Ratification of the Hague Protocol; Its Relation to the Uniform International Air Carrier Liability Law Achieved by the Warsaw Convention

Paul Reiber

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RATIFICATION OF
THE HAGUE PROTOCOL; ITS RELATION
TO THE UNIFORM INTERNATIONAL AIR
CARRIER LIABILITY LAW ACHIEVED
BY THE WARSAW CONVENTION

By Paul Reiber

A.B., 1935, Nebraska Wesleyan University; LL.B., 1940, Harvard
Law School. Member Massachusetts and Virginia Bars. Assistant to
the General Counsel, Air Transport Association of America.

The United States must soon choose whether it will continue to
support uniformity in the international law regulating the liaibil-
ities of air carriers to their customers or encourage diverse national
rules to be applied. This choice is required by action taken to amend
the existing international agreement, the Warsaw Convention, under
which a uniform code now applies to the vast majority of the world's
air traffic. The amendment by the Protocol signed at the Hague in
September of 1955, poses the question whether we want to maintain
the uniformity now in effect. Failure of the United States to ratify
would permit at least two sets of international rules to become effec-
tive—the Protocol rules between the countries ratifying it and the
present Warsaw rules remaining in effect between the countries not
ratifying the Protocol. A worse possible result of a departure from
the usual United States policy supporting cooperation in arrange-
ments.

1 The Convention's official designation is International Convention for the
Unification of Certain Rules Relating to International Transportation by Air. It
was ratified by the Senate on June 15, 1934 and was proclaimed by the President,
June 27, 1934, 49 U.S. Stat. at L. Part 2, p. 3000; the English translation begins
at p. 3014.

2 In general, it has been United States policy to foster and encourage inter-
national agreement in matters affecting international air transportation. This
policy was reaffirmed by the 1954 statement of Civil Air Policy by the President's
Air Coordinating Committee (Gov. Printing Office, May 1954), pp. 37-8:

"Foreseeing the need for world-wide cooperation among nations for
the orderly advancement of post-war international civil aviation, the
United States in 1944 was instrumental in drawing up the Convention on
International Civil Aviation and has since then played a leading role in
the International Civil Aviation Organization (ICAO) established under
this Convention. The accomplishments of ICAO to date, particularly in
promoting safety of international aviation and in facilitating international
air commerce, have fully demonstrated the need for the continuance of
cooperative efforts in fostering the development of international civil
aviation.

"1. THE UNITED STATES CONTINUES TO SUPPORT THE
INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO),
AND PROPOSES THAT ITS FUTURE ACTIVITIES BE CONSIST-
ENT WITH THE FOLLOWING OBJECTIVES: (Emphasis in the
original.)

"D. THE ADOPTION OF CONVENTIONS ON INTERNATIONAL
AIR LAW NEEDED IN CONNECTION WITH INTERNATIONAL
AIR OPERATIONS." (Emphasis in the original.)

For a discussion of the importance of international agreements to U. S. intern-
national air transport, see also the report of the Senate Interstate and Foreign
Commerce Committee on the McCarran Bill to amend the Civil Aeronautics Act,

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RATIFICATION OF THE HAGUE PROTOCOL

ments vital to international air transport, is the result advocated by some of refusing to ratify the Protocol and denouncing the basic convention. It is the danger of action in this direction that prompts a review of the Warsaw Convention, the Hague Protocol and their importance to international air commerce.

This paper contends that the advantages of uniform rules in this field of international law are so substantial to American passengers, shippers and air carriers, that American interests require the continuance of the uniform code established by the Warsaw Convention, and require, therefore, the ratification of the Hague Protocol.

WARSAW PROVISIONS AND AMENDMENTS

The Warsaw Convention standardizes important aspects of the obligations and rights of, and between, air carriers and passengers and shippers in international air transportation. For example, minimum contents of documents such as the passenger ticket, baggage check and air waybill are specified in Articles 3, 4 and 8 of the Convention. The basis for, and the maximum amount of, the liability of the carrier for injury, death or damage are prescribed in Chapter III; while this limits the amount recoverable, for example, for a passenger's injury or death to $8,292, it also prevents the establishment of a lower limit by statute or tariff rule (Article 23). It permits a higher limit to be set by agreement (Article 22 (1)) and permits the court to award a higher amount when the carrier's fault is equivalent to "willful misconduct" (Article 25). The Convention also prescribes which carrier may be sued and where (Article 28), the time during which complaint must be made (Article 26), and the time during which action must be brought (Article 29). Article 30 specifies the rules applicable when transportation is performed by successive carriers.

The Protocol signed at the Hague in September, 1955, would make several changes. The limit on recoveries from air carriers for personal injury and death would be doubled to $16,584 (Article XI). The plaintiff could be allowed to recover attorneys' fees and court costs under specified circumstances in addition to the judgment (Article XI). The obligations of the carrier to provide certain information on transportation documents would be clarified and simplified (Articles III, IV, and VI). The provisions permitting recoveries to exceed $16,584 would be clarified (Article XIII).

The Protocol may not amend the Convention as extensively as some may wish, but the history of the amending process, the minute and extensive examination given these amendments and dozens of other proposals over a long period, makes clear that other or additional proposals will not receive serious consideration now. Proposals were made to amend the Convention before 1940 by both the International Chamber of Commerce and IATA, but efforts to amend did not start on an intergovernmental level until after the Second Great War and

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8 The Protocol is discussed in this issue by Calkins.
then it took almost a decade to prepare amendments for ratification. In 1946 CITEJA\(^4\) met to consider amendments in January, July and November. The Legal Commission of the Provisional International Civil Aviation Organization debated amendment in May and June of that year. The Legal Committee of ICAO thereafter considered amendments or had revisions in various stages of preparation in each succeeding year. Several drafts were prepared by Major K. M. Beaumont, the United Kingdom representative on the Committee, completely rewriting the Convention. These total revisions required interested governments to review existing articles and proposals to add new ones. Some governments, particularly the United States, distributed these drafts and comments to organizations of lawyers, government agencies, and interested carriers for review\(^5\) and suggestions. After such wide consideration, the Ninth Session of the Legal Committee of ICAO in 1953 prepared the “Rio” draft which was considered by the Convention at the Hague in September of 1955. After this protracted scrutiny, study and debate, it seems clear that the amendments included in the Hague Protocol are as many and as good as can be agreed upon by negotiating nations for the present. The choice before the United States, therefore, is narrowed. It is no longer profitable to consider additional or different amendments of the Warsaw system; if we want a uniform system, as we believe we do, these amendments to the Warsaw Convention constitute the system we can bring into effect in the reasonably near future.

THE UNIFORMITY ACHIEVED

The feature of the Warsaw Convention from which flows the greatest benefits for travelers, shippers and carriers, is the reduction of what could be an extensive variety of rules of liability in international air transportation into a simplified and standardized code. The potential diversity of the rules without the Convention can be illustrated on a relatively short international trip. Thus if a United States citizen purchased a ticket in New York to travel from New York to Cairo via BOAC Sabena and Air France, he would, in the course of the journey, pass through the air space of at least nine jurisdictions and use the carriers of three nations. If he were injured in Italy and his baggage


\(^5\) The articles discussing the amending proposals which have appeared in this Journal are proof of the public discussion given the amendments in the past decade. Knauth, “Some Notes on the Warsaw Conv. of 1929” (1947), 14 J. of Air Law & Comm. 44.


were damaged on the journey, it would be uncertain and baffling as to which law governs his rights, which law determines the liability of the carriers, which carrier should be the defendant, and how it can be brought to trial. Very different answers to each of these questions might be given if he sues in Britain, which is the home of BOAC, or Belgium, the home of Sabena, or in Italy, the site of the accident, or in France, the home of Air France, or in the United States, where the passenger is domiciled and started his journey.

In cargo transport the variety of rules could be even more perplexing. Thus a shipment of watches from Switzerland to Peru might pass through the air space and therefore the legal jurisdiction of France, England, Ireland, Canada, the United States, Panama, Colombia, Equador and Peru. On this journey, the shipment could be carried on four carriers. Presumably by designating the route, the shipper, carrier and consignee could try to anticipate the possible application of the laws of those countries to the contract of carriage and provide for the foreseeable contingencies. But even such a prodigious effort would not have avoided the problems in a recent case where the watches were carried beyond Peru to Bolivia.6

The diversity of law and the uncertainty of application, so much a part of international commerce, is familiarly described by a leading maritime lawyer:

"A learned Netherlander, Professor R. P. Cleveringa of the University of Leyden, has recently discussed the same problem as it relates to ocean shipping, and he puts this case: An Antwerp merchant concludes, in London, a contract with a French shipowner to transport 100 cases of crystalware from Rotterdam to New York in a French-flag vessel. So the problem concerns France, England, Holland and New York. It is by no means unusual to have a business deal angled in four or more states, provinces, Dominions or Nations. The bill of lading, issued in Rotterdam, states that the carrier's liability shall not exceed 100 florins per case. On arrival, one case is missing, and its true market value is 2,000 florins. How much shall the French carrier pay the Belgian merchant? In London, where the contract was made, the bill of lading limitation is regarded as valid, and the merchant gets 100 florins. Under French law, he gets 50,000 francs, which is 200 florins. Under Dutch law, he gets 600 florins. And under New York law, he gets $500, which is about 1,300 florins. Here are four answers to one question concerning an international transport of goods. If private international law exists as a single law, the question should have one answer, and three of the four answers should be wrong. If the law differs according to the independent national views of the various nations, the question is capable of 88 or 89 answers—one for each nation. And as several of the nations are federal unions of sovereign States, cantons, provinces, there could be as many as 200 answers as the world is politically ordered today."7

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6 The fact that Bolivia is not a party to the Warsaw Convention accentuates United States interest in extending the acceptance of the uniform rules.
A parallel situation which illustrates both the problem and the solution was this country's experience before and after the Carmack Amendment of 1906\(^8\) to the Interstate Commerce Act. Before that amendment, the shipper, when his traffic moved over the lines of several rail carriers through the jurisdiction of two or more states, had to look to state laws to recover damages. The difficulties of the shipper seeking recovery in such cases were so great they were termed “almost insuperable” by the courts.

“It has frequently been explained by the courts that the purpose of the Carmack Amendment was to do away with the difficulties shippers had encountered in seeking to recover against carriers for damages to property carried over more than one line of railroad. The obstacles met by a shipper in attempting to locate responsibility for damages to property shipped over different lines of railroad were almost insuperable, and frequently the shipment, as in this case, was not only over several lines, but for long distances and in several different states. To afford a remedy for such a condition Congress gave the shipper the right to institute an action against the carrier receiving his property for an interstate shipment, and to recover damages occurring anywhere in the course of the transportation, leaving it to the carrier receiving the property to recover from the carrier on whose line or lines the damage or injury occurred.” Looney v. Oregon Short Line R. Co., 271 Ill. 538, 111 N.E. 509, 510 (1916).

The United States Supreme Court commented on this problem as follows:

“Neither uniformity of obligation nor of liability was possible until Congress should deal with the subject. The situation was well depicted by the supreme court of Georgia in Southern P. Co. v. Crenshaw Bros. 5 Ga. App. 675, 63 S.E. 865, where that court said:

“Some states allow carriers to exempt themselves from all or a part of the common-law liability by rule, regulation, or contract; others did not. The Federal courts sitting in the various states were following the local rule, a carrier being held liable in one court when, under the same state of facts, he would be exempt from liability in another. Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holding that it was practically impossible for a shipper engaged in a business that extended beyond the confines of his own state, or a carrier whose lines were extensive, to know, without considerable investigation and trouble, and even then oftentimes with but little certainty, what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another. The congressional action has made an end to this diversity, for the national law is paramount and supersedes all state laws as to the rights and liabilities and exemptions created by such transactions. This was doubtless the purpose of the law...” Adams Exp. Co. v. Croninger, 226 U.S. 491, 57 L. ed. 314, 319-20 (1913).

If differences between states whose laws are based on the common law, as is true in our country, have posed problems for shippers which were “almost insuperable”; it can safely be concluded that the enforce-

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ment of rights in nations as diverse as those flown over in world air transport, would impose even more prodigious burdens.

American concern about the lack of uniformity in international law on this subject, before the Warsaw Convention was adhered to by the United States, was expressed by the Aeronautical Chamber of Commerce of America, Inc., in its recommendations to the Secretary of State. It recommended adherence to the Convention "thus alleviating the chaotic conditions which now confront American international air transport operators and the public with respect to matter coming within the purview of the Convention."9

The desirability of uniformity was explained by Judge Steuer in his charge to the jury in *Froman v. Pan American* 1953 U.S. Av. R. 1, 4 (1953) where he said:

"The general law in regard to the happening of an accident is that it is governed by the law of the place where the accident happened, and that has this peculiar consequence: that the laws of different places being very different, if an accident happened on one part of the flight the passengers might have a perfect right to recover and if the same thing happened in a different part of the flight they might not have any rights whatsoever.

"That was the situation that prevailed during the very early days of international flights, and it was found for various reasons that that was an entirely unsatisfactory condition . . .

"When that situation became apparent the representatives of thirty different nations met to draft a code to make the law uniform as regards flights of this character and to avoid the consequences of having different laws in different places. That meeting was held in Warsaw and the result of it is called the Warsaw Convention."

The goal of establishing a uniform international code on the subject has been achieved with considerable success; both in terms of the number of jurisdictions which apply it and the world's airlines which are governed by it.

Its provisions are agreed to by 107 jurisdictions, made up of 45 nations and 62 dependencies.10

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9 Message from the President of the United States transmitting the Warsaw Convention, April 9, 1934. 73d Congress, Exec. G.

10 The parties to the Warsaw Convention are:

- Argentina
- Australia
- including Nauru,
- New Guinea,
- Norfolk Island,
- Papua
- Belgium
- including all territories
- subject to the sovereignty or authority of Belgium
- Brazil
- Bulgaria
- Burma
- Canada
- Ceylon
- Czechoslovakia
- Denmark and the Faroe Islands
- Egypt
- Ethiopia
- Finland
- France
- including territories whose external relations are under her authority
- Germany
- Greece
- Hungary
- Iceland
- India
- Indonesia
- Ireland
- Israel
- Italy
- including territories under Italian administration
- Japan
The extent to which the important international airline competitors of the U. S. flag lines are governed by the Warsaw Convention can be seen by examining the nationality of the airlines operating on the important international air routes. Across the Atlantic, between the United States and principal European cities, thirteen scheduled air carriers operate, and each of them flies the flag of a country which is a party to the Warsaw Convention.\textsuperscript{11}

Across the Pacific routes, between the United States on the one hand and Tokyo, Manila, and Melbourne on the other, five scheduled

<table>
<thead>
<tr>
<th>Country</th>
<th>Notes</th>
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<tbody>
<tr>
<td>Liberia</td>
<td>(d) Togoland under United Kingdom trusteeship</td>
</tr>
<tr>
<td>Liechtenstein</td>
<td></td>
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<tr>
<td>Luxembourg</td>
<td></td>
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<tr>
<td>Mexico</td>
<td></td>
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<tr>
<td>Netherlands</td>
<td>Netherlands Antilles</td>
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<td></td>
<td>Netherlands New Guinea</td>
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<tr>
<td>Surinam</td>
<td></td>
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<tr>
<td>New Zealand</td>
<td>including Cook Islands, Tokelau Islands and Western Samoa</td>
</tr>
<tr>
<td>Norway</td>
<td>Including all territories subject to the sovereignty or authority of Norway</td>
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<tr>
<td>Pakistan</td>
<td></td>
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<tr>
<td>Philippines</td>
<td></td>
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<td>Poland</td>
<td></td>
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<tr>
<td>Portugal</td>
<td></td>
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<tr>
<td>Rumania</td>
<td></td>
</tr>
<tr>
<td>Spain, including:</td>
<td>colonies</td>
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<td></td>
<td>Spanish Morocco</td>
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<tr>
<td>Sweden</td>
<td></td>
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<tr>
<td>Switzerland</td>
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<tr>
<td>Union of Soviet Socialist Republics</td>
<td></td>
</tr>
<tr>
<td>United Kingdom and</td>
<td>Aden (Colony and Protectorate)</td>
</tr>
<tr>
<td></td>
<td>Bahamas</td>
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<td></td>
<td>Barbados</td>
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<td></td>
<td>Basutoland</td>
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<td></td>
<td>Bechuana and Protectorate</td>
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<td></td>
<td>Bermuda</td>
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<td></td>
<td>British Guiana</td>
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<tr>
<td></td>
<td>British Honduras</td>
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<tr>
<td></td>
<td>British Solomon Islands Protectorate</td>
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<tr>
<td></td>
<td>Cyprus</td>
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<tr>
<td></td>
<td>Falkland Islands and Dependencies</td>
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<tr>
<td></td>
<td>Fiji</td>
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<tr>
<td></td>
<td>Gambia (Colony and Protectorate)</td>
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<td></td>
<td>Gibraltar</td>
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<td></td>
<td>Gilbert and Ellice Islands Colony</td>
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<td></td>
<td>Gold Coast—</td>
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<tr>
<td></td>
<td>(a) Colony</td>
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<td></td>
<td>(b) Ashanti</td>
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<td></td>
<td>(c) Northern Territories</td>
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<tr>
<td></td>
<td>Yugoslavia</td>
</tr>
<tr>
<td></td>
<td>I. Documentation, The Hague Conference 69, ICAO (1955). In addition to the countries listed in that publication, Union of South Africa ratified the Convention on March 22, 1955, Venezuela and Egypt adhered to it on June 15, 1955 and Sept. 6, 1955, respectively.</td>
</tr>
</tbody>
</table>

\textsuperscript{11} The thirteen carriers are PAA and TWA (U. S.), KLM (The Netherlands), Air France (Fr.), BOAC (U. K.), SAS (Norway, Sweden and Denmark), Sabena (Belgium), Swissair (SW), El al (Israel), Iberia (SP), Lufthansa (Germany), LAI (Italian) and Loftleidir (Iceland), Official Airline Guide, Nov. 1956, p. D-31.
airlines are in operation and each of these also flies the flag of a country which is a party to the Warsaw Convention.12

Only on the Caribbean air routes between the United States and Latin America is this unanimity not maintained. Twenty-nine airlines operate between the United States and points to the south, twenty of which are nationals of countries which are parties to the Warsaw Convention.13

Another important measure of the uniformity which has been achieved by the Warsaw Convention would be to determine the proportion of the world's international air traffic which is governed by its rules. The exact proportions cannot be determined from available sources because while the Warsaw Convention applies to contracts for carriage between signatory countries, it also applies to other traffic, such as passenger traffic moving from a signatory country to a non-signatory country and which is traveling on a round trip ticket. Nevertheless, an interesting facet of the traffic affected can be deduced from the airline revenues reported to ICAO. Forty-four airlines operating international air transportation services reported revenues for 1954 of $1,989,000,000; 99.98% of these revenues were earned by 42 carriers of countries which are parties to the Warsaw Convention.14

While all of the revenues of these carriers were not necessarily earned from traffic which would be governed by the Warsaw Convention, it would seem clear that the Warsaw rules served as the basic liability rules for most of the world's international air traffic.15

13 Official Airline Guide, Nov. '56, p. D-26. The nine carriers which are nationals of non-Warsaw countries are: Avianca (Col.), Cubana and "Q" Airways (Cuba), AREA (Ecuador), TACA (home office listed in Louisiana, but a carrier of El Salvador), APA (Panama), LACSA (Costa Rica), CDA (Dominican Republic) and TAN (Honduras).
14 ICAO, Digest of Statistics No. 55, 1954, p. 36.
15 Additional traffic is governed by the Warsaw rules because several states apply some or all of the rules of the Warsaw Convention to their domestic air transport. These countries include Belgium, Greece, Luxembourg, Netherlands, Norway and the United Kingdom. Doc. 7450-LC/136, Vol. II, Annex VI, Appendix VII, Ninth Session of the Legal Committee, Rio De Janeiro, 25 August-12 September, 1953. Another measure of the reach of the Warsaw provisions is that in seven of the eight U. S. airline accidents, involving fatalities, in scheduled international air transportation, in which the accident occurred in a foreign jurisdiction and therefore would have been subject to the tort law of that jurisdiction, the place of the accident was a Warsaw country. Only the 1947 accident in Syria occurred in a non-Warsaw country. The accidents of the last 10 years referred to are:

<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>October 3, 1946</td>
<td>Stephenville, Newfoundland</td>
</tr>
<tr>
<td>December 22, 1946</td>
<td>Rineanna, Eire</td>
</tr>
<tr>
<td>June 19, 1947</td>
<td>Mayadine, Syria</td>
</tr>
<tr>
<td>April 15, 1948</td>
<td>Shannon, Eire</td>
</tr>
<tr>
<td>August 31, 1950</td>
<td>Cairo, Egypt</td>
</tr>
<tr>
<td>June 22, 1951</td>
<td>Enroute Monrovia, Liberia, Africa</td>
</tr>
<tr>
<td>April 29, 1952</td>
<td>Carolina, Brazil</td>
</tr>
<tr>
<td>July 27, 1952</td>
<td>Nr. Rio de Janeiro, Brazil</td>
</tr>
</tbody>
</table>

Three occurred over the High Seas, so the U. S. could apply its own law

<table>
<thead>
<tr>
<th>Date</th>
<th>Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 11, 1951</td>
<td>Enroute Miami, Fla.</td>
</tr>
<tr>
<td>August 10, 1952</td>
<td>Over South Island, Atlantic Ocean</td>
</tr>
<tr>
<td>March 26, 1955</td>
<td>Pacific Ocean 35 Mi. from Newport, Oregon</td>
</tr>
</tbody>
</table>
REASONABLENESS OF THE UNIFORM RULES

To obtain agreement among the participating nations, it was not reasonable to expect international acceptance of United States legal views on all issues; but it is a laudable feature of the Convention that the rules it codified are not so unreasonable by American standards as to make them unacceptable to us. Some of the rules adopted are more beneficial to American claimants against carriers than would be the rules applicable in foreign countries in the absence of the Convention; and in several instances the rules made effective by the Warsaw system benefit the claimants against carriers more than the rules normally prevailing in the United States.

One important respect in which the rule of substantive law applied to air transport by Article 23 of the Convention is preferable to what might otherwise apply, relates to whether a carrier can stipulate in the contract of carriage that its liability is limited to a low figure or that it will be exempt from liability for negligence. Before the adoption of the Warsaw Convention, the carrier could contract with the passenger to this effect in several countries with which the United States has a large volume of air traffic. Not only was that rule the law in the United Kingdom, and other English speaking countries such as Canada, Australia and the Union of South Africa; but it was effective in widely scattered countries and under otherwise differing legal systems, such as in France, Spain, Portugal, Bulgaria and Chile. The United States does not permit such contracts; so the Convention by adopting the rule consistent with United States law applies a rule preferred by United States policy and prevents, to the extent the Convention applies, the application of the opposite rule to United States citizens abroad.

A second important rule applied by the Convention shifts the burden of proof from the plaintiff to the carrier. Thus, Article 17 provides that the carrier "shall be liable for damage" and Article 21 relieves the carrier "if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him to take such measures." This relieves the plaintiff from the burden he has under the law of the United States to prove the carrier was negligent and the negligence caused the damage. This advantage would be valuable in any case, but in aviation litigation it is of significant importance because of the difficulty of proving negligence in airplane accidents. Dean Wigmore, after studying a number of aviation accidents in 1937, concluded:

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“that in 20% of the accidents which have thus far occurred would it have been possible for the plaintiff to find and produce provable evidence of the real cause of the accident.”

There are other rules applied internationally by the Convention which are advantageous to United States citizens because they are preferable to the rules which might otherwise apply to international air transport. Thus, Article 30 (3) gives the passenger or consignor the right of action against the first carrier as regards baggage or goods and gives to the passenger or consignee rights against the last carrier with respect to such traffic. This is preferable to a rule much less convenient which would limit the rights with respect to claims for damage to baggage or cargo only against the carrier which damaged the property. The latter rule prevailed in the United States until changed by the Carmack Amendment to the Interstate Commerce Act in 1906. The period during which action must be brought against the carriers, specified in Article 29 of the Convention, is two years; identical with the period allowed in 29 states in the U.S. and a longer term than is permitted under the statutes of ten states.

In addition to the advantages gained by United States passengers and shippers under the Warsaw Convention, advantages also accrue to American flag airlines. By standardization, the rules of law that would otherwise be a confusing uncertainty, are transformed into a reasonably knowable and insurable responsibility. An important benefit to our carriers is that by standardizing carrier liability to customers, it prevents foreign flag airlines from obtaining a competitive advantage in this area of their responsibilities.

The Warsaw Convention, desirable as it is for the sake of uniformity, does not carry with it rules so alien to American law as to deprive American claimants of important rights in the fields thus far discussed. Rather, from the point of view of American plaintiffs, the Convention applies, from among the varying alternatives in effect in many of the nations, relatively desirable rules and in several instances applies rules more advantageous for claimants than the rules applied in the United States.

One provision of the Convention, however, has been severely criticized in the United States—the limit on the liability of carriers for injury or death, and should be discussed in more detail.

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18 Sweeney, Report to the Civil Aeronautics Board of a Study of Proposed Aviation Liability Legislation, 111 (1941). The difficulties of plaintiffs is illustrated in Lobel v. American Airlines, 182 F.2d 217 (1951) (Cert. Den.) 342 U.S. 945 96 L.Ed. 703 (1952). There the plaintiff won a $31,000 judgment with the help of res ipsa loquitur, but when the case was sent back for a new trial because of an error in the charge to the jury as to res ipsa loquitur, and the plaintiff tried to prove negligence, he failed to prove it so the verdict went for the defendant. Lobel v. American Airlines, 205 F.2d 127 (1953). The doctrine of res ipsa loquitur does not shift the burden of proof, as interpreted by the majority of courts in the U.S. The plaintiff alleging negligence must prove it. Sweeney v. Ewing, 228 U.S. 293 (1913). See also 92 ALR 653 (1934).

19 The Martindale Hubbell Law Directory (1956). Nine states set the period at more than two years.
LIMITATION OF THE CARRIER’S LIABILITY FOR PERSONAL INJURY OR DEATH OF PASSENGERS

The provision in the Warsaw Convention and the Hague Protocol which stirs the greatest controversy and overshadow, in the debate of those agreements, all other aspects of the Convention or the Protocol, is the limitation on the liability of carriers for personal injury.

The Convention in Article 22 (1) limits the carriers' liability per passenger to 125,000 gold francs, approximately $8,292. This would be increased by the Protocol to double that amount or approximately $16,584.

The Protocol, however, has an additional provision which permits the plaintiff to obtain an award of an additional sum of an unspecified amount for court costs and other expenses of the litigation incurred by him.20 The additional award may be made "in accordance with its (the court's) own law..." Since the United States courts generally do not recognize attorneys' fees as costs, this award, above the judgment, will be available only after changes in rules of court or in statutes are made.21 These, however, are domestic matters which can be arranged without further international agreement, so the Protocol adds the refinement that if the plaintiff must sue for recovery, the carrier may be required to pay the expenses of the litigation which would include the attorney's fees and other expenses incurred in the litigation.

The criticisms of the limit have been leveled primarily at the limit of $8,292 presently in the Warsaw Convention.21a When the Conference at the Hague doubled the limit to $16,584, the delegates were making what they regarded as a generous concession to United States views.22 We contend, therefore, that the major objection to the limit has been met so far as it is practical to do so, and furthermore, that the increased

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20 The Hague Protocol in Article XI provides in Paragraph 4:
"The limits prescribed in this article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

21 As a general rule, in the absence of any contractual or statutory liability therefore, attorneys' fees and expenses incurred by the plaintiff or which the plaintiff is obligated to pay are not recoverable as an item of damages either in ex contractu or an action ex delicto. See Parks v. Booth, 102 U.S. 96, 26 L. Ed. 54 (1880); Guam Service Games v. Shelton, 126 F. Supp. 335 (1954). But statutory provisions authorizing recovery of attorneys' fees and expenses of litigation as a part of the costs in particular classes of actions have been sustained. Sioux Co. v. National Surety Co., 276 U.S. 237, 72 L. Ed. 547 (1928).

21a The American Bar Association in 1947 (72 A.B.A. Rep. 98, 164) and 1950 (75 A.B.A. Rep. 413-14) adopted resolutions to urge that consideration be given to an increase in the limit above the $8,292. A joint resolution was introduced in the 83d and 84th Congress (H.J. Res. 370 and H.J. Res. 191, respectively) that the CAB take appropriate steps to amend the Warsaw Convention to increase the limit. The U. S. delegations to the Ninth meeting of ICAO at Rio de Janeiro in 1953 and to the Conference at The Hague in 1955 were under instructions to increase the limit of liability.

limit makes this aspect of the Convention acceptable to the United States on its merits.

An important reason why the limit as proposed in the Protocol should be accepted by the United States is that it provides for American citizens a higher limit on recoveries for personal injury in international air transportation than would apply to Americans under the law of many foreign countries in the absence of the Convention and Protocol. Since Americans injured in foreign countries must look to the law of those countries for the right of recovery and the limit on recovery, if any, our residents must consider what they would face abroad in the event of an accident outside the United States. The listed countries limit the amount of recovery by statute at a limit lower than is prescribed in the Protocol.

Additional countries apply statutory limits lower than those in the Hague Protocol by virtue of their legislation which applies the Warsaw limit of $8,292 to non-Warsaw air transportation. These are Norway, Greece and the United Kingdom. The Warsaw Convention, as amended, has the effect, therefore, for American citizens injured in those countries of substituting for these statutory limits the figure of $16,584.

The amount set in the Protocol is also reasonable when compared with the limit on recoveries applicable under American law to passengers on seagoing vessels. Under the law applicable prior to 1935 in the United States, vessel owners were held liable only to the amount or

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Even if United States citizens suing abroad might in some cases be able to base their suit on the contract of carriage rather than tort law, many would sue in United States courts which would base the recovery on tort law, and apply the law of the jurisdiction where the injury was inflicted. “The measure of damages for a tort is governed by the law of the place where the tort was committed . . . there too was the right to damages created and the measure of them settled. So the measure of damages for death is determined by the law of the place where the fatal injury occurred.” Beale, Conflict of Laws, 1333 (1935).

24 Approximate Country Limit U. S. Equivalent
Belgium 250,000 Frs. $5,000
Brazil 100,000 Cruzeiros 5,405.41
Denmark 18,250 Kr. 2,645
Germany 20,000 Marks 7,460
Italy 160,000 Lira 256
Luxembourg 375,000 Fr. 7,500
Mexico 75,000 Pesos 8,670.52
Netherlands 12,500 Fl. 3,289
New Zealand 5,000 Pounds 13,964
Poland 10,000 Zloty
Sweden 18,250 Kr. 3,509
Costa Rica 20,000 Colons 3,561.88
Guatemala 5,000 Quetzels 5,000


value of the interest of each owner in the vessel and her freight pending at the time of the suit. If the vessel was lost, the owner could conceivably have no liability to the claimants because the vessel had no value at the time of the suit. This was changed by Congress in 1935 so that owners of seagoing vessels had to make available a minimum of $60 per ton “of such vessel's tonnage” for the payment of “losses in respect of loss of life or bodily injury.”

If this formula is applied to a vessel of 30,000 tons, the $60 liability would total $1,800,000. If divided among the approximately 1,000 passengers which can be carried on such a vessel, the liability per passenger would be $1,800. While the recoveries may be higher than $16,600 if the value of the vessel is high at the time of the suit, nevertheless, if the vessel is lost, the liability could be as low as $1,800 per passenger depending on the fund required by the tonnage of the vessel and the number of passengers among whom the fund must be divided.

The Protocol limit is also reasonable when considered in the light of the statutory limits for wrongful death in the United States. The Hague limit is higher than in four states where the limits range between $10,000 and $15,000.

In other states, although the statutory limit is higher, the Warsaw-Hague limit permits a higher net recovery. This results from the aid the plaintiff is given under the Convention and Protocol; first he is spared proving negligence and second, his recovery is not reduced by the attorneys' fees and costs of litigation if pre-trial settlement offers

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26 For a full discussion, see Knauth, 3 Benedict on Admiralty 310, et seq. (1940).
27 § 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; “seagoing vessel.”
   (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.
   (b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased in insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts. (49 Stat. 960 [1936]; 46 U.S.C.A. 183 (a) (b) Pocket Part.)
28 Colorado $10,000 (Col. Rev. Stat., 1955 Cum. Supp. Sec. 41-1-3); Indiana $15,000 (Burns Consol. Ind. Stat., 1955 Cum. Supp. Sec. 2-404); Maine $10,000 plus damages for conscious suffering, and expenses for medical, surgical and hospital care. (Rev. Stat. of Maine 1954, Ch. 165, Sec. 10); New Hampshire $7,500, unless decedent has left either a widow, widower, minor children or a dependent father or mother, in which case the limit is $15,000. (N. H. Rev. Stat. Anno. 1955, Sec. 596-13).

A question has been raised whether, in states with limits in statutes for recovery for wrongful death at amounts lower than $16,600, the Warsaw-Hague provisions will permit higher recoveries. It has been argued that since Warsaw creates no new cause of action, the state statute must be relied on and the lower limit coupled to the right of action will govern.
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were less than the judgment. To net $16,584 in the usual case after attorneys' fees, the plaintiff must get a judgment of $25,000 or $32,000, depending on the local practice as to contingency fees. To net $16,584 after attorneys' fees and costs of litigation, he must get a judgment for $27,000 or more. These are high awards in any case and are higher than the statutory limits prescribed in the other states which limit recoveries for wrongful death.

The limit of liability is also acceptable because it achieves desirable social goals at a more reasonable cost than might otherwise be entailed and apportions the costs in a justifiable manner.

For the average passenger claimant in international air transport the Warsaw-Hague provisions permits a net recovery that makes available more compensation more readily than is true in other personal injury situations. The social interest in getting reasonable compensation to the average claimants promptly is so great that several proposals to improve the compensation for personal injury and death in automobile accident cases, for example, have recommended that if a scheme were devised which would expedite and assure reasonable compensation, a limit of liability as low as $6,500 per person is justifiable.

For the above average passenger who wants more protection than the $16,584 provided in the Hague Protocol, the Warsaw system requires that he obtain it from other sources. This is relatively easy to do. Insurance is conveniently available in form and amount. Three

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29 Attorneys' fees have been 50% of the recovery so consistently that the rules of the courts of the City of New York have recently been amended, effective January 1, 1957, limiting the fees for recovery to approximately 33%. Thus according to the formula specified in those rules, if the plaintiff wins a judgment of $25,000, the attorneys' fees will be $9,000. But to the extent the plaintiff must bear the other costs of litigation, which can be conservatively estimated to be $2,000 in a case of this kind, the plaintiff's net would be nearer $14,000. For a discussion of high attorneys' fees, see "The Future of Insurance Awards and Compensation," Murphy (1953), Insurance Law Journal 90.


31 In the "Report of the Committee to Study Compensation for Automobile Accidents" (Columbia University Council for Research in the Social Sciences 1932), the Committee found several shortcomings in the operation of the fault principle of liability as it then operated in the Courts; among them were:

(1) The burden of proving fault
(2) The heavy cost of attorneys' fees

The study concluded that assurance of some recovery was so important that it recommended a compensation scheme with limits from $4,500 to $6,500 for permanent serious injury or death. For discussion of recent proposals to establish compensatory schemes to aid claimants, even though the maximum recoveries would be limited to less than the Hague Protocol limits, see: Grad, "Recent Developments in Automobile Accident Compensation" (1950) 50 Col. L. Rev. 300.
insurers now offer at airport terminals insurance for passengers up to $62,500.\textsuperscript{32} By buying from more than one insurer, up to $187,500 coverage can be obtained. The cost of this insurance for domestic and some foreign transportation is 20 cents per $5,000. The cost of insurance for transportation to other foreign points is sold at a somewhat higher rate. The convenience and availability of this insurance is greater with respect to air transportation than with respect to any other form of transportation, either domestic or international.\textsuperscript{33}

The advantage of this machinery for making the larger recovery available to the passenger who wishes it, is that by this method only the people who want recoveries in high amounts incur the expense of such protection. The cost of the protection is not charged to those passengers who neither have the need for nor can qualify for higher recoveries.\textsuperscript{34}

In summary, we have contrasted the advantages of continuing a uniform system of international law with the disadvantages the amended Convention would bring. Uniformity in this growing international commerce offers many favorable advantages to the users and operators of American flag airlines, against which, however, must be weighed the effects of the limit on liability of the carrier for personal injury of passengers. These effects, we believe, are not very serious. The limit as increased by the Protocol, is a substantial concession to the objections raised to the original limit. The new limit is reasonable by several tests; it compares favorably with other statutory limits in the U. S. and permits a net recovery which compares well with net recoveries in other cases in the United States. For passengers who wish higher recoveries, adequate and convenient facilities are provided to afford them those opportunities. We urge, therefore, that the uniformity of international law established by the Warsaw Convention be continued by the early ratification of the Hague Protocol.

\textsuperscript{32} Three insurers making accident policies available at airports are Associated Aviation Underwriters, New York; Continental Casualty, Chicago, Illinois; and Mutual of Omaha, Omaha, Nebraska.

\textsuperscript{33} At railroad and bus line ticket offices, the traveler can buy an accident insurance policy for $10,000 for 25 cents per day, issued by the Travelers Insurance Company, Hartford, Connecticut. Travelers by vessel do not depart from "terminals" as do travelers by train, bus and airplane, but through authorized travel agents they can purchase accident insurance for as much as $55,000 for 180 days for $129.50, issued by Continental Casualty Company, Chicago, and a similar policy issued by the Home Insurance Company, New York. These latter policies insure against accidents occurring on and off of the vessel during the insured period.

\textsuperscript{34} "The main job of accident law is, therefore, to promote the well being of accident victims if this can be done without imposing too great a social cost in other directions . . .

"Of prime importance is the fact that wherever there is widely held insurance, tort liability no longer merely shifts a loss from one individual to another but it tends to distribute the loss according to the principles of insurance, and the person nominally liable is often only a conduit through whom this process of distribution starts to flow. This does not at all mean that the loss disappears and does not have to be paid for. But it does mean that you ought to know who is paying for it, and in what proportions, before you can really see and evaluate what is going on even in terms of the fault principle."