Report on the Warsaw Convention as Amended by the Hague Protocol

Maurice Ravage
Benjamin H. Siff
Stuart M. Speiser

Recommended Citation
https://scholar.smu.edu/jalc/vol26/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
REPORT ON THE WARSAW CONVENTION
AS AMENDED BY THE HAGUE PROTOCOL*

A. INTRODUCTION

THE Warsaw Convention provides for a limitation of liability on the part of air carriers in respect of passengers, baggage and cargo moving in international carriage. The Convention has been in existence for almost thirty years and has been ratified by some forty-five countries, including the United States which ratified it in 1934. The Hague Protocol is, in effect, a new treaty incorporating important amendments to the Convention, notably a substantial monetary increase in the liability limitations. The Protocol was proposed by an international conference at The Hague in September, 1955, and was signed by delegates on behalf of twenty-six countries, including the United States, subject to ratification by their governments. It has been ratified by Czechoslovakia, Egypt, El Salvador, Hungary, Laos, Luxembourg, Mexico, Poland and the U.S.S.R. It seems to be conceded that most countries are awaiting the action of the United States, a prime mover for amending the Warsaw Convention, before determining whether to ratify the Protocol themselves.

In each of the last two years the Aeronautics Committee has devoted considerable study and discussion to the question whether the United States should ratify or reject The Hague Protocol. In the Spring of 1958 two extensive analytical reports were drafted by members of the Committee: Lee S. Kriendler and William G. Symmers. From these two drafts the present report has been largely drawn.

Exploration of the question of United States action on The Hague Protocol has exposed deeply divided opinions. This division of opinion has stemmed not so much from The Hague Protocol itself, but rather from a re-examination of the Warsaw Convention in terms of the present circumstances of commercial air transportation, of recent case law affecting the significance of the Convention and of actual experience gained in applying the Convention. Such opinions also have been affected by consideration of the United States’ role in formulating The Hague Protocol and by general considerations of foreign policy in reference to continued United States participation in an international arrangement of long standing.

The controversy has revolved around one central point: the soundness today of the principle of limitation of liability. The analysis of the problem, therefore, should begin with the history and rationale of this principle as it has been embodied in the Warsaw Convention.

B. HISTORY AND RATIONALE OF THE WARSAW LIABILITY LIMITATION

The enactment of the Warsaw Convention, in 1929, was the result of international conferences on air law held in Paris in 1926 and Warsaw in 1929. Its inception may be better understood in the light of its historical perspective. 1927 was the year in which Lindbergh flew the Atlantic. Amelia Earhart did it in 1928. In 1929 it was still uncertain whether the air age would be carried forward with lighter-than-air craft or heavier-than-air

* Prepared by the Association of the Bar of the City of New York, Committee on Aeronautics, and presented to the Stated Meeting of the Association on March 10, 1959.
The international air giants of today were literally in their swaddling clothes. Air France, though founded in 1919, did little more than link France with England and Africa. KLM was limited to flights of two hundred or two hundred fifty miles. Pan American was the United States' only international carrier and its international operations were confined to Havana, Cuba, and Key West.\(^3\) Passengers were not carried at night, and airplanes had a top speed of one hundred fifty miles an hour. Even in domestic travel, only 52,934 passengers were carried by air in the United States, in 1928.

Probably the principal problem facing the budding international airlines was the securing of capital, in the face of what appeared to be enormous hazards. In the absence of a limitation of liability one disaster might sweep away a large capital investment. It was in this atmosphere and era that the Warsaw Convention was enacted. Its most important provision was a limitation of liability for personal injury and death to passengers, to 125,000.00 Poincaré French francs (gold francs of a weight and fineness equivalent to approximately $8,300.00).

The United States was not a party to the Paris Conference of 1926 or the Warsaw Conference of 1929. Its motivation in adhering to the Convention is clear, however. The State Department began considering the Convention in 1933. In 1934 the Department transmitted its approval to the President with a statement that "the principle of limitation of liability would lessen litigation and prove an aid in the development of international air transportation, as such limitation will afford the carrier a more definite and equitable basis on which to obtain insurance rates and eventually reduce the operating expenses of the carrier."\(^4\)

The imposition of a maximum limitation of damages represents a departure from ordinary American tort principles. The very essence of our tort law, based as it is upon fault, lies in the concept of the tortfeasor (or the one who causes the damage) bearing the responsibility and the cost of the damage. Thus, in a simple personal injury accident case, our Courts struggle to measure, as precisely as possible, the monetary equivalent of the damage caused, so that the victim may be "made whole." Similarly, in wrongful death cases, our law and our Courts attempt to measure the precise amount of pecuniary loss sustained by the surviving beneficiaries.

Thirteen states do have maximum limitations of damages for wrongful death, however, (Colorado — $25,000, Illinois — $30,000, Kansas — $25,000, Maine — $20,000, Massachusetts — $20,000, Minnesota — $25,000, Missouri — $25,000, New Hampshire — $10,000-25,000, Oregon — $20,000, South Dakota — $20,000, Virginia — $25,000, West Virginia — $20,000 and Wisconsin — $20,000). The number has decreased in recent years, and the limitations have increased. No states limit liability for personal injury.

The principle of limitation of liability to passengers for personal injury and death, in a somewhat different form, is also known to American Admiralty Law, wherein liability of a ship owner to death and injury claimants is limited. The limitation does not apply if the accident was caused by negligence or unseaworthiness known or imputed to the owner. In the recent Andrea Doria-Stockholm collision cases, all claims were settled for adequate damages within the limitation amount. It was not necessary for claimants to prove privity or knowledge on the part of the ship owners to recover adequate damages.

Attempts have been made to justify, explain, or rationalize the principle of limitation of liability in international private air law on numerous grounds. These grounds are summarized and discussed by H. Drion in a recent book entitled "Limitation of Liabilities in International Air Law" (\textit{Martinus Nijhoff}, The Hague, 1954). Mr. Drion, who accepts the principle

\(^3\) \textit{Ibid.} p. 290, 291.
WARSAW CONVENTION AND HAGUE PROTOCOL

of limitation of liability and considers international private air law "un-thinkable without a limitation of the carrier's or operator's liability" lists eight grounds which "have been brought forward in justification of the limitation of the air carrier's or operator's liability." The eight are:

1. Analogy with maritime law with its global limitation of the ship-owner's liability;
2. necessary protection of a financially weak industry;
3. catastrophic risks should not be borne by aviation alone;
4. necessity of the carrier's or operator's being able to insure against these risks;
5. possibility for the potential claimants to take insurance themselves;
6. limitation of liability as a counterpart to the aggravated system of liability imposed upon the carrier and operator ('quid pro quo');
7. avoidance of litigation by facilitating quick settlements;
8. unification of the law with respect to the amount of damages to be paid.

1. Analogy With Maritime Law

Drion quickly dismisses this as a reasonable basis for justification of limitation of liability.

2. Protection of a Financially Weak Industry

Drion states:

"From the start, the idea of helping an industry in its infancy—the public interest in which far exceeding its financial outlooks—has been a major factor in the limitation liability in air law. It was felt—without much foundation, as the later history of aviation, especially within the U.S.A., would prove—that with unlimited liability for the carrier 'all commercial aviation would be impossible.' (citing the Belgian delegate DeVos, who played a 'preponderant part' in the history of the Warsaw Convention.)" (Drion page 15).

Drion rejects this rationalization, stating, at page 16:

"It is submitted that protection of the aviation industry is never a good ground for limitation of liability. If society wants to maintain air services although they cannot pay their own costs (including the damages they cause), it should frankly subsidize such services. 'Otherwise, one could as well take the view that a railway working at a loss, should not be obliged to pay for the expropriations effected as a consequence of its exploitation.'"

He goes on to say (page 16):

"The idea that aviation would be impossible without limitation of liability is flatly contradicted by the facts. Though USA law has no limitation of liability of air carrier or aircraft operator, neither with respect to passenger or cargo claims nor to surface damage, there is no country in the world where civil aviation has developed to a comparative level. And not only does American law not know of special limitations of liability for the protection of aviation, but the claims awarded there against carriers and operators are avowedly higher than anywhere else."

3. Catastrophic Risks Should Not Be Borne by Aviation Alone

Drion points out that the possibility of catastrophic risks ruining a business is not peculiar to aviation, yet other businesses and industries are held accountable for injuries and damage caused by them. Drion rejects this rationalization as a reasonable justification for limitation of liability.

4. Desirability That the Carrier or Operator Be Able to Insure His Liability Risks

Drion states:

"If one assumes that the desirability of the carrier or operator insuring his liability, and also that such insurance is only possible within limits,
does that mean that the uninsurable part of the risk should be borne by
the victim? This would be a sound conclusion only if the victim could rea-
sonably and more easily have insured that part of the risk. But then the
reason is not so much that the carrier could not insure himself against
unlimited liability, but rather that the victim was in a better position to
insure against that risk."

Drion concludes that “the desirability of the carrier or operator being
able to insure their liabilities is no sound reason for limiting these lia-

6. Possibility for the Potential Claimants to Take Insurance Themselves

This is one of the two grounds of alleged justification of limitation of
liability in air law accepted by Drion. Drion states his point of view, at page
23, as follows:

“Insurance presupposes a grouping of risks, and . . . the main criterion
for determining the various groups seems to be the requirement of equal
spreading of risk within each group. Where the risk is not equally spread
over the various members of the group, those carrying the smaller risk will
have to pay for the bigger risk carried by the other members of the group.”

Thus Drion argues that, from the standpoint of damages, the man whose
wrongful death would entitle beneficiaries to large damages is deriving some
sort of benefit at the expense of the passenger whose wrongful death would
result in smaller damages. This is the position taken by Paul Reiber, in an
article entitled “Ratification of The Hague Protocol,” the Journal of Air

Drion himself recognizes the limitations of this argument. He points out
that while from a damages standpoint, damages can better be calculated at
the joint of the object of the risk (the person insured), from an incidence
standpoint, risks can better be grouped around the point of the risk-creating
activity, “because at that point more of the factors determining the incidence
can be ascertained, such as quality of equipment, know-how of staff, care-
lessness, and surrounding circumstances . . .” (Drion, page 24).

Drion also states (page 24):

“But for a further determination of the chance, that an occurrence
insured against might happen, liability insurance has the advantage over
passenger or shipper’s insurance in that, by means of the loss experience
of the carrier, such factors as efficiency, safety and organization can also
be taken into account, whereby the risk can be more narrowly defined as
far as the probable incidence is concerned.”

It is well to point out that, while damages for potential wrongful death
may be anticipated with some accuracy, it is impossible, from the passenger’s
standpoint, to anticipate potential damages for personal injuries. The high-
est verdicts and settlements in airline crash cases have been in personal
injury cases. The very person whose wrongful death might result in virtually
no damages to beneficiaries, may be so severely injured in an airplane crash
that his or her damages for personal injuries may be huge.6

It may be noted also that the cost of insurance would be minimized if
its burden were shifted to the carrier, since all passenger liability would
then be insured in one transaction.

6 In Scotti v. National Airlines (U.S.D.C., E.D.N.Y., 1955) Fay Scotti, an
injured passenger, was 48 years old, unmarried, and earning a very small salary.
She had no dependents. Thus, had she been killed in the Elizabeth, New Jersey,

In the trial of her action for personal injuries, however, the jury awarded
her $170,000 plus a waiver, by the defendant, of $16,000 advanced for medical and
hospital expenses—a total of $186,000. The case was subsequently settled, on appeal
for a total of $181,000.
6. Limitation of Liability as a Counterpart of the Aggravated System of Liability Imposed Upon the Carrier and Operator

One of the features of the Warsaw Convention is the creation of a presumption of carrier liability. Thus, under the Convention, in case of accident involving bodily injury or death to passengers, or loss or damage to baggage or cargo, the burden rests upon the air carrier to prove its freedom from negligence if liability is to be avoided. It has been argued, therefore, that the limitation of liability is a justifiable *quid pro quo* for this presumption of liability up to the limited amount.

On the other hand, it has been contended, particularly by attorneys experienced in the trial of air carrier personal injury and wrongful death cases, that the asserted advantages of the "presumption of liability" to the passenger or to the estate of a deceased passenger, have been greatly exaggerated. In civil law countries liability on the part of the carrier is presumed, anyway. The passenger need only prove the contract of carriage, plus the fact that he has not safely arrived at his destination, to establish his case. To escape liability the carrier must prove *force majeure* or exclusive negligence of the passenger in order to escape liability. Even in common law countries, where a passenger may only recover upon proof of a carrier's negligence, the doctrine of *res ipsa loquitur* can be invoked, which, at least, provides the passenger with an inference of negligence sufficient to carry his case to the jury. Attorneys experienced in such matters say that as a practical matter even the doctrine of *res ipsa loquitur* is rarely needed by a plaintiff in a claim against an airline resulting from an accident. They say that the plaintiff, if he is fortunate in having diligent and knowledgeable counsel, can usually discover and prove a case of negligence against the airline. Airline accidents are carefully investigated, and the results of these investigations are made known to the public along with the source material that provided findings and conclusions. This is true of accidents in foreign countries as well as accidents in the United States. Where negligence can be proven, the shifting of the burden of proof, provided in the Convention, is of insignificant value. In any kind of serious case, the settlement value even if the case is not brought to trial will far exceed the limitations provided in either the Warsaw Convention or The Hague Protocol.

Drion rejects this rationalization as a reasonable justification for limitation of liability.

7. Avoidance of Litigation by Facilitating Quick Settlements

This is the second asserted rationalization for limitation of liability that Drion believes has merit. There can be no question that a sharp limitation of damages will avoid litigation and lead to quick settlements. As Drion points out, the often difficult question of ascertaining damages is virtually removed by a maximum limitation substantially below the actual damages in most cases. Thus a great area of disagreement is arbitrarily removed from the litigation and settlement process. This simplification of the judicial process is accomplished, however, at a substantial price—a price whose impact often rests on the surviving family of the deceased passenger who has failed to protect them by purchasing adequate insurance coverage and thus has left them face-to-face with the $8300 limitation of the Warsaw Convention.

Drion has this to say (page 42):

"If there is any field in which unification of the law on a world wide basis would be inappropriate, it is the field of the amount of damages to

---

6 Drion, p. 32, citing numerous authorities.
be paid in case of death or injuries. For in few areas local views and circumstances of a social and economic character are of such importance. Unification of the law as a ground for limitation of liability, therefore, should be rejected."

Drion sums up his conclusions on the rationalizations for limitation of liability as follows (page 42):

"For the limitation of liability in case of death or injury of passengers, provided by the Warsaw Convention, the only sound rationales have been found to be (a) the better position of the passenger in insuring the risk of his death or injury in excess of the average passenger accident risk, and (b) reduction of litigation by offering an easy basis for settlement."

C. THE CONVENTION'S "WILFUL MISCONDUCT" EXCEPTION

Article 25 of the Warsaw Convention provides that the carrier shall not be permitted to avail itself of the limitation of damages if the accident has been caused by what, in the original French of the Convention is referred to as "dol." "Dol" has been inaccurately translated in the official English and American translations as "wilful misconduct." In the Irish translation of the Convention "dol" is interpreted as "malice." In civil law countries where the Warsaw Convention has been enacted into national law, the word "dol" has been interpreted into the national words for gross negligence, and a similar definition has been accorded "dol" by a fairly recent French case.7

In the famous Froman case (Froman v. Pan American Airways (App. Div. 1st Dept.) 284 App. Div. 935, leave to appeal denied 308 N.Y. 1050, cert. denied 349 U.S. 947), the trial judge (Judge Steuer) charged the jury as follows:

"'Wilful' ordinarily means intentional; that the act that was done was what the person doing it meant to do. But the phrase 'wilful misconduct' means something more than that. It means that in addition to doing the act in question, that the actor much have intended the result that came about or must have launched on such a line of conduct with knowledge of what the consequences probably would be and had gone ahead recklessly despite his knowledge of those conditions." (record on appeal, pages 452-453).

Thus, in at least one American case, "wilful misconduct" has been defined as requiring infinitely more than "dol" requires in European countries. "Wilful misconduct" appears to require that the act of the carrier or its employee be intentionally done; that the actor must have intended the result that came about, or that he did the act with knowledge of what the consequences probably would be and that he did it recklessly despite his knowledge of the probable result.

Thus, it is clear that significant differences have developed between the various signatory countries to the Warsaw Convention on the character and the degree of fault required to defeat the limitation of liability; this, despite the avowed purpose of the Convention to establish uniformity.

D. OTHER "PRACTICAL" EXCEPTIONS TO THE APPLICATION OF THE CONVENTION

1. Liability of Aircraft and Component Manufacturers, Airport Owners and Operators, Governmental Agencies, and Maintenance Organizations

Since the Convention, by its terms, only limits the liability of the carrier to a passenger or shipper, and since the applicability of the Convention depends upon the contract of carriage between the carrier and the passenger or shipper, it is obvious that aircraft manufacturers, aircraft component

7 Drion, pp. 208-209; Missirian v. Air France (Tribunal Civil de la Seine; 1956, 23 Journal of Air Law & Commerce 235).
manufacturers (manufacturers of engines and propellers, for example), airport owners and operators, governmental agencies, and independent maintenance organizations cannot claim the limitation of liability available to the carrier. Thus, in Warsaw Convention cases, they are likely to be brought in as defendants despite the existence of very doubtful liability on their parts. This is unlike the situation in a non-Warsaw case, where the carrier, with its high duty of care, may well be liable for fault on the part of the other possible defendants, and where, therefore, other possible tortfeasors are not too often joined as defendants.

2. Agents and Servants of the Carrier

Despite the fact that the Convention speaks only of the carrier itself, and does not, by its terms, expressly limit the liability of servants and agents of the carrier, there is some question as to whether this liability is limited or not. A recent case in the United States District Court for the District of New Jersey specifically holds that the Warsaw Convention does not limit the liability of servants and agents (Pierre v. Eastern Air Lines and Foxworth, 152 F. Supp. 486). The case specifically held that the liability of the pilot of an Eastern Air Lines airplane was not limited by the Convention. This view is supported by several recognized writers in the field.8


E. EFFECT AND EVALUATION OF THE WARSAW CONVENTION

1. The Convention Does Not Create a Cause of Action

American proponents of the Warsaw Convention, and the principle of limitation of liability, have argued, in the past, that the Convention was valuable to the American passenger in at least insuring him, or his beneficiaries, a recovery up to the Convention limits.9 Thus, it has been argued that if an American passenger were killed in an accident occurring in Italy, recovery to his heirs would be limited to $256.00 (the domestic limitation in Italy) in the absence of the Convention, whereas, under the Convention, they could at least recover $8,300.00.

This argument has been seriously challenged by the recent decision of the United States Court of Appeals for the Second Circuit, Noel v. L.A.V., 247 F. 2d 677, cert. denied, December 16, 1957. The Noel case clearly and specifically holds that the Convention does not create a cause of action. Thus, at least in the Second Circuit, in an action brought by the beneficiaries of a passenger who was killed in Italy, recovery would seem to be limited to $256.00, despite the Warsaw Convention, since the Convention, under the Noel case, simply places a maximum limit on recoveries permitted by local law.

No doubt the argument will be made, in future cases involving this situation, that under the civil law, the carrier’s liability is basically contractual in character, and not delictual, and that the terms of the Warsaw Convention must be read into the contract between the parties. Thus, the argument may be made, that even in applying the law of Italy, the Convention limits will prevail. In view of the specific language of the Noel case, however, it would now appear that the Convention itself can no longer be said to guarantee the passenger a recovery of $8,300.00. Nor does the Convention achieve any uniformity in the law, under the Noel case, except in placing a maximum limit on recoveries.

8 Drion, p. 157, citing other authors, Calkins, 23 Journal of Air Law & Commerce 267.
9 Reiber, 23 Journal of Air Law & Commerce 283.
2. The Effect of the Convention in Essentially Domestic Cases

The applicability of the Warsaw Convention does not depend on the places of departure and destination of the particular flight during which an airplane crashes. Rather, its application depends on the contract between the passenger or shipper and the carrier, and whether that contract provides for some international carriage between Warsaw nations, as defined in the Convention. Thus, an American passenger who buys a ticket in San Francisco for a flight to New York with connecting flights to London and Paris is bound by the Convention on every leg of his journey including the trip from San Francisco to New York.

Thus it frequently happens that on completely domestic flights most passengers are entitled to ordinary tort damages, depending upon the place where the accident happens, while a small handful of passengers find themselves limited to $8,300.00. In the crash of a Northeast Airlines DC6A, at Riker's Island, New York City in February, 1957, for example, there were over one hundred people on board the airplane. The flight was purely domestic, from La Guardia Airport in New York City to Miami, Florida. It crashed a minute and a half after take-off. One man on board had a round trip ticket from New York to Miami and back, and a connecting flight from New York to Montreal. He found himself limited by the Warsaw Convention! Four passengers, in all, were so limited.

The experience of several attorneys, who specialize in handling claims for plaintiffs, arising out of air crashes, has been that the Convention has played a part most often, in their experience, in these domestic situations.

3. The Effect of Shifting the Burden of Proof

As indicated above, the Convention, up to its limits, places the burden of proof upon the carrier to absolve itself from liability. This, of course, is of practically no value to a plaintiff in a case where negligence can be established. Where the facts are known and where they are presented by both sides, the burden of proof is not particularly important. Nor does the shifting of the burden of proof make any difference in civil law countries, where there is a presumption of liability on the part of the carrier anyway.

The shifting of the burden of proof is of value to a plaintiff, in a common law jurisdiction, where nothing whatsoever is known about the accident. In this situation a plaintiff might recover $8,300.00 under the Convention, whereas he might, theoretically, be unable to recover without it. As a practical matter, however, even in these jurisdictions the doctrine of res ipsa loquitur is available to the plaintiff. Briefly stated, it provides that where a defendant was in exclusive control of the instrumentality causing harm, and where the type of accident was one which did not ordinarily occur in the absence of negligence, the mere happening of the accident may give rise to a permissible inference of negligence on the part of the defendant. This permissible inference, of course, is sufficient to take an airplane case to the jury. And, as a practical matter, the settlement value of a serious case will far exceed the Warsaw limits anyway.

Thus, many contend that the shifting of the burden of proof is of only theoretical value to passengers and that it is insignificant when compared with the diminution of damages imposed by the Convention.

4. Effect of the Wilful Misconduct Exception

A legal judgment in excess of the Warsaw Convention limitation, obtained through proof of "wilful misconduct" has been sustained in only one reported case, American Airlines v. Ulen, 186 F. 2d 529 (C.A., D.C.). Recoveries in excess of the Warsaw Convention limitation, however, occur with
some frequency. Indeed, members of this Committee, both past and present, have participated in numerous settlements in excess of Convention limits. The existence of the limitation imposed by the Convention, of course, has played a part in these settlements, serving to reduce the settlements below the amounts that would have been received in the absence of the Convention.

F. CHANGES MADE BY THE HAGUE PROTOCOL

1. The Limitation of Damages Is Doubled

The Hague Protocol would increase the maximum limit of passenger liability damages to 250,000 Poincare francs, or $16,584.00. This is double the present limit of 125,000 Poincare francs, or $8,292.00. The proposed limit is actually a compromise between the $25,000.00 that the United States delegation to The Hague Conference wanted and what the other nations represented would agree to.

In addition, The Hague Protocol provides that, in addition to the prescribed limits, the court may award "in accordance with its law . . . the whole or part of the court costs and of other expenses of the litigation incurred by the plaintiff," unless the carrier shall have offered an amount equal to the amount recovered within six months after the date of the accident, or before the commencement of the action, if that is later.

The net effect of this provision, from the standpoint of the American passenger, and assuming that American jurisdictions would amend their own law to allow the inclusion of attorneys' fees and other expenses in Warsaw cases, would be to permit, in some restricted cases, potential recoveries in excess of the limitation and perhaps up to about $25,000.00.

This is more theoretical than real, however, since in actual practice this provision would have the effect of inducing quick settlements for Warsaw limits, before expenses—and perhaps even attorneys' fees—have been incurred.

Whether it is good policy to induce these quick settlements, is open to question. Very likely this provision will have the effect of inducing passengers or their beneficiaries to settle without even retaining lawyers. The speed of the possible settlement, and the fact that attorneys' fees would necessarily come out of the claimant's share of the recovery (since the offer would no doubt be immediate) would make claimants susceptible to the argument that there is no need for them to retain attorneys at all. Thus, in situations where claimants could recover more than Warsaw limitations (or Hague limitations) either from the carrier or from others, claimants might actually suffer by virtue of this provision. In any event, in the vast majority of cases, this provision will have no effect whatsoever, and does not serve to increase the liability limits of The Hague Protocol.

2. Re-Definition of "Dol" and "Wilful Misconduct"

The Hague Protocol amends the Warsaw Convention to eliminate the word "dol" and its inaccurate English equivalent, "wilful misconduct." In its place it substitutes the following provision:

"The limits of liability specified in Article XXII shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; . . ."

This new requirement for upsetting the damages limitation of the Convention makes no change in the law if Judge Steuer's definition of "wilful misconduct," in Froman v. Pan American, supra, was correct. Experienced plaintiffs' attorneys have argued, however, that since this is an international treaty, the interpretation of "dol" made by French courts and other Euro-
pean courts should carry as much weight here in the United States as that of a domestic case. Thus they have refused to accept the severe interpretation of "wilful misconduct" made by Judge Steuer.

There can be no doubt that the new language of The Hague Protocol seriously tightens the "wilful misconduct" exception as it is administered in foreign courts. Thus, a serious question is presented as to whether this amendment concerning the degree of fault required to upset the damages limitation of the Convention will work to the detriment of the American passenger. Some experienced attorneys feel that it will reduce the possibility of settling cases in excess of the Warsaw limitation.

3. Limitation of Liability of Servants and Agents

The Hague Protocol extends to servants and agents of the carrier the limitation of liability available to the carrier itself.

In recent years suits have been brought against servants and agents of the carrier, including crew members, because of the obvious possibility of recovering unlimited damages. In the case of crew members an interesting situation has prevailed. Some carriers have "hold-harmless" agreements with their employees, providing that if judgments are rendered against the employees, the airline shall satisfy the judgments. In the case of other airlines, liability insurance written to protect the airline, has extended its coverage to employees of the airline. Thus, even in cases of financially irresponsible crew members, it has been possible to recover unlimited damages against the airline of its insurance carrier, despite the existence of the Warsaw Convention. There are no reported cases on this principle, but it is believed that this has been a factor entering into the settlement of some cases.

This amendment thus closes a loophole in the Convention. To those who accept the principles of the Convention, this plugging of a loophole is probably a good thing. On the other hand, to those who believe that the Convention is an evil, and is very harmful to American passengers, the closing of this loophole makes the Convention that much worse.

4. Miscellaneous and Minor Changes

Several miscellaneous and minor changes have been made in the Convention by The Hague Protocol. These pertain principally to simplification of documentation and notice of the Convention's applicability. None of these changes is of sufficient importance to affect a substantive attitude toward the Convention or to the principle of limitation of liability, and none will be discussed herein.

G. POSSIBLE COURSES OF ACTION FOR THE UNITED STATES

Given the Warsaw Convention and the changes in it proposed by The Hague Protocol, there are several possible courses of action for the United States to take. Theoretically, this country could refuse to ratify the Protocol but nevertheless continue to adhere to the Convention. No one has seriously suggested such a course of action. All agree that if we continue to adhere to the Convention, the Protocol should be ratified.

The issue therefore is between those who advocate the immediate denunciation of the Convention and those who oppose such denunciation. The pros and cons are discussed below.

10 Drion, pp. 176-191; note 5, supra.
WARSAW CONVENTION AND HAGUE PROTOCOL

1. The Arguments for Continuing to Adhere to the Convention and Ratifying the Protocol

Those who support the Convention and favor ratification of the Protocol point to the fact that the Convention was drafted in reliance upon time-tested principles emanating from several centuries of maritime law, and point to its durability over the years in face of changed conditions. They call attention to the advantages of uniformity in the law of international air carriage, and to the chaos of a forum shopping and the inequities of chance (limited liability or unlimited liability depending on the *lex loci*) which would result in the absence of the Convention.

They urge that the denunciation of a treaty involves more than questions of domestic law and policy and affects more than private rights. They say that an abrupt denunciation of a convention to which we have adhered for a quarter of a century would affect our relations with other countries in many other fields. They say that such action would prove valuable material for anti-American propaganda—that it would be urged as proof that we are always ready to take arbitrary and unilateral action whenever it served our selfish interests.

Those who oppose denunciation of the Convention do not argue that it is a perfect document. They say however that the Protocol constitutes a major improvement, achieved without loss of international good will. They urge continuing studies with an eye to further improvements by mutual agreement, rather than precipitate unilateral action.

2. The Arguments for Rejection of the Protocol and Denunciation of the Convention

Those who argue against ratification of The Hague Protocol do so because of their intense opposition to the principle of limitation of liability itself and because of the devastating effect which they believe it has upon uninsured passengers and their dependents. Their feeling is that the adoption of the Protocol will simply serve to cement into our law a principle which they deem abhorrent.

They feel that their opposition to the Warsaw Convention—so intense that it has caused opposition even to the Protocol, which would lessen the severity of the Convention—has substantial foundation. They say that attorneys who have had the burden of explaining the Convention's limitation of liability to destitute beneficiaries and injured passengers find it difficult to maintain a placid attitude toward anything associated with it. They feel that the principle of limitation of carriers' liability is unjustified and that at all costs the Convention must be removed from our law.

Proponents of this position are not impressed with the “international community” argument advanced by supporters of the Convention and the Protocol. Neither the Convention nor the Protocol, they believe, is the kind of internationalism that is calculated to capture the imagination or the spirit of people overseas. They say these documents appear to be designed primarily for foreign airlines, and that the foreign lines have been the major force behind the Convention. They believe that a renunciation of the Warsaw Convention would help, rather than hinder, the position of the United States with the people of the world.

RECOMMENDATION

After balancing all the considerations on both sides of the matter, the Committee recommends that the United States ratify The Hague Protocol.

The United States has been the leading nation in the conduct of international air transportation, and United States citizens make up the largest
national contingent of international air passengers. For the benefit both of our citizens as travellers and of our airlines as international air carriers, the United States has played a leading role in formulating and obtaining international agreement upon many aspects of and many matters affecting international air carriage, from the technical aspects of air navigation aids and procedures to the reduction of delays and red-tape in the application of customs, immigration and public health controls. Often other states have gone along with the United States proposals in these matters contrary to their own national views and in deference to United States influence in this field. For the United States, therefore, to renounce international agreement in an important area affecting international air carriage—and particularly where the United States has been largely responsible for the latest version of such agreement—would deal a serious blow to United States prestige in this field and would hamper the continuing efforts of the United States to obtain wider international agreement on matters affecting international air transport and improvement in the arrangements and procedures already established. Such a consequence would injure the substantial interests of United States citizens—both carrier and patrons of air carriage—on many fronts.

Moreover, U.S. failure to ratify The Hague Protocol would undoubtedly cause the failure of sufficient other states to ratify it so that the Warsaw Convention would remain in effect as it now is so far as other countries are concerned, and U. S. citizens as patrons of the air carriers of other flags would remain confronted with the grossly inadequate limitations of liability now set by the Convention.

On the whole, therefore, it appears to be more in the interests of the United States to stimulate acceptance of the improvements which The Hague Protocol would effect in the Warsaw Convention and to continue to assert leadership toward further improvement not only in the regime of the Warsaw Convention but also in the many other phases of international air transport which lend themselves to international arrangements and understandings. We therefore urge ratification of the Protocol.

In addition, we believe it may be possible to avoid one serious disadvantage of the limitation of liability in the Warsaw Convention without disrupting international agreement or impairing U. S. influence in this field. As pointed out above, the applicability of the Warsaw Convention today does not depend on the nature of the flight during which an accident occurs—that is to say, whether such flight is international in character by reason of the location of the points of origination and destination—but rather on the contractual arrangements made by the carrier or shipper—that is, whether the ticketing is international in character. Because of this fact the Warsaw Convention has had perhaps its widest application to purely domestic U. S. flights and has produced harsh distinctions in treatment between the bereaved survivors of the passengers, some of whom have been deprived of adequate compensation because of the largely fortuitous circumstance that their particular decedent was traveling on ticketing covering a through international journey rather than on tickets separately arranged for the domestic and the international portions of his trip.

The Committee therefore also urges that the appropriate governmental authorities consider limiting the application of the Warsaw Convention and The Hague Protocol, so that these treaties will not apply to flights which both originate and terminate within the United States. Inasmuch as foreign-flag air carriers are not allowed to engage in cabotage traffic within the United States, the exclusion from the Convention of purely domestic flights would not disturb competitive relationships between the U. S. and foreign-flag carriers and would leave the Convention still applicable to the domestic portions of flights which either originated or terminated outside the United
States, whether performed by U. S.-flag or foreign-flag air carriers. Under those circumstances, equal treatment, so far as limitation of liability is concerned, would be extended to all passengers on an international flight (i.e., the Convention limits would apply) and to all passengers on a domestic flight (i.e., the Convention limits would not apply). The harsh discrimination which has resulted under the Convention as now applied would be obviated, a truer uniformity of judicial process would be achieved, and the Convention’s limitations of liability would be confined to actual international carriage, which involves a smaller number of U. S. citizens and in which the passengers are presumably more aware of the risks and more likely to protect themselves and their families by the purchase of insurance.

The Committee respectfully submits the following resolutions:

RESOLVED, that the Report of the Committee on Aeronautics of The Association of the Bar of the City of New York, dated January 15, 1959, on the Warsaw Convention as amended by The Hague Protocol be approved; and further

RESOLVED, that in the opinion of this Association the prompt ratification of The Hague Protocol by this country amending the Warsaw Convention will be desirable and in the public interest, and that the President and Senate of the United States are hereby urged to take such steps as may be necessary to accomplish such ratification; and further

RESOLVED, that in the opinion of this Association it would be desirable and in the public interest for the appropriate governmental authorities to consider limiting the application of the Warsaw Convention and The Hague Protocol so that they will not apply to flights which both originate and terminate within the United States, and further

RESOLVED, that the Chairman of the Committee on Aeronautics be authorized to transmit copies of the foregoing Report of the Committee on Aeronautics and of this resolution to such Senate committees, Federal departments and officials, and other bodies and persons as he may deem appropriate.

Respectfully submitted,

COMMITTEE ON AERONAUTICS

LEANDER I. SHELLEY, Chairman
JOHN P. CAMPBELL
RONALD H. COHEN, Secretary
ASBURY H. NSWAMPERT
EGON R. GERARD

LOUIS W. GOODKIND
CLARENCE J. MCGOWAN
ROSALIE. C. SKEHAN
RICHARD B. SMITH
WILLIAM G. SYMMERS

January 15, 1959


The undersigned members set forth their dissenting views as follows:

The only major objection we find to the Warsaw Convention and The Hague Protocol concerns the severe limitation of liability for wrongful death and personal injury damages. Other matters covered by the Convention, such as documentation of international shipping, are not considered herein, and could well be a part of an unobjectionable treaty.

With limitation of liability, however, we feel that we must urge that the United States disapprove The Hague Protocol and withdraw from the Warsaw Convention. We do so with the further recommendation that the United States indicate its willingness to enter into a treaty containing the substance of other sections of the Warsaw Convention as amended by The Hague Protocol.
We have reached this conclusion for the following reasons:

1. There is no justification for limitation of carriers’ liability for personal injuries and death damages in international private air law. Even assuming that there was a need for such a limitation in the early days of international air travel—to foster the economic growth of a then infant industry—no such need exists today. Domestic airlines in the United States have grown and prospered without any such limitation. We have examined all known rationalizations for the principle of limitation of liability in international private air law, and we find none to be persuasive.

2. On the other hand, the severe limitation of damages imposed either by the Warsaw Convention or The Hague Protocol has had and will have a devastating and catastrophic effect on the lives and welfare of the victims of airplane accidents or their dependents. Where crippling injuries are sustained or where a killed passenger is a breadwinner of a family (as often is the case in air crashes) a huge and crushing burden descends upon the injured passenger or the dependents of a deceased passenger. The loss is thus borne almost entirely by the passenger (or the community, which must bear the cost of supporting him or his destitute dependents) despite the fact that the loss was occasioned by the fault of the carrier. If the problem is approached from the standpoint of ability to withstand or bear the loss, there can be no question that, as between the passenger and the airline, the passenger is least able to bear the loss. Yet, he must do so under the Convention.

3. The Convention, with or without The Hague amendments, creates a serious inequity among passengers on purely domestic flights. There have been numerous instances of grossly disparate recoveries by passengers on the same plane who suffered similar injuries, or by the estates of deceased passengers which sustained similar losses, and these instances will undoubtedly continue. As indicated above, this is due to the fact that the operability of the Convention depends on the passenger’s ticket, which may show connecting flights to foreign countries. Very often, passengers who have heard of the Warsaw Convention’s damages limitation are completely unaware of its possible applicability to a crash on a domestic flight. These passengers (or their estates) are shocked to find their damages limited. They simply cannot understand the disparity between themselves and passengers (or estates of passengers) who occupied adjoining seats.

4. The Convention has had, and with The Hague Protocol will continue to have, the effect of encouraging claims and actions against aircraft and component manufacturers, airport operators, maintenance organizations, and governmental agencies despite the existence of doubtful liability on their parts.

Were there some justification for the principle of limitation of liability (or, more so, were there an impelling need for it), we would give consideration to the proposition that half a loaf is better than none, and we thus might favor an attempt, such as The Hague Protocol, to improve the Convention by amending it. The fact of the matter, however, is that limitation of liability is indefensible morally, sociologically, and economically. The “practical” considerations of international relations suggested by proponents of the Convention fall far short of convincing us that we must accept so basically bad a principle as limitation of liability. Since the principle is bad we must reject it. We believe surgery, not palliatives is the remedy, and that approval of The Hague Protocol would serve to cement an undesirable principle into our law. For these reasons we urge rejection of The Hague Protocol and immediate withdrawal by the United States from the Warsaw Convention.

January 15, 1959

MAURICE RAVAGE
BENJAMIN H. SIFF
STUART M. SPEISER