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The Reference Column

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THE REFERENCE COLUMN

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(a) *Le contrôle du trafic aérien,* Dr. Hermann Döring, pp. 461-467.

This article presents the proposals submitted by the author, as a German representative, to the Committee on Air Law of the International Law Association, relative to an International Air Navigation Convention. In as much as the CINA convention was amended in June of 1929, some of the suggestions here offered are of interest. Of the eight provisions submitted, only the first three are here reviewed. The others deal with licenses, exemptions from seizure, patents, tortfeasors, and liability to the laws of the state in which the aircraft and persons therein find themselves.

The first three recommendations include the following provisions: (1) An undertaking to accord freedom of innocent passage, but allowing a restriction of this freedom by either belligerents or by neutrals when their airspaces are endangered by war operations carried on by belligerents or by others thought to be lending aid. The reservations also apply in case of civil difficulty. (Cf. Article 3, par. 4 of the CINA Convention, amended June 15, 1929). (2) Nationality to be determined by registration, and aircraft may be so registered only when they belong to one having his permanent residence in that State. In case of war, and upon demand of a belligerent, a State is to strike out the registration of all aircraft owned by nationals of that belligerent. The provision also disallows dual registration. (3) This section deals with the privileges and exemptions accorded to aircraft belonging to the authorized lines engaged in regular air transport. Aircraft of these lines, if over prohibited zones, must signal but may not be required to land at once.

(b) *Les aéronefs sanitaires et la Convention de Genève du 27 juillet 1929,* Ch. L. Julliott, pp. 468-513.

By way of introduction to this article, see Julliott and Des Gouttes, *Rapport au Ier Congrés international de l'aviation sanitaire, sur l'immunisation des aéronefs sanitaires en temps de guerre,* Droit Aérien, April-June, 1929, p. 141 (reviewed in 1 JOURNAL OF AIR LAW 114). Sketching the history of this question, the author indicates the general need for a revision of the Geneva Convention of 1906, the British and French proposals therefor and the recently adopted modifications of Article 18, as follows:

"Aircraft (appareils aériens) utilized as a means of sanitary transport enjoy the protection of the Convention during the time in which they are exclusively set apart for the evacuation of wounded and sick, and for the transport of sanitary personnel and material.

"They shall be painted white and shall carry the visibly distinctive mark, provided for in Article 19, beside the national color upon their upper and lower surfaces.

"Except in case of special and express license, the flying over the line of fire, likewise that of the zone situated in advance of the large medical sta-

tions (grands postes medicaux de triage) as well as, in a general manner, of all enemy or occupied territory, shall be prohibited.

"Sanitary aircraft shall obey all summons to land.

"In case of such landing, or a fortuitous landing, upon enemy territory or that occupied by the enemy, the wounded or sick, likewise the sanitary personnel and material, including the aircraft, remain under the protection of the present Convention.

"The pilot, helpers, and radio operators captured, shall be returned on condition that they shall be utilized only in sanitary service until the end of hostilities."

Part II deals with the viewpoint of the Geneva Conventions of 1864, 1906 and 1929. Part III discusses the question of aerial exploration of the field of battle, while Part IV is concerned with the aeroplane as a means of moving the wounded back. Here the author considers the limitations placed upon the altitudes at which such craft may fly. In Part V, the status of the pilot is discussed. The author shows that while these pilots may be employed in fighting planes alternately before capture, that, if once captured while in sanitary service, they will be returned only on condition that they shall be used solely in this hospital service until the end of hostilities. After mentioning the matter of markings, Part VII presents, in parallel columns, the texts of the Twelfth International Red Cross Conference (1925) and the modifications proposed by M. Des Gouttes and the author.

(c) *Le problème du desarmement aérien,* E. Korovine, pp. 514-531.

In Parts I and II, the author very briefly reviews the regulation of aerial warfare from the Hague Conference of 1899 to the present date, together with the restrictions placed upon German aircraft development by the Versailles Treaty. He indicates the general tendency to consider all aerial warfare legitimate, especially aerial bombardment.

Part III raises the fundamental questions that should be considered as showing a need for such disarmament. Much depends upon the answer to two questions: (1) Is it possible to distinguish civil and military aircraft? (2) What is the military value of civil aircraft? The author quotes Paul Boncour as saying that civil aircraft may be converted within twenty-four hours into bombing craft, and that no regulation is complete until this fact is clearly recognized. A sub-committee of the Council of the League of Nations reported that any technical distinction between civil and military aircraft was unsatisfactory and impossible, and to this report Germany and the Argentine dissented. Nor was there agreement as to the mode of determining the second question—since much would depend upon the character of military aviation in each country, and since each country tended to place different values on its civil aircraft. In 1927, the meeting at Brussels considered several measures relative to civil aviation, and the following were advocated: (1) Separation of military and civil aviation as to organization—especially where there was but one minister for both, (2) governmental abstention from prescribing military features in aircraft construction, (3) not encouraging the employ of military aviators in civil aviation, (4) giving up of subsidies to economically unnecessary lines, and (5) stressing the international nature of civil aviation and fostering kartells. More significant was the Geneva meeting of March 21-April 26, 1927, which dealt more strictly with the dis-

armament question. The author indicates the dissension of the United States' delegation to the criterion of considering the degree of development of civil aviation when determining the matter of military limitation. The German delegation insisted that the civil development was of no immediate service in determining military aviation needs or limitations.

Part IV presents the Soviet proposals for general disarmament, and emphasizes the fact that aerial disarmament or limitation can only be properly viewed in the light of general disarmament. The author quotes in detail from the Soviet proposal.

(d) *Le voie aérienne arctique et l'état juridique des territoires polaires septentrionaux,* V. Lakhtine, pp. 532-556.

After a preliminary discussion of the discoveries and explorations in the North polar regions, the author considers the question of sovereignty as applying to the following situations: (1) Lands and islands already discovered. Traditional theory demands three elements: (a) discovery, (b) effective occupation, and (c) notification of appropriation to other States. But he shows, that it is impossible, at present, to comply with the requirement of effective occupation and that this must be supplanted by another concept—that of the extension of the sovereignty of the bordering or riparian State according to the geographic and economic radius or sphere of influence. In other words, it would make no difference as to what State had discovered this territory for, since there had been no effective occupation, there could be no case of actual appropriation and so the idea of sovereignty as determined by geographic and economic influence could be applied. (2) Lands and islands not discovered follow the same principle. If, then, such lands or islands be discovered that now are considered as belonging to no one, they shall be subject to the sovereignty of the littoral polar State in whose region of geographic and economic influence they may be, irrespective of the nationality of the discoverer. There is a legal presumption that such land belongs to the nearest adjacent State in whose sector of influence it happens to be. (3) Glacial formations are divided into two classes: (a) moving glaciers which partake of the nature of the polar seas, and (b) relatively fixed formations, which may be employed as objects of general utility, and which are likened to polar territory subject to the sovereignty of the littoral States dependent upon the sections of geographic and economic influence. (4) The expanse of polar sea, divided into two categories: (A) Waters covered by more or less fixed glacial formations, which are likened to land and so are subject to the sovereignty of the littoral State as aforementioned. (B) Waters free of glacial formations and divided into three sub-classes: (a) river mouths, bays and interior waters which are national waters subject to the sovereignty of the riparian State; (b) waters between islands of an archipelago, again subject to the sovereignty of the riparian State—which sovereignty may or may not be limited; (c) other waters, subject to the more or less limited sovereignty of the littoral arctic States according to their sectors of influence.

(5) Air space, whereby the sovereignty of each littoral polar State extends to all the airspace above the sector of its geographic and economic influence. The author has submitted a map of the North Polar regions showing the rough division into six groupings as follows: (1) United States

140-170 W.; (2) Russia, 170 W. -33 E.; (3) Finland, 33-32 E.; (4) Norway, 32-10 E.; (5) Denmark, 10 E. -60 W.; (6) Canada, 60-140 W. After explaining these groupings, the author considers the pole territory itself and concludes that neither in law nor in fact can it be the property of any State, since it is the intersection of all these sectors of influence as determined by the meridians aforementioned.

(e) *L'origine de la convention aérienne du 13 octobre 1919, son extension progressive de 1922 à 1928 et sa revision,* Albert Roper, pp. 557-567.

Here in a few pages the author presents a most excellent summary of the CINA Convention to date, its organization and committee divisions, meetings, reports, etc. Among the subjects studied by the Commission are the following: (1) Determination of minimum standards for a certificate of airworthiness. (2) Use of radio in aircraft. (3) Uniform air maps. (4) Unification of ship's papers. (5) Regulation of lights and signals. (6) Uniform licenses. (7) Uniform terminology. (8) Pilot's medical examinations. (9) Centralization and distribution of meteorological information. (10) Centralization and publication of air traffic statistics.

(f) *The Amsterdam Congress of the International Chamber of Commerce,* pp. 587-594.

This article, prepared by or for the editor, reports the proceedings at this fifth international congress. Resolutions adopted include the following: I. Law and Aeronautical Regulation, (a) Responsibility of the Transporter, wherein international uniformity was urged in the matter of such regulations, and (b) Obstacles to Air Traffic, wherein attention was given to delays made necessary by the provisions of the international conventions, and where it was urged that the customs formalities be accelerated. II. Aéroports francs, wherein it was recommended that these airports should be established in all the principal international centers so that merchandise could be loaded, discharged, and stored, and aircraft serving the regular transport lines, prepared and equipped, duty free. III. Air Mail, and IV. Linking up air and rail transport, wherein it was urged that a study be made of the possibilities of such organization of air and rail service, in each country and by the International Railway Union and Air Traffic Association.

(g) *Comité international technique d'Experts juridique aériens* (Fourth session), Jean Tissot, pp. 595-632.

The author here discusses the proceedings at the fourth session of the Committee held in Paris, May 6-8, 1929. The first Commission concerned itself with a study of two subjects: (A) that of ownership and registration, reported by M. Giannini; (B) that of aircraft mortgage (hypothèque), reported by M. Richter. The tentative drafts, in each case, were presented and were approved in principle subject to definite adoption at the next session. Relative to the former, (A), three provisions were submitted: (1) The ownership of aircraft, voluntary transfers, formation, modification or renunciation of rights, etc., in order to be valid between the parties and against third persons, should be inscribed upon the aeronautical register and noted in the registration certificate. The object of this provision is to give the maximum publicity to these transactions to one who might wish to extend

credit. (2) The motors, tools, and instruments destined for permanent use of the aircraft are to be considered as an integral part of the aircraft even if they are temporarily separated—providing they are listed in the inventory or analogous document. (3) The aeronautical register is to be kept by the authorities determined by the national laws and according to the rules prescribed in those laws. A person interested may obtain a certified extract therefrom. There was some question here as to whether or not there should be a single register, and the general view was that for both public and national law, it would be better to advocate the keeping of a single aeronautical register. M. Giannini mentions the question of nationality of aircraft and states the divergent viewpoints, but thought it not necessary to include any standard for nationality determination in this tentative draft, since it is only to cover private air law.

Relative to (B), the report of M. Richter, fifteen provisions were submitted dealing with the mortgage question. (1) Hypothec mortgage means a charge, whatever be its name or origin, inscribed on the register and which appropriates the aircraft to the payment of a debt the amount of which is also inscribed. The ordinary definition of "hypothèque" is that of a security which appropriates the thing encumbered to the payment of a debt, but here the committee was anxious to feature two conditions: first, that the transaction should be made public by inscription and, second, that the amount should be determined in advance and also inscribed upon the register. (2) These mortgages which are regularly established and which are not extinguished, according to the law of the contracting State on the register of which the aircraft is listed, produce, in each contracting State, the effects as prescribed in this present Convention. (3) Under reservation of a contrary agreement by the parties, this mortgage guarantees in order of the principal sum, current interest and arrears, at the rate inscribed upon the register, together with expenses of collection, with reference to No. 6. (4) The mortgage extends to all objects indicated in art. 2, except those not owned by the owner of the aircraft. (5) The mortgage does not extend to freight. (6) The following shall be paid in preference to the mortgage: (a) Judicial expenses or costs of administrative procedure, together with the amount due to any public service connected with air navigation which expense was created on the last voyage. (b) Indemnities due to salvage or for assistance given—to be determined in inverse order to the dates of service. (c) Indemnities arising from injuries caused to third persons upon the territory of the State where the breach was committed. (d) Creditors proving past contracts or for operations ordered by the commanding officer during the voyage, for the conservation of the aircraft. In any case, this right of preference is lost after three months delay.

(7) The order of two or more of these mortgages is to be determined by the law of the place of registration. (8) The mortgage precedes all creditors except those mentioned in (6). But this mortgage cannot be opposed to a distraint if the mortgage was inscribed on the register after the distraint. (9) However, the mortgage creditor may lose his preference right to others than in 6, if the law of the place of registration allows it. (10) The right of retention is allowed only to the creditors prescribed in 6, and the right of retention cannot be made an obstacle to execution and sale proceedings. (11) Since the committee thought the mortgage would be without

value unless enhanced by a sum of insurance, they reserved this sum to the mortgage creditor. (12) Nor can one oppose against the mortgage creditor the fact that another aircraft is appropriated to the payment of the mortgage debt. (13) The law of judicial sale and extinction of the mortgage are determined by the law of the place of sale. A month's notice is provided for. (14) Deals merely with notifications. (15) Nothing here to prejudice the Floating Charge.

The second commission, with M. de Vos and M. Ripert as reporters, dealing with the subject of the Responsibility of the Carrier, did not make a report at this session. Nor did the fourth commission, with M. Babinski as reporter, present its views upon the question of the juridical status of the aircraft commander.

The third commission offered reports on its two studies, one on Responsibility to third persons on the ground, by M. Ambrosini; the other on Insurance, by M. do Paço for M. da Silva Costa. The first of these two reports brought forth the most argument, and contains eight provisions. (1) The first provides that all damage caused by an aircraft, while maneuvering or in flight, to persons or property on the ground gives a right to entire reparation where it is established that the damage exists and resulted from the aircraft. This responsibility may be lessened or done away with only in case of fault of the person injured. We have here enunciated the doctrine of "responsabilité objective," the reasons for which might be stated as follows: (a) There is no possible equality of situation between the one causing the injury and the party injured; hence the traditional theory falls down entirely and any theory of negligence must give way to an objective test involving absolute liability; (b) Since, in the great majority of cases, it is impossible for the party injured to prove the negligence of the party causing the injury, an absolute liability only is an adequate source of protection to the person on the ground. Further, this standard is desirable to guard against hostile feeling toward flying which would obtain if the person on the ground had the burden of proving the pilot's fault; (c) The use of any instrument which creates new risks or perils for the persons on the ground carries with it a guaranty that those persons should not suffer from its use. This idea may be pushed so far as to impute a moral quality to the acts of the aviator; (d) Finally, there is the doctrine that absolute liability is a corollary of the right to fly over private property, although it might be suggested that such liberty of flight is not an absolute one.

(2) The second article provides similar reparation in case of damage caused by any falling body whatsoever from the aircraft, even in case of ballast or of a release in case of necessity, and the same general rule applies for injury caused by any person whatsoever on board the aircraft. This article follows from the first and strengthens the conviction that the framers of these clauses are seeking stringent rules to protect the persons on the ground. (3) Members of the crew are liable only for injuries due to their torts or negligence, and this may be lessened or waived in case of fault of the person injured. However, this principle is otherwise stated in the commission report, following the deliberation of May 4th. There, the wording is as follows: Members of the crew are responsible for injuries caused by them, unless they can prove absence of tort or negligence.

(4) The owner and operator (exploitant) are jointly liable for all aforementioned damage, as well as the person causing the injury. This

doctrine of joint liability is the second main principle in the report. The idea of joining the owner and operator is primarily to prevent the owner from escaping liability by turning over the operation to one who is financially unable to pay for any injuries caused. It is clearly aimed at fraud and is merely another step toward full protection for those on the ground. (5) Jurisdiction is given to the tribunals at the domicil of the defendant, at the place of the injury, and at the business residence of the insurer. This last provision is notable as it will allow the person injured to proceed directly against the insurer. (6) Deals with the limitations of time in which to bring an action after the injury and after the party injured has learned who caused the damage. (7) This convention to govern all cases of responsibility and (8) is applicable at any time to damage caused by aircraft of one contracting State in another contracting State. It is hoped that the contracting States will conform their private legislation to the principles of this Convention.

The three fundamental doctrines set forth are: (a) "responsabilité objective," (b) unlimited liability, and (c) joint liability of "propriétaire et l'exploitant." The question of limitation was strongly opposed but lost out by a 12-7 vote. The British Government reserved the question of the application of this convention to aircraft belonging to the State which, under English law, have special privileges.

The second report, by M. Carlos da Silva Costa, on insurance, covers two main topics: (1) insurance against liability to third persons, and (2) insurance of passengers. Relative to the former, the reporter states that while compulsory insurance is desirable to protect the third persons, still it is of doubtful value since it places a heavy burden upon the small companies and is unnecessary for the larger ones whose financial strength is a sufficient guaranty of payment. Further, there is the difficulty of obtaining uniformity—so as to warrant an international regulation. The British viewpoint would be opposed to any compulsory provisions while the Swiss interests lean to the other extreme and now demand security taken out in connection with a Swiss banking institution for foreign, as well as national, operators. He is in favor of the suggestion made by M. Ripert that each State shall guarantee payment for all its national aircraft no matter in what country the injury shall occur. Then each State will be free to take whatever measures it chooses to protect itself. For the purpose of facilitating recovery, it is suggested that each State appoint someone who may be sued for recovery for injuries received. The reporter believes this suggestion offers the only workable plan where the national viewpoints as to procedure are so radically different.

Relative to the second question, the reporter stresses the desirability of substituting insurance for the liability of the carrier. This might be accompanied, he believes, by having a company take out an accident policy for each of its passengers, up to the amount of its own liability and allowing the passengers to take out more insurance if they so desired. This suggestion is but tentative and the draft recommendations will doubtless be presented later.

(h) *Commission international de Navigation aérienne, session extraordinaire du juin 1929,* pp. 633-642.

This report lists the delegates, the topics considered and presents the protocol amending the CINA Convention of 1919. (See 1 JOURNAL OF AIR LAW 94, for the provisions of the protocol.)

(i) *Deuxième Conférence internationale de Droit privé aérien,* pp. 643-663.

The second conference of international private air law was held at Warsaw from the fourth to the twelfth of October and adopted a convention for the unification of regulations governing international air law, which convention consists of some forty-one articles.

The first chapter deals with the scope of the convention and definitions. (1) It applies to all international air transport of persons, baggage or goods when carried for hire. Also to such gratuitous carriage as is provided by a transport company. Further, where the carriage is performed by successive carriers, the whole carriage is considered as a single operation having international characteristics, and this cannot be defeated by having one company transport to a boundary line with another company carrying from then on. (2) The convention applies to transport effected by State aircraft, except those coming under the international postal union. An additional protocol provides that the contracting parties reserve the right to declare that this rule as to State aircraft does not apply to international air transport carried on directly by the State, its colonies, etc.

Chapter II deals with the transportation papers including the tickets, luggage tickets, and aerial bills of lading. (3) The ticket must show the place and date issued, the points of departure and destination, the name and address of the transporter, a statement that the carrier's liability is governed by this convention, etc. (4) Similar information is demanded for the luggage-ticket, including entry of weight and value declared. (5) This article provides for aerial bills of lading (lettre de transport aérien); (6) which bill shall be made out in triplicate and signed by the carrier; (7) covers the case where there are several separate packages; (8) specifies the contents of the aerial bills of lading; (9) disallows the carrier to avail itself of the provisions limiting its liability if no bill is issued or if not properly filled out; (10) makes the shipper liable for any false representations to the carrier; (11) the bill is prima facie evidence of the contract, receipt of the goods and conditions of carriage; (12) the shipper has the right to sell the goods en route or to order their return, but his rights cease the moment those of the consignee begin; (13) consignee's right to notice and delivery; (14) shipper's and consignee's rights of set-off; (15) any clauses in derogation of the former three provisions to be inscribed in the bill; (16) shipper to furnish information for customs or other dues, and shipper has no duty to verify this information.

Chapter III deals with the carrier's liability. (17) The carrier is liable for damage arising from death, wounds or any other bodily harm sustained by a passenger when the accident causing the injury is produced on board the aircraft or in the course of any embarcation or debarcation operations. (18) The carrier is liable for damage arising in case of destruction, loss or damage to registered baggage or merchandise when the event causing the injury occurs during the aerial transportation—which means the period when the baggage is under the care of the carrier, in the aerodrome, the aircraft or any place whatsoever in case of landing outside the aerodrome. But this does not include any land or water transport outside the aerodrome. Any damage done during the carrying out of the contract is presumed, unless proof be shown, to be during the period of aerial transportation. (19) The carrier is liable for damage resulting from delay in the carriage of persons, baggage or

goods. (20) The carrier is not liable if it proves that it and its officers have taken all necessary measures to avoid the injury, or that it was impossible for it to take them. In the carriage of goods and baggage, the carrier is not liable, if it proves that the damage arose from a fault of pilotage, from the conduct of the aircraft or from navigation, and that in all other respects, it and its officers had taken all the necessary measures to avoid the injury. (21) Where the carrier offers proof that the fault of the person injured has caused the damage or has contributed to it, the court may, in conformity to the provisions of its own law, hold the carrier not liable or liable only for a lesser amount. (22) In the carriage of persons, the liability of the carriers to each passenger is limited to the sum of 125,000 francs, but this may be raised by a special agreement. For registered baggage and merchandise, the carrier's liability is limited to 250 francs per kilogram, except by agreement and payment of a higher rate, unless the amount agreed upon is more than the actual value of the goods. For goods in the custody of the passenger, the carrier's liability shall not exceed 5000 francs per passenger. These amounts refer to French francs. (23) Any attempt to exempt the carrier from liability or to lower the aforementioned amounts are null and void, but the nullity of any such clauses will not void any other part of the contract. (24) Deals with procedure of recovery. (25) The carrier may not take advantage of the foregoing limitations of liability if the damage arises from its own fault or fraud. Also if caused by one of its officers within the exercise of his functions. (26) Receipt of baggage or merchandise by the consignee, without protest, constitutes a presumption, which is rebuttable, that the goods have been delivered in good condition. In case of loss, damage or delay, a protest must be made, in default of which no action may be had. (27) In case of the death of the debtor, action may be brought against other proper parties. (28) Jurisdiction and procedure. (29) Time for bringing action. (30) Rules of the convention to govern connecting air carriers. But note that recovery by a passenger can only be had against the carrier on whose line the damage occurred, unless the initial carrier expressly stipulated to assume the responsibility for the entire journey. In case of merchandise or baggage the shipper or consignee may sue the initial or delivering carrier, who, in turn, may sue the intermediate carrier on whose line the loss, damage, or delay occurred. Here, there is a joint liability between the carriers.

Chapter IV deals with air-rail, or air-water, etc., carriage. (31) The convention applies only to the air carriage. Chapter V deals with the final, general provisions as to ratification, etc. (38) The convention may be adhered to by all States.

(j) *International Air Traffic Association,* Jean Tissot, pp. 664-666.

A very short note covering the features of the twenty-first session of this association at Rome, February 19th and 20th, 1929.

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