Scandinavian Governments expressed themselves against revision.⁵⁷ The three American aviation insurance groups expressed opposition.⁵⁸ Consequently, the CITEJA's experts contented themselves with a non-binding discussion of the Reporter's text, resulting in an elaborated series of "Notes" (Summary of Discussions)⁵⁹ which were transmitted to the PICAQ.⁶⁰ The matter now rests with the PICAQ which hopes, in May 1947, to reorganize as the permanent ICAO and to add to its organization a Legal Committee competent to do such drafting as may be desired. At the moment, the evidence seems to be that the great airlines, speaking through the IATA, and the powerful American underwriting groups, are opposed to any revision at this time.

(Danish); Doc. 444 (French); Doc. 446 (Egyptian); Doc. 449 (Italian); Doc. 453 (Netherlands); Doc. 455 (Norwegian); Docs. 458 & 459 (Greek); Docs. 464 & 465 (Polish); Doc. 466 (Swedish).

⁵² Some twenty Government answers which had reached PICAQ were paraphrased in CITEJA Cairo Doc. C-5. The U.S. Government's answer to the PICAQ is not yet released.

⁵³ CITEJA Doc. 445—Report on the Revision of the Warsaw Convention and Draft Convention by Major K. M. Beaumont, September 1946.

⁵⁴ The text of this revision is set forth on page 87 ff., *infra*, of this issue of the JOURNAL.

⁵⁵ See CITEJA Cairo Docs. C-9 & C-12. See PICAQ Doc. 2359, LG/5, 29/11/46 at page 8.

⁵⁶ International Chamber of Commerce Air Transport Committee at Paris, October 1946. See CITEJA Cairo Doc. C-1.

⁵⁷ See CITEJA Cairo Doc. C-3, CITEJA Docs. 443, 455 & 466.

⁵⁸ See CITEJA Cairo Docs. C-17 & C-20.

⁵⁹ CITEJA Doc. 472, Nov. 17, 1946—Summary of Discussions of the New Draft Convention annexed to the Report of Major K. M. Beaumont. Significant portions of these discussions are found in the footnotes appended to text of the Beaumont draft of revision of December 1946, commencing page 87, *infra*, of this issue of the JOURNAL.

⁶⁰ CITEJA Plenary Resolutions No. 157-9, Nov. 17, 1946. See page 81, *infra*.

SOME SUGGESTED REFORMS

Statements Required on Tickets, Checks and Waybills

Over-elaboration of the required statements was the original complaint in 1938 against the Warsaw Convention. This complaint has, for the moment, been laid aside; for the IATA at Cairo in October 1946 took the view that the present requirements can reasonably be complied with. Carriers always wish to keep their documents as short and non-binding as possible. The ideal carrier's ticket merely would say: " X Airline, one passenger, New York to Bombay. For terms see tariff on file." Their customers, however, usually want to know more exactly what performance is promised in exchange for the price paid. Insurance companies, banks and financing institutions, freight brokers and agencies, and the families, business associates and administrators of passengers (killed or severely injured in remote foreign lands) all have a legitimate interest in knowing the terms of transportation agreed to. When the journey is long and passes from one country to another the need for explicit statement is enhanced. The public interest would seem to justify the present requirements of the Convention. Indeed, as devices for control of international rates are developed, it could be necessary to add more data, rather than to subtract from that now required. For instance, the U. S. Maritime Commission is considering a requirement that every ocean bill of lading shall include the rate schedule. It would, in American practice, be quite unfair to let a mass-shipper in the U. S. - U. K. trade have the benefit of "flat rates" or "agreed charges" such as are permitted by the British Road and Rail Traffic Act.⁶¹

Baggage Valuations

The baggage valuation provisions might be re-framed. At present, "checked baggage" is valued at some \$16.58 per kilo, and the passenger's clothing, the contents of his pockets and handbags, etc. is given a lump value. While there is no argument about a loss by a crash, it is suggested that a theft or a mere loss by the passenger's carelessness is not adequately dealt with. The values might be fixed per passenger, rather than per kilo. However, such proposals would not justify disturbing the present settled structure of ratifications.

The Allocation of Cargo Loss and Damage Risks

There are, rather obviously, three possible solutions of the relations between the air carrier and the owner of damaged cargo. At one extreme, all the risks of loss and damage can be imposed on the air carrier; this is in effect the "all risks insured" air waybill or bill of lading. A prominent result of this system is a high rate, for the carrier must be paid not only for the carriage but for the cost of cargo insur-

⁶¹ Under that Act, for instance, a chain store company may contract with a railway to have all its goods carried for a year for an agreed flat rate charge. See 14 ICC Prac. J. 114.

ance as well. Insured bills of lading have long been familiar in the Great Lakes and Atlantic coastwise package trades.⁶²

At the other extreme, the risks can all be imposed on the owner of the cargo, and he may insure them, in whole or in part, as he may see fit. This system results in cheap rates, for the carrier is paid only for the carriage. This arrangement has long been sanctioned by the British courts as quite compatible with public policy, provided only, that the language of the bill of lading is explicit and clear, and frankly advises the consignor of the goods what transport risks are borne by the goods owner. Sixty years ago the New York courts⁶³ accepted the British view, but the United States courts began to denounce various ocean carriers' exception clauses as contrary to public policy; the result was the federal Harter Act of 1893⁶⁴ which imposed a divided-risk solution on all our courts, federal and state.

The third solution is a division of the risks at some fair line. The common law of England, in stage-coach days, drew the line at the Act of God, the acts of the King's enemies, and the inherent vice of the goods. There is an implied warranty that the ship is seaworthy, the coach or car roadworthy, the airplane airworthy. By statute, Parliament excused loss by fire on shipboard unless caused by the shipowner's act or neglect.⁶⁵ This common-law is also the law in the United States.⁶⁶ It imposes a great many losses on the carrier and results in smaller profits or higher rates, which in international unrestricted competition discourage getting business from carriers who operate under other laws. British and other foreign ocean carriers have succeeded for many years in offering low rates because their courts gave effect to specific bill of lading clauses excepting the carrier from liability for negligence; but eventually this became extremely unsatisfactory to their customers.⁶⁷ A much more practical and workable division of the risks is stated in the U. S. Harter Act of 1893, which has been successively adopted by Canada, Australia, and New Zealand⁶⁸ and, after 1924, spread over most of the world (except Latin America) in the form of the Ocean Bill of Lading Convention.⁶⁹ This system relieves the water carrier who has provided a seaworthy ship at the start of the voyage of losses due to errors of management and navigation, but imposes on the carrier full liability for the receipt, custody, care, stowage and delivery of the goods. The French describe this as the separation of *fautes nautiques* from *fautes commerciales*; the Italians

⁶² See *The Dixon-King*, 301 U.S. 696, 1937 A.M.C. 697.

⁶³ *Rubens v. Ludgate*, *Hill S.S. Co.* (1892, 1st. Dept.) 20 N.Y. Supp. 481 at 485-486; affirmed without opinion, 143 N.Y. 629 (1894). See also *Robertson v. National S.S. Co.* (1891) 139 N.Y. 416.

⁶⁴ Act of Feb. 13, 1893. 46 U.S. Code 190-196.

⁶⁵ 57 & 58 Vict. ch. 60 (1894).

⁶⁶ R.S. 4282; 46 U.S. Code 182.

⁶⁷ See Historical review in KNAUTH, *Ocean Bills of Lading*, (2nd ed., 1940) page 99.

⁶⁸ Canada Water Carriage of Goods. (1910), 9 and 10 Edw. 7, Ch. 61; later re-enacted as Rev. Stat. 1927, ch. 207; Australia (1904) and New Zealand (1908).

⁶⁹ Brussels, 25 August, 1929, U.S. Treaty Series No. 931, 51 U.S. Stat. at L. 233.

similarly phrase it as *colpa nautica* and *colpa commerciale*. Fifty years experience with this system has amply demonstrated that it works well; the carrier is compelled to accept sufficient risks to prod him into a reasonable amount of care without unduly raising the rate charged for carriage, and the goods owner assumes a sufficiently large group of risks to give him adequate business choices as to whether to carry his own risks, or to insure some or all of them. This division of risks, first enacted in 1893, has had an expanding success; no trade that has adopted it has ever abandoned it for another. It now governs ocean trades throughout the British Empire and the Commonwealths (except South Africa) and throughout Europe and in the United States. It was adopted for international air transport by the Warsaw Convention in 1929.

The Beaumont proposals of September 1946 propose to abandon it by dropping Article 20 (2) which contains the essential language that the air carrier shall not be liable for losses of air cargoes due to pilot errors in navigation or in management. Thus it would saddle the losses due to pilot errors on the air carrier. The economic result would obviously be to raise the rates which must be charged by the air carrier for transport, and to limit the freedom of the customers of the airlines to decide for themselves whether they wish to insure such risks of loss. The goods owner today is free, when his goods move under the Warsaw Convention of 1929, to insure or not, through his own broker and with an underwriter of his own choice with whom he makes his own bargain as to premiums and extent of coverage. It is a primary transaction concerning his own risks. If Article 20 (2) is abandoned, the customer will be forced to pay the carrier for assuming these risks; and if he also insures them with his own underwriter (fearing that the carrier may become insolvent or resort to technical defenses), this will be a secondary transaction; his underwriter will by subrogation assert his rights against the carrier. The proposal to drop Article 20 (2) is thus a device to increase the air carrier's risks which will in turn justify an increase in the rates. If the air carrier is a government, the solvency of the carrier is doubtless assured; and the business man need merely fear the slow methods of bureaucracy in the handling of claims. If the air carrier is a private enterprise, there is always the risk of insolvency, especially if there is a bad series of accidents, in which event it may be vain to rely on the carrier to pay the losses for which it is liable and for assuming which it has been paid as part of the rate. As long as there are private carriers, Article 20 (2) should not be stricken.