International Civil Aviation Organization
INTERNATIONAL REVIEW

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INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

Assembly — Ninth Session

The Ninth Session of the Assembly of the ICAO completed a two-week meeting on June 13th, 1955, by voting a net budget for 1956 of $2,826,971 (Canadian); this compares with ICAO's 1955 net budget of $2,745,260, the increase being caused by a provision for the major session of the Assembly in 1956 being held away from ICAO headquarters in Montreal.

Fifty-three nations were represented at the Assembly. The officers were Brigadier C. S. Booth of Canada, President; H. E. Montague Jayawickrama of Ceylon, Raffaelo Ferretti of Italy, Rear Admiral C. V. Bunnag of Thailand, and Julio Hoepelman of the Dominican Republic, Vice-Presidents; Daniel Haguenau of France, Chairman of the Administrative Commission.

Among other actions taken by the Assembly were the following:

Germany: A request from the Federal Republic of Germany (West Germany) for membership in ICAO was approved by a vote of 51 nations in favor, with one abstention. The German application must now be forwarded to the United Nations General Assembly for approval.

United Nations Tenth Anniversary: The Assembly expressed its appreciation of the contributions to world peace and welfare made by the United Nations, and reaffirmed ICAO's intention to cooperate with the United Nations in accordance with the spirit of the Convention on International Civil Aviation and of the charter of the United Nations and with the terms of the UN-ICAO Agreement.

Length of Council Sessions: The Assembly believed that it might be possible for the ICAO Council to carry out its work program within shorter sessions than have been held in the past, and invited the Council to take certain actions which would determine whether this objective could be reached; the results of these experimental sessions would be reported to the 1956 Assembly.

Relations with the Province of Quebec: Noting that no agreement exists between ICAO and the Province of Quebec and that certain difficulties have been encountered, the Assembly invited the ICAO Council at its discretion to ask the Federal Government of Canada to continue its intercession with the Province to solve these difficulties. The Council was also instructed to carry out a study at its discretion to determine the cost of maintaining the headquarters of ICAO elsewhere.

The Secretary General of ICAO, Mr. Carl Ljungberg, announced during the closing session that Laos had adhered to the Convention on International Civil Aviation and will become the 66th Member State of ICAO on 13th July 1955.

LEGAL COMMITTEE

1. Report of the sub-committee on the negotiability of the air waybill.

The Sub-committee on the Negotiability of the Air Waybill established by the Chairman of the Legal Committee between the Ninth and Tenth Sessions of the Legal Committee, in June 1954, and composed of: Mr. V. Campos, Mr. T. Cavalcanti, Mr. C. Ganns, Brazil; Mr. Diaeddine Saleh, Vice-Chairman of the Legal Committee and Mr. M. Tabie, Egypt; Mr. A. Garnault, France; Mr. A. Ambrosini, Mr. R. Monaco, Italy; Mr. E. M.
Loaeza, Mexico; Mr. H. Drion, Rapporteur, Netherlands; Mr. C. Gómez Jara, Chairman, Spain; Mr. K. Sidenbladh, Sweden; Major K. M. Beaumont, Chairman of the Legal Committee, United Kingdom, and Mr. G. N. Calkins, United States, met in Madrid, at the Instituto Francisco de Vitoria, from 12 April to 18 April 1955 and held five meetings.

At an organization meeting held in Montreal during the Tenth Session of the Legal Committee, Mr. Gómez Jara (Spain) was elected Chairman and Mr. Drion (Netherlands), Rapporteur.

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In order to examine the subject of the negotiability of the air waybill, in pursuance of a request of the Legal Committee at its Tenth Session, the Sub-committee considered:

(1) Two reports prepared by the Rapporteur (which were taken by the Sub-committee as the basis of its discussions);
(2) Comments of Italy and of Mr. K. Sidenbladh (Sweden) on the negotiability of the air waybill;
(3) Various papers submitted by the Secretariat.

The Sub-committee considered the following three major questions:

(1) Can a negotiable air waybill achieve any useful purpose which could not be arrived at with a non-negotiable air waybill as at present in use with air carriers?
(2) Are there any insurmountable obstacles in the present Convention which make it impossible to use a negotiable air waybill?
(3) If the first question is answered in the affirmative, what action could be recommended in view of the fact that a Diplomatic Conference will meet in The Hague in September 1955 to consider the revision of the Warsaw Convention?

The Sub-committee's discussion on these questions and the conclusions arrived at thereon are set out in the following paragraphs:

**Usefulness of a negotiable air waybill**

With the rapid growth of freight transportation by air since the last war, the problem of the negotiable air waybill has come into the limelight and on various occasions representatives of the international business world have advocated the introduction of a document in air transportation which would afford the same possibilities and safeguards as the shipping bill of lading. For several years the problem has also been studied by the legal experts of the International Air Transport Association.

Lately, there have been signs of a growing interest on the part of the users of air transportation, such as the recent decision by the Air Transport Committee of the International Chamber of Commerce to submit to the Council of the ICC the following Draft Resolution:

"The International Chamber of Commerce is of the opinion that, with the rapid growth of cargo transportation by air, any legal obstacles which may exist against the issuance of negotiable air waybills should, in the interest of the users of air transportation, be removed, so as to make it possible to issue air waybills having the same characteristics as the shipping bills of lading whenever the use of such documents is desirable and warranted by the circumstances. For that reason, the International Chamber of Commerce recommends that in the event of any modification of the Warsaw Convention, the opportunity for amendment be used for facilitating the issuance of negotiable air waybills."

Similar interest in the negotiability of the air waybill has been shown by the International Aircraft Brokers Association.

It is to be observed that in continental railway transportation the question of negotiability has already for a long time been the subject of discus-

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1 See Air Charter Bulletin No. 31 (1953) of 21 August 1953.
sion. The matter was one of the main items on the Agenda of the Fourth Conference (Rome 1933) for Revision of the Berne Convention, concerning the carriage of goods by railway. But, in the recent Conference of 1952 the question was not considered so urgent as to warrant immediate action.

What special characteristics of the bill of lading make it preferable to the present non-negotiable air waybill? What purposes are served thereby? To what extent do these purposes possess the same value in air transportation? Are there special reasons which could be advanced against the introduction of a negotiable air waybill?

The main characteristics of the bill of lading which demonstrate its usefulness when compared with the non-negotiable consignment note are clearly its transferability and its quality of giving the regular holder a right to delivery and of representing the goods for all purposes for which their possession is important. Two important advantages are secured thereby: (1) the goods in transit can be the object of banking transactions and (2) they can be the object of sales transactions during transit.

Sub. (1). The banking transactions can take two forms with a number of variations. The purchaser may open a credit with his bank on behalf of the seller with instruction only to pay against delivery of the documents (bill of lading, insurance policy and invoice). It may also be that the seller draws a draft on the purchaser and offers it with documents to his bank to have it discounted. The bank will offer the bill of exchange with documents to the purchaser against payment of the purchase price and any additional sums due by the purchaser. In both cases the seller need not wait till arrival of the goods to receive cash payment and on the other hand the purchaser does not run the risk of having paid without receiving the goods. The longer the transit the more important this possibility becomes, but even with the comparatively short periods of transit required for transportation by air there is a clear advantage in the procedure.

Sub. (2). The possibility of sales transactions with respect to the goods during the time that they are in transit is probably less important in air transportation than in sea transportation. For this possibility it is essential that the bill of lading be forwarded by quicker means of transport than the goods, as the goods can only be delivered after arrival of the bill of lading at the place of destination. Since air transportation is the quickest means of transport it will need about the same time for the bill of lading to arrive at destination as is needed for the goods, so that any subsequent sales of the goods during transit would only delay the delivery of the goods. On the other hand, it should not be forgotten that even between air carriage services there exist clear differences in speed, as there exist differences in speed between different means of sea transportation. After all the maritime bill of lading had developed long before air carriage existed and was also used on transatlantic traffic where both the goods and the bills of lading had to be carried by ship. Not always is air transportation chosen only for its greater speed. Sometimes it is mainly preferred because of the different routing which it follows, whereby certain States may be avoided where the goods would be exposed to special dangers. Moreover, air transportation may be combined with sea transportation in which case the need of negotiability applies to the entire air/sea carriage.

What objections against making the air waybill negotiable can be drawn from the different character of air transportation as compared with sea transportation?

(1) In air carriage the goods will in most cases arrive at the same time, if not earlier, than the air waybill. For goods carried by scheduled services without necessity of trans-shipping, the value of the objection is evident except on such lines where freight traffic is delayed more than the mail
traffic (which is privileged) as a consequence of congestion. In combined air/sea or air/railway carriage the objection does not apply.

(2) As the goods can only be delivered against production of the negotiable document, they will often have to be stored in a warehouse at the airport of destination, especially in view of the consideration discussed under (1) but also because the carrier does not know in advance to whom he will have to deliver so that he can not give notice of arrival. Now it has been pointed out that the storage space at airports is generally small as compared with the storage room at sea harbours. On the other hand it is difficult to find a reason why airports could not adapt themselves to the needs of transportation as seaports have done in the past. As far as notice of arrival difficulties are concerned they can, in most cases, be met by inserting an “also notify” address on the air waybill, which appears already on the present IATA Air Waybill.

(3) The growth of the scheduled services in sea transportation has led to the general acceptance, against the opposition of the banking world, of the “received for shipment” bill of lading (instead of the “shipped” bill). As, in air transportation, a quick despatch of the negotiable document to the place of destination would be more essential than in sea transportation, it will be more frequently impossible to wait for the loading of the goods on the airplane. Where the time factor is an essential element in many commercial transactions, the purchaser or bank holding the bill of lading has a clear interest in knowing when the goods have actually been shipped, so that a “received for shipment” air waybill will not always be satisfactory.

(4) More or less the same objections as obtained against the “received for shipment documents” may be raised against the through bill of lading or even against any bill of lading covering transportation with one or more trans-shipments. It is submitted that trans-shipments in air transportation will be more frequent than with sea transportation as the space and load factor is by far more important in air navigation than in sea transport, so that it will often happen that goods have to be off-loaded midway in order to be carried on by another aircraft, because of the fact that the second stretch to be flown is a long distance leg requiring more fuel to be taken on the aircraft. Also mail priority may result in the off-loading of cargo at an intermediate stopping place for on carriage by another plane.

(5) Another objection which has been raised against making the air waybill negotiable is that this would complicate the combined air/railway transportation. The objection does not seem very sound for, on the one hand, the same argument could be made for defending negotiability with a view to combined air/sea carriage, the possible development of which should not be too easily discarded. On the other hand, there are countries where the railway bills are already negotiable (e.g. United States, cf. Pomerene Act 1916, S.1).

(6) One very useful function of negotiable bills of lading in the surface field is that of an instrument of credit, enabling the buyer to finance his purchase by obtaining a loan from his bank, with the shipment constituting the security. Much the same result, however, can often be reached in the air cargo field today with a straight air waybill. This is accomplished in the following manner: The shipper consigns the goods C.O.D. to the buyer’s bank in the city of destination instead of the buyer. The carrier is directed on the air waybill to notify not only the bank (consignee) upon the arrival of the goods, but the buyer (“also notify address”) as well. Upon receipt of notification of arrival, the buyer takes the same steps he would take with a shipment under a negotiable bill of lading, to obtain a release from the bank. When the bank is satisfied by the buyer either by payment or other means, it will pay the C.O.D. charges to the carrier and direct the carrier
to deliver the goods to the buyer. This method requires, of course, the willingness of a bank at point of destination to act as consignee.

Weighing the various arguments for and against the usefulness of negotiability of air waybills, the Sub-committee has arrived at the conclusion that no urgent need would seem to exist at the moment for such documents. On the other hand, there is evidence that some need is felt for a negotiable air waybill. The instance of such need will, no doubt, increase with the increase of carriage of goods by air. That being so, there should be no legal obstacles preventing carriers and shippers by air from availing themselves of a facility which has already been in use for years by carriers and shippers by sea.

In arriving at this conclusion the Sub-committee has also taken into consideration the psychological fact that the banking world is used to the maritime bills of lading with their well known characteristics and may hesitate to accept a document, whatever its legal merits, which does not possess these characteristics.

It was the unanimous feeling of the Sub-committee that the use of a negotiable air waybill should, in any event, be made conditional upon the consent of both the carrier and the consignor. In the majority of cases of carriage by air negotiability would not serve any useful purpose, whereas it would require facilities and training not available now at many airports, and would create a serious source of delays in the delivery of the goods.

Are there obstacles in the Warsaw Convention?

The Sub-committee has considered whether anything in Articles 5 to 16 (inclusive) presents an insurmountable obstacle of a legal character preventing the issuance of a negotiable air waybill. For that purpose it has given separate consideration of each of these articles.

Articles 5, 7, 9 and 16 do not offer any complication whatsoever in this respect and do not require comment.

The effect of Article 6 in the event of a negotiable air waybill being issued was the subject of considerable discussion, especially paragraph (1) which provides that “the air waybill shall be made out by the consignor in three original parts and be handed over with the goods.” It was questioned by some whether the system of issuing waybills in three original parts could be reconciled with the concept of negotiability. The Sub-committee felt, however, that the requirement of the air waybill having to be established in three originals does not mean that all three originals must be made negotiable. Reference was made in this respect to the Italian Navigation Code of 1942 which has incorporated the provisions of the Warsaw Convention, including those of Article 6, at the same time providing for the possibility of having the consignor’s copy only made negotiable. Reference was made in this respect to the Italian Navigation Code of 1942 which has incorporated the provisions of the Warsaw Convention, including those of Article 6, at the same time providing for the possibility of having the consignor’s copy only made negotiable. The Sub-committee felt, however, that the requirement of the air waybill having to be established in three originals does not mean that all three originals must be made negotiable. Reference was made in this respect to the Italian Navigation Code of 1942 which has incorporated the provisions of the Warsaw Convention, including those of Article 6, at the same time providing for the possibility of having the consignor’s copy only made negotiable. Also the fact that Article 6, in conformity with the other relevant articles of the Convention, is based on the idea of the air waybill being made out by the consignor, does not, in the opinion of the Sub-committee, constitute a real obstacle against negotiability, as, also under the Warsaw Convention, the air waybill must in any event be signed by the carrier. Article 6(5), moreover, already envisages the possibility of the air waybill being actually made out by the carrier, as is the present practice.

Article 8 provides for the insertion of the name and address of the consignee on the air waybill “if the case so requires” (“s’il y a lieu”). There can be no doubt that the drafters adding the words “s’il y a lieu” have meant to leave open the possibility of an air waybill issued to order.²

² Cf. the minutes of the Session of CITEJA at Madrid, 1928, at pp. 68-69 and the minutes of the Conference of Warsaw of 1929, at p. 105.
It may be questioned whether Article 11 could be an obstacle for introducing a negotiable document. The first paragraph of this article allows proof to the contrary with respect to the conclusion of the contract, the receipt of the goods and the conditions of carriage as evidenced by the air waybill, and the second paragraph does the same with respect to the statements concerning weight, dimensions, packing and apparent condition of the goods. This means that the carrier may prove that he has not received the goods as stated on the air waybill or that the weight, dimensions, packaging or apparent condition of the goods or the conditions of contract were different from those mentioned on the air waybill. Is Article 11 mandatory in a sense that the carrier could not deprive himself in advance by an express stipulation in the air waybill from the right to produce evidence against the air waybill? It is hard to see on what such mandatory character on behalf of the carrier could be based. Where the drafters of the Convention made its provisions mandatory they did so for the protection of the passenger or consignor, not of the carrier (cf. Art. 23), because the carrier is in the better position to impose his terms upon his co-contractor by way of standard conditions of carriage. It is submitted, therefore, that Article 11 is no obstacle against establishing a negotiable document of such a character that its statements cannot be contradicted by the carrier if invoked by bona fide third parties in possession of such document, even when in accordance with some legal systems the carrier were to be precluded from proving that he had not received the goods described in the air waybill.

Articles 12, 13 and 14 establish the rights of the consignor and consignee with respect to delivery of the goods and the exercise of the other rights arising from the contract, in a way which is incompatible with the character of a negotiable document. However, the second paragraph of Article 15 permits these provisions to be substituted by other clauses provided they are incorporated in the air waybill. Due to a rather loose translation by the English legislator the French word "dérogeant" has been reproduced as "may be varied." This has created some doubt as to the question whether a complete reversal of the situation envisaged by Articles 12 and 13 could be accepted by English Courts, which are bound to the English text of the Carriage by Air Act. If this is true there can be no doubt that the English legislator has changed the Convention as intended by its drafters.

From the above observations it is clear that, although the provisions of the Warsaw Convention do not make it legally impossible to introduce a negotiable air waybill, such a result can only be arrived at by including in the air waybill some express provisions to waive or exclude, as the case may be, the provisions of Articles 11, 12, 13 and 14 of the Convention.

What action should be recommended in view of the coming Diplomatic Conference at The Hague?

The Sub-committee has given consideration to the following possible solutions:

(1) A complete set of provisions giving substantial rules on the matter of negotiable air waybills without reference to municipal law.

(2) A conflict of laws rule indicating the municipal law to be applied with respect to negotiability with a reference to the maritime law provisions of such municipal law in case it does not have general legal provisions on negotiability.

(3) A conflict of laws rule only, without reference to maritime law.

(4) A conflict of laws rule with the added obligation for the Contracting States to adopt appropriate legislation, if necessary, for allowing carriers to issue air waybills having the characteristics of the maritime bills of lading.
(5) A mere statement that the Warsaw Convention shall not be read to prohibit the issuance of negotiable air waybills, combined with the obligation for Contracting States mentioned under (4).

(6) A mere statement that the Warsaw Convention should not be read to prohibit the issuance of negotiable air waybills.

(7) Omission of any provision in the Convention on the matter of negotiability.

The Sub-committee has come to the conclusion that, at the present stage of development, the sixth solution is to be preferred, provided that the statement mentioned therein, as it only purports to give an interpretation of the present Convention, should not be included either in the Protocol or in the new Convention (whatever the method of revision will be), but should rather be given in the form of a Declaration to be inserted in the Final Act of the Conference. This will avoid the uncertainty which might otherwise be created during the period the Protocol or the new Convention has not yet become effective.

The Sub-committee felt, on the one hand, that such obstacles as might be felt by some to exist in the provisions of the Warsaw Convention, should be removed so as to give shippers and air carriers as good a chance as possible to develop their experience in the field of negotiable documents of carriage.

On the other hand, it was felt that the time is not ripe to take action on the basis of the more far-reaching solutions mentioned under (1) to (5) inclusive. It may be that, at some future time, the need for regulation of this subject may become so urgent that the convening of a special conference would be warranted.

The introduction of a choice of law rule was felt to be undesirable, because it would be impossible, in view of the diversity of aspects which must be taken into account in the matter of negotiability, to determine the applicable law in a way which would satisfy the great number of conflicting opinions existing in this field. It is to be observed that no universally accepted choice of law rules exist with respect to the negotiability of maritime bills of lading.

With respect to solution (5), it was thought that it would go too far to impose an obligation on the States as envisaged in that solution. On the other hand, the Diplomatic Conference might consider the adoption of a Recommendation in its Final Act to the effect that the States which are party to the Warsaw Convention remove such obstacles, as may exist in their national legislation, against the introduction of air waybills having the characteristics of maritime bills of lading.

The Sub-committee has discussed at great length the question of whether a provision should be recommended for insertion in the Protocol or in the new Convention, to the effect that, in the event of a carrier and shipper agreeing to the issuance of a negotiable air waybill, Article 11 would not apply, as far as it allows the carrier to produce counter-evidence against the air waybill, and that the rights conferred by Articles 11, 12, 13 and 14 to the consignor and consignee respectively, are to be exercised by the regular holder of the negotiable copy of the air waybill only. As has been pointed out above, the issuance of an air waybill having the characteristics of the maritime bill of lading is only possible under the present Convention by the insertion of express provisions in the air waybill excluding the application of Articles 11, 12, 13 and 14. The holder of an air waybill to order, even if it bore the express indication “negotiable,” would be in a doubtful position if the air waybill did not contain such provisions. For, unless he were the shipper, he could not exercise the right of stoppage in transitu and the other rights described in Article 12, and he would also
be exposed to the risk of the carrier offering evidence against the air waybill with respect to the weight, number and dimensions of the goods, as allowed by Article 11.

The Sub-committee felt, however, that without a more developed study of the subject, it would be unwise to make at this time a recommendation for the insertion of such a provision in the Protocol or in a new Convention. It was confident that, once the organized airlines decided to adopt the introduction of a negotiable air waybill, they would see to it that such a document would contain the necessary provisions to overcome those provisions of the Convention which otherwise impede negotiability.

Finally the Sub-committee has considered the possibility of amending Article 12 of the Convention so as to make the consignor's right of disposition, conferred by that Article, transferable by endorsement of the consignor's copy of the air waybill. Such an amendment has been advocated by at least one author and was also included by the Paris Sub-committee on the Revision of the Warsaw Convention (1952) in its draft for a new Convention (Art. 6, para. (5) of said draft).

This revision would reinforce the position of the bank holding the consignor's copy of the air waybill as a security. Under the present Convention, the holder of this copy, unless he is the consignor himself, has no rights with respect to the goods, but has only the certainty that the destination of the goods cannot be changed by the consignor without his knowledge and consent. That certainty is, however, of doubtful value if the consignor becomes bankrupt.

The Sub-committee feels that the addition to Article 12 of the following provision (similar to Art. 6(5) of the Paris draft) would be useful:

"The consignor may transfer his rights under this Article by endorsement and delivery of his part of the air waybill."

2. Sub-committee appointed to consider the practical difficulties which might be involved in revising the Warsaw Convention by means of a Protocol.

This Sub-committee was appointed by the Legal Committee in September, 1954, to consider the practical difficulties which might be involved in proceeding with the revision of the Warsaw Convention by means of a Protocol rather than by means of a revised Convention. It was asked to present its report so that it would be available to every member of the Legal Committee before the Diplomatic Conference to be held at The Hague in September, 1955.

The Legal Committee appointed the following Sub-committee:

Mr. André Garnault (France), Mr. C. Gómez Jara (Spain) and Mr. A. W. G. Kean (United Kingdom).

The Chairman of the Legal Committee, at the request of the Sub-committee, subsequently appointed Mr. H. Drion (Netherlands) to the Sub-committee.

The Sub-committee, composed as above, met in Madrid in April, 1955, and held five meetings. In addition the following ex officio members attended the meetings: Major K. M. Beaumont (United Kingdom), Chairman of the Legal Committee; Mr. Diaeddine Saleh (Egypt), Vice-Chairman of the Legal Committee. The Sub-committee elected Mr. Kean as its Chairman.

The Sub-committee does not regard its terms of reference as including the question whether there are other matters in the Warsaw Convention (in addition to those dealt with in the draft Protocol) which ought to be revised at the present time. It has concerned itself with what may be called the technical legal question:

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3 G. A. Schweickhardt in (1951) 5 Revue française de droit aérien, pp. 19-34.
Granted that the Warsaw Convention is to be revised only to the extent now envisaged by the draft Protocol, is the Protocol a satisfactory or indeed permissible method of achieving this result?

If not, by what other means can the same result be achieved?

The Sub-committee has assumed two principles which it does not think can be seriously contested:

a) Any Contracting State is entitled to claim that the benefit of an international Convention or Protocol must be given to its nationals by other Contracting States in all circumstances in which the Convention or Protocol applies:

b) The present Warsaw Convention applies to all international carriage performed for reward or performed gratuitously by an air transport undertaking, and, to adopt the words of the Supreme Court of the State of New York, “there is nothing in the Convention which conditions its application upon nationality” “Garcia and Alvarez vs. Pan American Airways, Inc. and Sullivan, 1945 U.S. Aviation Reports 39, at page 44.)

The Sub-committee considers that there is no conflict between these two principles.

At present, with the Warsaw Convention in force without any concurrent Protocol, the position is a simple one. If A, B and C are all Contracting States, each can insist upon the others applying the Convention in circumstances which fall within the terms of the Convention.

If, however, a Protocol is superimposed on the existing Warsaw Convention, the Protocol may be accepted by some but not all of the States which are bound by the Warsaw Convention. The following is an example of the situation which may then arise:

States A, B and C are bound by the Warsaw Convention, but only States A and B are bound by the Protocol. In litigation in the Courts of State A involving nationals of States B and C, State A will be obliged towards State B (which has accepted the Protocol) to give effect to the amended Convention and towards State C (which has not accepted the Protocol) to give effect to the existing Convention. If, therefore, the carrier is a national of State C, that State will be entitled to complain of a breach of an international obligation if its national carrier is not given the benefit of the limit of liability under the Warsaw Convention; but if, at the same time, the passenger or consignor or consignee is a national of State B, that State will be entitled to complain if its national passenger or consignor or consignee is not given the benefit of the higher limit of liability under the Protocol. State A, therefore, be subject to conflicting obligations towards States B and C. It would be possible to multiply examples. A similar conflict would, for example, arise if a passenger or consignor having the nationality of State C sought to rely on the absence of the documentation required by the Warsaw Convention, the carrier (a national of State B) having issued only the simpler documentation required by the Protocol; or if such a carrier relied on the more favourable provisions of the Protocol amending Article 25 of the Convention.

The view of the Sub-committee, therefore, is that in certain circumstances the Protocol method is bound to result in a conflict of obligations. This becomes especially clear if there is a lawsuit in the Courts of a State which has ratified the Protocol, affecting both the interests of nationals of a State bound by the Protocol and the interests of nationals of a State bound by the Convention alone. The Sub-committee does not consider that this is only an academic possibility.

It would likewise follow that no carrier doing business in any State bound by the Convention but not by the Protocol would dare to issue documents in the simpler form provided for in the Protocol. In case of litigation in such a State the carrier would, unless he had issued the documents required by the Convention, lose the benefit of any limitation of liability.
If, therefore, there were any number of Contracting States which did not accept the Protocol, the Protocol would be ineffectual so far as the simplification of documents is concerned, because carriers would in prudence be obliged to issue the more complicated documents required by the Convention.

The Sub-committee has considered various possible solutions of the problem, of which the following may be mentioned:

(A) The insertion in the Protocol of a provision that it is not to take effect until it has been ratified by every State which is bound by the Warsaw Convention.

(B) The insertion in the Protocol of a provision that it is to apply only if all parties to the case are nationals of States which have ratified the Protocol.

(C) The insertion of a provision that the Protocol is not to apply unless the carrier and the passenger or consignor, as the case may be, are nationals of States which have ratified the Protocol, the parties to the contract of carriage to be required by law to make declarations of their nationality which would be conclusive evidence to that effect in all cases arising under the Convention as amended by the Protocol.

(D) The insertion of a provision that the Protocol is to apply only if the carrier is national of a State which has ratified the Protocol.

(E) The ratification of a new Convention which would either reproduce the old Convention or include it by reference, in either case with such of the amendments now contained in the draft Protocol, and such consequential or other amendments, as the Conference may consider necessary or desirable.

The Sub-committee's comments on these solutions are as follows:

Solution (A). The Sub-committee rejected this because it would mean that a single State which was bound by the existing Convention would, in effect, be able to prevent the Protocol coming into force.

Solution (B). This is open to the following objections:

(i) It would be a retrograde step to make the application of the Protocol dependent on nationality;

(ii) In a case of successive carriage the limitation of liability would vary according to the nationalities of the successive carriers;

(iii) In issuing documents the carrier's clerks would have to determine whether the passenger or the consignor was a national of a State which had ratified the Protocol;

(iv) The carrier's clerks would also have to determine whether, in the case of goods, the consignee and possible holders of the air waybill (if made negotiable), and in the case of a passenger, the dependents of the passenger, were nationals of such a State;

(v) The Courts would be saddled with the task of determining the nationality of the parties;

(vi) Dual nationality would be an additional complication.

For these reasons, the Sub-committee rejected solution (B).

Solution (C). This solution suffers from some of the defects mentioned in connection with Solution (B), though it avoids others. Moreover, inaccurate declarations of nationality might be made, particularly in the case of goods. The point was also made that in some States it would be legally unacceptable for the rights of dependents to be affected by a declaration of nationality made by the passenger.

Solution (D). The Sub-committee agreed that this was a possible solution, but only if the effect of the Protocol were confined to raising the limits
of liability. If, for instance, the Rio proposal to revise Article 25 were accepted by the Conference, this solution would be inadequate because of the prejudice which would be caused to nationals of States which did not ratify the Protocol but were parties to the Warsaw Convention.

Solution (E). In the view of the Sub-committee, the best way of ensuring that no State is bound by conflicting obligations is the adoption of a new instrument replacing the Warsaw Convention. The new instrument need be no more than a text which, while preserving the unamended part of the Warsaw Convention, would include any or all of the substantive amendments which have already been agreed at Rio. Alternatively, the present text of the Warsaw Convention could be reproduced as an Annex to the new instrument with another Annex showing the amendments. The new instrument should come into force only at a certain time (say twelve months) after ratification by a specified number of States, and should include a provision that any State ratifying or adhering to the new Convention must denounce the Warsaw Convention with effect from the date on which the new Convention becomes effective with respect to that State.

The Sub-committee recommends Solution (E) and makes two further observations:

(i) The number of ratifications: The method of a Protocol would have the advantage of enabling States to accept an amended Convention while leaving the unamended Convention in force between themselves and those States which were not willing to amend it. The Sub-committee realizes that if its proposed solution (E), involving denunciation of the existing Convention, were adopted, the States which become parties to the new Convention, may, at any rate for some time, be less in number than the 43 States which at present are parties to the Warsaw Convention, and will cease to share a common regime with those States which do not accept the new Convention. This, however, is an inevitable risk. The Sub-committee believes that the fact must be faced that it is not practicable to do more than raise the limits of liability under the present Convention by any method unless a very substantial number of States agree to the changes. For that reason it recommends that a new Convention should not come into force until ratified by a large number of States;

(ii) Language of the texts: The Sub-committee considered the question whether, inasmuch as the existing Convention is in French, a new instrument adopted as Solution (E) ought to be only in French, rather than in the three official languages of ICAO. The Sub-committee is of the opinion that if, in adopting Solution (E), the method preferred were the preparation of a new instrument which included by reference the existing Warsaw text, the new instrument could be in an authoritative French text, with official Spanish and English translations recommended for use by Contracting States. If, on the other hand, the method preferred were the preparation of a self-contained instrument it would probably be drawn up in all the three official languages of ICAO, each text being equally authoritative. This would obviate a difficulty involved in being obliged to rely upon a single French text as in the present Warsaw Convention, but on the other hand would carry the risk of conflict between the three authoritative texts.

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)
TECHNICAL CONFERENCE

The 8th Technical Conference of the International Air Transport Association was held at San Juan, Puerto Rico, between April 25th and May 7th, 1955. 169 delegates, representing 25 IATA member airlines and 42 other international organizations, government departments, implementing agen-
cies, research establishments, air forces and manufacturers, thoroughly examined, over the two week period, problems of long distance air transport operations.

In looking to the problems of the future the Conference drew on the experience of the United States and Canadian Air Forces whose delegates were able to speak as common users with the airlines of many long distance routes and to contribute a wealth of information based upon their experience with extremely modern equipment possessing many characteristics similar to those of future civil aircraft.

André Priester, Vice President of Pan American World Airways and Vice Chairman of the IATA Technical Committee was chairman of this year's conference which concluded early in May and among the many well known aviation figures who attended the Conference were: Lord Douglas of Kirtleside, Chairman of BEA and Member of the IATA Executive Committee; Air Commodore Mann, Director General of Navigational Services in the U.K.; and Mr. Walter Benaghi, Chairman of the ICAO Air Navigation Commission.

As on all similar occasions during the past ten years, the Technical Conference was organized by Stanislaw Krzyczkowski.

The subject of long range operations was selected as the principal item of wide international interest for examination in the open forum where all interested parties are encouraged to participate in a completely informal manner. The Conference considered in detail the characteristics of long range aircraft of the next decade and their requirements for communications, navigational aids, meteorological services, air traffic control, etc.

Navigational Aids. The discussions indicated that with future long distance navigational aids greater emphasis will need to be placed on system reliability and the ability to obtain the required information under all conditions of flight and static. Accuracy requirements were shown to be a function of air traffic control requirements and hence could only be stated with precision for a particular area after first analyzing the anticipated traffic densities of different aircraft types and the system of control to be used.

As a supplement to long distance radio navigational aids much interest was displayed in self contained, airborne navigational aids which are independent of ground stations and which it is hoped will become available for civil use within the next five to ten years. One such aid which was examined—within certain security limitations—was the “inertial navigation” system. This system employs the physical properties of near perfect gyroscopes to provide a continuous indication within the aircraft of true horizontal and vertical. In conjunction with these references, accelerometers are then used to determine the instantaneous velocity of the aircraft and the distance and direction it has travelled. Finally computers can be added which will permit presentation of the navigational information in any required pictorial or symbolic form.

The maximum accuracy possible with inertial navigational devices was not disclosed but the hope was expressed that errors would not exceed one or two miles in position per hour flown. Since such errors would be independent of the distance flown, aids of this type would be increasingly attractive as aircraft speeds advance. The Conference strongly underlined the point that there are many sound operational reasons why inertial and other self-contained aids will not eliminate the continuing need for ground-referenced radio navigational aids.

Air Traffic Control. It was felt that the operating characteristics of future turbine powered aircraft will introduce greater inflexibility in the choice of optimum enroute altitudes and consequently that as traffic increases
and schedules become more complex, it will be necessary to make extensive use of aircraft separation in the horizontal plane. This requirement in turn will necessitate the development of navigational aids that will permit air traffic control procedures to be based on lateral and longitudinal separation standards which can be safely reduced to an absolute minimum.

Communications. It was felt that in the future there will be a general requirement to be able to call an aircraft in flight selectively so relieving the aircraft commander or other crew members of the need to maintain a continuous listening watch for long periods, often under severe static conditions. Airlines already employing the "Selcal" system of selective calling in the Pacific area reported themselves to be highly satisfied with it and compared the facility with the convenience of a household automatic telephone.

Other communications trends foreseen by the Conference included greater use of VHF to reduce the load on the limited number of HF channels available to civil aviation. This was felt to apply both to mobile communications and to relatively long distance ground-to-ground fixed communications where high powered forward scatter principles can now extend the range of VHF very substantially beyond the visual horizon.

In the field of communications procedures it was felt that considerable attention should be given to simplifying long range position reports and eliminating the redundant elements from messages passed over the Aeronautical Fixed Telecommunications Network. Both of these matters are to be the subject of further special studies within IATA.

Runway Requirements. The Conference expressed the view that civil aircraft to be operated in the next ten to twenty years will require runways at major international terminals capable to accepting aircraft which might weigh up to 300,000 pounds or more. Such aircraft may also necessitate runway lengths of 8,000 to 10,000 feet under standard sea level conditions, together with appropriate cleared areas. The Conference recognized that manufacturers are studying all possible means of reducing take-off runway length requirements and that among possible solutions which will be more closely studied in the future are means of assisted take-off and in-flight refuelling.

New IFR Requirements. In addition to the consideration of the problems of long distance operations, the IATA 8th Technical Conference considered several other items in more formal sessions. Important among these was a review of the long standing criteria of visibility and distance from cloud which determine whether a pilot may proceed under visual or instrument flight rules. The Conference concluded that at present day aircraft speeds, flights should be permitted under visual rules only when the pilot's forward visibility is at least five miles, his horizontal lateral distance from cloud is 2 1/2 miles and he is either 2,000 feet above cloud or 1,000 feet below cloud.

The Conference also reaffirmed the IATA view that as aircraft speeds increase further, it will be essential for all air traffic to be subjected to positive control at all times irrespective of visibility and cloud conditions. However, it was recognized that this desirable goal cannot be reached immediately and the above revised criteria for differentiating between Visual and Instrument Flight Rules would bring a greater percentage of aircraft under the jurisdiction of Air Traffic Control under marginal weather conditions.

International Legislative Problems. One aspect of the Technical Conference having considerable economic significance was a free exchange of views and experience between the airline representatives present on all the problems related to legislative restrictions as they affect civil air operations throughout the world. A comprehensive review was made of the difficulties which are being experienced and many specific problems were considered.
In some cases it was found that problems arose from variations in interpretation of ICAO Annexes and Procedures; in others it was evident that excessively restrictive views were held by some authorities on the need for governing airline operations by legislation.

The Conference formulated a number of recommendations—later approved by the IATA Technical Committee—which it is hoped will be the subject of future discussions with ICAO and States.

**INSTITUTE OF INTERNATIONAL AIR LAW, McGill UNIVERSITY, MONTREAL**

Professor John C. Cooper has resigned his position as Director of the above Institute at Montreal which, of course, works within the framework of the Law Faculty of McGill University. This position has been accepted by Dr. Eugene Pepin, formerly Chief of the Legal Bureau of ICAO, who will take up his duties early in September in preparation for the next session's work. Professor Cooper will continue to lecture on Public International Air Law and Mr. J. G. Gazdik will give lectures on Carrier's Liability in International Law.

During the Session 1954/1955, ten students followed the Course on International Air Law; they represented Canada, England, Pakistan, Scotland and U.S.A.

**OBSERVATIONS AND COMMENTS ON FOREIGN CASES**

*Jean Lacroix v. The Queen* 1954 Ex. C.R. 69 (Dec. 29, 1954)

*Lacroix v. The Queen* goes a long distance towards settling a Canadian landowner's rights in the airspace over his property. In that case the supplicant owned vacant land close to Dorval Airport and used it intermittently for agricultural purposes. The Crown having expropriated part of the supplicant's land and some land belonging to a neighbor, for installation of an approach lighting system to one of the airport runways, the supplicant claimed damages on the ground that a flightway was thereby established and the flying of planes over the supplicant's land was an interference with his rights of ownership and a disturbance of the full enjoyment of the property.

In a very interesting judgment, Mr. Justice Fournier of the Exchequer Court of Canada considered Section 414 of the Civil Code of the Province of Quebec which states “that the owner of the soil is also the owner of what is above and what is below.” He related this very specific statement to the principle expressed in the Code Napoleon and the Coutume de Paris, and to the maxim *cujus est solum, ejus est usque ad coelum*. He noted in particular the tendency in France, the United Kingdom and the United States, to restrict the interpretation of this maxim and rule of law “always keeping in mind that the owner is entitled to full enjoyment of his property.” Rejecting the contention that air and space were capable of ownership, he held that they fall in the category of *res omnium communis*, and that the owner had a right which was limited by the extent to which he could possess the air and space for the use and enjoyment of his land.

The case might be distinguishable on its facts; however, it is a powerful indication that Courts will tend to reach a conclusion reasonable to the landowner without interfering with the progress of aviation. It is particularly noteworthy for the utilization of legal experience in other countries and for the interpretation of the wording of a pre-aviation statute to conform to post-aviation practice.

MARGUERITE E. RITCHIE