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The Reference Column

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THE REFERENCE COLUMN

Department Editors.....LORRAINE ARNOLD
KATHERINE FRITTS

1. IL DIRITTO AERONAUTICO (June, 1928-October, 1930).*

(a) *Caratteristiche Fondamentali della responsabilità aeronautica.* Antonio Ambrosini.

The author introduces the subject by stating that the most important questions in air law are those of jurisdiction over the air and of aircraft liability. He feels that the first has been dealt with rather fully by national laws and international conventions, while the second is still in an unsatisfactory condition.

Aircraft liability means liability which may arise from the operation of aircraft, or aerial navigation. There may, of course, be accidents to aircraft not in operation, e. g., a fire in a hangar, but such cases present no new and characteristic features and are within the domain of existing law.

As regards liability, the different air laws are characterized: (1) by a desire to give the greatest possible protection to persons using aircraft and to third parties who may be injured thereby, in view of the considerable risks still pertaining to air navigation. Hence the departure from common law and adoption of the theory of risk or objective responsibility in some cases or in all cases; (2) by a desire not to impede the development of the industry by too severe standards of liability for pilots and operators. Hence attempts to fix legal limits for liability (maximum damages, relinquishing of aircraft to creditors, etc.); and (3) by the custom of protective agreements on liability, either special contracts or clauses introduced into passenger tickets or bills of lading. The validity of such clauses has been both upheld and denied.

This question is closely connected with that of insurance, whose development will make it possible to accept strict standards of liability.

The question of aircraft liability was discussed by the first international air law conferences, especially that of Verona in 1910. Two theories were advanced: (1) the application of the common law whereby liability depends on fraud or fault and does not exist in the case of accident or *force majeure*. This was the attitude of the Congress of Verona, and its strongest supporter was the German jurist Zitelmann; (2) the principle of objective responsibility which was soon advocated by many authorities and put into practice by the French courts. After the Paris convention of 1919, all civilized nations began to promulgate air laws—adopting the principle of objective responsibility in almost every case.

The first Italian legislative provision governing liability was the decree of 1919 which read: "For all injuries done in any manner and in any

*During the period from June, 1928, to October, 1930, an important series of essays on the topic, "Basic Principles of Aircraft Liability," appeared in *Il Diritto Aeronautico*, and this digest by Miss Flebiger offers a summary, in English, of the essays.

place to persons or to property by aircraft, the author of the injury, the commander and the owner of the aircraft shall be jointly responsible. The burden for the sole proof of the injury rests with the injured, but the injurer may be absolved by proof that the injury occurred through absolute *force majeure*. Accidents caused by defects in design, construction or maintenance may in no case be considered as due to *force majeure*." This article covers liability both between contracting parties and toward third persons. It follows the common law, except that the injured is not required to prove fraud or guilt on the part of the person causing the injury. This decree was abrogated by that of 1923 which is still in force (1928). The section on liability is not clearly phrased, and the author considers it a backward step. It follows the common law very closely, requiring proof of fraud or fault except in the single case of injury due to objects thrown overboard from the aircraft, where damages may be demanded in all cases except that of *force majeure*.

In contrast to the Italian law, the German law of 1922 adopts the principle of objective responsibility and states that the owner of the aircraft is obliged to compensate for damages done by it in all cases except where the person injured is proved to have been at fault. The Swiss law of 1920, the British of 1919, and many others (Hungarian, Danish, Finnish, Norwegian, Czech, Russian, etc.) follow the same lines. They accept the theory of objective responsibility for injuries to passengers and goods transported as well as for those to third persons.

There is, however, a third system which combines the two theories and which the author believes to be the most equitable of all. It has been adopted in the proposals of the C. I. T. E. J. A. and is the basis for the French law of 1924 which states: "The operator of an aircraft is legally fully liable for the damages caused by the operation of the aircraft or by objects which may become detached therefrom to persons or property situated on the ground. This liability may not be diminished or annulled except by proof of fault on the part of the victim." This applies to liability toward third persons, but, when considering liability as between parties to a contract, the principle of common law applies and "the carrier is liable for the loss or damage of merchandise transported except in case of *force majeure* or defect in the merchandise itself." *Force majeure* exempts the carrier from liability even in case of jettison of the goods when it is necessary for the safety of the aircraft and its occupants. It should be noted that the French law has no specific provision covering injury to passengers; in its absence, it is clear that the common law applies here also.

The author feels that it is impossible today to adhere wholly to the classic theory of guilt as the basis of liability. The theory of risk or objective responsibility should also be recognized—especially in the realm of modern transportation. Persons on the ground cannot guard against dangers from falling aircraft, since the latter have no clearly demarcated lanes of operation. The difficulty for the injured party to prove fraud or guilt on the part of the aircraft operator is so great that to require such proof is practically to exempt the aircraft operator from liability. A third reason for adopting the principle of objective responsibility in such cases is the absolute difference in the position of the injured and the one causing the

injury. For all these reasons, innocent victims of aeronautic activity should receive special protection, and to require the aircraft operator to pay damages is not to convict him of guilt but simply to make him compensate for the injury he may have done. These same arguments do not apply in the case of people who deliberately take passage or ship their goods by aircraft, and the author believes it proper to make a distinction here and adhere to the principle of subjective responsibility, as has been done in the conventions proposed by the C. I. T. E. J. A.

The acceptance of the principle of objective responsibility in the case of aircraft accidents carries with it one danger, namely, that the burdens imposed may be so great as to seriously impede the development of the aeronautic industry. To avert this danger, limitation of liability is advocated by many authorities—notably Berlingieri in Italy—and has been upheld by the International Chamber of Commerce, the International Air Traffic Association, and the Fourth International Air Navigation Congress held at Rome in 1927. But it has been opposed equally strongly by jurists like Pittard and Ripert, and the C. I. T. E. J. A., while accepting limitation of liability in the case of passengers and freight refuses to admit it in the case of injury to persons or property on the ground. The reasons for its refusal are two: (1) the unequal position of the two parties concerned and therefore the defenselessness of the injured; (2) the impossibility of foreseeing the extent of the damage which may be done. Dissenting members of the C. I. T. E. J. A. pointed out the deterrent effect of unlimited liability on the development of aeronautics, and the obstacles it places in the way of a sound insurance system.

The author believes in limited liability, and supports his position with the precedent of maritime law where the owner of a vessel is liable for damages to the value of his vessel and its appurtenances but can not be deprived of his property on land in order to pay claims. He believes the two cases are analogous, while Ripert and Pittard disagree.

If liability is unlimited the results of one accident may bankrupt an operating company. At the present stage of the industry air navigation is not sufficiently remunerative to allow the formation of reserves to meet enormous claims. Since the development of the aeronautic industry seems to be to the interest of the whole world, it is not unreasonable to ask the public to share to some extent in its risks for the sake of future benefits. The development of aeronautic insurance is likewise of the greatest importance, and this would be immensely facilitated by limiting liability. Some will say that these are practical but not juridical considerations: the author denies that there is a distinction, and states that the law must adapt itself to human needs, and that the economic factor has always been a most important one in its development. The question of how to determine a just limit for liability remains, which may perhaps be answered by studying the systems in force.

The English law of 1919 does not deal with the question of limited or unlimited liability; the common law applies. On the other hand the Swiss law of 1920 expressly excludes any limitation of liability and is extremely severe. The German law is rather complicated. It provides for a maximum payment of 1,000,000 marks in a lump sum or 50,000 marks annually in the case of the death or injury of one person; if more than one person

be killed or injured in the same accident, the total damages to be paid are limited to a lump sum of 2,500,000 marks or annual payments of 250,000 marks; the maximum for damage to goods is set at 500,000 marks; in case of fraud or guilt the aircraft operator is liable to an unlimited amount.

The Italian law adopts for aircraft the principle of relinquishment found in maritime law. It says: "The owner of aircraft, even when the aircraft has been rented, may free himself from civil liability for damages, unless he himself has been at fault, by relinquishing to all or to some of the creditors the aircraft itself and the rental paid or to be paid therefor. The declaration of relinquishment must be entered in the national aeronautic register and the entry reported to the creditors whose claims are entered in the same register. In case of relinquishment any creditor whose claim is recorded may take over the aircraft on condition of paying the other creditors whose claims are likewise recorded. If more than one creditor wishes the aircraft, the first one claiming it shall have it; if several claim it at the same time, the one with the largest sum of money owed him shall have preference. If no creditor takes the aircraft it shall be sold at the instance of the most diligent creditor and its price distributed among the creditors. Any balance remaining after all claims are satisfied shall be given to the owner." The aircraft owner in Italy may thus limit his liability even in cases where his employees have been at fault, providing that he himself has not been guilty of fraud or negligence. On the other hand a pilot who is not the owner of his machine is liable to an unlimited extent.

The French law limits liability for merchandise whose value has not been declared to 1000 francs per parcel, but does not provide a limit in the case of injury to passengers nor to persons and property on the ground.

The C. I. T. E. J. A. proposes that liability to passengers shall be fixed at 25,000 gold francs apiece unless a greater sum has been fixed by special contract, and that liability for merchandise be limited to 100 gold francs per kilogram unless a greater value be declared. These limitations are not affected by fault on the part of the aircraft operator.

The author criticizes the German law which does not really lighten the burden of the aircraft owner—since his liability is unlimited if any of his employees be at fault, and which fixes limits which are purely arbitrary. The French law and the C. I. T. E. J. A. proposal do not cover damages to third persons. Some have suggested a system based on English marine law which limits liability to so many pounds sterling per ton burden, but this too sets an arbitrary figure and, as in the German law, the maximum sum may be awarded in each of several successive accidents to the same company.

The theory of relinquishment adopted in Italian law has been criticized on historical grounds—its opponents saying that it is being given up in marine law. The author denies that this is altogether true, and insists that it would not be a valid argument in any case if relinquishment is suited to the exigencies of air law. A more serious objection is that the value of the aircraft, especially after an accident, is not sufficient to compensate the victims of a disaster, but this objection can be met by compelling the owner to insure his aircraft at its full value and providing that in case it is destroyed the amount of the insurance shall be paid to the creditors. The

author believes in abandonment, which is the only system, now in force, which makes it possible for aircraft owners to estimate the extent of their possible liability. It does not require capital beyond that represented by the aircraft itself. It also gives the person causing the injury the choice of fulfilling all claims or of freeing himself by relinquishing the aircraft. But its chief merit, in the eyes of the author, is that it does not fix a purely arbitrary limit to damages paid but makes them proportionate to the value of the machine which has done the injury—and in general the larger machine can do more harm. He believes that the relinquishment of the aircraft itself, together with its insurance, is better than any attempt to force the owner to pay cash claims up to its value, which he may not always be able to do. He prefers relinquishment to the system of attachment found in German and Scandinavian marine law which Berlingieri advocates for air law. He recognizes, however, that this theory of relinquishment is not much in favor with international congresses at the present time.

The author next takes up the subject of the exemption or waiver of liability clauses. These have been quite generally adopted and incorporated in the tickets and contracts of the leading air transportation companies of the various nations, and the International Air Traffic Association in its "transport conditions" in force since 1927 has a clause which reads as follows: "The air transport companies, their employes, offices and agencies refuse all responsibility in regard to the transport of passengers or baggage. In taking his ticket or taking part in the flight the passenger renounces for himself and his heirs all right to sue for damages inflicted on him or his baggage directly or indirectly by the operation of the aircraft or in connection with the air travel, especially in transit between his home and the airport. In particular he has no right to compensation for cancellation, delay or interruption of the flight." And further: "The air transport companies, their personnel and the companies and persons whom they may employ in the fulfillment of their obligations accept goods for transport at the sole risk of the shipper or his authorized agents."

There has been much difference of opinion among authorities on these exemption clauses. Some have argued that they are bad psychologically as tending to emphasize the danger of air travel, but the author considers this to be without merit. Railways and steamship lines have developed under a system of liability exemptions. Another argument is to the effect that it is unjust to oblige the passenger to sign a waiver of responsibility when the transporting company has a legal or practical monopoly. The author does not think this objection applies to air transport companies since, except in a few most unusual cases, the passenger may quite well travel by some other means if he feels he assumes too much risk in going by air. He believes that the validity of such clauses should be recognized, except in case of fraud or guilt on the part of the aircraft operator. Many companies, e. g., the Luft-Hansa and several French companies, give the passenger a free insurance policy against accidents. Exemption clauses are especially important in countries where air transport companies are subject to unlimited liability, and this raises the question whether they should be admitted where the liability is limited. This problem was taken up at the Paris conference of 1925 and the Warsaw conference of 1929, and both bodies adopted the principle of limitation of liability but went on record as

being opposed to clauses waiving liability altogether or fixing a limit lower than the legal one. This conclusion is supported by Ripert, and also by the author—provided that the legal limits of liability are not set too high. It is important that there be uniformity among nations in this matter of the validity of exemption clauses as otherwise the companies of certain countries will be at a grave disadvantage in competing for international business.

After these practical considerations the author takes up the juridical aspects of the exemption clause. It is, in fact, a special sort of contract, and specialists in both Roman and civil law disagree as to whether it is legitimate to protect oneself by contract from the effects of an act not yet committed. The prevailing opinion is that it is legitimate in the case of light fault (negligence) but not in the case of fraud, "*ne dolus praestetur*". This is expressly stated in the German civil code. The Swiss code rules out exemption from liability for fraud or grave fault and allows a judge to set aside contracts of exemption even in some cases of light fault. Both codes allow exemption from liability for the acts of subordinates.

The question of exemption clauses has assumed special importance in the field of modern transportation. In general, it may be said that such clauses have usually been declared null and void, or at least subject to special conditions, in the case of railways, while they have been allowed in the case of marine transport, and in air transport. The whole problem is one not yet settled, one school of opinion upholding exemption clauses on the ground of freedom of contract, while the other opposes them as contrary to the public interest. The author believes that clauses limiting liability to a fixed sum may be admitted valid by all, while those exempting from all liability should be ruled out in case of fraud or grave fault but allowed in case of light fault or ordinary negligence. In this last case there is no deliberate wrong-doing on the part of the person causing the injury, but only involuntary failure, and it is not probable that an exemption clause will make such failures more frequent since there is no knowing what will be adjudged not simple but criminal negligence. An involuntary fault can not be called immoral.

An opinion common in France is that an exemption clause does away with contractual liability but not with criminal liability; in other words, that it simply shifts the burden of proof from the injurer to the injured. This the author finds unsound since liability must be either contractual or extra-contractual and cannot have both characteristics at once. One cannot be both a party to a contract and an outsider.

An important point is to what extent one may claim immunity from liability for the acts of employes or agents. If the employe has considerable liberty of action, as in the case of the captain of a ship or the pilot of an aircraft, it seems just that the owner should be allowed exemption from liability even when such employe is seriously at fault.

Passing to an examination of the laws and practice of the various countries, we find that some nations have not dealt specifically with this question and in such cases the principles of common law must apply and the courts must rule on instances as they arise. An interesting example is that of Germany where there have been a good many opinions and decisions on this question. The validity of exemption clauses has been almost universally sustained—the only contrary decision being that of the *Amtsgericht* of Emden in 1925 which was reversed by the *Landsgericht* of Aurich the

same year. The most important decision was rendered by the Reichsgericht in 1927. German jurisprudence holds that exemption clauses may cover even grave negligence on the part of the owner and fraud on the part of his employes. The Reichsgericht holds that exemption clauses are inadmissible in land or water transport where there is a monopoly, but admissible in air transport since the public is never compelled to select that means of transportation. In granting such a wide interpretation the Reichsgericht insists that exemption clauses must be clear; the phrase "at his own risk and peril" printed on the ticket may be understood as covering ordinary risks of air travel, but is not sufficient to cover accidents due to the fault of the operator or pilot; if exemption is desired from liability for such accidents, it must be expressly so stated. A further point not dealt with in this decision but discussed by Döring is that such contracts with exemption clauses should be in a language sure to be understood, i. e. that tickets for air travel should be printed in one of the principal world languages.

French law provides for exemption clauses in the following terms: "The aircraft operator may by a special clause claim exemption from liability for air risks and faults committed by any person employed on board in the conduct of the aircraft, both in the case of passengers and goods. This clause does not exempt the operator from liability unless the aircraft was in good condition at its departure and the personnel provided with the proper licenses and certificates required by law, such special administrative certificates establishing a presumption in favor of the aircraft and its crew which may be combatted by proof to the contrary. . . . Any clause exempting the carrier from his responsibility for the loading, preservation and delivery of merchandise is null and void. And any clause tending to exonerate the carrier from responsibility for his personal faults is likewise null and void." These provisions were worked out by Ripert, an authority on maritime law, and follow the precedent of the Harter Act, the Hague Rules, etc. A distinction is made between operations on the ground (loading, safekeeping, etc.) where exemption clauses are not allowed and air navigation proper, where they are.

The author approves the provisions making the possession of the proper official certificates a presumption *juris tantum* in favor of the aircraft and its personnel. He finds the law a little too severe in making the owner always liable for his own acts and not taking account of the fact that he might, as pilot of his own plane, make an involuntary error of judgment. The expression "risks of the air" is not clear. As a whole the French law has many good points.

The Italian law is quite different; it states: "Clauses of exemption from complete or partial liability for injuries to passengers are null and void; such clauses are admissible for damages to merchandise not resulting from fraud." The courts have not had occasion to decide on this question. The author finds this provision too severe, especially in that it forbids a clause fixing a limit of liability for injuries to passengers. As a matter of fact some Italian companies do insert a clause stipulating that liability for each passenger is limited to 100,000 lire and that this figure has been a basis for fixing the price of the ticket, but it is doubtful whether the courts would sustain such a contract in view of the law. Since the air lines are subsidized by the State, it would be hard for the companies to maintain that liability alone determined the price of their services. Morpurgo has claimed

that in spite of the law the exemption clauses have the effect of shifting the burden of proof; the author disagrees, such clauses are wholly valid or invalid.

Relative to merchandise, exemption clauses are valid except in case of fraud, which may be either on the part of the operator or of his employes. There is some question as to what degree of negligence may be considered equivalent to fraud. The fact that Italian law makes such a difference between maritime and air law in the matter of exemption clauses is likely to lead to controversy.

In conclusion, the author returns briefly to the Warsaw Convention which excludes exemption clauses but which does provide for a limiting of liability. The Convention provides that the carrier is not liable if he has taken all possible measures to prevent the disaster; this follows British law and the International Maritime Convention of 1924 and is more liberal than the Latin system where, in the case of contractual liability, the carrier must prove *force majeure* or accident (*cas fortuit*). In the case of merchandise, the carrier is not liable for errors of navigation and handling of the aircraft, provided that he and his employes have taken all measures to prevent disaster. This makes a general rule of the exemption allowed in French law. If the carrier can prove contributory negligence on the part of the victim, the courts may cancel or diminish his liability, in accordance with the laws of the several countries. The present great differences among the laws of the different countries on these points make some divergence necessary although regrettable. The Warsaw Convention is thus very favorable to the carrier, and goes still farther in fixing a maximum liability of 125,000 francs per passenger, 250 francs per kilo of freight, and 5,000 francs for each passenger's baggage. These sums are fixed in francs on the basis of the stabilization of the French franc by the law of 1928. After such provisions, it is not surprising that the Convention rules out any exemption clauses. Naturally, also, it makes the carrier fully liable in case of fraud, or negligence equivalent thereto, on his own part or on the part of any of his employes in the exercise of their functions.

While the Convention deals only with international air transport and leaves each country free to regulate within its own borders, it is to be hoped that once the Convention is ratified the different nations will tend toward uniform laws governing this important subject.

JULIA FIEBIGER.

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*The Review is edited by Albert Roper, Secretary-General of the C. I. N. A., and this is the first number which has been published. The Review will appear four times a year.