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# THE AIRCRAFT COMMANDER IN INTERNATIONAL LAW

By ARNOLD W. KNAUTH

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THERE is at present virtually no established law as to the status, rights, powers and duties of the aircraft commander in international air traffic. As there are some 85 "nations" controlling foreign relations between the various land areas of the globe — of which only 52 are members of the "United Nations" emerging victorious from World War II — it is obvious that there are potentially about 85 different varieties of law as to the status of the aircraft commander. Many of these "nations" are federations of states, provinces, cantons; and taking all the legislative jurisdictions of the globe, there are about 524.<sup>1</sup> Unless some positive steps are taken to establish broad generalized propositions as to the aircraft commander, the chances are great that a needless amount of variation will occur, and commercial enterprise will be hindered.

Anticipating this development, the experts of the CITEJA began discussing a draft Convention on the Status of the Aircraft Commander in 1930, under the sound and imaginative guidance of Leon Babinski, the Polish expert, who was the Reporter on this topic until war overwhelmed his country in 1939.<sup>2</sup> The final stages have been guided by

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<sup>1</sup> In 1875, after Italy and Germany were united and before Turkey began to break up, there were only about 35 "foreign offices": Great Britain, France, Germany, Netherlands, Belgium, Denmark, Norway-Sweden, Switzerland, Austria-Hungary, Spain, Portugal, Russia, China, Japan and the 21 American republics. Their multiplication began with the break-up of the Turkish Empire, was accelerated in 1918, and proceeds today at a rapid rate.

In counting legislative bodies, the U.S.A. has 54 — (Congress, 48 states, 5 territories and possessions); the U.K. has 72 in its colonies, dependencies, etc.; Australia, 8; Canada, 12; Union of South Africa, 6; Switzerland, 22; U.S.S.R., 16; Brazil, 27; France, 15; India, 51; etc., etc. To make uniform for aviation some one rule of law — say the rule as to comparative negligence — might require legislation in each of over 500 legislatures.

<sup>2</sup> The first CITEJA Reporter, M. Thieffry, (Belgium), a well-known pilot, set up a questionnaire in 1927. Upon the death of M. Thieffry in an accident on a flight to the Congo, Mr. Babinski (Poland) undertook the task and presented a full report and a draft in 1931, CITEJA Doc. 127, which was provisionally approved, Resolution No. 47. Compte-Rendu of the Sixth Session, Doc. 162, Paris, 1931, p. 140.

André Garnault, the distinguished French expert.<sup>3</sup> The text adopted in plenary session at Cairo in November 1946,<sup>4</sup> and sent to the PICA0 with a recommendation of diplomatic action is the synthesis of a long and careful study, discussion and mature reflection. The time has now come to review and evaluate the remaining criticisms so that the work can be finalized.

As the text comes from the CITEJA, it is in the French language; but Articles 2, 5, and part of 6 were adopted in the English text as drafted by the U.S. delegation to the Cairo meeting of CITEJA,<sup>5</sup> and hence are not criticized by this writer. In the PICA0, there will be three official texts — French, English and Spanish.<sup>6</sup> The accuracy of the transliterations and translations, both as to the sense of the language and as to the legal implications of words chosen, therefore require the most careful evaluation at this time. Several English translations have been circulated by CITEJA, by PICA0 and by the U. S. State Department.<sup>7</sup> None seems to this writer to be wholly adequate, and a further reworking by the PICA0 seems essential.

The Convention deals with ten ideas, as follows:

1. Every aircraft must have a commander, and a method for appointment and a succession in case of injury, incapacity, etc.
2. The Commander must have authority to command and control persons on board.
3. He must be able, as Commander, to do what is necessary to expedite the voyage — procure supplies and repairs necessary for the voyage; and if a crew member drops out, hire a suitable man to complete the voyage. It is debatable whether his authority may be specially limited.
4. There should be public notice that he cannot, as Commander, do certain things: sell or pledge or mortgage the aircraft: perform marriages, act as notary.
5. His command of the crew begins at a certain point: as when they embark, and continues until the formalities of arrival are completed, or until he is relieved by another Commander.

As to the aircraft passengers and cargo, his control begins when these are placed in his charge and continues until he turns them over to some other qualified authority.

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<sup>3</sup> M. Garnault presented a Report and Draft in July 1946, CITEJA Doc. 434, aided by Norwegian, Argentine and French observations, Docs. 415, 417, 432; and a thoroughgoing revision in November 1946, Doc. 451. His final result was CITEJA Doc. 471, PICA0 Doc. 2417, LG/6, 5/12/46 which is the basis of the translation printed in this JOURNAL, Vol. 14 at page 84.

<sup>4</sup> CITEJA Cairo Doc. C-30, *cit. supra*, note 3. Subsequent versions of the text are: PICA0 Doc. No. 2417 Dec. 12, 1946; PICA0 Doc. No. 2879, Feb. 21, 1947; Informal CITEJA Paris revision of February, 1947; and U.S. State Dept. translations of Feb. 20 and March 4, 1947.

<sup>5</sup> U.S. proposals: CITEJA Cairo Doc. C-25.

<sup>6</sup> No Spanish text is yet available.

<sup>7</sup> See note 4, *supra*. There is also a British Foreign Office text.

6. He may go to the Consul of any nation whose nationals are interested in the aircraft, its managers, cargo or passengers; what the consuls may do depends on their consular laws and instructions.
7. Births and deaths on board must be suitably recorded and reported.
8. The convention states that it does not attempt to prescribe any competency tests for commanders; that is a matter for home legislation, or for CINA, PICAQ and ICAO.
9. The Convention will apply to international flight of aircraft registered in a State which ratifies or adheres, or registered by an owner who is a national of such a State.
10. It does not apply to military, customs or police aircraft.

There are the usual concluding clauses concerning ratification, denunciation, etc.

#### IS THE CONVENTION WORTH WHILE FOR AMERICA?

Some say that the Convention is not necessary; that the effort to state the law should follow and not precede the demonstration of the need and urgency of action. Before 1939, no foreigners could fly here, and the United States had only some 20 flying boats which went further than Cuba and a few machines going to Mexico and Canada; the problem of the commander's status abroad hardly existed in our consciousness. It was livelier in Europe, where some 250 landplanes were daily flying from country to country.

During the war, the civil aspects of aviation were unimportant; if a man had a military officer's orders in his pocket, he flew where he pleased, regardless of local police and sovereignty. Those days are now over. Civil conditions are with us again.

There are now nearly 1,000 machines, of great value and carrying persons of importance, couriers, mail and cargoes of increasing value, engaged daily in international flight. Nearly half of them are United States aircraft; nearly all of them are manufactured in American factories, paid for by dollar financing, often serviced by Americans with American spare parts and products. The United States believes that it has and will keep the lead in international flying. Numerous Americans are now intensely interested in every aspect of the subject. The pilots, through their Air Line Pilots Association, are keenly interested in bettering and standardizing their position. The police authorities of every nation are acutely aware of their power, opportunity and duty to watch and control the actions of foreign aviators. If we wait until the need of a convention has become urgent, it will be too late to act in time, and the public may fairly criticize those who delay the matter. When a subject is lively, but not yet shaped by the Courts, it may be easier to shape it by agreement; after cases have given the matter some unexpected and undesired twist, it may be difficult to undo what has occurred and give it a new shape. The Warsaw Convention of 1929 —

adopted by us in 1934 — is a good example;<sup>8</sup> it set a pattern of carrier liability before there were many cases, and before any party to the situation thought it had attained a superior position which it would be anxious to maintain.

The travelling public, those who ship their valued products by air, the insurance companies which underwrite these risks, and the government agencies concerned with air travel, all now have a great interest in the authority and duties of the aircraft commander, and that interest is bound to grow rapidly as international operations expand to new countries and become more and more intense on the old routes. The view that the Convention or the Legal Status of the Aircraft Commander is needless was advanced belatedly and, so far as the writer knows, only in the United States. The U. S. CITEJA Advisory Committee had put the matter to a vote in June, 1946 and in January, 1947; on each occasion the result was overwhelmingly in favor of considering the subject now. It would seem that the European countries are ready to go ahead with the Convention regardless of opposition.

The commander's status is today quite undefined. Surely a man employed to exercise some sort of control over a half million dollar machine, with a crew of 5 to 10 persons, with 30 to 80 passengers, cargo and mails of high value, and travelling over and to many jurisdictions should certainly have his status, rights and powers carefully and clearly stated in every language. The public interest demands it.

#### IS THE CONVENTION SOUNDLY CONSTRUCTED?

Coming to the structure of the draft Convention itself, criticism has been directed at three sections — Section 1 (2) as to how the commander shall be named; Section 3, which states the Commander's power to pledge his employer's credit to buy necessities for the voyage and to hire a substitute for a man who quits; and Section 6, which states the commander's right of access to the consuls of the various countries interested in the aircraft, the persons in it and its cargo. In neither case is there complaint about the clarity of the statement. The quarrels are with the basic ideas expressed.

#### *Selection of Commander*

As to the selection of the Commander, the employing airlines want the right of choice, while the Airline Pilots Association (ALPA) appears to wish the chief, first or senior pilot to be the Commander automatically. There are risks either way. Automatic seniority command destroys responsible management. If there should be a choice, it is feared that politics and nepotism will give the command — and the brass stripes — to some personal or family favorite, unqualified or less qualified than the first pilot and others on board. Hence, if the operator may choose, the choice must be made among the fully qualified

<sup>8</sup> See text Convention and series of articles on the Warsaw Convention in the Winter issue, 1947 of the JOURNAL: 14 JOURNAL OF AIR LAW AND COMMERCE 30, 37, 44, 87.

and certificated men on board. No less qualified man should ever be able to tell the more qualified first pilot what to do in any emergency. The decision to turn back, to go to an alternate airport, to land or not to land in thick weather, etc. must rest with one man — the most highly trained man aboard, up-to-the-minute in his knowledge of the procedures and practices of the place and the hour. No employer, company officer or stockholder should be able to overrule his judgment. It is not merely a matter of the safety of the one airplane; the safety of all other airplanes in the vicinity — especially in thick weather — depends on the correct use of the correct procedures. And everyone on the ground, who may be hurt by a crash, is keenly interested that the planes overhead — especially in bad weather — shall be commanded by men holding the highest rating and best trained to cope with adverse conditions and “instrument” procedures.

It may be that in the future, a rank of commander-pilot may be created and that former first pilots, retired because of age or disability, might be eligible for such rank although not personally fit to handle the controls. Should such rank be created by the regulating authorities, command might be entrusted to such men.

This is an international matter. It is urgently important that no State should sanction a flight to another State with the command in the hands of any person who does not possess the highest qualifications, much as a ship may not sail unless her skipper holds full Master's papers.

#### *Pledge of Credit*

As to the pledge of credit, the difference of views seems to have two angles: one question is whether the commander of the airplane — the leading person in charge for the owner or operator — is to be like a railway engineer or conductor or the driver of a bus or truck, who, when anything happens that he cannot fix with the tools and spare parts in his kit, simply sits down by the track or roadside and waits for the employer to send him aid. Railroads and bus-truck lines have no problem as to supplies, for their trains and vehicles stay on definite tracks. A Union Pacific train has never been blown by a cross wind into Texas; a Pennsylvania Greyhound bus has never unexpectedly found itself in Ontario.

Such things do happen to ocean shipping; and it has long been well settled that the Masters of vessels have powers adequate to deal with such situations and to keep the commercial enterprise moving, even under unexpected adverse conditions such as arise when cable communication is broken, when censors refuse to pass radio messages, when, for any of many reasons, the Master cannot quickly get the advice of his boss and has to act on his own responsibility or abandon the pretense that he is a common carrier in commerce and bound by a valid contract, duly paid for, to accomplish an agreed voyage.<sup>9</sup> The

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<sup>9</sup> An analysis of the Shipmaster's powers is given in a later section of this paper.

method by which the ship carriers can obtain credit in places where their normal arrangements are inadequate is the secret maritime lien *in rem*, which, with sundry local variations, prevails very generally in the ports of the world.<sup>10</sup> This is supplemented by the bottomry bond,<sup>11</sup> now seldom needed. These are sharp legal instruments which air carriers will, presumably, wish to avoid if they can find a satisfactory method of performing their commercial obligations by some smoother devices. Indeed, the proposed Convention, in Article 4, prohibits the Commander from making the pledge necessary for a bottomry bond.

It is submitted that the provisions of Article 3 of the proposed Convention are less onerous than the maritime device of the secret lien which follows the ship wherever she goes and into whosoever possession she passes. If a still less onerous device can be constructed which will satisfy the needs of commerce and persuade the shippers of cargo and their underwriters that contracts to carry by air will really be performed with reasonable dispatch, we have not heard of it.

The critics do not, it is submitted, give their due weight to the potent words "necessary," "prompt" and "indispensable" with which the powers to pledge credit are hedged about in Article 3. The critics appear to compel the Commander and supplyman to submit every purchase which requires credit to the managers of the airline at some company office where a suitably empowered contracting officer may be located. This assumes access to free and rapid means of communication by telephone, cable or radio.

It is fair to recall that since 1912 — 35 years last past — there have been World Wars totalling 12 years or one-third of the time, and important wars, with cables cut and censorships at inconvenient places, for at least 4 more years, or half the time. It seems, on this record, to be vain to construct a system of operations based on uninterrupted peace and daily and hourly availability of uncensored and uninterrupted communications between the continents. Shipping by sea often has to make use of the Master's powers of pledge in order to keep commerce moving, and few indeed have been the complaints of abuse of these powers. In this writer's view, it is wiser to equip our air carriers with powers adequate to meet the political and economic interruptions that have so often occurred in our own lifetimes, and are likely to occur again.

The Convention text does not reduce the aircraft commander to the level of a railway conductor or a bus or truck driver. It gives him a position somewhat below but broadly analogous to that of a shipmaster. This position is the result of much debate and consideration. It is submitted that it is right. There are in the world probably 5 million truck and bus drivers — perhaps many more. Such a large

<sup>10</sup> Concerning maritime liens, see: PRICE, *MARITIME LIENS* (Sweet & Maxwell, London, 1940), summarized in 227 L.Q. Rev. 44 (1941); Price, *Statutory Rights in Rem* (1945) 27 J. Comp. Leg. & Int'l L. 21; Price, *Priority of Maritime Liens* (1942) 24 J. Comp. Leg. & Int'l L. 38; I BENEDICT, *ADMIRALTY* 269, 272; (6th ed., Knauth, 1940); ROBINSON, *ADMIRALTY* c. 10 (1939).

<sup>11</sup> See, ROBINSON, *op. cit. supra*, note 10 at 370, 446; 2 BENEDICT at 176.

group may not, of course, be entrusted with broad contractual powers. There are not over say 25,000 shipmasters, all of whom have broad agency powers. There may in the foreseeable future be 10,000 international-flight aircraft commanders. Today there can hardly be as many as 3,000 in all countries on all routes.<sup>12</sup> They are supposed to be men of the highest character, trustworthiness and ability; they command pay which shows their worth. Air carriers ask the public to pre-pay large sums for contracts to carry swiftly. They must envisage a system by which *all* air carriers — large and small, scheduled and trampers — can satisfy the public and perform their contracts under all conditions, including the unforeseeable interruptions which are bound to occur in out-of-the-way spots at most inconvenient moments. It is submitted that the Convention supplies such a system; that it is a minimum system, and reasonable and workable.

So much for the question whether the aircraft commander is a railway conductor, a shipmaster or something else.

#### *Necessaries for the Voyage Undertaken*

The other angle is the meaning of "necessaries for the voyage," "necessary repairs," "absolute necessaries," and "indispensable crew service," and the like, found in Article 3. The text deals with necessaries for the voyage "undertaken" or contracted for. It might exclude a ferrying voyage in ballast, and be tied to commercial obligations. This would emphasize the public interest in the movement of commerce.

The real task is to persuade the supplyman and repairman in the distant foreign place to undertake to furnish the supplies and repairs on credit. The fact that the Commander has the legal power to pledge his employer's credit is no guarantee that the supplyman will accept it. He will want cash in Timbuctoo, not a right to sue in London or Chicago. At the very best, the system of the Convention will work well only in a world where aviation supply and repairmen are educated to rely on the pledge of credit which the Commander is empowered to make.

The repairman may sometimes have a possessory lien. Whenever the whole airplane or any part of it is brought to his shop, he will not have to release it to the owner until he is paid. That lien is of no use to the supplier of gasoline, oil or food; nor is it useful to the repairman who comes onto the airport and repairs the airplane without taking possession of it. However, many of these situations are going to be solved by payment enforced through the repairman's possessory lien. That lien always threatens delay; it slows up airplane service. The repairman's possessory lien is not commercially useful. It is an obstructive lien. For as long as it is exercised, the airplane cannot move

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<sup>12</sup> The U.S. Civil Aeronautics Authority has at present outstanding licenses suitable for piloting scheduled and unscheduled air transports to 3300 persons. Not all of them have attained or retained the necessary medical status. The U.S. Coast Guard has at present outstanding Master's licenses (all vessels, all oceans) to about 15,000 persons. Many are inactive. Each is good for 5 years.

or earn any money. As soon as the airplane moves to earn money, the possessory lien is necessarily lost, for the repairman is in no position to run the airplane for himself or for the account of others.

Large airlines do not need these arrangements for credit, for they have worldwide arrangements. But there will be many lesser lines, and many trampers and charter flights. Their needs are very important. The Convention is designed to meet these needs. It is the same in the ocean carrier business. Cunard and Canadian Pacific, covering the globe, do not need or want liens and implied powers of pledge for credit, but have to tolerate a system which enables the generality of shipping to function.

It has been proposed that the employer may limit his commander's statutory powers by express terms; the CITEJA experts wrote such a text and later discarded it.<sup>13</sup> It poses the question whether the employer would have to bring the limiting notice to the attention of the prospective supply and repairman, or whether the intending supplyman must make inquiries for himself. It would seem reasonably easy for an airline which places a contracting officer at an airport to give express notice to all the supply and repairmen in the locality that its commanders at that place have no authority to buy supplies or order repairs. Even at the largest airports, such notice could readily be given to the supplymen who solicit business there. If the burden is reversed, as it is in the maritime trades,<sup>14</sup> the duty to inquire must be limited to what can be found aboard the airplane or what is common knowledge at that place, for it is assumed that there is no time or opportunity for communication with the distant home office of the airline. The

<sup>13</sup> CITEJA put it in, Doc. 434, July 1946; and took it out, Doc. 451, November 1946.

<sup>14</sup> The U.S. Maritime Lien Act (1910, reenacted 1920), June 5, 1920, C. 250, 41 Stat. 1005, 46 U.S.C. 971 (1940) provides:

*"Persons Entitled to Lien"* — Subsection P.

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessities, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel."

*"Persons Authorized to Procure Repairs, Supplies, and Necessaries"*

—Subsection Q.

"The following persons shall be *presumed* to have *authority* from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessities for the vessel: The managing owner, ship's husband, *master*, or *any person to whom the management of the vessel at the port of supply is entrusted*. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel." [Italics added.]

*"Notice to Person Furnishing Repairs, Supplies, and Necessaries"*

—Subsection R.

"The officers and agents of a vessel specified in Subsection Q *shall be taken to include* such officers and agents *when appointed by a charterer*, by an owner *pro hac vice*, or by an *agreed purchaser in possession* of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities was without authority to bind the vessel therefor." [Italics added.]

The leading case is *Carver v. United States (The Clio)*, 260 U.S. 482, 1923 A.M.C. 47, where Holmes, J. said: "To ascertain is to find out by investigation"—*i.e.*, to ask: Is there a charter?

usual course would be to ask the commander to display his credentials and state what limitations, if any, have been imposed by his employer. There should be no occasion for any but a truthful answer; and an employer who places a lying or deceitful person in charge of his airplane should, on ordinary principles, be responsible to businessmen who in furtherance of commerce rely on the clear appearance of good faith. The preference of this writer is for the system of express notice to the tradesmen who solicit business at the airport.

Consider the situation of a repairman who will rely on the Convention and a signature of an aircraft commander to a contract and promissory note. He must be prepared to prove, in a foreign court, in an action *in personam* against the "exploitant" of the aircraft the following propositions:

- (a) the man in the airplane was at the time in fact the aircraft commander;
- (b) the signature is his signature;
- (c) the man was at the time in fact employed by the defendant and entrusted with charge of the aircraft;
- (d) the voyage contracted for was such and such;
- (e) the repairs and supplies were necessary to further continuance of the voyage contracted for;
- (f) the repairs and supplies could bring about the prompt resumption of the voyage;
- (g) he had not received notice of any express limitation on the commander's statutory authority; there was no local knowledge of any limitation. Or alternatively, he made inquiry of other tradesmen and asked the commander and was assured that there was no limitation on his powers.

He must admit that he does not rely on any agreement of mortgage or similar charge, which is forbidden by Article 4. Furthermore, if he has to sue in the U.S.A., he cannot recover the lawyer's fees and other expenses; he can only get what we call court costs. And he runs the risk of finding that the "exploitant" or airline manager is bankrupt.

These burdens certainly reduce the risk of abuse of the credit power. Many may think that Article 3 is not as valuable a creator of credit as it seems.

#### *Safety vs. Benefit*

A critic of Article 3 has suggested that the Commander's statutory powers should be expressly limited to what is necessary for *safety*. Paragraph 3 (c) is already thus limited; but paragraphs 3 (a), (b), (d), (e) and (f) are clearly broader — they authorize the Commander to buy, repair, borrow and hire in order to get on with the voyage. This is a very fundamental problem. Is it enough to empower the Commander to get the stranded cargo into a warehouse and the stranded passengers into a hotel? Or do the demands of commercial enterprise dictate that the goods and the passengers must be caused to arrive at

their destinations? This problem is well-known in the shipping industry as the question of common safety versus common benefit. Commercial benefit envisions more than safety — it contemplates arrival at destination or market. This problem will become familiar in air transport. Are the merchants going to be satisfied with a legal set-up which strands them and their goods in mere safety at a place where they do not want to be? Or will they demand a legal system which at least authorizes the commander on the spot to make engagements which may enable the aircraft to resume the voyage promptly? As the air cargo business increases, it may safely be predicted that the latter course will become imperative. The shippers and consignees of air cargoes, backed by the insurance companies and the banks which provide the credit for the movement of the goods, will insist on more than “common safety” at the place of delay; they will demand safety *and* the resumption of the voyage to destination. Article 3 as now drawn meets that demand. This is an important point. The existence of the airlines has evoked air commerce, which must insistently be served. Absent the commerce, air transport would revert to an adjunct of luxury and pleasure.

#### *Power to Hire Substitute Crew Members*

Special attack is directed at Article 3 (e), which empowers the Commander to hire a substitute for a man who quits. It is earnestly said that each aircraft crew is a “team” and that it is positively dangerous and risky to contemplate a system where a substitute may be put in, to replace a member of the team who quits.

Stewards and stewardesses, horse handlers, and other attendants in airplanes can, of course, readily be replaced.

The criticism is however relatively true today as to pilots, navigators, radiomen. But there have been enough instances of the substitution of one man by another to show that substitutions are feasible. We notice that a fully booked flight is not cancelled because an assigned pilot catches a cold; another man is substituted, without laying up the whole crew. Air transport is not so fragile an instrument that the illness of one man during the journey stops the whole enterprise if he can be replaced by another man holding the proper qualifications. As the years pass, it seems reasonably certain that the supply of adequately trained men will increase, and if one such happens to be available at a place where another man happens to quit work, the needs of commerce will dictate that a means must be provided for making it possible to hire the substitute and get along with the business, without waiting for a manager on the other side of the world to give the arrangement his blessing, or a government official at a distant capitol to go through a regulatory ritual.

#### *Access to Consuls*

Coming to Article 6 — access to the consuls — it is said that this is unworkable and will result in conflict, confusion and strife. But all

that the text says is that the Commander may call the consul's attention to the situation of the man or property in respect of which the consul may have a duty to perform. How this can cause strife is not clear. Consider the alternatives: the consul of the airplane's State of registry alone is to be notified. It will then be his duty to care for nationals of other States, to look after property owned in other States. What could stir up more strife than that? It takes the consul out of his proper national duties and turns him into an international officer. Or consider a third alternative: After the accident or disaster, the consul of the airplane's registry looks after the people of his own country, but neglects all foreign interests; and the aircraft commander — who has no status with the police of the foreign place where he has happened to descend — cannot or need not notify the consuls of the foreign interests concerned. What could be more productive of complaints than that?

It would seem proper to ask the critics of Article 6 to be much more specific, and give us some realistic examples of the supposed conflicts which this Article might engender.

Article 6 was carefully reworked at Cairo by the American delegation; they added the last paragraph, which CITEJA adopted. Thus on the record, the United States is committed to Article 6, and it would be embarrassing to abandon or oppose it now, unless the reasons are of the most convincing sort.

#### THE MARITIME ANALOGY

It is asked what comparable authority the shipmaster has to pledge the shipowner's credit?

The shipmaster's powers are traditional in English and American law, and found in the cases and some statutes.<sup>15</sup> In Europe they are stated in the Codes.<sup>16</sup>

The shipmaster at sea usually commands a vessel worth from \$300,000 to \$800,000 in peace times. Numerous vessels are worth \$1,000,000 to \$2,000,000. There are 200 or 300 vessels worth from \$5,000,000 to \$20,000,000. Every shipowner has the benefit of some form of statutory right to limit his liability in respect of his personal liability for the contracts and the negligent acts of his shipmasters.<sup>17</sup> Up

<sup>15</sup> U.S. statutes provide that he must furnish wage accounts, enter and clear vessels at the custom house, perform many specific duties. Since 1931, his "privity and knowledge" of an unseaworthy condition prior to the moment of sailing is the privity and knowledge of the shipowner. MACLACHLAN, *MERCHANT SHIPPING* (7th ed., London 1932) Chapter IV, presents the most comprehensive statement of the British law and views as to the shipmaster.

<sup>16</sup> The famous French *Ordonnance de la Marine* of 1681, states the Captain's powers in Livre Second, Titre Premier, Articles 1-36. He selects the crew (Art. 5), furnishes the ship (Art. 8), signs bills of lading (Art. 9) keeps the log (Art. 10), must be personally present when the vessel departs (Art. 13), cannot make purchases in the port where the owner resides (Art. 17), but may do so elsewhere (Art. 19), is personally liable for abuse of his powers to purchase supplies (Art. 20, 29, 30), may discipline and punish the crew for offenses (Art. 22).

<sup>17</sup> For an account of various systems of limitation of shipowner's liability, see IV, BENEDICT, *op. cit. supra*, note 10, §543.

to this date, the aviation industry has been extremely shy about proposals for any similar "global" limitation of liability.<sup>18</sup>

For *necessary* supplies and *necessary* repairs, the shipmaster may pledge his employer's property — vessel and freight — either in writing as by a Bottomry Bond or a supply or repair contract or bill approved by himself, or orally, and his dealings, if not secured by an express pledge, are nevertheless impliedly secured by the secret, unrecorded maritime lien which adheres to the vessel and to her voyage freight, and which cannot be defeated by a transfer of ownership nor by a bankruptcy. It can only be defeated by a governmental requisition of the vessel, in which event the lien adheres to the just compensation payable or paid for the vessel.<sup>19</sup>

Considering the large values of vessels, this secret lien security is ample for the largest imaginable purchases of necessities, for the largest supposable wage bills, for very large "necessary" repairs.

Furthermore, the shipmaster has implied authority to sign bills of lading of all descriptions, binding on his employer and also on the ship *in rem* to carry goods at whatever freight rate is named to any place which is named.<sup>20</sup> Also, he may take passengers and a cargo without any written contract at all,<sup>21</sup> and by the act of sailing the ship bind his employer and also the ship *in rem* to carry that cargo to an orally agreed destination on common-law terms of carriage, *i.e.*, to deliver safely subject only to the four defenses of Act of God, the King's enemies, inherent vice of the goods, act of law or legislation.

He can, with certain statutory formalities, fire his crew<sup>22</sup> and hire a new crew.<sup>23</sup> He can discipline,<sup>24</sup> dis-rate,<sup>25</sup> promote.<sup>26</sup> He can confine a person in the ship's brig.<sup>27</sup> He can stop, slow, anchor, deviate,<sup>28</sup> make general average sacrifices within very broad limits of honest per-

<sup>18</sup> M. Ambrosini, CITEJA Reporter, has pursued this difficult topic: CITEJA Report, August 1936, Doc. 305; CITEJA Report, July 9, 1946, Doc. 437. See American observations, February 1936, CITEJA Doc. 291, and September, 1936, CITEJA Doc. 314.

<sup>19</sup> See I BENEDICT, *op. cit. supra*, note 10, at 26. Also: Fitz-Henry Smith, *The Maritime Lien Act* (1911) 24 Harv. L.R. 182; J. W. Griffin, *The Federal Maritime Lien Act* (1923) 37 Harv. L.R. 15, 1924 A.M.C. 206; E. L. Willard *Priorities Among Maritime Liens* (1931) 16 Corn. L.Q. 522.

<sup>20</sup> Carriage of goods by Sea Act, Act of April 16, 1936, Sec. 3 (3), 49 Stat. 1208, 46 U.S.C. 1303. The language is identical with the Ocean Bill of Lading Convention, Brussels, 1924. U.S. Treaty Ser. No. 931, 51 Stat. 233. See discussion in KNAUTH, OCEAN BILLS OF LADING (2nd ed. 1941) at 130.

<sup>21</sup> *The Esrom*, 272 Fed. 266 (C.C.A. 2nd, 1921). He may agree to an adjustment of a dispute about demurrage and dispatch money: *The Theodore Roosevelt*, 12 F. 2d, 562, 1926 A.M.C. 764 (C.C.A. 4th). But he may not vary a contract, such as a charter party or bill of lading, made by his employer: *The Manta* 13 F. 2d, 535, 1926 A.M.C. 1354 (C.C.A. 2d).

<sup>22</sup> Master may fire a seaman: *Texas Co. v. N.L.R.B.*, 120 F. 2d, 186, 1941 A.M.C. 835 (C.C.A. 9th).

<sup>23</sup> Master may hire a seaman: R.S. 4504, 46 U.S.C. §546.

<sup>24</sup> *The Algic*, 95 F. 2d, 784, 1938 A.M.C. 531 (C.C.A. 4th) (mutiny); *Southern S.S. Co. v. N.L.R.B.* 316 U.S. 31, 1942 A.M.C. 515.

<sup>25</sup> *Neal v. Lykes*, 127 F. 2d, 879, 1942 A.M.C. 724 (C.C.A. 5th).

<sup>26</sup> *Bender v. Waterman*, 1946 A.M.C. 1322 (E.D. Pa.).

<sup>27</sup> *United States v. Flores*, 289 U.S. 137; *The Rolph*, 293 Fed. 269, 1924 A.M.C. 23 (N.D. Cal.); *aff'd* 299 Fed. 52, 1924 A.M.C. 942 (C.C.A. 9th); *Dick v. U.S. Lines*, 38 F. Supp. 685, 1941 A.M.C. 287.

<sup>28</sup> *The Turret Crown*, 297 Fed. 766, 1924 A.M.C. 253 (C.C.A. 2nd); See *Exner v. Gallagher*, 157 F. 2d, 291, 1946 A.M.C. 1449 (C.C.A. 2nd).

sonal judgment on the spot as to what the situation requires.<sup>29</sup> He can marry,<sup>30</sup> bury,<sup>31</sup> conduct religious services.

### CONCLUSIONS

The object of giving the shipmaster the foregoing powers is to expedite commerce. For without cargoes and passengers and the mails, air carriers would not exist and pilots would be unemployed. We bend our efforts to create an international rule of law which will facilitate the services rendered by air carriers. It is not sufficient to rely on the local laws of the 85 nations and the 524 legislative jurisdictions. For all local authorities are by nature hostile to the foreigner, to his commerce, to his laws and ways. David Maclachlan, the great organizer of the merchant marine law of England in 1860, wrote in his preface a statement repeated by his editors through eleven editions; it is as sound today for air transport as it has always been for transport by sea.<sup>32</sup> Mr. Maclachlan was emphasizing the merits of the "general maritime law" to which we can resort in all nations. But there is no "general aviation law"; we must create it. This has since 1925 been the highly important work of the International Juridical Committee of Air Law Experts. They have already given us the Warsaw Convention for Passenger carriage, Baggage and Air Waybills for cargo and the Convention on Attachment of Aircraft — both in very general use. They have offered texts on Surface Damage, Salvage at Sea. They have thoroughly discussed and explored numerous other possibilities for uniform international private air law — land salvage, collision, insurance aspects, the crew's employment contract, general average, title registration, enforcement of pledges, mortgages, conditional sales agreements. The Commander Convention is part of this series. Each is designed to be an expediter of commerce — an aid to air transport, expressing conditions fair to the carriers, the pilots and employees, the passengers and shippers of cargo, and in the general public interest. The fear that the many sovereign nations of the earth will solve these problems, each for itself, with countless variations of detail, all hampering and destructive of air commerce, urges us to support every reasonable step towards a common statement of legal principles which can be widely accepted.

<sup>29</sup> CONGDON, GENERAL AVERAGE, 4 (2nd ed., N.Y., 1923). The classic case is *Ralli v. Troop*, 157 U.S. 386 (1895). See ROBINSON, *op. cit. supra*, note 10, at 774.

<sup>30</sup> *Fisher v. Fisher*, 250 N.Y. 313, 1929 A.M.C. 659.

<sup>31</sup> *Brambir v. Cunard*, 37 F. Supp. 906, 1941 A.M.C. 391 (S.D. N.Y.).

<sup>32</sup> MACLACHLAN, MERCHANT SHIPPING, Preface to 1st ed. (1860):

"The municipal law, . . . framed for the citizen, and occupied solely with the relations that multiply within the same independent commonwealth, is hostile to foreign intercourse; and consequently under a conflict with other laws of that nature it needs must resort to the Comity of Nations, *not for a governing principle, but for a temporary concession that leaves these conflicting laws as hostile as before*. The law maritime, expressly with a view to intercourse with other nations, commissions and announces the agent [the Shipmaster] through whom it is to be conducted, and governs that intercourse when it takes place. The validity of his acts is dependent upon its sanction; and the foreigner is secure of no advantage obtained in prejudice of the Master's public authority." [Italics added.]