The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law - Part II

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THE AIR CARRIER'S LIABILITY IN CASES OF UNKNOWN CAUSE OF DAMAGE IN INTERNATIONAL AIR LAW—PART II

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In the first part of this article, two main questions were raised in connection with the examination of Art. 20 paragraph 1 of the Warsaw Convention, the keystone of the system of liability laid down by the Convention: (1) What is the meaning of "all necessary measures," and (2) what are the requirements to satisfy the burden of proof imposed upon the carrier? Regarding the first question, it was pointed out that the original wording of the article including the expression "the reasonable measures" intended to introduce a system of liability based on fault. At the Warsaw Conference, 1929, the expression was changed to "all necessary measures," but the principle behind the terminology remained unchanged. This has been confirmed by the revision works on the Convention, by authors, and by the courts of several countries. As far as the second question is concerned, it was shown that the views of the various authors are widely divided in respect of the requirements to satisfy the burden of proof in cases of unknown cause of damage. The preparatory works of the Warsaw Convention were examined and it was concluded that no support could be derived from these works for a specific interpretation of Art. 20 paragraph 1 on this point. Finally, the revision works and the debate during The Hague Conference, 1955, were analyzed.

In the following, the court decisions of various countries on cases of unknown cause of damage will be examined; thereafter, an analysis of the problem will be made, and conclusions will be drawn. Finally, the unexplained cause of damage will be examined in relation to some other provisions of the Warsaw Convention, to the Rome Convention, 1952, and the draft Convention on Aerial Collisions.

e. Court Decisions

The courts of a number of countries have been confronted with the question of the air carrier's liability in cases of unexplained origin of damage, and their decisions will be examined in the following. First, however, a judgment shall be mentioned which does not concern the unknown cause of damage, but which nevertheless deals with the requirements for the carrier's proof pursuant to Art. 20 paragraph 1. It is a French decision rendered by the Tribunal civil de Toulouse, February 10, 1938, in the case Csillag vs. Air France.208

On a flight from Spain to France a passenger was hurt by some violent shakings of the aircraft and sued the company for compensation. The Court gave judgment in favour of the defendant company, inter alia on the following grounds:

"Whereas Art. 20 states . . . that the carrier is not liable if he proves that all necessary and possible measures have been taken by him and his servants or agents to avoid the damage;"

NOTE: Footnotes follow end of article on Pages 145 to 149.

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Whereas the text does not speak about the faults which might have been committed and whereas the text by referring to the necessary and possible measures only, indicates that in order to exonerate himself the carrier has not to prove that he and his servants or agents have committed no faults, it being sufficient for him to show—as said the delegate M. Pittard—that he has exercised the diligence of a *bonus pater familias* and has taken all the reasonable and normal measures to avoid the damage;

Whereas the special risk of the air and the conditions of flight, moreover, render it very difficult, in fact almost impossible, to furnish negatively the proof of non-existence of fault;

Whereas Lady Csillag does not allege any fault in the organization of exploitation, in the choice and supervision of the personnel or the aircraft which seems, on the contrary, to have been normally executed; ...”

It will be noted that the argumentation of the judgment is based, above all, upon the passage starting with the words: “Que peut-on exiger du transport aérien” of Pittard’s report of 1925. Furthermore, it appears that the views stated in this decision and the interpretation of Art. 20 paragraph 1 advanced by Lemoine correspond closely to each other.—

A Hungarian case, *F. A. vs. Hungarian Airlines*, Royal Court of Appeals of Budapest, April 2, 1936, has been referred to in connection with the question of the carrier’s liability in cases of unknown cause of damage. The case was about the loss of a coat fallen through an open window over Czechoslovakia during a flight from Budapest to London. In view of the fact that the window could not have opened itself and that the claimant could not establish how, or by whom, the window was opened, the Court admitted that the carrier had taken all necessary measures to prevent the opening of the window, and, thereby, to avoid the damage.

This judgment, however, seems not to have any connection at all with Art. 20 paragraph 1. Considering an object of which the passenger took charge herself, the case had to be decided in accordance with the relevant national law, not the Warsaw Convention. The Convention confines itself to prescribing a limit to the carrier’s liability in such cases, see Art. 22 paragraph 3, but contains no provisions concerning the principles of liability to be applied.

In the English case *Grein vs. Imperial Airways, Ltd.*, King's Bench Division, October 23, 1935, Court of Appeal, July 13, 1936, the Court was faced with an accident, the real cause of which remained unknown. On a flight from Antwerp to London an aircraft crashed as a result of a collision with a wireless mast at Ruysselede, Belgium, and all persons on board perished. The weather conditions were bad and foggy when the accident occurred, and it was established that the pilot had been well aware that the wireless mast in question was situated in the vicinity of his route. The aircraft had sent out a message which was received by Haren Airport asking for its bearing. The reply from Haren was to the effect that the signal was weak and that Haren was busy with another aeroplane.

Lewis J. was of the opinion that the pilot was guilty of negligence when, after failing to get a message from Haren and failing to get a landmark, he went on flying in the direction of the Ruysselede wireless instead of adopting other possible courses. Although the judge concludes in finding negligence on the part of the pilot—thus presupposing sufficient evidence in support thereof—the view that the cause of the accident actually was unknown seems to suggest itself by the following statement:

“Perhaps if Gittins (the pilot) or the other occupants of the aeroplane were here they might put a different complexion upon the facts which I have found, and ... I feel that it is my duty to decide this case on the evidence which has been given, and I cannot speculate as to what in fact happened on the fatal journey.”

With regard to this question the opinion of Mr. Justice Lewis was upheld by the Court of Appeal, one of the judges finding negligence on the
part of the pilot, another one stating—more in conformity with the view that the cause of damage was unexplained—that "none of the defenses allowed by the Convention is proved." Accordingly, the Court gave judgment in favor of the plaintiff for the equivalence of the maximum amount fixed in Art. 22 of the Convention.

A few years later the question came up in the case Primatesca vs. Ala Littoria, Tribunale di Tripoli, August 14, 1937. During a landing en route at Marsa Scirocco, Malta, on a flight from Rome to Tripoli one of the floats of a hydroplane broke while landing on the sea with the result that some of the passengers suffered damage. The carrier maintained that all the necessary measures had been taken to avoid the damage or were impossible to take. The Court, not satisfied with the carrier's proof in this respect, stated that evidence to the effect that the landing manoeuvres had been perfectly correct should be supported by technical expert opinions. If that were the case the carrier might have a possibility of escaping liability by proving not only that no fault was committed, but also that he and his servants or agents had taken all necessary measures to avoid the damage or that it had been impossible for them to take such measures.

In a judgment of April 28, 1939, the Tribunale di Tripoli reversed the decision of August 14, 1937, and gave judgment in favor of the carrier. Having heard the opinions of technical experts, the Court was now satisfied that the pilot had made a correct landing manoeuvre.

In the same period the question was thoroughly considered by Landesgericht in Frankfurt am Main, Germany, in a judgment rendered March 8, 1939, in the case Flohr vs. K.L.M. (Royal Dutch Air Lines). An aircraft crashed in the Alps on a flight from Milan to Frankfurt am Main. It had lost height when passing through a bank of clouds over the mountains, probably as a consequence of icing conditions, and had been forced down into a narrow valley. The pilot had tried a forced landing, and it was established that in connection with these manoeuvres the pilot had acted entirely correctly. The Court considered inter alia the question whether all the necessary measures to avoid the damage had been taken or were impossible to take, and stated in this respect that nothing could be blamed on the carrier with regard to airworthiness, maintenance and equipment of the aircraft or to the qualifications of the pilot. Furthermore, the pilot was not to be blamed that he had flown directly towards the Alps instead of taking another direction in order to gain the necessary altitude.

The Court had finally to consider the question

"... whether the pilot, having taken the direct route to approach the Alps and having entered a zone of disturbances, took all necessary measures to avoid the accident. The Court finds itself unable to solve this problem.

The expert has concluded that the pilot had made up his mind to pass through the bank of clouds at an altitude of approximately 4000 m. It is in any case questionable whether this decision was the correct one, or whether the pilot ought to have chosen another possibility—for example to return. To this question no reply can be given. ... It is possible, indeed, that the pilot has acted correctly—as he did when flying in the valley. ... This possibility is not sufficient, however, to satisfy the burden of proof imposed upon the defendant (the carrier). When, as in this case, all the persons in the aircraft perished in the accident, it results from the allocation of the burden of proof that it is up to the defendant to bear the consequences flowing from the impossibility of explaining the circumstances of the catastrophe. There are, indeed, cases where experience permits the conclusion that the accident would have happened even if the pilot had acted with the greatest caution; for example, an accident caused by an unforeseen hurricane. But such is not the case here. It was only at a very late stage, at the moment when he was flying at 4000 m., above the clouds, that the pilot saw the bank of clouds rising to more than 6000 m. As an experienced pilot, familiar with meteorological questions, he
should have been aware of the danger presented by a passage through clouds of this kind. Therefore, it cannot be admitted that the icing, considered as the cause of the accident, took the pilot by surprise, particularly since he had found himself in a similar position several days before, when he was engaged in his first flight above the Alps under the control of another pilot. Under these circumstances, the action based on Article 17 and 22 paragraph 1 of the Warsaw Convention is well founded; one can know nothing concerning the attitude adopted by the pilot at the time of his passage through the clouds, the cause of the icing, and the defendant must bear the consequences of this uncertainty...

In a note to the judgment Schleicher\textsuperscript{220} has declared himself in agreement with the decision. If the purpose behind Art. 20 was to give the carrier a more extensive opportunity of exonerating himself from liability, he states, it would have been necessary to give a clear expression to this effect in the German Implementation Act.

Agro\textsuperscript{221} on the other hand, does not agree with the judgment and holds the view that it would have been more correct to presume non-existence of fault on the part of the pilot—in other words to state “cas fortuit.” Goedhuis\textsuperscript{222} expresses the opinion that the requirements of the Court with regard to proof of the cause of the accident and of the unexpected and unforeseeable character of the cause (“onverwachtheid en onvoorzienbaarheid”) impose, in fact, an objective liability on the carrier.

Also Lemoine has criticized the decision during the discussions concerning revision of the Warsaw Convention in CITEJA.\textsuperscript{223}

In the United States the question of liability in cases of unexplained origin of damage has been brought before the courts in a number of cases. In the case of Wyman and Bartlett vs. Pan American Airways Inc., State of New York, Supreme Court, New York County, June 25, 1943,\textsuperscript{224} almost nothing was known about the circumstances of the accident: Plaintiff’s testator had lost his life while a passenger in defendant’s airplane on a flight from San Francisco to Hong Kong. The aircraft had left Guam bound for Manila and never arrived at that or any other destination. The last message was sent from a point above the high seas about half way between Guam and Manila and indicated that the aircraft was involved in an unpredictable storm area, in which the pilot had left the direct course and was pursuing a roundabout route.

In his opinion Schreiber J. states:

“... Plaintiff’s testator was lost in the disappearance without trace of that aircraft.

... There was no proof in this case of ‘wilful misconduct’\textsuperscript{225} on the part of the defendant, and indeed, no proof of any negligence connected with or a proximate cause of the accident. ... Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (Art. 20).”

Accordingly, the air line was held liable up to the limit of liability of the Convention.

Another case from New York is Ritts vs. American Overseas Airlines, United States District Court, Southern District of New York, January 17-18, 1949.\textsuperscript{226} A trans-oceanic aircraft having made a stop at the alternative Newfoundland airport at Stephenville, continued its flight at night, and proceeded after take-off straight due east for seven miles, when it failed to clear a hill not marked with any light. It was established that the pilot had been fully aware of the existence of the hills in the vicinities of the airport. It was dark when the airplane took off, and the pilot apparently did not spiral to attain elevation, but flew for about two and one-half minutes and crashed against the hill which was approximately 1200 feet high. The aircraft hit the hill at about 1160 feet.

One minute after take-off the Stephenville tower control operator talked
by radio telephone to the airplane and requested a ceiling check. In reply a message was sent from the aircraft requesting the tower control officers to “wait for ceiling check.”

The Court’s question whether the air company had proved by a “preponderance of the credible evidence that the company and its agents had taken all reasonable and necessary measures to avoid the damage or that it was impossible to take such measures,” was answered in the affirmative by the jury, and a verdict in favour of the air company was returned.

From the very same accident emanated, however, another case, viz. Goepp vs. American Overseas Airlines, State of New York, New York County, Supreme Court, October 25, 1951, and January 7, 1952.227 In this case the jury had arrived at an entirely opposite result and had returned a verdict for the plaintiff for 65,000 dollars, i.e. above the Warsaw limits. Implicit in the jury’s verdict was a finding that the defendant (the air company) was responsible for a violation of the Civil Air Regulations, constituting wilful misconduct. The defendant moved to set the verdict aside as being against the weight of the evidence, or alternatively to reduce the verdict to 8,300 dollars (the Warsaw limits). The Supreme Court denied these motions, stating inter alia that “there was evidence from which the jury could have found that the accident resulted from the pilots lack of familiarity with the airport, and that the knowledge he lacked would have been supplied by (certain) qualifying procedures required by the CAB rules.”

The decision was appealed, and in the judgment of the Appellate Division228 it was stated by the majority of the judges that it is “abundantly clear that any failure to make (the qualifying procedures) . . . bore no proximate causal relation to (the) accident. . . .”229 The defendant upon this appeal did not question plaintiff’s right to recover 8,300 dollars under the Warsaw Convention, and the plaintiff was given judgment for this amount. Thus a balancing of the extreme views taken with respect to the liability arising from this accident was finally arrived at. The Court of Appeals per curiam and without opinion affirmed the judgment of the Appellate Division.230

Two other decisions from the United States may be mentioned in this connection. Although the principal issue in these cases is the question whether the accident was caused by wilful misconduct or not, both of them contain considerations which may contribute to the understanding of Art. 20 paragraph 1 also.

The first case is Grey vs. American Airlines Inc., United States Court of Appeals, Second Circuit, November 7, 1955:231 An aircraft proceeding on a flight from New York to Mexico City had trouble with No. 1 engine which was stopped and its propeller feathered. On approaching Dallas, Texas, a series of events occurred with respect to No. 4 engine which half a mile from the landing field began to fail. The aircraft lost speed, descended to the left of the runway and struck a hangar. A number of passengers were killed.

Before the District Court the jury had returned verdicts in excess of the Warsaw limits of 8,300 dollars per passenger. On motion to reduce the verdicts to the limit the Court held that the evidence did not support a verdict of wilful misconduct, and, accordingly, the verdicts were reduced to 8,300 dollars.232

The Court of Appeals upheld the opinion of the District Court, and stated that the real cause of the accident remained in doubt. In his examination of the provisions of the Warsaw Convention, Harald S. Medina, Ct. J., said inter alia:

"... Chapter III is the one which concerns us here. Art. 17 imposes an absolute liability upon the carrier for all personal injuries, regardless
of fault, 'if the accident which caused the damage so sustained took place on board the aircraft.' But this liability is excused by Art. 20 paragraph 1, if 'the carrier proves' that it 'has taken all necessary measures to avoid the damage or that it was impossible' for it to take them. As to this it is plain that the burden of proof is upon the carrier. And, in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable.'

The other case, arising from the same accident, is Rashap vs. American Airlines, Inc., United States District Court, Southern District of New York, October 5-13, 1955. The question here was also whether the plaintiff had proved the damage to have been caused by wilful misconduct. The air company had conceded that it was responsible up to the Warsaw limit provided that losses had been suffered up to such amount.

In the Court's instruction to the jury the following was stated inter alia:

"... The law provides, in the first place, that in the event of an accident in an international airplane, the passenger can recover what his damages are up to 8,300 dollars without any proof or consideration except the fact that the accident happened and that he was injured, and the extent of his injuries. The only way that the company could avoid paying that amount would be to come in and show that there was absolutely nothing that they could have done that would have prevented the accident. As you can see, that is a most difficult thing to prove and would apply only in unusual circumstances. So the effect is, under the Warsaw Convention, that if there is an accident on an international airplane flight, a passenger recovers his damages up to 8,300 dollars practically automatically just because of the happening of the accident."

After several hours of deliberations the jury found the air company not guilty of wilful misconduct.

These judgments reflect a remarkable development in the attitude to the question of liability pursuant to the Warsaw Convention. In the United States the main interest in connection with the liability has been transposed from the problem: liability or non-liability, to the question of limited—unlimited liability. This appears to be an inevitable consequence of the standard of living in North America. During the debates at The Hague Conference, 1955, concerning the raising of the limits of liability of the Convention the United States delegate, Mr. Calkins, stated that in his country "there had been judgments of 160,000 dollars... and there were a great number of judgments in the 40,000-50,000 dollars range. The average settlement of claim paid to widows of United States Government employees was 70,000 dollars..." Against this background it seems quite natural for the parties to concentrate upon the possibilities—or the risks—of the unlimited liability. The Warsaw limit amount seems to have been reduced to a secondary importance. The carrier will be only too willing to offer this amount to settle the case, and the plaintiffs will consider it unsatisfactory. This attitude will also be reflected in the judges' considerations, and as a natural course of development the view will gradually prevail that the liability pursuant to Art. 20 paragraph 1 of the Convention is imposed upon the carrier "practically automatically" in the case of an accident.

It will be seen that in this way the social conditions of life in a country may have a direct bearing on the interpretation of the liability provisions of the Warsaw Convention, and differences in social standards may lead to differences in the understanding of these provisions—thus counteracting in practice the uniformity of law formally attained through the Convention.

It remains to be seen, however, whether the fact that the Warsaw limit with regard to passengers was raised 100 per cent at The Hague Conference will stimulate interest in the limitation amount and thereby in the carrier's defense pursuant to Art. 20 paragraph 1. Also the advent of aircraft carrying 100-150 passengers may contribute to a revision of the prevailing views.
There is a number of other cases of unknown cause of damage in which the carrier has offered compensation to the plaintiffs up to the Warsaw limits, see for example the Belgium case Pauwel vs. SABENA, Tribunal de première instance de Bruxelles, May 6, 1950, concerning an aircraft which failed to land at Gander Airport, Newfoundland, and crashed 43 km. from the airport; the French case Hennessy vs. Air France, Tribunal civil de la Seine, April 24, 1952, and Cour d'Appel de Paris, February 24, 1954, concerning a crash on the Azores, 60 km. from Santa-Maria Airport; and another French case, Del Vina vs. Air France, Tribunal civil de la Seine, July 2, 1954, a crash in the Persian Gulf. In Garcia vs. Pan American Airways, New York Supreme Court, Appellate Division, May 21, 1945, the cause of the airplane's crash into the waters of the Tagus River at Lisbon, Portugal, was uncertain, also. The main issue in the case was whether the Warsaw Convention was to be applied at all. This question was answered in the affirmative, and the carrier was held liable up to the limits of the Convention. It is, however, difficult to see whether or not the carrier had offered the limited compensation in advance.

Although it is impossible, when contemplating the above mentioned court decisions, to consider them as concurrent exponents of one, and only one, interpretation of Art. 20 paragraph 1 with respect to the requirements for the carrier's burden of proof, it is nevertheless possible to point out a prevailing tendency: The majority of the decisions has given expression to the view that in cases of unknown cause of damage the carrier is to be held liable. This is true with regard to the English Grein-case, the first Primavestra-case from Tripoli, the German Flohr-case, the American Wyman-case, and the Goepp-case. The same understanding has been indicated in the American Grey-case and Rashap-case. Inconsistent with the majority view, on the other hand, are the Csillag-case from Toulouse and the American Ritts-case. The latter seems, however, to have been offset by the Goepp-case. Finally, the second (appeal?) decision from Tripoli in the Primavesta-case is left out of consideration as that judgment was not concerning an unknown cause of damage.

If the court decisions are compared to the opinions expressed by the authors it will be seen that a substantial majority of the decisions has approved the restrictive interpretation of Art. 20 paragraph 1. A majority of two cases has inclined towards the liberal interpretation. No judgment has approved a presumption of the due diligence of the crew in cases where a direct proof has been rendered impossible by the circumstances.

3. Evaluations

The starting point for considerations concerning the carrier's liability in cases of unknown cause of damage may naturally be taken in the allocation of the burden of proof in Art. 20 paragraph 1. In this respect the Article is clear: The onus is imposed upon the carrier—he has to show that he himself as well as his servants or agents have taken all the necessary measures to avoid the damage or that it was impossible for him and them to take such measures. From Pittard's report of 1925 it appears that the allocation of the burden of proof was the question to be determined immediately after the choice of the principle of liability had been made. Thus the authors of the Convention seem to have attached great importance to the allocation of "cette lourde charge"—and have certainly been well aware that this was a decisive element in the entire system of liability laid down by the Convention.

What does it mean that the burden of proof is imposed upon the carrier? It implies that the carrier is held liable unless he furnishes satisfactory evidence—or in other words: that he bears the risk of the impossibility of producing the required proof. The courts are bound to reach a decision
in the cases under consideration, and in those cases where "the law becomes stalled on dead center because of total absence of proof" the court has to resort to the burden of proof as the decisive element in solving the problem of liability. In order to confine to a minimum the number of these cases—which are, of course, less satisfactory to the sentiment of justice than the normal cases decided on the basis of a legal evaluation of elucidated facts—the burden of proof is imposed upon the one who, on the average, has the facilities of examining the circumstances surrounding the damage and, thereby, of securing the relevant evidence.

Next, it can be maintained that to satisfy the requirements of Art. 20 the carrier must furnish evidence to the effect that he and his servants or agents have committed no faults. This seems abundantly clear from Pittard's report of 1925 and has also been accepted by an overwhelming majority of the court decisions and authors. From the generally accepted principles of causal relation in the law of compensation it follows that only faults in causal and adequate (i.e. not too remote) relation to the occurrence of the damage are relevant.

It has been said that a negative proof is normally impossible to furnish. It is, of course, true that by nature a piece of evidence can be positive (and concrete) only. But the conclusions to be drawn from a number of pieces of evidence may be formulated positively as well as negatively. "Having committed no faults" is the negatively formulated counterpart to "having exercised due care (due diligence)." Both expressions aim at the same purpose, namely to state that a person in a given situation has acted in accordance with a required standard. The standard itself may be described by means of the phenomenon "a bonus pater familias" or "a reasonable man." The proof for compliance with this standard is of course the same whether the conclusions (or the requirements) are expressed in a positive or a negative way. When the various pieces of evidence have been produced they will be assessed by the court, and from this evaluation the court will decide whether or not it has been proved that the required standard has been complied with. Its conclusions may be formulated positively ("has exercised due care") or negatively ("has committed no faults").

It is, of course, impossible to point out what proof and how much proof is required to satisfy the carrier's burden of proof. The court must make an assessment of the evidence of each case on its own merits in order to decide whether the carrier has proved by a preponderance of evidence that no faults have been committed. In this respect the court may base itself also on presumptions, provided that these are justified by the available information concerning the factual circumstances in accordance with the general principles of assessment of evidence.

In cases of completely, or almost completely unknown cause of damage the carrier has no possibilities whatsoever of conveying to the judge a basis for the assumption that the crew has shown due care in exercising its duties up to the moment of damage. Consequently, the carrier cannot be considered to have satisfied the requirements for his burden of proof, and he cannot escape liability. An opposite solution to the effect that the carrier may be relieved of his liability by furnishing a general proof of the due care of the crew members on the basis of their licenses and general qualifications, would constitute a flagrant departure from the normal principles for assessment of evidence—considering that a certificate for certain qualifications or for a certain professional skill can never empirically be regarded as a guarantor for the non-commitment of faults by the person in question. No justification is to be found for such a departure. A presumption of the due diligence of the crew cannot be accepted on that basis, either. In both cases the allocation of the burden of proof in Art. 20 paragraph 1 would be made entirely illusory. For, as has been said before, it is exactly in the cases where the
circumstances render the furnishing of evidence impossible, and in these cases only, that the allocation of the burden of proof plays a decisive rôle in the question of liability. The burden of proof would be reduced from a risk of the impossibility of furnishing sufficient evidence to a burden of information only. On the other hand, the passenger, or his next of kin, and the shipper would automatically be burdened with the risk of the inability of furnishing proof in these cases—which would be a situation exactly opposite to the intentions of the authors of the Convention as explained in Pittard’s report of 1925.

In addition, the result in practice would be entirely contrary to the general purposes behind the allocation of the burden of proof. It is conceivable that in order to avail himself of either the liberal interpretation of Art. 20 or the proposed presumption a carrier might be interested in showing that in a given case the direct proof of absence of fault is impossible to furnish. In such a case his co-operation to the elucidation of the case might be influenced thereof. In other words, a liberal interpretation or a presumption as proposed would create a risk of increasing the number of cases of unexplained damage, whereas the obvious purpose behind the allocation of the onus has been—and must be—to reduce the cases of unknown cause of damage to a minimum.

It has been said that “the fact of imposing upon the carrier the burden of proving affirmatively that his agents took the necessary measures, would mean imposing an absolute liability upon him in cases where the cause of the accident remains unknown,” and this would be contrary to the intention of the authors of the Convention. This point of view cannot be endorsed, however. It is true, of course, that as a consequence of the implied risk attached to the burden of proof a carrier may be held liable in a case where the facts—if known—would have revealed absence of fault. But this is quite another matter than imposing an absolute liability upon the carrier. The principles of liability as laid down in Art. 20 paragraph 1 (subjective liability) become inoperative in certain cases owing to lack of knowledge of the factual circumstances, and, accordingly, such cases have to be decided via the play of the burden of proof. This is a simple consequence of the fact that the acts of the crew escape legal evaluations, but that nevertheless a decision has to be reached. The conclusion to be drawn from the quoted point of view would be, in fact, that whenever a person is to be held liable for his own faults and those of his servants or agents, the legislator or the courts should be debarred from imposing upon him the burden of proving absence of fault. The absolute liability which the authors of the Convention rejected was the traditional objective liability as it is known, for example, towards third parties on the surface, but certainly not the liability emanating from the implied risk attached to the burden of proof.

In cases of partly unknown cause of damage it is conceivable that the carrier might have a possibility of satisfying the requirements for his burden of proof. If, for example, the available evidence in a given case indicates the cause to be one of two or more established phenomenons, the carrier may succeed in showing that no faults have been committed in connection with any one of the established hypotheses. Furthermore, if a given cause of damage has been established with a certain (higher) degree of probability, one cannot preclude the possibility that the court on this basis—in connection with further information concerning the acts of the crew members and in particular of the pilot—may arrive at the conclusion that the required proof pursuant to Art. 20 paragraph 1 was furnished—without finding itself able to lay down in general that the presumed cause with certainty is the cause, or the sole cause, of damage.

These examples, however, are both to be found close to the borderline to
the elucidated cases. The more removed a case is from this line the more
the possibilities of establishing the proof are fading away.

Summarizing these considerations it can be stated that in a case of
completely, or almost completely, unknown cause of damage the carrier can
find no basis for the furnishing of evidence to fulfil his burden of proof
pursuant to Art. 20 paragraph 1. In cases of partly unknown cause of
damage it is conceivable that the carrier may have a possibility of furnish-
ing the required proof if the case under consideration contains unknown
elements to a smaller degree only. In other cases the possibility seems to
fade away.

If the adduced considerations are compared to the above examined court
decisions it will be seen that the majority of the decisions seems to be in
conformity with these views.

This is true, in the first place, with respect to the English *Grein-case.254*
The pilot had continued the flight at the same low altitude in spite of the
fact that the weather conditions were bad and that he had lost his way and
must have been well aware that he was in the vicinities of the wireless mast.
No explanation could be given of the reason why he proceeded with the
flight under such circumstances instead of adopting other possible courses,
and the possibility of an error of judgment was thus left open. Against this
background it seems quite natural to consider the requirements for the
burden of proof *not* to have been satisfied.

In the German *Flohr-case*255 the situation seems to have been somewhat
similar, except for the fact that more information concerning the course of
actions of the pilot was available. It had been established that the weather
conditions in the Alps were bad and that the pilot had acted correctly when
flying directly towards the Alps and when trying a forced landing. The last
problem to be solved was the question whether the pilot, having entered the
zone of disturbances, had exercised due diligence. As in the Grein-case no
information could be given concerning the reason why the pilot did proceed
with the flight and did not try other possibilities. It could be asked whether
the existing information about the pilot's skill and care, for example in
connection with the attempt to make the forced landing, could permit the
presumption that he had acted correctly also when entering the zone of
disturbances. Apparently, the court did not find justification for such a
presumption—and it seems difficult to criticize this attitude. The carrier
has not been imposed an absolute liability by the court, but has been held
liable for the impossibility of furnishing sufficient evidence as to the correct
behavior of the pilot: "... one can know nothing concerning the attitude
adopted by the pilot at the time of his passage through the clouds, the cause
of the icing, and the defendant must bear the consequences of this uncer-
tainty."

In the American *Wyman-case*257 the cause of accident was almost com-
pletely unknown—the only information being that the aircraft was involved
in an unpredicted storm area. No basis at all is to be found upon which the
court could decide whether or not faults had been committed during the
flight, and in its decision the court has clearly drawn its conclusions from
this uncertainty.

The *Primatesa-case* from 1937 in Tripoli258 may be understood to the
effect that the court states it to be impossible to give judgment in favour of
the carrier unless he explains in details the events leading up to the accident
and shows that all necessary measures have been taken. If that be the
correct understanding the decision seems to be in harmony with the above
considerations.259 On the other hand, the judgment may also be interpreted
to the effect that the carrier lost his case because he did not explain the
case even to the extent that was possible under the circumstances. In that
case the court has not decided the question whether or not the carrier is to be liable in cases which are impossible to explain.

The American Ritts-case and Goepp-case seem to offset each other. In the Ritts-case the carrier escaped liability although no explanation whatsoever had been given of the fact that the pilot did not spiral to attain sufficient altitude. This decision is inconsistent with the above considerations concerning the burden of proof. The judgment was also totally repudiated by the decision reached in the Goepp-case emanating from the same accident. In that case the majority of the Appellate Division gave a judgment the result of which is in harmony with the above views. But as the carrier did not question the plaintiff’s right to recover the awarded limited amount of 8,300 dollars, the decision did not directly treat the problem under consideration.

The only “conclusion” to be drawn from these two cases seems to be a gentle amazement as to how the same accident can give rise to decisions so entirely incompatible. An explanation may be found in the fact that the assessment of evidence has been made by laymen (a jury) who are not, as a matter of course, experienced in that field.

Remaining is the Csillag-case from Toulouse. The views expressed by the court in this case—but not necessarily its conclusions—are completely inconsistent with the above considerations and, indeed, with all the rest of the judgments—except for the Ritts-case. The court has described the requirements for the carrier’s exonerating proof in a way which, it is respectfully submitted, would render his burden of proof entirely illusory. To reach this result the court has based itself upon Pittard’s report of 1925. However, as has been stated earlier, no support can be derived from this report for an understanding to that effect.

Finally, it is worth noting in this connection that also IATA has expressed itself concerning the requirements to satisfy the carrier’s burden of proof. “The Warsaw Convention . . . gave to the plaintiff the benefit of any doubt by requiring the defendant carrier to assume the burden of explaining the cause of the accident and establishing that it had taken all necessary steps to prevent its occurrence,” an IATA observer stated during the revision works on the Warsaw Convention. It seems quite natural for the carriers to stress a restrictive interpretation of Art. 20. For, ever since the beginning of the discussions concerning the question of the carrier’s liability towards passengers and consignors, the voices of the partisans for a system of absolute liability—more or less similar to that of the railways—have been heard. By emphasizing the fact that they are always to be held liable whenever the possibility of negligence exists, the carriers seem to have taken out the sting of the arguments for substituting a strict liability for the present system. Those of the users who want to be compensated in any case when damage occurs may easily obtain that through insurance. Of the main arguments for the absolute liability only the wish for clarity and uniformity remains. The question whether or not a need in this respect is felt will, of course, first and foremost depend on the possibilities of reaching a uniform interpretation of Art. 20 and 25 of the Convention.

4. COMPARISON WITH MARITIME LAW

In connection with the examination of the carrier’s liability in cases of unknown cause of damage pursuant to Art. 20 paragraph 1 of the Warsaw Convention it may be of interest to glance, for a moment, at the corresponding problem in international maritime law. The attention will be focused on “Convention internationale pour l’Unification de certaines Règles en Matière de Connaissance” (the so called Hague Rules), signed at Brussels, August 25, 1924. Art. IV subsection 2 contains a detailed enumeration of
widely different causes of damage for which the carrier is not to be liable, and it finishes with the following "catch-all" provision under paragraph q:

"(Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from)

q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

It appears that the carrier is liable unless he furnishes proof to the effect that neither his fault nor that of his servants or agents has contributed to the loss or damage. In other words, the proof to be furnished pursuant to the Brussels Convention Art. IV subsection 2 paragraph q seems to be identical with the proof required by the Warsaw Convention Art. 20 paragraph 1 when correctly interpreted. Thus it lies near at hand to ask whether the carrier is held liable pursuant to the Brussels Convention in cases of unknown cause of damage.

According to Scrutton it is not necessary for the carrier to show the exact cause of the loss in order to claim the protection of the rule under Art. IV subsection 2 paragraph q of the British Carriage of Goods by Sea Act 1924, provided that he shows that the loss was not due to his negligence. But it is not enough that the loss is unexplained because the onus is on the carrier to show absence of fault or negligence.

In Carver's "Carriage of Goods by Sea" reference is made to Heyn vs. Ocean S.S. Co. and the Ellerman Line case to show that in cases of unexplained cause of damage the carrier is held liable. Astle states that "the interpretation of paragraph q of Art. IV Rule 2, by the Courts of (the United Kingdom) and the United States has placed a very heavy burden upon the carrier," and later reference is made to the Ellerman case.

In the American case Middleton vs. Ocean Dom. S.S. Co. the Court stated that

"... in a suit for total loss of cargo, the libellant's admission of the fact that the vessel had stranded and thereafter sunk and become a total loss places the carrier in the position of sustaining the burden of showing that the immediate cause of the loss was an excepted peril."

In another American case, Fagundes Sucena Cia vs. Mississippi Shipping Co. the Court held a similar view with respect to unexplained water damage of wheat flour in bags.

The Supreme Court of Canada has emphasized the requirements for the carrier's burden of proof pursuant to Art. IV subsection 2 paragraph q in the Canadian Water Carriage of Goods Act 1936 in the Lady Drake case. A cargo of molasses in casks came adrift in heavy weather. The ship owner pleaded that the loss was due to perils of the sea, and that it had satisfied the burden of proving that there was no negligence in accordance with paragraph q. The Supreme Court, affirming the lower courts, stated:

"... It was very vigorously urged by the counsel on behalf of the ship that he had established a prima facie case of absence of negligence by proving proper stowage. But it will be observed that the burden resting upon the carrier is a very heavy one. He has to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given."

In connection with the French Act of 1936 introducing the provisions of the Brussels Convention Ripert states that pursuant to Art. IV subsection 2 paragraph q the carrier is not liable if he establishes the cause of damage
and the absence of fault. As far as the paragraphs a-p are concerned it is sufficient for him to show that the damage is due to one of the excepted causes and the non-existence of fault is a consequence of the nature of the cause.\textsuperscript{276}

In \textit{Italy} the opinions seem to be divided. According to \textit{Manca}\textsuperscript{277} the carrier is to be liable in cases of unknown cause of damage. This is an obvious consequence of his burden of proof pursuant to Art. 422 of the Italian Code of Navigation which contains the principles of Art. IV subsection 2 paragraph q of the Brussels Convention. The author refers in this connection to the concurring view of \textit{Ferrarini}.\textsuperscript{278} On the other hand, \textit{Lefebvre d'Ovidio and Pescatore}\textsuperscript{279} hold the opinion—as they did with respect to the Warsaw Convention Art. 20 paragraph 1\textsuperscript{280}—that damage caused by unknown cause must be borne by the shipper. No Italian cases have been cited in support of either of the advanced views.

In \textit{Norway} the opinions are not quite concurring, either. \textit{Jantzen}\textsuperscript{281} admits that the text of the Norwegian Maritime Code of February 4, 1938 § 118,\textsuperscript{282} if literally interpreted, would result in the carrier being held liable in cases of unknown cause of damage. Basing himself upon the explanatory statements of the Bill, the author states, however, that in case of a ship disappearing without leaving a trace the carrier might be relieved of his liability upon the proof that the ship was seaworthy before the departure.\textsuperscript{283} In cases of unexplained damage of goods during the voyage the carrier should have a possibility of escaping liability, also. \textit{Sejersted},\textsuperscript{284} however, assumes that the exonerating proof can hardly be established unless the cause of damage is explained.

The \textit{Dutch} author \textit{Schadee}\textsuperscript{285} states in connection with the new Dutch Act implementing the Brussels Convention that the carrier's burden of proof is a heavy one, and he seems to indicate that the carrier is supposed to explain the cause of damage in order to escape his liability.

With regard to German law, \textit{Wüstendörfer}\textsuperscript{286} and \textit{Abraham}\textsuperscript{287} state that pursuant to § 606 and § 607 in the German Commercial Code (das Handelsgesetzbuch) containing the principles of the Brussels Convention, the carrier has to explain the origin of damage and to prove that no fault has been committed for which the carrier may be liable. If the cause of damage remains unknown the carrier has to bear the consequence of this uncertainty. This is the opinion held by the German courts.\textsuperscript{288} The courts are, however, inclined to moderate, to a certain degree, the requirements for the exonerating proof in such cases.\textsuperscript{289} Thus the carrier is considered to have established satisfactory proof if he is able to point out certain possible causes of damage and in addition shows that no faults have been committed in connection with any one of these possible causes.\textsuperscript{290} Also, it has been held sufficient, both in respect of the cause of damage and of the non-existence of fault, that evidence has been furnished on the basis of a sufficient measure of probability.\textsuperscript{291}

In his comments on the \textit{Spanish} Act of December 22, 1949, Art. 8\textsuperscript{292} \textit{Calero}\textsuperscript{293} confines himself to state that the provision under paragraph q imposes upon the carrier a burden of proving that he himself and his servants or agents have exercised due diligence.

It appears from this survey of the maritime law—which, by no means, can be considered exhaustive—that the problem of the unexplained causes of damage is a well known phenomenon in sea-borne carriage, also. And it is justifiable to conclude that the majority of the different courts and authors have taken up the attitude that, on principle, the carrier is to be held liable in cases of unknown cause of damage. Thus, it can be stated that the prevailing tendency in the requirements to satisfy the air carrier's burden of proof pursuant to Art. 20 paragraph 1 of the Warsaw Convention corre-
sponds to a similar tendency in the requirements for the sea carrier’s proof according to Art. IV subsection 2 paragraph q of the Brussels Convention.

**D. Article 20 Paragraph 2**

Art. 20 paragraph 2 of the Warsaw Convention deals with the carriage of goods and baggage only. The carrier is not liable in such a carriage if he proves that the damage was occasioned by negligent pilotage or negligence in the steering of the aircraft or in the navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. As earlier mentioned the present Art. 20 paragraph 2 is one of the results of the compromise of opinions which was reached at the Warsaw Conference. The principle behind the provision has been taken from the maritime law where a (partly) corresponding rule is found in the Brussels Convention 1924 Art. IV subsection 2 paragraph a, and in the American Harter Act of February 13, 1893.

Art. 20 paragraph 2 has never played a significant rôle in the application of the Warsaw Convention. It has been invoked only in a few cases, and has very often been considered a foreign streak in the Warsaw principles of liability, permitting, as it does, an exception from the carrier’s vicarious liability. At The Hague Conference, 1955, Art. 20 paragraph 2 was unanimously deleted and thus the existing difference in the carrier’s liability in respect of passengers and goods will be eliminated from the moment the Hague Protocol comes into force.

It can be asked whether, in the case of unknown cause of damage, the carrier is able to invoke Art. 20 paragraph 2 with the result that he may be relieved of liability as far as carriage of goods and baggage is concerned. The wording of the provision seems to indicate an answer in the negative. In order to prove that the damage was occasioned by negligent pilotage, etc., it seems indispensable for the carrier to prove in the first place how the damage was caused and then that the cause in question constituted one of the excepted causes of Art. 20 paragraph 2. It is conceivable, however, that it might be considered sufficient for the carrier to point out that the damage is caused by one of two or more defined causes, and that no faults but nautical ones have been committed in connection with any one of the established possibilities. On the other hand, it is also possible that the requirements to satisfy the carrier’s burden of proof pursuant to Art. 20 paragraph 2 would be considered more stringent than the requirements pursuant to Art. 20 paragraph 1.

To delineate the exact borderline between nautic faults and other faults has caused considerable trouble among the authors. In connection with the problem under consideration a scrupulous outlining of the scope of Art. 20 paragraph 2 seems not to be necessary, however. Of importance is only the question whether it can be said that all faults committed by the crew after the departure must eo ipso be nautic faults. If so, the carrier might escape liability in a given case of unknown cause of damage by proving that if fault has been committed at all, it must have been faults committed by the crew during the flight. However, such a view is not acceptable. Whenever the fault in question is not clearly specified, a possibility seems always to exist that a fault which cannot be characterized as a nautic fault might have caused the damage. If, for example, the crew members neglect the fire-alarm on account of the fact that on earlier occasions it had shown a tendency to start the alarm without actual fire, and if an accident is caused owing to such neglect, it seems difficult to maintain that the fault in question is solely “negligent pilotage or negligence in the steering of the aircraft or in navigation.”

Thus it can be stated that in cases of unknown cause of damage occurring in the carriage of goods and baggage the carrier will not in general be
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able to furnish the proof required in Art. 20 paragraph 2 of the Warsaw Convention and, accordingly, he cannot escape liability by invoking this provision.

No court decisions seem to exist on this question.

E. Article 25

The cause of damage is of a decisive importance for the application of Art. 25 of the Warsaw Convention. If the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct, the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability, see Art. 25 paragraph 1. Similarly, if the damage is caused as aforesaid by the carrier's servants or agents acting within the scope of their employment, the carrier shall not be entitled to avail himself of the said provisions, Art. 25 paragraph 2.

It is indubitable that the burden of proof is imposed upon the claimant, and it seems indubitable also that he has to explain the origin of the damage in order to fulfil the requirements of his onus. An unknown cause of damage gives no indications whatsoever of wilful misconduct or its equivalence. Even if it be established that the carrier or his servants or agents did commit faults which might be characterized so—for example certain cases of deliberate violation of flight regulations—the proof of the causal relationship between these faults and the damage would still be missing and could never be furnished in cases of inexplicable cause of damage. To assume any wilful misconduct or causal relation under such circumstances would mean to shift the burden of proof from the claimant onto the carrier.

These viewpoints have been approved by the courts. In the Belgium case Pauwels et al. vs. SABENA le Tribunal de première instance de Bruxelles stated:

"... in order to invoke Art. 25 the claimants must prove:
(1) That one or more faults had been committed by the carrier,
(2) That a chain of causation exists between the damage and one or more of the faults proved against the carrier or his servants,
(3) That the faults causing the damage were committed in such a way as to present the characteristics of dol, or of a fault which, according to the law of the Tribunal, is considered to be equivalent to dol."

An analysis of the evidence available to the Court in this case led to the conclusion that the real cause of accident remained unknown. In these circumstances the Court held that "the claimants had failed to establish any fault on the part of the defendants or their servants, or (a fortiori) any chain of causation between the alleged faults and the accident."

The French Cour d'Appel de Paris faced the same problem in the case Hennessy vs. Air France and expressed itself very clearly on this point:

"La preuve de l'existence d'une faute lourde incombait à M. Hennessy. Il ne l'a pas faite, il ne pouvait pas la faire, puisque les éminents techniciens qui ont procédé aux enquêtes n'ont pu que formuler des hypothèses."

In the earlier quoted American case Grey vs. American Airlines the District Court gave the following interpretation of Art. 25—which seems to contain an analysis directly hitting upon the purposes behind the Article:

"We hold that the trial judge ruled correctly when he charged the jury that plaintiffs could recover no more than 8,300 dollars on account of the death of each accident, unless plaintiffs proved by a fair preponderance of the credible evidence that there was wilful misconduct on the part of defendant's employees, or any of them, which was a substantial contributing factor to the accident. The specific language of Art. 20 paragraph 1 and the absence of corresponding words in Art. 25 would seem to make admissible no other interpretation of the Convention. But perhaps of
greater significance is the general purpose of protecting international air carriers from the burden of excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carrier of this burden of proof whilst at the same time giving the injured parties the opportunities to prove wilful misconduct, if they can.

The same accident from which the Grey-case emanated gave rise also to the Rashap-case, and in the latter the Court stated:

"The plaintiff carries the burden of proof as to his claim that the accident was caused by the wilful misconduct of the air line company and also as to the amount of the damage. Therefore, in order to find a verdict for the plaintiff, you must also find that he has established the cause by a fair preponderance of the evidence, which means that the evidence in support of its contentions outweighs, in your judgment, the evidence to the contrary."

In the American Wyman-case and the French case Del Vina vs. Air France, in both of which the cause of damage remained unknown, the claimants failed to receive compensation beyond the Warsaw limits. This is true also in the case Nordisk Transport vs. Air France which was about a box of watches having disappeared without a trace en route from Paris to Saigon. The lower court had held that the fact that the air company could give no explanation whatsoever concerning the circumstances of the loss of the box constituted a sufficient basis for a presumption of wilful misconduct. But la Cour d'Appel de Paris stated expressly that wilful misconduct (faute lourde) is never presumed, and the compensation was reduced to the Warsaw limits.

Of special interest as far as proof of causal relationship is concerned is the American Goepp-case. In the lower court the judge gave the following explanation to the jury:

"The burden of proof on this cause of action (i.e. founded on Art. 25), unlike the burden of proof on the other cause of action (Art. 20 paragraph 1) rests upon the plaintiff. She must satisfy you by a fair preponderance of the credible evidence . . . that the defendant acting through its officers, employees or agents was guilty of wilful misconduct. Wilful misconduct is never presumed."

Nevertheless the jury returned a verdict awarding the claimant compensation of 65,000 dollars, i.e. above the Warsaw limits. The defendant moved to set this verdict aside, but in the Supreme Court of New York Botein Ct. J. stated:

" Implicit in the jury's verdict was a finding that the defendant was responsible for a violation of the Civil Air Regulation, constituting wilful misconduct under the provisions of the Warsaw Convention. The only question to be considered . . . is whether . . . this violation was the proximate cause of the decedent's death. The pertinent regulation provides that within a specified period preceding his employment 'the qualifying pilot shall have performed in flight . . . all of the approved instruments procedures at each refueling airport approved for the route.'

There was evidence in the records from which the jury could have found that the accident was the result of Captain Westerfeld's lack of familiarity with conditions at the Stephenville Airport; and that the knowledge he lacked would have been supplied by qualifying procedures which conformed to the requirements of the Civil Air Regulations. In such event there was sufficient basis for the jury's finding that the violation of the regulation was the proximate cause of decedent's death."

These considerations were rejected, however, by the majority of the Appellate Division. The Court held that evidence that the pilot had made only one checkflight to the alternate airport Gander, with which he had had
previous and subsequent familiarity (and not two flights as required by the regulations), did not in law bear any proximate causal relation in respect of the accident in question:

"... it is abundantly clear that any failure to make two flights to Gander before qualification bore no proximate causal relation to an accident which occurred 167 miles away."320

Accordingly, the amount awarded was reduced to $8,300 dollars constituting the Warsaw limits, the plaintiff's right to which the air company upon appeal did not question.

In a dissenting opinion one of the judges expressed quite different views with respect to the requirements for the proof of causal relation:

"On the matter of proximate cause it was quite reasonable for the jury to find that the pilot's sub-standard familiarity with an instrument landing on the field at Stephenville involved of necessity a relatively sub-standard familiarity with the terrain, resulting in the pilot's ignorance of the hill which, on take-off, the plane struck. This the jury could find, was a proximate cause of the accident. It should be obvious too that with respect to air accidents, because of the mysteries in which the fatal and more serious accidents become shrouded a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required. What may be required as evidence of proximate cause in a trolley car accident would not be a relevant standard in an accident involving a modern transport plane, or the jet liner now at the threshold of air transportation."321

This line of thinking has been strongly criticized by Drion322—and criticism is justified, indeed. A "liberal approach in finding proximate cause" would, if generally accepted, mean the ruin of the basic idea of the Warsaw Convention: unification of the law. The more important it is, therefore, to emphasize the analysis of Art. 25 given by the District Court in the Grey-case323 which reached the heart of the purpose behind the Article.

The unknown cause of damage seems not to create any special problems with respect to other provisions in the liability chapter of the Warsaw Convention than those of Art. 20 and 25. The cause of damage plays, it is true, a decisive rôle in Art. 21 pursuant to which the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability if he proves that the damage was caused or contributed to by the negligence of the person suffering damage.324 But it is beyond any reasonable doubt that in the case of unexplained cause of damage the carrier can find no basis for invoking this Article.

The allocation of the burden of proof may, however, cause some problems in connection with the new paragraph 2 of Art. 23 of the Convention as drawn up by The Hague Conference, 1955, and although the Protocol has not yet come into force,325 this provision will be examined in the following in relation to the unknown cause of damage.

F. New Article 23 Paragraph 2 (The Hague Protocol Article XII)

Pursuant to Art. XII of The Hague Protocol the existing provision of Art. 23 of the Warsaw Convention326 shall be renumbered as paragraph 1 and another paragraph shall be added as follows:

"2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried."327

If the carrier has inserted the permitted clause in the contract of carriage, the following seems to be the result of this new paragraph with respect to the allocation of the burden of proof:

Upon the shipper's proof of damage, the carrier may, at first in any case, confine himself to point out that the damage was due to the inherent defect,
quality or vice of the cargo. This is where the effect, if any, of the new provision comes in, for, pursuant to the general principles of the Convention (Art. 20) the carrier would have had to show that all necessary measures to avoid the damage had been taken or were impossible to take. If, however, the shipper can prove that the damage in question has been caused wholly or partly by another fact than one of those mentioned in paragraph 2—for example delay—the carrier must show that he is not liable pursuant to the relevant Articles of the Convention, i.e. that he and his servants or agents had taken all necessary measures, Art. 20, or that the damage was caused or contributed to by the fault of the shipper, Art. 21.

An understanding along these lines seems to be the most natural one, and derives also support from the discussions during The Hague Conference. Similarly, it is in accordance with the corresponding rules in international maritime law, see the Brussels Convention relating to Bills of Lading of 1924, Art. IV subsection 2 paragraph m, and subsection 2 in fine.

It is conceivable, however, that the carrier's proof that damage has been caused by the inherent defects, etc., of the goods, is likely to have the same effect as described above, even if Art. 23 paragraph 2 does not apply or the permitted clause is not inserted in the contract of carriage. This would be the case if a causal relation between the occurrence causing the damage and the air carriage is a prerequisite for claiming compensation pursuant to Article 18. By pointing out that the nature of the goods in question is the cause of damage, the carrier has shown the non-existence of such a causal relationship. Considering that the Warsaw Convention lays down rules concerning air carriage for the very reason of the special nature of such carriage and of the special risks created by it, it appears most reasonable to interpret Art. 18 as presupposing a causal relation between the air carriage and the occurrence causing damage.

If the damage of the cargo is inexplicable, the carrier will find no basis for invoking Art. 23 paragraph 2 successfully. If he succeeds, on the other hand, in proving that the damage was a result of the inherent defect, quality or vice of the cargo, but it remains uncertain whether or not other causes may have contributed to the loss, it is for the shipper to bear the risk of this uncertainty, and the carrier will not be responsible. If, however, the shipper establishes the existence of a contributing cause, but the circumstances do not permit any explanation of the chain of events leading up to this cause, the carrier will be held liable. For, in such a case he has no possibility of furnishing proof to the effect that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures, see Art. 20 paragraph 1 of the Convention.

III

THE UNKNOWN CAUSE OF DAMAGE AND THE ROME CONVENTION OF 1952

Leaving the carrier's liability towards passengers, or their dependents, and shippers of cargo, and turning to his liability towards third parties on the surface—i.e. persons unconnected with aviation—we leave also the principle of presumed liability as provided for in the Warsaw Convention and enter into the realm of objective, or absolute, liability. The relevant rules are contained in the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, October 7, 1952. The Convention applies to damage caused in the territory of a Contracting State by an aircraft registered in the territory of another Contracting State, see Art. 23. Any person who suffers damage on the surface shall, upon proof only that damage was caused by an aircraft in flight or by any person
or thing falling therefrom, be entitled to compensation as provided by the Convention, Art. 1 paragraph 1. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations, Art. 1 paragraph 2.

It appears that, in principle, the cause of damage is immaterial. It is irrelevant to ask the question why did the incident, giving rise to the damage, occur? Whether the damage was caused by the carrier's negligence, by the negligence of a third party, or by force majeure, etc., the person having suffered the damage is entitled to claim compensation from the person liable. However, in order to protect the operator against catastrophic risks the Convention provides for a limitation of his liability graduated after the weight of the aircraft.

The background for this system of liability is the concept that damage caused on the surface by aircraft constitutes a risk which must be borne by the operator. The third parties, suffering damage, have no relationship whatsoever to aviation and have no means of avoiding the damage. They have been exposed to this risk without any consent, and they cannot be expected to have insured themselves against this risk.

The Convention contains, however, certain (very limited) defenses for the operator, as well as a possibility of aggravation of his liability, and the application of these special provisions has been conditioned upon certain causes of damage. If the damage has been caused solely or contributed to by the person suffering the damage, the person who would otherwise be liable may escape his liability or have it reduced, Art. 6. If the damage is the direct consequence of armed conflict or civil disturbance, the person otherwise liable shall not be responsible, Art. 5. In cases of unknown circumstances surrounding the damage no possibility will exist of successfully invoking these defenses.

On the other hand, an unknown cause of damage will debar the claimants from pleading Art. 12 of the Convention pursuant to which the liability shall be unlimited if the damage was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage; see in this connection the corresponding problem concerning Art. 25 of the Warsaw Convention.

Apart from these special cases, an elucidation of the chain of events leading up to the incident causing damage will be of no interest to the question of liability pursuant to the Rome Convention.

IV

THE UNKNOWN CAUSE OF DAMAGE AND THE DRAFT CONVENTION ON AERIAL COLLISIONS

For the moment there are no international rules in existence concerning the liabilities in cases of aerial collisions. Yet, an international convention is on its way. During its Tenth Session in Montreal, 1954, the Legal Committee of ICAO drew up a draft convention on aerial collisions which was not, however, considered sufficiently developed for submission as a final text to the approval of a diplomatic conference. The draft was revised by a Sub-committee of the Legal Committee in Paris, March-April, 1960, and the revised text was to be examined during the Thirteenth Session of the Legal Committee in Montreal, September 1960. Due to lack of time it was not possible, however, for the Committee to consider more than some selected problems related to this subject. The Committee, after taking decisions on
those problems, decided that the subject should be further studied, having regard to those decisions, by a Sub-committee which it decided to establish for the purpose.\textsuperscript{335}

In this chapter the problems concerning the unknown cause of damage will be examined in the light of the principles of liability established by the Legal Committee during its Thirteenth Session with regard to aerial collisions. First, however, certain basic provisions of the draft convention worked out by the Sub-committee in Paris, 1960, will be touched upon—provisions concerning which no discussion took place during the Thirteenth Session of the Legal Committee.

The provisions of the draft convention shall apply to every collision between two or more aircraft in flight.\textsuperscript{336} If two or more of the aircraft involved have the nationality of different Contracting States the provisions are applicable irrespective of where the collision occurred. If the collision takes place in the territory of any Contracting State and at least one of the aircraft involved has the nationality of another Contracting State the draft convention is also to be applied, see Art. 1 of the Paris draft.

Liability for the damage contemplated in the draft convention shall attach to the operator, see the draft art. 2 paragraph 1. The damage contemplated is: (a) damage to, or loss of use of, one of the aircraft involved, or damage to or delay of, persons or property thereon caused by one or more of the other aircraft involved; (b) damage which has been suffered by the operator of one of the aircraft concerned because he has been obliged by law to pay and has paid compensation for damage caused by the collision, see Art. 3 of the draft. It will be seen that the draft does not apply to direct action which may be brought with respect to injury, delay, or damage caused to persons or property on board an aircraft against the operator of the same aircraft, or with respect to damage caused to persons or property on the surface; all of these matters will, it is assumed, be regulated by applicable law including any international convention (the Warsaw Convention or the Rome Convention) which applies.

Thus, the following claims will be covered by the draft:

1. Claims against the operator brought by another operator in a direct action for recovery of damage or loss of aircraft and consequential losses in connection thereto;

2. Claims against the operator brought by another operator in a recourse action for compensation paid to persons associated with the latter's aircraft, to persons associated with the former's aircraft, and to third parties on the surface;

3. Claims against the operator brought by persons connected with the aircraft of another operator.\textsuperscript{337}

During its Thirteenth Session the Legal Committee adopted, as a basis for a draft convention on aerial collisions, the following principles of liability:

1. In respect of passengers and goods on the other aircraft: The Warsaw system according to which liability attaches upon proof that damage occurred, but the operator may exonerate himself by proving that he and his servants or agents took all necessary measures to avoid the damage or that it was impossible for him and them to take such measures;

2. In respect of other damage: a system whereby the operator will be liable if the claimant establishes that the operator was at fault.

It will be seen that the liability of the operator of a colliding aircraft is based on fault. The burden of proof, however, has been placed differently in respect of different claims. As far as passengers and goods on the other aircraft are concerned, the operator must prove that he and his servants or
agents have committed no faults at all. Otherwise he will be held liable. In respect of other damage, it is for the claimant to prove that the operator was at fault.\footnote{388}

If damage is caused by the fault of the operator of two or more aircraft, each of the operators shall be liable to the other operators for damage sustained by them in proportion to the degrees of fault respectively committed in causing the damage, Art. 4 paragraph 1 of the Paris draft. This pro rata rule corresponds to the rule laid down in international maritime law in the “International Convention for the Unification of Certain Rules of Law in regard to Collisions,” signed at Brussels in 1910.\footnote{389} The Paris draft, however, does not include a provision in respect of the situation in which the degree of fault committed by either of the operators cannot be determined. The Montreal draft on aerial collisions, 1954, contained a rule according to which each of the operators should bear the damage suffered by him in cases of undetermined degrees of fault. The Brussels Convention, 1910, on the other hand, provides for a division of liability in equal shares in such cases. A provision to the same effect was found in the draft on aerial collisions drawn up by a Sub-committee of the Legal Committee in Paris, 1954.\footnote{390}

It will be seen that the former draft conventions included—as does the Brussels Convention of 1910—specific rules providing for a situation in which the cause of damage is partly unknown: It is established that faults have been committed on both sides; but the degree to which these faults respectively have contributed to the damage remains undetermined. It is, of course, not mere coincidence that provisions in this regard are to be found in legislation dealing with sea or aerial collisions. In both cases experience shows difficulties in explaining the chain of events leading up to the collision. In respect of collisions at sea, each of the ships has generally its own explanation of the events, and witnesses without fear and favour are rare. Aerial collisions will often result in total loss of the aircraft involved, thus rendering it extremely difficult to explore the relevant factors in connection with the accident.

On the other hand, it must be borne in mind that the importance of such provisions concerning the undetermined degree of fault is largely dependent upon the extent to which the court is inclined to establish a certain proportion of liability between the operators concerned although all relevant circumstances surrounding the collision may not have been disclosed. Considerations of this kind seem to have been decisive for the Sub-committee in Paris, 1960. The Sub-committee considered, having regard to experience, that if a court finds that there is fault on the part of more than one of the operators, it would also be able to determine the degree of fault of each of them.\footnote{391} It seems questionable, however, whether a reasoning along these lines will serve the purpose of the convention: the unification of law. In order to reach a determination of the degree of fault respectively committed the judge might feel forced to leave the proven facts as a basis for his decision and indulge in speculations as to what really did happen in a given case. A specific provision regarding the undetermined degree of fault will probably contribute to avoid such speculations.

It can be asked what the legal result would be of undetermined degrees of fault if no specific rule is in existence in this respect. The results would probably differ from country to country. Some courts might hold the convention to be based on the idea of proof of fault and proof of the degree of fault. Consequently, absence of proof of such degree would mean that each party would bear his own damages. Other courts might adopt the view that once faults on the part of the operators concerned have been established each of the parties must be entitled to recovery, and the only natural solution would be to share the liability in equal shares. Thus, it seems indis-
pensable to lay down one or the other rule to assure uniform solutions of the problem.

A comparison of the results of the two possible solutions seems to turn the scale in favour of the rule of sharing the liability in equal shares. For such a provision will mean the avoidance of the extreme cases of arbitrariness, i.e. cases in which one of the operators has to bear all the damage, or an overwhelming part thereof, by himself, although it is established that also the other operator has contributed to the damage through his fault—be it to a lesser or higher degree. It appears more equitable—may be even more logical—to put the case of undetermined degree of fault on an equal footing with the situation in which equal degrees of fault have been established on the part of both operators, rather than comparing it to the case in which no faults have been proved.

In the following the various aspects of the carrier's liability in cases of collision will be examined especially with regard to a completely or partly unknown cause of damage. For the sake of simplicity a collision with only two aircraft involved is envisaged. Furthermore, claims brought by servants or agents on board an aircraft against their own carrier (employer) are not taken into account. As earlier stated such claims are not considered to fall within the scope of the Warsaw Convention, but must be decided upon in accordance with the contract of employment and the applicable national law. Nor will the question of limitation of liability be touched upon.

(I). If it is unknown whether or not the two carriers in question, or their servants or agents, have committed any fault, then, according to the interpretation given in this study of Art. 20 of the Warsaw Convention, each of the carriers shall be liable towards their own “Warsaw passengers” and “Warsaw consignors.” The carriers will find no basis for proving that all necessary measures to avoid the damage have been taken or were impossible to take, see the Warsaw Convention Art. 20, cf. Art. 17 and 18. Whether or not non-Warsaw passengers and non-Warsaw consignors will be entitled to compensation will depend upon the applicable national law.

Both of the carriers will be held liable towards passengers or consignors of goods on the other carrier's aircraft, as they will have no possibilities of furnishing the required proof of non-negligence, cf. the new principles of liability adopted by the Legal Committee in Montreal, Sept. 1960. The same ought to be true in respect of claims brought by servants or agents connected with the other carrier's aircraft.

Both of the carriers will be liable for damage suffered by third parties on the surface as a consequence of the collision, see the Rome Convention Art. 1 and 7. Damages not covered by that Convention must be decided upon in accordance with the applicable national law.

Neither of the carriers is liable towards the other for damages on aircraft, consequential losses etc. sustained by him. Nor can either of them bring recourse claims against the other for any sums paid as a consequence of the collision to persons associated with his own aircraft or to passengers or consignors of goods on the other aircraft, or to third parties on the surface. Each of the carriers must bear his own losses and damages as no proof of fault can be furnished.

(II). In cases of partly unknown cause of damage in the sense that fault has been established on the part of one of the carriers in question, but it remains unknown whether or not the other carrier has committed any fault, the result will be the following:

The negligent carrier is liable towards his own Warsaw passengers and Warsaw consignors of goods, see the Warsaw Convention Art. 20, cf. Art.
17 and 18. Likewise, he is liable towards passengers and consignors of goods on the other aircraft, cf. the Montreal, 1960, principles.

The other carrier is liable towards his own Warsaw passengers and Warsaw consignors—he can furnish no proof to satisfy the requirements of Art. 20 of the Warsaw Convention. Similarly, he is liable towards passengers and consignors of goods connected with the aircraft of the negligent carrier, cf. the Montreal, 1960, principles.

Both of the carriers are liable towards third parties on the surface, see the Rome Convention Art. 1 and 7.

The negligent carrier is liable towards the other carrier for all losses sustained by the latter in connection with the collision, i.e. damage or loss of aircraft, consequential losses, and damages including compensation paid to persons and consignors of goods on his own aircraft and to passengers and consignors of goods on the aircraft of the negligent carrier, and to third parties on the surface. In other words: the negligent carrier will be held liable for all damages and losses arising from the collision—subject to the applicable limits of liability—either through direct claims or through recourse claims.

(III). If it has been established that no fault has been committed by one of the carriers involved in the collision, but it remains in doubt whether or not the other carrier has been negligent, the former will not be liable towards his own Warsaw passengers and Warsaw consignors, see the Warsaw Convention Art. 20, nor towards persons associated with the other aircraft. The other carrier will be liable towards his own Warsaw passengers and Warsaw consignors, and towards passengers and consignors of goods on the aircraft of the non-negligent carrier, see the Warsaw Convention Art. 20, cf. Art. 17 and 18, and the Montreal, 1960, principles.

Both of the carriers will be liable towards third parties on the surface, the Rome Convention Art. 1 and 7.

Neither of the carriers will be entitled to bring claims against each other, neither directly nor in recourse actions, as none of them can furnish proof of fault on the part of the other.

(IV). If, finally, the collision has taken place under circumstances which—although revealing that faults have been committed by both parties involved in the collision—nevertheless do not permit the degree of fault to be determined, then each of the carriers will be held liable towards his own Warsaw passengers and consignors, see the Warsaw Convention Art. 20, cf. Art. 17 and 18, and each of them will be liable towards persons associated with the aircraft of the other carrier, cf. the Montreal, 1960, principles, and towards third parties on the surface, the Rome Convention Art. 1 and 7.

Whether or not the carriers will be entitled to bring claims against each other, either directly or in a recourse action, is impossible to anticipate—unless a specific rule in this respect will be included in the final text of the Convention. Some courts may deny the carriers the right of bringing claims against each other, thus making each carrier bearing the losses suffered by him. Other courts may hold the view that the liability is to be shared in equal shares, thus recognizing the right of each carrier to bring claims, directly or in recourse actions, against the other carrier for one half of all losses and damages sustained in consequence of the collision.
ANNEX I

THE WARSAW CONVENTION, signed at Warsaw, October 12, 1929

CHAPTER III

Liability of the Carrier

ARTICLE 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 18

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an occurrence which took place during the carriage by air.

ARTICLE 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

ARTICLE 20

(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the steering of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

ARTICLE 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the person suffering damage, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

ARTICLE 22

(1) In the carriage of passengers the liability toward each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by a special contract with the carrier, the passenger may establish a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
AIR CARRIER'S LIABILITY

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.

ARTICLE 23

Any provision tending to relieve the carrier of his liability or to establish a lower limit than that fixed in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the contract, which shall remain subject to the provisions of this Convention.

ARTICLE 24

* * *

ARTICLE 25

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his intentional misconduct (dol) or such fault on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to intentional misconduct (dol).

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

ARTICLE 26

* * *

ARTICLE 27

* * *

ARTICLE 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier has his domicile or has his principal place of business, or has an establishment by which the contract has been made, or before the Court having jurisdiction at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court seized of the case.

ARTICLE 29

* * *

ARTICLE 30

(1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his estate can take action only against the carrier who performed the carriage during which the accident or the delay occurred save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor and the consignee.
LIST OF STATES HAVING RATIFIED OR ADHERED TO THE WARSAW CONVENTION
(as of January 1, 1960)

Argentina
Australia, including Nauru, New Guinea, Norfolk Island and Papua
Belgium, including all territories subject to the sovereignty or authority of Belgium
Brazil
Bulgaria
Burma
Byelorussian Soviet Socialist Republic
Cambodia
Canada
Ceylon
The People's Republic of China
Czechoslovakia
Denmark and the Faroe Islands
Egypt
Ethiopia
The Federation of Malayan States
Finland
France, including all territories whose external relations are under French authority
Germany
Ghana
Greece
Guinea
Hungary
Iceland
India
Indonesia
Ireland
Israel
Italy, including all territories under Italian administration
Japan
Laos
Liberia
Liechtenstein
Luxembourg
Mexico
Morocco
The Netherlands, including all territories subject to the sovereignty or authority of the Netherlands
New Zealand, including Cook Islands, Tokelau Islands and Western Samoa
Norway, including all territories subject to the sovereignty or authority of Norway
Pakistan
The Philippines
Poland
Portugal, including all territories subject to the sovereignty or authority of Portugal
Rumania
Spain, including all territories subject to the sovereignty or authority of Spain
Sweden
Switzerland
Ukrainian Soviet Socialist Republic
The Union of South Africa and South-West Africa
The Union of Soviet Socialist Republics
The United Kingdom
Aden
Bahamas
Barbados
Bassutoland
Bechuanaland (Protectorate)
Bermuda
Brunei
Channel Islands
Cyprus
Falkland Islands
Fiji
Gambia (Colony and Protectorate)
Gibraltar
British Guiana
British Honduras
Hong Kong
Ile of Man
Jamaica, including Turcs, Caicos and Caymen Islands
Kenya (Colony and Protectorate)
Leeward Islands
Malta
Mauritius
Nigeria
North Borneo
Northern Rhodesia
Nyasaland Protectorate
Sarawak
Seychelles
Sierra Leone (Colony and Protectorate)
Singapore
British Somaliland (Protectorate)
Southern Rhodesia
St. Helena and Ascension
Swaziland
Tanganyika
Trinidad and Tobago
Uganda (Protectorate)
Western Pacific (British Solomon Islands Protectorate, Gilbert and Ellice Islands Colony and Tonga)
Windward Islands
Zanzibar (Protectorate)
The United States, including all territories subject to the sovereignty or authority of the United States
Venezuela
Viet-Nam
Yugoslavia
FOOTNOTES

211 Archiv für Luftrecht (Germany) 1937 p. 79-81.
212 See for example van Houtte op. cit. no. 46; Litvine op. cit. no. 294.
213 Similar Riese op. cit. p. 46, and Abraham in Z.f.L. 1953 p. 84.
214 U.S. Av. R. 1936 p. 184-250. See also Journal of Air Law and Commerce,
1960, p. 10.
215 Ibid. p. 206.
216 Ibid. p. 234 and 250.
218 Rivisto di diritto aeronautico 1939 p. 127-129.
220 Ibid. p. 89-92.
221 In Rivista di diritto aeronautico 1940-41 p. 72.
222 Goedhuis 1943 p. 449.
223 See Compte Rendu des Réunions de la Deuxième Commission de CITEJA,
la Caire, November 1946, Doc. 495 p. 57, (see also M. Goedhuis p. 56-57).
225 See Art. 25 of the Warsaw Convention.
228 State of New York, Appellate Division, December 16, 1952, see U.S. and
229 Concerning the dissenting opinion of Breitel J., see infra p. 134-135.
231 U.S. and C. Av. R. 1956 p. 626-31; see also U.S. and C. Av. R. 1956 p. 140:
United States Suprem Court 1956, Certiorari denied.
232 United States District Court, Southern District of New York, February 21,
233 Ibid. p. 628.
234 Ibid. p. 593-625.
235 Ibid. p. 603-604.
236 See also the verdict for 65,000 dollars in the above mentioned Goepp-case,
see supra p. 123.
238 See The Hague Protocol Art. XI.
243 See, however, infra p. 128.
244 The Italian Palleroni-case, see Journal of Air Law and Commerce, 1960,
p. 9, has sometimes been invoked in support of a liberal interpretation of Art. 20
paragraph 1. That case is not about an unknown cause of damage, however. With
respect to the requirements for the carrier's burden of proof the judgment confines
itself to the statement that it is of importance to produce airworthiness certificates,
etc.: "I certificati di navigabilità e di eseguiti controlli del Registro italiano navale
e aeronautico .... pur non esonerando, per sé soli, il vettore da responsabilità,
debbono valere quali elementi concorrenti di guidizio nel valutare la condotta di
lui," see Rivista di diritto aeronautico 1938 p. 141-150.
249 See for example the Csillag-case, supra p. 119; Lemoine op. cit. no. 819;
Litvine op. cit. no. 292. Compare The Hague Conference 1955 p. 99 (Professor
Cooper).
250 I.e. a very high degree of lack of knowledge of the chain of causation lead-
ing up to the phenomenon causing damage.
254 See supra p. 120.
255 See supra p. 121-122.
256 See supra p. 121.
257 See supra p. 122.
258 See supra p. 120-121.
However, the distinction made in the judgment between proof of absence of fault and proof that all necessary measures have been taken cannot be endorsed, see Journal of Air Law and Commerce, 1960, p. 10.

See supra p. 122-123.

Or, to speak the language of Drion, how “it is possible for courts or juries to leap over the broad river which separates absence of negligence from wilful misconduct,” see Drion op. cit. no. 180.

See supra p. 120.


See supra p. 122-123.

Or, to speak the language of Drion, how “it is possible for courts or juries to leap over the broad river which separates absence of negligence from wilful misconduct,” see Drion op. cit. no. 180.

See supra p. 120.


See supra p. 120.


1937 American Maritime Cases p. 1487.


Except for the case of fire, see paragraph b.


Ferrarini: I contratti di utilizzazione della nave e dell’ aeromobile, Rome 1947.

D’Ovidio and Pescatore op. cit. no. 409.


This provision contains, in principle, the rule of the Brussels Convention Art. IV subsection 2 paragraph q. See also the Norwegian Act of February 4, 1938 § 4 subsection 2 (q) implementing the corresponding rule of the Brussels Convention.


Fr. Sejersted: Om Haagreglene, (concuring the Norwegian Act of February 4, 1938, implementing the Brussels Convention), Oslo 1949 p. 73.


292 The Spanish Act introduces the provisions of the Brussels Convention. In Art. 8, however, the Act contains the words "las costas de la prueba" instead of the correct "la carga de la prueba," see Art. 8 subsection 1 and subsection 3 paragraph q, cf. Calero: El Contrato de Transporte Maritimo de Mercancías; Seción la Ley de 22 de diciembre de 1949 que introduce las normas del Convenio de Bruselos de 1924, Rome-Madrid 1957 p. 163.
293 Calero op. cit. p. 165-166.
294 Compare the First Schedule of the British Carriage by Air Act 1932 Art. 20 subsection 2, and Art. 20 subsection 2 of the translated text as ratified by the United States Senate on June 15, 1934, both of which contain the expression: "... in the handling of the aircraft," which extends the scope of the provision considerably beyond the limits of the French expression: "... de conduite de l'aéronef." See also Drion op. cit. no. 32 note 1.
295 See Journal of Air Law and Commerce, 1960, p. 16; see also the German proposals during the Third Session of CITEJA in Madrid, May 1928, ibid. p. 16.
296 Similar clauses had "from time immemorial ... certainly appeared in all British Bills of Lading," see Sejersted op. cit. p. 62 with references. The Harter Act was the result of a compromise between the interests of ship owners and shippers.
297 It can be mentioned that the United Kingdom Order of Council, 1952, which makes most of the Warsaw provisions applicable to non-Warsaw carriage, has expressly omitted Art. 20 paragraph 2, cf. paragraph 14 of the First Schedule of the Order.

Provisions corresponding to Art. 20 paragraph 2 have also been omitted in IATA Conditions of Carriage (Cargo), April 1, 1954, cf. Art. 14, and in IATA Airway Bill Condition of Contract, April 1, 1984, cf. Art. 4. The same is also true with respect to checked baggage in IATA Conditions of Carriage, Interline International Carriage, May 23, 1958, cf. Art. 4. It must be remembered, however, that in this regard the IATA conditions of carriage are effective only when the Warsaw Convention does not apply.

298 See The Hague Protocol Art. X.
299 See also Ripert with respect to the excepted causes in the maritime law, supra p. 130.
300 See in this connection "Indberetning fra de danske medlemmer af den nordiske luftprivatretskomité 1936" (Report from the Danish members of the Nordic Committee on private air law 1936) p. 23 where it is stated that it seems to be reasonable to make the requirements for the burden of proof in paragraph 2 of Art 20 more stringent than those for the burden of proof in paragraph 1. The reason for this is undoubtedly the special character of the provision in paragraph 2. See for example Goedhuis 1933 p. 191, same author 1937 p. 232-233, same author 1943 p. 244; van Houtte op. cit. no. 48; Lemoine op. cit. no. 847; Riese op. cit. p. 452-453; Lit Vine op. cit. no. 307; Kamminga: The Aircraft Commander in Commercial Air Transportation, The Hague 1953, p. 102-103.
301 The French original text of Art. 25 paragraph 1 runs as follows: "Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol." Concerning the difficulties encountered in the interpretation of Art. 25, see Drion op. cit. no. 168-191.
302 This appears even more clearly from the new wording of Art. 25 adopted by The Hague Conference, see Art. XIII of the Protocol: "The limits of liability specified in Art. 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." (Italics supplied.)
303 Similar Drion op. cit. no. 190 note 3.
304 See supra p. 124.
305 U.S. Av. R. 1350 p. 375.
307 See supra p. 123.
309 See supra p. 123-124.
justification of the principle of liability based on proof of fault in a convention

the claimant in all cases—also in respect of passengers and goods on the other

will be entitled to sue, see LC/Working Draft No. 642, 2/5/60, p. 7 section 15.

remote. With regard to cargo, the person having sufficient interest in the cargo

person who has suffered damage which, in the judgment of the court, is not too

In movement.

Art. 20 paragraph 1, the carrier would have had to bear the

burden of proof in Art. 20 paragraph 1, the carrier would have had to be

risk for this uncertainty.

nullity of the whole contract, which shall remain subject to the provisions of this

The British Carriage of Air Act 1932 Art. 21, and Art. 21 of the translated

text as ratified by the United States Senate, contain both the words “the injured

person” instead of “the person suffering damage”; see also Drion op. cit. p. 357.

As of March 1, 1960, the following States have ratified the Protocol: Australia, Czechoslovakia, Egypt, France, the German Democratic Republic, Hungary, Ireland, Laos, Luxembourg, Mexico, Poland, Rumania, El Salvador, The Union of Soviet Socialist Republics, Yugoslavia. The Protocol will become effective when ratified by at least thirty States, see Art. XXII of the Protocol.

Art. 23 runs as follows: “Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.”

Similar Riese in Zeitschrift für Luftrecht 1956 p. 30, but opposite Drion
during the Hague discussions, see The Hague Conference 1955 p. 392-393; compare Calhoun and Sidenbladh, ibid., who were opposed to the views held by Drion. The discussions in The Hague are found in The Hague Conference 1955 p. 108-110, 157-160, 210-214, 349, and 392-393.

As earlier stated the burden of proving that such a relationship does not

exist must fall upon the carrier, see Journal of Air Law and Commerce, 1960, p. 6.

This is where the effect, if any, of Art. 23 paragraph 2 sets in. Pursuant
to the interpretation given in this study of the requirements for the carrier's burden of proof in Art. 20 paragraph 1, the carrier would have had to bear the

uncertainty.

The Convention has replaced the earlier Rome Convention of 1933 and its

additional Brussels Protocol of 1938. The Rome Convention of 1952 became effective on February 4, 1958, and has been ratified or adhered to (as of March 1, 1960) by Australia, Canada, Ceylon, Egypt, Luxembourg, Pakistan, Spain and Ecuador.

Pursuant to Art. 2 of the Rome Convention the liability shall be attached
to the operator of the aircraft. Concerning the definition of the expression “opera-
tor,” and its relation to a “carrier,” see infra note 339.

The draft convention does not enumerate or exclude any person who may

be a claimant under its provisions. Consequently, it will be for a claimant to estab-

lish his right of claim with respect to the damage contemplated by the Convention. Thus the owner of the damaged aircraft, if he is not its operator, is not excluded from claiming compensation. Again, with regard to loss of use of an aircraft which has been damaged, a claim could be sustained by its operator or by any other person who has suffered damage which, in the judgment of the court, is not too

remote. With regard to cargo, the person having sufficient interest in the cargo

will be entitled to sue, see LC/Working Draft No. 642, 2/5/60, p. 7 section 15.

Pursuant to the Montreal draft, 1954, the burden of proof was placed upon

the claimant in all cases—also in respect of passengers and goods on the other

aircraft, see Art. 3 of the said draft. However, during the discussions of the Paris

Sub-committee, March-April 1960, some of its members expressed doubt as to the

justification of the principle of liability based on proof of fault in a convention
which limits the compensation which may be recovered by a claimant. During the Thirteenth Session of the Legal Committee, Montreal, Sept. 1960, the present basis of liability was adopted following a proposal made by Professor Rinck, Germany, see ICAO Doc. LC/145 26/9/60 p. 20. Furthermore, the Legal Committee decided to accept The Hague limits in respect of claims made by passengers and consignors of goods on the other aircraft, see p. 22 of the said document.

339 See Art. 4 of the Convention.
342 As earlier mentioned the liability shall attach to the operator of the aircraft causing damage, and the term “operator” is defined in Art. 2 paragraph 2 of the Paris draft, 1960, as follows: “The person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator.” See also the Rome Convention, 1952, Art. 2 paragraph 2 in which the same definition has been included. Normally, the concept of “the carrier,” whose liability is the subject of this study, will be covered by the expression “the operator.” But it need not necessarily be so. If, for example, the carriage is performed by a person other than the contracting carrier the latter will not be the operator, as the former is the one retaining the control of the navigation. In the following, however, it is presupposed that the carrier is the operator.

344 I.e. passengers and consignors whose contracts of carriage are governed by the Warsaw Convention.

345 In their legislations concerning non-Warsaw carriage a substantial number of States have included the principle of presumption of liability on the part of the carrier, thus giving the carrier, in principle, the same defense as provided in Art. 20 of the Warsaw Convention. See further ICAO Doc. 7450-LC/136, Ninth Session of the Legal Committee, Rio de Janeiro, 1953, Vol. II p. 221-232.
346 The proposal as formulated during the Thirteenth Session of the Legal Committee mentions “passengers and goods on the other aircraft” (italics supplied), see Doc. 8101 LC/145 26/9/60 p. 20 paragraph 5.1.(1). However, nothing seems to indicate the necessity of a conclusion e contrario to the exclusion of the crew members of the other aircraft.
348 Compare, however, supra note 346.