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UNIFORM AIR TRANSPORT DOCUMENTS AND CONDITIONS OF CONTRACT

By J. G. Gazdik*

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LIKE all forms of commercial transport before it, air transport issues tickets and traffic documents to passengers and shippers. There is no essential legal difference in this system of documentation between airlines and, for example, railroads. The nature of these documents and their relationship to the basic contract of carriage are subjects well developed in all important legal systems.

Although the Warsaw Convention has placed air transportation in a peculiar situation by setting down detailed rules for the issuance and contents of the documents, it did not change their relationship with the contract of carriage under common law. Air traffic documents are "common form documents" with all the inherent correlatives under English and American law. The documents are evidence of the existence, validity and terms of the contract, but their absence, irregularity or loss does not affect the existence of the contract or its terms.

While centuries of precedent in other forms of transport have dealt with many of the basic legal problems involved in airline documentation, certain legal complications have been created for air transport by the need for uniformity and even universality in these terms and relationships to facilitate the growing volume of interline carriage on a worldwide basis.

UNIFORMITY — RECENT TRENDS

Every airline began operations with its own ideas as to how traffic documents should be drawn up, but so long as every carrier operated with divergent documents and under different conditions, the carriage of passengers or cargo on services of more than one airline required a new set of documents for each carrier involved. Furthermore, since there was no international law regulating air carriage, carriers found it advisable to consolidate the terms of their contracts and to develop documents which would stand up before various courts.

* The opinions expressed in this article are those of the writer and do not necessarily represent the official point of view of the International Air Transport Association (IATA).
The Prewar Period

The first uniform Conditions of Carriage were developed in 1927 by members of the old IATA — the International Air Traffic Association. These Conditions were so framed that the carrier was generally under no liability to those with whom he had entered a contract of carriage, either for the injury or death of the passenger or for loss of or damage to cargo, except where such liability was imposed on the carrier by applicable law.

While carriers were preparing these first Conditions, CITEJA\(^1\) began to work on two projects: the Convention on the liability of air carriers, and the Convention on the air waybill. After five years of deliberation, from 1925 to 1929, the two projects were consolidated and the Convention for the Unification of Certain Rules Relating to International Carriage by Air was signed at Warsaw on 12 November 1929. The new convention substantially modified carriers' legal position insofar as it restricted the contractual freedom which they had hitherto enjoyed in many jurisdictions. Roughly speaking, the Warsaw Convention created a presumption of fault on the part of the carrier and, as a quid pro quo, set specific limits to the liability of the carrier. Also, the Convention incorporated detailed rules regarding documents of carriage (passenger tickets, baggage checks and air waybills). In an effort to comply with these detailed rules, new standard tickets, baggage checks and air waybills, incorporating new uniform General Conditions of Carriage, were developed by the old IATA in 1931. To assure that the new documents complied strictly with the Warsaw Convention, the forms were submitted to and approved by CITEJA.

Despite this approval, an English Court held in 1936 that the IATA air waybill did not comply with the requirements of the Warsaw Convention.\(^2\) In the light of legal decisions of various other Courts and of technical improvements in the handling of traffic, the documents were modified from time to time. The basic relationship between the documents and IATA 1931 Conditions of Carriage, however, remained unaltered.

In order to complete the record of development of the traffic documents prior to World War II, the Trans-Oceanic World-Wide Conditions of Carriage prepared in New York in 1939, and the "Simplified Conditions and References to the General Conditions of Carriage" drawn up in Leiden in 1939 and known as "the Leiden Conditions" deserve mention. The former were intended to govern commercial traffic over the Atlantic and Pacific, the latter were designed to be set out on the passenger ticket, baggage check and air waybill in Europe

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\(^1\) Comité International Technique d'Experts Juridiques Aériens (CITEJA).

and in the Eastern Hemisphere, as a reference to carriers’ conditions of carriage.

Because of the outbreak of World War II, the Trans-Oceanic Conditions of Carriage were not endorsed by the old IATA and the “Leiden Conditions” were put into use only in Europe.

The Postwar Period

The resumption of general international air transport after the war, when the new IATA — the International Air Transport Association — was established, found the airlines using a variety of traffic documents and conditions of carriage which differed greatly in their terms. Some followed the 1931 IATA Conditions of Carriage and used the “Leiden Conditions” on their traffic documents in much the same way as the later IATA “Conditions of Contract” have been used as a short form for the same purpose.

Others, operating under an essentially different regime, were obliged by national laws to file “tariffs” with government agencies. Still others in South America offered carriage under conditions inconsistent with both the 1931 Conditions and the tariffs of other airlines. Thus, one of the first aims of the reorganized and worldwide IATA was the standardization of the documents and terms of the conditions of carriage under which carriage was to be contracted on lines of successive carriers. This was a difficult, but nevertheless urgent project. The prewar IATA documents and conditions could be considered only as one aspect of a problem which necessarily included the legal and practical requirements of the well developed American “tariff” system and the needs of South American and Far East operations as well.

New forms of traffic documents to meet these new needs were developed first, when the IATA Traffic Conferences at Rio de Janeiro adopted standard IATA passenger ticket, baggage check and air waybill in 1947. Although these forms have undergone considerable amendment since, they have never been subjected to serious legal question. Some concern was expressed regarding the indication of agreed stopping places, the abbreviations of carriers’ names and of towns of departure and destination, and to the reference to the Warsaw Convention on the ticket and waybill, but a recent Court decision has reaffirmed the legality of the present practice.

3 Articles 3, 4 and 8 of the Warsaw Convention.
4 Kraus v. KLM (Royal Dutch Airlines) U.S. 2 Avi. p. 15,017. It was argued “that the limitation of liability does not apply here because the waybill does not conform to the requirements of the Warsaw Convention, that it contains a statement of the ‘agreed stopping places.’ In space provided for this information, the waybill states: ‘See list of scheduled places in the time tables of the carriers concerned, which lists (but not the times therein) are made hereof.’ The purpose of this requirement was to enable one to determine whether or not the carriage was international within the meaning of the Warsaw Convention. The incorporation by reference to a published and readily available time table is a sufficient compliance with the provisions of article 8(c) of the Warsaw Convention, especially in this case, since the international character of the air carriage could readily be determined from the ‘place of departure’ and the ‘place of destination’ appearing on the face of the air waybill.”
Simultaneously with the drawing up of the standard forms of traffic documents, carriers also agreed to the so-called IATA "Conditions of Contract," really a short form of the Conditions of Carriage to be printed on the limited area of the traffic documents.

The title of the Conditions of Contract is not, perhaps, entirely descriptive. They might more properly be termed "Excerpts of the General Conditions of Carriage" or "Reference Conditions." However, since no agreement could be reached in 1947 on a standard IATA General Conditions of Carriage, the aspect of reference to these Conditions could not be emphasized in the title, nor could they be called excerpts of a non-existent uniform document.

The question as to whether it was necessary or not to print Conditions on the traffic documents in addition to a reference to the Conditions of Carriage was never clearly determined. It was suggested that certain legal systems, particularly in Latin America, might not recognize the terms of the Contract of Carriage unless they were in writing on the ticket or air waybill. The practice may also have some justification in English Law where the fear was expressed as to the validity of a Condition of the Contract of Carriage excluding or limiting carriers' liability by reference. If these Conditions were not printed on the ticket or air waybill, certain courts might not consider the reference as adequate "notice" to passengers and shippers and might question the consent of passenger or shipper to these terms of the Contract.

As a matter of record, the IATA Conditions of Contract were redrafted at Bermuda in 1949 and amended at Madrid in 1950 to incorporate policy decisions of the airlines regarding their contractual liability undertaking. The situation discussed here, however, was not affected.

Bermuda Conditions of Carriage (1949)

The third step toward standardization was the drafting of a standard General Conditions of Carriage which might replace the prewar IATA Conditions. This was an extremely ambitious project. To be completely successful, it would have to meet the requirements of those countries where carriers were obliged to file rules tariffs, to cover air traffic on a worldwide basis, and conform to the traffic and operational procedures of more than 60 airlines. Considering the stage of development which air transport had reached at the conclusion of the Second World War, these proved to be insurmountable difficulties. International carriers were not quite ready to give up their own traffic procedures for the sake of uniformity — and particularly on the very many issues which must be covered by the tariffs filed by airlines in North America.

It was therefore realized that no complete solution could be expected from this first effort and the focus of inquiry was narrowed down to a determination of how much standardization could be

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5 These liability rules are dealt with specifically in Part III.
achieved in the shortest possible time. This proved to be the acceptance by carriers at Bermuda in 1949 as a recommended practice of the new IATA "Conditions of Carriage — Rules Tariff," which was drafted on the basis of the prewar IATA Conditions of 1931, the Trans-Oceanic Global Conditions of 1939, and the Rules Tariffs of certain American carriers.

This Bermuda document, which could be termed as the new IATA Conditions of Carriage, represented a compromise between the European conception of "conditions of carriage" as the terms of contract, and the American system of publishing all rules in a tariff filed with the U. S. Civil Aeronautics Board (CAB) and the Canadian Air Transport Board (ATB).

While the Bermuda document might be considered as an important step forward to standardization of the rules covering international air carriage, their status is entirely different from the prewar IATA Conditions of Carriage. The latter was a uniform contract, whereas the Bermuda Conditions are not mandatory. They are, rather, a set of Recommended Practices which have only moral effect and which the airlines are free to change, modify, or alter as long as they reproduce the contents of the Conditions of Contract. As a result, for an interim period at least, the situation remained chaotic. Notwithstanding the high degree of acceptance of the bulk of the Bermuda recommendations by many carriers, a representative cross-section of the Conditions of Carriage currently adopted by various airlines indicated several general trends of deviation from the Bermuda document.

One group of carriers, in an endeavor to meet the requirements of the CAB and ATB, decided to include more detail in the so-called Consolidated Rules Tariff than were considered necessary in the Bermuda Conditions of Carriage. On the other hand, the tendency among European carriers in general, was either to omit a great deal of detail included in the Bermuda Conditions or to replace them by general statements of principle. The purpose of European carriers could have been to reduce the Conditions of Carriage to a bare text which was not liable to change, so that it could be printed in permanent form, either in booklets or on posters to be displayed on the walls of passenger and cargo receiving centres.

The new IATA traffic documents, together with the Conditions of Contract, were put into practice on a worldwide basis — but the carriers' Conditions of Carriage, to which these documents referred, were sometimes inconsistent with the terms of the Conditions of Contract. These inconsistencies resulted in several confusing situations. First, which conditions — Conditions of Contract on the uniform documents

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6 Civil Aeronautics Act of 1938 (49 U.S. 403) CAB Economic Regulations 221 and subs.
7 Consolidated Rules Tariff issued on one (1) day's notice under special tariff permission of the Civil Aeronautics Board No. 4660 and under special permission No. 1102 dated June 8, 1951 of the Air Transport Board. Issued by W. D. Barrington, Agent, International Air Transport Association, 809 Madison Ave., New York 22, N.Y., U.S.A.
or the individual carriers' Conditions of Carriage — would override the others in the case of conflict? Fortunately, this point was not raised before the Courts at the time and the carriers have since brought their individual Conditions of Carriage into line with the IATA Conditions of Contract — other discrepancies notwithstanding.

The second question arose in connection with interline carriage. Individual airlines sell transportation and issue traffic documents, not only over their own lines, but also over the lines of other carriers. Which carriers' Conditions of Carriage are incorporated by reference in the written Conditions of Contract on the document — those of the issuing, the first, the carrying, the connecting or the last carrier?

The third difficulty arises from the necessity to give passengers and shippers reasonable opportunity to investigate the terms of the Conditions of Carriage should they so desire. This requirement is met by having available for inspection in the offices of the carrier or its agents the Conditions of Carriage under which they operate. So long as there are inconsistencies between the Conditions of Carriage of individual airlines, any carrier doing interline business would seem to be required to keep in its offices, and those of its agents, copies of the Conditions of Carriage of all other carriers with whom it does such business. For the time being, and until uniformity is achieved, only this rather expensive and burdensome arrangement would seem to satisfy the scrupulous legal mind.

For the time being, then, there is a uniform IATA Conditions of Contract used by IATA member carriers, even though there is no uniformity in their Conditions of Carriage. What, it might be asked, would be the situation of a Court deliberating the proper interpretation of the Conditions of Carriage under these circumstances?

Presumably, the Court would take into consideration these factors:

i — the form of the document, particularly insofar as it supplied information on the essentials of the contract;
i — the endorsement under the heading of Conditions of Contract; and
iii — the carriers' own Conditions of Carriage, more or less on the basis of the Bermuda documents.

The Conditions of Contract printed on the document provide, for all practical purposes, the link between the carrier and the passenger and/or shipper. Under the circumstances, they are of paramount importance because they serve two major functions:

i — they provide a reference to the carriers' Conditions of Carriage; and

ii — they incorporate in the documents the most important liability rules governing the contract of carriage.

It is now proposed to note some of the legal questions involved in the performance of these two functions.

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9 The Bermuda Conditions of Carriage — Rules Tariff, are recommended practices only.
VALIDITY OF REFERENCES IN CONDITIONS OF CONTRACT TO CONDITIONS OF CARRIAGE

The IATA Conditions of Contract on the passenger ticket and air waybill incorporate by reference the carriers' individual Conditions of Carriage or Rules Tariff, as the case may be. The validity of this reference and its effects have already been reflected upon in Court decisions; because of express statutes in the United States (referred to hereafter as U.S.), legal questions relating to the problem in that country are quite distinct from those in the United Kingdom (referred to hereafter as U.K.). This is a matter of considerable interest to the carrier, for the Conditions of Carriage incorporate many “special” terms which, in the absence of express agreement between the parties to the contract of carriage, might not be upheld as valid by the Courts.

Contract of Carriage is an Accepted Offer

In the U.K. the entire situation is subject to the operation of Common Law. In accordance with the basic principles of obligations, every agreement is an accepted offer, “the union into a single, whole and undivided declaration of will of declarations, each in the same sense, by several persons of their wills in respect of a particular matter.” The contract of carriage must comply with this principle, but the difficulty in the so-called “ticket cases” is that carriers set their conditions and undertaking well in advance and passengers accept these conditions in the majority of cases without giving too much consideration to them.

Technically, an offer to carry by the carrier must be communicated to the other party before it can be accepted by the passenger or shipper to become an agreement. The communication has two important aspects:

i — the manner in which communication is made; and
ii — the substance which is to be communicated.

It is easy to realize that passengers or shippers might desire to set aside a contract on the grounds that they did not properly understand its terms (conditions and undertakings), or that the agreement contained such provisions which would never have been agreed by them had they had an opportunity to study the terms of the contract.

In cases in which a contract was evidenced by a ticket on an airline, a railway or a boat, the person delivering the ticket (the airline, railway, ship owner or agent) is regarded as the offeror and the other person (the intending passenger or depositor) as the offeree.

“A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in common form stating the terms by which the per-

10 Civil Aeronautics Act of 1938, as amended, and CAB Economic Regulations.
11 Chapter 5, Para. 36, “Salmond and Williams on Contracts” (1945).
son delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it."

Such offers contain numerous terms governing the undertakings of the offeror and the conditions in which the carriage is conducted. Sometimes they modify or exclude statutory or common law liabilities which would otherwise, in the absence of a contract, govern the carriage. Once the carrier seeks to take advantage of such a term, the passenger or shipper may contend that the condition on which the carrier desires to rely did not include the terms of the contract, notwithstanding that the contract as such was or was not communicated to the passenger or shipper.

The possible cases fall into four categories. If the contract is set down in writing as is the case in air transportation, the law seems to be clearly stated by the learned Justice Blackburn as follows:

"And it is clear law that where there is a writing, into which the terms of any agreement are reduced, the terms are to be regulated by that writing. And though one of the parties may not have read the writing, yet, in general, he is bound to the other by those terms; and that, I apprehend, is on the ground that, by assenting to the contract thus reduced to writing, he represents to the other side that he has made himself acquainted with the contents of that writing and assents to them, and so induces the other side to act upon that representation by entering into the contract with him, and is consequently precluded from denying that he did make himself acquainted with those terms."

If it can be proved that the passenger in fact, had the knowledge of the term of the contract and its contents, then it is accepted that the carrier shall have sufficiently communicated the term in question to the passenger. If the passenger did not know of the contents of the term, but knew that there were terms to the offer, the carrier will again be able to rely on the Conditions of Carriage, as the passenger will be estopped from denying that the terms of the contract were communicated to him. The Courts would construe the conduct of the passengers in assenting to the offer which he knew was subject to terms as representing to the carrier an agreement to the terms regardless of whether he read them or not. In fact, it might be said that the attitude of the passenger induced the carrier to enter into a contract with him.

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14 Harris v. Great Western Railway(s), (1876), 1 Q.B.D. 515, 530.
15 In Parker v. South Eastern Railway (1877) 2 C.P.D. 416, 425; "Now as regards each of the plaintiffs, if at the time he accepted the ticket, he, either by actual examination of it, or by reason of previous experience, or from any other cause, was aware of the terms or purport or effect of the endorsed conditions, it can hardly be doubted that he becomes bound by them."
16 Parker v. South Eastern Ry. (1877), 2 C.P.D. 416, 425; "Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are."
Finally, there is the case where the passenger did not know that there were terms attached to the offer, undoubtedly he will contend that the terms were not communicated to him. If the carrier has done, however, what is reasonably sufficient to give the passenger notice of those terms, the passenger might be stopped from denying the knowledge of the terms.

It would seem that in all cases where a term is to be considered as having been communicated to the passenger by reason of his having accepted a ticket containing the term or a reference to it — and not because he is in fact shown to have read the term — that term must be of a usual and reasonable sort. The conduct of the passenger in accepting a ticket referring to conditions and undertakings of a contract, of whose contents he is not shown, does not seem to mean that passenger was content with unusual terms of the contract. It is sometimes said that in such cases there is an implied understanding that the offer does not contain any unusual terms except those to which the carrier has called his passengers' attention in a special and distinctive way.

"The truth is, people are content to take these things on trust. They know that there is a form which is always used — they are satisfied it is not unreasonable, because people do not usually put unreasonable terms into their contracts. . . . I think there is an implied understanding that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read — no condition not relevant to the matter in hand."17

This passage raises a question as to what would be considered reasonable, which is a question for the Jury.

"Whether all that was reasonably necessary to give him (the offeree) this notice was done is . . . a question of fact, in answering which the tribunal must look at all the circumstances and the situation of the parties."18

Where, however, the only reasonable conclusion on the evidence would be that what was reasonably sufficient to effect communication was, or was not, done, the issue will not go to the Jury but will be decided by the Court in favor of carrier or passenger accordingly.

There is a great deal of English law admitting the validity of a contract where the carrier had done all that was reasonably sufficient to call the attention of the passenger to the terms of the contract, more particularly that the conditions and undertakings formed the basis of the contract.18 It appears that it is a question of fact in each case whether it can be presumed that the passenger has assented to the conditions by accepting the document. There are earlier cases which

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UNIFORM DOCUMENTS AND CONDITIONS

indicate that the passenger was bound by the conditions as a matter of law. It will be interesting to note that where a carrier handed over the document in an envelope sometime after the contract was made, but immediately prior to the beginning of the flight, he was estopped from relying on the rules of the conditions included in that document.

The question of validity of conditions referred to or contained in the passenger ticket or consignment note was not disputed in cases brought against Imperial Airways, but in a recent Canadian case it was held that where the conditions of the contract were signed by the passenger, he is bound by the terms of that contract whether or not he knew them or had noticed them.

These authorities seem to indicate that the reference on the passenger ticket and air waybill to carriers' General Conditions of Carriage, effectively incorporates, at least under English Law, the terms of these Conditions in the Contract of Carriage.

**Tariff Rules Are Part of the Contract of Carriage**

The situation in the U.S. is somewhat different. Under the Civil Aeronautics Act of 1938, as amended, carriers are required to file tariffs with the CAB. Once filed, and unless they are unlawful or otherwise invalid, these tariffs determine the rights and obligations of carriers. They become a part of the contract between the carrier and the passenger. "Tariff" is defined in Economic Regulations of CAB (221.1) as:

"... a publication containing rates applicable to the transportation of persons or property, and rules relating to or affecting such rates or transportation, whether such rates and rules are combined in one publication or are stated in separate publications. A "loose-leaf tariff" shall be deemed to consist of that combination of pages, whether original or revised, which is currently effective."

While 403 (a) of the Civil Aeronautics Act requires only the filing of tariffs showing all rates, fares and charges for air transportation, the Economic Regulations (221.7) p. 5000 provide that:

"Rules relating to or affecting the application of rates may be published in a tariff other than the tariff naming the rates."

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Section 403 (a) of the Civil Aeronautics Act provides in part that

"Tariffs shall be filed, posted, and published in such form and manner, and shall contain such information, as the Board shall by regulation prescribe; and the Board is empowered to reject any tariff so filed which is not consistent with this section and such regulation."

Section 403 (b) of the Act requires that the provisions in the Rules Tariff shall be observed by both the carrier and the passenger. This language is substantially the same as Section 6 (7) of the Interstate Commerce Act (Title 49 U.S.C), and it is well established that a carrier’s tariff on file with the Interstate Commerce Commission has an effect equivalent to law until declared unlawful by that Commission, and that the provisions of those tariffs established the legal relationships of the parties. This is so, irrespective of the injured party’s actual knowledge of the tariff provisions.

Any person may file a complaint with the Board asking that any rule, regulation or practice be declared unreasonable or unlawful. Furthermore, the Board may investigate such matters on its own initiative. If the Board finds, after notice and hearings, that any rules, regulations, or practices are unreasonable or unlawful, it may determine and prescribe lawful rules, regulations or practices.

The foregoing seems to require that any rule determining liability of the carrier must be approved by the CAB and is subject to question by any party. The question of the reasonableness and legality of these rules is within the sole jurisdiction of the CAB and Courts are without jurisdiction to grant relief to a party until a finding has been made by the Board that the rules are unlawful, or until the party alleges that he has exhausted all his remedies before the Board.

It is also established that reference on a ticket to the rules of a filed tariff is valid though it was contended that time limit requirements (written notice within 30 days after occurrence of the injury) are invalid because not set out in the passenger ticket issued to plaintiff, and because the words, “Sold subject to tariff regulations,” printed on the ticket did not give plaintiff legal notice of the specific time limiting provisions contained in the tariff, even if the latter was on file in defendant’s office.

26 U.S. Civil Aeronautics Act, Section 1002(a).
27 U.S. Civil Aeronautics Act, Section 1002(b).
28 U.S. Civil Aeronautics Act, Section 1002(d).
30 Wilhelmy v. Northwest Airlines. Aviation Cases (2) 1949, P. 15024. Defendant denies negligence and specifically further pleads as an affirmative defense that the ticket sold to plaintiff for the flight in question contained the provision, “Sold subject to tariff regulations” and that the time of plaintiff’s flight on defendant’s airplane, there was an effective tariff duly filed, posted and pub-
The Supreme Court of the State of Washington also held that passenger was bound by tariff regulations and that under them, in the given case, passenger had no right to accommodations on subsequent flights to the exclusion of other passengers scheduled for those flights. The Court specifically held that

"His (plaintiff's) ticket was sold subject to tariff regulations with which he was charged with notice."

The Supreme Court of Illinois held a passenger bound to take notice of tariff regulations respecting time limits for filing written notice of claim and commencing suit—the words on the ticket being, "Sold subject to tariff regulations."32

There is definite statutory requirement33 that each carrier shall post and make available for public inspection at each of its stations or offices at which property is received for transportation or at which tickets for passenger transportation are sold, all of the currently effective tariffs. Contractual obligations and arrangements are governed by the Civil Aeronautics Act and not by Common Law or some other statute.34

The cases heretofore cited seem to indicate that tariffs operate as a matter of law and what is filed with the CAB as tariffs (not objected to by the Civil Aeronautics Board) becomes a part of the contract between the carrier and passenger and shipper. A recent case before the U. S. District Court for the District of Columbia (Shortley and Shortley vs. North Western Airlines Corporation) brought up, however, some disturbing findings and cast some doubt as to the generally accepted view. In this case action was brought against North Western Airlines by a husband to recover damages for injuries as a result of negligent landing of one of defendant's airplanes and by wife for damages for the loss of consortium of her husband as a result of those injuries. The defense moved for summary judgment and contended "that the plaintiff cannot maintain this action because written notice of the male plaintiff's accident was not presented to the general office

lished, which provided in effect that no action should be maintained for personal injury to a passenger unless written notice of the claim is presented in writing to the defendant within 30 days after the occurrence of the injury and unless the action is actually commenced within one year after such occurrence, but that no such notice was given and the present action was not commenced within the times respectively provided in said tariff.

31 Jones v. Northwest Airlines, 22 Wm. (2d) 863.
32 Koontz v. South Suburban Safeway Lines, 73 N.E. (2d.) 919. "Because of the fact that the tariff regulations filed with the Commission are of an intricate and complex nature, it is manifestly impossible to imprint on tickets all of the rules and regulations of the tariffs. These rules and regulations are nevertheless binding upon the carrier and the passenger. The carrier may not lawfully deviate from its filed tariffs. It cannot obligate itself to deviate from the rates and conditions of the tariffs. To permit a carrier to do so would open the door to discrimination."
33 Economic Regulations (222.2 g).
of the defendant within 90 days of the alleged occurrence and suit was not instituted by plaintiffs within one year following the occurrence as were required by the defendant's tariffs," but the motion was dismissed on the strength of the opinion that the inclusion of the particular provision in the tariff does not operate as a matter of law precluding the plaintiff from maintaining an action within the period fixed by law as a statute of limitation. Furthermore, it was indicated that the provision on the passenger ticket: "The time limits for giving notice of claims and the institution of suit are set forth in Carrier's tariffs" was not sufficiently expressed and consequently could not be considered as an agreement between the plaintiff and the carrier giving effect to the limitation as to claims for injuries and commencement of action thereon.

While it was admitted that a contract imposing conditions as to reasonable time for making claims and for the institution of actions thereon (Gooch vs. Oregon Shortline Railroad Company 258 U. S. 22) may be made, it was implied that this would at least require express terms to be set forth on the ticket itself and preferably that such terms should be signed by the passenger and shipper. Reference was made to a cardinal rule laid down in the Majestic 166 U. S. 375, 386, 41 L.Ed. 1039, but this case does not seem to convey a requirement as severe as the conclusion drawn therefrom. The passage in The Majestic requires only that "When a company desires to impose special and most stringent terms upon its customers, in exoneration of its own liability there is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted." It would follow that in the Shortley case the term regarding time limitation in carrier's tariffs was not distinctly declared and deliberately accepted. Surely such conclusion is without definite foundation since nothing in the Shortley case seems to convey doubt as to why the terms of the contract published and filed with the CAB should not be construed as "distinctly declared" and why could not the acceptance of a ticket which makes specific reference to published tariffs mean "deliberate acceptance" of the terms of tariffs on the part of the passengers. Furthermore, the cases referred to heretofore and also cited in the Memorandum acknowledged the validity of a reference to tariffs and accepted the view that knowledge of the terms of the tariffs has been conveyed to the passenger and shipper through such reference. Though some of these cases were discussed in the Memorandum their strength has not been convincingly destroyed.

Notwithstanding the ruling in the Shortley case the effects of which cannot as yet be clearly determined, the U. S. situation appears to be much like that in the U.K. in practice, the main distinction being that the latter achieves fair protection of the public by means of Statute whereas the former by the operation of Common Law. Also, in the latter, the rule is subjected to prior approval by the government agency (CAB) and the former will not be tested except by the Courts. In both
cases however, the reference to the Conditions of Contract or Tariffs, to serve as notice to the individual, is definitely necessary.

A cursory review indicates that French Courts are also extremely severe in the matter of communication of offer and its acceptance, particularly if the contract contains clauses purporting to exclude or limit carriers' responsibility. They admit their validity only if these clauses have been duly called to the attention of the passenger or the shipper at the time when the contract was concluded and if the language of the clauses is clear and accurate.

The judgment in the case of Birdeau v. Cie d'Assur, La Protectrice pronounced by the Cour de Cassation of France, 31 January 1950, established clearly the French position. It referred to Article 105 of a Decree of 12 January 1939 which provides that common road carriers must bring to the knowledge of shippers the clauses which limit their liability. In accordance with this case carriers can only make use of the limitation of liability clause, as a defense, if they can prove that the clause did appear on the waybill given to the shipper; if there was no waybill given, or if the clause did not appear therein, carriers cannot claim that the shipper had knowledge thereof through the notice posted in the carrier's office unless they can prove that the shipper entered their offices. Though this case specifically refers to road carriers it is suggested that it would equally apply to air carriers.

Generally, French jurisprudence would not give effect to a clause limiting carrier's liability if it was not printed on the traffic document (ticket or air waybill) though it was posted in carrier's office; or if it was printed on the traffic document but the document was not made out before the carriage started or if the document was not handed over to the passenger or shipper. Also, if the print is in very small characters, in the margin of the document, half hidden under a fiscal stamp, or even appearing on the back of the document without being referred to on the front.

It is understood that reference to the general conditions of a carrier's organization would in itself not make a clause valid unless the ticket or air waybill contained definite indication as to the limits of the liability incorporated in the text of such general conditions.

The traffic documents used presently by IATA carriers would seem to satisfy the requirements of British, U. S. and French courts as regards notice to passengers and shippers. These documents not only call expressly the passenger's or the shipper's attention to the existence of the General Conditions of Carriage, or Tariff, but also incorporate the most important terms affecting carrier's liability.

**Carrier's Liability Under the Conditions of Contract**

The second main function of the Conditions of Contract is to incorporate terms relating to carriers' liability. The old IATA General Conditions of Carriage of 1931 were based on two fundamental liability rules:
Carrier's fault was presumed where damage was sustained during the period of air carriage in the event of death or wounding of a passenger, destruction or loss or damage to registered baggage, or destruction or loss or damage to goods.

The liability however was limited to the amounts prescribed by the Warsaw Convention.

Generally speaking, carriers extended the liability rules of the Warsaw Convention contractually to all carriage to which the Convention would not otherwise apply.

In 1936, as regards passengers, "Special" conditions were adopted. These special Conditions, which are added to General Conditions of Carriage published by British companies, provided in substance that for carriage which was not governed by the Warsaw Convention "passengers and baggage are accepted for carriage only upon condition that the carriers, their servants or agents, shall be under no liability in respect or arising out of the carriage." This declaration was followed by a renunciation by passengers for themselves and their representatives and dependents for all claims for compensation for damage sustained on board the aircraft or in the course of any operations in flight, embarking or disembarking caused directly or indirectly to passengers or their belongings. The general effects of the clause were that if the carriage was governed by English law, and the Warsaw Convention was not applicable, carriers denied all liability.

The "Leiden Conditions" drafted in 1939 which merely purported to unify the "Conditions" to be printed on the IATA traffic documents, were in conformity with the 1931 IATA General Conditions of Carriage and they also included the "Disclaimer Clause."

When traffic documents and conditions of carriage were drafted for transatlantic air services in 1939 in New York, it was pointed out that in order to achieve similar effects of Carriers' Conditions of Carriage under American law as obtained in the U.K. and in Europe generally, considerable changes might be required in the liability rules of the old IATA Conditions of Carriage. The new conditions which were to be incorporated in the proposed traffic documents were a combination of what was considered to be the minimum essential conditions required to deal with legal situations existing both in

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55 Special Conditions: "Notwithstanding the provisions of Article 1, paragraph 1, Article 18, paragraph 1, subparagraph (1) and paragraph 2, Passengers and Baggage, it is expressly declared that, so far as concerns carriage which is not 'International Carriage,' as defined in Article 1, paragraphs 2 and 3, of the General Conditions (c), and in Article 1, paragraphs 2 and 3, of the Convention of Warsaw of 12th October, 1929, passengers and baggage are accepted for carriage only upon conditions that the carriers, their servants or agents shall be under no liability in respect or arising out of the carriage; and that passengers renounce for themselves, their representatives and dependents all claims for compensation for damage sustained on board the aircraft or in the course of any of the operations of flight embarking or disembarking, caused directly or indirectly to passengers or their belongings or to persons who, except for this condition, might have been entitled to make a claim, and whether caused or occasioned by the act, neglect or default of the carriers, their servants or agents, or otherwise howsoever."
America and in the Eastern Hemisphere. Two sets of Conditions were prepared:

i — The suggested "Passenger (contract) Ticket Liability Rules" of 1939 were simple. Where these rules were not in conflict with the law to be applied by the Court seized of the case, carriers, their servants and agents were under no liability in respect or arising out of the carriage or any service or operations of the carriers, their servants or agents. In addition to this disclaimer, all claims were renounced by passengers as in the clause adopted in 1936 by the British carriers. Finally, for registered baggage, the liability of carriers was limited to one hundred dollars.

ii — The liability rules in the draft "Terms and Conditions" on the back of the air waybill were quite different; carriers denied all liability for loss, damage, deterioration, destruction, theft, pilfering, delay or default or non-delivery or misdelivery which was not caused by the airline's actual negligence or that of its servants, agents or employees acting within the scope of their authority, or which were due to war risks or to the act or restraint of any government, or to strikes, riots or civil commotion. An attempt was also made to limit carriers' liability notwithstanding negligence on their part to the "amount of consignor's declared value for carriage." Finally, carriers expressly denied liability for loss of profit or for consequential or special damages.

In other words, for transatlantic carriage, carriers excluded all liability regarding passengers, but undertook limited liability as regards registered baggage and goods in every instance where fault was proven. While, due to the outbreak of World War II, these liability rules never achieved great practical importance, they seem to reflect certain influence of American law on the IATA liability rules.

The first new IATA Conditions of Contract drafted at Rio de Janeiro in 1947 adopted in general the liability regime suggested in 1939 for transatlantic traffic. Carriers agreed to deny all passenger liability whether or not caused by the act, neglect or default of the carriers or otherwise. The new IATA Conditions of Contract therefore eliminated the need for the Special Clause.

In the 1948 Bermuda amendments to the IATA Conditions of Contract, carriers reversed this position and, in general, denied liability on their part except if the damage was proved to have been caused by their negligence or wilful fault, and without contributory negligence on the part of the passenger. These Conditions attempt to limit this liability of carrier, so far as legally possible, to the amounts adopted in the Warsaw Convention as far as passengers are concerned, and to one hundred dollars (U.S. funds) as regards registered and personal property.
In case of goods, the charges for carriage having been based upon the value declared by shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face thereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed 250 such French gold francs or their equivalent per kilogram of goods destroyed, lost, damaged or delayed; all claims shall be subject to proof of value. In both cases, on the ticket and air waybill, it is expressly provided that the carrier issuing an air waybill for carriage exclusively over the lines of others does so only as a sales agent.

**Burden of Proof**

In addition to the apparent variety in the degree of liability reflected in carriers' conditions of contracts in the past twenty years, perhaps the development as to the burden of proof in the conditions deserves some attention.

Generally, in common law, the burden of proof is on the plaintiff who must prove fault on the part of carrier in order to justify his claim. This general rule was not incorporated in the Warsaw Convention. Indeed, the Convention established a presumption of fault on the carriers' part and shifted the burden of proof as a *quid pro quo* for the limited liability granted to air carriers. The Warsaw rule as to proof applies only to carriage governed by the Convention, whereas other carriage, in the absence of contractual arrangement would fall under the general rule.

The old IATA conditions of carriage extended the Warsaw rules contractually to carriage not governed by the Convention. As a result, passengers and shippers were never obliged to prove fault (except dol or wilful misconduct) on part of carriers who in all cases were liable up to the Warsaw limits, unless they could prove that they had taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.

contributory negligence of the passenger; (b) Carrier is not liable for any damage directly or indirectly arising out of compliance with laws, government regulations, orders or requirements or from any cause beyond Carrier's control; (c) in any event liability of Carrier for death, injury or delay of a passenger shall not exceed 125,000 French gold francs (consisting of 65½ milligrams of gold with a fineness of 900 thousandths) or its equivalent; (d) liability of Carrier in respect of baggage and other personal property is limited to its declared value which shall not exceed $100 (U.S. currency) or its equivalent per passenger, unless a higher valuation is declared in advance and additional charges are paid pursuant to Carrier's tariffs; (e) a carrier issuing a ticket or checking baggage for carriage over the lines of others does so only as agent, and no carrier shall be liable for any damage not occurring on its own lines unless proved to have been caused by its own negligence or wilful fault; (f) in the case of a carrier having its principal place of business in the British Empire or in Ireland, or in any case where this contract is governed by British or Irish law, the carrier reserves the right to refuse to carry any passenger, and passengers are carried upon condition that the carrier shall be under no liability in respect of carriage or of any other services or operations performed by it, and the passenger by acceptance of this ticket renounces for himself, his representatives and dependents all claims for compensation for damage arising out of or during the performance of the contract, caused to or sustained by any person who, except for this condition, might have been entitled to make a claim, and whether caused by act, neglect or default of the carrier, or otherwise.⁹
Unlike this system, the transoceanic conditions drafted in New York in 1939 and the postwar IATA conditions of contract adopted in Rio de Janeiro in 1947 and amended in Bermuda in 1949, do not purport to extend contractually all of the Warsaw rules to carriage not governed by the Convention. Consequently passengers and shippers are bound to prove fault on part of carriers. In other words, the common law rule was not altered in these new conditions and the burden of proof remained with the plaintiff.

There is nothing inconsistent in the objectives of the new IATA conditions with the efforts of carriers to obtain universality in the rules governing international carriage. The apparent lack of a single rule for all air carriage (on the basis of the Warsaw Convention) is not ideal but not without serious justification. In certain jurisdictions, the making of Warsaw rules contractually binding on passengers and shippers would have a peculiar result. In the U.S. only sixteen states have statutes establishing maximum amounts recoverable in suits for wrongful death which have the effect of limiting the liability of carriers for deaths of passengers in those states. In the remaining states, there is no arbitrary limitation upon amounts recoverable for wrongful death, but in accordance with the common law principle, "any contract purporting to exempt a common carrier of persons from liability for negligence of itself, or its servants, to a passenger for compensation is void as being against public policy." The contracts of air carriers which purported to exempt carriers from or limit their liability by private contract were held to be invalid. Furthermore, no statutory limitation exists for amounts recoverable by passengers for personal injuries.

Under the circumstances, the Courts interpreting the contract of carriage, if not under the Warsaw Convention, would appear to recognize the presumption of fault on the part of the carrier, but in the absence of an international treaty would ignore the liability limitations for negligence by contract. In other words, the contract would be interpreted to the great disadvantage of the carriers. While they could not avail themselves of the liability limitations, their position would be unduly worsened before the Courts. They would practically undertake an unlimited absolute liability with only one defence if they could prove to have done everything to avoid the accident.

It is significant that the change in the liability rules in the IATA conditions coincided with the beginning of transatlantic commercial

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38 Colorado, $10,000; Connecticut, $20,000; Illinois, $20,000; Indiana, $15,000; Kansas, $15,000; Maine, $10,000; Massachusetts, $15,000—Minimum $2,000; Minnesota, $17,500; Missouri, $15,000; New Hampshire, $10,000; New Mexico, $10,000; Oregon, $10,000; South Dakota, $20,000; Virginia, $15,000; West Virginia, $10,000; Wisconsin, $15,000 (Larger amount may be awarded, up to $2,500 to parent, husband or wife; widow with dependent children may recover up to $7,500 above maximum).


operations and participation of U.S. carriers in IATA. Because of the impossibility under U.S. law to limit common carriers' liability by contract, it appears to be impracticable, at least as far as carriers are concerned who operate into the U.S., to extend the Warsaw rules to "non-Warsaw" carriage in Carriers' Conditions of Carriage.

Res Ipsa Loquitur

The Opinion attached to the CAB Order approving the IATA Conditions of Contract (Traffic Conferences Resolution) specifically raised the question of burden of proof. It questioned whether the respective part of the IATA Contract denying liability except in case of proven fault of carrier, would not possibly be construed as an effort to avoid the application of the legal doctrine *res ipsa loquitur* insofar as death, injury or damage to personal property in the custody of the passenger is concerned (which would place certain burdens of proof on carriers).

*Res ipsa loquitur* has two main requirements:  

i — that the occurrence was such that does not ordinarily happen if due care has been taken;  

ii — that the instrumentality was under the exclusive control of the defendant when the accident occurred.

The doctrine of *res ipsa loquitur*, although it provides a substitute for direct proof of negligence where plaintiff was unable to point out the specific act of negligence which caused his injury, is a rule of necessity to be invoked only when, under the circumstances, direct evidence is absent and not readily available. As a principle, the application of *res ipsa loquitur* will depend on the circumstances of each individual accident.

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41 September 1, 1949.  
42 Conditions of Contract, para. 4 (IATA Traffic Conference Resolutions 275a and 540a).  
43 Thompson's Commentary in the Law of Negligence, Vol. 3, section 2754 states:  
"In every action by a passenger against a carrier to recover damages predicated upon the negligence or misconduct of the latter, the burden of proof in the first instance, is of course, upon the plaintiff to connect the defendant in some way with the injury for which he claims damages. But when the plaintiff has sustained and discharged this burden of proof by showing that the injury arose in consequence of the failure, in some respect or other, of the carrier's means of transportation, or the conduct of the carrier's servants, then, in conformity with the maxim *res ipsa loquitur*, a presumption arises of negligence on the part of the carrier or his servants, which, unless rebutted by him to the satisfaction of the jury, will authorize a verdict and judgment against him for the resulting damages. Stated somewhat differently, the general rule may be said to be that where an injury happens to the passenger in consequence of the breaking or failure of the vehicle, roadway, or other appliance owned or controlled by the carrier, and used by him in making the transit, or in consequence of the act, omission or mistake of his servants, the person entitled to sue for the injury makes out a prima facie case for damages against the carrier by proving the contract of carriage; that the accident happened in consequence of such breaking or failure, or such act, omission, or mistake of his servants; and that in consequence of the accident the plaintiff sustained damage."

44 Brott et al v. Western Air Lines Inc. (2 Av. 14,701).  
46 Dykstra and Dykstra (1946) p. 272 The Business Law of Aviation. "In spite of the vast advances which have been made in air transport, it is still recognized that in all such operations there is a wide element of chance which
Though in the regime of the Bermuda Conditions the burden of proof is generally on the plaintiff, the effects of application of *res ipsa loquitur* cannot be neglected. Some of the U.S. decisions hold that the doctrine, if applied, results in a "presumption of fault." Others consider it as a "permissible inference" and, again, others as a *prima facie* case. Finally, there is a view, prevailing in the U.K. cases, that if the doctrine is applied, "the burden of proof is shifted" to the defendant carrier.\(^4\)

Perhaps the divergency in the U.S. judgments regarding the application of *res ipsa loquitur* is due to the continued use of the same words *res ipsa loquitur* to describe all the rules mentioned heretofore, without distinguishing between them.\(^4\) The system whereby *res ipsa loquitur* does not shift the burden of proof on defendant entirely, is considered to be just and fair to air transportation, and the draftsmen of the Bermuda Contract did not intend to interfere with its application in the United States or otherwise.

Following their adoption, the provisions of the postwar Bermuda Conditions of Carriage, dealing with carriers' liability were subject to some criticism. Generally, two objections were made:

i — that the postwar IATA Conditions (1949) did not make the Warsaw liability rules applicable to carriage not "international" under the Convention, as did the prewar IATA Conditions (1931); and

ii — that the so-called "Disclaimer Clause" was unreasonable.

The first of these technical questions has already been dealt with

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\(^4\) Chief Justice Groner in Capital Transit Co. v. Jackson 80 U.S. App. D.C., 162, 164, clearly explains that: "in the District of Columbia the rule is that, when 'res ipsa' is applicable, it permits an inference of negligence and thus establishes a 'prima facie' case, or in other words, makes a case to be decided by a jury. But it does not shift the burden of the proof. When all the evidence is in, the question for the jury still is whether the preponderance is with the plaintiff."

\(^4\) Smith et al. v. Pennsylvania Central Airlines Corp. (U.S. 2 Av. p. 14,619): "The concept of 'res ipsa loquitur' has been variously defined and explained. The prevailing view is that this doctrine under certain circumstances treats the occurrence of an accident as itself constituting evidence of negligence. It permits, although it does not compel, an inference of negligence from the event. Proof of the accident alone becomes sufficient to make out the plaintiff's 'prima facie' case and to shift to the defendant the burden of going forward with the evidence. The inference authorized by the rule of 'res ipsa loquitur' must be weighed in conjunction with the evidence offered by the defendant, and does not relieve the plaintiff of the burden of proof resting on him on the entire case. The doctrine finds its principal application in case of injuries caused by a mechanism entirely controlled by the defendant, especially if the circumstances are such that the accident would probably not have occurred but for a failure on the part of some human being."

"In our opinion, 'res ipsa loquitur' means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. 'Res ipsa loquitur' where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."
in the preceding paragraphs but the background and justification of the second question require some explanation.

The British Disclaimer Clause

The origin of the clause goes back to 1936, when it was first adopted by IATA as an optional clause. Since 1936 this condition has been incorporated in all displayed Conditions of Carriage and in reference to Conditions on the tickets or ticket covers of British companies, sometimes under the following heading:

“Special Condition applicable to air journeys which are not 'International Carriage' as defined by the Convention of Warsaw for the unification of certain Rules relating to International Transport of the 12th October, 1929.”

This special condition was also adopted by foreign companies operating into British territory because they anticipated the possibility of claims which might develop into actions in the British Courts. The Conditions of Contract in the first postwar IATA documents did not include such a clause because the liability system adopted in those first Conditions excluded carriers' liability generally. Under those circumstances, there was no need for the special "disclaimer clause." In 1949, when the Conditions of Contract were modified and the new IATA Conditions of Carriage were adopted as a recommended practice, the “Special Clause” reappeared in the Conditions of Contract.49

The necessity for the “Special Disclaimer Clause” arose from a technical decision of the English Court50 founded upon the precise wording of the English Fatal Accidents Act, the effect of this decision being that carriers' liability to the dependents of a deceased passenger could be excluded altogether, but could not be limited. The features of the “Disclaimer Clause” were twofold:

i — the right of the carrier to refuse to carry any passengers; and

ii — the renunciation by the passenger for himself and his representatives of all claims or compensation for damages by the act, neglect, or default of the carrier.

In Mexico City in November 1949, the clause was further extended to include:

iii — the express denial of common carrier status of the carrier and an indemnification against any claim which might be brought against the carrier.51

49 4(f) and 4(e) of the Conditions of Contract printed on Passenger Ticket and Baggage Check and Air Waybill respectively.


51 Condition 4(f). “If Carrier's principal place of business is in territory of the British Empire or British Commonwealth of Nations, or in Ireland, or if the law applicable to the contract of carriage is the law of any such territory or any part thereof, it is a condition of the contract of carriage that Carrier is not a common carrier and reserves the right to refuse to carry any passenger, and that passengers and baggage are accepted for carriage only upon condition that Carrier shall be under no Liability in respect or arising out of the carriage, and that passengers renounce for themselves, their representatives and dependents all claims for compensation for injury (fatal or otherwise), loss, damage or delay, however caused, sustained on board the aircraft, or in the course of any of the operations of flight, embarking or disembarking, caused directly or indirectly to
While the first and third features of the clause were designed to avoid the heavy obligations of a common carrier under English law and implied warranty in the contract of carriage that the aircraft were fit for the purpose for which they were intended under the contract, the second feature contained the renunciation and the disclaimer of all liability, the necessity of which was indicated above.

It is well known that U.K. and U.S. Law differ as to common carriers. Not only the degree of care to be exercised by common carrier is different, but also the considerations prevailing as to the circumstances under which a carrier was to become a common carrier.

In England, “a common carrier is so called as being a person who proves himself ready to carry goods for everybody”:54

“If a man who owned an aeroplane or a seaplane chose to engage in the trade of carrying goods as a regular business and to hold himself out as ready to carry for any who wish to employ him so far as he had room in his airship or aeroplane for their goods, very likely he will become a common carrier or be under the various liabilities of a common carrier.”55

There has been no English case in which Article 4 (f) of the IATA Conditions of Contract (or any similar disclaimer) has been successfully challenged in the British Courts. There have, of course, been many claims, but very few of them reached the Courts, possibly because plaintiff’s counsel has advised that the disclaimer clause is an effective bar.

In the U.S., a disclaimer of common carrier status by an air carrier would not effectively alter the status if the circumstances would point to operations of a common carrier.60 In Canada, the disclaimer clause was tested in the Ludditt v. Ginger Coote Airways Case67 and upheld by the Privy Council. In Scotland it came up in the case of McKie v. Scottish Airways, and went up to the Court of Appeal in Scotland. In this case it was argued by the plaintiff that the disclaimer clause was contrary to public policy since it was wide enough to exclude claims for wilful misconduct. The court sidestepped this issue as no wilful misconduct was proved and therefore it was not necessary to take a stand one way or the other.

passengers or their belongings or to persons who, but for this condition, might have been entitled to claim, and whether caused or occasioned by the act, neglect or default of Carrier, or otherwise howsoever, and that passengers for themselves and their estates will indemnify Carrier against any such claim.”

52 As to the rights and liabilities of common and private carriers, see Coggs v. Bernard (1703) 2 L.D.R.A.Y.M. 909.
54 Great Northern Railway Co. v. L.E.P. Transport and Depository Ltd. (1922) 2 K.B. 742 at Page 765.
This decision implied the term "public policy" which is very difficult to define. In the leading English case, it was stated:

"... public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when all other points fail."^{59}

Lord Halsbury said:

"I deny that any court can invent a new head of public policy... it is because these things have been either enacted or assumed to be by the Common Law unlawful, and not because a judge or court have a right to declare that certain such things are in his or their view, contrary to public policy."^{60}

On the other hand, some of the more recent decisions hardly seem to be consistent with Lord Halsbury's view. For example, McCardie, J. said:^{61}

"The truth of the matter seems to be that public policy is a variable thing. It must fluctuate with the circumstances of the times."

It would be arbitrary to say in what circumstances the Courts would uphold the clause. In case of wilful misconduct or gross negligence of the carrier, it is probable that English Courts would hold the "Disclaimer Clause" contrary to public policy. This is, however, merely speculation, since no case involving the point in question has yet been tried before U.K. Courts as regards air carriage or surface carriage.

The objections which were raised against the "Disclaimer Clause" of the IATA Conditions of Carriage prompted carriers to seek means by which the "Disclaimer Clause" could be eliminated. The necessity to deny the common carrier status was first attacked. The effect of this denial was:

i — that the carrier cannot be compelled to accept for carriage either goods or passengers unless he chooses to do so;
ii — that his liability in the event of loss of, or damage to, goods does not exceed that of a bailee at common law, i.e., that he does not incur an "absolute" or "insurer's" liability;
iii — that any condition in the contract by which the carrier purports to negative or to restrict his liability in certain events, e.g. in the event of fire or of theft, will be construed as covering the case in which such event was caused by the negligence of the carrier himself or his servants.

Since a "common carrier of passengers" is not liable like an insurer and he is merely liable to take "all due care," it was found that the only effect of his being a "common" carrier consists in his duty not to discriminate between would-be passengers. Whether a carrier is

^{58} For general notes on the subject, see Halsbury's Laws of England, Vol. 7, pp. 173, et seq.
^{59} Richardson v. Millish (1824).
^{60} Janson v. Driefontein Consolidated Mines Ltd. (1902).
^{61} Naylor, Benzon & Co. Ltd. v. Krainesche Industre Gesselschaft (1918) 1 K.B.
a common carrier of passengers or not, therefore seems to be irrelevant as far as the liability of carrier is concerned. Consequently, the express denial of common carrier status was not essential.

The situation regarding baggage is different. If an air carrier is considered to be a common carrier of passengers, it must be assumed that he is also a common carrier of their baggage and as such, cannot refuse to carry baggage. The express denial of common carrier status in this case had the effect of avoiding carrier’s absolute liability and of authorizing him to pick and choose freely between baggage to be carried. The same objective is served by 4 (a) of the Conditions of Contract which negatived absolute liability, and Article 9 of the Bermuda Conditions which authorizes carrier to refuse to carry any baggage if in his opinion its weight, size or character rendered it unsuitable for carriage. The express denial therefore was again not considered necessary to achieve these goals.

In case of goods, the significance of the “Disclaimer Clause” in the Conditions of Contract on the air waybill is that it purports to exclude the common carriers’ absolute liability for loss and damage and to put air carriers in the same category as private carriers, whose liability in respect of goods depends on negligence. But this objective is effectively achieved in the general liability rules included in the Conditions of Contract printed on the air waybill. Furthermore, the effects of the Aslan case which implied that a common carrier has an absolute warranty for the cargo worthiness of the aircraft is unambiguously excluded in Article 11 (3) (e) of the Bermuda Conditions.

Based upon these considerations, carriers (in Madrid, 1950) decided to delete from the “Disclaimer Clause” the denial of their common carrier status. The clause remained, however, as a disclaimer of all liability of carriers in order to nullify the effects of the Nunan case.

On January 30, 1952, a long awaited action took place. The U.K. Government made and laid before Parliament the Carriage by Air (Non-international Carriage) U.K. Order. This Order became effective April 1, 1952. In substance, it applied the rules of the Warsaw Convention, with only some exceptions, to all carriage. By and large, air carriers’ liability for all carriage which is subject to this Order, will be limited to the amounts specified in the Warsaw Convention. While this was not the first time a State decided to extend the Warsaw rules to air carriage generally (Scandinavian countries, Switzerland, etc., have done so long before), the U.K. Order in Council has particular importance inasmuch as it will greatly reduce the need for the British “Special Clause.”

Since in other jurisdictions where, on the basis of Fatal Accident

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63 Caswell v. Cheshire Lines Committee (1907) 2 K.B. 499.
64 Turner v. Civil Service Supply Association Ltd. (1926) 1 K.B. 50.
65 Aslan v. Imperial Airways Ltd. (1933) 149 L.T. 276.
66 "No warranty concerning any aircraft engaged in the carriage or concerning its fitness for the carriage of the goods to which the contract relates is implied in the contract of carriage."
Acts, the Nunan case would be followed, carriers could still not effectively limit contractually their liability vis-a-vis the relatives of the deceased, the necessity for the "Disclaimer Clause" will not entirely disappear with the issuance of the British Order in Council. Whether or not carriers will take the risk of the deleting it prior to action by the respective governments (through Orders in Council or otherwise) has not yet been determined.

The foregoing indicates that the efforts of the airlines to obtain maximum uniformity have so far resulted only in an agreed set of rules dealing with the liability of the carrier, included in the IATA Conditions of Contract printed on the ticket and air waybill. These rules, notwithstanding some of the objections raised against them, appear to have been crystallized in the form adopted at Bermuda in 1949. They are sound and fair to both the traveling public, the shippers and the carriers. Moreover, they form the basis of a contract which creates valid obligations in perhaps all legal systems.

In order to properly evaluate these rules, many factors must be taken into consideration. The most important of these is the fact that the IATA documents constitute an effort to incorporate in uniform documents the legal principles of numerous countries, even though the liability laws of these countries applicable to international air transportation are far from being uniform. As a result, carriers in some jurisdiction are given greater protection than in others. It is hardly within IATA prerogatives to insist that a carrier forego the legal protection given to it by the laws of its country, any more than it is within its prerogative to require a carrier to accept in its documents the legal principles of another country. The Conditions of Contract presently contained in the documents endeavor to satisfy the various legal points of view and they appear to be consistent with the legal principles of the jurisdictions accounting for the major share of passenger and cargo traffic. They contain reasonable and fair rules governing air carriage. The divergencies between the interpretations of the contract in the various jurisdictions do not affect the soundness of the contract which, nonetheless, puts passengers and shippers throughout the world generally in much the same position.

There is, as yet, no complete uniformity in the detailed Conditions of Carriage which carriers have found necessary since the war. Carriers are continuing their efforts to achieve this goal through various means. It is appreciated, however, that the rapid growth of air transport activity may not again make possible a rigid set of rules like the prewar IATA Conditions of Carriage. Future endeavors will probably require more flexible provisions, adaptable to changing traffic conditions and developments.