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Maurice Amos

W.A. Brown

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THE TERMS OF THE LIABILITY INSURANCE POLICY: THE BRITISH POINT OF VIEW

SIR MAURICE AMOS AND W. A. BROWN*

(1) Report of the British Delegation

It seems desirable to sum up briefly the circumstances under which it has become necessary for the C.I.T.E.J.A. to resume the study of certain aspects of the problem of aircraft insurance against the risk of damage caused to third parties on surface.

At the time of the examination of the Convention proposed by the Third International Conference on Private Air Law for the unification of certain rules relating to the liability for damages caused by aircraft to third parties on the surface, the Conference recommended that the C.I.T.E.J.A., in the studies it was pursuing on insurance in air navigation, should examine the question of insurance of the operator's liability to third parties in order to secure a uniform international regulation on this point.

The aim of the proposed Convention is to impose upon aircraft an objective liability for the damages caused, combined with a limitation of such liability. Article 12 (1) of the Convention prescribes that every aircraft recorded on the Register of the territory of one high contracting party must, in order to fly over the territory of another high contracting party, be insured for the damages contemplated in the Convention, within the limits fixed in Article 8, with a public insurance institution or an insurer authorized for such risk in the territory in which the aircraft is registered. Paragraph 3 of the same Article 12 prescribes that the insurance must be assigned specially and preferentially to payment of the indemnities due on account of damages contemplated in the Convention. According to Article 14, the operator will not be entitled to avail himself of the provisions of the Convention that limit his liability (*inter alia*) if the security offered as prescribed by this Convention is not good or does not cover the liability of the operator for the damage caused within the limits and conditions of the Convention.

* Members of the British Delegation to the C.I.T.E.J.A., reporting the delegation's views on the subject of Insurance in April, 1934; translated at the U. S. State Department from Document No. 211, Proceedings of the Third Committee of C.I.T.E.J.A.

Article 16 prescribes that the judicial authorities of the defendant's domicile and those of the place where the damage was caused, at the option of the plaintiff, shall have jurisdiction to hear damage suits in the territory of each of the high contracting parties, without prejudice to the injured third parties' direct action against the insurer in a case where it would be exercised.

It is not necessary to recall to the minds of the Members of the C.I.T.E.J.A. that the said provisions constitute a compromise between the diverse views with regard to the limits that should be fixed for the insurer's liability, the Rome discussions having revealed the existence of substantial divergencies between the different viewpoints.

The preliminary draft convention that was submitted to the Rome Conference was the one that finally resulted from the labors of the C.I.T.E.J.A. at its Seventh Session at Stockholm, in the month of July, 1932. The text of this preliminary draft is printed on page 31, Volume 2, Documents, of the Minutes of the Sessions of the Third International Conference. Article 8 (1) of this preliminary draft states that each contracting State undertakes to include in its legislation the necessary penalties in order that no aircraft entered upon its registers can circulate over the territory of another contracting state without being insured against the damages contemplated by this Convention and within the limits determined by the Convention. Under Article 12 the person suffering the damages will have a direct recourse against the insurer of the aircraft that caused the damage.

What was the character of the right of the injured party against the insurer derived from Article 12 of the Stockholm draft? It could be seen at Rome that the opinions of the Delegates were far from being unanimous on this question. In the opinion of the majority this provision would have the effect of rendering the insurer liable to the injured party in as absolute a manner as if his engagement had been stipulated directly and personally by the injured party. In other words, according to this interpretation, exceptions and defenses based upon the restrictive conditions of the policy, or upon the defects thereof, which exceptions and defenses may be pleaded by the insurer against the insured, the operator of the aircraft, would not be valid against the claims of the injured third parties. Other delegates maintained, on the contrary, that Article 12 by no means had the effect of contributing such a radical extension of the liability normally resulting from an insurance contract, and that the injured third parties' action still lay

in the system of the common law, and was limited consequently by all the exceptions which could be pleaded against the insurer.

The discussions which took place on this subject at Rome are recorded on pages 187 to 198, 204 to 216, and 291 to 294 of the Minutes. Reference may be made likewise to the remarks submitted by the British Delegation on Articles 12 and 13 (printed on pages 67 and 68, Volume 2, Documents), as well as the supplementary remarks of the same Delegation on the general problem of insurance in its relations with the Convention (printed on pages 123 to 125). Sir Alfred Dennis' conclusions (printed on page 190 of the Minutes) indicate that he was far from insisting upon the integral principles of contractual liberties; he proposed, on the contrary, that the insurer should not be permitted, in answer to a direct claim on the part of the injured third party, to avail himself of any of the conditions of the insurance contract not relating to one of the following six subjects:

1. The case of fraud or concealment of a material fact by the insured;
2. The case where, at the beginning of the flight, the aircraft is not in a condition of air navigability [is not air-worthy] or is not properly equipped;
3. The case of violation of a rule of law when such violation caused the damage or contributed to the same;
4. The case where, in violation of the terms of the policy, the aircraft has taken part in races or other unusual sports events;
5. The case where, without being authorized to do so in the policy, the aircraft has engaged in a night flight;
6. The case of fraud or premeditated misconduct of the operator.

The special committee which was instituted with the mission of examining and reconciling these differences adopted by a majority vote the following text¹:

TEXT ADOPTED BY THE SPECIAL COMMITTEE

Article 8

"1. Every aircraft recorded on the register of a contracting party must, in order to circulate above the territory of another contracting party or the high seas, be insured against the damages contemplated in this Convention, within the limits determined in Article 4 above, with a public insurance in-

1. Volume 2, Documents, page 153.

stitution or an insurer specially approved for such risk by the State in which the aircraft is registered.

"2. This insurance shall be considered as regular in each contracting State if it meets the following conditions:

"(a) that it covers all the risks contemplated in this Convention or that the clauses omitting or reducing the insurer's guaranty in certain cases shall not be valid against third parties;

"(b) that it covers the liability to third parties, regardless of which operator is declared liable and even in a case where there is an abusive operation;

"(c) that the insurance indemnity cannot be legally paid except to the party suffering the accident or to his legal representatives;

"(d) that the insurer cannot plead against third parties the causes of nullity or of cancellation of the insurance contract that he could plead against the insured.

"3. If the insurance does not meet all these conditions, each contracting State may make use of the right which is granted it in Article 10, paragraph 3, of this Convention.

Article 9

"1. The legislation of each State may exempt the aircraft from this insurance wholly or in part if a security is given for the risks contemplated by this Convention:

"(a) in the form of a cash deposit made in a public fund or a bank approved for this purpose by the State of registry;

"(b) in the form of a guaranty given by a bank approved for this purpose by the State of registry.

"2. The cash deposit and the guaranty must be assigned specially and preferentially to payment of the indemnities due on account of damages contemplated in this Convention. They must be reintegrated as soon as the sums they represent are susceptible of being reduced by the amount of a compensation payment.

Article 10

"1. The nature, the scope and the duration of the securities contemplated in Articles 8 and 9 above shall be evidenced either by an official certificate or by an official notation upon some of the ship's papers. This certificate or this document must be produced whenever required by the public authorities or on the request of any interested party.

"2. The said certificate or document must conform to the forms attached to the Convention, and they will attest to the regularity of the situation of the aircraft with respect to the obligations of the operator.

"3. If none of the said documents can be produced, if the document is irregular, or if the duration of the security has expired, the aircraft must be held by the proper authorities of one of the contracting States until the necessary steps have been taken to render its situation regular.

"4. If the insurance contracted does not meet the conditions contemplated in Article 8 above, a notation to that effect shall be made on the official certificate or on the ship's papers. The insured may demand that the indication of the condition which is not met by the insurance shall be noted in writing. The State on whose territory the aircraft has entered may then

authorize the flight, considering the security as sufficient, or prohibit it until one of the guaranties contemplated in Article 8 and 9 has been given.

Article 11

"The operator shall not be entitled to avail himself of the provisions of this Convention that limit his liability:

"1. If the damage is due to fraud or gross negligence on his part or on the part of his agents, with the exception, however, of errors in piloting.

"2. If he is not insured under the conditions contemplated in Article 3, Paragraph 2, or if he has not furnished the security contemplated in Article 9, unless the State on whose territory the damage was caused has authorized the flight in accordance with the provisions of Article 10, Paragraph 3, above."

The Special Committee's report was not adopted by the Conference; but a compromise solution among the various viewpoints was finally found, and was expressed in the text cited above of the Rome Convention, by virtue whereof the operator of an aircraft, whose liability is not covered by a valid insurance, loses the right to appeal to the provisions of the Convention limiting the said liability. The ideal of a uniform insurance policy for all countries was given up as impossible of realization; and the Convention, while refraining from questioning the direct right of action against the insurer which can exist outside of its provisions, does not prescribe the recognition of such right. It is to be supposed that even in cases where there actually exists a direct right of action against the insurer, the latter are authorized to invoke against the injured third party all the defenses which would be at their disposal against the insured himself.

The terms of the compromise solution were explained to the Conference by the President and by Professor Ripert, whose speeches are found on pages 291 and 294 of the Minutes. As it appears from the decision adopted on this subject by the Conference, the latter felt, nevertheless, that it would be desirable to submit to more extended examination the question of the possibility of rendering more efficacious the security furnished by insurance to injured third parties, without placing too heavy burdens upon the development of civil aviation, by exaggerating the charges for insurance against the risks contemplated by the Convention, or otherwise.

The Conference was given to understand that European insurers were ready, for their part, to study the question as to whether they could accept a direct liability toward third parties, and, if so, on what conditions.

The conditions of an air insurance contract must necessarily

depend, in large part, upon the personal reputation and the technical qualifications of the insured and the pilot, as well as other variable circumstances. For this reason, the ideal of a uniform insurance policy, or a uniform insurance premium, is impossible of realization. It is necessary to leave complete liberty to the insurers as well as to the insured to agree upon special conditions which seem to them to be suitable in the circumstances of each case. The progressive way seems to lie in the suggestions made at Rome by the British Delegation,—which suggestions, it appears, would be acceptable to the European insurers—whereby the injured third parties would be acknowledged to have, under proper conditions, a direct right of action against the insurers, and that at the same time, without changing the contractual relations between the insurers and the insured, a limit be imposed upon the defenses which might be invoked by the insurers against the action of the third party.

Lloyd's insurance policy on liability to third parties contains, in the form now in current use, explicit stipulations, among others, on the following subjects:

- (1) The purposes for which the aircraft may be used: For example, prohibition of night flying;
- (2) The country in which flight is authorized;
- (3) The name of the operator and the pilot;
- (4) The material condition of the aircraft ("airworthiness");
- (5) Prohibition of acknowledgment of his liability by the insured, after an accident;
- (6) Exclusion (sometimes) of accident risks within the limits of an airport, or on the occasion of a public meeting;
- (7) Nullity of a fraudulent insurance contract. The violation of any one of these conditions authorizes the insurers to consider the policy as cancelled.

It is quite well understood that Lloyd's insurers are prepared to underwrite almost all imaginable risks, without exception; but they would not agree to underwrite unusual risks except upon payment of premiums in proportion by the insured.

This involves the question of maintaining a fair balance. The imposition upon the insurers of too great a direct liability to injured third parties would result by making the "good risks" share the expenses of the "bad risks," in increasing to serious proportions the liabilities of the business operations, and thus retarding the development of aviation and the aviation industry.

Keeping in view these considerations of a general order, it would perhaps be useful to examine the conditions of the Lloyd's policy mentioned above (page 8) from the point of view of the question of the practicable situation of the insurer who is the object of a direct action upon the suit of an injured third party. We may admit with respect to No. 1, that it would be possible to exaggerate the risk that the insured aircraft will be used in a way not authorized by the policy, and that the possibility of an unauthorized use thereof, excluded from the category of the defense which may be invoked by the insurer against the third party, could be covered without an excessive addition to the premium. All the more because the foreign countries visited by the aircraft may, by their own regulations, protect their citizens against the danger of stunt flying or other unusual flights. Similar remarks are applicable to conditions Nos. 2, 3 and 4, especially when it is remembered that the operator will almost certainly have insured himself against the risk of damage to the aircraft and to his own person, and that by a policy which will grant similar conditions, which conditions will of course retain their full effect with respect to him. The interest the operator will have in refraining from any act of negligence which would have the effect of endangering his own right of recourse, will greatly influence him to give his full attention to the airworthiness of the aircraft, and to the manner in which it is piloted.

The validity of the defense based upon a condition relating to the country in which the flight is authorized by the policy seems to be contemplated by Article 13 of the Rome Convention. The possibility remains open to each country of taking all possible measures to prevent the illegal entrance of foreign aircraft, and to have verifications made as to whether their policies authorize flight over the territory visited.

As to condition No. 3, it is difficult to admit that it is unreasonable for the insurer to be able to make objection to operation by persons other than those expressly contemplated in the policy. But the Rome Convention (Article 5) renders the operator liable for the damage caused when an aircraft is being used without his consent, if he has not taken the useful measures to prevent it. It may be that the risk may be considered as not being too great for the insurers, and they would be ready to accept it without insisting upon too great an increase in the premium.

With regard to condition No. 4, it would perhaps be dangerous to agr ee that the insurers can invoke, against third parties, as a

defense, the bad physical condition of aircraft, as almost every accident can be attributed to some defect or other of this nature. But it would perhaps be well to require the insured operator to obtain a certificate of airworthiness of the aircraft; and the question would be worthy of study as to whether the insurer should not be authorized to invoke the existence of a material defect which, if it had been discovered at the beginning of the flight, would have necessitated the refusal of such certificate.

As to the conditions indicated under No. 5, it does not seem at all inequitable for the insurer to be able, as against third parties, to contest the correctness or the decisive character of the operator's admissions. The claimant would not be prejudiced in the proof of his just claims; while the insurer, in a contrary case, might be exposed to the danger of serious injustice if he were bound by the lightly made admission of an operator whose sense of responsibility would be lessened by the fact that it is someone else who will pay.

As to condition No. 7, it must be admitted that it would be difficult for the insurer to estimate the proper premium if he must remain liable, even in a case where the policy has been issued on the basis of fraudulent statements. Such a contract would constitute an insurance not only against the risks of aviation but against the risk of the insured's dishonesty. It is a universal principle of law that a contract obtained by means of fraudulent statements is null and void, either absolutely or relatively, and there do not seem to be sufficient reasons to make an exception to this principle in the case of aeronautic insurance. Such a case would perhaps present itself only rarely in practice; but the cases which did occur would precisely be among the most onerous for the insurers; and there are grounds for doubting whether it would be possible, as a matter of fact, to contract insurance contemplating this eventuality. Perhaps, however, we might adopt the principle that the right of the insurer to make objections on the ground of fraud on the part of the insured should be limited to the case in which it would be established that the fraudulent statement had a real connection with the damage caused, in view of the fact, especially, that the liability to be covered is independent of negligence on the part of the operator.

The idea of establishing an identical form of policy for the various countries would perhaps not be impossible of realization, but its realization would not be in the interest of the aviators. The most desirable solution of the problem would consist rather:

(a) In imposing upon every insurer who sells policies acknowledged as satisfying the conditions prescribed by the Rome

Convention, a direct obligation in favor of the injured third party;

(b) In recognizing that the right of action of the said third parties must be exercised at the insurer's domicile;

(c) In agreeing that the direct obligation of the insurer to the third parties shall be independent of the special stipulations of the policy, the insurers remaining free to determine as they see fit upon the premiums, their possible recourse against the insured, and, in general, all the conditions of the contract which do not affect the third party's right;

(d) In recognizing that the injured third party's rights of action are subject to the following conditions:

(1) That the damage was caused during the period in which the policy was valid;

(2) That the damage was caused within the territorial limits contemplated by the policy (these last two conditions resulting by implication from the provisions of the Rome Convention);

(3) That at the beginning of the flight the aircraft was provided with a certificate of airworthiness, of which we have spoken, and that at this very moment there is no apparent defect which would have justified the refusal by the proper authorities of a flight permit.²

(4) That the damage was not caused by a fact or a circumstance on the subject of which the insured has been guilty of deceitful statements made to the insurer;

(5) That any admissions which the operator may have made to the third party or otherwise will not be valid against the insurer.

It seems evident that notwithstanding the provision of the article of the Rome Convention which renders valid the defense of joint negligence, litigation by the injured third parties and insurers will rarely raise the question of the fact of the liability, and that claims of this nature will almost always demand for their solution only the pecuniary estimation of the damage caused. The same is true in most cases of disputes relating to maritime assistance; and as experience shows that in cases of this nature it is easy and not very costly to establish in hearings where both parties are in attendance the amount of the indemnities payable without going out of the City of London, although the ship and the cargo which are subjects of the litigation are at the other end of the world, we may

2. It would perhaps be proper to observe that the general opinion on this subject seems to be changing, as is indicated by the fact that according to a bill now before the British Parliament the (compulsory) insurer of automobile liability would be deprived of the right to invoke against the injured third party any condition of the policy relating to the material condition of the vehicle insured.

maintain that it would be equally easy at the very domicile of the insurer to agree upon the amount of the damage caused elsewhere by aircraft.

It would be opportune to impose upon the injured third party a peremptory choice between the exercise of his action against the operator and direct action against the insurer. To this principle we might, however, permit two exceptions:

(1) In a case where the third party, having secured a judgment against the insurer believes that he can prove that the operator was guilty of gross negligence, which would permit him, by virtue of Article 14 of the Rome Convention, to claim from the operator compensation beyond the limits fixed in Article 8;

(2) In cases where the insurer shall have proved that for a cause independent of the existence or of the cause of the damage, the policy cannot be validly pleaded against him in the case.

We might prescribe that when the insurer intends to invoke a defense of this nature, he would be obliged to give notice of his intention within a short period, in order that the propriety thereof may be passed upon summarily and as a preliminary remedy. In case the insurer gained his case in this procedure, the claimant would have full liberty to resume his action against the operator.

In this order of ideas, it is thought, the interests of the injured third parties could be reconciled with those of the insurers, in such a way as to make possible the functioning of insurance with favorable premiums, while doing justice to the fair claims of any possible injured parties.

Document No. 203, which was distributed to the members of the C.I.T.E.J.A. at the London Session in October, 1933, includes:

Form of certificate proposed as satisfying the conditions of Article 13 of the Rome Convention. This form had been unanimously approved by the meeting of the "National Aviation Insurance Pools" which had just been held at Montreux.

It may as well be recognized that if a uniform certificate is not adopted there will be difficulties of administration. We think that the form suggested is satisfactory; and if a new Convention is adopted along the general lines proposed in this note, it would be possible to omit the words "subject to the conditions of the policy."

The few foregoing remarks are submitted to the members of the C.I.T.E.J.A. for examination in the hope that the discussion to which they may give rise in the next meeting of the Third Commission, will provide the Reporter with directions that will permit

him to prepare a draft convention for submission subsequently to the C.I.T.E.J.A. for approval, in execution of the task which was imposed upon them by the decision of the Third International Conference.

(2) Revised Text of the British Delegation's Proposal³

The C.I.T.E.J.A.:

Considering that it appears difficult, at the present time, to reach a final solution on certain problems which arise in connection with the putting into execution of Articles 12 and 14 of the Convention signed at Rome, on May 29, 1933, for the unification of certain rules relating to damages caused by aircraft to third parties on the surface;

Considering that there is reason to believe that there would be advantage in having the C.I.T.E.J.A. express its opinion with reference to the conditions under which the said articles ought to be applied,

States that it is of the following opinion:

1. In order to comply with the provisions of Articles 12 and 14 of the Rome Convention for the unification of certain rules relating to damages caused to third parties on the surface, laws should be enacted providing that, in order to defeat a claim made under the terms of the said Convention by an injured third party, the insurer, in addition to the defenses available to the operator, can set up only one or more of the following defenses:

a) That, at the time when the injury was suffered, the obligation of the insurer had been terminated by lapse of time.

b) That the injury occurred outside the territorial limits stipulated in the insurance contract, unless such flight outside such limits shall have been caused by *force majeure* or the obligation to assist.

c) That, at the beginning of the flight, there was no valid certificate of airworthiness in existence for the aircraft.

d) That the personnel indispensable for the operation of the aircraft did not hold valid licenses.

2. a) The obligation of the insurer shall be deemed to have been terminated upon the date fixed by the insurance contract for its own normal expiration, or upon the date fixed by an anticipatory denunciation; provided, however, that notice of one or the other

3. Document No. 260, Annex A, p. 63, of the Proceedings of the Third Committee of the C.I.T.E.J.A. at the joint meeting with the I.A.T.A., and the I.U.A.I., dated July, 1935, translated at the U. S. State Department.

date, according to the case, shall have been sent in due time by the insurer both to the insured and to the proper authorities of the Government in whose territory the aircraft is registered.

b) In order to be deemed to have been sent in due time, the notice must be sent before the normal expiration date of the contract or the date contemplated in the denunciation, within a period of time which shall neither be less than thirty days nor more than sixty days.

c) If the notice is delayed the time during which the insurer's liability shall continue to exist shall be extended by a period of time equal to such delay.

d) A premature notice shall have no effect.

e) If the operator has contracted for other valid insurance, the extended liability of the first insurer shall cease upon the effective date of the new contract.

M. S. AMOS

W. A. BROWN

London, July, 1935.