The Codification of Air Carrier Liability by International Convention

George R. Sullivan
THE CODIFICATION OF AIR CARRIER LIABILITY BY INTERNATIONAL CONVENTION*

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I. INTRODUCTION.

By the Warsaw Convention,1 an attempt has been made to establish a uniform system of liability on the part of carriers by air engaged in the international transportation of passengers and merchandise. The liability embraced is that which arises from

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1. The official name is International Convention for the Unification of Certain Rules Relating to International Transportation by Air. The Convention itself is the work of the International Technical Committee of Aerial Legal Experts (C. I. T. E. J. A.) created at the International Conference on Private Air Law held in Paris, October and November, 1925. This committee proceeded to draft a convention on the liability of carriers in air transport, which was adopted at the Second International Conference on Private Air Law held at Warsaw in October, 1929. The Convention became effective as to the United States on October 29, 1934.

The revised translation of the complete text appears in Dept. of State Treaty Information Bulletin No. 54, pp. 17-33 (March, 1934); 5 JOURNAL OF AIR LAW 486 (1934); 1933 U. S. Av. Reports 302.


Other sources which are hereafter referred to in abbreviated form, are: Goedhuis, La Convention de Varsovie (La Haye: Nijhoff, 1933). This work is particularly valuable because of the exhaustiveness of its analysis.


C. I. V. Convention on the Transport of Passengers and Luggage by Rail, signed at Berne, October 23, 1924. See text in Hudson, supra, p. 1468.


General Conditions of Transport. Agreement made between the air navigation companies, members of the International Air Traffic Association (I. A. T. A.), which is composed of European air transport lines. This agreement came into force at the same time as the Warsaw Convention, February 13, 1933. Its text appears in 3 Revue Aeronaute Internationale 78 (1933).
the contract of transportation; in other words, where the Convention applies, liability is grounded upon the contractual relationship existing between carrier and passenger, or between carrier and consignor or consignee; all other sources of liability are abrogated. The parties to this jural relationship (who may sue, and who may be sued) are the passenger (or upon death, his representatives) and the carrier, or the consignor or consignee (or both) and the carrier.

The Convention does not embrace the liability of the carrier to anyone not in privity of contract with him, nor his liability for damage caused outside the course of actual transportation (e.g., a passenger injured by the negligent maintenance by the carrier of a waiting room or comfort facilities would be obliged to seek his remedy according to the domestic law of the place).

The liability imposed by the Convention is (a) for the death or wounding or bodily injury of a passenger, (b) for the loss of, or damage to, goods transported, and (c) for damage occasioned by delay in the transportation of passengers or goods. This liability is limited by the Convention except where, under certain circumstances, the carrier is not permitted to avail himself of its terms. But this liability is taken away (and this is the most important feature of the document) when the carrier brings himself within the extensive exoneration provisions (error in navigation, necessary measures taken to avoid damage, etc.). This is, in the briefest form, a skeleton view of the Convention. In what follows, an attempt will be made to analyze and evaluate it in the proper detailed degree.

The Convention is appropriate for study at this time for three reasons: first, because by virtue of ratification by the United States, which became effective October 24, 1934, a proper understanding of its terms is essential to the American aviation industry; second, because of the rapidity with which air transport lines are establishing terminals beyond the boundaries of the United States, the matter has become of immediate practical importance; and third, because of the possible revision of the Convention in the near future, some preparation for presentation of the American viewpoint is desirable so that its rules will be consistent, as far as practicable, with the actual conditions under which the industry now operates in this country. To this end, the approach used in this study will be two-fold: first, analysis, or interpretation; sec-

2. See the Rome Convention which governs as to damages to persons and property on the surface. 4 JOURNAL OF AIR LAW 567 (1933).
ond, criticism, with suggestions for changes. This involves an examination of the significant sections, in their order, followed by a conclusion stating recommended modifications.

This study does not take up a discussion of the section on Transportation Documents which represent a field somewhat distinct from carriers' liability, and which would require, for an exposition of any value, a knowledge of administrative detail in the aviation industry which this writer does not possess.

II. Scope—Definitions.

Article 1. (1) This Convention shall apply to all international transportation of persons, baggage or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this Convention the expression “international transportation” shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this Convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this Convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

While the title of this section (which is taken from the Convention itself) includes both scope and definitions, there is little in Articles 1 and 2 dealing with definitions. This general criticism may be made of the Convention as a whole. Terms such as “air transportation enterprise,” “necessary measures,” “error in piloting” are freely used in most important provisions with no attempt to explain or delimit their meaning. Particularly is this necessary in a codification which must be translated into many languages and applied in many different legal systems. Without such definitions, too much leeway is left to be worked out by individual courts, and uniformity (one of the principal objectives of the Convention) is defeated.
The expression “transportation . . . performed by aircraft for hire,” is wide enough to include all situations where payment is made in some form, and presumably extends to all flights whether made on scheduled lines, or chartered trips, by carriers regularly engaged in the business, or by an individual owner of a plane making an isolated trip with a paying passenger, or carrying merchandise for a compensation. M. Goedhuis raises some borderline cases and questions how they would be affected by the terms of the Convention. For example, a case where an aircraft owner, for a consideration, leases a ship, equipped to make a particular international trip, to a private individual who himself wishes to make the flight. Because the flight is international and for a consideration, M. Goedhuis believes it would come within the scope of the Convention, and that the owner would be considered the carrier, and the lessee, a passenger. This is a difficult interpretation to place on Article 1 in view of other portions of the Convention, particularly those contemplating the issuance of passenger tickets, and those which speak of the carrier or his agents taking all necessary measures to avoid the damage. Such provisions, on their face, contemplate the carrier or his representative being at the controls or actually conducting the voyage in some way. Furthermore, there is nothing in the relation of lessor and lessee of a plane requiring the application of an international convention; the lease transaction itself is governed by the law of the place where it is entered into. If an accident occurs because of the plane, for which the owner is responsible, this only gives rise to an action based either on the express terms of the agreement of the parties, or implied warranties in such contract, which again would be governed by lex loci contractus.

Nevertheless, the raising of such questions does point to the necessity of a more specific treatment of these situations. An indication of what was in the minds of the drafters may be found in the following taken from the preliminary discussions of the C. I. T. E. J. A.: "M. Ripert believed that the basic question was—When transportation is effected by one who is not engaged in the business but who, for a remuneration, agrees to make a particular flight, would one admit that such transportation does not fall within the scope of the Convention? It must be apparent that it would be dangerous to permit this gap, and that it is necessary
to give a definition large enough so that all possible forms of transportation can be brought within the scope of the Convention." It is evident from this and the rest of the discussion by the delegates that all international carriage of passengers, goods, and baggage, performed for payment, whether by an individual owner of a plane not regularly in the business, or by a commercial transport enterprise, comes within the terms of the Convention.

The second sentence of paragraph (1) makes gratuitous transportation performed by an air transportation enterprise subject to the Convention. Excluded is gratuitous transportation undertaken by one not in the position of an entrepreneur. The intention was, as may be gathered from the preliminary discussions of the experts, to leave unaffected such casual, isolated trips where carriage is afforded by a person not engaged in the business, with no agreement that payment be made.

Gratuitous transportation may have different meanings. If it is a question of a person who is aboard a plane without the knowledge or consent of the carrier, the Convention should have no application, whether the carrier be an air transportation enterprise, or anything else. If the carrier's employee in charge of the plane, without the knowledge of the carrier-owner, and in disobedience of orders, takes another person aloft, is this gratuitous transportation within the meaning of paragraph (1)? Where a person, by express agreement with the carrier, is allowed to make a certain flight without giving any cash consideration, what was probably meant by gratuitous transportation is reached; this writer believes that the element of agreement between carrier and passenger should be stressed to eliminate the situation where a person is aboard the plane as a trespasser, or in violation of orders.

But even if cash payment is not made for the transportation, is it necessarily gratuitous? Suppose that an individual owning a plane for his own business and pleasure, undertakes to carry a person in an international flight, the agreement being that the latter will perform certain services for the aircraft owner at the point of destination, and then returns to the place of embarkation. If the question is whether any valuable consideration flows to the carrier, this situation would not be gratuitous transportation, and would be subject to the Convention notwithstanding the fact that

6. The inconsistency in the use of the word "persons" in Article 1, and "passengers" in Article 17 appears to be an oversight in draftsmanship. No reason suggests itself for the distinction. M. Goedhuis (op. cit. p. 92) believes the word "passengers" should be used in Article 1 as throughout the Convention.

the carrier is not in the position of one engaged in the air transportation business.

While paragraph (2) of Article 1 purports to be a definition of "international transportation" as used in the Convention, so much meaning is contained in this expression, that the paragraph becomes one dealing with the scope of the Convention, just as much as paragraph (1). Briefly, there is international transportation (a) where the place of departure is in the territory of one High Contracting Party, e.g., a flight from the United States to Mexico (both parties by adherence); (b) where the place of departure and of destination are within the territory of a single High Contracting Party but with an agreed stopping place within territory subject to the sovereignty of another power, whether or not that power is a party to the Convention, e.g., a flight from the United States to the Canal Zone, with an agreed stopping point in Mexico, or a flight from one of the states in the Union to Alaska, with a regular stopping point in Canada (not yet a party to the Convention). International transportation does not exist, within the meaning of Article 1, where either the point of departure, or of destination, is not in the territory of a High Contracting Party, even where an agreed stopping place is, e.g., a flight from Mexico to Canada, with one or more stops in the United States.

"According to the Contract Made by the Parties":

This paragraph emphasizes the intention of the parties, as evidenced by the contract which they enter into, in determining what is the place of departure and the place of destination. For example, a person who boards a plane in Chicago to go to El Paso, will not be subject to the rules of the Convention because the plane is blown off its course and required to make a landing in Mexico, just across the border. Similarly, a contemplated flight from Chicago to Mexico City does not lose its international character because the plane crashes a few miles away from the Chicago airport. This emphasis upon the intention of the parties permits a certainty in the application of the Convention, and makes it unaffected by an incidental occurrence, such as a forced landing in a foreign state, or abandonment of a voyage before its destination is reached.

A disadvantage of using the contract of the parties as the determinative factor, rather than such a possibility as nationality of

8. Article 1, paragraph (2).
the aircraft (the suggestion of the Brazilian delegation), is that in
one accident the liability of the carrier to different passengers may
be governed by different laws. For example, M, a passenger, bound
for Mexico City, boards a plane at Chicago together with N, who
is traveling to El Paso. After traveling a few miles from the Chi-
cago airport, the plane crashes. M's suit against the carrier will
be governed by the terms of the Convention; he cannot recover
more than the limit expressed in Article 22. N may sue by local
law, and the amount of his possible recovery is unlimited.

Exactly the same is true in the transportation of goods; lia-
ability as to a portion of the cargo may be subject to the Warsaw
Rules; as to that which is being carried within the territory of one
state, liability is governed by domestic law. Another problem in
the same respect is raised by the section dealing with transporta-
tion documents. By Article 4, a baggage check covering goods car-
rried in an international flight, as defined by the Convention, must
be issued, and must contain specific data; 9 by Article 5, an air
waybill covering merchandise similarly carried in international
flight must be issued and also must contain particular details set
out in that article. 10 If such a baggage check and air waybill are
not issued and do not contain such information, the carrier will
not be permitted to avail himself of the provisions of the Conven-
tion which exclude or limit his liability. 11 In the same flight, the
carrier may be transporting baggage and merchandise not subject
to the Convention; whether or not such goods require the issuance
of a check or waybill must be decided by consulting the particular
domestic law which applies. This necessitates the carrier's as-
certaining at his peril the fact whether or not individual passengers
and individual items of cargo are being transported within the
scope of application of the Convention; or he may be able to de-
vise forms of transportation documents which satisfy both the
Warsaw Rules and the particular domestic law which governs.

9. "... the number of the passenger ticket, the number and weight
of the packages, and a statement that the transportation is subject to the rules
relating to liability established by this Convention."

10. "... the place and date of its execution; the place of departure
and of destination; the agreed stopping places, provided that the carrier may
reserve the right to alter the stopping places in case of necessity, and that if
he exercises that right the alteration shall not have the effect of depriving the
transportation of its international character; the name and address of the
consignor; the name and address of the first carrier; the name and address
of the consignee, if the case so requires; the nature of the goods; the number
of packages, the method of packing and the particular marks or numbers upon
them; the weight, the quantity, the volume or dimensions of the goods; a
statement that the transportation is subject to the rules relating to liability
established by this Convention."

11. Article 4 (4) and Article 9.
"Whether or Not There Be a Break in the Transportation or a Transshipment":\(^{12}\)

Nothing appears either in the preliminary sessions of the Experts or in the discussions at the Second International Conference on Private Air Law regarding the meaning of these terms. If a "break in the transportation" is used to cover situations where stops are made for meals, or over-night stops,\(^ {13}\) the problem is simple enough. Likewise, where a plane is forced to land to avoid bad weather conditions and resume the voyage with the advent of more favorable conditions. The word "transshipment" may raise more perplexing problems. In a case where passengers or goods must be carried on the ground from one airport to another, such transshipment should not alter the international character of the entire voyage; if this is the effect of the phrase above quoted, the result is clear. But in this connection, Article 31 should be referred to, which provides that in a case of combined transportation, performed partly by air and partly by any other mode of carriage, the terms of the Convention apply only to the transportation by air. In other words, such incidental transportation on the ground does not change the application of the Convention to the other stages of the trip, but nevertheless such ground transportation remains subject to local law.

Transportation With the Place of Departure and the Place of Destination Within the Territory of a Single High Contracting Party With an Agreed Stopping Place in the Territory of Another Power:

The application of this type of international flight can best be understood by considering actual flights. A trip from Miami to the Canal Zone would be domestic; if a stop were regularly made in Mexico, or Colombia, it would become international, whether or not the territories in which such stops were made were parties signatory. A more extreme example would be from Detroit to Buffalo; if a stop were made in Canada, the Convention would apply. This may seem an anomalous result, but the drafters evidently had it fully in mind; in the words of the Reporter, the restriction of the agreed stopping place to territory of a High Contracting Party was deliberately excluded "to extend as far as possible the field of ap-

\(^{12}\) Article 1, paragraph (2).
\(^{13}\) Such stops are frequently found on time schedules of air transport lines. See The Official Aviation Guide.
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plication of the Convention . . . and to grasp the first opportunity to transform a domestic flight into an international one."14

To what extent the stopping place in the territory of another power must be agreed upon prior to the commencement of the flight may present some difficulty. Very often flights are scheduled between two terminals with provisions that intermediate stops will be made to pick up passengers on flag signals.15 Would such landings be regarded as agreed stopping places within the meaning of Article 1 (2)? If not, could the terms of the Convention be avoided by calling a stop where passengers are usually taken on, a flag stop? Another difficult situation can be supposed: M, a passenger, boards a plane at Detroit to fly non-stop to Buffalo. If he has given the matter any thought, he will believe the transaction to be subject either to the law of Michigan or of New York. Another passenger, N, purchases a ticket for St. Thomas, Ontario, the carrier agreeing that a stop will be made at that point to put him down. This differs from the flag stop situation in that the stopping place is agreed upon before the flight begins. But it is not an agreed stopping place as far as M is concerned. Suppose in such a case, the plane crashed shortly after taking to the air and while still within the Michigan boundaries. The carrier's liability to N could not come within the scope of the Convention because his point of destination was in a non-signatory state. In determining liability to M, the meaning of agreed stopping place would become crucial.

Where a stop is regularly scheduled to be made, but in the course of the flight a landing at that point is abandoned for some reason satisfactory to the person in charge of the plane, e.g., weather conditions, quarantine restrictions, civil insurrection, etc., such change does not deprive the transportation of its international character. This is provided by Article 3 (1) (c) which is a part of the section dealing with transportation documents.16 By virtue of all these considerations, the expression "agreed stopping place" has been set down for definition by this writer.

15. The actual use of flag signals is being supplanted by radio communication between plane and airport, but the same principle applies.
16. "... the carrier must deliver a passenger ticket which shall contain the following: ... the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character."

The logic of placing such a provision, relating to the fundamental application of the Convention, in the section dealing with Transportation Documents is questionable. Furthermore, it is spoken of only in connection with the passenger ticket and the air waybill. Doesn't it have any significance as far as the baggage check is concerned?
"Transportation to Be Performed by Several Successive Air Carriers":

By paragraph (3) resort is again had to the intention of the parties—this time to determine whether transportation, the various stages of which are performed by different air carriers, is one undivided conveyance. A person in Bakersfield, California, wishes to fly to Mexico City. He purchases a ticket from the X line which will carry him to Los Angeles, and also a ticket for the rest of the journey on the Y line, the two lines having an inter-company agreement for the sale of tickets on each other's lines. So far as the portion of the flight performed by the X line is concerned, this is purely intrastate business. Yet, by virtue of paragraph (3) when such a flight is coupled with the Convention-defined "international transportation" it likewise becomes international, "if it has been regarded by the parties as a single operation." For that reason, the X line must issue a ticket in accordance with Article 3 of the Convention; the baggage check must conform to the terms of Article 4. If an accident occurs on the portion of the journey which it flies, the passenger's recovery may be limited by Article 22, or he may recover nothing whatever by virtue of Article 20.

The practical significance of this feature of Article 1 upon all internal flights must be fully appreciated. Any transportation by air within the boundaries of the United States may nevertheless become subject to the Warsaw Rules if it constitutes a stage in "international transportation." While the ordinary American air transport line, with no foreign terminals, may at the present time look upon the possibility of a law suit arising from such internal traffic connecting with international transportation as too remote, the unusual increase in foreign travel by air within the past few years will soon change those remote possibilities into actualities. To meet this problem, carriers must be prepared to issue transportation documents conformable to Articles 3 to 9, inclusive. It is possible that in one accident, the difference between the maximum recovery under the Convention and the usual amount of recovery allowed by juries under the common law would make up for whatever expense would be incurred in the adoption of such transportation documents.

The emphasis placed upon intention of the parties, both by paragraphs (2) and (3), deserves further attention. A drawback

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17. "... it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty... of the same High Contracting Party.

18. See cases dealing with amount of recovery, p. 37, note 96.
in its use to determine the scope of the Convention is the difficulty in proving what the parties intended. In so far as in a particular case extrinsic evidence is available to prove what the parties contemplated, well and good; but in the absence of such tests, what must be done? Furthermore, what should be the result where one party intended one thing, and the other party the opposite? To what extent will printed stipulations on the tickets and waybills be accepted as proof of intention? Perhaps these difficulties are unavoidable. Their existence, however, must be recognized.\footnote{Could a chartered flight constitute one of the stages of a voyage performed by successive carriers, within the meaning of paragraph (3)? If it was regarded as a single operation by the parties, yes. The fact that it was covered by a separate contract, standing alone, would not be conclusive.}

A factor which will tend to give intention a more tangible form is the development of consolidated ticket offices which act as clearing houses for many lines. This development is being urged by air line companies for the attractive convenience it means to their patrons. If a person can, through one of these agencies, negotiate transportation which may take them over many lines, there is a more plausible basis for the view that the parties have regarded it as a single operation.

It should be noted that paragraph (3) is restricted to transportation performed by several successive air carriers. Nowhere in Article 1, which presumably sets out the scope of the Convention, is reference made to international flights in which a portion of the carriage is performed by a mode of conveyance other than by air (except in the use of the word “transshipment”). Yet, by virtue of Article 31, such a situation could come within the terms of the Convention as to the stages performed by air, if the other provisions of Article 1 are satisfied. For example, a passenger bound from Chicago to Tampico leaves the plane at Dallas to proceed to Brownsville by train because of adverse flying conditions, the rest of the journey being completed by air. An accident occurring during any stage of the trip performed by plane comes under the Convention, but any damage suffered while the passenger is being carried by railroad is governed by local law. For purposes of clarity, the extension of the Convention to this type of situation should be indicated in Article 1.

In General:

In so far as paragraph (3) permits the possible extension of the Warsaw Rules to a purely intrastate flight, though nevertheless connecting with an international flight, a possible constitutional
question is presented. In the illustration previously used of a trip from Bakersfield to Los Angeles and then to Mexico City, suppose an accident occurs before Los Angeles is reached. In the litigation that results, the carrier may seek to avail himself of the exonerative and restrictive features of the Convention. Might not the injured passenger effectively contend that inasmuch as the transportation performed by the defendant carrier was entirely intrastate, no federal law or treaty can have any application thereto? If there is a valid analogy in cases decided under the interstate commerce clause of the Constitution, the answer is that when a passenger or commodity has begun to move from the United States to a foreign country, commerce between nations has commenced; the fact that several different and independent agencies are employed in the transportation, some acting entirely within one state, does not affect the character of the transaction.20

At this point an examination of typical flights between the United States and foreign countries, most of them now established with regular schedules, will be made with an attempt by the writer to classify them from the standpoint of their being governed by the Warsaw Rules.

(1) *Flight from San Francisco to Mexico City*—(a) Entire trip performed by one carrier. Convention applies; point of embarkation and of destination are within territory of contracting states.

(b) From San Francisco to Los Angeles on A line, from Los Angeles to Mexico City on B line. Convention applies “if it has been regarded by the parties as a single operation.”

(c) From San Francisco to Los Angeles on A airway, from Los Angeles to El Paso on M railroad, from El Paso to Mexico City on B airway. If regarded by the parties as a single operation, the Convention will apply to the flight from San Francisco to Los Angeles, and to the flight from El Paso to Mexico City, but not to the railroad transportation between Los Angeles and El Paso.

(d) From San Francisco to El Paso by air, from El Paso to Chihuahua by railroad, the remainder of the trip by air. The Convention does not apply; of the two stages covered by air, neither, by itself, would come within the terms of Article 1. (See Article 31.)

(2) *Flight from San Francisco to San Salvador, stopping, among other points, at Los Angeles and Mexico City*—The Con-

20. See *The Daniel Ball*, 77 U. S. 557 (1870).
vention does not apply to any part of the transportation since the point of destination is in a non-contracting state.

(3) Flight from San Francisco to Panama City, stopping, among other points, at Los Angeles, Mexico City and San Salvador—The Convention applies to the entire transportation; the point of embarkation and the point of destination are within the territory of a single High Contracting Party with an agreed stopping place within a territory subject to the sovereignty of another power, even though not a High Contracting Party.

(4) Flight from San Francisco to Rio de Janeiro, stopping, among other points, at Los Angeles, Mexico City, San Salvador, Panama City—The Convention applies to the entire transportation; both the point of departure and the point of destination are within contracting states. The fact that stops are made within non-contracting states is immaterial.

(5) Flight from San Francisco to Honolulu—The Convention does not apply; the point of departure and the point of destination are both within the territory of a single High Contracting Party with no stopping place within territory subject to the sovereignty of another power. The status of Hawaii with respect to the United States—whether it be a territory, state, colony, or dependency, seemingly is immaterial.

(6) Flights from San Francisco to Manila, with stops, among other points, at Honolulu—The Convention does not apply if there is no agreed stopping place within territory subject to the sovereignty of a power other than the United States.

(7) Flight from San Francisco to Canton, China, with stops, among other points, at Honolulu and Manila—The Convention would not apply, since the point of destination is in a non-contracting state.

The above enumeration represents only typical situations. Other international flights which are now scheduled, as to Vancouver, Winnipeg, Montreal, the British possessions in the West Indies, French and Dutch possessions in South America, could be similarly analyzed only at the expense of great length.

Recommendations:

(1) Definitions should be more freely used. Among others,
the following terms suggest themselves for a more precise delimitation of their meaning:

Passenger—Should the term include one who is rightfully in the plane, but not in the role of a passenger, e. g., a government inspection official? Should a stowaway be considered a passenger?

Carrier—It should be pointed out specifically that this term is not restricted to persons regularly engaged in the business. Also, the difficulty presented by the situation where ownership and control of a plane are in separate hands should be met. M. Goedhuis suggests that the word be considered to mean the person with whom the contract of transportation is concluded. This would be helpful, particularly where contracts are negotiated with air express agencies, in which cases the agency is regarded as the carrier rather than the operator or owner of the plane. But such an interpretation should not be permitted to lead to confusion where passage is purchased from a ticket agency, where the passenger is dealing with a separate corporation whose shares are either owned by all the lines whose tickets are handled, or by private interests entirely. In such a situation, ordinary rules of principal and agent apply.

Gratuitous transportation—Should mean where no money consideration is paid. The presence of consideration in other forms should not make what is otherwise gratuitous transportation into transportation for hire. It should not extend to the transportation of those who are wrongfully in the plane, because the Convention as a whole seems only concerned with the liabilities growing out of the commercial relations of passengers or shippers, and the carrier.

High Contracting Party—Does this term include a state having the power to enter into international treaties in its own behalf, notwithstanding the fact that such state is subject, in some degree, to the sovereignty of another Power, e. g., Canada?

Agreed stopping place—How do flag stops fit in with this term? What is its application to the situation where a flight is scheduled as non-stop, but the carrier agrees, just before the flight commences, to make an intermediate stop for one passenger to alight?

Transshipment—(1) What is the line of distinction between

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22. In the United States it is a usual practice for Bureau of Air Commerce officials to ride, without charge, to their points of duty in air transport planes, when space is available.


24. By the Imperial Conference of 1926, the right of Canada and the Irish Free State to negotiate directly with foreign governments was fully recognized. Thereafter, each is bound only by a treaty signed by its representative. But the sovereignty of these two dominions is by no means complete.
transshipment as used in Article 1, and transportation performed
"partly by any other mode of transportation" as used in Article 31?
If carriage is arranged between two contracting states, and trans-
shipment is made over the border separating their two territories,
has this any effect upon the application of the Convention?

(2) The provision in Article 3 (1) (c) that the carrier re-
serves the right to alter stopping places in case of necessity with-
out affecting the international character of the transportation is a
matter of scope and should find a place in Article 1.

(3) The application of the Convention to flights combined
with other modes of conveyance should be specifically treated in
Article 1, and distinguished from what is meant by transshipment.

(4) Since the drafters intended the widest possible extension
of the terms of the Convention, this writer believes it feasible to
include a provision to the effect that where the point of departure
is in a contracting state, and the point of destination is in a non-
contracting state, but where one or more stopping places are lo-
cated within the territory of contracting states other than the High
Contracting Party in which the point of departure is located, the
Convention shall apply to that part of the transportation performed
up to the time of the last stopping place situated within the ter-
ritory of a High Contracting Party. For example, in a flight from
Mexico City to Montreal, with several stops in the United States,
as the Convention stands, no part of this flight would come within
its terms since the point of destination is not in a High Contracting
Party. Under the above recommendation, the Convention would
apply to the flight up to the time of the last stopping place in the
United States. Similarly, where the point of departure is in a non-
contracting state, and the point of destination is in a contracting
state, and where one or more stopping places are located within
the territory of contracting states other than the High Contracting
Party in which the point of destination is located, the Convention
shall apply to that part of the transportation performed from the
time of the first stopping place situated within the territory of a
High Contracting Party up to the time that the point of destination
is reached. An example of this would be a flight from Vancouver
to Mexico City, via Seattle, San Francisco and Los Angeles. This
innovation would permit the Convention to govern that part of the
flight from Seattle to Mexico City.

Article 2. (1) This Convention shall apply to transportation
performed by the State or by legal entites constituted under
public law provided it falls within the conditions laid down in
Article 1.
(2) This Convention shall not apply to transportation performed under the terms of any international postal Convention.

In connection with Article 2, the British Carriage By Air Act\(^{25}\) provides that:

"Every High Contracting Party to the Convention who has not availed himself of the provisions of the additional Protocol thereto shall, for the purposes of any action brought in a court in the United Kingdom in accordance with the provisions of article 28 to enforce a claim in respect of carriage undertaken by him, be deemed to have submitted to the jurisdiction of that court, and accordingly rules of court may provide for the manner in which any such action is to be commenced and carried on; but nothing in this section shall authorize the issue of execution against the property of any High Contracting Party."

This article does bring up the difficult question of a suit against a sovereignty. But this is more a matter to be governed by the state against which suit is sought to be brought; it can hardly be contended that a state ratifying the Convention, without the additional protocol, thereby impliedly consents to being sued; only the clearest of express terms could be said to have that effect.

Because of the insistence of the British delegation of their right of reservation to paragraph (1) of this article, and after heated objections to the British stand on the part of other delegates,\(^{26}\) an additional protocol was added by which the contracting parties reserve the right to declare that paragraph (1) of this article shall not apply to international transportation by air performed directly by the State, or by any territory under its sovereignty. The international transportation contemplated by this reservation evidently includes all types of air transport performed "directly by the State"—purely commercial transportation, as well as that performed only in the public interest. As pointed out by M. Ripert,\(^{27}\) "The tendency of all laws, at the present time, is to treat commercial undertakings by the State on a parity with the enterprises of private individuals."

The reservation permitted by the Additional Protocol was exercised by the United States Senate at the time it gave its advice and consent to adherence.\(^{28}\)

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25. 22 and 23 Geo. 5, ch. 36 (1932).
26. Procès Verbaux, p. 97. The Italian delegate stated: "The British reservation has a very great practical importance; for the moment it has none, since there are no air transport companies belonging to the State, but none-theless, the fact remains that the hypothesis may become a reality."

The reservation contained in the Brussels Convention (Article 13) is more
CODIFICATION OF AIR CARRIER LIABILITY

III. LIABILITY OF THE CARRIER.

Article 17. The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Who Is the Carrier?

The ambiguity in the use of the word carrier, as used in Article 17 with respect to passengers, and in Article 18 with respect to goods, would be clarified by a definition in Article 1, as previously suggested. Goedhuis points out that it may mean proprietor, the charterer, or the owner; also, that the matter of this definition was sent back to the C. I. T. E. J. A. for further consideration. It would seem that mere ownership would have no controlling effect in determining who is liable. It is the one who undertakes to carry who assumes the burden of liability, regardless of the name or ownership of the means of conveyance by which the transportation is effected. This has been recognized in the general law of carriers in the United States, regarding the liability of express companies. Goods which they undertake to transport are considered to be in their continuous custody even though the actual transportation is effected by means of vehicles belonging to and controlled by others. Their name or ostensible acting as agents or forwarders is not allowed to change this rule of liability. A view of the problem raised in such a situation can be seen in Kentucky Bank v. Adams Express Co., wherein the express company undertook to transport money from one city to another for the plaintiff. The train in which the money was being carried fell from a trestle and was destroyed, together with the money, by fire, the accident evidently caused by the negligent care of the trestle by the railroad company. The court viewed the railroad as agent of the express company and stated that the fact that the latter had no control over the railroad company or its servants was immaterial. "Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct." The air express agen-

Limited: "This Convention does not apply to vessels of war nor to Government vessels appropriated exclusively to the public service."

30. Yet, in the field of maritime law, the Harter Act emphasizes the liability of the owner, "If the owner exercises due negligence, etc., neither the vessel, her owner, charterers, or agents shall be responsible (when the fault is due to an error in navigation or management) nor shall the vessel, her owner, charterers, agents, or master, be held liable for losses arising from dangers of the sea, acts of God," etc. 46 U. S. C. A. 192.
31. 93 U. S. 174 (1876)
cy presents the same problems, since the rate, structure, regulations, inter-company arrangements, etc., are almost exactly similar to those used by the railway express agency. Because of this, and because the Convention does not specifically treat this phase of air transportation, the law that has developed in the United States regarding express companies will probably furnish valuable aid in air transport litigation.

Another development in aviation can be considered with regard to the scope of the word “carrier.” Some air lines have arrangements whereby telegraph companies provide pick-up and delivery service in the transportation of merchandise. Such telegraph companies should not be regarded as carriers within the meaning of the Convention. Although the shipper and consignee deal directly with them, they act as agents rather than independent contractors. They do not, like the express agencies, set the rates for the transportation.

Who Is a Passenger?

There must be a contractual relation of passenger and carrier; Article 3 (1) specifically provides that a passenger ticket must have been issued and delivered. Otherwise the carrier “shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.” Gratuitous transportation performed by an air transportation enterprise is expressly included within the terms of the Convention. Insofar as this means transportation furnished without charge, but to serve a purpose of the carrier, e.g., the carrying of a notable person for advertising value, the carrying of a representative of the company to a new post of duty, or of an attorney to defend an action in another country—this provision cannot be criticized. In such a case, there is as much a quid pro quo as where a passenger pays the regular rate. Furthermore, there is nothing in the relationship between carrier and passenger in such gratuitous transportation which presents a characteristic justifying a different standard of liability. But even if transportation is thus offered gratuitously, the carrier, to preserve his rights under the Convention, should...
issue a passenger ticket. This entire matter would be clarified by an adequate definition of gratuitous transportation, as recommended at the end of Article 1.

In the general law of carriers in the United States, the relation of carrier and passenger is equally dependent on the existence of a contract of carriage, but there need not necessarily be an express contract; the agreement may be implied from the circumstances of the particular case. If a person accepts a gratuitous ride from a carrier, in good faith, he is considered a passenger and entitled to the same degree of care for his safety and protection as paying passengers. If he is wrongfully on the vehicle, the carrier owes him no duty except not to injure him wantonly or wilfully.

"Death or Wounding of a Passenger or Any Other Bodily Injury":

Since all the states of the Union now have wrongful death statutes no innovation is presented by this portion of Article 17. In speaking of "other bodily injury suffered by a passenger," did the drafters of the Convention have in mind the injury a passenger may sustain through fright? Certainly, in the very nature of air traffic, there is abundant opportunity for such cases to arise. The characterization of the injury as bodily would not keep these cases out, since in almost all cases of injury caused through fright, there is a real physical disability suffered, such as extreme nervousness, hemorrhage, miscarriage, traumatic neurasthenia, insanity, physical injury consequent upon fainting, etc.

In railroad cases, there is an intimation that even if actual physical injury does not result, recovery can be had for mere fright or mental suffering where the carrier was guilty of wilful and wanton negligence. If this view were carried over into the law of air carriers, recovery would have to be permitted for fright occasioned by a pilot engaging in acrobatic flying. The Convention, by the use of the word bodily would be barred from following domestic law in this latter respect.

"If the Accident Took Place on Board the Aircraft, or in the Course of Any of the Operations of Embarking or Disembarking":

Such a provision illustrates the inherent difficulty of freezing

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38. See the collection of cases in Green, "Fright Cases," 27 Ill. L. Rev. 761 (1933), particularly the section dealing with passengers, p. 775.
into words the exact limitations of a law—to draw a line on one side of which liability exists and is absent on the other.\textsuperscript{40} If the line is too definitely drawn, in a matter which will always offer widely varying circumstances, the rule becomes inflexible. If it is too loosely gauged, the rule is ambiguous and its content must be limited by many different judges who are called upon to construe it.

If we regard the Convention as a whole, we are safe in assuming that the intention was to limit its application to such time that the passenger is exposed to dangers of aviation. An international convention is not necessary to govern the liability of an air line company in its capacity as waiting-room proprietor, or station-wagon operator.

This article states that the carrier is liable if the damage was sustained while the passenger was on board the aircraft. This is presumably so whether the plane is in flight or on the ground preparatory for flight, or in any other position incidental to the purpose of the contract of carriage. While this would take care of the majority of cases, there is a fringe of possibilities which must also be provided for. A passenger may be exposed to dangers of aviation before he boards the plane, or after he alights from it.\textsuperscript{41} To cover these cases, the somewhat vague expression “in the course of any of the operations of embarking or disembarking” was used. When do these begin and end? In the city of Chicago, it is common to purchase air transport tickets at an agency in the business district and travel to the airport in a station wagon. The relation of passenger and carrier exists from the time the ticket is bought; at that time, new liabilities and rights exist between the parties. But if injury were sustained in the course of transportation to the airport, the nature of those rights and liabilities would be governed not by the Convention, but by local law, since the passenger has not yet come into contact with the company in its capacity as a carrier by air. That is a clear case. If the airport waiting-room is maintained by the carrier, is an injury sustained therein by a passenger within the terms of the Convention? The passenger is present there for the purpose of embarkation. But again the purpose of the Convention must be considered; no hazard peculiar

\textsuperscript{40} Compare the remarks of Justice Holmes in Schlesinger v. Wisconsin, 270 U. S. 230, 46 S. Ct. 260, 262 (1926): “While I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ as to the place where the line should fall.”

\textsuperscript{41} In Curtiss Wright Flying Service, Inc. v. Williamson, — Tex. —, 51 S. W. (2d) 1047 (1932) a passenger, after the plane had landed with its door on the far side from the hangar, walked to the front of the plane, under the wing and fell into the revolving propeller.
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To air navigation has been encountered. To permit the air carrier to limit his liability as a waiting-room operator would be a discrimination against every operator of railway or bus passenger stations.

Most large airports are managed so that passengers for a particular plane are kept behind a gate until the ship is in position and ready to be loaded. The gate is then opened and the passengers walk to the plane. The very fact that a gate is used indicates that particular hazards exist ahead. It is at this point that the passenger passes from the custody of the waiting-room operator, to the custody of the person or corporation who is going to perform the contract of carriage. This would seem then the logical place to draw the line.

It must be remembered, however, that not all flights commence at large airports so arranged. A passenger may board a plane at an intermediate stop where no barriers exist between hangar and landing field. This consideration, therefore, forbids stating the rule in terms of station gates or other aspects of the physical situation which would not be everywhere duplicated. 42

In the law of carriers in the United States, all the rights and duties which flow from the passenger-carrier relation may exist at the moment the person steps on the premises of the railroad—and even though he has not yet purchased his ticket, although he has the intention so to do. 43

In General:

(1) Because of the use of the word "accident" in Article 17, the Convention may be given a more restricted application than was intended by its drafters. In Article 18, the word "occurrence" (l'événement) is used in the same relative position regarding the transportation of goods. The latter term has a broader meaning than the former. Accident connotes that which is unforeseen, unexpected, undesigned. There is nothing in the preliminary discussions to indicate the intention to have the carrier's liability so conditioned.

(2) Goedhuis raises the question 44 whether liability should not be expressly limited to damages caused as the result of, or in

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42. The General Conditions of Transport of the I. A. T. A. provide (IA. Article 7, par. 2): "(1) The presence of passengers upon the area of departure or near aircraft is forbidden without the express permission of the officials of the carrier. (2) Passengers must only enter or leave aircraft at the request of such officials."


the course of transportation. In other words, Article 17 is broad enough, on its face, to make the carrier liable for injury sustained by two passengers engaging in mutual combat. It must be admitted that the Convention does not specifically cover this point. The only help the carrier would get from the Convention in such a situation would be Article 20 (1) which exonerates him if he has taken all necessary measures. Whether this can be accepted as completely reassuring is open to question. But the result in such a case, in the hands of a competent court, would not be in doubt, since the very purpose of the Convention is to take away the liability of the carrier in situations where damage is caused without his fault. This underlying purpose should have considerable weight in clarifying some of the ambiguities of the Convention.

(3) It will be noticed that Article 17 does not extend the period of transportation of passengers by air as far as Article 18 (2) does with respect to baggage or merchandise—"or, in the case of a landing outside an airport, in any place whatever." This provision was undoubtedly inserted to cover the situation where goods are damaged after a forced landing is made, a circumstance which would make it difficult, if not impossible, for the consignor to prove just where the damage was sustained. Under similar circumstances in the carriage of passengers, this difficulty would not be encountered. If the passenger disembarked and walked away from the aircraft, his passing out of the custody of the carrier breaks the continuance of the latter's responsibility.

Recommendations:

The expression "in the course of any of the operations of embarking or disembarking" should be defined. It might be stated that these operations commence, where embarkation takes place at an airport operated with a restraining barrier for passengers about to go aboard, when passage is made through such gate, and vice versa, on disembarking, and that in other situations, such operations shall be deemed to have commenced when the passenger is exposed to the particular hazards of transportation by air.

The word "accident" should be replaced by the broader term "occurrence." This substitution, it is believed, does not enlarge the scope of the Convention beyond what was intended by the drafters.

Article 18. (1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.
(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of landing outside an airport, in any place whatsoever.

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

Different considerations apply as to the period of time during which the carrier should be liable for damage to goods, as contrasted with liability for damage to passengers—at what factual stage potential liability attaches, and ends, or is suspended. For one thing, when goods are in the custody of the carrier, they are completely within his control. Secondly, once the consignor delivers goods to the carrier, the former has no means of establishing at what particular time or under exactly what circumstances the injury was sustained. Both of these considerations dictate that the liability of the carrier attach upon delivery of the goods to him; the responsibility not to end until delivery to the consignee. This is particularly so where the contract of transportation is completed by successive carriers. Notwithstanding these considerations, the Convention adopts a different criterion in determining whether the carrier is liable for injury to goods or baggage. It provides that: (1) the goods or baggage must be in the custody of the carrier, whether in an airport or on board an aircraft, or (2) in case of a landing outside an airport, in any place whatsoever.

This formula makes possible a gap of non-liability at various intermediate points in the performance of a contract of transportation of goods. Suppose merchandise is being forwarded by air express from Chicago to Mexico City, under one contract entered into in Chicago between the consignor and a domestic carrier by air who undertakes to transport the goods to El Paso and there deliver them to another carrier for the balance of the distance. Under Article 1 (2) and (3), the whole of this transaction comes within the terms of the Convention (Mexico is a party by adherence). Suppose that in El Paso, to effect the delivery from one air carrier to the other, it is necessary to transport the goods by vehi-

45. It may be argued that this standard is the same as though the Convention read, from the time the carrier takes possession until the time of delivery to the consignee. If this is the effect, it is difficult to see why such wording was not used, from the standpoint of simplicity and ease of administration.
From one airport to another, and that in such operation the goods are damaged. By both paragraphs (2) and (3) of Article 18, the liability for such damage (regardless of who the defendant may be, the initial carrier, the transfer company if there is one, or the second carrier) would not be governed by the Warsaw Convention, notwithstanding that any liability incurred at any prior or subsequent stage of the journey, would come within its terms. Confusion would be the result: would the responsibility be governed by the law of Texas, where the injury took place, or the law of Illinois, where the contract was entered into?

It is also to be noticed that by the terms of Article 18, the carrier's responsibility for damage to baggage or merchandise may arise earlier in point of time than with respect to passengers. Baggage checked in the airport waiting-room comes within the provisions of the Convention at that moment, whereas the passenger to whom such baggage belongs remains subject to domestic law until he approaches the plane preparatory to embarkation. The same is true in the opposite situation upon arrival at the point of destination.

In paragraph (1) of this article, in stating that "the carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage..." the drafters of the Convention overlook the fact that in Article 4, paragraph (4), the statement is made that if the carrier accepts baggage without a baggage check having been delivered, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability. The latter provision would indicate that a carrier is responsible whether or not baggage accepted is checked. In view of this, the limitation of Article 18, paragraph (1), to checked baggage is misleading. What was probably meant was baggage which the carrier takes into his custody in the transportation of passengers, as distinguished from articles which the passenger takes charge of himself.

Paragraph (3) of this article provides that where transportation by land, by sea, or river takes place in the performance of a contract for transportation by air, any damage is presumed, subject to proof to the contrary, to have been the result of an event which

46. Appreciate the further difficulties presented by the application to this situation of Article 30, discussed infra p. 56.
47. Note that the General Conditions of Transport, Article 19, par. (4), make it one of the stipulations in contracts of transportation that the carrier shall accept no responsibility in connection with surface transportation at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based.
took place during transportation by air. With a few hypothetical cases, the meaning of this provision may be appreciated.

1. If the air transport line operates its own pickup and delivery service, it will be liable either under the Convention or at common law, wherever the damage may have occurred. But wishing to take advantage of the exemptions and limitations of the Convention, the carrier will allow the presumption to stand, offering no proof that damage really occurred in the course of delivery service by land. The danger lies in the possibility that plaintiff may have proof that the damage did in fact occur during transportation by land.

2. If the delivery or pickup service, taking place in the performance of a contract for transportation by air, is performed by someone other than the air transport line, and perhaps not in privity of contract with it, and the goods have been damaged, the air transport line will marshall its evidence to overcome the presumption that damage occurred during the transportation by air. The danger lies in that it may be impossible to gather such convincing evidence as to amount to proof of that fact.

Understanding that the Convention is directed to relieve the carrier from responsibility for damage occasioned by the peculiar danger incident to carriage by air, it is necessary to draw the line between those activities properly within the scope of the Convention and those for which the carrier should stand liability under the ordinary common law rules, like every other transporter of goods. But loading and delivery operations by land must necessarily become an important adjunct to transportation by air. Again, the line is difficult to draw.

A more conclusive method of handling this problem is found in the C. I. M., 48 which provides that regular automobile or navigation services which complete a journey by rail and carry international traffic under the responsibility of a connecting state or of a railway may, by their own volition, make their undertakings subject to all the obligations and rights conferred on railways by the Convention. 49 If a similar provision were incorporated into the Warsaw Convention, it would mean that an air carrier, operating its own land delivery service, could invoke the protection of the Convention, whether the damage occurred in transportation by air, or by land, and apart from its ability to prove or disprove exactly where the damage was sustained. But the probability that this

48. Article 2, secs. 1 and 2.
49. "Subject to any modifications necessitated by differences in the methods of transport."
would be regarded by the courts as a discrimination against other carriers by land must be recognized.

In the United States, the carrier becomes liable as such upon the delivery of goods into his custody for immediate shipment, and regardless of the carrier placing the goods in a warehouse pending shipment, he is still liable as carrier. But where the carrier holds goods at the request of or for the accommodation of the shipper, his liability is that of a warehouseman, responsible only for ordinary care.50

**Article 19. The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage or goods.**

M. Goedhuis points out51 that liability for delay was objected to strongly by the I. A. T. A., but that the authors of the Convention believed it would be illogical that in a mode of transportation which is supposed to be extra fast, passengers could not complain of delay.52

But this provision is not a wide open source of liability. The plaintiff, to make out his case, must show:

1. That there was, in fact, a delay—a departure from scheduled time, or, if time of departure and arrival were not scheduled, that the transportation took an unreasonable length of time. In the General Conditions of Transport prescribed by the I. A. T. A.53 it is stipulated that “carriers do not guarantee the carriage or delivery of goods within a definite time except by special agreement incorporated in the air consignment note.” And in connection with passengers and baggage, these same conditions provide:51 “the time tables of carriers furnish indications of average time without these being in any way guaranteed.” Such stipulations in the contract may make it impossible to prove the fact of delay.54

2. That the delay occurred during “transportation by air.”

53. IB. Article 9.
54. IA. Article 19, par. 1, (2).
55. Airlines in the United States make similar stipulations. The time tables of Northwest Airlines state: “Schedules show the time at which planes may be expected to arrive at and depart from stations, and to connect with other planes or trains, but the company will not be responsible for consequences arising from delays or from errors in the printed schedule. The time shown is subject to change without notice.” Those of Pennsylvania Airlines provide: “These time tables show the time at which planes may be expected to depart from and arrive at the several stations shown and to connect with trains or other planes, but their departure, arrival or connection at the time stated is not guaranteed. Pennsylvania Airlines and Transport Company will not be responsible for errors or omissions in time tables, inconvenience or damage resulting from delays to planes or failure to make connections and also reserves the right to vary from the times shown, without notice to the public. All schedules, fares and information subject to change without notice.” *The Official Aviation Guide*, May, 1935.
This is ambiguous. The absence of a supplementary clause, such as that in Article 18 (2), explaining what is embraced by this expression, may imply a strict limitation to delay taking place while the plane is in flight. Such an interpretation is highly unreasonable, almost absurd. Delay is almost certain to occur not while the plane is in flight but during a postponed departure, or during needless landings, or landings necessary because of the negligent care of the plane, etc.

(3) That as the result of such delay the plaintiff suffered damages. The limitation on the carrier's liability for damage caused by delay is, by Article 22, 250 francs per kilogram in the case of goods, and 125,000 francs as to passengers.

If the plaintiff can show all of the above, the carrier may nevertheless avoid all liability if he can make proof according to Article 20, the exemptive provisions of which present a formidable obstacle to any recovery. Their effect will be discussed later in this article.

Alternative theories of liability may be considered: In the United States it may be generally stated that a carrier is liable only for such delay as arises through its negligence, and when injury is caused thereby. The law implies an undertaking to deliver within a reasonable time. This is essentially the same standard of liability imposed by the Warsaw Convention.

That provided by the C. I. M. is also similar: "The railway shall be liable . . . for any damage caused through delay in delivery. . . . The railway shall not be responsible for damage resulting from delay in delivery, if it can prove that the delay was occasioned by circumstances outside its control." But the measure of recovery is specifically set out: if the plaintiff is unable to prove the damages suffered as the result of the delay, the railway is obliged to pay a proportion of the cost of carriage, increasing with the duration of the delay, up to a maximum of 50% of the cost of carriage. For example, a delay not exceeding one-tenth of the period allowed entitles the plaintiff to recover one-tenth of the cost of carriage. But where proof is adduced of loss resulting from the delay, compensation not exceeding the cost of carriage may be recovered. It has been pointed out that this machinery is advantageous both to the carrier and shipper; to the former because it permits him to foresee exactly the maximum extent of his potential liability, and to the latter because it relieves him from

56. 10 C. J. 283, 831.
57. Article 27, sections 1 and 3.
58. Article 33.
the burden of proving the elements of his damages in every case. It is believed, however, that there is an element of unfairness in this method. Where lines are operated under competitive conditions, sufficient inducements exist to run on scheduled time; in the infrequent cases of unreasonable delay, damages should be required to be specifically proven. Possibly, an automatic sliding scale of damages such as that authorized in the C. I. M. would be appropriate where carriers are government owned and are operated under monopoly conditions. In such cases, the recovery savors of a penalty rather than compensation.

**Article 20.** (1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.\(^5\)

**In General:**

Reaching Article 20, we come to the heart of the Convention. Here is the means by which the carrier can avoid responsibility altogether. In discussing this article, it is necessary to make some assumption as to the desirability of giving the air carrier a special and more lenient measure of liability than other carriers. If one is of the view that such leniency should not be extended and that the air transport industry should be subjected to the same degree of responsibility as carriers by land, a view which was forcefully defended by the Soviet delegation, the whole structure of Article 20 must be redesigned. The writer has chosen, rather, the assumption that limited liability is logically and economically desirable—logically, in part because of the special treatment shipowners have received for reasons which apply with equal force to air line companies, and economically because the trend of opinion is toward the encouragement of the aviation industry's de-

\(^5\) In two respects, the form of Article 20 may lead to some confusion. First, by dividing the article into two paragraphs and making the second applicable to the transportation of goods and baggage, it is possible to jump to the conclusion that paragraph (1) applies only to the transportation of passengers; to avoid this interpretation, the insertion at the beginning of paragraph (2) of the words "in addition," or "Furthermore," would be helpful. Second, at the end of paragraph (2), the words found at the end of the first paragraph, "or that it was impossible for him or them to take such measures," have been omitted. No reason is seen for this omission. Goedhuis (p. 192) lists this as one of the matters to be considered upon revision of the Convention.


\(^1\) For example, the fact that when a catastrophe occurs to plane or ship, usually the entire investment of the owner is absolutely lost.
development—witness the liberality of government subsidies, municipal construction and maintenance of airports, etc.\footnote{62}

That limitation of liability is only one method of relieving the burden must be recognized. M. Kaftal advocates a system of absolute liability coupled with compulsory insurance.\footnote{63} Such a system has its advantages: The person damaged is entitled to compensation regardless of such immaterial factors as how the accident occurred; the time and expense of litigation is dispensed with; losses are apportioned over the industry as a whole.

Accepting the basic principle of Article 20 as representative of the views of the majority of the delegates, we concern ourselves only with its interpretation.

**Agents:**

The word "agent" has been translated from the French préposé, which has the meaning of "officer," or "person in charge." It does not have the legal meaning that "agent" has, of one in the position of a proxy, or one who contracts with third parties on behalf of a principal. For this reason the word "servant" may be a more correct translation, as the latter term includes all who act under the authority and direction of another.

**Necessary Measures:**

The use of the word "necessary" in connection with the measures to be taken by the carrier may be productive of some confusion in Anglo-American courts where the standard of "reasonableness" has always been used. "Necessary measures" connotes everything required to prevent the accident; "reasonable measures" leaves room for recognition of the fact that human foresight and judgment can never be infallible. The word "reasonable" was used in the preliminary drafts\footnote{64} and the substitution of the word "necessary" was proposed by the Soviet delegate.\footnote{65}

The taking of necessary measures is an extremely wide term.\footnote{66}

\footnote{62} Great Britain was the chief advocate of limited liability in the preliminary discussions. \textit{Procès Verbaux}, p. 29.

\footnote{63} André Kaftal, "Liability and Insurance," 5 Air L. Rev. 157 (1934). See the resolution proposed by M. Kaftal and adopted by the International Air Congress meeting at The Hague in 1930, which recommends the study by the CitéJa of insurance methods to be used in conjunction with the Warsaw Convention, 14 \textit{Droit Aérien} 740 (1930). See, also, Robert Homburg, "Compulsory Aviation Insurance," 4 Air Law Rev. 274 (1933).

\footnote{64} See \textit{Compte Rendu}, \textit{CitéJa}, 3rd Session, p. 47.

\footnote{65} \textit{Procès Verbaux}, pp. 26, 136. At another point it was intimated by the Swiss delegate that while "reasonable measures" may have a precise meaning in England, it conveys no thought whatever, elsewhere. Page 31.

\footnote{66} Must these phrases necessarily be condemned because they do not have a crystal-clear meaning? Compare the vagueness of other highly important concepts in the law—act of God, due process, due care—and the
Different courts in different countries are bound to have variant ideas as to what is contained in this requirement. Will it be satisfied if the carrier proves that proper inspection was made of the plane before it left the aerodrome? Or that the pilot and co-pilot hold proper licenses? If it means that the carrier must, in his proof, follow the course of the plane up to the time of the accident and prove that in all that time he and his agent had taken all the proper steps to avoid the accident, or that it was impossible so to do, his burden is heavy indeed. While this article does not expressly require the carrier to ascertain the cause of the accident, a strict interpretation of this article would indirectly do so, since the nature of the accident would determine the extent of defendant's proof. For example, if a crash was caused by ice forming on the wings, the carrier would not have to prove that the motor was functioning properly; he would have to prove the taking of necessary measures regarding such ice formation, however. To be adequately prepared to give the necessary proof, he should know the cause. Without such knowledge, he would evidently have to run the whole gamut of possible causes and show that he had taken necessary measures with respect to each.

Impossible to Take Necessary Measures:

Somewhere in these exemptive provisions must be found the analogy of *vis major, force majeure*, act of God, inevitable aci-
tenacity with which they persist as Instrumentalities in the judging process. See Green, Judge and Jury (1930) p. 179.

67. In this regard, see Curtis-Wright, Inc. v. Glose, 66 F. (2d) 710 (1933), wherein the deceased, the sole passenger in a flight from Miami to Tampa, and the pilot were killed when the plane crashed in an attempted landing on a small private field. The court said: "That the plane was in good order, supplied with proper equipment, fuel, etc., is clear. The mishap, therefore, cannot be attributed to any equipment cause but rather to an operative one. Was there evidence of lack of due conduct on the pilot's part?"

Thereupon, the court, after considering what the pilot might have done to avoid the accident, concluded there was evidence from which the jury could infer negligence on defendant's part. In other words, conceding that the carrier was free from fault prior to the departure of the plane, he must be able to show the exercise of due diligence by his employee right up to the time of the accident.

But cf. Allison v. Standard Air Lines, 65 F. (2d) 668 (1933). The passenger was killed when the plane crashed into a mountain in foggy weather. By virtue of the defendant's testimony that it maintained a systematic method for checking of all planes prior to flight, that the plane in question was so checked and found in good condition, that the pilot was employed for a time sufficient to be familiar with the route, the court held that there was sufficient evidence to support a verdict for the defendant.

Goedhuis intimates (op. cit. 186) that proof by the carrier of exercising reasonable diligence in choosing his employees, and in their supervision, would not be allowed.

In The Fort Morgan, 274 F. 734 (1931), affmd. 284 F. 1, the owner of a ship stranded through negligence in navigation, was obliged to show the exercise of due care in the selection of navigation officials and engine-room force to secure the protection of the Harter Act.

69. The Harter Act (46 U. S. C. A. 192) provides that the vessel owner's liability will be limited only if he proves that he exercised due diligence to make the vessel seaworthy and properly manned. This all relates to what took place before departure.
dent, dangers of the sea, etc. Why any of these expressions is not used is not clear. Perhaps the reason is that these phrases have acquired in different systems of law a wealth of connotation which it would be impossible to harmonize for purposes of a code designed for universal application.

In proving that it was impossible for him or his agents to take necessary measures, the carrier exempts himself from responsibility for damage caused by act of God, act of the public enemy. But the necessary measures concept is wider than that. For example, an accident caused by motor failure could not be viewed as an act of God. The latter phrase means something exterior, unforeseeable, irresistible. But by proving that regulation tests were made of the motor, that its operation was checked immediately before the flight, etc., the carrier has proved that necessary measures have been taken. The possibility exists that carriers will escape liability under Article 20 in situations where they would have been liable under the act of God formula.70

This wider field of exemption, however, may be balanced by the difficulty of proving necessary measures. M. Goedhuis believes the proof required by Article 20 is more difficult than to prove vis major, having in mind the cases wherein the real cause of the damage cannot be discovered.71 If many airplanes crash without the cause being ascertainable, this may be true. But in the analysis of causes of accidents compiled by the Bureau of Air Commerce, in the year 1933 only 3.77% of the total were classified as undetermined or doubtful, and in 1934, none was so classified.

Error in Piloting:

In addition, the carrier of goods and merchandise is not liable if he can prove that the damage was caused by an error of piloting, of navigation, or in the handling of the aircraft. At the insistence of the German delegate, the Convention does not provide this avenue of escape in the transportation of passengers; it was contended that if this source of responsibility were taken away, there would be nothing left on which a passenger could hope for recovery.72 This means there is a greater range of non-liability with respect to goods, than as to passengers. In this respect, the Article differs from the common law of the United States which makes the carrier an insurer of merchandise carried but requires him only to

70. See André Kaftal, "Liability and Insurance," 5 Air L. Rev. 267, 268 (1934).
use due care in the transportation of passengers, and the burden of proof lies with the plaintiff. In interstate commerce, this has been modified by the Hepburn Act: the carrier of goods has been relieved of his common law liability as insurer; the loss must be attributable to some breach of duty or default on his part.

Goedhuis points out that the original source of this exemption is to be found in the Harter Act. The cases construing this provision of the Harter Act may be illuminative as to the practical effect of this exemption. They indicate that the purpose of the Act in this respect is to relieve the owner of the ship, who is otherwise without fault, from the consequences of the acts of his employees in charge of and operating his vessel—in a sense a partial abrogation of the rule of respondeat superior. In the discussions of the C. I. T. E. J. A. on the preliminary draft, the view was expressed that these terms extended only to the acts of the commander, pilot and navigator. But this cannot be viewed as a binding or necessarily exclusive interpretation. Goedhuis questions what the application of these terms would be if the accident were caused through the fault of the radio operator. A logical interpretation would be that they embrace the acts of anyone engaged in the piloting, the navigation or the handling of the plane, regardless of their designated capacity.

How wide these exemptive provisions are may be guessed at from an examination of the Bureau of Air Commerce analysis of causes of accidents occurring in scheduled air-transport services for the half-yearly periods of 1933 and 1934.

72. Hutchison on Carriers, Vol. II, sec. 882. This is based on the theory that the bailor of goods rarely could know how the injury to his control occurred. The application of this theory to modern transportation law has been criticized: "Once within the carrier's vehicle, the passenger entrusts his safety to the carrier as fully as a consignee of goods. A passenger has no greater knowledge of the manner in which the train which contains his goods is operated." F. N. Bohlen, "Aviation Under the Common Law" (1934) 46 Harv. L. Rev. 216.
74. 46 U. S. C. A. sec. 192: "If the owner of any vessel transporting merchandise or property shall exercise due diligence to make the said vessel seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner shall be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor from losses arising from dangers of the sea, acts of God, or inherent defect of the thing carried."
75. 15 F. (2d) 249 (1926) (failure to jettison leaking drums of sulphuric acid whereby other cargo was damaged; held, a fault in management for which the vessel was not liable).
78. The Milwaukee Bridge, 15 F. (2d) 249 (1926) (failure to jettison leaking drums of sulphuric acid whereby other cargo was damaged; held, a fault in management for which the vessel was not liable).
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(1) Accidents caused by errors of judgment, poor technique or negligence of the pilot constituted from 13% to 41% of the total number of accidents for that period. In this group, the carrier could rely on the error-in-piloting provision to escape liability in the transportation of merchandise.80 If the accident occurred in the carriage of passengers, the carrier would be obliged to prove that he had taken all necessary measures to avoid the damage, or that it was impossible to do so.

(2) Accidents caused by weather ("conditions which could not reasonably have been foreseen and avoided") ranged in percentage from 14 to 27. Under the necessary-measures clauses of Article 20, this category should mean complete non-liability for the carrier.

(3) Accidents due to mechanical causes, such as power plant failures, undercarriage, handling qualities, instruments, etc., comprised from 30% to 49% of the total number of accidents. This group could be broken down, from a liability standpoint, into the following:

(a) Inherent defects, errors of design or engineering, defective materials. Whatever is here embraced points to ultimate liability on the part of the manufacturer.81

(b) Conditions developing through use of the plane and ordinarily discoverable by usual methods of inspection, e.g., weakening of undercarriage, of wearing surfaces, improper lubrication, etc. In this class, the carrier would find it difficult to prove that he had taken all necessary measures to avoid the damage.82

(c) Structural or mechanical failures which develop in spite of the taking of all necessary measures (assuming that there is a standard of reasonableness in the use of the word "necessary").

80. If the error were committed by an inexperienced pilot, and traceable to such inexperience, the carrier could not prove that "in all other respects, he and his agents have taken all necessary measures to avoid the damage." Cf. Ziser v. Colonial Western Airways, 10 N. J. 1118, 162 Atl. 591 (1932) (the court held the jury was entitled to find negligence on the ground, among others, that the carrier had intrusted the plane to a pilot new to the locality).

81. No provision is made in the Convention for damage caused by inherent defects in the aircraft itself, but up to the time of the conference at which the Convention was adopted, Article 20 (1) read: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures, unless the damage occurred through an inherent defect in the aircraft." The omission of the last phrase was advocated by the British and French delegates, and after an extended discussion, was adopted. The Swiss delegate, in opposing this omission, criticized drawing an analogy to maritime law, and contended that when an accident was caused through inherent defect, the passenger should have his remedy against the carrier, who then might go against the manufacturer. Procès Verbaux, p. 31.

82. Cf. Bole v. Colonial Western Airways, Inc., 110 N. J. Law 76, 164 Atl. 436 (1932)—(by virtue of testimony that on the next previous flight the engines of the plane had not worked well, the court declared that the use of the plane after an opportunity to observe its defective operation, without adequate repair, would be some evidence of negligence).
(4) **Accidents due to the condition of the airport or terrain** ("conditions which could not reasonably have been detected or avoided") ranged up to 14%. These accidents should mean in large part no liability on the part of the carrier by virtue of the necessary-measures provisions, or possibly the error-in-piloting clause.83

(5) **Accidents due to causes undetermined or doubtful**—In the period from July to December, 1933, the percentage was 3.77. In all the other periods, no accidents were so classified. This percentage represents two out of one hundred and seventy-four accidents, and is small enough to be almost insignificant; it points to the fact that accidents in which no evidence can be gathered as to why they occurred will be very few indeed.

As mentioned above, the exemption provided by the error-in-piloting clause applies only in the transportation of baggage and merchandise, and not of passengers. This special treatment deserves some explanation. The British delegate, chief proponent of this feature, pointed to this exemption in maritime law where it was invoked because "maritime operations are of a nature so difficult, so delicate, that everyone agreed it was not fair to impose upon shipowners responsibility for the faults committed by the captain of the vessel... My government [Great Britain] has recommended that I urge with all possible energy the adoption of this amendment [to provide the error-in-piloting exemption in the transportation of passengers as well as goods and baggage] because it appears that the responsibility imposed on the carrier is altogether too heavy."84 In proposing that this amendment should not apply to the transportation of passengers, the Italian delegate said it was a matter of humanitarian policy.85 This viewpoint must carry some weight. When it is a question of the destruction or damage of a commodity, the consignor can be considered to have undertaken one of the speculations that attend all business transactions; if he has insured himself against this loss, there is, in almost every case, a complete recompense. But this reasoning has no validity in the carriage of passengers; human life or bodily injury cannot be treated in terms

83. Consider the case of *McCusker v. Curtiss-Wright Flying Service, Inc.*, 269 Ill. App. 502 (1933). The pilot was killed and the plaintiff, the only passenger, was injured in an attempted landing of the plane on an emergency landing field. The only basis for a negligence finding was the pilot's failure to use a flare; this, the court held, was sufficient to support a verdict. This view of the court, translated into the necessary-measures language of the Convention, would likewise mean recovery for the plaintiff. The error-in-piloting exemption would not have any bearing, since it is a case of transportation of a passenger.


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of dollars and cents. Underlying this, of course, is the assumption that a greater measure of liability will promote greater care on the part of the carrier.

Defendant's Burden of Proof:

In bringing his action, the plaintiff need only allege the happening of the accident, the injury or loss sustained, the circumstances bringing the accident within the terms of the Convention by doing so he has made out a *prima facie* case. It is not necessary, as in the ordinary tort action, to allege specific acts of negligence on the part of the defendant, nor that plaintiff was free from contributory negligence. The burden then devolves upon the carrier to prove that he and his agents had taken all necessary measures to avoid the damage, or that it was impossible for him or them to take such measures. This is a burden of proving affirmatively the carrier's freedom from fault. This burden of proof is strongly suggestive of that employed by the maxim *res ipso loquitur*.

The maxim is used in two types of situations. First, where the causes of the accident are within the exclusive or predominant knowledge of the defendant so that he alone can adequately show what brought it about. And second, where the accident is one which would be almost impossible, or at least extremely unlikely, to happen in the absence of negligence, an accident which, in the light of common experience, justifies the conclusion that defendant has been negligent. In the first situation, there is ample justification for using the maxim; this is indicated in the case of *Wilson v. Colonial Air Transport, Inc.* The court stated that because there was no evidence to show by whom mechanical inspections were made, it was not established that all the circumstances were in the sole control of the defendant or his servants, that therefore the maxim could not be applied. But *res ipso loquitur* has also been used in air carrier cases in the second sense. *Smith v. O'Donnell.*

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86. At first thought it might seem that it is a matter for the defendant to plead that the Convention applies, in view of its limiting and exemptive provisions, in his favor. But to have the case brought within the terms of the Warsaw Rules may be just as attractive to the plaintiff; he may be unable to allege specific acts of negligence committed by the defendant; he may, as a gratuitous passenger, to whom no ticket was issued, have a better chance of recovering under the Convention than he would by local law (see discussion in this regard, p. 18); he may not be able to prove himself free from contributory negligence and wish to shift that burden to the defendant; in all cases, it is to the advantage of the plaintiff to found his action on the Convention.

87. Article 21 provides that the carrier has the burden of proving the contributory negligence of the plaintiff. See discussion *infra.*

88. 278 Mass. 420, 180 N. E. 212 (1932).

89. — Cal. App. —, 6 P. (2d) 690 (1930); aff'd 215 Cal. 714, 12 P. (2d) 933 (1932).
"If the proper degree of care is used, a collision in midair does not ordinarily occur, and for that reason the doctrine was properly submitted to the jury."

The burden of proof principle imposed by the Convention is similar to the use of the maxim in the first sense. The carrier is in a better position to know the cause of the accident and assemble proof of his exercise of due care than the plaintiff is to prove that the defendant was negligent.90

Recommendations:

(1) The word “agents” should be replaced by “servants” or “employees” to give a clearer meaning to the article in Anglo-American courts.

(2) There should be inserted at the end of paragraph (2), for purposes of consistency with paragraph (1), “or that it was impossible for him or them to take such measures.”

(3) New considerations should be given to the desirability of a specific treatment of accidents caused through faults of design or manufacture. These cases, which according to Bureau of Air Commerce statistics form a considerable proportion of the total number of accidents, cannot adequately be handled by the necessary-measures formula.

Article 21. If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

This article places the burden of proving the contributory negligence of the injured person upon the carrier; this is the general rule in the United States91 although there is authority to the contrary.92 Also, according to this article, the effect of contributory negligence of the injured person upon the liability of the carrier—whether it will exonerate him wholly or only in part, is to be determined by the lex fori.93 In the United States it is generally held that even though the carrier be negligent, if the injury was

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90. If a plane crashed, killing the operators as well as passengers, is there any knowledge exclusively in possession of the defendant? Possibly, yes. The carrier’s mechanical experts would be better able to abstract some evidence from the wreckage than the plaintiff would.


93. Under the C. I. V. (passengers by rail), art. 28, this question would be solved by resorting to the lex loci rather than the lex fori.
contributed to by the passenger's contributory fault, recovery is completely defeated.\textsuperscript{94}

It is also to be noted that there is a well-settled rule that the contributory negligence of an injured passenger will not shield the carrier from liability where the latter's conduct has been marked by gross or wilful negligence. Article 25 of the Convention provides that the carrier may not avail himself of the provisions which exclude or limit his liability if the damage is caused by his wilful misconduct. If there is a question whether Article 21 is such a provision which "excludes or limits" the carrier's liability within the meaning of Article 25, the courts of the United States would undoubtedly answer the question in the affirmative, in view of the rule hereinabove stated.

Article 22. (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the Court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

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

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65\textsuperscript{1/2} milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

In terms of American dollars, computing the franc at its par of 6.63 cents,\textsuperscript{95} the liability of the carrier for each passenger is limited to $8,287.50; for checked baggage and goods $7.51 per pound; for objects which the passenger takes care of himself $331.50 per passenger. It should be observed that the maximum amount for passengers is considerably lower than what is usually recovered in death cases in the United States.\textsuperscript{96}


\textsuperscript{95} This is the franc established by law of 1928. The interesting discussion of the delegates regarding this article will be found in Proceedings, p. 50.

\textsuperscript{96} Boole v. Colonial Western Airways, 10 N. J. Misc. 517, 158 A. 440 (1932) (verdict of $33,000 to wife of deceased, reduced to $25,000); Henderson
Different methods of converting the limit of liability into terms of other national currencies suggest themselves. In the English Carriage by Air Act\(^7\) which gives effect to the Convention within the United Kingdom, it is provided that the sums mentioned in francs in Article 22 shall, in any action against the carrier, be converted into sterling at the rate of exchange prevailing on the date on which the amount of any damages to be paid by the carrier is ascertained by the court. Such an interpretation recommends itself from the standpoint of simplicity. If current rate of exchange is adopted, however, strict logic would require that the rate prevailing at the time the injury was sustained be adopted rather than that at the time judgment is entered. This is fundamental in the law of damages—that the elements of damage, e.g., earning power, market price of commodities, and so forth, must be determined as of the time that the injury occurred. By Article 29, two years delay may take place before action is begun; it may be another year before judgment is entered in the case. This makes the amount of recovery too greatly dependent upon fluctuation in international exchange.

But an entirely different method is possible, namely, to use the gold parity existing between the franc and the particular currency into which the sum is to be translated; e.g., the franc created by the law of June 25, 1928, represents, at par, .0663 in terms of the American dollar. By this method, the expression of the American equivalent would be fixed, from the time that the Convention becomes effective in the United States, and would not fluctuate during the time that it is in force with the ups and downs of a foreign national currency, in this case the French franc. This interpretation, on a gold parity basis, is bolstered by the reference in paragraph (4) to the gold content of the present franc. The handling of this problem in the Brussels Convention, in which the limit of liability is expressed in terms of pounds sterling, is similar to what has been done in the English Carriage by Air Act, above referred to. Express provision is made that “national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of

\(^{97}\) 1932, 22 & 23 Geo. 5, sec. 1(5).
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the arrival of the ship at the port of discharge of the goods concerned."98

By the Harter Act, the shipowner's liability as to property loss or damage is limited to the value of the interest of the owner in the vessel;99 for the death of a passenger, "the recovery shall be a fair and just compensation."100 The Interstate Commerce Act contains no express limit of liability. By the Brussels Convention, Article 1, the shipowner's liability is measured by the value of the vessel, freight and accessories, with an additional provision that in case of death or bodily injury of passengers, the shipowner is liable in an amount exceeding this limit up to £8 per ton of the vessel's tonnage. The C. I. M., like the Warsaw Convention, adopts the weight of the merchandise lost or damaged as a measure for the carrier's limit of liability.101

The fixing of a maximum limit of recovery for one injured in the transportation of goods or passengers by air is not a legal problem at all, but must be decided upon after giving consideration to a number of economic, technical, and social factors. Assuming that limited liability is desirable, viewpoints will differ as to where that limit should be placed. Airline operators will want to see it as low as practicable. The passengers and shippers, who of course have no collective voice, would contend that the limit be high enough to permit a compensatory recovery. Between these two opposites, a compromise can never be a fair one, either to the carrier, or to the passenger or shipper.102

Paragraphs (1) and (2) provide that, as to both passengers and goods, a higher limit of liability may be set by special agreement of the parties. This would usually be attended by the payment of an additional sum. But it should be noted that by such a special contract, there is no assurance that the higher sum will be paid. In the case of goods, Article 22 (2), the carrier is permitted to prove that the declared sum "is greater than the actual value to the consignor at delivery."103 In cases of injury or death to a

100. 46 U. S. C. A. 761.
101. C. I. M., Art. 29 et seq.
103. Regarding this clause, M. Goedhuls states, "considering that the declaration [of special interest] has precisely for its object the obtaining of a recovery additional or supplementary to the objective value of the merchandise, this object is made almost illusory by the provision in the second sentence [whereby the carrier can show actual value is less than declared value]: Op. cit., p. 214. This is not altogether true in every case. Instances where a special declaration of value is made because the actual value of the merchandise, per pound, is greater than the limit provided, would probably be more numerous than those instances where a special declaration is made because subjective value is greater than actual value.
passenger, while the probabilities are that a jury could be convinced that plaintiff was injured to the extent of the sum set by special contract, the carrier could insist, as a matter of law, that plaintiff’s recovery be limited to compensation.

Regarding paragraph (3) of this article, M. Goedhuis asks why such a provision is made, since articles in the possession and control of a passenger and for which no transportation document is issued, would not seem to come within the scope of this Convention. The General Conditions of Transport of the I. A. T. A. expressly state:104 “The passenger is entirely responsible for the supervision of articles which he takes charge of himself. The carrier accepts no responsibility for the supervision of such articles even if his employees assist in loading, unloading or transshipping them.”

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

The first clause of this article must be interpreted to mean liability as laid down by the Convention for carriage by air, inasmuch as there is a wide field of liability of the carrier outside of and entirely unaffected by the Convention, e.g., ground transportation by the carrier supplementary to transportation by air. The validity of provisions relieving the carrier from such responsibility would be determined by national law. Such provisions are to be found in the General Conditions of Transport of the I. A. T. A.105

In interstate commerce in the United States, the Hepburn Act, which relieves the carrier of goods from his common law liability as insurer, provides that no contract, receipt, rule or regulation shall exempt such common carrier from the liability imposed by the Act.106 But, by the second Cummins amendment, this does not apply to goods which the carrier has been authorized or required

104. I. A., Art. 6, par. 5.
105. I. A., Art. 18, par. 5: "Passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage (which practically coincides with the liability laid down by the Warsaw Rules) no liability whatsoever is accepted by the carriers . . . and upon conditions that (except in so far as liability is expressly provided for in these Conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings . . . and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based." [Similar provision is made respecting the carriage of goods in I. B., Art. 19, par. 4.]
to carry at rates dependent upon the value declared in writing by the shipper.\textsuperscript{107} Nor does this apply to the interstate transportation of passengers, and therefore state law must be looked to in this regard: it is the general rule that common carriers of passengers cannot relieve themselves from the obligation to observe ordinary care, by any contract whatsoever, but that they may limit their liability by special agreement for a reasonable exemption from responsibility for injuries not arising from negligence.\textsuperscript{108} The Harter Act which governs the liability of vessel owners, contains a provision similar to Article 23.\textsuperscript{109}

M. Goedhuis\textsuperscript{110} raises the question whether a carrier could, to avoid the difficulties of proving he has taken all necessary measures, stipulate in the contract of transportation that the proof of certain facts will be equivalent to proving that all necessary measures have been taken, and conditionally answers the question by stating that nothing in principle would oppose so doing. To the present writer, it seems impossible to square such a stipulation with the underlying principles of the Convention, one of which is to secure uniformity not only as between countries, but also as between individual carriers. Another principle involved is that restrictive stipulations in transportation documents are often viewed as a form of deception, and almost always represent compulsion.

\textbf{Article 24.} (1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

This article contemplates that every cause of action embraced or provided for by the Convention shall be brought in accordance with its conditions.

Paragraph (2) of this article provides that in the case of the death or injury of a passenger, national law may be resorted to for determination of the proper parties plaintiff and the nature and extent of their rights \textit{inter sese}. In its failure to make specific provision in this respect, the Convention is unlike most codifications.\textsuperscript{111} This omission also leaves a doubt as to what domestic

\begin{itemize}
\item \textsuperscript{107} 49 U. S. C. A. 20 (11).
\item \textsuperscript{108} Cooley, Torts (4th ed., 1932), sec. 495; 10 C. J. 714.
\item \textsuperscript{109} 49 U. S. C. A. 190, 191.
\item \textsuperscript{110} Op. cit., p. 218.
\item \textsuperscript{111} Lord Campbell's Act, 9 & 10 Victoria, c. 93, gives a right of action for wrongful death to the personal representative for the benefit of the wife, husband, parent or child. A United States statute as to death on the high seas by wrongful death, 46 U. S. C. A. 761, similarly so provides.
\end{itemize}
law shall apply, whether it shall be the law of the place, law of the forum, etc. There is room for another question to arise: The application of whatever domestic law governs may differ according to the nature of the responsibility sought to be enforced. For example, in Anglo-American common law, the rules applicable in actions *ex contractu* differ from those in actions *ex delicto*; a parent of an injured child may sue the tortfeasor for loss of services, but could not sue one who has merely breached a contract with the infant. What is the nature of the liability placed upon the carrier by the Convention? It should be observed that while certain portions of the text emphasize the contractual relationship of the parties, one must conclude from the terms of Article 20 that the responsibility imposed upon the carrier is one based on fault. To meet this incorporation of local law, Great Britain, in its Carriage by Air Act, makes specific provision as to who may bring an action to enforce liability in the event of the death of a passenger.

Article 25. (1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court to which the case is submitted, is considered to be equivalent to wilful misconduct.

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

112. In the domestic law of the United States, whether or not the cause of action survives is governed by the law of the place where the injury occurred: 56 L. R. A. 194, note. That statute would also determine who are the proper parties plaintiff, and in whose behalf the suit may be brought. *Usher v. West Jersey R. Co.*, 126 Pa. 206, 17 A. 597, 4 L. R. A. 261 (1889). The lex loci delicti also determines to whom the damages recovered shall be distributed. *Penna. R. Co. v. Levine*, 269 P. 567 (C. C. A. 1920).

113. 22 & 23 Geo. V (1932): "1. The liability shall be enforceable for the benefit of such of the members of the passenger's family as sustained damage by reason of his death.

"In this paragraph the expression 'member of a family' means wife or husband, parent, step-parent, grandparent, brother, sister, half-brother, half-sister, child, step-child, grandchild:

"Provided that, in deducing any such relationship as aforesaid, any illegitimate person and any adopted person shall be treated as being, or as having been, the legitimate child of his mother and reputed father or, as the case may be, of his adopters.

"2. An action to enforce the liability may be brought by the personal representatives of the passenger or by any person for whose benefit the liability is under the last preceding paragraph enforceable, but only one action shall be brought in the United Kingdom in respect of the death of any one passenger, and every such action by whomsoever brought shall be for the benefit of all such persons so entitled as aforesaid as either are domiciled in the United Kingdom or, not being domiciled there, express a desire to take the benefit of the action.

"3. Subject to the provisions of the next succeeding paragraph, the amount recovered in any such action, after deducting any costs not recovered from the defendant, shall be divided between the persons entitled in such proportions as the Court (or, where the action is tried with a jury, the jury) direct.

"4. The Court before which any such action is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside the United Kingdom in respect of the death of the passenger in question."
The important provisions of the Convention which "exclude or limit the liability" of the carrier are Articles 20, 21, and 22. There can be no criticism in using the wilful misconduct of the carrier to checkmate the contributory negligence of the injured person, or, in a sense, to neutralize its effect. That was most probably the original reason for the development of degrees of negligence, particularly where, as in Anglo-American common law, contributory negligence defeats recovery altogether. But whether this neutralizing effect should go so far as to remove all limits upon defendant's liability is another question, and there is good ground for believing it should not. Some considerations on this point follow:

1. If proof of wilful misconduct is permitted to counteract the effect of contributory negligence on right to recovery, that is sufficient. It is not necessary to extend its effect to amount of recovery, since the chances are that the injured person will not have suffered more because the accident was caused by wilful misconduct.

2. Compensatory damages are not to be confused with punitive damages. If the purpose of Article 25 is to punish the carrier, it is doubtful whether this is the proper method of accomplishing that purpose, since this article will be applied not so much in cases of what is patently wilful misconduct, as, rather, in cases of a degree of negligence which courts will label wilful misconduct. Such distortion will be induced, this writer believes, by the desire to soften the effect of a statute which takes away a common law remedy.

3. In allowing to courts this amount of latitude to determine what the equivalent of wilful misconduct is, uniformity, one of the principal objectives of the Convention, is sacrificed. M. Riese, however, seeks to justify this clause by pointing out the wide divergence of views among different countries as to the exact content of wilful misconduct.116

4. The solution of this problem reached by the C. I. M. and the C. I. V. is to double the maximum liability of the carrier where he is guilty of wilful misconduct.116

Paragraph (2) is restricted in its application to where the

114. The expression is also used with the same effect in Articles 3(2), 4(4), and 9.

115. In the French text, the word dol is used. Riese states that the concept of faute lourde should also be comprehended by this expression: "Observations sur la Convention de Varsovie," 14 Droit Aerien 216, 222 (1930). Even in English and American law, "wilful misconduct" does not have an altogether precise meaning.

116. Article 36.
agent acts within the scope of his employment. It is not clear why this restriction exists in this article and not in Article 20. There was no discussion of this point by the delegates. There is a possible explanation of this seeming inconsistency in the fact that all actions of the carrier's agents embraced in Article 20 would necessarily be within the scope of their employment, while acts of wilful misconduct would very often be outside such scope. The taking of necessary measures to avoid damage, as used in Article 20, is definitely a part of the duties of the carrier's employees. Such a restriction therefore has no place in Article 20. Nor does this leave a gap where there is wilful misconduct on the part of the employee outside the scope of his employment, since an agent is personally responsible for his own torts.

Does violation of government regulations by the carriers or his agents constitute wilful misconduct? Almost certainly the answer is yes, where such violation contributed in a causative way to the accident. In this regard it is interesting to observe that in the 99 civil aircraft accidents resulting in fatalities during the last six months of 1934, 89 persons were killed and 49 were severely injured during flights in which the pilots ignored air commerce regulations.117

Article 26. (1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be prima facie evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of baggage and seven days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing despatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

This article in effect states that if, in case of damage to baggage, complaint is not made within three days after receipt, and within seven days in the case of merchandise, a presumption that the goods have been delivered in good condition will arise, and, in addition, no action shall lie against the carrier, save in case of fraud on his part. As M. Goedhuis points out,118 if the second

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consequence attaches, paragraph (1) has no significance; since, if the cause of action is barred, there can be no proceeding in which the presumption can operate. There is a partial answer to this: failure of the consignee to complain within the time prescribed may take away his cause of action against the carrier, but it does not take away his right to set up the damage as a defense to an action by the carrier for the cost of the transportation. True, the consignee would have to overcome the presumption in paragraph (1), but this would not be more onerous than the burden of proving any affirmative defense.

However, there should be some recognition of the fact that not in every case is damage apparent at the time of delivery, that wrapped or packed goods cannot always be conveniently examined at the moment of delivery. For this reason, the presumption provided in paragraph (1) should not arise until there has been a reasonable opportunity to make such examination of the goods, and at the end of another period of time thereafter, the right of action should fail altogether. These considerations suggest the following re-wording of Article 26:

**ARTICLE 26.** (1) In case of damage to goods or baggage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within three days from the date of receipt in the case of baggage and seven days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage or goods have been placed at his disposal.

(2) *Failing to complain within such times shall be prima facie evidence that the goods or baggage have been delivered in good condition and in accordance with the document of transportation.*

(3) Failing complaint within three days after the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

(4) *Every complaint must be made in writing upon the document of transportation or by separate notice in writing despatched within the times aforesaid.*

**Article 27.** In the case of the death of the person liable, an action for damages lies in accordance with the terms of this Convention against those legally representing his estate.

by one of broader meaning, e. g., claimant (ayant-droit) since it is not always the consignee who wishes to make a complaint. (b) That in paragraph (2) after the word damage, the words "or partial loss" be added.

119. The Brussels Convention provides (Article 6): "If the loss or damage is not apparent, the notice must be given within three days of the delivery. In any event the carrier and the shipper shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

The C. I. M. makes similar provision for apparent and non-apparent damage: Article 44.
In the expression “against those legally representing his estate,” the Convention is virtually resorting to local law, and that, of course, is the desirable thing. Matters of procedure, it was constantly reiterated in the preliminary discussions, should be left as much as possible to the law of the court before which the action is brought. Furthermore, the question does not have a great deal of practical importance in view of the corporate form assumed by most carriers.

Article 28. (1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the Court at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court to which the case is submitted.

Selection of Forum:

This article gives the plaintiff the option of bringing his action in the court of any one of four possible places, provided it is within the territory of one of the signatories to the Convention: (1) The domicile of the carrier; (2) his principal place of business; (3) his place of business through which the contract was made; (4) the place of destination.

In any H. C. P. which is composed of federated states, the question must arise whether the domicile referred to in this article extends to the whole territory of the contracting party, or means the component state in which the carrier has his residence if an individual, or is incorporated, if a corporation. This problem would be presented in the United States. A carrier operating across the border between Mexico and this country may be incorporated in Delaware. Does domicile mean any state in the Union, or Delaware? If it is restricted to the latter state, there is hardly any hardship on the plaintiff in view of the other choices which he may make in selecting a forum.

In the preliminary drafts, a further choice of fori existed: “... or, in case of the non-arrival of the aircraft, at the place of the accident.” This was omitted upon the motion of the British delegate, on the ground that this “would be provocative of great inconvenience and would give rise to actions which the carrier would find it very difficult to defend.” For example, in a flight from London to India, where one passes over many countries...
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having no well developed system of law, it would be a hardship for a British transport company to defend an action in Persia or Mesopotamia.

If this choice of fori is in any way a free one, the plaintiff may, in exercising it, well consider those provisions of the Convention which leave certain matters to be determined by domestic law. If he has been contributorily negligent, he will bring his action where that defense exonerates the carrier only partially, rather than completely.\(^1\) If his right to bring the suit is in doubt, he will choose the forum whose law is most favorable to his bringing the suit.\(^2\) If one of the above four choices gives him a chance of proving wilful misconduct on the part of the defendant, it will similarly be advantageous to choose that forum.\(^3\)

In the Berne Convention (goods and passengers by rail), no such choice exists. The action can only be brought before a competent court of the state to which the railway defendant belongs.\(^4\)

Article 28 mandatorily states that an action for damages must be brought in the territory of one of the High Contracting Parties. But where a plaintiff wishes to avoid the application of the Convention with its limited recovery, what will prevent him from suing in a state not a party to the Convention? If he does initiate his proceedings in a non-signatory state, will that state, upon the insistence of the defendant, enforce the terms of the Convention? Two persons entered into an employment contract, electing to be governed by the Workmen's Compensation Act of Vermont. After an accident occurring in New Hampshire, the employee's administrator brought an action in that state based on New Hampshire law. The defendant was successful in having the Vermont statute applied, under the compulsion of the full faith and credit clause of the Federal Constitution.\(^5\)

In a second case, an action was brought in Texas for an injury which occurred in Mexico. The final holding was that it would be unfair to the defendant to deny him the advantages of the Mexican law, but because the recovery details of that law could not be effectively administered in an American court, the entire case was dismissed.\(^6\)

In other words, as between two foreign states, there is no

\(^{122}\) See Article 21.
\(^{123}\) See Article 24 (2).
\(^{124}\) See Article 25 (1).
\(^{125}\) C. I. M. and C. I. V., Art. 42.
superior sovereignty compelling a court to apply a foreign law by which the parties had agreed to be governed; and where the enforcement of such foreign law is optional, the court to which the case is submitted may well refuse to apply it because of procedural difficulties, or because it conflicts with local public policy.

Execution of Judgments:

The Convention makes no mention of reciprocity among contracting states in the enforcement of judgments rendered under its terms. Regarding this, one observer states:  

One would hesitate to introduce a provision of this nature for the limited field of private aeronautical law, believing it preferable to reserve that for an international accord on civil procedure.

To introduce such a provision would not represent a pioneer step since both the C. I. V. and the C. I. M. contain such provisions. Besides, of all subjects for international accord, civil procedure seems least feasible and most remote. A better reason for the omission of such a provision lies in the fact that the Convention is open for signature to all states, regardless of the stage of development of their legal system; the C. I. V. and the C. I. M., on the other hand, contain measures which give the signatory states some voice in the admission of new states.

The lack of such a provision in the Warsaw Rules should caution the plaintiff to select with care the forum in which to pursue his cause of action. He should choose that jurisdiction where sufficient of defendant’s goods are located for the satisfaction of his judgment.

Consolidation of Actions:

No mention is made in the Convention of the possibility of consolidating in one tribunal of causes of action arising out of the same accident. Such a provision also was objected to by the British delegate. To be sure, there is not the necessity for such a provision in a codification in which limitation is based upon a
given sum per passenger or per pound of merchandise, as there is
where total liability in one accident is limited, as is true in the
Brussels Convention and in the Harter Act. But from another standpoint, there is such a necessity. As has been pointed out previously, by Article 24, the Convention does not attempt to lay down any measures for determining, in cases of the injury or death of a passenger, who are entitled to bring suit, and what are their respective rights. By reason of this omission it is possible for different administrators of a passenger killed in an air accident, to be appointed in different jurisdictions and to prosecute contemporaneously in different courts their rights of action against the carrier. This difficulty could be remedied either by modifying Article 24 so that it definitely specifies in whom the right of action lies, or by setting up some means of bringing together in one forum scattered proceedings based on the same cause of action.

Recommendations:

The word “domicile” should be defined where an H. C. P. is composed of semi-sovereign federated states.

Article 29. (1) The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitations shall be determined by the law of the Court to which the case is submitted.

In the Berne Convention, the period of limitation is one year, but extended to three years in cases of fraud or wilful misconduct.

Article 30. (1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this Convention, and shall be deemed to be one of the contracting parties to the contract of transportation in so far as the contract deals with that part of the transportation which is performed under his supervision.

132. Article 8: “If different creditors take proceedings in the courts of different States, the owner may, before each court, require account to be taken of the whole of the claims and debts so as to ensure that the limit of liability be not exceeded.”
133. 48 U. S. C. A. 183. Under the Harter Act, the vessel owner may file a petition for limitation of liability which has the effect of drawing to one court all proceedings growing out of the same accident. See the case of Butler v. Boston & Savannah S. S. Co., 130 U. S. 627 (1889).
134. This difficulty has been partly met by the British Carriage by Air Act. See the portion noted supra, Article 24, footnote 3.
(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Where goods are transported by successive air carriers, by virtue of one contract entered into between the shipper and the initial carrier, it is eminently desirable from the plaintiff's standpoint to be able to prosecute his claim to a final conclusion in one action. To do this he must either join all carriers who performed a part of the transportation, or he must be permitted to sue one against whom collective responsibility may be asserted; this is so because, in the majority of cases, the shipper cannot know in the custody of which carrier the damage was sustained. At common law, there was a further difficulty. If the plaintiff knew that the damage occurred while the goods were under the care of a carrier other than the one with whom the contract was entered into, his action might be defeated because there was no privity of contract between them.137

In interstate shipments in the United States, the Hepburn Act permits the consignor to sue the initial carrier whether or not the damage occurred during his portion of the transportation. In addition, the person sustaining the loss may sue the particular connecting carrier actually responsible for the injury.138

This device is adopted by the Warsaw Convention, with the additional provision that the person entitled to delivery of the goods may sue the last carrier.139 Further than that, both consignor and consignee may, apparently as a second chance, bring action against the carrier who performed the transportation during which the damage took place.140

136. Transportation performed by successive air carriers with which Article 30 deals, is to be distinguished from combined transportation performed partly by air and partly by any other mode of transportation, as treated in Article 31.

137. By providing that each successive carrier shall be deemed to be one of the contracting parties, the issue of privity of contract is avoided by the Convention.


139. Even in the extreme case where goods are lost in shipment, and the last carrier never received them into his custody. M. Goedhuis (op. cit., p. 243) criticizes the extension of this device to this extent; but see an express provision to this effect in C. I. M., Article 42, par. 3.

140. The C. I. M., Article 42, par. 3, provides: "The plaintiff can choose between the said railways; once, however, the action is brought his right of choice ceases."
The perfect operation of this system of collective responsibility of the first or last carrier would depend upon the existence of inter-company arrangements for mutual assistance in the defense of actions for damages, and for the apportionment among the respective carriers of judgments so recovered. In the absence of such arrangements, the convenience that this short-cut represents to the plaintiff is balanced by the inconvenience it means to the respective carriers in two respects: first, where damage is caused while goods are being handled by an intermediate carrier, and the initial carrier is sued; the latter to avail himself of the exemptive feature of Article 20 must prove not only that he and his agents took all necessary measures to avoid the damage, but also that the intermediate carrier and his agents did likewise; second, where, under the above circumstances, judgment goes against the initial carrier, he will be required to enter into new negotiations with the intermediate carrier for reimbursement, which quite conceivably might lead to further litigation.\footnote{141} However, the last sentence of paragraph (3) stating that the carriers shall be jointly and severally liable, may contemplate the possibility of the joining of all carriers, and if such joinder is permissible under local rules of procedure, and to the extent that all carriers are subject to service of process in one jurisdiction, this may be a solution of some of the difficulties discussed above.

During such time as air routes are not well established for the transportation of merchandise, it is quite natural for shippers to enter into separate contracts with different carriers for successive stages of a long transportation. In such a case, to permit the shipper to sue the initial carrier for damage occurring anywhere along the line, while an advantage, seems hardly one to which he is entitled in view of the burden this places on the first airline company to carry on the litigation after judgment is rendered against him in the first instance. From this standpoint, paragraph (3) of Article 30 might well except those cases of transportation performed by successive air carriers wherein there is an independent contract relation between the shipper and each carrier. Article 30 makes no such distinction, but paragraph (1) does refer to the third paragraph of Article 1, which states:

(3) Transportation to be performed by several successive air carriers

\footnote{141} The C. I. M., while providing that actions may be brought either against the dispatching railway, the railway of destination, or the railway on which the event giving rise to the action took place (Article 42), also provides that the Convention shall apply only to the specific railway lines enumerated by the Convention, or appropriately added thereto (Articles 1 and 58). This furnishes a facility for working out adequate inter-company relationships to meet effectively the obligations imposed by such a measure.
shall be deemed, for the purposes of this Convention, to be one individual transportation. if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts. . . .\textsuperscript{142}

This paragraph is to be used primarily in determining whether the Convention applies at all. If the court determines that it does, can the initial carrier nevertheless rely on this same paragraph to urge that the transportation in question was not regarded by the parties as a single operation, in so far as the application of Article 30 (3) is concerned? The proposition seems to be finely drawn but it must be recognized that different considerations govern in settling the above two issues. As far as collective responsibility is concerned, each carrier involved in the transaction would naturally urge the application of the Convention; but it could be emphatically contended that to use Article 1 (3) to make Article 30 (3) apply in every case imposes upon the first or last carrier an extremely more onerous burden than would be his under domestic law.

By paragraph (2) of Article 30, a passenger or his representative can sue only the carrier on whose line the accident took place, based on the theory that in such a case there would not be the difficulty of determining the responsible party that exists in the carriage of merchandise. But another reason exists for permitting suit against the initial or last carrier in all cases, which is that to require the plaintiff to sue an intermediate carrier will often necessitate bringing his action in a foreign jurisdiction,\textsuperscript{143} whereas, the choice that exists for the shipper of goods (paragraph (3)) permits suit to be brought either at the place where the contract was entered into, or at the place of destination, either one of which would probably be the jurisdiction in which the plaintiff is domiciled. To be sure, Article 28 (1) would allow the passenger or his representative to sue the intermediate carrier at the place of destination, but would the defendant always be subject to process and his goods subject to levy of execution in that jurisdiction?

With the development of air express agencies, the importance of these problems will be minimized, as the consignor and consignee deal with only one party, regardless of how many individual lines the goods may be carried on.

\section*{IV. Combined Transport}

\begin{quote}
Article 31. (1) In the case of combined transportation performed partly by air and partly by any other mode of trans-
\end{quote}

\textsuperscript{142} Italics ours.

\textsuperscript{143} In death cases, this would mean the appointment of a local administrator and other similar complications.
portation, the provisions of this Convention shall apply only to
the transportation by air, provided that the transportation by
air falls within the terms of Article 1.

(2) Nothing in this Convention shall prevent the parties in
the case of combined transportation from inserting in the docu-
ment of air transportation conditions relating to other modes of
transportation, provided that the provisions of this Convention
are observed as regards the transportation by air.

The chief difficulty presented by this article is the situation
where goods are delivered in a damaged condition by an express
agency, part of the transportation being performed by air and part
by rail. Such coordinated air-rail and rail-air transportation is an
established service offered by Railway Express Agency. How will
it be determined whether the damage was incurred during that part
of the trip by land, or by air?

In such a situation, it seems there is the same need for a pre-
sumption that the damage occurred during transportation by air, as
there is in Article 18 (3) which treats of land transportation for
the purpose of loading, delivery, or transshipment.

V. GENERAL AND FINAL PROVISIONS.

Article 32. Any clause contained in the contract and all
special agreements entered into before the damage occurred
by which the parties purport to infringe the rules laid down by this
Convention, whether by deciding the law to be applied, or by
altering the rules as to jurisdiction, shall be null and void. Ne-
evertheless for the transportation of goods arbitration clauses
shall be allowed, subject to this Convention, if the arbitration is
to take place within one of the jurisdictions referred to in the
first paragraph of Article 28.144

Article 33. Nothing contained in this Convention shall pre-
vent the carrier either from refusing to enter into any contract
of transportation or from making regulations which do not con-
fine with the provisions of this Convention.

It should be noted that this article does not state that a carrier
may refuse to enter into a contract of transportation; it only de-
declares that nothing in the Convention will prevent such refusal.
The implication is that the prohibition of such refusal by some
other, local, law would not be disturbed.145 This raises the general
topic of common carriers. The distinction between private and

144. No comment.
145. Compare the C. I. M.: "Every railway coming under the Convention
is bound . . . to undertake the transport of goods accepted under the Conven-
tion, provided that the consignor complies with rules laid down in the Con-
tvention. . . ." Art. 5, sec. 1. And the C. I. V.: "Where an international
tariff exists for a given journey . . . carriage may not be refused, provided
that the passenger complies with the provisions of the present Convention:"
Art. 4.
common carriers is important in three respects: it determines their right to contract for limitation of or exemption from responsibility; it fixes the degree of care which they must exercise in the pursuit of their calling; and it determines their duty to serve all without discrimination. As to the first two of these, the Convention speaks finally and completely, drawing no distinction between the two types. As to the third, local law is permitted to apply.\(^1\) The result is that so far as the Convention is concerned, the distinction between private and common carriers is absolutely of no significance.

To this writer, this feature of the Convention is of extreme importance, and heartily to be recommended. As stated by one authority:\(^2\)

It should be immaterial whether the aviation company in whose plane a passenger is injured is a public or a private carrier. No reason appears why those who carry on that most dangerous form of aviation, the carriage of passengers for the mere thrill of flight, should be able to make themselves substantially immune from responsibility by inserting in the tickets a provision that they are free to refuse their services to anyone whom they may choose to reject, although in practice this privilege is never exercised.

**Article 34.** This Convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

**VI. Conclusion.**

In so far as the portions discussed in this article are concerned, the Convention represents a significant forward step in a process which must never be recognized as ended. No code of law is ever expected to be perfect or complete. The most that should be expected is a working model on which refinements may be made from time to time.

It cannot be too strongly emphasized that a convention designed for world adherence must lend itself to acceptance by many diverse systems of law, without revolutionizing in too great a degree settled notions of any one system. Provisions of a more or less

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1. Pursuant to the terms of Article 33, the General Conditions of Transport of the I.A.T.A. provide: “The carrier reserves the right to refuse to enter into a contract of carriage without giving any reason.” I.A., Art. 13, par. 2.

2. In making no specific provision as to the duty of carriers to extend their services to all without discrimination, the Warsaw Convention is leaving no important gap; this is strictly not a question of private law, but rather a matter to be decided by local public policy.

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general application should be used wherever possible. Emphasis upon minutiae should be resorted to only when obviously necessary, and from time to time as the goal of uniformity in at least the broader aspects is more nearly achieved.

In the contemplated revision of the Warsaw Convention, much important ground will be lost, this writer believes, if the text is scrapped wholesale. It would be far more advisable to have only a re-working of those parts which experts in law, in engineering, in management, and other phases of the industry, and in government, deem to be impracticable or undesirable.