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Need for Revision and Amplification of the Warsaw Convention

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NEED FOR REVISION AND AMPLIFICATION OF THE WARSAW CONVENTION *

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At its Meeting in Montreal in June 1949 the Legal Committee of the I.C.A.O. decided to suspend further consideration of revision of the Warsaw Convention until they received from the writer a Report on the subject together with a new draft Convention. The preparation of this Report and new draft Convention, with Commentary thereon, has again impressed upon the writer's mind the many defects and obscurities in the existing Convention and the omission of provisions concerning a number of matters which should be included in a Convention regulating the liability of air carriers and the manner of dealing with claims which arise from accidents and occurrences incidental to air transport. It may therefore be of interest to call more specific attention to these questions.

In the first place it is necessary to state that the text of the Warsaw Convention quoted in this Article is taken from the English translation scheduled to the Carriage by Air Act 1932. This translation from the French original is not good, and it differs in a number of respects from the American version, which is not official in the sense that it has not statutory authority, since the only text for international purposes, which is the French text, has been ratified by the U.S.A. as a self-executory treaty.

Article 1 (1) of the Convention refers to the carriage of "persons," not "passengers." This has led to difficulties in connection with the carriage of employees of the carrier, who may or may not be members of the flying personnel and who may or may not be travelling in pursuance of their duties as employees of the carrier.

This paragraph also limits the scope of the Convention to carriage "for reward" and gratuitous carriage by "an air transport undertaking."

* Convention for the Unification of certain Rules relating to International Carriage by Air, signed at Warsaw 12th October 1929.
which is not defined. This raises an important question of principle, namely as to whether the scope of the Convention should be limited in this way, or whether its scope should be extended to cover all "international carriage" undertaken by anyone, whether for remuneration or not. If the scope were so extended, the rules concerning liability, and its limits, would apply to all operators of aircraft, including private owners and their passengers. Sound arguments can be adduced both for and against such an extension.

**ARTICLE 1 (2)** defines the expression "international carriage," to which alone the rules of the Convention are applicable; and the applicability or otherwise of the Convention is dependent upon the place of departure and the place of destination agreed upon between the parties to a contract, which is regarded as a *sine qua non*. This principle is, in fact, essential because the important thing is the carriage which was *agreed upon* between the parties, and not the carriage performed, because the latter may bear no relation to what was agreed, for instance the case of an aircraft intended to make a long journey which stops, owing to accident or otherwise, soon after starting, or which carries the passenger or goods to a place which was not intended. The latter point is important because a passenger who intends and has agreed to make an "international" flight governed by the Convention should not be deprived of his rights under the Convention simply because the carrier fails to perform the "international" flight intended by both parties. Incidentally the words "according to the contract made by the parties" is a somewhat free translation of the French "*d'après les stipulations des parties*.”

Under the existing definition the only carriage governed by the Convention is carriage in which "according to the contract made by the parties" the places of departure and destination are situated either within "the territories of two High Contracting Parties, or within the territory of a single High Contracting Party if there is an agreed stopping place within a territory" of another State. The expression "High Contracting Party" has created difficulty, partly because in different Articles it is used to mean two entirely different things, that is to say "Contracting State" and "Signatory State."¹ Nowadays it is normal to use the expression "Contracting State" to mean a State which has ratified or adhered to a Convention, as distinct from a State which has merely signed without having ratified.

The same paragraph also refers to "sovereignty, suzerainty, mandate or authority" (omitting trusteeship) which have given rise to difficulty. The modern equivalent² is "territories for the foreign relations of which the Contracting State is responsible." This appears to meet the difficulties created by the wording used in the Warsaw and Rome Conventions.

¹ Articles 36-41.
² Used in the Convention concerning the International Recognition of Rights in Aircraft.
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There would seem to be no reason why the scope of the Convention should not be widened to cover also carriage between two States either (instead of both) of which is a Contracting State, since this would seem to create no greater jurisdictional problems than exist under the present Convention.

The intention of Article 1 (3) dealing with successive carriers is clear enough, namely that for the purpose of deciding whether or not "international carriage" is involved, one must regard the arrangement, made between the carrier or his agent and the passenger or owner of goods, as a whole to see if it discloses that the whole operation or transaction comes within the definition of the Convention. However, when the test is applied to specific transactions, the legal meaning of the phraseology used has given rise to doubts and difficulties, and this paragraph could be improved.

ARTICLE 2 (1) makes reference to "legally constituted public bodies," a phrase which is meaningless in English law. The French text is "personnes juridiques de droit public." This has a definite connotation in those States which use the French language, but the writer has not yet heard of a phrase in English which conveys exactly the French meaning, probably because there is nothing exactly equivalent to this in countries which adopt English law or law based thereon.

ARTICLE 2 (2). refers to "carriage performed under the terms of any International Postal Convention." This would seem to restrict the carriage concerned to "correspondence," as defined in, and carried under, the provisions of the Universal Postal Convention. If so, it is not wide enough to cover all mail, since by no means all mail (letter and parcel post) falls within this definition which, under the Universal Postal Convention, is limited to international correspondence.

ARTICLES 3 TO 11, deal with traffic documents—passenger tickets, luggage tickets (baggage checks) and consignment notes (air waybills) — in meticulous, but confused, detail concerning the particulars which these should contain, including the obligatory particulars which must appear if the carrier is to preserve his rights under the Convention to defend claims and to have his liability limited. Since the object of the Convention is to lay down rules relating to the liability of the carrier and the rights of his clients so far as concerns all carriage which falls within the scope of the Convention, there would seem to be no necessity to cumber the Convention with traffic details of this character, which are a nightmare to traffic clerks and which can much better be left to carriers who are expert in such matters, especially since frequent changes in traffic documents are necessary or desirable to deal with questions of accountancy, records, customs and general convenience. All the documents are required for the purpose of identity and receipt, and the consignment note must comply with Customs requirements since, as a practical measure, the Custom Authorities long ago agreed
to accept a copy of this document in lieu of a Customs declaration or manifest. Furthermore, the existing provisions of these Articles are in many cases obscure and in some cases absurd, as will appear from what follows:

Article 3 (1) provides that the carrier must deliver passenger tickets "which shall contain" a number of specified particulars; but paragraph (2) merely provides that "if the carrier accepts a passenger without a passenger ticket (contents unspecified) having been delivered, he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability." The two paragraphs appear to be self-conflicting, though it is clear that if no ticket (whatever its contents) is delivered, the carrier has no defence open to him and his liability is unlimited. Some lawyers consider that this may be the effect even if the ticket delivered lacks any of the particulars specified in paragraph (1), though paragraph (2) states that the absence, irregularity or loss of the ticket does not affect the contract or the applicability thereto of the provisions of the Convention. In any event the penalty for failure to deliver a ticket seems positively savage.

Sub-paragraph (c) of Article 3 (1) concerning the obligation to insert "the agreed stopping places" has created much difficulty, and its real meaning and intention are obscure. Carriers generally attempt to comply with this requirement by inserting in the ticket a reference to their timetables, as indicating the "agreed stopping places," which may be altered "in case of necessity." The word "necessity" should be noted. Evidently it would not entitle the carrier to alter an agreed stopping place unless necessity arose. The object of inserting at least one agreed stopping place is important when carriage between two territories of the same State is involved because, unless there is an agreed stopping place in another State, the carriage would not be "international." If the agreed carriage is between two Contracting States, there is no need to insert an agreed stopping place in order to establish that the carriage is "international." Therefore in this case it might suffice to insert "none" in the rubric for agreed stopping places, indicating that no stopping place is agreed, although several stops might be made and indicated in timetables. It would be safer in all cases to insert at least one agreed stopping place in a State other than the State of departure. This Article is a jumble of obscurities.

Very similar remarks apply to Article 4 concerning the "luggage ticket," the expression used to describe the baggage check. In this case again it is declared that the luggage ticket "shall contain" particulars listed under eight headings; but paragraph (4) of the Article provides that "if the carrier accepts luggage without a luggage ticket having been delivered, or if the luggage ticket does not contain" three of the eight specified particulars, "the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability," that is to say he is deprived of all defences and is subjected
to unlimited liability. It is doubtful if the draftsmen really intended this.

"Agreed stopping places" are not required in the luggage ticket, but the number of the passenger ticket is an obligatory particular. In practice nowadays the carriers, members of the I.A.T.A., use one document comprising both the passenger ticket and the luggage ticket, which contains rubrics for all the particulars required by Articles 3 and 4.

One of the obligatory particulars in the baggage check is "the number and weight of the packages," not the baggage. In consequence of this, and of the wording of Article 22 (2), which refers to "the package," the opinion of some lawyers is that, in order to comply with the stringent provisions of paragraph (4), it is necessary that the weight of each package comprised in the baggage covered by a luggage ticket should be shown separately therein or that a separate baggage check be issued for each package comprised in the baggage. This is not done in practice, and carriers may be running serious risk in consequence. Also, the practice differs in various countries as to the basis of compensation payable when part of the baggage is lost or damaged. Some base the compensation under Article 22 (2), upon the weight of the whole of the baggage comprised in the baggage check, and some only on that portion of it which is lost or damaged. There is no clear indication in the Convention to show which method is right.

Articles 5 and 6 require the consignor (shipper) to make out consignment notes in triplicate for cargo. Yet Article 9 deprives the carrier of his defences and imposes upon him unlimited liability if any one of ten obligatory particulars is not included, regardless of the fact that some of the particulars are only known to the carrier and some of them are only known to the consignor. In actual practice the carrier usually completes the consignment note on behalf of consignors as their agents, upon instructions from consignors who obviously must furnish particulars of cargo, leaving the carriers to insert traffic particulars required.

Article 7 gives the carrier the right to require a separate consignment note for each "package." This has a bearing upon Article 22 (2) in connection with the assessment of compensation for loss or damage. It raises great difficulties concerning construction, for reasons similar to those referred to in connection with the luggage ticket (Article 4 (2) (f) and (4) above).

Article 8 provides that the consignment note shall contain seventeen specified particulars, only ten of which, however, are obligatory under Article 9, as mentioned above. Some of these, namely those relating to the cargo, can obviously be supplied only by the consignor; the others, relating to the carriage itself can only be supplied by the carrier. Yet, as mentioned above, the obligation to complete the
whole of the consignment note is cast upon the consignor under Articles 5 and 6, though the carrier is subjected to unlimited liability without defence if any of ten obligatory particulars is omitted. This makes the strict legal position quite absurd. The draftsmen of the Convention omitted to take into consideration the practical aspects applicable to carriage of cargo. Remarks similar to those made above (in connection with Article 3) apply to "agreed stopping places." In Article 8 (h) reference is made to "the number of the packages," which has reference to Article 22 (2); but paragraph (i) refers to "the weight, the quantity and the volume or dimensions of the goods," not "packages," so that in this case, unlike the case of baggage, a separate weight for each "package" is not required, though under Article 7 the carrier can require a separate consignment note for each "package." The obscurity and confusion involved in these provisions could hardly be worse.

ARTICLE 9. The unfortunate consequences of this Article for the carrier, if details of which he may have no knowledge are missing, have been referred to above.3

ARTICLE 10, makes the consignor "responsible for the correctness of the particulars and statements relating to the goods which he inserts in the consignment note." In this case it evidently dawned upon the draftsmen that the consignor could not necessarily complete all the particulars required; but this Article is in conflict with Articles 5 and 6, which require the consignor to make out the consignment note, while at the same time, under Article 9, making the carrier liable for terrible consequences if the particulars are incomplete.

ARTICLE 11 deals with the weight of evidence to be given to the various categories of particulars furnished concerning cargo, and the party against which such evidence is prima facie available. The writer is of opinion that none of the provisions of Articles 3 to 11 inclusive are necessary in a Convention dealing with the rights and liabilities of the parties to a contract of carriage by air, and that it would be better that they should be omitted altogether, leaving the parties to provide traffic documents or other evidence as to the terms of contract, and simply to provide that all contracts which fall within the scope of the Convention are subject to the provisions of the Convention, whatever the contract may say, leaving to the party seeking to enforce a contract the obligation to prove what its terms were. In the event of the principles of the Articles concerned being retained, it is obvious for reasons given above that these would require drastic revision in order to remove the obscurities, anomalies, contradictions and absurdities which exist at present.

ARTICLES 12, 13, 14 AND 15 deal with the consignor's right to stop or re-direct the cargo in transit; and the consignee's rights on arrival.

3 See observations on Article 8.
of the cargo at destination, or in the event of its loss. They call for no special comment, although Articles 12 and 13 are cumbersome and could be improved and shortened, especially if Articles 3 to 11 are eliminated, as suggested above. No provision is made for the case when the carrier is unable to despatch or deliver cargo through no fault of his own.

**ARTICLE 16** casts upon the consignor the obligation to supply information and documents necessary to enable cargo to be delivered, including Customs requirements. This Article might not be necessary if Articles 3 to 11 are eliminated.

**DEATH OR INJURY**

**ARTICLE 17** provides for the carrier's liability "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." This Article is full of pitfalls and obscurities:

(a) Does it cover the liability of officials, employees and agents of the carrier? It has been suggested that employees can be sued separately and that they are not protected by the limited liability under Article 22. It should be noted that in Article 25 "any agent of the carrier acting within the scope of his employment" is referred to. It would seem that a similar reference should be made in Article 17 or Article 22, if not both.

(b) The wording of the Article would cover the death or wounding of a passenger by another passenger on board the aircraft, or damage sustained by illness, or, for instance, a miscarriage. It is suggested that it should be limited to damage sustained as a direct result of an accident attributable to the air carriage.

(c) No indication is given as to when the operations of embarking or disembarking begin or end, either at an airport or anywhere else, for instance in the case of a forced or accidental landing. The operations of embarkation might be said to begin when the passenger reaches the airport, or when he is summoned by an official to proceed to Customs or other authority prior to departure, or when he is requested to proceed to the embarkation area, or when he steps from the embarkation area into the apparatus leading to the aircraft, or when he actually enters the aircraft. Similarly, the operations of disembarkation might be said to end at any time from the moment when the passenger leaves the aircraft until the moment when he leaves the airport buildings after completion of immigration, passport, health, police, Customs and other formalities. Much greater certainty is required, including certainty concerning the period of liability in the case of forced or accidental landings.
(d) There is no provision for consequential damage, for instance damage sustained in boats or rafts after a descent on the sea, or sustained when attempting to reach a place of safety or civilisation after an accident or forced landing in a desert region or away from civilisation. A case occurred recently when a passenger was flung out of an aircraft during a forced landing. She was not seriously hurt, but a minute or two afterwards there was an explosion of fuel which damaged her very badly. Her lawyers claimed that this damage was outside the scope of the Convention, because the damage was caused after disembarkation, and that consequently the compensation was not limited.

(e) No distinction is drawn between wounding or bodily injury and disablement, total or partial, temporary or permanent. If, as has been suggested, different limits should be imposed for different categories of injury, it would be necessary to classify these carefully and distinctly.

(f) It is not clear if mental injury is covered by the Article, for instance anything ranging from temporary mental derangement to permanent madness.

It will be obvious from what appears above that very drastic revision and amplification of this Article are required.

**ARTICLE 18** deals with the carrier's liability for loss of, or damage to, goods and registered baggage occurring "during the carriage by air," and paragraph (2) defines what is meant by "carriage by air." It differs materially from the formula used in Article 17 for obvious reasons, and "comprises the period during which the luggage or goods are in charge of the carrier" (presumably intended to include his employees) whether in an aerodrome or on board an aircraft or, *in the case of a landing outside an aerodrome, in any place whatsoever." It is not clear if goods in bond or customs in or near an airport are "in an aerodrome," or what exactly comprises an aerodrome, especially in the case of a sea or water airport. Also, surely the period should cover goods in transference by surface transport from one airport to another in the custody of the carrier's employees in the course of a journey involving stages. It is suggested that the proper formula should extend from the time when the goods are placed in the custody of the carrier's employees at the airport of departure until they are delivered to the Customs Authorities at the airport of destination or, in the case of a forced or accidental landing en route, to the Customs or other authorised place near the landing, including any surface transport which may be involved in complying with the contract to carry from the place of departure to destination, and that any surface transport in the course of such carriage should be covered by the Convention — not only surface transport in the case of a landing outside an aerodrome, as provided by the Article. Paragraph (3) of Article 18 refers to this aspect.
of the matter, without however dealing with it. It provides that the carriage by air does not extend to any surface transport outside an aerodrome, but that when there is surface transport outside an aerodrome "which takes place in the performance of a contract of carriage by air for the purpose of loading, delivery or trans-shipment," it shall be presumed, in default of proof to the contrary, that any damage sustained happened during the carriage by air. But this merely deals with the presumption, and not with the difficulty that surface transport outside an aerodrome is not governed by the Convention, although it may well form part of the performance of the contract to carry from place of departure to place of destination. This Article also therefore requires substantial amendment.

**ARTICLE 19** provides that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods." This is completely vague and obscure. How is delay reckoned? Is it based on published time tables in the case of passengers or in the case of cargo? If not, when does the period in respect of which a claim for delay can be made begin to run? Article 17 gives no guidance. Cannot the carrier escape all liability for delay by stipulating that he cannot and will not guarantee times of departure or arrival or the making of connections? What ratio of delay should give rise to a claim? Should it be minutes or days? Similar problems arise in connection with luggage which normally accompanies a passenger, whether or not it is registered baggage. In the case of cargo, it is suggested that the carrier may be able to repudiate liability by refusing to guarantee any time for departure or arrival. Even in the case of perishable goods (and live animals if they can properly be included in the term "goods"), it would hardly be reasonable to bind the carrier to accurate times, in view of the many circumstances appertaining to air transport. The formula for "period of carriage by air" in Article 18 does not help, and it is suggested that Article 19 is really meaningless in its present form. Something very much more definite is required.

**ARTICLE 20 (1)** provides that "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 or them to take such measures." In the first place it should be noted that in this case the agents of the carrier are mentioned, though they are not in Articles 17, 18, 19 or 22. Secondly, it is obvious that if all necessary measures to avoid the damage had been taken no damage could have occurred. Instead of "necessary," the word used should be "reasonable or "proper" (French "utile"). The latter (as used in Article 5 of the Rome Convention) is preferable, since the word "reasonable" is not normally used in this connection in some legal systems, though in English law the word "necessary" has been construed as "reasonably necessary" or "reasonable." Presumably the concluding words of this
paragraph refer to cases of *force majeure* only, but the paragraph requires amendment.

If the word "proper" is substituted for the word "necessary" it appears to the writer that the meaning of the paragraph would be in accordance with the intention of the draftsmen, namely that the carrier has a good defence if he proves to the satisfaction of the Court that he and his agents have taken all measures which a good carrier would normally take (i.e. the high degree of care required of a common carrier in the United States), and that he is not responsible for damage sustained through circumstances amounting to *force majeure*. What does amount to *force majeure* might vary in different circumstances. For instance, in certain cases lightning might cause damage, although the writer has twice been in an aircraft struck by lightning which caused no serious damage. If damage were caused by lightning the Court might enquire whether meteorological reports indicated that thunderstorms were anticipated upon the proposed route of the aircraft, and, if so, whether a good carrier should or should not have cancelled the flight; whether the pilot took steps to avoid the thunderstorm area or should have done so; whether the aircraft was or should have been equipped with devices to render innocuous the effect of a flash of lightning passing through the aircraft from one cloud to another in its search for an "earth." As a result of such enquiries, the Court might find that all proper measures had not been taken. Similarly, if the damage was caused through the action of a maniac, or of passengers under the influence of drink or drugs, the Court might enquire if the carrier had taken proper measures to guard against and deal with such possible occurrences and their consequences. In any of such, or similar, cases, the Court might well find that it was not impossible for the carrier or his agents to have taken measures to avoid damage caused by events of this character in a particular case. It is suggested that the carrier would have a good defence if he could prove that the damage was caused by a latent defect in the design or structure of the aircraft, if the latter had a current Certificate of Airworthiness, and the daily Certificate of Safety was properly completed. This would not prejudice claims based on negligence by injured parties against the aircraft constructor, or even perhaps against parties who had negligently issued the Certificate of Airworthiness. For the purpose of the new draft Convention proposed by the writer, he has suggested the following formula:

"(1) The carrier is not liable if he proves that he and his employees took all proper measures to avoid the damage, or that it was impossible for him and them to take such measures.

(2) In the case of hand baggage, the carrier is liable under the provisions of Article 12 (2) [this is the paragraph dealing with the period of liability in connection with hand baggage] only if the passenger proves that the damage was due to the negligence of the carrier or his employees."
(3) Any deviation made for the purpose of saving life, or for reasons of safety or meteorological conditions, or other reasonable deviation, shall not constitute a breach of the contract or carriage, and the carrier shall not incur any liability merely by reason of such deviation."

**ARTICLE 20 (2)** is curious. It relates only to goods and luggage, and provides that the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation. It is believed that this is a misapplication of a marine rule. The result is that, if the carrier furnishes the proof required under paragraph (2), he automatically deprives himself of the chance of proving his non-liability under paragraph (1). The Legal Committee of the I.C.A.O., and its predecessor the C.I.T.E.J.A., took such a poor view of paragraph (2) that, on each occasion when it has been discussed, it has decided that it should be omitted from any future Convention.

**ARTICLE 21** applies the normal rule of contributory negligence; but it is defective because it refers only to the uninjured person and not also, as it should, to the party suffering damage. They may not be the same.

**ARTICLE 22**, deals with the limits of the carrier's liability. As above mentioned, there is no reference to employees of the carrier, and some lawyers have suggested in consequence that employees, for instance pilots, are not entitled to the limiting provisions in the event of action being taken against them outside the provisions of the Convention which, in Articles 17, 18 and 19, refers only to the carrier.

**DISCUSSION OF LIMITS**

The limit of liability in respect of passengers is 125,000 Poincare francs, 125 of such francs being equivalent to £1 gold. The present equivalent of 125,000 of such francs is about £2,040 sterling, or $8,160 United States currency. This limit applies to claims in respect of death, wounding, injury or delay (see Articles 17 and 19). It has been suggested that different limits might properly be applied to (a) death, (b) permanent disablement, (c) injury short of permanent disablement and (d) delay respectively. If this principle is adopted it would be necessary to define "permanent disablement" and perhaps to specify, for a death claim, that death should supervene within a stated time from the date of the accident which caused it. Paragraph (1) of the Article provides that the parties may, by special contract, agree a higher limit, and refers to "the Court seized of the case," which means the Court trying the action.

During the last twelve years, since when revision of the Convention has been under consideration, a good deal of discussion has ranged round the question of increasing, or otherwise, the limit of liability of the carrier for the death or injury of a passenger, though actually
this is one of the least important questions involved, because even if the limit for death, or permanent disablement or other injury, or all three, were to be increased by say 50%, it would not have a great effect on anybody concerned. For instance, on the death of a passenger, or if he is injured, it does not make very much difference if he or his estate or dependents receive a maximum of £2,000 or £3,000. On the other hand, since one can insure the risk of death for 24 hours at a premium of 2/- (half a dollar) per £1,000 or $4,000, the cost of insuring the carrier's risk of liability to a similar amount should be less. Consequently, an addition of 2/-or less to an Atlantic fare of about £80 ($320) can be considered negligible.

Sound arguments can be advanced both for and against an increase in the limit of liability towards passengers. It is significant that, in response to a questionnaire on the subject circulated to Governments in 1948, nineteen Contracting States replied and of these nine favoured an increase ranging from 100% downwards.

One of the main arguments for justifying a limit at all is that, in consideration of this, the passenger does not have to prove negligence, as would be normal, because the onus of proof that he has taken "all necessary measures to avoid the damage" is cast upon the carrier in Article 20. One of the main arguments for an increase is that the existing limit is much lower than damages which are frequently awarded as compensation in many States. For instance, an English Court recently awarded a lady £12,500 for permanent disfigurement caused by an explosion, although she was not disabled; and damages from £5,000 to £10,000 have been awarded for loss of a hand or foot.

Owing to the Convention limits being based on gold, they now represent in currency about double what they did in 1929. Some argue that this reflects adequately the increased cost of living. Others maintain that it does not, or that the cost of living has no bearing on the question. Any limit must be arbitrary. The average compensation paid for death or injury in accidents outside the Convention, when negligence has to be proved, would not seem to exceed greatly, if at all, the Convention limits. This is no doubt accounted for partly by the fact that in death claims it often happens that no one suffers financial damage from the death, for instance if the deceased had no dependents. On the other hand, if there were no limit imposed by the Convention, it is possible that in many cases damages very largely exceeding the existing limit could be justified.

It seems to the writer that undue importance may have been attached to this question, which really has nothing like the importance of most of the other questions connected with revision of the Convention, especially since everyone can, for a modest rate of premium, insure absolutely any risks of air carriage up to almost any amount, and be sure of receiving the sum insured with no risk of the carrier being able to prove that he was not liable under the provisions of Articles 20 or 21.
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Article 22 (2) provides that the limit for registered luggage and goods shall be "250 francs per kilogram"; but it does not say if this is the weight of all the baggage comprised in a luggage ticket or all the cargo comprised in a consignment note, or if it is meant to refer only to that portion of the baggage or cargo which is lost, damaged or delayed.  

This Article also provides for the consignor to make "a special declaration of the value at delivery" when "the package was handed over to the carrier," and for the payment of a "supplementary sum if the case so requires," in which event "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." This phraseology gives rise to several problems.

"Special declaration of value at delivery" is a translation of the French expression "intérêt à la livraison," which would, generally speaking, include cost, insurance, freight and the value to the consignee (not the consignor) of the goods if delivered punctually to him in good order at the place of destination specified in the contract, although at the end of paragraph (2) it is perfectly true that the French text also refers very literally to "real interest of the consignor at delivery," which presumably means the value to the consignor in having the goods delivered although it would seem that the main interest in delivery of the goods at a special time and place would be that of the consignee.

The reference to "the package" also raises questions. As above mentioned, Article 4 (3) (f), dealing with registered baggage, refers to "the number and weight of the packages"; which gives force to the argument that each item of baggage should be shown on the baggage check with a separate weight for the purpose of Article 22 (2). But in Article 8 (i) relating to goods, the corresponding provision is "the weight of the goods," not each package, or "the package," perhaps because Article 7 gives the carrier the right to require separate consignment notes "When there is more than one package." If he fails to take advantage of this provision it appears that he may be running a risk. It is all very confusing and obscure.

Article 23, the principle of which is repeated in Article 32, provides that provisions of the contract which infringe the Convention rules are void. This calls for no comment.

Article (1) enunciates the obvious principle that actions concerning baggage and cargo under Articles 18 and 19 can only be brought subject to the conditions and limits of the Convention and paragraph (2) applies the same principle to death claims under Article 17 "without prejudice to the question as to who are the persons who have the

5 See also remarks above concerning Articles 18 and 19, and especially as to the difference between baggage and cargo under Articles 4 and 8.
right to bring suits and what are their respective rights.” This latter phrase leaves in doubt (a) the persons entitled to claim or bring suit in the event of death, (b) the persons entitled to participate in compensation awarded or agreed and (c) the law to be applied to the distribution and allocation of any such compensation. The persons entitled to bring suit may not be the same as those entitled to participate in the compensation. It is very necessary for carriers to know the parties entitled to give effective receipts for compensation awarded or agreed; and it is suggested that the law applicable to distribution should be that governing the moveable property of the deceased. This paragraph requires substantial elaboration.

**ARTICLE 25** deals with the important question of “wilful misconduct,” the presence of which, if proved against the carrier “or any agent of his acting within the scope of his employment,” has the effect of depriving him of the benefit of “the provisions of the Convention which exclude or limit his liability.”

In the first place, the French text, which is the only one for international purposes, and which governs in the U.S.A. since ratification of the Convention as a self-executory treaty, uses the word “dol,” which has no exact connotation in the English language. It has been translated as “wilful misconduct” which, although not exactly translating “dol,” has been the subject of many pronouncements by high judicial authority.6 “Dol” and “wilful misconduct” must be distinguished from negligence, whether qualified or not by such adjectives as “gross” or “criminal.” Yet in some States “dol” has been translated to mean “wilful misconduct or gross negligence.” The phrase used in the English translation of the Convention is “by wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case (meaning trying the action) is considered to be equivalent to wilful misconduct.” It seems that what the draftsmen intended was that the word “dol” should be used in States where that word has an exact connotation and that in other States the nearest equivalent should be used. The English translators translated the French exactly, supplying the expression “wilful misconduct” to signify “dol,” although it is difficult to understand what equivalent for “wilful misconduct” there could be under the law of those countries in which “wilful misconduct” is used and in which judicial pronouncements as to its meaning have been given over a long period of years.

This aspect of the matter opens the door to different interpretations of the phraseology used in the Convention, which indeed have been applied by different Courts. The writer suggests that, as the word “dol” has a connotation which is not properly translatable into some languages, perhaps because the idea behind the word is unknown in

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some countries, neither this word nor the expression "wilful misconduct" should be used; and that, instead, the idea inherent in the principle should be incorporated in the Convention, bringing out the essential features required, as laid down by high judicial authority. It is no use explaining that green is a mixture of blue and yellow to a man who is colour blind.

At present, if "wilful misconduct" is proved against the carrier or any "agent" of his acting within the scope of his employment, he is entitled to set up no defence under the Convention (for instance under Articles 10, 16, 20, 21, 26 and 29) and his liability is unlimited. Obviously this is a most important and serious Article for the carrier. Apart from defining what is meant by "dol" or "wilful misconduct," instead of using these expressions, it has been suggested that the principle should be applicable only to the carrier himself and to parties who on his behalf control or manage his business, and not to employees such as flying and ground personnel. There may be justification for the adoption of the latter principle in the fact that an act or omission amounting to "wilful misconduct" could not be done or omitted by an employee "within the scope of his employment." The whole subject requires thought owing to the serious issues and potential damages involved in connection with aircraft carrying large numbers of passengers and heavy and valuable loads of cargo.

**ARTICLE 26** deals with the times within which claims in respect of cargo or baggage must be lodged in various categories, failing compliance with which they will be inadmissible. The times specified are much shorter than those normally allowed by carriers who are members of the I.A.T.A. and might consequently be lengthened. The Article makes no mention of the time allowed for claims relating to injury to passengers, whether resulting in death or not.

**ARTICLE 27** provides that if the party liable dies, the liability passes to those representing his estate, in fact laying down that the principle "actio personalis moritur cum persona" does not apply. No comment arises on this Article.

**ARTICLE 28** establishes the various Courts in which the plaintiff may take action. Such Courts must of course be in a Contracting State. If the scope of the Convention is widened, as suggested in connection with Article 1 (2), it would be necessary to revise this Article accordingly. It should be noted that Article 28 refers to "the option of the plaintiff," which may mean that he must exercise an option to choose one only of the various courts specified, though hitherto it has been supposed that the plaintiff may proceed in all or any of the specified courts.

**ARTICLE 29** prescribes the period of two years for taking action. It has been suggested that this period might be limited to one year. This, of course, has nothing to do with the time for making claims under Article 26.
ARTICLE 30 (2) raises problems, which are largely due to a bad translation of the French text. It provides that "the passenger or his representative can take action" etc. The French text reads "le voyageur ou ses ayants droit," which is believed to mean anyone entitled to take action arising from the death, including "legal personal representatives" (in the English legal sense meaning parties representing the estate of the deceased), dependants (parties financially dependent on the deceased) and perhaps parties interested in the services of the deceased. In any new Convention (which would have English, French and Spanish texts) the exact meaning and intention should be properly and correspondingly expressed in all three. It is suggested that the paragraph should be completely redrafted to provide that, in case of death, action must be taken by the person or persons legally entitled to represent the estate of the deceased on behalf of all persons who have suffered damage by reason of the death and who are entitled to claim in respect thereof.

ARTICLE 30 (3), which must be read in conjunction with Article 28 (1), raises the possibility that a consignor or passenger may take action in respect of cargo or baggage against the first carrier in one State, a consignee or passenger may take action against the last carrier in another State, and both may take action against an intermediate carrier in another State, arising from the same loss, damage or delay of cargo or baggage, since each is given rights as plaintiff, and under Article 28 (1) each plaintiff may choose his own jurisdiction, and perhaps more than one. This possible multiplicity of actions may create difficulties for the carrier which may not have been intended. In fact instances of this have occurred. It would seem wise to reconsider this aspect in connection with any revised Convention.

ARTICLE 31 deals with combined carriage, performed partly by air and partly by other modes of carriages, and provides that the Convention rules shall apply only to the air carriage. Upon this, observations in connection with Article 18 have a bearing.

ARTICLE 32 states the obvious rule that provisions in a contract which infringe the Convention rules shall be null and void, following Article 23; and provides for arbitration in connection with the carriage of goods. This Article calls for no comment.

ARTICLE 33 gives the carrier the right to refuse to enter into any contract of carriage, and to make regulations which do not conflict with the rules of the Convention. It is not within the scope of this Article to discuss the position of "common" or other carriers under various legal systems.

ARTICLE 34 exempts from the provisions of the Convention "carriage by air performed by way of experimental trial by air navigation

\[\text{\textsuperscript{7}}\text{See observations on Article 28.}\]
undertakings with the view to the establishment of a regular line of
air navigation, nor does it apply to carriage performed in extraordinary
circumstances outside the normal scope of an air carrier's business." 
The writer feels that this Article might well be suppressed. There
seems no reason why passengers or carriers should be deprived of their
respective rights under the Convention in the circumstances mentioned.
If carriers carry, for remuneration or gratuitously, passengers on such
flights, and the passengers desire to engage in them, it seems reasonable
that the Convention rules should apply. The Article has created diffi-
culty as to the meaning of "experimental trial";\(^8\) and "air navigation
undertaking" is not defined.

**Article 35** seeks to define "days" as "current days not working
days." It is suggested that this definition should be "consecutive calen-
dar days, not working days" following precedent.

**Article 36** declares that the Convention is drawn up in French in
a single copy which remains deposited in the archives of the Ministry
of Foreign Affairs in Poland. It is normal nowadays to have Conven-
tions in English, French and Spanish, all of which are of equal validity;
and to provide for deposit in the archives of the I.C.A.O.

**Articles 37 to 41** are formal; but the expression "High Contract-
ing Party" is used in different Articles to mean two entirely different
things, namely a Signatory State (meaning a State which has signed
but not ratified) and a Contracting State (meaning a State which has
ratified and adhered to the Convention). In Articles 37 to 40 it is used
in both senses. In Article 38 it is not clear if Signatory State or Con-
tracting State is meant. In Articles 39 and 41 it is used to mean Contract-
ing State. This confusion led to the House of Lords, the highest judi-
cial authority in the United Kingdom, to decide\(^9\) in an action upon a
contract comprised in a consignment note, incorporating the I.A.T.A.
Conditions of Carriage based on the Convention, that (a) "High Con-
tracting Parties to the Convention of Warsaw" in this clause (i.e. the
clause in the Conditions) included all the original signatories to the
Convention, whether they had subsequently ratified or not; (b) the
Orders made under Section 1 (2) of the Carriage by Air Act 1932 had
no operation on the construction of a contract relating to carriage not
subject to the Act, and that therefore (c) carriage from Great Britain
(which had ratified) to Belgium (which had signed but not ratified)
fell within the category of "international carriage" (referred to in
the Conditions, which reproduce the definition in the Convention), al-
though it was not subject to the Carriage by Air Act 1932 under which
the Warsaw Convention was adopted by the law of England.

From what appears above it will be observed that almost every
Article of the existing Convention includes defects or obscurities, and

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\(^8\) In the case of the SABENA aircraft which crashed at Gander when making
one of six trial flights under special permit from the C.A.B.

\(^9\) In *Phillipson v. Imperial Airways Ltd.* (1939) A.C. 322; (1939) 1 All E.R.
761; (1939) USAVR 63; Digest-Supp.
some of them contain several. These are not merely theoretical or technical defects. On the contrary they cause almost daily practical difficulties and problems for the carrier, insurers and lawyers dealing with claims and actions arising from an ever-increasing volume of air carriage. It would seem that now, twenty years after the Convention was signed, it is surely time that these defects should be rectified. Every time the Convention comes under legal review, uncomplimentary observations concerning its bad drafting are made.

**Errors of Omission**

Unfortunately this aspect of the matter is not the end of the sad story, because what appears above deals only with errors of commission. It is now necessary to call attention to errors of omission, namely to matters which should be dealt with in any revised Convention and which are not dealt with in the existing one, as follows: —

(a) The position concerning the rights and obligations of the parties, when it is impossible to effect despatch or delivery of cargo should be regularised.

(b) There should be provision for a carrier's lien on cargo, to cover expenses involved over storage, etc. when cargo cannot be despatched or delivered through some fault of the consignor or consignee.

(c) It may be found desirable to make provision in a revised Convention for negotiability of the Air Consignment Note.

(d) It is most necessary to make provision for charters, that is to say, the case when the whole capacity of an aircraft is chartered for a particular voyage or series of voyages (Voyage Charter) or on voyages to be ordered by the charterer during a specified period (Time Charter). Both these types of charter fall into two categories, namely when the charterer uses the capacity of the aircraft for himself and his friends, or the case when the charterer himself employs space in the chartered aircraft in carriage for remuneration. In the former case the operator alone is the carrier, and the charterer is in the position of a passenger; in the second case, the charterer becomes a “carrier” because he himself makes a contract to carry. Charters of various kinds are nowadays very common, and it is important that the legal position of owners, operators, carriers and charterers respectively should be properly regularised.

(e) As mentioned above, in connection with Articles 17, 18 and 19, it is necessary to define clearly the various periods during which the carrier should be liable in relation respectively to passengers, baggage and cargo, and in relation to delay in each case.

(f) Provision should be made for deviation on a voyage.
(g) Provision is required to deal with specially valuable articles, as is normal in other spheres where such articles are involved.

(h) It may be desirable to incorporate in a revised Convention provision for staying subsequent actions, when more than one is commenced in different States, until the first action has been decided, in order to protect the carrier from a multiplicity of actions at the same time in different States, or that the plaintiff must exercise an option to choose one court only, if, in fact, a plaintiff is entitled to take action in more than one Court arising out of the same cause of action under existing Article 28.

(i) It is very necessary for provision to be made for the law applicable in actions for compensation arising from death; also as to the parties entitled to claim and give receipts, and the parties entitled to participate in compensation awarded or agreed, and the method of distribution and allocation of such compensation.

(j) Provision is required to deal with territories of a Contracting State which change their status, either by acquiring independence or by passing from the sovereignty or authority of one State to that of another, whether a Contracting State or not. This has a most important bearing upon the territories which come within the scope of, and are bound by, the provisions of the Convention, or not, as the case may be, especially since the character of the carriage concerned, that is to say whether it is "international" or not, is dependent upon the status of such territories.

(k) Finally, there is the all-important question of definitions, very few of which are incorporated in the present Convention. Consequently, practising lawyers are always being faced with problems concerning the real meaning and intention of many words and phrases used. The definition of "operator" is of special importance, especially since the definition in Article 5 of the Rome Convention is not satisfactory. Some other definitions which are almost essential are those of "carrier," "charter," "contract of carriage," "employee," "last carrier," "officials" and "passenger," for reasons which will be apparent to those who study the July 1949 draft of a new Convention prepared by the writer for submission to the Legal Committee of the ICAO. Definitions of a number of other words and phrases included in that draft are also most desirable, especially in cases which require reconciliation of terms for which the English and American languages use different words.

What appears above provides, in the writer's opinion, a very strong case not only for drastic revision of almost the whole of the existing Convention, but also for the incorporation in a new Convention of many new principles concerning which the existing Convention is silent.