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DEVELOPMENTS IN THE CODIFICATION OF PRIVATE INTERNATIONAL AIR LAW*

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Public International Air Law:

A clear distinction should be made between international conventions within the field of private international air law and public international air-law conventions and agreements. The following multilateral conventions on public international air law have been adopted:

International Convention for the Regulation of Aerial Navigation, signed at Paris, on October 13, 1919.¹

Ibero-American Convention Relating to Air Navigation, signed at Madrid on November 1, 1926.²

Habana Convention on Commercial Aviation, signed at Habana, Cuba, on February 20, 1928, during the Sixth International Conference of American States.³

Each of the above multilateral conventions accords to civil aircraft of any one of the contracting parties the right to enter the territory of the other contracting parties, subject to certain limitations which are set forth in the convention. Numerous bilateral

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1. 11 League of Nations Treaty Series 174. For amended text of convention see Bulletin No. 22 of the International Commission for Air Navigation, pt. 2, p. 1, Secretariat, 15 bis rue Georges-Bizet, Paris.

2. For a comparison of the Ibero-American Convention with the Paris Convention of 1919, see Enquiries Into the Economic, Administrative and Legal Situation of International Air Navigation (League of Nations Organization for Communications and Transit, Geneva, 1930), p. 178. The Ibero-American Convention contains fewer annexes of technical regulations than the Paris Convention of 1919. In all other respects the provisions of the two conventions are very much the same.

The Paris Convention of 1919 was signed by countries in various parts of the world; the Ibero-American Convention was signed by Spain, Portugal, and the Latin American countries; and the Habana Convention on Commercial Aviation was signed by the United States and the Latin American countries.

3. Department of State Treaty Series, No. 840. The Habana Convention on Commercial Aviation differs in form from both the Paris Convention of 1919 and the Ibero-American Convention of 1926, but contains a number of the basic principles of these two conventions. Unlike these two conventions, however, the Habana Convention has no annexes containing technical regulations.

aeronautical agreements within the field of public international air law have been concluded between various countries, with the same end in view.

There is another multilateral convention which, although not dealing specifically with the right of aircraft of one of the contracting parties to enter territory of the other parties, may be considered to be within the field of public international air law. This is the International Sanitary Convention for Air Navigation,⁴ adopted by the Permanent Committee of the International Public Health Office in Paris at its session of April 29, 1932, and left open for signature at The Hague on April 12, 1933. Under the terms of this convention each of the contracting parties will, with respect to aircraft of other parties permitted to enter its territory, have the right to impose certain sanitary and quarantine measures designed to guard against the introduction of communicable diseases.

The International Convention for the Regulation of Aerial Navigation of October 13, 1919, was signed on behalf of the United States but has not been ratified by this Government, which is therefore not a party to the convention. The Ibero-American Convention of November 1, 1926, was not signed by the United States, nor has this country adhered to the convention. The Habana Convention on Commercial Aviation, adopted at Habana, Cuba, on February 20, 1928, was signed on behalf of the United States, which has become a party to the convention by ratification. It came into force between the United States and other countries parties thereto on August 26, 1931. The International Sanitary Convention for Air Navigation, which was left open for signature at The Hague on April 12, 1933, was signed on behalf of the United States on April 6, 1934, and has been ratified by this Government. It came into force between the United States and other countries parties thereto on November 22, 1935.

The United States has, in addition to becoming a party to the Habana Convention on Commercial Aviation, dealing with the right of entry of civil aircraft, entered into a number of bilateral air-navigation agreements on this subject, within the field of public international air law.⁵

Private International Air Law:

The International Committee [International Technical Committee of Aerial Legal Experts—C.I.T.E.J.A.] has completed its

4. Department of State Treaty Series, No. 901.

5. [See 6 JOURNAL OF AIR LAW 261 (1935) for list (Ed.).]

work on five important international conventions and has nearly completed its labors on two others. These conventions are as follows:

(1) **The Warsaw Convention.** The Convention for the Unification of Certain Rules Relating to International Transportation by Air was adopted and signed at Warsaw, Poland, on October 12, 1929, during the Second International Conference on Private Aerial Law.⁶ A preliminary draft of this convention was prepared by the International Committee and referred to the Warsaw Conference for final adoption and signature. As stated, *supra*, the delegates to the First International Conference on Private Aerial Law, held in Paris in 1925, adopted a convention relating to the liability of the aerial carrier in the transportation of passengers and cargo, as well as a resolution recommending the creation of an international committee on private aerial law. The convention adopted at that Conference was referred to the International Committee, after its organization, for further study. The Committee thereupon prepared its own draft, which was the one referred for consideration to the Second International Conference on Private Aerial Law, held at Warsaw in October, 1929. The convention adopted at Warsaw was signed on behalf of 23 countries and is now in force among most of the countries of the world in which air transportation on an international basis is well developed. In the Western Hemisphere the convention has been adhered to by the United States, Mexico, and Brazil. The convention became effective on October 29, 1934, between the United States and other countries parties thereto.

The Warsaw convention provides uniform rules concerning the form and effect of transportation documents such as passenger tickets, baggage checks, and aerial way bills.⁷ The effect of the

6. The United States was not officially represented at the First and Second International Conferences on Private Aerial Law, being represented only by observers, and did not sign the convention relating to international transportation by air adopted in preliminary form at the First International Conference and in final form at the Second International Conference.

7. Treaty Series, No. 876. See *Alexander N. Sack*, "Unification of Private Law Rules on Air Transportation and the Warsaw Convention," 4 *Air Law Review* 346; *George R. Sullivan*, "The Codification of Air Carrier Liability by International Convention" (an individual study made in conjunction with the Air Law Institute of Chicago), 7 *JOURNAL OF AIR LAW* 1; *Maschino*, "La Convention de Varsovie et la Responsabilité du Transporteur aérien," 14 *Droit Aérien* 4 (1930); *Riese*, "Observations sur la Convention de Varsovie," 14 *Droit Aérien* 216 (1930); "General Conditions of Transport," 3 *Revue Aéronautique Internationale* 78 (1933). This is an agreement made between the air-navigation companies members of the International Air Traffic Association—I. A. T. A.—composed of European air-transport operators. The agreement became effective at the same time that the Warsaw convention came into force, *i. e.*, Feb. 13, 1933. The courts of the United States have not, so far as the writer is aware, had occasion to construe the terms of the Warsaw convention of Oct. 12, 1929. A case in which the Warsaw convention was considered has, however, arisen in the British courts. This is the case of *Grein v. Imperial Airways, Ltd.*, decided on Oct. 23, 1935, by Mr. Justice Lewis in the High Court of Justice, King's

convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of passengers or loss of or damage to baggage or cargo, subject to certain defenses allowed to the carrier under the terms of the convention. However, the convention contains provisions placing a limitation on amounts for which the carrier shall be liable, but he is not entitled to avail himself of the provisions of the convention which exclude or limit his liability if the damage is caused by his willful misconduct or by such default as is considered to be equivalent to willful misconduct, or, in certain cases with respect to transportation of cargo, if the transportation documents are not furnished in accordance with the requirements of the convention.

(2) **Mortgages, Securities, and Aerial Privileges.** At the sixth annual session of the International Committee held in Paris in October, 1931, the Committee completed work on a Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges.⁸ This convention has not yet been referred to a general international conference on private aerial law for final adoption and signature. It may be explained at this point that while a session of the Committee is in a sense an international conference, the term "international conference" as used in this discussion refers to a diplomatic conference or a meeting of officially accredited delegates appointed by the various governments for the purpose of taking definite action on a draft convention completed by the International Committee.

The Draft Convention on Mortgages, Other Real Securities, and Aerial Privileges governs the status of mortgages obtained on

Bench Division, Royal Courts of Justice. The full text of the opinion may be found in 7 JOURNAL OF AIR LAW 128.

See also *Arnold W. Knauth*, "Federal Airship Foreign Commerce Bill," 2 JOURNAL OF AIR LAW 202; *Edgar Allan Poe*, "The Proposed Federal Merchant Airship Act and Its Comparison with the Existing Maryland Act," 3 JOURNAL OF AIR LAW 179; *John C. Cooper*, "Rules of Aircraft Liability in the Proposed Federal Merchant Airship Act," 2 AIR LAW REVIEW 327 [Note: The congressional bills discussed by Messrs. Knauth, Poe, and Cooper were not enacted into law.]; *John F. O'Ryan*, "Limitations of Aircraft Liability," 3 AIR LAW REVIEW 27; *Arnold W. Knauth*, "Limitation of Aircraft Owner's Liability," 3 AIR LAW REVIEW 135; *William M. Allen*, "Limitation of Liability to Passengers by Air Carriers," 2 JOURNAL OF AIR LAW 325; *E. A. Harriman*, "Carriage of Passengers by Air," 1 JOURNAL OF AIR LAW 33; *Rowan A. Greer*, "The Civil Liability of an Aviator as Carrier of Goods and Passengers," 1 JOURNAL OF AIR LAW 241; *George B. Logan*, "The Liability of Airport Proprietors," 1 JOURNAL OF AIR LAW 263; *John K. Edmunds*, "Aircraft Passenger Ticket Contracts," 1 JOURNAL OF AIR LAW 321; *Frank E. Quindry*, "Airline Passenger Discrimination," 3 JOURNAL OF AIR LAW 479; *Warren Jefferson Davis*, "State Regulation of Aircraft Common Carriers," 1 AIR LAW REVIEW 47; *Howard Osterhout*, "The Doctrine of Res Ipsa Loquitur as Applied to Aviation," 2 AIR LAW REVIEW 9; *Francis H. Bohlen*, "Aviation Under the Common Law," 6 AIR LAW REVIEW 155; *André Kaftal*, "Liability and Insurance—the Relation of Air Carrier and Passenger," 5 AIR LAW REVIEW 157; *J. Francis McCormick*, "Air Negligence," 5 AIR LAW REVIEW 333; *Carl Zollmann*, "Aircraft as Common Carriers," 1 JOURNAL OF AIR LAW 190; *Irwin S. Rosenbaum*, "Regulation of Aircraft as Common Carriers," 3 JOURNAL OF AIR LAW 194; *Frank E. Quindry*, "Air Express," 4 JOURNAL OF AIR LAW 145.

8. The complete text of this draft convention may be found in Treaty Information Bulletin No. 40, January, 1933, p. 33.

aircraft as security for the payment of debt. It specifies what fees, charges, or expenses incurred by the aircraft are entitled to preferences over mortgage claims. It is contemplated by the convention that there shall be a register that may be consulted by interested parties in which there shall be included data pertaining to any attachment proceedings.

(3) **Ownership of Aircraft and Aeronautic Register.** At its sixth annual session held in Paris in 1931, the International Committee completed work on a Draft Convention on the Ownership of Aircraft and the Aeronautic Register.⁹ This convention has not yet been referred to a general international conference on private aerial law for final adoption and signature. By this draft convention, the high contracting parties would undertake to establish in their national laws that every aircraft registered in accordance with these laws would be included on a register for the publicity of rights, having in view the inscription of ownership and other rights. These data might be entered upon the ordinary register for the aircraft or such data might constitute a special register. All transfers of property *inter vivos*, assignments, cessions of real rights, and renunciations of such rights would be valid with regard to third parties only through their inscription on the register and would produce no legal effect until the date of such inscription.

(4) **Precautionary Attachment.** The delegates to the Third International Conference on Private Aerial Law, a diplomatic conference, held in Rome in May, 1933,¹⁰ adopted and signed a Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft. The convention was signed on behalf of 25 countries, including the United States. The preliminary draft of this convention as referred to the Rome Conference was prepared by the International Committee. The convention as adopted at Rome has not yet been ratified by a sufficient number of countries to put it into force.¹¹ It has not been ratified by the

9. The complete text of this draft convention may be found in Treaty Information Bulletin No. 40, January, 1933, p. 38.

10. See favorable report of the House Committee on Foreign Affairs on a recommendation by President Hoover that an appropriation be authorized to defray expense of participation by the United States in the Third International Conference on Private Aerial Law (H. Rept. 1950, 72d Cong., 2d sess.). [Note: The resolution under consideration failed of passage. The United States was, however, officially represented at this Convention by delegates who signed the conventions adopted.]

11. The complete text of the convention as adopted and signed at Rome may be found in Treaty Information, Bulletin No. 47, August, 1933, p. 22. Art. 11 of the Convention provides that the convention shall come into force 90 days after the deposit of the fifth ratification. It has so far been ratified only by Germany, Spain, and Rumania. No decision has been reached by the Department of State on the question of recommending to the President that the convention be transmitted to the Senate of the United States for its advice and consent to ratification. This convention was signed at Rome on the same date as the Convention for the Unification of Certain Rules Relating to Damages

United States. This convention exempts certain classes of aircraft, including government aircraft and aircraft employed on a regular line of communication, from what is known as a precautionary attachment. A precautionary attachment, within the meaning of the convention is any act, whatever it may be called, whereby an aircraft is seized in behalf of a private interest through the medium of agents of justice or of a public administration, for the benefit of a creditor, or of the owner, or of the holder of a lien on the aircraft, where the attaching claimant cannot invoke a judgment and execution, obtained beforehand in the ordinary course of procedure, or an equivalent right of execution. The convention sets forth the conditions under which the right of exemption from a precautionary attachment may be invoked, and is understood to be intended to prevent an undue interruption in international transportation, which would result from the seizure and detention of aircraft, where the aircraft are owned and operated by responsible organizations.

(5) **Damages to Third Parties on the Surface.** The delegates to the Third International Conference on Private Aerial Law held at Rome in May, 1933, also adopted and signed a Convention for the Unification of Certain Rules relating to Damages Caused by Aircraft to Third Parties on the Surface. The preliminary draft of this convention as considered at Rome was prepared by the International Committee. The convention as adopted at Rome was signed on behalf of 26 countries, including the United States. It has not yet been ratified by a sufficient number of countries to put it into force, and has not been ratified by the United States. This convention provides for the payment of damages in cases of injury to persons and property on the surface as a result of objects falling from aircraft or from the fall of the aircraft itself. While the Warsaw convention, signed at the Second International Conference on Private Aerial Law held at Warsaw in October, 1929, relates to the liability of the carrier where there is a contractual relationship between the passenger or shipper and the carrier, the Rome convention on damages caused by aircraft to third parties on the surface relates to the liability of the carrier to persons with whom he has no contractual relationship. The Rome convention is based upon the principle of absolute but limited liability, with a right, however, to interpose the defense of contributory negligence. The carrier must be insured against damages to persons and property

Caused by Aircraft to Third Parties on the Surface, the ratification of which has been delayed; see *post*.

on the surface or maintain a cash deposit or a bank guaranty to satisfy the payment of claims for such damages.¹²

Conventions Now Being Prepared:

There are two other conventions in course of preparation on which the preliminary work of the International Committee is well advanced. One is known as the Convention for the Unification of Certain Rules relating to Assistance and Salvage of Aircraft or by Aircraft, and the other as the Convention for the Unification of Certain Rules relating to Aerial Collisions. In addition, the International Committee is doing the groundwork on several other important conventions, one of which relates to the legal status of the commander and crew of the aircraft. The proposed salvage and collision conventions were considered at the tenth annual session of the International Committee held at The Hague in September, 1935, at which the United States was represented.¹³ This was the first occasion on which American representatives have gone abroad to attend a meeting of the Committee. Copies of the detailed report of the American Delegation at The Hague may be obtained at the Treaty Division of the Department of State so long as there are copies available for distribution.¹⁴

The salvage draft under discussion at The Hague applied to salvage on land as well as at sea. A serious objection was made

12. The complete text of the convention as adopted and signed at Rome may be found in Treaty Information Bulletin No. 47, August, 1933, p. 27. See *J. Francis McCormick*, "The Rome Convention—Its Constitutionality—Its Purpose—Its Scope," 6 *Air Law Review* 207.

See also *Antonio Ambrosini*, "Liability for Damages Caused by Aircraft on the Ground: A Proposed International Code," 3 *Air Law Review* 2; *Van Vechten Veeder*, "The Legal Relations Between Aviation and Admiralty," 2 *Air Law Review* 29; *Franklin F. Russell*, "Liability of a Flying School for Damage Done by a Student Pilot," 4 *Air Law Review* 254; *Robert Homburg*, "Compulsory Aviation Insurance," 4 *Air Law Review* 274; *Hampton D. Ewing*, "The Ground Rule of Torts by Aircraft at the American Law Institute," 5 *Air Law Review* 323; *Walter Crowder*, "Aviation Insurance," 2 *JOURNAL OF AIR LAW* 176; *Kurt J. Kremlick*, "A Survey of Aviation Insurance Law," 2 *JOURNAL OF AIR LAW* 524; *André Kaftal*, "The Problem of Liability for Damages Caused by Aircraft on the Surface," 2 *JOURNAL OF AIR LAW* 179, 3 *JOURNAL OF AIR LAW* 347; *George W. Ball*, "Compulsory Aviation Insurance," 4 *JOURNAL OF AIR LAW* 52; *George B. Logan*, "The Present Status and Development of Aviation Law," 2 *JOURNAL OF AIR LAW* 510; *F. H. Bohlen*, "Aviation Under the Common Law," 48 *Harvard Law Review* 216 (1934).

Article 24 of the Convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface, *supra*, provides that the convention shall come into force 90 days after the deposit of the fifth ratification. It has so far been ratified only by Spain and Rumania. No decision has been reached by the Department of State on the question of recommending to the President that the convention be transmitted to the Senate of the United States for its advice and consent to ratification. Pending a study of the insurance provisions of the convention there has been a delay on the part of the signatory powers, generally, in the matter of reaching a decision on the question of ratification.

13. For the complete texts of the draft collision and salvage conventions considered at The Hague in September, 1935, see Treaty Information Bulletin No. 66, March, 1935, pp. 17-25.

14. For a summary of the report of the American Delegation see Treaty Information Bulletin No. 74, November, 1935, p. 11.

to the draft on the ground that it imposed an obligation on a commander of an aircraft to go out of his way to assist another aircraft or a vessel in distress when to do so might seriously endanger the lives of persons on board the rescuing aircraft. The convention also laid down the rules to be applied in the matter of remuneration for salvage services rendered. As a result of the discussion at The Hague, it was decided to have two salvage conventions, one relating to salvage on land and one to salvage at sea.¹⁵ The proposed collision convention, the draft of which was revised at The Hague, sets forth the method for apportioning damages in the event of aerial collisions. These draft conventions will require further consideration by the International Committee before they can be referred to an international conference for final adoption.¹⁶

During the Hague sessions the International Committee also considered the question of aviation insurance and made certain recommendations on this subject. The ratification of the Convention relating to Damages Caused by Aircraft to Third Parties on the Surface, signed at Rome on May 29, 1933, during the Third International Conference on Private Aerial Law, has been delayed because of difficulties arising with respect to the interpretation of the insurance provisions of the convention. The aviation insurers have contended that the convention should be interpreted to require the issuance of incontestable aviation policies and that they should be allowed certain defenses against the payment of claims for damages caused by aircraft to persons and property on the surface. One of the purposes of the meeting of the International Committee at The Hague was to make recommendations as to the extent to which the aviation insurers should be permitted to interpose defenses against the payment of claims arising under the convention. Some differences over the insurance provisions of the convention arose during the Rome Conference in 1933, and it was decided by the Conference to have the International Committee give further study to the question after the convention was signed.¹⁷

Procedure and Conclusions:

While in theory the International Committee completes its work

15. The text of the draft salvage convention as revised at The Hague in September, 1935, to apply to salvage at sea may be found in Treaty Information Bulletin No. 74, November, 1935, p. 22.

16. The text of the draft collision convention as revised at The Hague in September, 1935, may be found in Treaty Information Bulletin No. 74, November, 1935, p. 26.

17. For the text of the recommendation made by the International Committee at The Hague in September, 1935, on the subject of aviation insurance as related to the Rome convention of May 29, 1933, on liability caused on the surface by aircraft, see Treaty Information Bulletin No. 74, November, 1935, p. 30.

with respect to a particular draft convention after it approves such draft and it is referred for final consideration to a general international conference on private aerial law, it would seem that in practice there is a tendency for the International Committee to continue to maintain an interest in the conventions after they are finally adopted and signed at international conferences. As stated above, the Committee has made a study of the insurance provisions of the Rome Convention Relating to Damages Caused by Aircraft to Third Parties on the Surface. In addition it has taken an interest in the study of possible amendments to the Warsaw Convention relating to the Liability of the Aerial Carrier, signed at the Second International Conference on Private Aerial Law held in Warsaw in 1929.

When it is realized that the International Committee has undertaken to draw up a code of air law analogous in many respects to the great code of maritime law and that the code of maritime law has been built up over a period of several centuries, the magnitude of the task undertaken by the International Committee will be readily understood. The Committee has made great progress during the comparatively short time it has been in existence; but when it is realized that it is attempting to apply to air navigation, a new form of transportation, new principles which will be adaptable to the peculiar needs of this form of transportation, and that a study must be made of the principles underlying other forms of transportation, such as rail, steamship, and motor transportation, in order to see to what extent their basic principles might be applied to air navigation, it will be seen that the Committee must necessarily proceed with caution, as there are comparatively few well-established rules resulting from practical experience to guide it in its labors.

While it will doubtless be desirable to codify private international air law and avoid a tendency to have this branch of the law develop in a sort of haphazard fashion, the Committee should, in my estimation, guard against a hasty adoption of international conventions which might be regarded as premature, that is to say, conventions relating to subjects which are not ripe for codification or dealing with matters on which too little information has been obtained as a result of practical experience to warrant an attempt at codification. This, it is believed, would result in a too-frequent revision of conventions after their adoption and signature at diplomatic conferences.