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# SOME PROBLEMS INVOLVED IN REVISION OF THE WARSAW CONVENTION

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THE Legal Committee of the International Civil Aviation Organisation at its Second Meeting at Geneva in June 1948, resolved that revision of the Warsaw Convention was necessary, that immediate study with a view to revision should be undertaken and that a new draft Convention (based on the draft prepared by the author in December 1946 for the C.I.T.E.J.A.) should be prepared together with a Report thereon, for submission to the Committee. At the same time, the Committee appointed a Sub-Committee (of which the writer is Chairman) to deal with the matter and prepared a series of fifteen instructions and questions, the latter required to be answered, if possible, at the next Meeting of the Committee. They were answered at the Meeting of the Committee at Lisbon in September 1948.

Although a number of questions of principle have been provisionally agreed since January 1946, there remain several problems of major importance which require solution,<sup>1</sup> in addition to numerous less important or subsidiary questions, before it will be possible to finalise the draft of a new Convention for consideration by Governments. Within the scope of this article it is possible only to comment upon some of the most important and interesting questions involved.

The Legal Committee desired the Sub-Committee to make provision for the scope of the new Convention to be extended as widely as possible in order that the rules relating to liability of the air carrier might be applicable upon the broadest possible international basis. In the course of its studies the Sub-Committee considered at least eight different methods by which the scope of the existing Convention could be extended. It should be noted that at present the

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<sup>1</sup> See Knauth, *Some Notes on the Warsaw Convention*, 14 J. Air L. & C. 44 (1947); Beaumont, *Some Anomalies Requiring Amendment of the Warsaw Convention of 1929*, 14 J. Air L. & C. 30 (1947); Parker, *Adequacy of Passenger Liability Limits in the Warsaw Convention*, 14 J. Air L. & C. 37 (1947); Wetter, *Possible Simplification of the Warsaw Convention Liability Rules*, 15 J. Air L. & C. 1 (1948).

definition of "international carriage" to which the Convention is applicable means roughly carriage which, according to the contract, is between two contracting States or between two points in the same Contracting State with an agreed intermediate landing in another State.

The author originally suggested extending this principle by making the Convention applicable also to carriage operated by any national of a Contracting State, provided that the point of departure or the point of destination was in a Contracting State and any landing was contemplated in any State other than the State of departure. This suggestion did not find favour with the Sub-Committee, which propounded three new suggestions — the first based upon any of the points of departure, destination or intermediate landing being in different States, one of which must be a Contracting State; the second based upon the points of departure and destination being in different States, one of which must be a Contracting State or the points of departure and destination being in the same State with an agreed landing in another State; and the third based upon the inclusion of any carriage passing out of a Contracting State over another State or the high seas.

#### PRACTICAL DIFFICULTIES

There are practical difficulties associated with all these proposals, mainly owing to the fact that Courts of non-Contracting States in which actions might well be brought would not be likely to recognise and apply the rules of the Convention. The third suggestion would also have the effect of involving unnecessary interference with national laws which regulate flights between two points in a State even when passing over another State or the high seas. In this connection it should be mentioned that, for the purpose of all these proposals, the territory of a Contracting State would comprise all the territories for the foreign relations of which the State concerned is responsible, this being the formula adopted in the Convention concerning the International Recognition of Rights in Aircraft signed at Geneva in June 1948.

An entirely new principle was suggested by Brigadier R. O. Wilberforce of the United Kingdom. This was that the Convention should apply to any air carriage under a Contract which is governed by the law of a Contracting State (including of course Convention carriage), except carriage wholly within a Contracting State, unless the State concerned waived this exception. This suggestion is most interesting because it constitutes a new method of approaching the problem and may be found to solve this more satisfactorily than other methods.

Yet another formula has been submitted by the author for consideration. This is based upon the nationality of the aircraft, and the places of departure and destination being in different States (Con-

tracting or not) or in the same Contracting State with an agreed landing in another State. It is suggested that this formula would reduce the difficulties in connection with jurisdiction and enforcement of the Convention rules which are inherent in some of the other suggestions, and it would greatly extend the scope of the existing Convention because nearly all aircraft operating internationally are registered in Contracting States.

It remains for the Legal Committee of the I.C.A.O., and ultimately Governments, to decide which of these suggestions, or any other, to adopt. It is possible that two or more of the principles referred to might be incorporated in the final solution.

#### DEFINITION OF "PERIOD OF CARRIAGE BY AIR"

The definition of "Period of Carriage by Air," which is of great importance, caused the author, as Reporter, considerable trouble. Ultimately the Committee agreed with him that it is essential to have a different definition for passengers on the one hand and cargo and registered baggage on the other hand, because the latter travels from airport of departure to airport of destination wholly within the custody of the carrier, including any surface transport involved in connection with transshipment, etc.; whereas passengers on long journeys may pass wholly outside the control of the carrier's employees and act as free agents during landings en route. Consequently the Convention rules should be applicable only during those portions of the journey during which passengers remain within the control of the carrier or his employees.

A certain difficulty arose in connection with forced or accidental landings in the sea or desert regions. It was felt that the carrier should be responsible in such cases until the passenger reached a place of safety. The latter proved very difficult to define, and eventually it was provisionally agreed that the difficulty could be overcome by providing that damage arising from, or attributable to, an accident or occurrence during the period of carriage by air should be deemed to have been sustained in an accident which took place during the period of carriage by air. This would take care of the case when a passenger suffered damage between the forced or accidental landing and the time when he reached a place of safety.

The Committee decided that the rules of the Convention should not be extended to surface carriage between airports and town centres, mainly because this would have the effect of interfering unnecessarily with domestic laws governing such carriage.

#### LIMITATIONS AND BASES OF LIABILITY

Much consideration has been given to the question as to what conduct of the carrier and his employees should subject him to unlimited liability, in other words, disentitling him to take advantage of

those provisions of the Convention which limit his liability. The Legal Committee had already expressed the opinion that the existing provisions of Articles 3 (2), 4 (4) and 9 of the present Convention are too onerous, and inappropriate to deal with cases of missing or defective traffic documents. The general opinion was that unlimited liability should be involved only if the carrier, or an employee of his, is guilty of a wrongful act or omission, done with knowledge of its wrongfulness and with intent to cause damage; and that these are the only circumstances which should involve removal of the limits of liability. A formula is being devised to incorporate this principle, instead of using the expression "wilful misconduct" (dol), because the latter has caused doubts and difficulties, partly because translations from the English and French texts have not in all cases followed the concept involved, and partly because there appears to be a tendency in some Courts to construe negligence or gross negligence as wilful misconduct.

The Legal Committee agreed in principle that the existing basis of liability should be maintained, namely liability based on negligence, but with the burden of proving that he had taken all necessary measures to avoid the damage being cast upon the carrier. This is a variant of the normal principle most valuable to claimants, but almost inevitable because of the difficulty of obtaining any evidence capable of proof in many air accidents. The incorporation of this principle is the main justification for placing modest limits upon the carrier's liability.

The question of limits of liability is one rather of policy than of law, and the Committee decided to circulate to Governments a short Questionnaire with a view to obtaining definite information concerning policy before attempting to reach conclusions. It is known that some Governments consider the existing limits too low, especially in the case of death or injury of passengers. On the other hand, some States appear to have refrained from ratifying or adhering to the present Convention because the limits are considered to be too high. Furthermore, some Contracting States think that the existing limits for cargo and registered baggage are too high. The main objective of a new Convention is to ensure that the largest possible number of States will become Contracting parties in order that the rules of the Convention may be applicable as widely as possible. It must also not be overlooked that any increase in limits must increase insurance premiums covering the risk of liability; that increase in premiums must increase the cost of carriage; that many passengers are not concerned with damages in the event of death, either because they have no dependents or because the latter are well provided for by means of insurance or otherwise; that some dependents suffer no financial damage through a death; and that insurance of the risk of death or injury can be effected by passengers for individual journeys at very

modest premiums. These and other points have been mentioned in a Commentary annexed to the Questionnaire addressed to Governments; and answers to this are awaited.

#### CHARTER FLIGHTS

The existing Convention makes no mention of Charters. It is considered desirable that clear rules should be incorporated in the new Convention regularising the respective positions of owners or operators on the one hand and charterers of an aircraft complete with operating personnel on the other hand; also dealing with the respective obligations of the parties according to whether the charterer is really in the position of a passenger or in the position of a party using the chartered aircraft for his own benefit on a commercial basis. An entirely new Article on this subject has been incorporated in the new draft.

#### NEGOTIABILITY OF AIR WAYBILLS

It has been suggested that the new Convention should include provisions for making consignment notes (air waybills) negotiable. As the Convention deals with rules concerning the air carrier's liability, the writer considers that it would be inappropriate to include provisions concerning negotiability of consignment notes. The Convention leaves owners of cargo and carriers free to have consignment notes in any form they like, merely prescribing that certain specific particulars and information must be included therein. Consequently it is open to owners of cargo and carriers to make whatever arrangements they like concerning traffic documents and their negotiability, if desired. Nevertheless, there has been included in the new draft an Article to make it clear that there is nothing to prevent the consignor's or the consignee's copies of the consignment note, or both, being made negotiable. As the latter document must travel with the cargo, and no speedier means of despatch is available, negotiability of the consignee's copy would not seem to have much, if any, practical value.

#### OTHER SIGNIFICANT QUESTIONS

The new draft also includes provisions for "Valuable Articles" to be treated in a special manner, following the principle which has been applied in other forms of carriage. It is not anticipated that this matter should create serious difficulty.

Article 24 of the present Convention leaves open various legal doubts and difficulties. Therefore an entirely new Article has been suggested to provide (a) for the case when two or more parties are entitled to claim in respect of the same death, injury, loss, damage or delay and (b) for the law to be applied in case the matter is not covered by the national law of the Court trying the action, both in the case of death and in the case of all other claims.

It is also suggested that provision should be inserted for staying actions in certain Courts when actions by or on behalf of the same passenger or owner of cargo are begun before more than one Court; and for consolidation of actions.

It is also proposed to add provisions to the existing Article 27 (No. 29 in the new draft) specifying the parties entitled to claim in the event of the death of a passenger, who shall be entitled to give receipts and discharges; and also providing for (a) the case in which there is no legally appointed representative recognised as such by the Court trying the action, (b) payment of damages to the competent authority in the State of the Court concerned, and (c) the case in which actions arising from the same death are brought before the Courts of more than one State.

The above remarks deal only with some of the many questions which arise in connection with the preparation of a new draft Convention; but they include the main problems and will give some idea of the important questions of principle and law which are involved, and the revision or incorporation of which are considered necessary or desirable in connection with the proposed new Convention.