1952

The Draft Rome Convention from the Standpoint of Residents and Other Persons in This Country

Leander I. Shelley

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
Leander I. Shelley, The Draft Rome Convention from the Standpoint of Residents and Other Persons in This Country, 19 J. Air L. & Com. 289 (1952)
https://scholar.smu.edu/jalc/vol19/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE DRAFT ROME CONVENTION FROM
THE STANDPOINT OF RESIDENTS AND
OTHER PERSONS IN THIS COUNTRY

By Leander I. Shelley

General Counsel, Airport Operators Council; Member New York
Bar; LL.B. Cornell, 1917; Formerly, associate and member of firm
of Medina & Sherpick, 1920-1926; Lt., U.S.A. with A.E.F.

DURING September of this year the International Civil Aviation
Organization expects to complete in readiness for signature an
international agreement or convention which, if adopted, would
directly affect the substantive rights of every person — adult or child —
who lives or owns property in the vicinity of the routes traversed by
foreign aircraft in flight over this country. This proposed agreement
has received surprisingly little newspaper comment, and perhaps for
this reason has excited surprisingly little public interest. Since with
the future growth of aviation industry it is confidently to be expected
that overseas aircraft operations, including those of foreign flag air-
craft, will be extended to many parts of this country which are now
served only by domestic operators, a huge segment of our population
is potentially affected.

The proposed agreement deals with claims for property damages,
personal injuries and death caused by foreign aircraft in flight to
persons or property on the surface, as for example by aircraft crashing
while in flight or by objects dropped from aircraft in flight. Its effect
— if the United States becomes a party thereto — would be to deprive
persons in this country of their rights to recover their full loss or
damages from foreign flag aircraft operators to the end that United
States flag airlines operating overseas may enjoy a corresponding lim-
ited liability when they cause injuries or damages to persons or prop-
erty on the surface in foreign countries.

Since the proposed agreement will be opened for signature this
fall, it is the purpose of this article to discuss its provisions primarily
from the standpoint of those who reside, work or own property in this
country, and to suggest methods whereby the benefits of the proposed
agreement to United States flag airlines may be retained without im-
posing unjust and inequitable burdens upon such residents, workers
and property owners.

1 Mr. Shelley's article was written earlier in the summer prior to the ICAO
meeting in Rome. The Rome meeting will be reported in the Autumn issue of
the JOURNAL.—Editor.
The International Civil Aviation Organization, familiarly known as ICAO, was itself created in 1944 by an international agreement known as the Chicago Convention. It was created generally for the purpose of promoting the development of all aspects of international civil aeronautics.

The proposed agreement or convention which ICAO is now sponsoring is designed to supersede an agreement dealing with the same topic, i.e., damages caused by foreign aircraft to persons or property on the surface, which was drafted in Rome, Italy in 1933 at a conference in which this country participated, and which is familiarly known as the Rome Convention. This earlier agreement was ratified by only six nations — Belgium, Brazil, Guatemala, Italy, Roumania and Spain. Since its creation in 1944, ICAO has been studying the problem of revising the Rome Convention in hopes of reaching a result which will meet with general acceptance. The now current draft was prepared at the seventh session of its Legal Committee held in Mexico City early in 1951, and for this reason will be referred to in this article as the Mexico City Draft. Its complete text has been published in a prior issue of the Journal of Air Law and Commerce.

The Mexico City Draft and prior drafts have been the subject of careful study by the Air Coordinating Committee of the Executive Branch agencies concerned with aviation. Copies have been circulated by that Committee to persons and organizations whom it deems particularly interested, including among others the Air Transport Association, the Airport Operators Council, the National Association of State Aviation Officials, the Aircraft Owners and Pilots Association and various airlines and insurance organizations, and their comments and suggestions have been solicited.

Like any document which is the product of protracted negotiations, the Mexico City Draft is essentially a compromise. By no means all of the suggestions of this country have been adopted. It is to be assumed, however, that it represents substantially all that the representatives of this country feel can be negotiated. Further revisions are expected to come from the conference held in Rome, Italy, this September, but it is doubtful whether they will materially affect the fundamental principles embodied in the document. At the conclusion of the September conference, ICAO expects to open the document for signature by such countries as may desire to subscribe to it.

---

2 Pronounced “Eye-kay-oh”.
3 Convention on Civil Aviation (the so-called Chicago Convention), Article 44(i). This Convention was signed by more than thirty nations of which the United States is one.
5 18 Jrl. of Air L. & Com., 98.
FEATURES OF THE DRAFT

For the purposes of the present discussion, the salient features of the Mexico City Draft may be summarized as follows:

(1) Rules would be established governing claims for damages caused in this country by foreign flag aircraft in flight to persons and property on the surface markedly different from those governing claims for damages caused in this country by United States flag aircraft.

(2) In so far as foreign flag aircraft are concerned, claimants would be deprived of their right to recover full damages in accordance with now existing state laws.

(3) On the other hand, claimants would be permitted to recover damages, up to amount permitted by the Convention, without proof of negligence or other fault on the part of the foreign flag operator.

(4) The United States might require foreign flag aircraft operators to secure the payment of claims arising in this country, but such security would be either insurance taken out in the foreign operator's home land or a cash deposit made in its home land or a guarantee by a bank in its home land.

(5) Actions to enforce claims would be brought in the courts of the place where the accident occurred, but judgments obtained by United States claimants could be enforced abroad, either in the foreign operator's home land or elsewhere, only if the foreign court decided that it was not contrary to the public policy of the country in which such court was located.

(6) United States flag airlines operating overseas would receive the benefit of similar limited liability in cases where their aircraft in flight cause damages to persons or property on the surface in foreign countries; but they would be required to pay such damages without proof of fault on their part.

SOME POTENTIAL ANOMALIES

At the outset, it may be said that while the Mexico City Draft would establish rules governing claims against foreign flag aircraft operators different from those governing claims against United States flag operators, this fact would not seem to constitute a reason for its rejection.

It would, of course, create a somewhat anomalous situation, smacking faintly of the discredited extraterritorial system formerly imposed by treaty in China for the benefit of certain Western nations. If, for example, a Stratocruiser negligently operated by an United States flag operator crashed in flight into a Stratocruiser owned by a foreign flag air line and parked upon the ramp and apron area of an airport in this country, the foreign air line could recover its full damages. If the situation were reversed and it were a parked Stratocruiser of the United States flag operator which was destroyed by the foreign Stratocruiser which crashed in flight, the American operator could recover
but $664,525, although its actual damage in the event of total loss might be in the neighborhood of $1,500,000. Such anomalies may however be ignored if the proposed agreement presents material advantages to this country.

**Recovery Ceiling for All**

As in the case of the original Rome Convention, the Mexico City Draft is newsworthy because it assumes to regulate the rights of people who in the greater part have no connection whatsoever with aviation. The persons who potentially may be injured by crashes of foreign flag aircraft include persons who are neither aircraft operators nor airport operators, who are neither airline nor airport officers or employees, and who are neither air passengers nor the shippers or consignees of air freight. They include all who live or own property in the vicinity of the routes traversed by foreign flag aircraft in this country.

From the standpoint of such persons, the salient feature of the Mexico City Draft is the ceiling which it would place upon the amounts which they could recover. In the first place, it would place a monetary limit upon the amount which could be recovered in the aggregate by all claimants upon all claims arising out of any one accident. This limit would vary in amount, depending upon the size of the particular aircraft causing the injuries and damages, and would be subject to an overriding provision that regardless of the size of the aircraft involved, the maximum amount which could be recovered by all claimants combined should not exceed $737,000.

The following table indicates the aggregate amounts which would be recoverable by all claimants in the case of certain types of aircraft which have been selected for illustrative purposes.

<table>
<thead>
<tr>
<th>Type of Aircraft</th>
<th>Weight Lbs.</th>
<th>Ceiling on Total Claims</th>
</tr>
</thead>
<tbody>
<tr>
<td>Piper Cub</td>
<td>1,850</td>
<td>$36,850</td>
</tr>
<tr>
<td>Twin Beech</td>
<td>9,000</td>
<td>110,550</td>
</tr>
<tr>
<td>DC-3</td>
<td>25,200</td>
<td>160,574</td>
</tr>
<tr>
<td>Convair</td>
<td>40,500</td>
<td>224,509</td>
</tr>
<tr>
<td>Martin 202</td>
<td>43,650</td>
<td>237,673</td>
</tr>
<tr>
<td>DC-4</td>
<td>73,000</td>
<td>360,319</td>
</tr>
<tr>
<td>Constellation</td>
<td>96,000</td>
<td>456,433</td>
</tr>
<tr>
<td>DC-6</td>
<td>97,000</td>
<td>460,607</td>
</tr>
<tr>
<td>DC-6 A &amp; B</td>
<td>100,000</td>
<td>473,145</td>
</tr>
<tr>
<td>Super Constellation</td>
<td>120,000</td>
<td>556,721</td>
</tr>
<tr>
<td>Stratocruiser</td>
<td>145,800</td>
<td>664,525</td>
</tr>
</tbody>
</table>

In the event that the aggregate of all just claims exceeds the monetary limit based upon the weight of the foreign aircraft involved, the

---

6 The dollar amounts given in this article are approximate. The limits set by the Mexico City Draft are in terms of francs having "65½ milligrams of gold of millesimal fineness 900." For the purposes of this article it has been assumed that the value of a franc is $0.0737.

7 See Note 6 above.

8 See Note 6 above.
Mexico City Draft would grant a preference to claims based upon personal injuries as contrasted to those based upon property damages, up to one-half the limiting amount; and would permit all claimants, both for personal injuries and for property damages, to share ratably in the balance.

All other considerations aside, the equity of a system which bases a limitation of liability upon the size of the aircraft involved may well be questioned. It seems to be assumed that the size of the aircraft may have some relationship to the operator's ability to pay, but the same foreign flag operator may operate aircraft comparable in size to a Constellation and also aircraft of a size comparable to a Stratocruiser. Assuming the selfsame injuries and damages caused by the selfsame foreign flag operator in the selfsame way, it seems somewhat anomalous to say that the total amount which it is to be required to pay shall vary to the extent of $100,000 depending upon whether a Constellation or a Stratocruiser was the cause. Certainly the ability of that particular aircraft operator to pay would be the same in either case.

This basis of computing maximum liability is reminiscent of the Admiralty rule which permitted a ship owner to limit his liability to the value of the ship. But in the present case the limits of liability, while proportioned to the size of the aircraft, are materially less than its value. Thus the limit of liability in an accident involving a Stratocruiser is $664,525, as compared to its approximate cost of $1,500,000 when new.

As to claims for personal injuries, including death, however, the Mexico City Draft contains the further limitation that the liability in respect of loss of life or personal injury shall not exceed $22,110 per person killed or injured. If for example, a business executive were killed on the ground by a crashing foreign flag aircraft, and if it were conclusively proven in court that the actual monetary loss occasioned to his family by his death was $100,000, the amount which could be recovered from the foreign aircraft operator would nevertheless be limited to $22,110.

This ceiling upon judgments for personal injuries — regardless of the disabling nature and permanence of the injuries, and regardless of the earning capacity of the injured person, — is to be contrasted with the $65,000 verdict recently awarded by a jury in a federal court in Brooklyn, New York, to a seaman for the loss of his right arm. Had the plaintiff in that case been injured by a foreign aircraft operator and his claim been subject to the Mexico City Draft, he would have received but one-third of that amount.

Even with this low limit of $22,110 on individual claims for personal injuries it can be seen that in the case of an accident causing injuries to a number of persons, and particularly where a small aircraft

---

9 See Note 6 above.
10 New York Herald Tribune, June 25, 1952, page 1. The plaintiff's right hand was bitten off by a hippopotamus aboard the freighter, African Star, of the Farrell Lines, Inc. His arm was amputated below the elbow.
is involved, the overall limitation upon the total liability of the foreign flag operator may prevent an individual claimant for personal injuries from recovering even that amount. If there were a claimant for damages to property arising out of the same accident, he would suffer from the disability that the claimants for personal injuries would receive a preference up to one-half of the aggregate for which the foreign flag operator is liable.

As may be seen, under possible circumstances the Mexico City Draft would drastically reduce the amounts which persons suffering injuries or damages in this country might otherwise recover under the law of the state in which the accident occurred. This is the price which the proponents of the Mexico City Draft propose to pay for corresponding limitations upon the liability of the United States flag airlines when they cause injuries or damages to persons or property on the surface in foreign countries.

THE INSURANCE ARGUMENT REFUTED

On occasion it has been suggested that this deprivation of their right to collect full damages from foreign flag aircraft operators would as a practical matter impose no real hardship upon those who are injured or whose property is damaged because they can protect themselves by taking out insurance to the full extent of their possible injuries or damages.

This suggestion may have some surface plausibility, particularly when confined to real property and phrased as a statement that the property owner will undoubtedly carry insurance in any event so it makes no difference whether or not he has a cause of action against the foreign flag aircraft operator. Nevertheless, it is difficult to believe it is seriously made even as applied to damages to real property. Any attempt to apply it to claims for personal injuries exposes its absurdity. Consider for example the case of an apartment dweller who suffers permanent injuries in his home through the negligent operation of a foreign flag aircraft. Is it seriously to be argued that his claim for damages should be defeated — even partially — on the argument that he could have taken out accident insurance if he cared to do so?

Such a principle, if it were accepted, would lead logically to the conclusion that in no case should a tort feasor be held liable for the damages which he causes, since the injured party could always have protected himself by taking out insurance. It is a principle which, if sound, would be as applicable to damages caused by United States flag aircraft as to damages caused by foreign flag aircraft — and would be equally applicable to damages caused by persons operating motor vehicles on our highways or by anyone else who causes damages through his negligence or other fault.

The principle that innocent persons should be required to take out insurance to protect themselves and their property from the wrongful acts of others — and that they should do so at their own cost and expense to the end that the liability of the tort feasor may be reduced
ROME CONVENTION EFFECT ON RESIDENTS

— is quite novel to our thinking. Unless and until we are prepared to abandon the fundamental principle that the wrongdoer, not the injured party, should be responsible for the loss, the provisions of the Mexico City Draft limiting the liability of foreign flag aircraft operators cannot be justified upon the argument that the injured parties can protect themselves by accident insurance.

PROOF OF NEGLIGENCE NOT NEEDED

It should be borne in mind, however, that while the Mexico City Draft limits the amounts which may be recovered by the injured parties, it also provides that damages up to the prescribed limits are recoverable without proof of negligence or other fault on the part of the foreign flag operator.

It is sometimes argued that ability to recover damages regardless of fault on the part of the foreign flag aircraft operator will be of such benefit to persons in this country as to justify a treaty limiting recovery to an amount which may be substantially less than the damages actually suffered. An analogy is sometimes drawn to workman's compensation statutes which make the employer liable regardless of fault but which deprive the injured employee of the right to collect unlimited damages. The analogy is somewhat doubtful. Under the workman's compensation statutes, the amount which the employee may recover is specified in the statutes. Having proved the injury, he need not prove actual damages. In contrast, the Mexico City Draft leaves the burden upon the claimant of proving his actual damages, but limits the amount which he may recover.

Regardless of the validity of this analogy, however, the question still remains whether from the standpoint of potential claimants, the right to recover damages without the necessity of proving negligence or other fault is of such value as to justify depriving them of their right to recover full damages in cases where fault is proven. Judging by the rules of law generally prevailing in this country in cases involving personal injuries and property damages, it would seem that the consensus is that this question should be answered in the negative. It is quite arguable, however, that special circumstances exist in the case of aircraft accidents which justify or even require the adoption of special rules of liability.

It is for example arguable that it is essentially unjust and inequitable to persons whose homes may be destroyed or who may themselves be injured by falling aircraft to subject them to the burden of investigating and establishing to the satisfaction of a court the cause of the accident. Of course, if an action were brought for damages based on trespass to real property, no proof of negligence would be necessary, but where the claim is for personal injuries, it may be said with a degree of plausibility that neither the average home owner nor the ordinary citizen who may be injured is in a position to hire experts

in aeronautical design, construction and operation to make the necessary studies and give the necessary testimony. It may also be argued that the controlling evidence as to the cause of the accident may frequently be destroyed by the accident itself or may be in that broad field where experts differ or may be wholly within the control of the defendant airline or a government agency. For these reasons, it may be argued that the public interest is better served by a compromise rule which would impose absolute but limited liability upon the aircraft operator.

It is not within the scope of this article to discuss the validity of such arguments, although it may be said in passing that if any change from the common law is to be made, a rule establishing a rebuttable presumption of negligence on the part of the aircraft operator would seem more consistent with our prevailing ideas of equity in the field of tort. This article is confined to the question whether it is desirable and in the public interest for this country to become a party to the Mexico City Draft. From that standpoint, it is sufficient to point out that — even assuming for the purposes of discussion that it is desirable to impose absolute liability upon aircraft operators regardless of the care which they may exercise — it is not necessary to enter into an international treaty to accomplish the desired result. If that is the desired objective, such liability can be imposed by Congress acting under the Commerce Clause of the Constitution. In the absence of Congressional action, it can be imposed by appropriate state legislation, and such liability is imposed by the Uniform Aeronautics Law which provides

"The owner of every aircraft ** is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner is negligent or not, **"

and which is in effect in various states.12

**POWER TO REQUIRE INSURANCE**

It has also been suggested, however, that the limitation of liability upon claims against foreign flag aircraft operators might itself be of benefit to potential claimants since it might make it easier for this country to require foreign flag aircraft operators to take out insurance to guarantee the payment of claims against them. Of course, the Congress already has power to enact legislation requiring such insurance, and in the absence of Congressional action the individual states would have power to require compulsory insurance of aircraft operators — just as various states require it of motor vehicle operators — so long as the requirement is reasonable and applies alike to aircraft operated

12 See for example New Jersey Statutes Annotated, Section 6:2-7. Other states imposing absolute liability are Delaware, Minnesota, North Dakota, South Carolina and Tennessee.
wholly within the state and to aircraft operated in interstate and foreign commerce.

It has been suggested, however, that in the absence of an international agreement such as the Mexico City Draft establishing limited liability, any attempt by this country to impose compulsory insurance requirements which would be applicable to foreign flag aircraft operators might lead to retaliatory or conflicting action on the part of other countries — might lead to even more stringent requirements by foreign countries.\textsuperscript{18}

This suggestion assumes that it is desirable to compel aircraft operators to furnish proof of their financial ability to pay claims, either by insurance or otherwise, which is perhaps a debatable assumption. Assuming, however, its desirability from the standpoint of national policy, it seems questionable whether the Congress should hesitate to adopt appropriate legislation because of fear of retaliatory action by foreign countries. If the more stringent requirements which hypothetically might be imposed by foreign countries are reasonable, the fact they are more stringent should not make them objectionable. If on the other hand what is visualized is the imposition of arbitrary and unreasonable requirements in order to force concessions from this country — whether in the form of agreements to limit liability or otherwise — it would seem to constitute a species of international blackmail to which this country should not yield. If such action were to be threatened, this country would have a variety of recourses, but appeasement should not be one.

Particularly since so many foreign flag airlines are owned and operated, directly or indirectly by their governments, it cannot be assumed that many of those who operate in this country are financially irresponsible. From the standpoint of the potential claimant, it is scarcely beneficial to deprive him of his right to collect full damages from solvent foreign flag operators to the end that it may be easier from this country — if it wishes — to exercise its undoubted right to require compulsory insurance by those who may be financially irresponsible.

As already indicated, the Mexico City Draft provides that proceedings to recover damages to persons or property on the ground shall be brought against foreign flag operators in the courts of the place where the accident occurred,\textsuperscript{14} and further provides that any judgments obtained may be enforced by the courts of the foreign aircraft operator's homeland or those of any other Contracting State — but not if such court is of the opinion that

\begin{quote}
"the judgment is one which is contrary to the public policy of the state in which that court is located."
\end{quote}\textsuperscript{15}

\textsuperscript{18} See article by G. Nathan Calkins, Jr., cited in note 4 above.
\textsuperscript{14} Article 20, paragraph (1).
\textsuperscript{15} Article 20, paragraphs (4) and (6).
This provision is scarcely one which will commend itself to such of our residents and citizens as may find it necessary to seek the enforcement of judgments obtained pursuant to the Mexico City Draft; and indeed it is somewhat difficult to fathom its real purpose and possible effect.

Presumably, in most instances, the principal assets of the foreign flag aircraft operator which is the judgment-debtor will be located in its home land. If the foreign flag operator is required to furnish security for the payment of claims made under the Draft, such security will also be located in its home land and not in this country, whether such security takes the form of insurance, a cash deposit or a bank guarantee.\(^{16}\) By hypothesis, any judgment obtained in this country and sought to be enforced against the foreign flag aircraft operator in its home land will be one which has been obtained under and pursuant to the Mexico City Draft and in accordance with its terms. Any such judgment will presumably have been obtained without proof of negligence or other fault on the part of the defendant, since the right to compensation without such proof is given by the Draft. By hypothesis, also, the home land of the foreign flag operator and any other country in which such a judgment is sought to be enforced pursuant to the Draft will be a country which has adhered to the Draft and is a party thereto.

One would naturally assume that the terms and conditions of a treaty or other international agreement to which a country is a party would *per se* represent the public policy of that country. Indeed, if the question were asked as to what constitutes its public policy with respect to the subject matter of a treaty to which it is a party, one would normally turn to the treaty itself for the answer. Nevertheless, in the present instance it seems to be assumed that a judgment obtained pursuant to the Mexico City Draft and in strict accordance with its terms may in some way and for some reason be contrary to the public policy of the countries who become parties thereto, including the home land of the foreign flag aircraft operator against whom the judgment is obtained.

Accepting such a principle, as one must do in light of the plain language of the Draft, it would seem that the effect of the provision quoted above is that although persons in this country who suffer damages on the ground from foreign flag aircraft in flight are forced to forego their right to collect full damages, among other things because they are granted a right to collect limited damages without proof of fault, nevertheless, even those limited damages will not be collectible in the foreign flag operators home land where the bulk of its assets are located if the courts of that country decide it is unsound public policy to enforce the judgment. Apparently, under the broad language of the draft, the foreign court could refuse to honor the judgment on the ground that public policy in the country where it was located did

\(^{16}\) Article 15, paragraphs (2) and (3).
not permit the recovery of damages without proof of fault, or on the
ground that such public policy required damages to be limited to
amounts substantially less than the limits prescribed by the Draft, or
on the ground it was contrary to such public policy to permit dollars
to be transferred from that country to the United States, or upon any
other ground which appealed to its fancy. Apparently it could refuse
to enforce the judgment on the ground that the public policy of its
country did not permit suits against its government or governmental
agencies — and in considering this possibility it will be borne in mind
that practically all foreign flag airlines are government owned or
operated.

It is difficult to appraise the exact intent and effect of the above
quoted provision, but it is not too much to say that in practical effect
it may mean that judgments obtained in this country are to be enforce-
able abroad only in the discretion of the foreign courts, and that it
may nullify to a marked degree any rights which it is claimed the
Mexico City Draft confers upon persons in this country having claims.

**Short Statute of Limitations**

The Mexico City Draft provides a short statute of limitations. Actions must be brought within two years, and the statute can be
tolled for only one additional year. More important, if the injured
party fails to make a claim against the foreign flag operator within
twelve months all other claims are to receive priority as to payment,
and the delinquent claimant is to be paid only to the extent, if any,
that there remains any balance of the amount to which the foreign
flag operator's liability is limited.

It would seem that such provisions may work possible hardships
upon claimants, particularly those who suffer severe personal injuries
and who for that very reason are least able to proceed promptly with
the preparation and presentation of claims and the prosecution of
actions. On the other hand, the necessity for some such limitation
is obvious if there is to be a limit upon the operator's aggregate lia-
bility to all claimants. If there is to be such a limit, there can be no
judgment in favor of any claimant till all claims are established in
order that they may be pro rated if they exceed the limit. A longer
period in which to make claims might result in undue delay in the
payment of all claims with consequent hardship upon needy claim-
ants. The present provisions with respect to time are probably as
equitable as any if the principle of limited liability is accepted.

**Justifying Adherence**

In light of the considerations discussed above, it seems fair to con-
clude that if the Mexico City Draft is to be considered from the stand-
point of the persons in this country who may potentially be claim-
ants against foreign flag aircraft operators because of personal injuries,

---

17 Article 21, paragraphs 3(1) and (2).
18 Article 19.
death or property damage caused on the surface by aircraft in flight — and if it is to be considered solely from that standpoint — then adherence to the Mexico City Draft would not be justified. So far as such persons are concerned, it would appear to deprive them of substantial rights without conferring upon them any counterbalancing benefits which could not be conferred by the enactment of appropriate state or federal legislation.

The Mexico City Draft however is not to be considered solely from the standpoint of such potential claimants. On the contrary, it is to be considered primarily from the standpoint of United States flag airlines who operate overseas, and the justification for this country's adherence thereto must be sought in the benefits conferred upon such airlines when their aircraft in flight cause injuries or damages to persons or property on the surface in other countries where they are the "foreign flag" aircraft operators.

From this standpoint, the proponents of the Mexico City Draft urge that it will protect United States flag airlines operating overseas from "catastrophic risks." By this is meant that if the Draft is not adopted, United States flag airlines which cause damage to persons or property in their operations in foreign countries may and in all probability will be subjected to foreign laws making them absolutely liable without limitation as to amount and without regard to the degree of care which they exercise in their operations. It is assumed that under conceivable circumstances judgments would be obtained against them of such magnitude as to affect their ability to operate — or at least that the possibility of such judgments might tend to curtail materially their operations abroad.

The argument thus briefly outlined needs careful consideration.

**Need for U. S. Flag Airlines**

Any realistic consideration of the Mexico City Draft must start with the premise that a strong system of United States flag airlines operating overseas is as essential to our national welfare, both from the standpoint of peacetime economy and from the standpoint of national security, as is a strong merchant marine. Certainly, no one who has the best interests of this country at heart could contemplate with equanimity the possibility of transportation by air between this country and foreign countries becoming a monopoly by foreign flag operators to the exclusion of our own airlines. It seems axiomatic that the overseas operations of United States flag airlines must be preserved and protected, and that if necessary, unusual and extraordinary measures are justified to that end.

The questions are as to the necessity of such measures and as to the best method of attaining the desired end without injustice to persons in this country who are potential claimants against foreign flag operators.

The question whether subjecting United States flag airlines to
unlimited liability without fault in foreign countries would in fact result in claims of such magnitude as to prejudice their foreign operations, is one which this article can raise but cannot answer.

Interestingly enough, ICAO itself has made some comments bearing upon this question. In an official document entitled “Comments by the Council on the Mexico City Draft of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,” it is said

“According to ICAO records, we might estimate the total number of third party accidents of all kinds involving foreign civil aircraft at between 10 and 20 in a year.”

The document suggests a possible ratio of one accident causing personal injuries or death out of every twenty accidents of all kinds. So far as property damages are concerned, it says

“Instances where the damage done might be assessed as high as the limits in the Mexico City Draft appear to be extremely rare, perhaps occurring with a frequency of about once per hundred or two hundred of all accidents involving any third party damage. This might mean that, for international civil aviation, accidents coming within the Mexico City Draft Convention would be expected to give rise to claims beyond the overall limits proposed, perhaps once in every ten or twenty years.”

These official comments would seem to suggest that the possibility of a United States flag airline being subjected to “catastrophic risks” in its operations abroad is remote, even though it were liable for all damages caused by it to persons and property on the surface, without limit and without proof of fault. They are however quoted in this article, not for the purpose of establishing the remoteness of the risk, but rather for the purpose of indicating that a question exists on the point.

From the standpoint of United States flag airlines operating abroad, it may be that these ICAO comments are open to question as based upon inadequate data. In such a field of prognostication experts may well differ in their conclusions, and at best, their estimates merely show the mathematical probabilities before the event. They do not guarantee if or when the event will occur. If there is a real possibility of “catastrophic risks” such as is envisioned by the proponents of the Draft, it is no answer to say that statistically it should not occur for many years.

These ICAO comments would however seem to place a burden upon the proponents of the Mexico City Draft to produce sufficient data, expert opinion and other evidence to establish the possibility of “catastrophic risks.”

Assuming that convincing proof is made on this point, the question will still remain whether United States flag airlines operating overseas

19 Prepared by the Air Transport Committee during the 14th session of the ICAO Council, and distributed to member states to assist them in considering the Mexico City Draft.
can protect themselves by insurance obtained at reasonable rates from normal sources. Here also this article can only raise and cannot answer the question; but it may be noted that the statements made by the proponents of the Mexico City Draft to the effect that potential claimants in this country can obtain insurance to the full extent of their possible injuries and damages would seem to suggest that United States flag aircraft operators could obtain insurance to the full extent of the injuries and damages which they may cause abroad.

The fact that aircraft have been and are operated in this country in states which impose absolute liability upon their operators without limitation as to amount would also seem to have some bearing upon the foregoing questions, but the answers lie with data and evidence not available for the purpose of this article.

**Protection for U. S. Airlines**

Assuming that United States flag airlines are subject to "catastrophic risks" in their operations abroad and that they cannot protect themselves by insurance obtained from normal sources, it does not necessarily follow that this country should adhere to the Mexico City Draft and obtain a limited liability for United States airlines in foreign countries at the expense of those who suffer injury or damages in this country. A more direct and equitable method of providing the necessary protection for United States flag airlines would be for the Congress to provide insurance against such risks.

The War Risk Insurance provided during World War II constitutes a precedent for such action. It will be recalled that for obvious reasons insurance against war risks was not obtainable during the war from private insurance companies although they had theretofore written it. It was felt that it was inequitable to let the burden of the loss caused by acts of warfare be borne by those who were so unfortunate as to have their property damaged or destroyed. Accordingly, the Congress made provision for War Risk Insurance, issued by the government itself, for the protection of our citizens.

In the present instance, it seems self evident that the preservation and extension of overseas operations by United States flag operators, and as a corollary the protection of such operators against catastrophic risks, is in the interest of the nation as a whole. It would seem that the authorization of government insurance to provide such protection would be both logical and in the national interest.

Since the protection required is only against risks deemed to be catastrophic, such insurance might well take the form of excess insurance. It need only cover the excess liability over the amount which the United States flag operator can reasonably be expected to absorb or to cover by insurance obtained through normal channels. Moreover, if the cost proves excessive, there is no controlling reason why the United States flag operator should be required to pay it in full.
Since the protection of the United States flag operator is in the national interest, the nation itself may well assume a portion of the cost.

Provision for such a system of government insurance would seem to afford the simplest and most equitable solution to the problem.

**Proposal to Pay Claims Above Limit**

It is only if Congress determines that it would not be desirable and in the public interest to provide such government insurance that adherence to the Mexico City Draft need be seriously considered. In that event it must be borne in mind that the Mexico City Draft deprives claimants in this country of substantial rights. It would seem that this country would be justified in adhering thereto only if it can be done without imposing undue and unjust burdens upon those persons.

This result can be accomplished if the Congress adopts a statute placing the duty upon the federal government to pay any excess of the just claims of residents and citizens of this country over and above the amounts they are permitted to recover and collect from foreign flag aircraft operators under the Mexico City Draft. In that event, our country would receive the benefits resulting to it from a limitation upon the liability of United States flag airlines for injuries and damages caused by them in foreign countries, without however imposing special burdens and disadvantages upon persons suffering injuries or damages from foreign flag aircraft in this country.  

---

20 The Airport Operators Council is sponsoring such a bill in Congress. Its text is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

That in the event this nation enters into any treaty, convention, compact or other agreement with any other nation or group of nations which limits the liability of any aircraft operator for injuries to persons (including wrongful death) or for damages to property, (other than to persons and property upon aircraft while in flight), when such injuries or damages are caused within the territorial limits of the United States or its possessions, or which limits the right of any person to enforce any judgment for money damages obtained because of such personal injuries (including death) or damages to property, then in the event of any such injury or damage, the United States shall be responsible for the payment of the difference, if any, between the amount recoverable and collected pursuant to such treaty, convention, compact or other agreement and the amount which would have been recoverable under the law of the state, territory, or district in which such injuries or damages occurred but for such treaty, convention, compact or agreement. Any person whose right of recovery under the law of the state, territory or district in which such injuries or damages were caused, or whose right to enforce any judgment obtained therefor, is limited by any such treaty, convention, compact or other agreement shall be entitled to bring an action to recover such difference in amount from the United States in the Court of Claims or, without regard to whether the amount exceeds $10,000, in any District Court of the United States. The term “person” as used herein shall be construed to mean, without limiting the generality thereof, any individual, association, partnership, public or private corporation, state, political subdivision or state or bi-state agency.
Conclusions

To sum up, the following conclusions with respect to the desirability of adherence to the Mexico City Draft seem warranted:

1. That the Mexico City Draft would deprive persons in this country of substantial rights.

2. That it would not confer advantages upon them which could not be conferred upon them by appropriate state or federal legislation.

3. That the proponents of the Mexico City Draft should establish the following points, and if they fail to do so, this country will not be justified in adhering to the Draft:
   (a) That if United States flag airlines are subjected to unlimited liability for injuries and damages caused by them in foreign countries, there is a real possibility that they will be subjected to claims and judgments of such magnitude as to imperil their overseas operations;
   (b) That they will not be able to protect themselves against such "catastrophic risks" by insurance obtained through normal channels.

4. That the maintenance and extension of the overseas operations of United States flag airlines is of importance to this country as a whole, and that if the proponents of the Mexico City Draft establish the two points mentioned above, the Congress should take appropriate measures to protect United States flag airlines from "catastrophic risks."

5. That it would be unjust and inequitable to impose burdens upon persons who happen to be injured by foreign flag aircraft to the end that the country as a whole may benefit by the operations of United States flag aircraft abroad; and that the Congress should give consideration to protecting United States flag airlines operating overseas from "catastrophic risks" through government insurance comparable to War Risk Insurance.

6. That if the Congress makes such insurance available to United States flag airlines, there will be no necessity for adherence to the Mexico City Draft.

7. That if the Congress decides not to provide such insurance, then to avoid injustice and inequity to those injured by foreign flag aircraft, this country should not adhere to the Mexico City Draft unless and until the Congress adopts legislation providing that the country as a whole shall be responsible for the payment of damages caused to them by foreign flag aircraft to the extent that they are deprived of such damages by the Draft.