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THE PROBLEMS OF LIABILITIES IN INTERNATIONAL CARRIAGE BY AIR

A STUDY IN PRIVATE INTERNATIONAL LAW

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INTRODUCTION-CARRIAGE BY AIR

During the last fifty years aviation and carriage by air underwent a fantastic technical development and expanded vastly in the economic life of society. Huge modern sound speed aircraft, with perfect comfort and linking virtually all important places in the world have at present become a matter of course of the 20th century. Nevertheless the present generation remembers the astounding and revolutionary experience of the primitive wooden airplanes, which were able to carry 2—3 passengers on short distance and at a speed which barely exceeded 100 kms./ /hr.; travelling in such planes was a sports adventure and a hazardous risk.

Contemporary modern aircraft can be characterized by the following data: a maximum speed of almost 1000 kms./hr., a maximum range of about 10,000 kms./hr., the possibility of all day and all weather traffic, accommodation for 80—130 passenger, perfect comfort, and a high degree of security[1].

The airplane has proved to be an ideal means of transport, first of all for its speed which highly exceeds other means of transport. It overcomes without difficulties natural obstacles — oceans, high mountains, and polar regions; no other means of transport can rival it in this sphere.

The indisputable advantages of carriage by air are the chief reason of its rapid and mass expansion. The ABC World Airways Guide[2] at present quotes a total of 2350 regular lines of air navigation, which link 3450 world cities. The network of air routes expands continously, air traffic and the number of aircraft increases and the planes are being perfected, flight times are being reduced, new airports are being constructed at which the biggest types of aircraft carrying thousands of passengers can land and take off every day.

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[1] The biggest contemporary civil aircraft — the Soviet TU-114 Rossiya — has accommodation for 220 passengers, cruising speed of 1000 kms./hr., and maximum range of almost 15 000 kms. For a survey of the other types of aircraft now used and of their technical and economic data see "Civil Aircraft Type Data", ICAO Bulletin, Vol. XV, No 8, 1960, p. p. 140 seq.

[2] The ABC World Airways Guide, January 1962.

In 1961 alone the scheduled air services of the ICAO Member States[3] covered 3080 million kilometres and carried 112 million passengers.

The rate of the growth of the volume of carriage by air is extremely high particularly since 1945. The world air companies transported a total of 9 million passengers in 1945 to an average distance of 880 kms., at an average speed of 240 kms./hr., a single aircraft carrying 13 passengers. At that time, small twin-engin airplanes, corresponding to the DC-3 type, prevailed in air transport.

In 1950, 31 million passengers were transported at an average speed of 285 kms./hr., as well as 770 million, t./km. of goods and mail, the aircraft carried 27 passengers on the average.

Development in the next 5 years: by 1955 air traffic had more than doubled — 68 million passengers were carried at an average speed of 315 km./hr. as well as 1670 million t./km. of goods and mail, the passengers were flown to an average distance of 905 kms. and the aircraft carried 27 passengers on the average. The airplanes of the air companies of ICAO Member States covered 2,280 million flight-kilometres.

The preliminary data for 1961 show that during that year 112 million passengers were carried to an average distance of 1,035 km. at an average speed of 375 kms./hr.; at the same time, 3,200 million t./km. of goods and mail were transported; the aircraft carried 38 passengers on the average[4].

The cited statistics do not include data on the air transport services of the states which are not members of ICAO, in particular those of the U. S. S. R. and the People's Republic of China. The Soviet Aeroflot alone transported about 20 million passengers in 1959[5]!

Carriage by air will undoubtedly undergo further vast development on a world-wide scale by the planned establishment of helicopter lines which will certainly multiply the volume of air traffic, especially on short-distance routes, in suburban traffic and in the transport of passengers from big international airports to city centres. The same consequences will certainly result from the new type of aircraft which is under intensive study and which is to have a short or even vertical take-off and landing.

The development of a supersonic aircraft for regular air transport is at present also being feverishly studied. For the time being, technical

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[3] International Civil Aviation Organization has been constituted under art. 43 *et seq.* of the Convention on International Civil Aviation, signed on December 7, 1944, at Chicago. See No 147 (1947), Collection of Laws of the Czechoslovak Republic.

[4] For statistical surveys see ICAO Bulletin, Vol. XV, No 1, 1960, Vol. XVI, No 4, 1961, p. 69, Vol. XVII, No 3, 1962, p. 42; and Révue Générale de l'Air, No 4 (1961), p. p. 359, 360.

[5] J. Loginov, Letecký obzor, No 11 (1960), p. 326.

and economic conditions of an aircraft are being studied which would be able to carry about 200 passengers and would achieve a cruising speed of M-2 to M-3. Such an aircraft is to be developed by 1975, in the co-operation of Britisch and French firms, and the news is leaking ever more frequently that a prototype of such an aircraft has already been developed in the U. S. S. R. and will be operational shortly.

Carriage by air is ever more attractive also for the gradual reduction of its costs, the air tariff is slowly nearing to the railway and the shipping tariffs; this applies naturally to the carriage of passengers only. For this reason the rate of the growth of carriage by air is more speedy than that of the other categories of transportation, and air carriage even increases to the detriment of carriage by sea. This is particularly evident on the North Atlantic lines, which is shown by the following table[6]:

The numbers of transported persons in *thousands:*

	1950	1957	1958	1959
Carriage by sea	310	435	950	884
Carriage by air	142	427	1292	1650

In 1961, 1,761,000 passengers already crossed the North Atlantic[7] by air. Speed and comfort rank high among the advantages of air carriage; in future, relatively low prices will probably rank among them as well — at least on long-distance routes, in comparison with the expenses and the waste of time in other categories of transportation.

The advantages of carriage by air are ever more evident in the field of the transportation of goods and freight. The speed of air carriage enables the supplier to respond flexibly to the customer's demands, to deliver goods on time, this for instance, in case of seasonal and fashion goods, to provide speedily spare parts, etc.; in the field of exports, the air carriage of goods also exerts its influence on the speed recovery of letters of credit (L/C) and documentary collection (D/P), and hence a speedy rate of the return of foreign exchange. The carriage by air of goods is less demanding as far as packing is concerned and even goods particularly liable to damage (such as quickly perishable fruits, live animals, etc.) can be transported.

But there still exists the general idea that carriage by air is dangerous and risky. In fact not a single week passes without news of an air

[6] „Doprava přes Atlantik" ("Trans-Atlantic Transportation"), Letecký obzor, No 12 (1960), p. 369.
[7] ICAO Bulletin, Vol. XVI, No 4, 1961, p. 71.

accident. The extent of such accidents seems to increase — because of the increasing capacity of aircraft. A series of terrible air disasters which happened recently can be recalled. More than 100 persons were killed in each of these disasters.

On June 3, 1962 an Air France BOEING-707 crashed during take-off at Orly airport near Paris, *130 persons* on board were killed. It is the biggest single aircraft disaster in history.

On December 16, 1960, a TWA Super G-Constellation and a DC-8 of the United Airlines crashed over New York. *125 passangers* on board and *17 persons* on the ground were killed;

On July 1, 1956, planes belonging to the same companies collided over the Grand Canyon, Colorado. *128 persons* lost their lifes;

On June 22, 1962 an Air France BOEING-707 crashed near Guadeloupe Point-à-Pitre airport. *112 persons* perished;

On March 5, 1962, a DC-7 C of the Caledonian Airways crashed at Douala, in the Cameroon. There were *111 victims;*

On March 16, 1962, a Constellation of the Flying Tiger disappeared in the Pacific. There were *107 victims.*

Dozens of air accidents, which happened recently and where the number of victims ranged from 50 to 100, could be cited. These are *prima facie* shocking data. Their tragic nature is augumented by the fact that as a rule none of the passengers or of the crew survives the air accident, and the aircraft and the freight are completely destroyed. In the other categories of means of transport — especially in carriage by sea or by rail — big accidents also happen, and the number of victims is often substantially higher; but as a rule, a major part of the passengers survive the disaster.

At the dawn of the development of aviation, carriage by air really was risky. In 1925—1929, 28 casualties per 100 million passenger — kilometres were registered in carriage by air, in 1935—1939, 9 accidents, in 1945, 3.09, in 1950 1.97, in 1955, even 0.66 only[8]. The declining trend of the rate of accidents is also evident in the following years. Thus for instance there were only 0.63 fatal disasters per 100 million passenger-kilometres in 1947, only 0.59 in 1959, and a minimum increase to 0.77 in 1960[9]. Jet airlines are chiefly responsible for the recent moderate rise in the rate of accidents. The General Assembly of IUAI (the International Union of Aviation Insurers), held at Montreaux, on June 6 to 8, 1961, stated that in 1958, 12 jet-propeled aircraft of the western airlines were completely destroyed in 41 grave disasters. According to

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[8] ICAO Circular 60-AN/45, No 7, p. 225.
[9] "Les accidents d'avion en 1960", Revue Générale de l'Air, No 3 (1961), p. p. 273—275.

statistical data one total destruction of a jet-propelled aircraft roughly per 100 000 flight hours was registered; as far as piston-engine aircraft are concerned statistical data show that the destruction of one airplane happens in 500 000 flight hours[10].

These facts expressed in absolute numbers are as follows: 615 persons were killed in the whole world in international and national carriage by air in 1958, 570 persons in 1959 and 857 persons in 1960. The data for 1962 will probably be substantially higher because from February to June alone four BOEING-707 aircraft of American make filled to capacity crashed.

The dangerous character of carriage by air will not seem nearly so striking when compared to the accident rate, e. g., in carriage by rail, *viz.:*

The 41 railway transport companies associated in the Union Internationale des Chemins de Fer, registered for instance 0.24 fatalities per 100 million passenger-kilometres in 1956[11].

United States statistics show that the railway is the most secure means of transportation in the national transport of the U. S. (0.07 fatal accidents per 100 million passenger-kilometres in 1955), the second place being occupied by air carriage (0.8 fatalities in comparable conditions), and that passengers are exposed to the biggest risk when travelling in motorcars (2.9 casualties under the same conditions)[12].

Tens of thousands of lifes are lost in world automobile traffic every year. In this relation it appears to be unjust to attribute a particularly dangerous character to carriage by air, in which the world average of the number of victims is approximately 500 to 800 annually.

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In the development of carriage by air Czechoslovakia keeps pace with the world's most advanced states. The Czechoslovak Airlines inaugurated their first air routes in October 1923. Shortly after World War II they extended the network of their air routes to most European capitals and to the Middle East. As early as in 1957, the Czechoslovak Airlines acquired from the U. S. S. R. the most modern TU-104 jet airlines and thus, next to the Soviet Aeroflot and within the framework of the IATA, they became the first air company to fly jet-propelled aircraft on its scheduled lines. In 1960 planes of the Czechoslovak Airlines carried about 500 000 passengers on the home lines only. The

[10] Zeitschrift für Luftrecht und Weltraumrechtsfragen, No 4 (1961), p. 303.
[11] Statistique Internationale, Union Internationale des Chemins de Fer, 1956, p. p. 75 and 126.
[12] Statistical Handbook of Civil Aviation, US Department of Commerce, CAA/1956, p. 123.

network of foreign lines is being expanded every year: in addition to lines to the chief European cities, air routes to North and West Africa, to the Near, Middle and Far East, and the first scheduled line of the socialist countries over the Atlantic (Havana *via* Shannon, Gander) have been inaugurated. Further lines are being planned to Central, North and Latin America. It is envisaged that in 1965 the Czechoslovak Airlines will transport 1.5 million passengers on national lines alone. In June 1962 the total length of air routes operated by the Czechoslovak Airlines reached almost 100 000 kms. Their aircraft — and first of all the Soviet jet TU-104 airliner and the turbo-prop IL-18 which rank among the supreme achievemets of world air technology, as far as security and the economic factors are concerned — land in 50 foreign cities. The Czechoslovak Airlines carry out 90 flights a day, and in 1961 for the first time they transported a million of passengers a year. Prague has become a world airport, where aircraft of 20 world air lines land[13].

The security of the operation of the Czechoslovak Airlines also reaches world standard. The *exposé* to the Law No 63 (1951), Collection of Laws, Relating to Liability for Damage Caused by Means of Transportation, stated the following:

„The technical improvement of aviation is clearly demonstrated in the minimum number accidents in air traffic. If we compare the number of persons and the amount of goods transported with the number of the cases of damage, it will become evident that in the course of the post-war years 0.00014 per cent only fall to accidents of persons and 0.00088 per cent to damage sustained by goods".

These figures naturally have become obsolete: in spite of the immense development of air services, not a single crash occurred on the air routes operated by planes of the Czechoslovak Airlines in the years 1957—1960! The tragic disasters of Czechoslovak aircraft on the line Prague—Bamako, near Rüsselbach in the vicinity of Nuremberg, on March 22, 1961, and near the Camp-Cazes airport in the vicinity of Casablanca on July 12, 1961, in which 52 and 72 person were killed respectively, occured under strange circumstances which led world press and experts to assume that they had been caused by outside interference, and to exclude that they had resulted from the normal risks of air traffic. The inquiry into the said accidents has not yet been finally closed.

[13] The Soviet AEROFLOT, the Polish LOT, the Hungarian MALEV, the Rumanian TAROM, the Bulgarian TABSO, the DEUTSCHE LUFTHANSA of the German Democratic Republic, AIR FRANCE, SABENA, BEA, KLM, SAS, SWISSAIR, the Yugoslav JAT, ALITALIA, AUSTRIA AIRLINES, as well as the non-European AIR INDIA, CUBANA, ARIANA AFGANISTAN, IRAQ AIRWAYS and the UNITED ARAB AIRLINES.

Part I

"AIR LAW" AND THE PROBLEMS OF LIABILITY

In connection with the development of aviation and of carriage by air, various social relations come into being and are regulated by law.

Considerable attention is given in jurisprudence to the juridical relations which arise in the sphere of aviation and carriage by air. The respective problems are as a rule treated under the title of „air law" (letecké právo, droit aérien, Luftrecht or Luftfahrtrecht, diritto aeronautico, vozdushnoye pravo, prawo lotnicze, etc.). Literature devotes a great number of handbooks, monographs, complete vast systems and also a series of specialized juridical journals[14] to "air law". As a rule, "air law" is treated as a special branch of law, which occupies an autonomous position in the legal system.

Is the so-called "air law" really an independent branch of the system of law? The answer to this question is indispensable from the angle of the definition of the theme of the present study as well as from the methodical aspect.

Polish author *T. Halewski,* one of the pioneers of "air law", asserts that "air law is an independent and autonomous branch of law, which has its own history, its own system and doctrine."[15] He proceeds from the principle that any branch of law is autonomous if it complies with the following three basic conditions: the novelty of the subject-matter, the specialty of the principles, and the completeness of the system.

Analogous conclusions have been arrived at by the Czechoslovak author *V. Mandl,* for whom "air law is a section of legislation, formed — from the angle of the respective dividing idea — by rules of law which particularly set forth duties grouped around flying"[16].

R. Coquoz considers "air law" to be "an *ensemble* of rules of law which settle legal relations arising from the use of air". Within a more restricted meaning he conceives "air law as the law governing carriage

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[14] See annexed bibliography.

[15] Dr Tadeusz Halewski, O system prawa lotniczego, Lwów 1937, 70 pages, on p. 12.

[16] Dr. Vladimír Mandl, Letecké právo, Plzeň 1928, p. p. 13—14.

by air, *i. e.,* as that branch of law which treats relations ensuing from aviation[17]. "Air law" is defined in almost the same terms by *Lemoine*[18] and *F. de Visscher*[19], as well as by Riese[20], Le Goff[21], and many others.

All quoted authors regard "air law" as an independent branch of the system of law. They treat this question explicitly; nevertheless there is a number of writers who do not solve expressly the questions of the subject of "air law" and of the latter's place in the system of law, but who in fact interpret the *ensemble* of the respective problems as an autonomous legal branch.

This conception cannot be considered scientifically correct. All the said authors construe the branch of "air law", procceeding from *the subject-matter* of human conduct, from the subject-matter of the given *social relations* (airspace, aircraft); the specificity of the *subject-matter* of a social relation becomes for them the determining criterion for the definition of an independent branch within the system of law.

In Czechoslovak juridical literature, Academician Knapp proved impressively that the determining criterion of the system of law cannot be found in the subject of social relations[22].

The given subject of social relation (airspace, aircraft, carriage by air) may appear in the most various relations requiring a *specific human conduct* which is typical of those legal relations which are governed by *public international law* (e. g. the régime of airspace, international aviation governed by international agreements on air services), by *private international law* (e. g. the problems of the conflict of laws in the sphere of the air freight contract, the questions concerning liability in international carriage by air unified by international treaties), by *civil law* (e. g. the domestic contract of carriage, the sale or hire of aircraft), *by administrative law* (e. g. the verification of airworthiness, registration, etc.), by *financial law* (e. g. air customs regulations), etc.

If we consider that the criterion of the system of law is the specificity of human conduct in certain social relations which are governed by law, the so-called "air law" appears to be a conglomerate of — for instance

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17 Raphaël Coquoz, Le Droit Privé International Aérien, Exposé systématique et critique, Paris, Les Éditions Internationales 1938, p. 3.

18 Maurice Lemoine, Traité de droit aérien, Paris 1947, p. 3.

19 Fernand de Visscher, Les conflits de lois en matière de droit aérien, Recueil des Cours, Académie de droit internationale, 1934-II, p. 286.

20 Otto Riese, Luftrecht, K. F. Koehler 1949, p. p. 11 and 12.

21 Marcel Le Goff, Manuel de droit aérien. Droit privé, Paris, Dalloz 1961.

22 Viktor Knapp, Předmět a systém československého socialistického práva občanského, Prague 1959, Publishing House of the Czechoslovak Academy of Sciences, especially p. p. 67—79.

— public international law, private international law, civil law, financial law, etc., but not an independent branch of law[23].

Consequently, "air law" cannot be considered an independent branch within the system of law. In spite of this conclusion it is, nevertheless, possible to speak in a certain sense about "air law" — namely from the aspect of the system of *jurisprudence*. The system of law and the system of jurisprudence should not be identified. Within the system of jurisprudence, "air law" is justified in its capacity as a *comprehensive scientific specialization* which though falling within the scope of a series of legal branches is nevertheless instrumental from the point of view of a comprehensive scientific research of the given human activity, from the angle of practical needs and, finally, from the pedagogical point of view[24]. *Expediency* is the criterion for the creation of a comprehensive scientific specialization within the system of jurisprudence.

The theme of the present study places it within the scope of private international law. Its aim is an analytical and critical examination of the problems of civil liability which arise in connection with international cariage by air. It will examine them from the angle of the resolution of the aspects of the conflicts of laws, in order to find the applicable municipal law, first and foremost from the angle of multilateral treaties which unify the rules of civil law character. The conventions of this nature are — according to the prevailing opinion — considered a subject of the doctrine of private international law[25].

From all the civil law problems bearing upon carriage by air, those of the liability for damages are the most practical and the most difficult. The difficulty of the resolution of these questions is augmented by the

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[23] Czechoslovak literature generally agrees with the conception of Academician Knapp that the determining criterion of the system of law is the specificity of human conduct in certain social relations which are governed by law. Although polemic against this conception exceeds the framework of this study, it is necessary to mention that this criterion might seem to be somehow vague. It is problematic which human conduct is sufficiently "specific" to construct a conclusive criterion. Is the field left to subjective evalution of what is "specific" not too vast? Wherein does then consist the criterion of "specificity" itself?

[24] Cf. Viktor Knapp, l. c., p. 76; Vladimír Outrata, Předmět mezinárodního práva, Časopis pro mezinárodní právo, No 1 (1961), p. 16.

[25] L. A. Lunc, Mezhdunarodnoye chastnoye pravo. Obshchaya chast, Gosyurizdat 1959, p. p. 20—24.

L. A. Lunc, Du rôle de droit international privé dans la coopération internationale, VIe Congrès de AIJD, Travaux de la Commission de droit international privé, Brussels 1956, p. 6.

Rudolf Bystrický, Základy mezinárodního práva soukromého, Prague, Orbis 1958, p. 18.

Contra: e. g. Réczei László, Zur Frage des Gegenstandes des internationalen Privatrechts, Staat und Recht, No 3 (1955) (in this work, the author restricts the scope of private international law exclusively to the resolution of the conflicts of laws; he does the same in his system Internationales Privatrecht, Budapest 1960, p. 9).

fact that carriage by air is of an international character, and that an immense quantity of "foreign elements" may occur in the coherent civil law relations. An intricate complex of problems of private international law arises regarding the question of which territorial law is to be applied, or concerning the interpretation of the international conventions for the unification of private law and the filling of their gaps by means of the respective territorial law.

In no other branch of human activities can there be such a plurality of foreign elements in civil law relations as in the field of international carriage by air. The following hypothetic example may prove it in a rather ridiculing way: a citizen of the state A, who is domiciled in the state B, buys in the state C a passenger ticket for a flight from the state D to the state E; carriage is performed by an aircraft bearing the registration mark of the state F; in the airspace of the state G the aircraft collides with another aircraft which is registered in the state H; the passenger is killed, and the falling wreckage causes damage to nationals of the state H; a survivor who is citizen of the state I and resides in the state J intends to bring action for damages. Before which court will he enforce his claim? Against whom? Under which law? This is a hypothetic example, but in a way it is not quite improbable.

The following is the systematic division of the present study:

In its part II it treats the problems of the carrier's liability in international carriage by air of the passengers and the consignors of goods, provided that liability ensues from the *contract of carriage.*

Part III presents an *exposé* of the issues resulting from liability in those cases where transportation itself is performed by another person than the carrier who entered into the contract (the problems of charter-party are especially concerned).

Part IV gives an outline of the problems of liability ensuing from aircraft collisions; this part also includes the questions of the liability of the organs of ground control.

Part II

THE CARRIER'S LIABILITY IN INTERNATIONAL AIR CARRIAGE OF PASSENGERS AND GOODS

A) CONFLICT OF LAWS

By its technical nature carriage by air aims at international contacts. The technical and economic advantages of carriage by air can become evident especially in long-distance transportation and when the mighty stream of passengers and goods flows between the big cities of the world. Air transport was concentrated on international routes ever since the beginning of its technical development; the first scheduled air service was inaugurated on the line Paris—Brussels as early as at the beginning of 1919. But on the world scale, at present about 70 per cent, of all air carriage services operate *nationally* and only 30 per cent have the character of *international* transport. In spite of this, the legal régime of carriage by air (national and international) on the whole shows a trend towards unification and stadardization on an international scale.

NATIONAL CARRIAGE BY AIR

National carriage by air, i. e. carriage performed exclusively within the territory of one ftat, does not give rise to particularly difficult juridical problems. The legal relations between the carrier and the passenger (including especially questions of the carrier's liability for damage caused to the passengers or the goods, which are the most important ones in practice) are as a rule governed by the *municipal* law of the respective state. The following rules of law are notably the authority for Czechoslovak national carriage by air: the provisions of the Civil Code (No 141 [1950], Collection of Laws, and particularly sections 337 *et seqq.* and 474—484); those of the Civil Aviation Law (No 47 [1956], Collection of Laws, and particularly sections 53—61); those of the Law on the Liability for Damage caused by the Means of Transport (No 63 [1951], Collection of Law); those of the Air Carriage Regulations (Public Notification of the Ministry of Transport, No 31 (1960), Collection of Laws); and those of the conditions of carriage and the tariffs of the Czechoslovak Airlines, approved by the Ministry of Transport under section 4 Air Carriage Regulations, and section 56, Law No

47 (1956) of the Collection of Laws. But even the legal rules governing purely national carriage show evidently the influence of multilateral international conventions, which unified broad domains of the régime of carriage by air. E. g. section 55 (2) (a) of the Law No 47 (1956), Collection of Laws, lay down that air carriage regulations may for the purpose of national carriage adopt the principles of international agreements even if such agreements differ from the Czechoslovak rules. In additon, section 60 of the quoted law allows even for national carriage by air the limitation of the operator of aircraft or the air carrier's liability, as far as the extent of liability is concerned, provided the international agreements limit liability in this way. These questions are elaborated in detail in the Air Carriage Regulations (Public Notification No 31 [1960], Collection of Laws); under the provisions of its section 38 (1) (a), the carrier's liability for registered luggage and goods is in national carriage by air governed by the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air (No 15 [1935], Collection of Laws); and under section 38 (3), the limitations of liability which are stipulated in the Warsaw Convention apply even to such international carriage which is not governed by the Convention in other respects, and even to purely *national* carriage.

In consequence, the national law governing carriage by air adopts to a considerable extent the international regulation. This fact emphasizes the necessity of an analytical study of those international conventions which unify civil law problems of carriage by air. Czechoslovak jurisprudence has so far not devoted any attention to these questions[26].

INTERNATIONAL CARRIAGE BY AIR AND THE CONFLICTS OF LAWS.

Only such carriage in the course of which the state frontier is crossed and during which the air route passes over or ends within the territory of a foreign state may be generally considered *international* carriage by air.

The legal régime of international carriage by air in its present extent is almost unthinkable without an international standardization and unification of the regulation of the legal relations between the carrier and the passengers and consignors of goods.

Without a broad international unification, serious difficulties would

[26] An informative article on the Warsaw Convention was published by Dr Vladimír Mandl, the Czechoslovak pioneer of "air law" (and of the "law of outer space"); this article was published abroad (see "La responsabilité-type en matière d'aviation", Révue générale de droit aérien 1936, p. p. 475 seq.).

arise in setling the legal relations between the carrier and the passengers or the consignors of goods in international carriage. It would be necessary to solve complicated *problems of conflicts of laws* in order to find the governing law *(lex obligationis)* which would be applicable to legal relations ensuing from the contract of international carriage by air and especially also to the issue of the carrier's liability resulting from this contract.

The following example may serve as an illustration[27]: a Frenchman, resident in Denmark, bought a passenger ticket for a flight from Geneva to London at a Swedish travel agency in Stockholm. He used for the flight an aircraft of the American PAA, which crashed on Belgian territory; the passenger was seriously injured. If the question of liability were not unified on international scale, the problem of which law is to be applied would arise. The Danish, Swedish, Swiss, English, U.S. and Belgian laws are susceptible of application. If in this concrete case no type contract, based on the IATA General Conditions and the Warsaw Convention, would be concluded (i. e. if the parties had not chosen unified law), the solution of the problem of the conflict of laws would be very difficult.

Even if such a case is almost completely out of question in the present situation (with the exception of nonscheduled and occasional carriage) theoretically at least six different conflict of laws solutions may be argued, and the following laws may be applied as regards the aspect of the conflict of laws:

a) the law of the place of the contract *(lex loci contractus);*
b) the law of the place of departure;
c) the law of the place of destination, i. e. the law of the place of the performance of the contract *(lex loci solutionis);*
d) *lex fori;*
e) the law of the flag, or of the place of the registration of the aircraft respectively *(lex banderae);*
f) the law of the carrier's principal place of business.

(It is evidently not possible to take into account, in this connection, the law of the place where damage was occasioned — *lex loci delicti commissi* — because the rights resulting from liability in international carriage by air are based upon a *contractual* relation, on the contract of carriage; not claims *ex delicto* (torts) but rights *ex contractu* are concerned, and in respect of the latter the *lex obligationis* is applicable.)

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[27] Cf. Dr Otto Riese Internationalprivatrechtliche Probleme auf dem Gebiet des Luftrechts, Zeitschrift für Luftrecht, No 3 (1958), p. p. 279 and 280.

But some of these conceivable constructions offer no satisfactory solution which would correspond to a reasonable settlement of the respective legal relation; the application of a law might take place which is in no real connection with the given legal relation and which could not reasonably be taken into consideration by the parties to the contract. E. g., *the place of the contract* (i. e., of the purchase of the passenger ticket) is, in the quoted example, evidently quite an occasional moment, and is in no connection with the given obligation or the latter's subjects. The application of *the law of the place of departure* has a number of advocates in theory[28]; it is considered an easily ascertainable criterion which the parties to the contract of carriage know; it is not however, a satisfactory criterion; it fails, for instance, in case of carriage performed successively by several carriers within the framework of one contract of carriage, and it also is impossible to give grounds for differentiating the position in law of various persons travelling on board the same aircraft, according to the airport where they started their flight. The application of the criterion of *the place of destination* would equally differentiate the position in law of the passengers on board the same aircraft; a real connection of the law of the place of destination and of the contract of carriage may be construed in most cases only with difficulties (e. g., a Polish national takes an aircraft of the Czechoslovak Airlines for a flight to Cairo; the law of the U.A.R. would in this case hardly correspond to a reasonable settlement of the legal relation). The application of the *lex fori* to the relations in the field of obligation is repudiated by the entire doctrine of private international law; *lex fori* may be applied only in case of prorogated jurisdiction by consent of the parties; the pactice of a number of states is inclined to hold the principle *"qui eligit judicem eligit jus"* and regards prorogated jurisdiction as the choice of substantive law (of the *lex fori)* as well[29].

The law of the flag (or of the place of the registration of the aircraft respectively) is practical and justified in carriage by sea, where the passenger or the consignor of the goods knows the ship to perform the respective carriage. But in the practice of carriage by air, a joint operation of a certain route is very frequent and is carried on within the scope of pool contracts by several air transport undertakings; in addition, the latter may use on the line, in exceptional cases, a chartered aircraft belonging to another air transport company. Therefore the flag (the indentification markings) of the aircraft used for a certain concrete

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[28] See, e. g., Maurice Lemoine, l. c., Nos 572 and 573, p. p. 399—400.
[29] Rudolf Bystrický, Základy mezinárodního práva soukromého, Orbis, Prague 1958, p. 463.

carriage would also represent a more or less occasional moment from the angle of the legal relations between the carrier and the passengers or the consignors of goods.

It seems, in consequence, that only the law of the state where the contracting carrier has his *principal place of business* might become a reliable criterion in the field of the conflict of laws for the settlement of legal relations between the carrier and the passenger or the consignors of goods, provided that no homogeneous unification would exist in the domain of substantive law. That law would, as a rule, best correspond to a reasonable settlement of the legal relation[30], it is easily ascertainable and stable; it would also be in conformity with Czechoslovak legislation (point 5 of section 46 of Law No 41 [1948], Collection of Laws). The IATA General Conditions of Carriage of Passengers, Baggage and Goods virtually apply this criterion: under these Conditions, the rights ensuing from liability are governed by *lex fori,* but at the same time it is set forth that as for suits arising from contracts of carriage which are not subject to the stipulations of the Warsaw Convention that court is exclusively competent within the jurisdiction of which the principal establishment of the air carrier is situated.

This very brief survey proves how difficult, heterogeneous and disputable the solution of the conflict of laws problems would be in international carriage by air, if the *fundamental* questions were not settled by the unification of the rules of substantive law.

B) WARSAW CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR AND THE HAGUE PROTOCOL (1955)

a) THE HISTORY OF THE ORIGIN OF THE CONVENTION

At the very beginning of the development of international aviation the necessity made itself felt to co-ordinate and to unify the rules governing the contract of carriage and the problems concerning the carrier's liability. After 1918, the national legislations of different countries regulated these questions in different ways, either in the form of special "aviation" laws, or by the analogous application by the courts of the general provisions of civil law to the problems of carriage by air[31].

[30] Bystrický, l. c., p. 302; Schnitzer, Handbuch des internationalen Privatrechts, Basle 1949, Vol. II, p. p. 414 et seqq.

As early as in March 1922, the Consultative and Technical Committee of the League of Nations for Transport and Transit called attention to the danger of the possibility that the development of aviation may be hampered if co-ordination or unification does not take place in the field of "private air law". On November 30, 1923, the International Chamber of Commerce also drew the attention to the necessity to place the civil law régime of international carriage by air on a unified international basis to be analogous to the régime of carriage by rail (Bern Convention CIM and CIV), and recommended to convene to that end an international conference[32].

It was the French government which took the initiative in this field. On August 17, 1923, the then Premier Raymond Poincaré sent notes to the diplomatic representatives accredited in France in which he communicated that the French Parliament was discussing a bill on the air carrier's liability, but that according to the French government's opinion this question could be settled in a systematic way only by means of a broad multilateral convention. He recommended therefore the convocation to Paris of an international conference which would "1. elaborate the text of an international convention relating to the liability of the air carrier, 2. consider the expediency of a further study of the international unification of civil law in the field of the problems of aviation"[33].

The conference was convened after some delay and met on October 26, 1926, in Paris, with the participation of the delegates of 41 countries (the so-called Ist International Conference on Private Air Law). It approved preliminarily a "Draft Convention Relating to the Liability of the Carrier in International Carriage by Air" and decided to constitute a permanent organ — the International Technical Committee of Juridical Air Experts (CITEJA — Comité International Technique d'Experts Juridiques Aériens) — which would continue to work on the problems submitted to the Conference[34]. In 1927 and 1928 CITEJA studied especially the problems relating to the unification of the form and the requirements of the documents of carriage (passenger ticket, luggage ticket, air consignment note), as well as the liability of the carrier. It was decided to join the two questions and to give them priority in drafting international unification.

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[31] For a survey of the legislation and practice of 39 states in the interval between the two World Wars see D. Goedhuis, National Air-Legislations and the Warsaw Convention, The Hague, M. Nijhoff 1937, p. p. 11—119.

[32] H. Couannier, Les éléments créateurs du droit aérien, Paris 1929, p. 62.

[33] Conférence Internationale de Droit Privé Aérien, Impr. Nationale Paris 1926, p. 5.

[34] The said organ elaborated a series of draft conventions in the field of international air law. It ceased to exist only on September 1st, 1947, when its tasks were assumed by the Legal Committee of PICAO — see PICAO Doc. 4629.

Which were the ways of bringing about international unification? Three general forms of proceeding were possible, *viz.:*

1. Unification may be confined to a mere unification of the rules governing the conflicts of laws and to the unification of the provisions relating to the jurisdiction and competence of courts. Thus it is possible to obtain uniform aspects determining which municipal law is to be applied to a concrete case and the court of which state enjoys jurisdiction for settling actions. From the angle of international unification, this solution constitutes the minimum exigency; substantive law is not unified, but unification is carried out only in the field of the criteria of conflicts of laws and of jurisdiction (this form of unification is employed for instance in all the bilateral treaties of judicial co-operation which the Czechoslovak Socialist Republic has concluded with socialist countries).

2. Unification within the most precise meaning of the term may be attained by an international adoption of a uniform regulation of substantive law, which would then be adopted also by the municipal legislations of different states and which would be homogeneously in force in international and national relations. In this form, unification took place only in a few branches, and by far not on a general international scale (e. g. the Geneva Conventions relating to bills of exchange and cheques of 1930 and 1931).

3. Finally, it is possible to stipulate uniform rules governing substantive law, but to restrict the applicability thereof exclusively to the questions of *international* relations, i. e., to relations in the field of civil law which show a certain specific foreign element; such a unification does not at all affect relations which are exclusively national[35]. This form is employed, for instance, by the Bern Railway Conventions CIM and CIV, the SMGS Convention, and the "General Conditions for the Deliveries of Goods between Foreign Trade Corporations of the Member States of the Council of Mutual Economic Assistance" of 1957.

It was decided at the CITEJA sessions in 1927—1928 that a mere unification of the conflict of laws and jurisdictional aspects of the liability of the carrier in international carriage by air would only sanction the then existing lack of unity and lucidity of substantive law. The second possible form — the unification of substantive law rules appeared ideal, provided such unification would be in force both in the international and the national relations. A number of jurists, particularly Italian, adhered to this conception, but it has not been accepted, because serious difficulties would arise in realizing it, since it would require radical

[35] Raphaël Coquoz, Le Droit Privé International Aérien. Exposé systématique et critique, Paris, Les Editions Internationales 1938, p. p. 47 et seqq.

modifications of the municipal laws of certain countries in a number of cases. This way has been declared unfeasible, and there was no hope that it could be adopted on a broad international scale. In consequence, there only remained the third way — that of the unification of the sole problem of *international* carriage by air, without affecting the legislation governing internal transport. This way had effective hope of general acceptance and satisfied the most urgent need — to unify the rules concerning *international* relations, where the lack of unity in the solution of the respective questions gave rise to the gravest difficulties. The CITEJA draft has been conceived in this spirit. It was circulated for comment among those participating in the "Ist International Conference on Private Air Law" and on October 4—12, 1929, the "IInd International Conference on Private Air Law", convened by the Polish government, took place in Warsaw and adopted the *"Convention for the Unification of Certain Rules Relating to International Carriage by Air"* the so-called *Warsaw Convention*[36]. It came into force on February 13, 1933 (in Czechoslovakia on February 15, 1935); in a few years it was ratified by a decisive majority of states over the territories of which international airlines operate and it virtually became the broadest international convention unifying "private" law.

The practical impact of the Warsaw Convention is further extended by the fact that its contents was virtually fully adopted by the "General Conditions of Carriage of Passengers, Baggage and Goods" of the International Air Transport Association (IATA). The different carriers adapted these "General Conditions" which today form the basis of the type contracts (contracts of adhesion) of a decisive majority of the world air carriers. The Warsaw Convention also exerted a marked influence on making the national rules of law which have to a great extent adopted its stipulations in a number of countries, including the Czechoslovak Socialist Republic[37].

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[36] See No 15 (1935) and Law No 243 (1933), Collection of Laws of the Czechoslovak Republic.

[37] As on January 1, 1962, the following states were bound by the Warsaw Convention: Argentina, Australia, Belgium, Brazil, Bulgaria, Burma, Cambodia, Canada, Ceylon, Cyprus, the Czechoslovak Socialist Republik, Denmark, Ethiopia, Finland, France, Ghana, Great Britain, Greece, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Laos, Liberia, Lichtenstein, Luxemburg, the Malayan Federation, Morocco, Mexico, the Netherlands, New Zealand, Nigeria, Norway, Pakistan, the People's Republic of China, the Philippines, Poland, Portugal, Rumania, Salvador, Spain, Sweden, Switzerland, Syria, Tunisia, the Union of South Africa, the U.S.S.R., the U.A.R., the U.S.A., Venezuela, South Vietnam, the Vietnamese People's Democratic Republic, and Yugoslavia. — On September 3, 1955, the government of the German Democratic Republic notified to the Polish government, in its capacity as the depositary of the Warsaw Convention, that it considers the Convention valid for the German Democratic Republic. After the war, the government of the German Federal Republic put the Warsaw Convention into force in the relations with certain states in form of exchange of notes.

The Warsaw Convention is undoubtedly the most important instrument in the field of the unification of the legal régime of international aviation. Its basic stipulations have been conceived so well as to be fully practicable and *on principle* satisfactory at present — more than 30 years after the Warsaw Conference. In the course of time the development of the practice of international air relations as well as the technical development of aviation naturally revealed some deficiencies in the legal régime stipulated by the Warsaw Convention; the need of a revision of its text has arisen, and such a revision was pleaded in the doctrine as well as on the forum of certain international organizations (especially IATA, CITEJA, after the war PICAO, and since 1947 ICAO).

After preparations taking almost seven years, the International Civil Aviation Organization (ICAO) convened to The Hague an international conference on private air law which on September 6—28, 1955 discussed the *Hague Protocol* which amends the Convention for the Unification of Certain Rules Relating to International Carriage by Air[38]. Czechoslovakia took part in the conference and signed the Hague Protocol on September 28, 1955; ratification was carried out on September 23, 1957. The Hague Protocol did not yet come into force; under its article XXII, it shall come into force as soon as thirty signatory states have deposited their instruments of ratification (as on April 1, 1962, it was ratified by 19 countries only). For the time being, the Warsaw Convention continues to be in force in its original version. Not a *new* treaty but merely a protocol amending certain articles of the Warsaw Convention was adopted at the conference of The Hague; this fact testifies to the general recognition of the importance of the Warsaw Convention and to the stability of the régime it provides for.

The Warsaw Convention of 1929 is a treaty for the unification of *certain* rules relating to international carriage by air. In consequence, it does not unify the régime of international carriage in an exhaustive manner and relinquishes many problems to municipal laws to make rules applicable under the provisions governing the conflict of laws. The Warsaw Convention is restricted to two fundamental problems of international carriage by air, *viz.:*

1. It unifies the rules relating to the documents of carriage (passenger ticket, luggage ticket, air consignment note) and sets forth the legal significance thereof, and particularly the bearing of these documents on the question of the carrier's liability;

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[38] For its text see ICAO Doc. 7686-LC/140, Volume II, p. p. 1—13; for the Czech translation see: Národní shromáždění RČS 1957, paper No 145, and Letecký oběžník, No 12 (1960) of August 1, 1960.

2. it lays down a uniform substantive law régime of the liability of the carrier for damage sustained by a passenger and for damage to any registered luggage or to any goods, if the occurrence which caused the damage took place during the carriage by air. At the same time the Convention determines which courts are exclusively competent to settle the actions arising from liability. The most important element of the unification of the carrier's liability is the *limitation* of the said liability to a maxium sum.

There is an intrinsic link between these two problems: the existence of the documents of carriage, delivered in due form and provided with the prescribed requirements is proof of the existence of a contract of carriage of a specific type, namely of the "international carriage by air" within the meaning of the Warsaw Convention; and the existence of such contract is a prerequisite of the application of the stipulations of the Warsaw Convention which govern the liability of the carrier.

Although the Hague Protocol brings rather radical amendments to the rules relating to the documents of carriage, as well as partial amendments to the régime of the liability of the carrier, it does not abolish this basic conception of the Warsaw Convention.

b) THE SCOPE OF THE APPLICATION OF THE WARSAW CONVENTION

The Warsaw Convention stipulates that it applies to all *international carriage* of persons, luggage or goods performed *by aircraft* for *reward.* It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.

The idea of "international carriage" is in more detail specified according to place, personal and objective aspects. International carriage means any carriage 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 carriage or a transhipment, are situated either *within the territories of two Parties to the Warsaw Convention,* or within the territory *of a single Contracting Party,* if there is *an agreed stopping place* within a territory subject to the authority of another Power, even though that Power is not a party to the Convention. A carriage without such an agreed stopping place between two places subject to the authority of the same Contracting Party is not deemed to be international for the purposes of the Warsaw Convention. A carriage to be performed by several successive air carriers is deemed for the purposes of the Convention to be *one undivided* carriage, if it has been regarded by the parties as a single operation, whether it had been agreed

upon under the form of a single contract or of a series of contracts, and it does not lose its international character because one or a series of contracts is to be performed entirely within a territory subject to the authority of the same Contracting Party (article 1 of the the Warsaw Convention).

The conditions of the application of the régime of liability under the Warsaw Convention may in consequence be enumerated as follows:

1. Carriage must be "international carriage" within the meaning of the Warsaw Convention, i. e. also *according to the contract made by the parties.* In consequence, the existence of contract of carriage is presumed and, within the framework of such contract, the existence of a consent of the parties as to the places of departure and those of destination as well as to the stopping places, giving the carriage the nature of "international carriage".

The criterion for setting the character of „international carriage" under the Warsaw Convention are the place of departure and that of destination, as determined by the *agreement* of the parties to the contract of carriage. A mere flight over foreign territory without landing there does not transform concrete carriage to "international carriage" within the meaning of the Convention, if landing later takes place within the territory of the same state where the aircraft took off, or within the territory of a third state which is not party to the Warsaw Convention.

For instance: On the route Prague-Tirana, the aircraft flies over the territories of Hungary and Yugoslavia which are bound by the Warsaw Convention. By a direct flight without a stop-over the given flight does not assume the character of "international carriage" under the Warsaw Convention, because Albania is not a contracting party to the Convention. Analogously, a flight from Eastern to Western Pakistan would not be governed by the Convention, provided there is no landing within Indian territory.

To assume the character of "international carriage" of a certain transport no *real* flight across the border is necessary; the respective *contractual intention* is sufficient. Thus even a flight which unexpextedly ended (e. g. by an emergency landing or a crash) within the territory of the state where the aircraft had taken off, may fall under the concept of "international carriage" under the Warsaw Convention. On the contrary, a real flight over a foreign territory or a landing there are naturally irrelevant, provided they were occasioned by a deviation from the envisaged course (because of weather conditions, the technical condition of the aircraft, etc.), since a landing *agreed upon by the parties* is not concerned.

Certain doubt may arise when a passenger buys a return or a round ticket where the place of departure and that of the *final* destination are identical, and a stopping place or several stopping places are stipulated in countries which are not parties to the Warsaw Convention. The question may be raised whether a return ticket represents a *single carriage* or *two independent operations* with separate places of departure and of destination.

A British court considered in a concrete case the question whether a carriage performed upon the basis of a return ticket London-Antwerp — Antwerp-London is governed by the stipulations of the Warsaw Convention. At the material time Belgium was not party to the Warsaw Convention. The decisions taken by the two instances were that in the given case London was the place of departure as well as the place of destination, and that Antwerp was merely an agreed stopping place which gives to the respective contract of carriage the character of "international carriage"; a single contract is concerned, and the stipulation of the Warsaw Convention should be applied[39].

2. The Warsaw Convention may be applied only in case of "international carriage" within the above mentioned sense, provided carriage *by air* is concerned, e. g., if the carrier cancels the flight due to weather conditions or for technical or other reasons, and if he procures a substitute carriage by other means of transport (a train, a bus) for the passengers, such as admissible, e. g., under section 17 (4), Air Carriage Regulations (Public Notification No 31 [1960], Collection of Laws), the provisions of the Warsaw Convention are not applicable to such carriage.

3. The Warsaw Convention may be applied only if the contract of carriage, made for an „international carriage", provides for a *reward.* If gratuitous carriage is concerned, it must be performed by an air transport undertaking. At first sight, this provision is not at all obscure. A certain difficulty arises, however, when article 1 of the Warsaw Convention is interpreted, since it speaks of the carriage of *"persons"* and does not use the term "passengers". The concept of "person" is juridically absolutely undue. A stowaway also may be a "person" carried gratuitously by an air transport undertaking. A "stowaway" is obviously transported without any contractual relation with the carrier, and the provisions of the Warsaw Convention cannot be applied to such a "carriage". But should in such a case the carrier be deprived of the advantages offered him by the Convention particularly by the global limitation

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[39] See Grein v. Imperial Airways Ltd., decision of King's Bench Division of October 23, 1935, and decision of the Court of Appeal of July 13, 1936; quoted according to Conférence de la Haye, Septembre 1955, Document No 36 — Convention de Varsovie — Jurisprudence, p. p. 15 *et seqq.*

of the extent of liability? Should a stowaway enjoy a better position (right to damages without limitation) than regular passengers? Such a case has happened several times in practice, and literature recommends different solutions[40]. It seems that a satisfactory solution might result from the consideration that there is no contractual relation between the carrier and the stowaway, such a relation from which an obligation of the carrier would arise to take all the measures necessary to prevent damage; the carrier can only be liable *"ex delicto"*, and it is necessary to prove his fault and this often proved difficult in case of air accidents.

In an aircraft performing "international carriage" there may be other persons who gratuitously take part in this transport. First of all are the carrier's personnel who are on duty in the respective aircraft (the pilots, the navigator, the radio operator, the steward) are concerned. The stipulations of the Warsaw Convention are notionally inapplicable to these persons. Their relation to the carrier is based on a contract for employment and not on a contract of carriage. The situation is different in case of those employees of the carrier who are travelling on board the aircraft and are not members of the crew of the respective airplane, be it on a service trip for the carrier to another town or privately (the carriers associated in IATA sometimes offer reciprocally to their emploees and the members of their families free tickets even for private trips); the provisions of the Warsaw Convention should undoubtedly be applied to employees travelling privately, because gratuitous carriage performed by an air transport undertaking is concerned; but if the employee makes a service trip for the carrier (e. g. for commercial negotiations abroad) the situation is to some extent testable. Hower, in literature the opinion prevails that in such a case the employees should be equal to other passengers, even if they travel gratuitously; a high percentage of other persons using carriage by air also travel on service trips for their employers, and there is no reason for the stipulations of the Warsaw Convention to be applied to one category and not to the other[41]. The employment relationship with the carrier does not exlude the conclusion between the same subjects of a contract of carriage, be it for reward or gratuitously.

The Warsaw Convention *does however not apply:*

1. To carriage performed under the terms of any international postal

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[40] Riese proposes to apply *"exceptio doli"* against such claims; see Luftrecht, p. 407. H. Drion recommends to construe in each case contributory fault attributable to the "stowaway" and to limit liability; see Limitation of Liabilities in International Air Law, the Hague, M. Nijhoff 1954, p. 55, note 51.

[41] An extensive summary of these problems is offered by J. H. K. Müller, Die Haftung des Luftfrachtführers bei Dienst- und Freiflügen seiner Arbeitnehmer, Zeitschrift für Luftrecht und Weltraumrechtsfragen, 1 (1960), p. p. 41—58.

convention (art. 2 [2] of the Warsaw Convention; the wording of the Hague Protocol runs as follows: "to carriage of mail and postal packages"). The Universal Postal Convention of 1952 stipulates its own general conditions applicable to international postal traffic. At the time of the drafting of the Warsaw Convention, the London Postal Convention of 1929 was already in force, and at the time of The Hague Conference, the Universal Postal Convention of 1952 was already in operation. It had therefore no practical sense to embody these questions in the Warsaw Convention or in the Hague Protocol[42];

2. to international carriage by air performed as experimental *trial* operation by air transport undertakings with a view to the establishment of regular air lines, or to carriage performed under extraordinary circumstances outside the normal scope of an air carrier's business (art. 34). This article has been deleted in the Hague Protocol and replaced by quite a different conception, *viz.:* under the new wording, only due documents of carriage shall not be required in the case of carriage performed under extraordinary circumstances outside the normal scope of an air carrier's business. However, the Warsaw Convention shall apply to such carriage as well.

In 1929, when the Warsaw Convention was being drafted even trial flights performed with the aim of inaugurating new air routes were a source of a great risk, especially due to more difficult navigation and insufficient ground control. The Convention therefore refused the carrier the advantages offered by its régime of liability. In the present technical situation, airlines of some air transport company land in all places of importance in the world. If another company starts operation on the same route, it is not exposed to unknown risks, and there is no reason why the régime of the Convention should not in future be applicable even to these trial flights.

A trend to consider these questions in a more liberal way already makes itself felt in the administration of justice: on May 6, 1950, a Brussels court of first instance in the case Fischer & Co. v. SABENA decided that the first flight of a SABENA aircraft over the Atlantic Ocean, performed on September 17, 1946, cannot fall under trial flights with the view to the inauguration of a new line within the meaning of art. 34. The court held that there was a very intensive carriage by air on the transatlantic line in 1939—1945, and that at the material time five important air transport companies were already operating scheduled flights. Handbooks for pilots were even published for these lines[43].

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[42] Cf. D. Goedhuis, l. c., p. 139.
[43] Quoted according Doc. No 36, Conférence de la Haye 1955, p. 27.

Not even long flights over deserts, oceans or polar regions cause great risks in the present state of technology. As soon as the Hague Protocol comes into force, only a certain reflex of art. 34 of the Warsaw Convention will survive: if a carrier performs flights under singularly extraordinary circumstances (e. g. rescue work in case of natural disasters, the deliveries of medicaments and foodstuffs into stricken areas), he is on the contrary fully protected by the advantages of the régime of the Warsaw Convention and in addition he is not obliged to deliver due documents of carriage; in any other cases the carrier who lacks these documents is liable to considerable sanctions: the impossibility of invoking the bulk limitation of the extent of liability.

c) THE DOCUMENTS OF CARRIAGE UNDER THE WARSAW CONVENTION AND THEIR RELATION TO THE RÉGIME OF LIABILITY

The Warsaw Convention unifies the form and the requirements of the basic documents of carriage, *viz.:* the passenger ticket, the luggage ticket (the so-called baggage check), and the air consignment note; the Convention brings their requirements in connection with the régime of the liability of the carrier.

1. For the carriage of passengers the carrier must deliver a *passenger ticket* (letenka, billet de passage, Flugschein, proyezdnoy bilet). The Warsaw Convention does not juridically qualify this document. It does not lay down whether the passenger ticket shall be delivered to a named person and, therefore, be untransferable, or whether it shall be a bearer document, whether it shall have the character of securities, etc. The detailed provisions governing the nature of the passenger ticket are contained in the IATA General Conditions, and the General Conditions of Carriage of Passengers, Baggage and Goods, employed by most carriers by air and based upon the IATA General Conditions.

The Warsaw Convention sets forth that the passenger ticket *must* contain the following particulars (art. 3):

a) the place and date of issue;

b) the place of departure and of destination;

c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, but such an alteration shall not have the effect of depriving the carriage of its international character;

d) the name and address of the carrier or carriers;

e) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.

It follows therefrom that the Warsaw Convention strictly sets a number of formal requirements to the passenger ticket. But the latter is not a valuable security. It is only a title, an instrument of proof; it verifies the conclusion of a contract of carriage which has specific requirements and is subject to the régime of liability established by the Warsaw Convention. The absence, irregularity or loss of the passenger ticket do not affect the existence or the validity of the contract of carriage which — provided it falls under the category of "international carriage" — continues to be governed by the rules of the Warsaw Convention. This provision is rather peculiar: even if passenger ticket lacked the statement that the carriage concerned is subject to the régime of liability under the Warsaw Convention which limits the carrier's liability, the stipulations of the Convention would nevertheless be applicable! But if the carrier accepts a passenger *without a passenger ticket having been delivered at all,* the rules relating to liability established by the Warsaw Convention shall be applicable, but the carrier *shall not be entitled to avail himself of those provisions of the Convention which exlude (!) or limit his liability* (art. 3 [2] of the Warsaw Convention).

The Hague Protocol brings rather radical amedments to the provisions relating to the requirements of the passenger ticket and will — after it will have entered into force — eliminate excessive formalism. It sets only those requirements which are absolutely indispensable for the ascertainment that the respective carriage is "international carriage" within the meaning of the Warsaw Convention. The Hague Protocol imposes on the carrier the duty to deliver a passenger ticket containing:

a) an indication of the places of departure and of destination;

b) if the places of departure and destination are within the territory of a single Contracting Party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place;

c) a notice to the effect that if the passenger's journey involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss or of damage to baggage. This notice is intended to draw the passengers' attention to the bulk limitation of the carrier's liability and induce them to consider whether they should not conclude their proper individual insurance (in most

world airports it is possible to effect such insurance easily and at a very low cost by throwing a few coins into a slot-machine).

The Hague Protocol explicitly qualifies the juridical character of the passenger ticket: it shall constitute *prima facie* evidence of the conclusion and conditions of the contract of carriage. The Hague Protocol also abolishes the above-quoted odd stipulation of the Warsaw Convention and provides that if, with the consent of the carrier, the passenger embarks without a passenger ticket having been delivered, or *if the ticket does not include a notice to the effect that the régime of the Warsaw Convention may be applicable to the respective carriage,* the carrier shall not be entitled to avail himself of the provisions limiting his liability (but not *excluding* the liability as well; under the existing terms of the Warsaw Convention, the carrier is in such a case not even entitled to avail himself of those circumstances which *completely exclude* his liability, e. g. of the own fault of the damaged person or of the fault of a third person, etc.; this is obviously contradictory).

The impulse to this revision of the text of the Warsaw Convention has been given by a series of difficulties which arose in hearing cases particularly in courts in the United States and in Great Britain.

On January 20, 1956, for instance, the High Court of Justice, Queen's Bench Division, was hearing the case Preston v. Hunting Air Transport Ltd. Damages were claimed by children whose mother was killed on February 16, 1952, when an aircraft of the defendant company crashed in Sicily. She was travelling from London to Nairobi (Kenya juridically was a territory of the same Contracting Party to the Warsaw Convention — namely Great Britain — as the place of departure), with stopping places in Nice, Malta and Entebbe. The plaintiffs were claiming that the passenger ticket did not contain stopping places within other territories and that in consequence it did not conform to the requirements under art. 3 of the Warsaw Convention. They therefore claimed damages which would not be restricted by the limitations of the Warsaw Convention. The court rightly referred to that provision of the Warsaw Convention (art. 3 [2]) under which the irregularity of the passenger ticket does not affect the validity of the contract of carriage or the applicability of the rules of the Convention. Only if no passenger ticket at all were delivered, would the plaintiffs be entitled to claim damages without the bulk limitation of the amount[44].

A case which was objectively completely analogous was heard in the American District Court for the Southern District of New York, on

[44] Quoted according to "IATA, Reports on Air Carriers' Liability", No 31.

December 21, 1950 (the case Grey *et al.* v. American Airlines, Inc.), which rendered the same decision[45].

Another case the facts of which were more complicated (Jane Froman v. Pan-American Airways, Inc.) was heard in the Supreme Court of New York County on February 2, 1948, and in the New York State Court of Appeals on April 4, 1949. The plaintiff signed a contract with an American company to perform on European theatrical stages for U.S. military units. Up to the last moment she did not know where she was travelling and which means of transport she would use. When she was embarking the plane, a representative of the company with which she had signed the contract gave her the passport and a passenger ticket of the PAA. The aircraft crashed in Lisbon, and the plaintiff was seriously injured. She claimed damages exceeding the limitations of the Warsaw Convention and pleaded that she had not been informed of the conditions of the contract of carriage, that the carrier had not delivered her the passenger ticket himself and that before departure she had not been aware of the condition contained in the passenger ticket to the effect that the liability of the carrier may be limited under the Warsaw Convention. The courts of the two instances refused the plaintiff's claims as far as they exceed the limitations of the Warsaw Convention and held that the Warsaw Convention does not require that the ticket containing a due notice relating to the conditions of the contract of carriage and the possibility of the limitation of the carrier's liability be delivered into the passengers's hand directly and in person. The representative of the company for which the plaintiff was to work had concluded on her behalf the contract of carriage to Europe with the carrier. The courts decided that the representative of the company had been tacitly authorized by the plaintiff to conclude the contract under the conditions of the Warsaw Convention[46].

2. For the carriage of luggage, other than small personal objects of which the passenger takes charge himself during the flight, the carrier must deliver a *luggage ticket* or *baggage check* (průvodka pro zavazadla, bulletin de bagages, Fluggepäckschein, bagazhnaya kvitantsiya).

The Warsaw Convention itself does not define the term luggage or what is the difference between luggage and "goods" transported under an air consignment note. The differencies are defined by the IATA General Conditions and the General Conditions of Carriage of Passengers, Baggage nad Goods, applied by respective carriers and based upon the IATA General Conditions. As a rule (insofar as it is practicable for the

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45 See (1950) United States Aviation Reports 507.

46 Quoted according to "Conférence de La Haye, Doc. No 36, Convention de Varsovie, Jurisprudence", p. p. 22 *et seqq.*

carrier), luggage is transported in the same aircraft as the passenger. Under the IATA Conditions, the carriers grant to the passengers gratuitous carriage of luggage not exceeding a certain weight (the so-called free weight allowance which generally amounts to 30 kgs for passengers in the first class and 20 kgs. for those in the tourist or economy class); as a rule passengers pay a special charge for excess luggage (mostly 1 per cent of a simple passenger ticket for the respective line per 1 kg. of weight). The carriage of *goods* is on the contrary performed under a special and considerably cheaper tariff and often by special freighters.

In the practice of the carriers, the passenger ticket and the luggage ticket are mostly joined in a single document (passenger ticket and baggage check). The Warsaw Convention sets that the carrier is bound to make out the luggage ticket in duplicate, one part for the passenger and the other for the carrier.

The luggage ticket shall contain the following particulars (art. 4 of the Warsaw Convention):

a) the place and date of issue;
b) the place of departure and the place of destination;
c) the name and address of the carrier or carriers;
d) the number of the passenger ticket;
e) a statement that delivery of the luggage will be made to the bearer of the luggage ticket;
f) the number and weight of the packages;
g) the value declared (this, however, obliges the passenger to pay a supplementary sum according to the tariff);
h) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.

The absence, irregularity or loss of the luggage ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to the rules of the Warsaw Convention. Nevertheless, if the carrier accepts luggage without a luggage ticket having been delivered, or *if the luggage ticket does not contain the particulars set out at (d), (f) and (h) above*, the carrier shall not be entitled to avail himself of those provisions of the Warsaw Convention which exclude or limit his liability (paragraph 4 of article 4). Contrary to the passenger ticket the requirements of the luggage ticket are conceived more rigorously, but in a more logical way. The carrier is deprived of the advantages of the rules relating to liability under the Warsaw Convention not only if he does not deliver the luggage ticket at all (such as in case of the passenger ticket), but also if the luggage ticket lacks the following important requirements: *the number of the passenger ticket* which

refers to a certain contract of carriage offering the possibility of judging whether "international carriage" within the meaning of the Warsaw Convention is concerned, the data of the *number* and *weight* of the packages in default of which the claims arising from liability under the Warsaw Convention cannot be settled, and finally *a statement that the carriage is subject to the rules established by the Warsaw Convention.* From the juridical point of view the consent of the passenger to the said statement must be regarded as a choice of law, i. e. of the régime of the Warsaw Convention, this choice being made by the parties to the contract of carriage.

The provision of the Hague Protocol of 1955 already takes into account the fact that it is the practice of the carriers that the baggage check is usually combined with or directly incorporated in the passenger ticket and that the practice of the carriage by air distinguishes *registered baggage* (i. e. luggage of which the carrier was put in charge in the course of the flight) from *unregistered baggage* (i. e. luggage which the passenger takes charge of by himself during the flight).

As soon as The Hague Protocol comes into force it will bring about an amendment simplifying the requirements of the baggage check, *viz.:* in respect of the carriage of *registered* baggage, the carrier shall deliver a baggage check which (unless combined with or incorporated in a passenger ticket which complies with art. 3 of the Warsaw Convention), shall contain:

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single Contracting Party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place;

c) a notice to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or of damage to baggage. Here too, by analogy to the passenger ticket, this notice is intended for the passenger to consider whether or not he should conclude individual insurance in case the value of his luggage exceeds the sum to be paid to him by the carrier under the rules relating to liability established by the Warsaw Convention.

The Hague Protocol explicitly qualifies the legal nature of the baggage check: the latter shall constitute *prima facie* evidence of the registration of the baggage and of the conditions of the contract of carriage. In

consequence it is not a valuable security, and does not embody the right to dispose of the luggage — it is only a qualified title.

Under the Hague Protocol the absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall none the less be subject to the rules and régime of the Warsaw Convention. The carrier is not entitled to avail himself of the limitation of his liability under the Warsaw Convention only in case he takes charge of the baggage without a baggage check having been delivered or if the baggage check does not include the notice to the effect that it may be possible to limit liability in view of the applicability of the Warsaw Convention to the respective carriage.

There is not a single case in the practice of the courts the subject-matter of which would consist in the luggage ticket[47].

3. The third document of international carriage by air is the *air consignment note* (letecký nákladní list, lettre de transport aérien, Luftfrachtbrief, vozdushnoperevozochny dokument). The Warsaw Convention devotes its articles 5—16 to the air consignment note. Most of them deal, however, with the unification of rules of substantive law relating to the mutual rights and duties of the consignor of goods, the carrier and the consignee of goods. Only some of the respective stipulations directly concern the character and the requirements of the air consignment note and its consequences for the rules governing the carrier's liability in international carriage by air.

By analogy to the carriage by rail, the air consignment note is made out by the consignor of the goods and every carrier of goods has the right to require the consignor to make out and hand over to him the said document; every consignor of goods has the right to require of the carrier that he accepts this document. Analogous provisions are also to be found in national laws; e. g., under section 475 of the Czechoslovak Civil Code the carrier is entitled to require that the consignor delivers him a written confirmation of the order of transportation (consignment note). The consignment note is in its nature but an evidence of the conclusion of the contract of carriage and not a valuable security.

Under art. 8 of the Warsaw Convention, the air consignment note shall contain the following particulars:

a) the place and date of the execution of the air consignment note;

b) the place of departure and of destination;

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[47] Cf. the survey of the cases concerning the Warsaw Convention for 1929—1955, quotation in note 43 above.

c) the agreed stopping places, provided the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises this right the alteration shall not have the effect of depriving the carriage of its international character;

d) the name and address of the consignor;

e) the name and address of the first carrier;

f) the name and address of the consignee, if the case so requires;

g) the nature of the goods;

h) the number of the packages, the method of packing and the particular marks or numbers upon them;

i) the weight, the quantity and the volume or dimensions of the goods;

j) the apparent condition of the goods and of the packing;

k) the freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;

l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

m) the amount of the declared value of the goods;

n) the number of parts of the air consignment note;

o) the documents handed to the carrier to accompany the air consignment note;

p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;

q) a statement that the carriage is subject to the rules relating to liability established by the Warsaw Convention.

If the carrier accepts goods without an air consignment note having been made out or if the air consignment note does not contain all the particulars set out in paragraphs a) to i) inclusive and q), the carrier shall not be entitled to avail himself of the provisions of the Warsaw Convention which exclude or limit his liability.

It is a special feature of the carriage of goods that *the consignor* is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note. He will be liable for all damage suffered by the carrier or another person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements. This provision relating to the *consignor's* liability for the particulars contained in the air consignment note is based upon the fact that the nature or condition of the goods may frequently bring about greater risk in carriage by air and cause damage to the carrier or other persons.

The stipulations of the Warsaw Convention relating to the air consignment note and its requirements are unnecessarily encumbered by technical details which are irrelevant for the régime of liability established by the Warsaw Convention. The Hague Protocol of 1955 will considerably simplify this problem, what corresponds to practical needs. Under the said Protocol it will only be necessary to include three requirements in the air waybill, *viz.:*

a) an indication of the places of departure and destination;

b) if the places of departure and destination are within the territory of a single Contracting Party to the Warsaw Convention, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place;

c) a notice to the consignor to the effect that, if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or of damage to cargo. (Article VI of the Hague Protocol.)

The Hague Protocol also conceives with much less rigour the consequences which the contents of the waybill have for the régime of the carrier's liability, namely: only if, with the consent of the carrier, cargo is loaded on board the aircraft without an air waybill having been made out, or if the waybill does not include the notice relating to the applicability of the Warsaw Convention and of its régime of the limitation of the carrier's liability, the carrier shall not be entitled to avail himself of the provisions of the Warsaw Convention.

For a number of years it was the practice of the courts to apply in principle this more moderate conception of the interpretation of the rigorously demanded requirements of the air consignment note and of the consequences of these requirements of the air consignment note and of the consequences of these requirements for the régime of liability. Let us quote for instance the decision of the Supreme Court of New York County of June 21, 1954, rendered in the case American Smelting and Refining Corp. v. Phillipine Airlines Inc., *viz.:*

The plaintiff arranged with the defendant carrier for the transportation of cargo from Oakland, California, to Hong-Kong. The air consignment note omitted the indication of the stopping places which is one of the rigorously demanded requirements in default of which the carrier is deprived of the right to avail himself of the limitation of liability under the Warsaw Convention. The aircraft crashed, the cargo was destroyed and the plaintiff claimed damages exceeding the limits set forth by

the Warsaw Convention. The court declined this claim and held that the international character of the contract of carriage was evident from the indication of the place of departure (Oakland) and that of destination (Hong-Kong); it must have been clear to the plaintiff and it results from a sensible interpretation of the arrangement of the parties, that, if such a distance (13,000 kms.) is concerned, the aircraft *must* have stopping places for technical reasons — refuelling. The court added an interesting argumentation: when dispatching the cargo, the plaintiff explicitly communicated to the defendant that he did not want to insure the goods; should the defendant bear the same risks as the insurance company, although he gets only the normal freight and not the insurance premium? The carrier is not an insurer [48].

An analogous decision was rendered, on October 3, 1949, by the Supreme Court of New York County in re Kraus v. KLM. In this case, too, about the "international" character in view of the fact that the places but referred to the carrier's schedule for the respective line. The court regarded this reference as sufficient proof of the fact that the stopping places had been agreed upon by the parties although they were not expressly contained in the air waybill. In addition, there were no doubts about the „international" character in view of the fact that the places of departure and of destination had been clearly fixed[49].

The air consignment note within the meaning of the Warsaw Convention is a mere instrument of proof; it is *prima facie* evidence of the conclusion of the contract of carriage by air, of the receipt of the goods by the carrier and of the conditions of carriage. The air consignment note is not a negotiable instrument (a "carriage note" within the meaning of section 476, Civil Code); in consequence, it is not "negotiable", such as, e. g., the bill of lading in carriage by sea.

In theory (and much more in theory than in practice!) the opinion was pleaded that in the carriage by air the consignment note should also have the nature of a carriage note, the character of a valuable security, and that it should be transferable ("negotiable"). The Warsaw Convention does not explicitly solve this question. In its article IX, the Hague Protocol of 1955 adds to article 15 of the Warsaw Convention the following provision: "Nothing in this Convention prevents the issue of a negotiable air waybill."

The Final Act of the Hague Conference[50] returns to this problem in declaring in its Resolution A that nothing in the text of the Warsaw Convention (i. e. prior to the Hague revision), prevents the issue of

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[48] Quoted accoring to Doc. 36, Conférence de la Haye 1955, p. p. 37 *et seqq.*
[49] *Ibid.*, p. p. 38 and 39.
[50] See ICAO Doc. 7687-LC/140, Vol. II Documents, p. p. 19—35.

a transferable air waybill and that article IX of the Hague Protocol has been adopted *for the purpose of clarity only*. Consequently, the concrete settlement is left to national legislation[51].

Excessive attention was paid by the legal Committee of ICAO and at the Hague Conference to questions of the transferability of the air consignment note. The International Chamber of Commerce, at its 1955 session in Madrid, also expressed the demand of laying down the transferability of the consignment note in carriage by air[52]. However, this question does not seem to be of much practical value from the angle of international commercial relations. The air carriage of goods is so speedy that he carriage note (the "air bill of lading"(may hardly become a subject of business prior to the goods themselves. As a rule, the goods arrive in the place of destination simultaneously with the air consignment note.

At the end of this part on the documents of carriage under the Warsaw Convention and the Hague Protocol it is necessary to stress once more the close connection of the documents of carriage and the entire régime of liability established by the Warsaw Convention. The documents of carriage and their requirements constitute a proof of the existence of a contract of carriage by air of a certain type (with certain foreign elements) as concluded between the carrier and the passengers or the consignors of goods, and are of decisive importance for the ascertainment of whether or not the Warsaw Convention is applicable to the respective carriage.

d) THE LIABILITY OF THE CARRIER AS ESTABLISHED BY THE WARSAW CONVENTION

The following three main principles may characterize the legal regulation of the carrier's civil liability for damage sustained by the passengers and for damage caused to registered luggage or goods in international carriage by air in such a manner as this liability has been unified by the Warsaw Convention (including the Hague Protocol):

1) The liability of the carrier is *limited to fixed maximum sums:*

2) the liability of the carrier is based upon *fault;*

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[51] It is possible, by means of this argument to argue with the opinion of R. Heřman, L. L. D. ("Air Carriage Regulations", Letecký obzor, No 12 [1960], note on p. 377) according to whom Air Carriage Regulations (Public Notification No 31 [1960], Collection of Laws) have not been able to lay down a transferable air consignment note as the Hague Protocol has so far not yet come into force internationally.

[52] See B. Lempérier, La resposabilité du transporteur aérien, Revue Générale de l'Air, No 1 (1956), p. p. 3—16, on p. 15.

3) *the presumption of the fault of the carrier is set down* — in consequence, the burden of proof rests on the carrier.

Before analysing each of these principles, it should be emphasized that this régime of the carrier's liability is of *imperative character* and that the parties to the contract for carriage may not elude the rules of the Warsaw Convention under sanction of nullity. Under art. 23 of the Warsaw Convention, any provision tending to relieve the carrier of liability or to fix a lower limit of liability than that which is laid down in the Warsaw Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract of carriage which shall remain subject to the provisions of the Warsaw Convention. Similarly under art. 32 of the Warsaw Convention, any clause 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 the Warsaw Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void.

Consequently, the provisions of the Warsaw Convention which unify the rules of substantive law relating to the liability of the carrier are strictly imperative, and no agreement concluded by the parties and no choice of law can be in derogation of their force.

1. The limitation of the extent of the carrier's liability

a) The rules of the Warsaw Convention

The principle of the limitation of the extent of the liability of the carrier in international carrige by air is generally considered to be the leading principle of the rules relating to carriage by air[53]. In its art. 22. the Warsaw Convention sets the limitation of the carrier's liability separately in respect of the passengers, in respect of registered luggage and of goods, and in respect of objects of which the passenger takes charge himself (unregistered luggage).

The liability of the carrier for each passenger is limited to the sum of 125 000 francs[54]. Where, in accordance with the *lex fori* of the court seised of the case, damage may be awarded in the form of periodical payments, the equivalent of the capital value of the said payments shall

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[53] Cf. e. g. H. Drion, l. c., p. 1.

[54] Under paragraph 4 of art. 22 of the Convention, francs shall be deemed to be gold French francs (the so-called Poincaré francs) the value of which is equal to 65½ milligrams gold of millesimal fineness 900. They may be converted into any national currency in round figures; 125 000 francs equal, according to the present rate of exchange, to the sum of roughly U. S. $ 8,291.87 or Kčs 59,750.

not exceed this limit. Nevertheless, by special contract the carrier and the passenger may agree to a higher limit of liability.

In the carriage of registered luggage and of goods the liability of the carrier is limited to the sum of 250 francs[55] 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 value, unless he proves that that sum is greater than the actual value to the consignor at delivery.

As regards objects of which the passenger takes charge himself (unregistered luggage and those objects which the passenger carries with and on him) the liability of the carrier is limited to the fixed sum of 5 000 francs[56] per passenger.

The said amounts represent the *maximum* extent of the liability of the carrier. In consequence, they are not lump sums which the carrier would be liable to pay in each case of the death or wounding of a passenger or any other bodily injury suffered by a passenger, or in the event of the destruction or loss of or of damage to luggage or goods. The damaged person must in any case prove that he has suffered damage equal to or exceeding the fixed maximum sum. If damage amounts to less than this sum, real damage only is compensated to him.

The Hague Protocol of 1955 which amends the Warsaw Convention will rather radically modify the rules governing the liability of the carrier. It was the limitation of the liability of the carrier which was the central problem of the revision of the Convention at the Hague Conference. These questions will be dealt with later.

b) The reason for the limitation of the extent of liability

The fundamental question is raised when the régime of the liability of the carrier as established by the Warsaw Convention is studied, namely: why is the liability of the carrier *limited* to fixed maximum sums? It is, in fact, a general legal principle proper to all national systems of civil law that causing damage (whether arising from an infringement of an obligation *(ex contractu)* or from the violation of another legal duty *(ex delicto sive quasi-delicto)* brings about the liability for damages by restoring the previous state or in the form of a pecuniary compensation. Not only *actually sustained* damage is compensated, but as a rule

[55] Roughly 119,50 Kčs, according to the present rate of exchange.
[56] I. e. roughly Kčs 2,388.

also *what the injured person has lost (damnum emergens* and *lucrum cessans* — see e. g. section 354, Civil Code). The fact that the liability of the carrier is limited, as far as the extent of damages is concerned is, in fact, an essential departure from the current rules of civil law relating to damages. How should this departure be justified?

A series of opinions appeared in theory which tried to solve this question. All theoretical justifications are lucidly and critically summarized by H. Drion[57], who offers a total of eight possible solutions, *viz.:*

I. *the analogy to maritime law* which also knows a bulk limitation of the liability of the carrier. The Brussels Convention of 1924 Relating to the Unification of Certain Rules Concerning the Bills of Lading (the so-called *Hague Rules),* for instance, limits in art. 4 (5) and in art. 9 the liability of the carrier for each lost piece or unit of the cargo to the sum of 100 pound sterling in gold. This principle is also adopted by Czechoslovak law in the Public Notification No 160 (1956), Official Gazette, Relating to the Conditions of the Carriage of Cargo by Sea; in section 6 (4) the extent of the liability of the carrier is limited to 2.000 Kčs for each lost or damaged piece or other usual transport unit of the cargo[58]. This argumentation naturally explains nothing; it only refers to the fact that the limitation of the extent of liability also exists in the law governing carriage by sea, but it does not elucidate the substance or the reasons;

2. *assistance granted to an emerging weak industrial branch.* This argumentation was brought forward in CITEJA already before the Warsaw Conference. According to this theory the limitation of the carrier's liability is to be a financial aid and support to the development of carriage by air as such development would be hampered financially in case of unlimited liability. This theory can evidently be refuted in referring, for instance, to U.S. legislation which does not lay down any limitation of the carrier's liability in national transports, and in spite of this carriage by air is one of the most lucrative branches of U. S. capitalist undertaking;

3. *the accident risk should be shared so as not to be taken by the air carrier only.* — This theory is unacceptable, too. There is a number of branches in economic life which bring benefit to society and at the same

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[57] Op. cit. Limitation of Liabilities in International Air Law, M. Nijhoff, The Hague 1954, p. p. 12—44; see also Report on the Warsaw Convention as Amended by the Hague Protocol, Journal of Air Law and Commerce, Vol. 26 (1959), No 3, p. p. 255—268.

[58] Cf. Dr F. Hanák, Odpovědnost námořního dopravce v právu československém a v právu mezinárodním, Studie z mezinárodního práva III, Prague, Publishing House of the Czechoslovak Academy of Sciences 1957, p. p. 201—247, and particulary p. 241. But the author does not analyse the reasons of the limitation of liability.

time give rise to a certain potential danger for society (railways, gasworks). Everybody who undertakes in a certain branch is bound to run the risks which come into being by the operation of the respective branch and he cannot shift such risks to possible victims;

4. *the limitation of liability to a fixed sum enables the carrier to insure his liability reliably.* — Although *Drion* refuses this theory[59] a certain justification of the limitation of the carrier's liability to fixed sums can, according to our opinion, be found there from the economic point of view. The insurance of liability incontestably has its place in the total costs of carriage by air. The insurance of a limited risk would evidently require high insurance premium which might make carriage by air considerably more expensive and hamper its development;

5 *the limitation of the carrier's liability also enables the passengers or the consignors of goods to effectively insure the risks to which they themselves are exposed.* — It is necessary to proceed from the idea that the carrier is not an insurer. When the liability of the carrier is limited to fixed sums those who use the carriage by air are able to calculate in a realistic way the difference between the sum which the carrier would eventually be bound to pay them and real damage they may sustain. They can insure this difference. When the risks are calculable, a fixed sum insurance is generally not expensive. The insurance premium is said to come to less than the refreshment the passenger gets on board an aircraft[60];

6. *the limitation of the carrier's liability countervails the intensified system of liability to which the carrier is subject.* — One of the chief principles of the Warsaw Convention régime is the presumption of the carrier's fault. It will be shown later how difficult it is for the carrier to be discharged. In consequence, this theory is principally based on the argument *quid pro quo.* This argumentation is however not conclusive; in a number of countries national legislation — analogously to the Czechoslovak Law No 63 (1951), Collection of Laws — lays down not only the presumption of the carrier's fault but even the liability for the result — an objective (absolute) liability. Under such a régime the carrier may be discharged only if he proves the fault of the injured person or if he proves that it was impossible to prevent damage *(vis major)*[61]. This extraordiarily rigorous régime of objective liabiliy is not "outweighed" by any limitation of the extent of liability;

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[59] L. c., p. 21.

[60] G. W. Orr, The Rio Revision of the Warsaw Convention, Journal of Air Law and Commerce, Vol. 12 (1954), p. p. 39—49 and 174—181; see p. 49.

[61] See, e. g., section 4 of the Law No 63 (1951), Collection of Laws.

7. *The limitation of the carrier's liability will restrict lawsuits and will facilitate a speedy settlement.* — In practice, this argumentation undoubtedly proves fully justified. Under the system of the limitation of the extent of liability most claims are settled extrajudicially so that the carrier pays the maximum sum set by the Warsaw Convention. Lengthy lawsuits coming through several instances considerably delay damages granted to the injured persons and in addition judicial proceedings are prone to consume enormous court fees and law costs. As a rule, the carriers also welcome the possibility of an extrajudicial settlement within the maximum limits set down by the Warsaw Convention, because they thus avoid undesirable publicity of their suits which endangers their reputation;

8. *laying down fixed limits brings about a unification of law in respect of the extent of liability.* — It may only be remarked in relation to this theory that although the unification of law is a *result* of the limits set forth by the Warsaw Convention, it certainly is not their *purpose.* The aim of the limitation of the carrier's liability is to be found in the economic sphere.

The quoted survey shows how many various arguments have been brought forward by theory in an effort to justify the limitation of the extent of the liability of the carrier in the international carriage by air. But in practice economic consideration are of primary importance. It is worth noting which economic arguments helped, for instance, to carry in the U.S. Senate the ratification of the Warsaw Convention. The Department of State stated in its report that in its view it is very important, if not absolutely indispensable for the development of the international air carriage of the United States, that the operator of the international carriage by air be fully and clearly aware of the extent of his liability in the event of accidents causing the death or injury of passengers or the loss of or damage to the cargo. The Warsaw Convention evidently complies with this necessity and in the State Department's view its provisions are just and grant protection to the carrier as well as to the passengers and to the consignors of goods. If the United States refuse to become a Contracting Party to the Warsaw Convention, its carriers will be seriously handicapped economically when operating in the countries which are Parties to the Warsaw Convention[62].

It is however impossible to ignore the fact that the principle of the Warsaw Convention relating to the limitation of the extent of the carrier's liability has a number of opponents both in the theory and

[62] Sen. Doc. Exec. G. 73rd Sess. 1934; quoted as according to Harold J. Sherman, The Social Impact of the Warsaw Convention, Exposition Press, New York 1952, p. p. 84 and 85.

in practice. This is especially demonstrated in the United States. A broad discussion was provoked there by a series of judicial decisions rendered in the suits which resulted from the accident of the PAA aircraft "Yankee Clipper", in Lisbon on February 22, 1943. H. J. Shermann devoted a book[63] to this accident, and particularly to the lawsuit "Arthur A. Lee v. Pan-American Airways Inc.", in which he tries to prove that the Warsaw Convention is contrary to the U.S. Constitution and that the limitation of the extent of liability is unmoral, unjust and arbitrary. Nevertheless, his argumentation is inconclusive and more indignant than juristic. Sherman argues first of all that it is morally intolerable that the survivors of A. A. Lee, an eminent and successful businessman, get damages of merely U.S. $ 8,291,87.

Even at present similar objections, however, appear in U.S. influential juristic quartes.[64] They recommend that the United States not ratify the Hague Protocol and that it immediately renounce the Warsaw Convention. They stress that the limitation of the extent of liability might have been of certain importance in the early stage of the development of carriage by air but that no such necessity exists to-day. They also point out that the Warsaw Convention gives rise to disparity in the position of passengers on purely national routes: an aircraft on the line New York — Los Angeles may carry passengers who participate in "international" carriage (e. g. those who have a passenger ticket Paris — New York — Los Angeles) and for whom the liability of the carrier is limited, and passengers who participate in purely national carriage for whom the carrier's liability is without any limitation. It is naturally difficult to justify the different positions of two passengers sitting on neighbouring seats on board the same aircraft. But this disparity can be settled (such as the Air Carriage Regulations, Public Notification No 31 (1960), Collection of Laws, do) by means of setting forth the same limitation of the extent of liability on purely national lines, as well.

What is the attitude of Czechoslovak law to the principle of the limitation of the extent of liability? As shown above, the Air Carriage Regulations fully adopt the rules of the Warsaw Convention relating to the limitation of the carrier's liability. They do so (see section 38 [3]) even as concerns exlusively national carriage and such international carriage to which the Warsaw Convention is otherwise not applicable. Another, even more general provision of Czechoslovak law relating to the limitation of the extent of liability can be found in section 7 (2) of the

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[63] See note 62.

[64] E. g., Association of the Bar, Committee on Aeronautics; see Report on the Warsaw Convention, as quoted in note 57.

Law on the Liability for Damage Caused by Means of Transport, No 63 (1951), Collection of Laws. This rule provides that *"the government may fix by means of an ordonance the maximum sum of damages"*[65]. The government did not yet avail itself of this authorization because in practice the court's right of mitigation as laid down in section 358 of the Civil Code, is sufficient which — in connection with section 21 of the Civil Code, relating to the special protection extended to socialist corporations — will suffice to protect the socialist transport undertakings against excessive claims[66]. The *exposé* concerning this rule of law states that the authorization of the government to fix the upper limit of pecuniary damages notably aims at the realization of the principles of the Warsaw Convention even in the field of national carriage by air: "This will eliminate the existing undesirable situation in which, for instance, a foreign capitalist who travels by air within the territory of the Republic may claim from our airlines a much higher compensation of profit lost (e. g. for the time he has been confined to bed) than that which would be due to him under the Warsaw Convention in case he took part in a flight in the framework of "international carriage". The exposé further states explicitly that it is also useful to fix the upper limit of damages in order *to facilitate the calculation for the purpose of fixing the insurance premium!*

If we further consider, for instance, the provision of section 6 (4) of the Public Notification Relating to the Conditions of Carriage of Cargo by Sea, No 160 (1956), Official Gazette, we can come to the conclusion that the idea of the limitation of the extent of the carrier's liability is by no means alien to our legislation. Analogically, the principle of the limitation of the extent of liability has been adopted by the Law Concerning Damages in Case of Accidents and Professional Diseases, No 150 (1961), Collection of Laws, as well as by the Public Notification No 7 (1962), Collection of Laws.

The principle of the limitation of the extent of liability is proper to other sources of private international law as well. It suffices to quote here the above-mentioned Brussels Convention (Hague Rules) of 1924 Relating to the Unification of Certain Rules Concerning the Bills of Lading, and — for instance — the Bern Railway Conventions (CIV, art.

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[65] At first sight, doubt may arise whether the Air Carriage Regulations in the form of a Public Notification of the Ministry of Transport are qualified for laying down the limitation of the liability in *air* carriage since Law No 63 (1951) has entrusted the *government* with this authority. These doubts may be removed by the renvoi contained in section 55 (2) (a) of Law No 47 (1956), Collection of Laws, although section 67 of the said Law which contains the authorization of the Ministry of Transport does not set down such an authorization.

[66] Cf. V. Veselý, Náhrada škody způsobené dopravními prostředky, Orbis, Prague 1952, p. 57.

31 [2], and CIM, art. 29, as amended in 1924). The principle of the limitation of the extent of liability will also occupy a firm place in international contractual rules relating to the liability for "nuclear risk" arising from the peaceful uses of atomic energy[67].

(c) The modification of the extent of liability under the Hague Protocol

The Warsaw Convention was signed in 1929 and was virtually being drafted since 1926. The then situation of the development of aviation necessarily exerted its influence upon its conceptions. In 1927 Lindbergh became the first to cross the Atlantic Ocean by air and in 1929, when the Warsaw Convention was signed, it was not yet certain whether in future airship or aircraft heavier than air would prevail in aviation. During the 25 years which have elapsed since the signature of the Warsaw Convention the extent of carriage by air increased 250 times[68], aviation technology has considerably advanced and in the light of this development the stipulations relating to the limitation of liability have become somewhat obsolete. The extent of the carrier's liability for damages has virtually become the focal point because of which the regime of the Warsaw Convention was attacked by both jurisprudence and legal practice. This problem also became the main issue at the Hague Conference of revision which met in September 1955 and adopted the Hague Protocol[69].

Substantial objections were especially raised as to the limitation to 125 000 francs of the carrier's liability in the carriage of persons. The change of the purchasing power of money during the last 25 years, the rise in living cotsts and the consolidation of the security off traffic and of the economic situation of the carriers were pointed out. The U. S. delegation insisted on tripling the limit of the liability for passengers — to 375 000 francs. American representative *Calkins* cited examples showing that American courts deciding in cases concerning national carriage awarded damage amounting to U. S. $ 160 000 (about twenty-fold the limit established by the Warsaw Convention). He directly threatened that the U. S. might renounce the Warsaw Convention, and that all the foreign carrier who operate air services in the U. S. would be subject to

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[67] Prof. Riccardo Monaco, Insurance in International Law, a series of lectures given in the course of the first half of the session of the Hague Academy of International Law in The Hague in July 1960.

[68] R. H. Mankiewicz, The Hague Protocol to Amend the Warsaw Convention, The American Journal of Comparative Law, Vol. 5, No 1 (Winter 1956), p. p. 78 and 79, on p. 78.

[69] See note 38.

U. S. law which an principle ignores any limitation of liability[70]. After a discussion of several days the Hague Conference reached a compromise conclusion: in its article XI. the Hague Protocol increased the liability of the carrier for each passenger to the sum of 250 000 francs[71] in the event of death or wounding or any other bodily injury. Thus the limit of the extent of liability has been doubled. Such a radical increase was opposed at the Hague Conference especially by the representatives of countries with a lower standard of economic development[72], whereas the compromise solution was generally backed by the other representatives.

The *exposé* of the governmental proposal submitting the Hague Protocol for approval to the National Assembly[73] states the necessity to raise the limits of the liability of the carrier, "because carriage by air becomes a normal means of transport and it is therefore necessary to take into account the fact that in the other categories of transportation the liability of the carrier is on principle unlimited . . . The Protocol complies with the requirements of Czechoslovak civil carriage by air. It brings an improvement into the existing rules governing legal relations in international carriage by air the importance of which continuously increases for international relations as well as for Czechoslovak and world economy. It is therefore in the interests of Czechoslovakia to take part in this new unification of the rules of international law in the field of civil carriage by air."

The increase of the limits of the carrier's liability applies to the liability for passengers only. The limits of liability in the carriage of registered luggage, goods and objects of which the passenger takes charge himself were not affected by the Hague Protocol. Article XI only brought a practical amendment to the way of calculating the material weight in the event of loss, damage or delay of *part* of registered baggage or cargo or of any object contained therein: under the Hague Protocol, the weight to be taken into consideration in determining the amount to which liability is limited shall be — in such a case — only the total weight of the packages concerned. Nevertheless, when the loss, damage or delay of part of the baggage or cargo affects the value of *other* packages covered by the same baggage check or the same air

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70 International Conference on Private Air Law, ICAO Doc. 7686-LC/140, Vol. I, Minutes; session of September 15, 1955.

71 I. e. about 119,500 Kčs.

72 E. g. Indian representative Bhatti pointed out that according to statistics since 1929 the costs of living increased only 28 per cent on the average, but that he believed that the living standard generally increased and that it was fair to expect that the passengers cover by their own insurance the risks of carriage by air. See ICAO Doc. 7686-LC/140. Vol. I, Minutes, p. p. 166 and 167.

73 The National Assembly of the Czechoslovak Republic, 1957, II[nd] term of legislature, paper No 145.

waybill, the *total* weight of such package or packages shall also be taken into consideration in determining the limit of liability.

Urged by the delegation of the United States[74], the Hague Conference adopted another rule (paragraph 4 of the revised article 22.) Under this provision the limitation of the extent of liability shall not prevent the court from awarding, in accordance to its own *lex fori,* in addition, the whole or part *of the court costs and of the other expenses of the litigation* incurred by the plaintiff. But the foregoing provision shall not apply if the amount of the damages awarded does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

From the angle of Czechoslovak practice and of the practice of most of the European countries, this rule relating to the recovery of the expenses of the litigation will not bring any novelty, because, under the laws of civil procedure of the majority of states, any party to legal proceedings is entitled to claim compensation for the expenses necessary for reasonably pleading its right, including expences caused by using a legal adviser, provided the party has full success in the case (see, e. g., section 129, Rules of Civil Procedure). The issue of the expenses of the proceedings is a problem to which the law governing the procedure and *lex fori* must always be applied. The stipulations of the Hague Protocol which govern the expenses of the proceedings may therefore contribute to certain further unification of law, especially with regard to countries the legislation of which (such as the U. S.) does not, in certain cases, consider the expences caused by using a legal adviser part of the expenses of the litigation.

(d) Currency problems

The Warsaw Convention sets down in fixed sums, expressed in "French francs", the limitation of the extent of the carrier's liability. At the time of the signature of the Warsaw Convention the French franc had a stabilized value and was covered by gold (the so-called Poincaré franc the value of which was fixed in 1928). In view of the well-known currency changes and upsurge in the capitalist countries, the authors of the Warsaw Convention defined the idea "French franc" by means of its gold value in 1928: the value of the French franc under the Warsaw Convention equals to 65½ milligrams gold of millesimal fineness 900/1000.

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[74] ICAO Doc. 7686-LC/140, Vol. I, Minutes, p. p. 295 *et seqq.*

In this form, the said provision of the Warsaw Convention might be in fact deemed to be a gold clause as it ties a pecuniary debt to precisely fixed gold value. The Warsaw Convention allows however to convert the "Fench franc" into *any national currency* in round figures. Nevertheless it does not settle the question of *how* the conversion should be carried out and *which moment* is material for the fixation of the rate of exchange.

Where the respective state currency is based on gold, it is not difficult to solve the problem of *how* the conversion of the „French francs" into the respective currency is to be effectuated: the rate of exchange will simply be fixed by the relation of the gold content in the "French franc" and the gold content in the respective state currency[75]. The gold content in the respective currency can only be considered from the angle of *lex pecuniae* because it ensues from the principle of the state sovereignty that each state is entitled to define its currency and to fix its legal rate of exchange[76]. A more complex situation would naturally occur in case of the conversion of "French francs" into a currency which is not covered by gold; in such an event it would be impossible to fix the conversion by means of the relation of the gold content in the respective currencies and it would be necessary to proceed from the legal rate of exchange with regard to the "franc" or to the latter's value in another currency.

More doubts arise in theory and practice as to the question *which moment* is decisive for fixing the exchange rate in respect of the national currency. It is possible to take into account as decisive the moment of the occurrence of damage and, in consequence, the moment when the claim comes into being (*wrong day rule*), the day when the judicial decision is rendered (*judgement day rule*) and, finally, the day of payment. The practice of states shows considerable differences in this respect.

The Hague Protocol will to a considerable extent clear up the solution: it will be explicitly provided in paragraph 5 of article 22 of the revised Warsaw Convention that, if conversion into national currencies other than gold is concerned, the conversion of the respective sums shall be made according to the gold value of such currencies *at the date of the judgement.*

In consequence, the Hague Protocol essentially adopts the Anglo-

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[75] E. g. Law No 41 (1953), Collection of Laws, fixes the gold content in 1 Kčs to 0'123426 grm. fine gold. Since, within the meaning of the Warsaw Convention, the "French franc" is 0'0655 grm. gold of millesimal fineness 900, it is possible to figure out that 1 „franc" equals to about 0'4776 Kčs.

[76] Bystrický, l. c., p. 318.

American practice (*judgement day rule*). It may justly be supposed that this conception is by no means alien to Czechoslovak legislation. This may directly be deduced from the provision of section 150 (1), Rules of Civil Procedure, according to which the moment decisive for the judgement is that existing *at the time of its pronoucement.*

The Hague Protocol also takes into account the fact that the idea "French franc", as defined in the Warsaw Convention, has in fact been obsolete long ago. Although the Protocol continues to enumerate in "francs" the limits of the extent of liability, it does not define them as "French" but as a "currency unit" consisting of 0.0655 grm. of gold of millesimal fineness 900, i. e. as an abstract criterion of value without relation to the concrete legal tender which is current in the respective state.

Considering currency questions arising from the Warsaw Convention it can be said that when ratifying the Warsaw Convention or later, certain states directly stated how they would convert "francs" into their respective national currency. E. g. the Belgian Law of April 7, 1936, set forth that 250 000 Belgian francs shall be deemed to be 125 000 gold francs under the Warsaw Convention[77] and it follows from the practice of courts that this is meant irrespectively of gold parity. On June 30, 1950, the Tribunal Civile of Brussels heard an interesting case of a certain consignor of goods against SABENA airlines[78].

The plaintiff claimed damages for a lost package. The cited Belgian Law converts gold French francs into Belgian francs in the rate of 1 : 2, and under the Law the plaintiff should have received a certain sum. However, the plaintiff objected claiming that this sum must be adjusted or increased respectively in view of the fact that as a result of the 1947 devaluation the value of the Belgian franc had dropped by 40 per cent. He claimed therefore an increase of the awarded damages by 40 per cent. The court did not adopt this opinion, and, referring to the generally accepted principle of *nominalism* applied to the settlement of pecuniary obligations, it declared that the quoted Belgian Law of 1936 fixed in new and independent manner the limit of liability and abolished the reference to the gold value of the franc as established by the Warsaw Convention. In this way the court held that pecuniary obligations constituted an obligation to pay a certain fixed amount of money *(dette de somme)* and not a certain value *(dette de valeur).*

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[77] Drion, l. c., p. 184.
[78] M. Litvine, Précis élémentaire de droit aérien, Brussels 1953, No 217.

(e) Cases of an unlimited extent of liability

The limitation of the extent of the carrier's liability for damages is not applicable to every situation. This advantage and special protection cannot be conceded to a carrier who does not duly fulfil his engagements, for otherwise the entire régime of liability, as established by the Warsaw Convention, would lack an important element which justifies any system of liability, namely *prevention.*

There are virtually three possible cases in which the carrier may not invoke the limitation of the extent of liability, *viz:* if the documents of carriage fail to comply with the requirements which are imperatively laid down; if the damage is caused by the carrier's "wilful misconduct" or by such a default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to "wilful misconduct"; and finally if the carrier has accepted the goods from the consignor with a declaration of value.

The following are the *defects of the documents of carriage.* As it has been stated above, the carrier shall not be entitled, under the Warsaw Convention (art 3 [2]), to avail himself of those provisions of the Convention which *exclude* or *limit* his liability, if he accepts a passenger without a passenger ticket having been delivered. This provision is considerably severe, and it is impossible to justify reasonably that the carrier would not be entitled to invoke even those cirtumstances which *exclude* his liability (e. g. in a situation where the damage was caused by the negligence of the injured person in the course of the carriage). The Hague Protocol will settle this question rather more realistically: the carrier shall not be entitled to avail himself of the *limitation* of liability, if the passenger embarks without a passenger ticket having been delivered, or the ticket does not include the notice to the effect that the Warsaw Convention and its régime relating to the limitation of the extent of liability may be applicable.

Analogous consequences are provided by art. 4 (4) of the Warsaw Convention, regarding the carriage of registered luggage, and by art. 9, concerning the carriage of goods, in case the luggage ticket or the consignment note do not contain the particulars required, or have not at all been delivered. In this respect the Hague Protocol will also moderate the rigorous requirements of the Warsaw Convention, in that it considers as an indispensable requirement only the notice relating to the applicability of the Warsaw Convention and its régime governing the limitation of liability. The lack of the document or of this requirement will prevent the carrier from availing himself of the provisions *limiting* the extent of his liability but not of those which exclude it.

As far as *qualified fault* is concerned, it ensues from the logic of the matter that the carrier cannot be protected by the advantages arising from the limitation of the extent of liability when the damage is caused by his wilful misconduct *("dol", "faute equivalente au dol").* This very logical stipulation of art. 25 brought about tremendous difficulties for practice: a number of injured persons tried in judicial proceedings to get damages above the limits of the Warsaw Convention, and invoked to this effect the application of the quoted rule; the text of the Warsaw Convention was however terminologically quite obscure, especially for the countries of the Anglo-American sphere of law. It was doubtful what is "wilful misconduct" and particularly what kind of fault should be equivalent, under *lex fori,* to this form of fault. The Hague Protocol will bring a clear solution to this question, as exposed *sub* 2) below.

As far as *special arrangements* are concerned: The limitation of the extent of liability under the Warsaw Convention is naturally not applicable in case the consignor of registered luggage or goods has made at the time the package was handed over to the carrier a special declaration under article 22 (2) of the Warsaw Convention (declaration of the value at delivery) and has paid a supplementary sum, if the case so requires (the packages with declared value). Analogously, a passenger may stipulate, by special arrangement with the carrier, a *higher* limit of liability. In pursuance of art. 23 of the Warsaw Convention, any special arrangements or clauses may only be stipulated to the benefit of the passenger or the consignor, and may only *increase* the extent of liability. Any provision tending to relieve the carrier of liability or to fix a lower limit of liability would be null and void.

2. *The basis of liability*

The régime of the carrier's liability in international carriage by air of passengers, luggage and goods is, as established by the Warsaw Convention, based upon the principle of the carrier's fault. Both in theory and in practice, this is only one of the possible variants of the basis of liability and is not — at least not in the sphere of transport — the most usual one.

The following trends can be traced in the historical development of the conceptions of the carrier's liability. According to the principles of Roman law (*receptum nautarum*)[79], the "carrier" was in the main

[79] Digesta, IV, 9, 1: "Nautae ... quod cujusque salvum fore receperint nisi restituent, in eos judicium dabo."

objectively liable (liability irrespective of negligence, liability for the result, absolute liability). The fundamental principle of bourgeois civil codes is liability for the *fault*, the injured person being obliged to prove the fault[80] (or the non-performance of the contract).

The rules governing the liability of the carriers and based upon fault, the burden of proof lying on the injured persons, were insufficient as early as in the period of the rapid development of carriage by rail at the end of the last century. In view of the complexity of the traffic, its technical installations and of the organisation of transport it was almost impossible for the injured person to be able to prove under all circumstances the fault of the carrier. The danger arose of "evidence emergency" on the side of the injured person. In jurisprudence the so-called "risk" or "interest" theories of liability emerged according to which the risks of any operation must be borne by those who gain profit from such operation and in whose interests such operation is realized.[81] The risk could be shifted to those who exploit such operation and in whose interests it is realized, by abandoning the principle of liability for negligence and of onus of proof resting on the injured person and in providing the much stricter liability *for the result,* or liability for fault but with an reversed burden of proof (presumption of fault, and *onus probandi* resting on the tortfeasor). For instance, the Austrian General Commercial Code of 1862 provided, in its art. 395, for a very rigorous régime of the carrier's liability for the result and a difficult discharge[82]. The trend of the development of the legal rules relating to the liability of carriers were evidently tending to the principle of the liability for the result (see, e. g., Railway Law, No 86 (1937), Collection of Laws; Aviation Law, No 172 (1925), Collection of Laws, which was as rigorous as not to deem *vis major* to be a reason of discharge). The law which is in force at present, namely the Law on the Liability for Damage Caused by the Means of Transport, No 63 (1951), Collection of Laws, enacted the principle of the liability for the

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[80] Cf., e. g., the general provision of the French Code civil, art. 1382: „Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé, à le réparer.". Analogously the Austrian ABGB (General Civil Code) in art. 1295.

[81] Štefan Luby, Prevencia a zodpovednosť v občianskom práve, Bratislava, Slovak Academy of Sciences 1958, Part I, p. p. 84—86. Jiří Švestka, Odpovědnost za škody způsobené při provozech zvláště nebezpečných, Prague, Rozpravy Československé akademie věd, řada společenských věd 1960, book 13, volume year 70, p. p. 22—27.

[82] Art. 395 read as follows: „The carrier shall be liable for the damage caused by the loss of or injury to the goods from the time he has taken them over to the time they will have been delivered, unless he proves that the loss or damage have been occasioned by a force as it is impossible to resist *(vis major)* or by the natural character of the goods, especially by inherent deterioration, disappearance, permeation, etc., or by insufficient packing the defficiency of which was externally not apparent."

result: the carrier shall be liable even to an extent exceeding the limits of the respective fault; and the *exposé* states the importance which this régime of liability has in the field of prevention, saying that the carrier is charged with increased liability even for the state of traffic installations and their functioning, as well as with the liability for the omission of care necessary in traffic for averting damage. In view of the provisions of section 38 (1) (a) Public Notification No 31 (1960) (Air Carriage Regulations), this régime of the liability for the result is also applicable to the national carriage by air of passengers and of those objects of which the passengers take charge themselves during the flight. The carrier may only discharge himself by proving that the damage was caused by the negligence of the injured person, by such an act of a third person which could not be averted, and that it is impossible to derive it from the condition of the means of transport or other traffic instalations, or from the failure or insufficiency of the operation of the traffic installations or of the organism of the persons employed there (section 4 of Law No 63 (1951), Collection of Laws).

The authors of the Warsaw Convention chose *fault* as the basis of the régime of liability and explicitly opposed the conception of the liability for the result[83]; this obviously took place under the influence of representatives of the Latin countries, particularly of France and Italy[84].

Nevertheless, the Warsaw Convention *presumes the fault of the carrier.* It does so by reversing the burden of proof; it lies upon the carrier to prove the facts which under the text of the Warsaw Convention enable him to achieve exculpation and discharge. The onus of proof rests upon the injured person only in case he wants to prove that the damage is caused by the direct or eventual intention of the carrier or of his agents acting within the scope of their employment. If this fact is proved, the carrier shall not be entitled to avail himself of those provisions of the Warsaw Convention which limit the extent of his liability.

The categories of damage. — Prior to making a detailed analysis of the régime of the carrier's liability as established by the Warsaw Convention, it is necessary to define beforehand all *the kinds of damage* for which the carrier is liable, i. e. the results he is bound to repair, provided there is causal relation between such results and his negligent or intentional action or omission.

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[83] Cf. the statement of the *rapporteur* M. Pittard, presented at the Paris Conference, on November 2, 1925; see Conférence Internationale de Droit Privé Aérien, Octobre — Novembre 1925, Paris 1926, p. p. 52—59.

[84] Raphaël Coquoz, l. c., p. 69.

Principally, the carier it liable for damage sustained by the *passengers,* for damage to registered *luggage* and *goods,* and for damage occassioned by delay in the carriage by air of passengers, luggage or goods (art. 17—19).

(I) In the carriage of *passengers,* the carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking (art. 17 of the Warsaw Convention).

In consequence, damage for which the carrier is liable is defined from the angle of time, space and subject.

The carrier is only liable for damage occassioned in the course of the *carriage by air* (argument: art. 1 (1) of the Convention. The Convention "applies to ... carriage ... performed *by aircraft* ..."), be it *on board the aircraft* or in the course of any operations of *embarking or disembarking an aircraft.*

The time and space definition of the damage occasioned on *board the aircraft* causes no particular difficulties. More complicated, however, is the definition of the idea "operations of embarking and disembarking". The interpretation of these ideas gives an answer to questions of *when* the liability of the carrier in the carriage of passengers *commences* and *when* it *ends.*

Goedhuis[85] takes into consideration four possibilities of the interpretation of the idea "operations of embarking and disembarking", *viz:*

a) "embarkation" begins at the moment when the passenger gets into the *bus* in which the carrier transports him to the airport. "Disembarkation" ends at the moment of alighting from the bus when travelling from the airport;

b) "embarkation" begins at the moment when the passenger enters the *airport* of his departure and "disembarkation" ends when he leaves the airport of his destination;

c) "embarkation" begins at the moment when the passenger leaves the airport building and enters the *landing field* towards the aircraft; "disembarkation" ends when he leaves the landing field and enters the airport building;

d) "embarkation" begins as soon as the passenger puts his foot on the *steps* at the entrance of the aircraft, "disembarkation" ends at the moment of the descent thereof.

The solution of these questions is not insignificant. The passenger may

[85] L. c., p. p. 192—197.

suffer damage while travelling by the bus, in the airport building, on his way to the aircraft and finaly cases are not infrequent, in the administration of justice, of injury sustained by a passenger by falling from the steps leading to the aircraft[86].

It is obvious that such a standpoint may best comply with the practice of the carriage by air according to which the operations of embarking the aircraft begins at the moment when the passenger, led by an agent of the carrier, leaves the airport building and enters the landing field. And the operations of disembaring end when the passenger leaves the landing field and enters the airport building. The carriage by bus and the stay in the airport building are in no direct relation with the embarkation or disembarkation of the aircraft or with the entire carriage by air and its specific risks.

This point of view was also held by the *Tribunal de Commerce de Marseille*, in its judgement of May 27, 1960, *re* Bonancea v. Air France[87]: the court rejected the claim of a passenger who had been seriously injured by falling in the corridor of the airport building at Marignane; the court took up the opinion that the operations of embarking the aircraft begin at the moment when the passengers, invited by the carrier's agents, leave the waiting room and enter the landing field.

The *Tribunal de grande instance de la Seine* arrived at the same conclusion in its decision of June 2, 1961, *re* Maché v. Air France[88]: After landing at San Bonet airport a passenger travelling on the line Paris — Palma Majorca was walking with a group of passengers from the aircraft to the airport building; the group was not duly led by an airport agent — as provided for by the regulations. At a distance of about 20 metres from the airport building, Maché stepped on a loose bar of the sewer which broke under his weight, (he weighed 175 kgs!); Maché fell into the sewer and was badly injured; he sued the Company preliminary for 400 000 NF, claiming that the limitation of the extent of liability as established by the Warsaw Convention was not applicable to this case as the risks of the carriage by air were no more concerned; the court awarded the plaintiff a mere amount of 125 000 gold francs of damages, on the grounds that the accident occurred, in the course of disembarkation and that the Warsaw Convention covered such accidents; "disembarkation" ends at the moment of entering the airport building.

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[86] See, e. g., Chutter v. KLM (United States Ditsrict Court, Southern District of New York, June 27, 1955); Scarf v. TWA (the same court, October 27, 1955). In the two cases, the indemnification was saught of a damage caused by an injury occasioned by a fall from the steps while embarking. See JALC, No 2 (1956), p. p. 232—234.

[87] Revue française de droit aérien, No 3 (1960), p. p. 325—327.

[88] See Revue Générale de l'Air, No 3 (1961), p. p. 292—300.

The West Berlin *Kammergericht* also shared this point of view in its judgement of March 11, 1961[89]: the plaintiff sustained an injury when coming down the staircase from the waiting room to the runway of the Tempelhof airport; the court decided that the air carrier is liable for this accident under the Warsaw Convention, because it was sustained at the time when the passengers had left the airport building on the instruction of the carrier's agents and were walking to the aircraft in order to embark.

The carrier is also liable for the damage which has been sustained on the airfield apron e. g., the damage caused by taxiing, landing or taking off aircraft), and at the moment of the direct entry into the fuselage of the aircraft (e. g., a fall from the steps, a fall from the aircraft if the stairs have not been properly fixed, etc.).

In general, the carrier is liable for damage sustained as a result of an *accident,* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. There must be causal relation between the "accident" and the damage and when the Warsaw Convention is correctly interpreted only such a harmful event may be deemed an "accident" which is not only in connection with carriage by air but directly results from it. Undoubtedly the carrier will not be liable for an injury caused to a passenger by another passenger, e. g. in the course of a fight. The carrier is equally not liable if the damage arose from an event which cannot be deemed an "accident" in air traffic (an acute illness, e. g. a heart attack, a cerebral stroke or a miscarriage during the flight, etc.). From this angle, it is possible to consider very problematic the decision rendered by the American City Court of Queen's County, New York, in June 1951, *in re* H. G. Philios v. TWA[90]: the court awarded damages to the plaintiff who during a flight from Rome to Athens on board an aircraft without an pressurized cabin suffered a rupture of the ear-drum and bleeding from the ear; no one of the passengers suffered a similar injury and an expert had ascertained that the plaintiff had been ill with a bad inflammation of the upper respiratory organs. It is impossible to agree with this decision, because no "accident" within the meaning of the Warsaw Convention was concerned and in addition the plaintiff was predisposed to an injury of ear-drum and her condition was not good enough for carriage by air[91].

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[89] See Zeitschrift für Luftrecht und Weltraumrechtsfragen, No 1 (1962), p. p. 78 *seq.*

[90] Conférence de La Haye, Septembre 1955, Doc. No 36, p. p. 105, 113, 116.

[91] Concerning the problem of liability in case of the carriage of sick persons cf. Albert R a b u t, "Le transport aérien des malades et la responsabilité du transporteur", Revue française de droit aérien, No 1 (1949), p. p. 1 *et seqq.*

The Warsaw Convention charges the carrier with liability for the damage caused to the passengers in the event of *death, wounding* or *any other bodily injury.* As concerns all these categories of damage the liability of the carrier is limited to 125 000 francs (to 250 000 francs under the Hague Protocol), without specifying in detail any difference between light and serious injury, partial and complete crippling, etc. In consequence, the extent of damages is not differentiated according to the different categories of damage and in different cases the extent of damages must be fixed within the limits laid down by the Warsaw Convention and under the respective municipal law. This will in practice mostly be *lex fori,* especially in practice in England (the *quantification of damages* is considered to be an issue of procedure)[92]. National law is also qualified to determine whether only the damage actually sustained or also the loss of profit of the injured person is to be compensated, whether "moral" damage, set down by bourgeois law, should be indemnified, etc.

A serious deficiency of these fundamental provisions of the Warsaw Convention which relate to the liability of the carrier for the passengers consists in the fact that the Convention does not determine persons who are entitled to claim damages, especialy in the event of the death of a passenger. The Warsaw Convention gives no solution to the questions which persons are entitled to sue (e. g., may the unmarried wife or the intended wife of the passenger claim damages? which relatives are entitled to claim?) or in which way should the adjudged sum be apportioned to the entitled persons. These questinos must also be settled under the national law, and here again the most practicable criterion in the field of the conflicts of laws is *lex fori*[93], although in numerous cases the *lex personalis* of the killed person might better comply with a reasonable settlement of the legal relations (especially in defining the circle of persons entitled to claim damages), as it is *lex personalis* which regulates the relations within the family and especially the obligations of the deceased towards certain persons.

It is a current phenomenon in the international carriage by air of passengers that on a certain route they are obliged to change aircraft, this frequently for an aircraft of another air company. Under art. 1 (3) of the Warsaw Convention, a carriage performed by several successive air carriers is deemed to be one undivided carriage if it has been regarded by the parties as a single operation. The question arises against which carrier the injured passenger or his repesentative may claim his

[92] See Bystrický, l. c., p. 278; Martin Wolff Private International Law, 2nd Edition, Oxford 1950, p. p. 242—243.

[93] The application of *lex fori* is recommended by Coquoz, l. c., p. 109.

right. The Warsaw Convention settles this issue in art. 30 (2) as follows: action can be taken only against the carrier who performed the carriage during which the accident occurred, save in the case where, by explicit agreement, the first carrier has assumed liability for the whole journey. Such a special obligation is very unpractical; e. g., the "Conditions of the Contract of Carriage of the Czechoslovak Airlines", printed on the passenger ticket, provide explicitly, in paragraph 4 (a), that the liability of the carrier is limited to cases which might occur on its own line. In delivering passenger tickets for the carriage on the line of other carriers, the Czechoslovak Airlines act only in the capacity as selling agents.

(2.) As far as the carriage of *unregistered laggage* and the objects which the passenger has with or on him are concerned, the Warsaw Convention contains no special stipulations relating to the carrier's liability for damage. Article 22 (3) only limits the extent of liability to 5 000 francs, but the Convention provides nothing as to the basis of liability. This deficiency of the unified provisions laid down by the Warsaw Convention must also be amended by municipal law, applicable according to the criteria of rules governing the conflicts of laws; as stated above (p. 19), the law of the carrier's principal place of bussiness will best comply with a reasonable settlement of the respective legal relation.

The IATA General Conditions, in art. 16 (3) (g), directly exclude the liability of the carrier for damage to unregistered luggage, if the damage has occurred while luggage is loaded, unloaded or transshipped, because the service offered in this event to the passenger by the carrier's agents are gratuitous. The carrier is liable only if the damage was caused, exclusively and directly, by his negligence.

(3.) In case of the carriage of *registered luggage* and *goods* the carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, the luggage or goods, if the occurrence which caused the damage so sustained took place during the carriage by air (art. 18 [1]).

The Warsaw Convention expressly sets down the time and space definition of damage to registred luggage and goods: the carrier is liable for damage which took place during the *carriage by air.* The "carriage by air" comprises the period during which the luggage or goods are in charge of the carrier, whether at an aerodrome or on board an aircraft, or in the case of a landing outside aerodrome, in any place whatsoever.

In consequence, the régime of the carrier's liability established by the Warsaw Convention does not apply to the *entire* period of time

during which the luggage or goods are taken care of or supervised by the carrier. The luggage or goods must be either *at an aerodrome* or *on board an aircraft* or in another place in case of a landing outside the aerodrome, for instance in case of an emergency landing outside the airport caused by a defect.

According to the explicit wording of the Warsaw Convention (art. 1 [3]), the period of the carriage by air, during which the carrier is liable under the rules of the Warsaw Convention, *does not extend* to any carriage by land, by sea or by river performed *outside an aerodrome* (i. e., for instance, the carriage performed by a motor truck from the town to the airport; on the contrary, the régime of liability established by the Warsaw Convention applies to damage caused to luggage or goods during handling on cars, conveyers, etc., *at the aerodrome*). In consequence, the period of the "carriage by air" of registered luggage and goods begins, within the meaning of the Warsaw Convention, at the moment when they are delivered at the *aerodrome of departure* and ends at the moment when they leave the *aerodrome of destination*[94].

The liablity for the indemnification of damage occured to registered luggage or goods *outside* the period of the "carriage by air" (e. g. during the transportation by a motor truck from the town office of the carrier to the airport) is governed by national law, applicable under the principles relating to the conflicts of laws. In this case, it is also the law of the carrier's principal place of business which complies best with a reasonable settlement of the respective legal relation. But municipal laws mostly do not provide for a bulk limitation of the extent of the carrier's liability. Disputes may arise frequently as to whether the loss of or damage to registered luggage or goods have occurred during *carriage by air* and consequently whether the régime of liability as established by the Warsaw Convention is applicable, or whether they have been occasioned during another carriage and whether the general rules relating to liability should be applied. For these cases the Warsaw Convention lays down the following rebutable presumption (art. 18 [3]): if carriage by land, by sea or by river takes place in the performance of a contract of carriage by air, for the purpose of loading on an aircraft, or for the purpose of the delivery to the consignee, or for the purpose of transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage *by air*.

Special problems arise in case of the carriage of luggage and goods which is performed by several successive carriers: against which carrier

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[94] The same opinion is held by Goedhuis, l. c., p. 202; and by Riese Luftrecht, p. 447.

may the right be claimed? It was possible to set forth a simple rule in case of damage sustained by the *passengers:* action can be taken only against the carrier who performed the carriage during which the *accident* occurred. This rule has been provided because in case of damage sustained by the passenger it is not difficult to establish on which line the accident took place. But in the case of the carriage of registered luggage and goods the liability for loss or damage is not linked to an *accident.* The carrier is liable if an occurrence ("événement" in the authentic French text, "occurrence" in the English official translation) took place during the carriage by air. The notion of "occurrence" undoubtedly is broader than that of "accident". An "occurrence" may even be less obvious, for instance even if packing appears to be undamaged the content of the package may be destroyed, partially stolen, deteriorated because it was kept next to other packages, for instance next to packages containing strongly aromatic goods, etc. Sometimes it can be difficult to find out at which point of the route the "occurrence" which caused the damage took place.

The Warsaw Convention provides in its art. 30 (3) that in case of the destruction or loss of registered luggage or goods the consignor will have a right of action *against the first carrier,* and the consignee who is entitled to delivery will have a right of action *against the last carrier,* and further, each may take action against the carrier who performed the carriage during which the damage took place; these carriers will be jointly and severally liable to the consignor or consignee (they will be bound *in solido).* This stipulation is very practical and well conceived, and allows a speedy and flexible settlement of damages. The rule providing that carriers are bound *in solido* guarantees that action may be taken only once — either by the consignor against the first carrier or by the consignee against the last one. If it is known which carrier performed the carriage during which the damaging "occurrence" took place, the entitled persons will be able to take action directly against him. The carrier who has compensated the damage has naturally a right of recourse (subrogation) against that carrier to which the damage is imputable. (In such case, the right of recourse should be qualified as a claim derived from unjust enrichment, or as an outlay incurred for another person; in this respect it would hardly be satisfactory to apply *lex loci delicti commissi* in solving the question raised by the conflict of laws — as recommend by Bystrický[95] in relation to claims derived from unjust enrichment — because the right is not based on a civil wrong and, in addition, it would be virtually impossible to localize the

[95] L. c., p. p. 313 and 314.

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[95] L. c., p. p. 313 and 314.

"wrong". It is better to share the view of L. Réczei[96] according to which it is primarily the debtor's place of business which, in the field of the conflicts of laws, constitutes the criterion applicable to the obligations arising from unjust enrichment).

In connection with the concept of "first carrier", it is useful to refer in a critical way to the decision of the former People's Civil Court of Prague made on April 10, 1958[97]. This decision cannot be considered as correct namely:

Deciding on an action brought by the State Insurance Institute, the court passed judgement against the Czechoslovak Airlines and awarded damages for a consignment of two chimpanzees, who died on their way from Prague to Calcutta. The carriage had been performed by the French company Air France. In the given case the Czechoslovak Airlines were not at all the carrier, the carriage was entirely performed on board an aircraft of the Air France company, and the Czechoslovak Airlines only had made out the air consignment note, in their capacity as selling agent. In this air consignment note it was stated by mistake that the Czechoslovak Airlines were the first carrier. But at the same time the "Conditions" printed on the back of the air consignment note provided expressly in their clause 4 (d) that the carrier acts *only in the capacity as selling agent* when he makes out an air consignment note for a carriage performed exclusively on the lines of other carriers. It is incontestable that no carriage to be performed by various successive carriers was concerned in the given case. The company Air France was the sole carrier on the entire flight Prague — Calcutta. The view held by the court that the air transport undertaking which orders the carrying out of the carriage on ground, which belongs to the carriage by air, should be deemed to be the carrier is contrary to the provisions of the Warsaw Convention (art. 18 [3]) under which the period of the "carriage by air" does not extend to any carriage by land; equally, the term of "carrier" must be attributed to the *actual* carrier. In addition, this wrong decision charged the Czechoslovak Airlines with the objective liability for a result which their care was absolutely unable to influence. The criticism of this decision is so much the more important in the Czechoslovak Socialist Republic as foreign air companies are not authorized to sell passenger tickets or to make out air consignment notes. Under contracts on general representation the Czechoslovak Airlines are their business agent. They currently make out consignment notes and deliver passenger tickets on the lines of exlusively foreign carriers, and they must not be

[96] L. Réczei, Internationales Privatrecht, Budapest 1960, p. p. 345 and 346.
[97] File number 1 C 1125/56.

charged with liability which is based neither on Czechoslovak law nor on the Warsaw Convention.

(4.) Under art. 19 of the Warsaw Convention, the carrier is liable for damage occasioned *by delay* in the carriage by air of passengers, luggage or goods. The Warsaw Convention does not lay down any separate limitation of the extent of the carrier's liability in case of delay; in consequence, the passenger may, within the meaning of art. 22, claim damages up to the sum of 125 000 francs (up to 250 000 francs under the Hague Protocol), and up to a sum of 250 francs per kilogram when carriage of registered luggage and goods is concerned.

This rule of the Warsaw Convention affects the carrier with unreasonable severity and it cannot be convincingly justified.

There can be no doubt that speed constitutes the fundamental advantage offered by carriage by air in comparison with other means of transport. The relatively high tariffs entitle passengers and consignors to expect and demand this speed from carriage by air. The aspect of prevention must not be however underestimated. Delay occasioned by intermediate landing in comparison to the envisaged time table of the flight may offer the carrier an opportunity to check the equipment of the aircraft, to make minor repairs and to avoid bad weather (storm front, occlusive front, danger of icing, etc.) and thus ensure better security of the flight.

In practice all the air carriers evade assuming the liability for delay, although art. 23 and 32 of the Warsaw Convention ban, under the sanction of nullity, any provision tending to relieve of liability. On the contrary, however, under art. 33 of the Warsaw Convention nothing shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the Warsaw Convention. The "IATA General Conditions" and the contracts of carriage of different carriers elude the question of liability for delay in a form which is not incompatible with the Warsaw Convention: as a rule they provide that the carrier will endeavour for carrying the passenger and his luggage as speedily as possible but without exactly fixing the time of the beginning and of the end of the carriage. The times contained in the schedules are declared to be approximate, they are not guaranteed and they do not form a part of the contract of carriage[98].

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[98] See e. g. clause 7 of the "Conditions of the Contract of Carriage", as printed on the form of the passenger ticket of the Czechoslovak Airlines, and clause 5 of the Conditions, inserted on the back of the air consignment note of the Czechoslovak Airlines.

The provision of art. 19 — although of small practical value — cannot be considered quite useless or even nonsensical as asserted, for instance, by Beaumont[99].

The carrier must be liable for damage occasioned by considerable delay caused by his fault. It is possible to fully agree with the decision of the *Tribunal civil de la Seine* of January 17, 1949, *in re* Société des Transports Clasquin v. Société Socotra[100]: the defendant firm engaged itself to carry by air a cargo for the plaintiff and did not fix any term in the consignment note; the aircraft which was to have carried the consignment crashed and the defendant put off the performance of the carriage until another aircraft was operational. The delay took 2 months, and the plaintiff claimed the right to withdraw from the contract and damages; the court justly adjudged the right to the full extent; it stressed that the air carrier gets an esentially higher freight-charge than, for instance, the shipper in sea transport mainly in view of the speed of the carriage. A clause according to which an exact date of the delivery of the consignment is not guaranteed cannot in advance release the carrier from all claims for damages in the event of damage caused by delay.

3. Fault, burden of proof, and discharge

On principle, the carrier is liable for all the categories of damage quoted above. He may exonerate himself from the liability only 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* (art. 20 [1] of the Warsaw Convention).

The provision of art. 20 (1) of the Warsaw Convention may be considered the foundation stone of the entire system of the liability of the air carrier. It provides for the *foundation of the régime of liability* (fault), the *burden of proof* (the presumption of the carrier's fault, accompanied by the onus of proof on his side), and finally the basic rule relating to the *discharge* of the carrier.

The carrier is not charged with objective liability for any damage which may be occasioned during the performance of the contract of

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[99] K. M. Beaumont, Need for Revision and Amplification of the Warsaw Convention, Journal of Air Law and Commerce, Vol. 16 (1949), p. 399.
[100] Conférence de La Haye, Septembre 1955, Doc. No 36, p. 61.

carriage but only for such damage which he has caused[101] by not having taken all necessary measures to avoid the damage. The injured person is not obliged to prove the carrier's fault, as is the case in obligations relating to damages in all existing systems of civil law (the principle *"actori legit probatio");* the carrier's fault is presumed and he must prove circumstances which may exculpate and discharge him.

For the purpose of analysis of this central provision of the Warsaw Convention, attention must be focused before all on the interpretation of the notion of "all necessary measures" *("toutes les mesures nécessaires");* the carrier is liable for their imputable non-performace, and on the contrary he may be discharged if he proves that he has taken "all necessary measures".

A literal interpretation of the notion of "all necessary measures" would obviously bring about quite absurd consequence. If the carrier were bound to take *all* the measures which are *necessary* to avoid damage, he could, in fact, never be discharged, because no such damage could occur which would not be imputable to him. Consequently, if the carrier took *all necessary* measures to avoid damage, no damage could, in fact, be occasioned. In case of such a literal interpretation the carrier might discharge himself only by proving that neither he nor his agents had the *possibility* to take the necessary measures, thus only in cases of *"vis major"* (e. g. the destruction of the aircraft, hit by lightning; however, even such a case may be of a relative character: the carrier should have had reliable information on the weather in the area of the route and should not have sent the aircraft into the storm front).

A correct interpretation of the important notion of "all necessary measures" may be endorsed by the standpoint of the authors of the Warsaw Convention, as officially expressed by *rapporteur* Pittard at the Paris Conference in 1925. In his report on the draft convention, Pittard said: "... the question arises on whom the burden of proof lies; it seemed to be just not to charge the injured person with this onus and to admit the presumption of the fault of the carrier. This is however a rebuttable presumption and the carrier is undoubtedly entitled to prove the contrary ...

What can be demanded from the air carrier? *A normal organization*

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[101] "Fault" covers the psychical relation of the tortfeasor to the unlawful act and to its result. Fault may have the form of *direct intention (dolus directus), indirect intention (dolus eventualis), conscious negligence* and *unconscious negligence.* The various forms of fault differ by their *intellectual* aspect (whether the tortfeasor *knew or was able to know* that he might cause damage) as well as by the aspect of *volition* (whether he *had the intention* or *did not have the intention* to cause damage) In carriage by air almost exclusively practical is *culpa; dolus* will be dealt with later *sub* 4. — Cf. Luby. l. c., p. p. 448—476 and 498—517.

of operation, a careful selection of personnel, constant supervision over the agents, a thorough checking of the installations, equipment and material used ... It is not equitable to charge the carrier with absolute liability, but it is just to release him from any liability if he has taken *reasonable* and *normal measures ("les mesures raisonnables et normales")* to avoid damage, i. e. if he exercised the diligence as may be required of a *bonus pater familias"*[102].

In consequence, the authors of the Warsaw Convention evidently had not in mind a requirement of all the *necessary* measures, but the requirement of *reasonable* and *normal* measures, taken with such a care *"qualem quisque diligentissimus pater familias suis rebus adhibet"*[103].

They proceeded from the concept that the carrier cannot be held liable for all — even accidental — risks of air traffic. At the time of the signature of the Warsaw Convention, and naturally even at present, carriage by air has not yet reached such a level of security as, for instance, railway traffic after almost 150 years of experience. In carriage by sea (the Hague Rules of 1924, art. 4 [1]) the carrier is also made liable only if he did not act with due diligence; and this provision served as an example for the authors of the Warsaw Convention[104].

The literature of "air law" also generally shares the opinion that for the purpose of discharge the carrier is not bound to prove that he has taken *all necessary* measures to avoid the damage, but that he has taken such measures as are reasonable according to the respective conditions, and that he has exercised due diligence in taking them. This view is advocated by Astle[105], Lemoine[106], Riese[107], Coquoz[108], Goedhuis[109], Shawcross and Beaumont[110], and Mc Nair[111].

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[102] Conférence Internationale de Droit Privé Aérien, Octobre — Novembre 1925, Paris 1926, p. p. 55 and 56 (italics by M. M.).

[103] Digesta 13, 6, 18pr.,; the authors of the Warsaw Convention were obviously near to the conception of negligence being a breach of the duty to exercise the diligence such as would be employed by an honest citizen in his own affairs *(diligens pater familias)*.

[104] G. Ripert, L'Unification du Droit Aérien, Revue Générale de Droit Aérien, 1932, p. 264; quoted according to Max Litvine, "Notes sur les causes d'exonération de responsabilité du transporteur aérien" (Commentaires de l'article 20 de la Convention de Varsovie), Centre Belge de Navigation, No 6, Brussels 1951, p. 17.

[105] W. E. Astle, Air Carrier's Cargo Liabilities and Immunities, London, H. F. G. Witherby 1958, p. 91.

[106] L. c., p. p. 544—546.

[107] L. c., p. p. 455 and 456.

[108] L. c., p. p. 136 and 137.

[109] L. c., p. p. 235—237.

[110] Shawcross and Beaumont On Air Law, Second Edition by Ch. N. Shawcross, K. M. Beaumont and P. R. Brown, London, Butterworth Ltd. 1951, p. 365 (No 390, note c]).

[111] A. D. Mc Nair, The Law of the Air, Second Edition by M. R. E. Kerr and R. A. MacCrindle, London, Stevens 1953, p. p. 208, 222.

In spite of this accord in the fundamental questions of the interpretation of the idea "all necessary measures", a certain difference may be found in the doctrine, and this difference is of fundamental importance for the settlement of those cases where the proximate cause of the accident has remained unknown. Such cases are rather frequent in air navigation, especially when no one of the crew or of the passengers survive the disaster, and the crew were unable to report to the ground control on the situation of the aircraft prior to the accident. Is it possible for the carrier to discharge himself in such a case, i. e. is he able to produce positive evidence that he has taken all necessary measures to avoid the damage?

This is possible when the idea "all necessary measures" is interpreted broadly. According to such an interpretation the carrier is not held liable if he proves that for the purpose of the performace of the contract of carriage he has employed the utmost diligence, such as may justly be expected from him; he is not obliged to prove which cause brought about the damage, whether he has taken such concrete measures as were able to face the respective cause of the damage, whether these measures were appropriate in the concrete situation and whether they were taken with due care. When this interpretation is applied, it is sufficient for the discharge if the carrier furnishes general proof of having taken all the fundamental measures which are necessary for a safe performance of the flight, for instance, if he proves that the aircraft was furnished with a certificate of technical airworthiness, that all provisions governing the operation of the aircraft were observed, that the latter was regularly maintained and repaired, that it had a sufficient supply of fuel and oil, that it was piloted by a licensed crew, that the crew had at its disposal meteorological reports on the route, the weather was suitable for the realization of the flight, etc. Such a liberal interpretation is presented, for instance, by Lemoine[112] and Litvine[113].

It is hardly possible to agree with this interpretation. If the carrier is to be discharged, the cause of the accident must be ascertained and the carrier must prove that he has taken all measures to avoid the accident — he must prove that he has taken such measures as are in direct and proximate connection with the cause of the accident, and that these measures were adequate to the concrete cause which resulted in the damage occasioned. For instance, in case the provable cause of the crash of the aircraft were the fact that irregular and strong icing had formed on the wings, the carrier might only be discharged by proving

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[112] L. c., p. p. 544—546
[113] L. c., p. 7.

that the aircraft was equipped with perfect and perfectly working de-icing equipment, that before the take-off and during the flight the crew had at its disposal reliable meteorological reports, and that it was unable to avoid the accident in spite of all this.

If, however, the cause of the accident is not reliably ascertained, the carrier is never able to produce positive proof of having taken all measures to avoid the concrete damage, and he can not be discharged[114].

There is ample literature on art. 20 (1) of the Warsaw Convention; it confirms the view that the carrier may be discharged, provided he proves that he has taken *appropriate* and not "all necessary" measures to avoid the damage. The administration of justice also confirms in the main the conclusion that the carrier cannot be discharged if the cause of the accident is not known.

For instance, *in re* Csillag v. Air France[115] the French Tribunal Civil at Toulouse, in its decision of February 10, 1938, fully released the carrier when the passenger had been injured on board an aircraft which encountered turbulent air conditions causing violent shocks and "pancaking". The court regarded as proved that the carrier has taken all the appropriate and normal measures to avoid the damage and that he was unable to prevent it.

In the case namely *in re* Clyde and Parsley v. Midcontinent Airlines Inc., the facts of which were analogous[116], the judgement directed the carrier to pay full damages because the captain of the aircraft did not instruct the passengers to fasten themselves in a zone of atmospheric turbulences. The carrier's agent thereby omitted to take appropriate measures which could have undoubtedly prevented the damage.

The case Wyman and Bartlett v. PAA, decided by the Supreme Court of the New York County on June 25, 1943[117], constitutes an instance of a disaster the cause of which remained completely unknown. Flying on the line San Francisco — Hong Kong, the aircraft landed on the island of Guam. There it took off for Manila but did not arrive there. The last report radioed by the crew from on board the aircraft said that the aircraft was entering a storm front of which it had not been previously informed. The captain reported that he was changing course and trying to avoid the storm. Although the court admitted to be proved that the accident had not been caused by a direct fault of the carrier,

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[114] The Danish Jurist Finn Hjalsted came to an analogous conclusion; see "The Air Carrier's Liability in Cases of Unknown Cause of Damage in International Air Law", Journal of Air Law and Commerce, Vol. 27 (1960), p. p. 1—28 and 119—149.

[115] Quoted by Lemoine, l. c., p. p. 548—549, note 2.

[116] United States Aviation Reports 1949, p. 424.

[117] See Conférence de La Haye, Septembre 1955, Doc. No 36, p. p. 15 and 33; and the United States Aviation Reports 1943, p. p. 1—4.

it found him obliged to pay damages on the grounds that he had not proved to have taken all appropriate and normal measures to avoid the damage and did not produce evidence disproving the presumption of fault as laid down in art. 20 (1) of the Warsaw Convention.

Special problems arise in the field of the carrier's discharge in the carriage of registered luggage and goods. In this respect the Warsaw Convention provides in its art. 20 (2) that in the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage *("faute de pilotage")* or negligence in the handling of the aircraft *("conduite de l'aéronef")* or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

It is obvious at first sight that this stipulation of the Warsaw Convention adopted the institution of maritime law — the *nautical fault*. A similar institution has been embodied in the Hague Rules of 1924 (art. IV [2] [a]), and its model may be found in the American Harter Act of February 13, 1893[118].

The essence of the institution of nautical fault is formed by the view that the carrier cannot direct and supervise directly the technical performance of carriage and must rely on the crew; he should not be liable for damage caused by "nautical fault". The crew's "nautical fault" naturally may discharge the carrier only in case of the carriage of luggage and goods, not of passengers.

The provision of art. 20 (2) of the Warsaw Convention must be considered odd for it does not comply with the present stage of carriage by air and is juridically rather inconsistently conceived. One of the most serious objections to the said provision may be the fact that luggage and goods are mostly transported in the same aircraft with passengers. Special cargo flights are relativy rare. It ensues therefrom that the carrier cannot invoke discharge upon the basis of "nautical fault" as far as damage to luggage and goods is concerned, because doing so he would automatically deprive himself of defence under art. 20 (1) as far as passengers are concerned (he would be unable to prove that he and *his agents* had taken all necessary measures to avoid the damage, since he would himself be admitting the fault of his agents).

Therefore it must be appreciated that the Hague Conference of 1955 decided without discussion and absolutely unanimously[119] to delete the stipulation of art. 20 (2) of the Warsaw Convention (art. X of the Hague Protocol). In consequence, the basic provisions relating to fault, the

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[118] Cf. Hjalsted, l. c., p. 132; and F. Hanák, l. c., p. 237.

[119] See the minutes of the 8th meeting of the Conference, Doc. ICAO 7686-LC/140, p. 94.

burden of proof and discharge will be set down by the Hague Protocol in a uniform way with regard both to the carriage of passengers and to the carriage of luggage and goods.

In the practice of the courts not a single case of the application of article 20 (2) is known.

4. Qualified fault

Under article 25 of the Warsaw Convention, the carrier shall not be entitled to avail himself of the provisions of the Convention which *exclude* or *limit* his liability, if the damage is caused by his *wilful misconduct ("dol")* or by *such default on his part as, in accordance with the law of the court seised of the case, is considered to be equivalent to wilful misconduct.*

This wording makes art. 25 a very contestable provision and gives rise to difficulties in practice. The injured persons invoke very frequently art. 25, in order to avoid the application of those provisions of the Warsaw Convention which limit the extent of the carrier's liability to fixed sums (art. 22).

In its essence, article 25 of the Warsaw Convention is directed to the cases of qualified fault, and in particular to those cases where damage has been caused by the carrier or his agents *intentionally. Direct intention (dolus directus)* is virtually almost unthinkable — in case of direct intention the carrier or his agents would directly want to cause damage. *Indirect intention (dolus eventualis)* is equally hardly possible, for instance, the carrier or his agents would *know* that damage might be occasioned (e. g. because of the technical condition of the aircraft) and would *agree* with damage in case it was caused.

The authors of the Warsaw Convention, however, wanted to make the régime of liability more rigorous and to deprive the carrier of the advantages and the protection, established by this Convention, not only in the case of the intention but also in cases of special qualified negligence. They had in mind, first of all, "gross negligence", as provided in a number of legislations, which is equivalent to intentional fault[120]. However, article 25 does not set forth any uniform rule of substantive law which would expressly define which fault is equivalent to intention. This has been done especially because of the fact that Anglo-American law ignores any special category called "gross negligence" and merges

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[120] *"Culpa lata dolo comparabitur";* this principle was laid down already in Justinian's law — see Digest 11, 6, 1, 1.

intention and "gross negligence" in a single notion — wilful misconduct[121]. What fault should be deemed equivalent to intention is to be determined, within the meaning of art. 25, under the *lex fori* of the competent court.

Under the Czechoslovak Civil Code, all these problemes appear irrelevant. As far as fault is concerned, the Civil Code discerns, in its sections 337 *et seqq.,* intentional fault and fault by negligence, but it does not consider it to be necessary to distinguish the degrees of negligence because — according to the *exposé* — this does not appear practical. The degree of fault in cases of damage caused by negligence is taken into account by the court only should the right of moderation within the meaning of section 358 be applied. Czechoslovak law consequently does not recognize any form of negligence which this law would make equivalent to intention connected with certain legal consequences.

The provision of art. 25 of the Warsaw Convention, in its present wording, has serious deficiencies. It is, for instance, not possible to agree with the conception according to which qualified fault bars the carrier from availing himself not only of the provisions *limiting* the extent of his liability but even of invoking those circumstances which *exclude* his liability. This makes it impossible for the carrier to avail himself, for instance, even of those facts which prove the contributory negligence of the injured person, as well as of the provisions of art. 1, 17 and 18 which define the liability of the carrier objectively and from the angle of time and space. The reference to a default which is, in accordance with *lex fori,* equivalent to wilful misconduct is also very vague and indistinct and it cannot be shown conclusively why *lex fori* should be applied. Art. 25 concerns essentially obligations *ex delicto* and the qualification of the form and the degree of fault in accordance with *lex loci delicti commissi* might rightly be expected.

In view of the difficulties caused in practice by this provision of the Warsaw Convention, art. 25 was fundamentally reshaped at the Hague Conference in 1955. It will no more contain the *renvoi* to *lex fori* but will constitute a unified rule of substantive law and lay down the liability of the carrier without any limitation of extent in those cases in which *intent* or the knowledge of omission will be proved on the side of the carrier or his agents acting within the scope of their employment (art. XIII of the Hague Protocol). According to the new formulation, the carrier, however, is not barred from availing himself of those facts which may exclude his liability.

It is evident from the interpretation of art. 25 and the respective administration of justice that the burden of proof lies on the injured

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[121] Riese, l. c., p. 466.

person in the cases of claims for indemnification of damage caused by the acts or the omissions of the carrier or his agents which these persons have done with intent to cause damage or recklessly and with knowledge that damage would probably result. The presumption of the carrier's fault, as provided by art. 20 (1) of the Warsaw Convention, does not apply to qualified fault. This view was confirmed, for instance, by the French *Cour d'Appel* at Paris, *in re* Hennessy v. Air France[122]. In its judgement of February 25, 1954, the court rejected the claim in af far as it exceeded the limitation of the extent of liability as established in the Warsaw Convention (the plaintiff claimed the sum of 25 million francs), holding that although the captain and the crew of the aircraft undoubtedly made grave mistakes (the aircraft did not follow the prescribed course and crashed on the slope of a mountain), it has not been elucidated what caused the experienced crew to lose orientation. Not even prominent technical experts were able to present any explanation, merely exist hypotheses which do not suffice to prove any qualified fault of the carrier and his agents.

The French *Tribunal Civil de la Seine* passed *in re* Missirian v. Air France a judgement of January 11, 1955[123], adjudicating the sum of 6 million francs which is much more than the limit set by the Warsaw Convention. It applied art. 25 relating to qualified fault *("faute lourde")* because the expert's report on the causes of the crash of the aircraft found that the crash had been occasioned by a blocking of the rudder and, generally a defect of the steering system. Immediately after take-off the aircraft veered in a direction opposite to the usual manoeuvre, the crew lost control of the plane which crashed shortly afterwards. It was also ascertained that there had been an apparent defect of the steering system even before take-off. The previous crew pointed out that the steering system wanted repair. The plaintiff thus succeeded in proving that the carrier had acted recklessly and with knowledge that damage may result.

5. *The contributory negligence of the injured person*

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 provision of its own law, exonerate the carrier wholly or partly from his liability (article 21 of the Warsaw Convention).

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[122] Conférence de La Haye, Septembre 1955, Doc. 36, p. 79; Revue française de droit aérien 1954, p. 62; and IATA Reports on Air Carrier's Liability, No 21.

[123] See IATA Reports on Air Carrier's Liability, No 34.

It is an unconditional requirement of the complete or partial discharge of the carrier that he himself must *prove* the fault or the contributory negligence of the injured person.

It is impossible to consider the provision of art. 21 of the Warsaw Convention as a rule of substantive law. It is only a *rule governing the conflicts of laws* and providing, with regard to all the problems of the fault or the contributory negligence of the injured person, for a *renvoi* to *lex fori.*

It might be possible to consider under *lex fori* merely the question of whether and to what extent the liability of the carrier could be eliminated or reduced with view to the fault or the contributory negligence of the injured person. But it is not possible to agree with the opinion advocated by Riese[124] who claims that it is necessary to consider under *lex fori* even the problem of whether the person to whose fault or contributory negligence the damage is imputable is capable to be liable for torts (e. g. because of age), and eventually also the question whether the respective legal representatives are held lieble for the conduct of the persons who have not the capacity to act in the law (minors, persons placed under guardianship). It is certainly impossible to consider these issues under *lex fori.* The so-called delictual capacity should be considered under *lex personalis* of the tortfeasor, or under *lex loci delicti commissi*[125], and the problem of the liability of the legal representatives or of the persons who have neglected their obligatory care should be considered under the *personal law of these persons.*

Article 21 was worded so as to form a rule governing the conflicts of laws, because in view of the objections of the British delegation it was not possible to lay down a provision of substantive law. At the time of the signature of the Warsaw Convention, the British conception of "contributory negligence" led not to a reduction but directly to the exclusion of the claim for damage. Law Reform *(Contributory Negligence)* Act of 1945 revised this conception[126].

Under the Czechoslovak Civil Code (section 348), the injured person shall bear the damage *proportionately* (i. e. in proportion to the nature and the extent of his fault), if the damage has been caused also by his fault. Such a rule is applicable in most national laws.

Not a single decision based on art. 21 of the Warsaw Convention could be found among the respective cases. In the practice of carriage by air the cases of contributory negligence or even of the exclusive fault of the injured person can easily be imagined. Thus, for instance,

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124 L. c., p. 461.
125 This is advocated also by Bystrický, l. c., p. 309.
126 Martin Wolff, l. c., p. 243.

a passenger is injured on board an aircraft after landing; he did not wait for the aircraft to come to a standstill facing the airport building, got up and began to dress although the passengers had been instructed to fasten themselves; in such a case it would undoubtedly be just to completely exonerate the carrier.

6. Procedure

An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination (art. 28 [1]).

Questions of procedure shall be governed by the law of the court seised of the case (art. 28 [2]).

The following courts are consequently exclusively competent (at the option of the plaintiff) for the procedure in the lawsuits concerning damages under the Warsaw Convention:

a) the court of the head office or the principal place of business of the carrier;

b) the court of the place where the contract of carriage has been concluded, provided this is the place of the carrier's firm (it clearly ensues from the interpretation of the Warsaw Convention that that court would not have jurisdiction which would be located at the place where the contract has been concluded, if this contract has been concluded only by the carrier's agent or selling agent);

c) the court of the place of destination.

The Warsaw Convention allows for the option of those courts which are in a certain relation to the contract of carriage as to their location. Therefore it has intentionally not provided for the jurisdiction of the court of the place where the damage has been occasioned; the respective state might be an absolutely occasional element in relations resulting from the contract of carriage.

In pursuance of art. 32, the enumeration of the competent courts must be deemed to be a rule of imperative nature. Nevertheless for the carriage of goods *arbitration clauses* are allowed if the arbitration is to take place within one of the states the courts of which would otherwise have jurisdiction. Practice does not yet make use of this possibility; the cases of the Arbitration Court of the Chamber of Com-

merce of Czechoslovakia do so far not include, a single award relating to the air carriage of goods.

The rule of art. 28 (2), providing that questions of procedure shall be governed by the law of the court seised of the case, is absolute superfluous and self-evident. The application of *lex fori* to the question of procedure is always beyond all dispute.

The option of one of the three possible courts has a certain legal consequence; for instance, the question of the significance of the contributory negligence of the injured person (art. 21) and of which default is equivalent to wilful misconduct (art. 25) shall be considered in accordance with the *lex fori* of the respective court.

The right to damages shall be *extinguished* if an action is not brought within the period of 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 carriage stopped (art. 29). This period may not be interrupted or suspended.

The method of calculating the period of limitation shall be determined by the *lex fori* of the court seised of the case.

The lack of provisions governing among the Contracting Parties the enforcement of judicial decisions between Contracting parties may be considered a rather serious deficiency of the rules relating to procedure under the Warsaw Convention; it undoubtedly reduces the value of the unification. Unified rules relating to procedure mostly also provide for the abolition of *cautio judicatum solvi;* but the Warsaw Convention does not set forth even this abolition, and the Hague Protocol will bring no amendment in this respect.

7. *Concluding notes on the Warsaw Convention*

The Warsaw Convention for the Unification of Certain Rules Relating to International carriage by Air is an important document of private international law. It unifies on a large international scale the form of the document of carriage in the field of the international carriage by air of passengers and goods and it unifies especially the régime of the carrier's liability. Without a unified international regulation these basic questions of international carriage by air would have to be solved under the principles relating to the conflicts of laws and applicable law would have to be sought. The criteria of the conflict of laws (of the application) would be very contestable in this respect, the respective solutions would be unforeseeable, and there would be, in the sphere of social relations which come into being in connection with international carriage by air,

a number of chaotic elements which would not guarantee legal security in the given social relations.

The Warsaw Convention eliminates these difficulties. In the course of almost thirty years of practice it proved to be a useful instrument which settles in an appropriate manner certain social relations which come into being in international carriage by air and which also promotes the economic development of international aviation. The Hague Protocol of 1955 will bring certain partial amendments to the rules established by the Warsaw Convention and these amendments justly reflect the present state of technical development of aviation. The Hague Protocol will especially induce a simplification of the formalities of the documents of carriage and an adequate expansion of the air carrier's liability for the passengers.

The fundamental principles of the régime of the air carrier's liability established by the Warsaw Convention are in full conformity with the principles of Czechoslovak legislation. Czechoslovak municipal law (e. g. Law No 47 (1956), Collection of Laws, and Public Notification No 31 (1960), Collection of Laws) adopts the régime of the Warsaw Convention which limits the extent of the carrier's liability, and it adopts this régime even with regard to such an international carriage to which the Warsaw Convention it not applicable, and even with regard to purely national carriage.

In spite of all its positive qualities the Warsaw Convention did not achieve a complete unification of the legal rules relating to international carriage by air. First of all, the Convention only settles *certain* problems (documents of carriage and liability), but even in this relatively narrow framework it leaves the solution of a series of questions to national law which is applicable in accordance with the rules governing the conflicts of laws.

Thus, for instance, *lex fori* is applicable to the exclusion or reduction of the carrier's liability in the cases of the fault or of the contributory negligence of the injured person (art. 21) and to the determination of the form of the default which is considered to be equivalent to wilful misconduct (art. 25).

The application of municipal law (as a rule, *lex fori* as well) is necessary for the determination of the extent of indemnisation of different forms of damage (death, injury etc.), because the Convention does not itself specify the extent of the compensation of a concrete case of damage but only fixes the maximum extent of liability in general. It is necessary to solve under territorial law (as a rule, *lex personalis* or *lex fori)* the question of which persons are entitled to claim damages

in the event of the death of a passenger and how the damages awarded or paid should be distributed among them.

The fact that the Warsaw Convention does not contain provisions relating to the enforcement of foreign decisions and that it offers no practical guarantee that several entitled persons would not bring their actions before several courts the option of which they may make does not contribute to the completeness of unification.

These deficiencies of the unification do, however, not reduce the value of the Warsaw Convention and do not cause serious difficulties in practice. Therefore it would not be correct to consider the possibility of a new revision of the Warsaw Convention, now when the Hague Protocol of 1955 has not yet come into force. The rather slow inflow of the ratifications of the Hague protocol shows small willingness of states to revise an instrument which has proved its value mainly as regards its almost universal adoption and stability.

Part III

THE QUESTIONS OF LIABILITY IN CARRIAGE PERFORMED BY A PERSON OTHER THAN THE CONTRACTING CARRIER

Introduction

It ensues from the analysis presented above of the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air as well as of the text of the Hague Protocol that the established unifying régime of liability may be applied only under the condition provided especially in art 1 (2): this basic condition of the applicability of the Convention is the existence of a contract of carriage[127] which shows specific "foreign elements" (the place of departure, the place of destination, the agreed stopping places) investing the contract of carriage with the character of the "international carriage by air" within the meaning of the Warsaw Convention.

However, in this connection the question arises whether the *"carrier"*, to whom the régime of liability applies as established in art. 17—25 of the Warsaw Convention, must necessarily be a contracting party to the respective contract of carriage or whether the régime of liability under the Warsaw Convention applies to *any* "carrier" or, more precisely, to any person who has *actually* performed the carriage without being a contracting party to the respective contract of carriage. Doubts concerning the solution of this question arise as both the Warsaw Convention and the Hague Protocol use solely the idea "carrier" without defining it more precisely.

The lack of the definition of the notion of "carrier" may be regarded as a serious deficiency of the Warsaw Convention but the definition has not been omitted or left out by mistake: in the course of the Warsaw Conference, the Brazilian delegation proposed a definition of the "carrier"[128] by means of which they wished to settle, among others, the problems of the so-called air charter but the Conference did not con-

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[127] In the authentic French text "stipulations des parties", ujednání stran" in the official Czech translation, "contract made by the parties" in the wording of the British Carriage by Air Act, and "agreement between the parties" in the authentic text of the Hague Protocol.

[128] See IIème Conférence internationale de droit privé aérien, Varsovie 1930. Procès-verbaux, p. p. 96, 97, 187, 216 and 217.

sider this question an important problem, intentionally left it open and contented itself by recommending that it remained within scope of issues to be dealt with by CITEJA in the future.

At the time of the signature of the Warsaw Convention, carriage by air was at the very beginning of its development, and business operations connected with international carriage by air also were correspondingly simple and little developped as regards their contents and form.

The forms of business operations in international carriage by air in the course of which the transport services are performed by a person other than the "contracting carrier" are at present ever more frequent and are carried out on an ever larger scale. In such cases the difficult problems arise as to ascertain whether the person who is not the "contracting carrier" but actually performs the carriage should also be subject to the régime of liability under the Warsaw Convention which offers considerable advantages by limiting the extent of liability, and what is in such a case the position the "contracting carrier".

These problems will be analysed below together with an outline of the commercial and technical importance and the legal nature of certain business operations which are frequent and in the course of which problems usually emerge. The entire scope of the problems will be illustrated by the so-called *air charter* and the interchange of aircraft with crew and a special form of air transportation called air freight-forwarding operations will be mentioned briefly. In conclusion a comment on the new "Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier" will be presented; the Czechoslovak Socialist Republic signed this Convention at the Diplomatic Conference in Guadalajara on September 18, 1961.

A) THE AIR CHARTER

a) The idea "charter party" in maritime law and in "air law"

Charterparty (contract of affreightment, affrètement par charte-partie, Raumfrachtvertrag, noleggio, frakhtovanie, czarter) is an old and long established institution of maritime law used in a number of economic types and variants in the carriage of goods by sea. The legal nature of charter party (C/P) and the classification of its different long established commercial types is not conceived in uniform manner and without conflicts not even in the sphere of the carriage of goods

by sea where a long and extente practice exists[129]. In the field of carriage by air the application of the institution of charterparty is, in view of different technical conditions, only analogous and not always quite correct.

It is almost impossible to present a simple and at the same time an exhaustive and generally applicable definition of the charterparty, and not even the authors of large monographs on the carriage of goods by sea try to do so. In practice, the notion of "charter" includes the most different kinds of contract for the carriage of goods by sea and agreements for the hire of a ship, contracts whose economic contents and purpose is the carriage of goods as well as contracts whose purpose is not transportation (as for instance chartering a ship for salvage at sea, fishing[130]; in aviation it may be the use of an aircraft for advertising, photographing, crop-dusting, etc.).

From the angle of law, charterparty is a contract *sui generis;* its different forms may include elements of the *contract of lease,* the *contract for work* and of a pure *contract of carriage,* so that various elements of contracts come to the fore in different concrete types of contracts.

The notion of "charterparty" is consequently rather vague from the angle of law and, in default of a more detailed specification of the concrete type and of the economic contents of the respective business operation, it is hardly practicable to present a *general* definition of the juridical tenor of charterparty.

Subject to these reservations, charterparty may be defined as being a *contract by means of which the operator of a ship* (most frequently the shipowner) *lets to another person* (the charterer), *temporarily and for a sum of money, a ship furnished with necessaries* (including the crew) *for a specified conveyance of goods on a specified voyage or on several voyages, or for transporting goods for a specified period, or for another agreed purpose.*

In practice charterparties are usually divided into the following types of contract, which are however not always analogously applicable to carriage by air:

a) *trip-charter:* by means of this contract, a ship furnished with necessaries is let to the charterer for the realization of a specified voyage or of specified and precisely defined voyages;

b) *time-charter:* by means of this contract, a ship furnished with

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[129] See, e. g., Scrutton On Charterparties and Bills of Lading, 16th Edition by Sir W. Lennox McNair and A. A. Mocatta, London 1955; Poor, American Law of Charterparties and Ocean Bills of Lading, 4th Edition, New York 1954; Dr. F. Hanák, Smlouva o námořní přepravě nákladů, Studie z mezinárodního práva V, Publishing House of the Czechoslovak Academy of Sciences 1960, p. p. 131—179; A. D. Keylin, Sovietskoye morskoye pravo, Moscow 1954.

necessaries is let to the charterer for a specified period of time, the concrete voyages being determined by the charterer himself;

c) *bare-boat* (bare-hull) *charter:* by means of this contract, the ship is let to the "charterer" without the crew and in the form of lease[131].

This "maritime" conception of charterparty is usually transferred from the sphere of the carriage by sea to that of aviation, but a detailed analysis shows that the analogy may be only very approximate.

Carriage by air is performed in completely different technical conditions which give the respective business operations an absolutely different economic character. In case of a sea charter the prevailing purpose of the contract is the carriage of cargo (of goods), whereas experience has shown that an air charter mostly concerns the carriage of persons and of their luggage. The time of transportation is incomparably shorter in aviation, loading and unloading is carried out by completely different technical means, etc. In case of sea charter it is, as a rule, necessary to individualize in the agreement the chartered ship by her name (although practice allows the charterparty to characterize the ship generally by a statement of her quality and burthen, e. g., "First Class Steamer 10 000 t.", or the clause "All substitute" is admissible), whereas the air charter contains only a generic indication of the type of the aircraft (IL-18, IL-14, DC-6B, DC-7C, etc.).

Another marked difference consists in the fact that in carriage by sea the institution of charterparty is mostly used in so-called *tramp-shipping* (in contradiction to line service), whereas in carriage by air the so-called air charter is current even on regular lines. The economic sense and purpose of the charter is also quite different in aviation.

The particular technical nature of aviation virtually excludes the possibility of a pure *time-charter* within the framework of which the charterer could freely decide for which flights he would employ the chartered aircraft within a certain period of time: it would at least be practically impossible to fix consideration only in view of the time (e. g., a fixed sum per day) and to theoretically allow the charterer to operate the aircraft round the clock. The service life of a number of costly parts of an aircraft is often calculated for dozens or for the maximum of several hundred *flight hours* and therefore it is as a rule necessary to fix in the charterparty the sum to be paid by a complex calculation, taking into account the number of flight-kilometres, the

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130 See F. Hanák, l. c., p. 138.

131 This definition shows clearly that the so-called bare-boat (bare-hull) charter has virtually nothing in common with the substance of the charterparty. It is, in fact a contract of lease, possibly with a certain specific character compared to the current contract of lease concerning a movable (the shipowner is usually bound to defray the insurance of the ship — the hull insurance).

number of flight-hours, the period of time during which the aircraft is put at the charterer's disposal and thus excluded from another operation, and a number of other aspects (the landing and hangar fees of foreign airports, the ground control fees, etc.).

It is thus possible to arrive at the conclusion that an analogous transfer of the conception of charterparty from the sphere of carriage by sea into that of carriage by air is hardly suitable.

The practice of carriage by air essentially employs the notion of "charter" only as a colloquial term whose juridical purport is not always identical with sea charter. The meaning of the idea of "charterparty" is very broad in aviation and it, in fact, designates any *use of an aircraft or the carriage by an aircraft "to order" — i. e. outside the framework of the regular services as fixed in the schedules of the carrier.*

The economic purpose of the use of an aircraft "to order" is first of all usually the performance of carriage to a certain place which is not connected by a scheduled air line of the carrier or the performance of carriage on a scheduled line but outside the schedule, and in putting the entire capacity of the aircraft at the disposal of a single conveyor. The use of an aircraft "to order" often has important tariff consequences: if the conveyor orders the entire capacity of the aircraft (e. g., an aircraft for 40 passengers, 800 kg. of luggage and 1000 kg. of goods), the fare per passenger or per unit of cargo may be fixed at a sum lower than the minimum tariff approved by IATA[132].

The idea of „charter" became customary in the practice of carriage by air although it is on the whole incorrect and juridically almost meaningless. It does not, however, appear in Czechoslovak legal terminology and the substance of the respective acts is fully expressed by the notion of "carriage to order" or *"unscheduled air carrige based on agreement";* the latter term is also employed in the Air Carriage Regulations (Public Notification No 31 (1960), Collection of Laws), namely in the provisions of sections 2 (2), 5, 20 and 24.

The notion of „contract of lease of aircraft", employed in the form of the type contract of the Czechoslovak Airlines, is absolutely incrorrect. In the cases under consideration no contract of lease relating to aircraft is concerned, but exclusively a contract of *carriage,* or a contract for work (if the aircraft is used for purposes other than carriage, such as geological surveying or archaeological exploration, photographing, for advertising purposes, crop-dusting, etc.).

In our further consideration of the contestable issues of liability we will completely set aside the so-called *bare-hull charter.* This form of

[132] Provided, naturally, that the rules of "IATA Resolution 045 — Charters" are observed; these rules aim at the elimination of unfair competition.

the use of an aircraft is, in fact, a hire of a movable, *viz.* of an aircraft without a crew. Provided that the hirer of the aircraft himself operates carriage in the hired aircraft, he enjoys the carrier's position in law, and no rights or duties arise for the owner of the aircraft from the contracts of carriage entered into by the hirer. The letter, in his capacity as carrier, is liable for the passengers and in relation to the consignors of goods under the Warsaw Convention (provided "international carriage by air" within the meaning of the said Convention is concerned) or under the respective *lex causae* governing the given contract of carriage (see p. 16—19 above). In the event of an accident the hirer may only have the right of recourse against the letter, provided he proves that the accident has been caused by the defective qualities of the leased aircraft. He should prove that, by fault of the latter, the aircraft has not been airworthy[133] and that the damage which the hirer has been obliged to compensate was in causal concatenation to this fact. Naturally, concrete questions should be solved under the *lex causae* of the respective lease. In default of the choice of applicable law, stipulated by the parties in the contract of lease, the solution of the questions arising from the conflicts of laws would by no means be easy: the tendency prevails in theory to apply to the contract of lease of a movable the law found out according to the letter's place of business or residence[134] but strong arguments might also be brought forward in support of the application of the *law of the flag* (of the registration mark — *lex banderae)* of the aircraft, especially in view of the fact that a number of states have laid down administrative regulations which are of imperative character and relate to the granting of approval of natural and legal person's ownership, administration and operation of aircraft[135]. We will also set aside the "charter" of aircraft for purposes other than carriage as these problems would completely exceed the limits of the theme of a study devoted to problems of internationl *carriage* by air.

b) The contestable issues of liability in the so-called "air charter"

For further consideration, the following conception first of all ensues from the above-quoted definition of the so-called "air charter": it is

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133 Analogously to the idea of maritime law "seaworthiness", the air terminology also employs the idea *"airworthiness";* see, e. g., art. 31 of the Convention on International Civil Aviation (the Czech and English texts in No 147 (1947), Collection of Laws), as well as section 11 of the Civil Aviation Law, No 47 (1956), Collection of Laws.

134 Bystrický, l. c., p. 298.

135 See, e. g., sections 6 and 8 of the Civil Aviation Law, No 47 (1956), Collection of Laws, and the Public Notification of the Ministry of Transport, No 144 (1957), Official Gazette, Relating to Approving the Administration (Ownership) of Civil Aircraft and the Operation thereof.

virtually a special contract of carriage, distinct from the current contract of carriage by air by the fact that it is performed to order (i. e. outside the framework of the scheduled time-table and, as the case may be, outside the regular air lines) and that the *entire capacity* of the aircraft is put at the disposal of the conveyor.

Under point 3 of the quoted Resolution 045 (Charters), adopted by IATA (International Air Transport Association) in 1958, the entire capacity of the aircraft, irrespective of the space which the charterer may actually use, shall be charged to his account.

It is current in carriage by sea that the charterer may conclude a *sub-charter* as regards the space he does not use or even as regards the entire capacity of the ship or he may transport other persons' individual packages accompanied by bills of lading. Analogously in carriage by air, the person who has concluded with the operator of the aircraft an agreement on a flight to order may under *certain conditions* dispose of the payload capacity of the aircraft. This is because he may sometimes act in capacity of the carrier and in *his own* name enter into the contract of carriage with the passengers and consignors of goods who will use the aircraft destined to perform the carriage "to order".

The limitation of this possibility notably ensues from the above-quoted IATA Resolution 045 — Charters. Provided that the air transport undertaking which is a member of IATA *does not grant to the conveyor any tariff reduction in the carriage by air to order* (i. e. unless the price per one seat or 1 kg. of cargo is not lower than the minimum fare or tariff approved by the IATA organization), the aircraft may be let to order to anybody who is then at liberty to dispose of the payload capacity of the aircraft. He may in his own name enter into contracts of carriage with persons interested in participating in the ordered flight and receive from them the respective sum of money and he may by his own activity (such as advertising, etc.) win all prospective participants in such a flight.[136] Thus for example the Czechoslovak Airlines concluded a contract with a certain foreign travel agency engaging the former to perform, on the account of such agency, an unscheduled flight from Prague to Varna, by an Il-18 aircraft; in such a case the other party may use the aircraft for 80 holidaymakers whom the agency won by its own advertising and with whom it concluded contracts of carriage in its own name.

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[136] Obviously the Czechoslovak Airlines may not enter into an agreement on a flight to order, which would enable the other contracting party to any form of private "transport undertaking"; section 2 (1) of Public Notification No 31 (1960), Collection of Laws, charges the Czechoslovak Airlines with performing carriage by air *in conformity with the State Plan of the Development of National Economy.*

However, in the interests of the elimination of unfair competition and of the evasion of the approved tariffs, Resolution 045 allows the charter only under rather rigorous conditions if in carriage to order the carrier *grants a reduction* in comparison with the minimum rates approved by IATA. The said conditions especially aim at establishing a restricted group of those participating in flights performed at reduced rates, and at preventing such a carriage performed at reduced fares from becoming goods "freely marketable" for the broad public, as this would prejudice the interests of the other carriers operating on regular lines at full fare.

The IATA Resolution 045 — Charters allows the letting of an aircraft to order at a reduction only —

a) *for the use* of an individual or a legal person (association, society, corporation). Carriage is performed "for own use" only provided it does not shift the costs of the freight wholly or partly, directly or indirectly to the carried persons;

b) *for affinity groups,* that is principally for a society or an organization which has a certain common goal or programme other than collective travelling and which was established a sufficiently long time before putting forward the request for the carriage by air to order, so that such a group might be distinct from the broad public. The agreement is concluded with one person representing the members of the group.

It occurs in these two forms of flights to order (without any reduction or at a reduction under the conditions set by IATA Resolution 045) that a "carrier" (the owner or the operator of the aircraft) performs the carriage agreed upon, whereas another person (the charterer, i. e. the person who has concluded with the carrier the contract of carriage to order) may conclude the transportation contract itself with the passengers or the consignors of goods so that there is no contractual relation between the passengers or the consignors of goods and the owner or operator of the aircraft.

Under such circumstances of fact certain issues arise which relate to the régime of liability in case of an accident or of another event. The crux of the disputes ensues from the fact that the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air sets liability of the "carrier" but does not define in any provision *who* should be deemed carrier.

In the interpretation of the stipulations of the Warsaw Convention it is possible to arrive at two controversial conclusions, each of which has its authoritative advocates in literature, *viz.:*

(a) "carrier" is the person who has, in his own name, *concluded the contract of carriage* of persons or goods;

(b) "carrier" is the person who *actually performs the carriage* subject to the provisions of the Warsaw Convention.

The view which evidently prevails in literature is that the carrier within the meaning of the Warsaw Convention is the person who has in his own name concluded the contract of carriage. This opinion is advocated, e. g., by D. Goedhuis[137], O. Riese[138], M. Lemoin[139], M. de Juglart[140], Shawcross and Beaumont[141], H. Drion[142], and others.

This opinion is logical. The Warsaw Convention presupposes the existence of the contract of carriage, and unifies on international scale certain consequences (liability) and requirements (documents of carriage) of such a contract. The authors of the Warsaw Convention only intended to lay down the liability of that carrier who has engaged himself under contract to perform the carriage. The provision of art. 20 (1) of the Warsaw Convention may also serve as an argument for the said conclusion, since it sets forth that the exoneration from liability requires the proof of such a diligence which may not be demanded outside the framework of a contractual obligation. The presumption of art. 30 (1), laid down in respect of carriage performed by various successive carriers, equally proves that the person who has entered into the contract of carriage must be deemed the "carrier"; this presumption would be superfluous if the person who has *actually* performed the carriage without being a contracting party to the respective contract of carriage were regarded as the carrier[143].

The contrary opinion (i. e. that the person who has *actually* performed the carriage should be deemed the "carrier") is defended in theory, for instance, by R. Coquoz[144], M. Litvine[145], and A. W. Kean[146]. McNair[147] holds an indistinct standpoint.

However, their arguments are altogether vague and inconclusive. First of all they deduce from the interpretation of art. 30 (1) of the Warsaw Convention that the actual performance of the carriage and not the

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[137] National Air Legislations and the Warsaw Convention, The Hague, M. Nijhoff 1937, p. p. 134—135.
[138] L. c., p. p. 406, 409, 422, 440 et seqq.
[139] L. c., p. 541.
[140] Traité élémentaire de droit aérien, p. 328.
[141] L. c., p. 343, note a).
[142] L. c., p. 134.
[143] Cf. R. H. Mankiewicz, Charter and Interchange of Aircraft and the Warsaw Convention. A study of Problems Arising from the National Application of Conventions for the Unification of Private Law, The International and Comparative Law Quarterly, Vol. 10, Part 4 (1961), p. 707—725.
[144] L. c., p. 92.
[145] Précis élémentaire de droit aérien, 1953, paragraph 180.
[146] ICAO Doc. 7921 LC/143-1, p. 14 *et seqq.*, and p. 32.
[147] L. c., p. 278—279.

conclusion of the contract constitutes the criterion applicable to the question whether or not a certain person is the "carrier". But the meaning of art. 30 (1) is different: it lays down the fiction that the "successive carrier" is also a contracting party to the respective contract of carriage and this stresses even more the fact that the conclusion of the contract of carriage exclusively constitutes the applicable criterion.

If the person who has entered into the contract of carriage (the "contracting carrier") is deemed the carrier within the meaning of the Warsaw Convention, the question arises whether the other contracting party (the passenger or, as the case may be, the consignor of goods) can take action, *under the Warsaw Convention,* directly against the person who has performed the respective carriage without being in a proximate contractual relation with the passengers or, as the case may be, the consignors of goods. If such person is not the carrier within the Warsaw Convention, it is very doubtful whether under the Warsaw Convention the régime of liability is applicable to him, i. e., especially, whether the two key provisions, namely the *presumption of fault* and the *limitation of the extent of liability* may be applied. (Carriage to order may give rise to equal doubts whether the "contracting carrier" should be held liable under the provisions of the Warsaw Convention when the carriage has actually been performed by another person; it is questionable whether his fault may be presumed with regard to those acts on the performance of which he has actually had no influence.)

The Warsaw Convention does not solve these very complex questions which arise in carriage performed by a person other than the contracting carrier, and this may give rise to very grave controversions in practice.

This fact naturally applies only to such cases when the parties do not take these issues into due consideration when concluding the contract relating to a flight to order.

The contracting parties may avoid all contestable questions by inserting the so-called "Warsaw clause" into the contract relating to a flight to order. This clause confirms in a contractual way the applicability to the respective carriage of the Warsaw Convention and its régime of liability. In such a case the Warsaw Convention is the *„lex contractus"* of the contract of carriage as between the owner or operator of the aircraft (i. e. the "actual carrier") and the charterer[148].

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[148] Point 7 of the form of the Czechoslovak Airlines "Contract of Lease of Aircraft" (see p. ... above) solves this question in a hardly expressive way referring to the Conditions of the Czechoslovak Airlines for Carriage by Air. The English wording of the same form contains an explicit *renvoi* to the Warsaw Convention. Analogous provisions are contained in the BOAC Special Flight Order Agreement (paragraph 3), the KLM Royal Dutch Airlines Aircraft Charter Agreement (art. 12), and the SABENA *Contrat de transport d'un groupe de passagers* (paragraph 3).

The actual carrier would best ensure his position in similar cases if he would consequently insist on delivering his own documents of carriage (passenger tickets, luggage tickets) to all the passengers who are transported on board his aircraft and have concluded with the charterer the contract of carriage; in this way he would enter into a direct contractual relation with them. This requirement seems to be undoubtedly applicable to the practice of the Czechoslovak Airlines, in view of the provision of section 6 of the Public Notification No 31 (1960), Collection of Laws, under which the carrier (the Czechoslovak Airlines) shall be bound to deliver to each passenger a passenger ticket, after the payment of the fare, and shall be entitled to refuse the carriage of a person who does not possess a valid passenger ticket; the quoted provision making no distinction between the scheduled carriage by air performed according to notified air timetables and unscheduled carriage by air (performed in pursuance of an agreement), this duty to deliver a passenger ticket to each passenger undoubtedly applies also to the cases of flights to order.

These seemingly formalistic precautions offer — in view of the obscurity of the provision of the Warsaw Convention relating to the question who is the "carrier" — a guarantee of the legal security of the "actual carrier" and the protection against possible excessive claims which might be raised before a foreign court.

An example, contemplated by certain authors, may serve as an illustration of the respective difficulties[149].

The person *A* (charterer) concludes a contract relating to a flight to order with person *B* (operator of the aircraft). *A* concludes in his own name a contract of carriage with a group of passengers so that *A* is the "contracting carrier" and *B* is the "actual carrier". The aircraft crashes due to the negligence of the crew (*B*'s personnel) — and it might happen now that the passengers would bring an action for damages against the "actual carrier" *B*. Irrespective of the lack of any contractual relation with the passengers, *B* might be found liable *ex delicto* under the law of the place where the accident has been occasioned *(lex loci delicti commissi)* although the respective carriage would otherwise comply with all requirements of "international carriage by air" within the meaning of the Warsaw Convention. In this way the damaged passengers would be able to intentionally omit to take action for damages against the contracting carrier whose liability undoubtedly is limited under the Warsaw Convention and to recover, by means of an

[149] H. Drion, l. c., p. 137; Kurt Grönfors, "Air Charter and the Warsaw Convention. A Study in International Air Law", The Hague, M. Nijhoff 1956, p. p. 27 *et seqq.*

action against the "actual carrier", an indemnisation exceeding the limits established by the Warsaw Convention. The defence of the "actual carrier" might be very difficult before certain courts.

If the competent court were inclined to a more liberal interpretation of the idea "carrier" whose liability should be limited in accordance with art. 22 of the Warsaw Convention, the proof would be sufficient that the "actual carrier" may be deemed carrier with regard to the respective passengers because he has concluded with person *A* a contract of carriage relating to the carriage of these persons although he is in no direct contractual relation with them. The contract relating to a flight to order (charter) is a *contract of carriage* entererd into between *A* and *B* the latter being the contracting carrier in respect of *A;* it is irrelevant that the substratum of the carriage (the nominal enumeration of the passengers) has not been specified (individualized) in detail in the contract between *A* and *B* at the time of the conclusion of the contract and that it has been quoted only generally (the number of persons).

It is naturally impossible to guarantee that every court would accept such an interpretation and for the time being questions arising from liability in international carriage by air to order remain contestable because of the obscurity of the Warsaw Convention in this field. The above-cited theory would be evidently untenable, for instance, in the case of a *time-charter* in which the operator of the aircraft does, in fact, not know at the time of the conclusion of the agreement what voyages will be performed by the aircraft during the fixed period and which substratum of carriage will be embarked.

The respective questions will be solved by the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, signed at the Diplomatic Conference in Mexico (Guadalajara), on September 18, 1961. The said Convention will be treated below.

But as long as the cited Convention does not come into force it is necessary to take the following measures in order to protect the interest of the "actual carrier" (the Czechoslovak Airlines) in such contestable situations:

I. To systematically include in each agreement for carriage to order a clause by virtue of which the liability of the carrier shall, in relation to the other contracting party *as well as to the carried passengers and the consignors of goods,* be subject to the rules of the Warsaw Convention;

2. to deliver to all those taking part in a flight to order passenger tickets and baggage checks containing printed conditions of carriage

and a clause relating to the applicability of the Warsaw Convention;

3. in a number of cases the interests of the national economy may also be promoted by a contractual clause laying down that the respective contract relating to a flight to order shall be governed by Czechoslovak law, except as otherwise provided in the Warsaw Convention, as well as by a submission clause referring disputes to the jurisdiction of the Czechoslovak courts (or, as far as suits arising from the carriage of goods are concerned (see art. 32 of the Warsaw Convention), to the jurisdiction of the Arbitration Court of the Chamber of Commerce of Czechoslovakia).

B) INTERCHANGE OF AIRCRAFT

Interchange of aircraft *(banalisation d'aéronefs, Austausch von Luftfahrzeugen)* is a commercial operation which is very practical and current in international carriage by air, although its legal nature is not always quite incontestable.

According to the European Civil Aviation Conference, the word "interchangeability" should be taken to refer to the ability of an airline operating internationally under a governmental agreement or authorization to use other aircraft belonging to a foreign airline and registered in a foreign state, without the aircraft's crew[150].

In explaining this commercial operation it is necessary to proceed from the fact that national legislation mostly contains imperative rules of law which lay down who may be the owner or operator of an aircraft, as well as rules governing the registrations in the registers of aircraft and finally rules relating to the exclusive right of certain organs or legal persons to operate carriage by air. Therefore an air transport undertaking needs a special legal ("governmental") authorization enabling it to operate in its own name an aircraft (be it with its own or with a foreign crew) which is registered in a foreign register of aircraft.

This authorization has been granted to the Czechoslovak Airlines by section 2 (4) of the Public Notification No 31 (1960), Collection of Laws, by virtue of which the carrier (the Czechoslovak Airlines) may make himself represented by another air carrier in international carriage by air.

The business operation may be taken into consideration in practice, for instance, in case of an excessive demand for carriage on a certain line which the carrier is not able to meet by means of the capacity of

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[150] See Journal of Air Law and Commerce, Vol. 24, 4 (1957), p. 480.

the planes at his disposal; in other cases the carrier is unable to cover his scheduled lines even in the event of the current demand for different reasons such as, for instance, several of his planes have been put out of operation for unforeseeable reasons such as a crash or a long-term repair. In such cases the carrier may make himself "represented" by another (foreign) carrier by two possible ways:

(a) by acquiring — generally in the form of hire — for temporary or even for a single use the aircraft of a foreign transport undertaking without a crew (interchange of equipment). If he performs carriage by means of such aircraft and with his own crew no special contestable issue of liability arise because it is obvious who is "carrier" within the meaning of the Warsaw Convention (see above p. 84 on the hire of aircraft);

(b) in acquiring, by agreement concluded with a foreign air transport undertaking, an aircraft with crew to perform a certain flight or to perform certain flights within a fixed time (agreement on a flight to order, charter; the specific character of this legal relation, however, consists in the fact that it is a contractual relation between two air transport undertakings the commercial rights of which are defined in strict rules of the respective national laws; therefore literature does not speak about charter, but employs the term "interchange of services").

Analogously to the agreement on a flight to order, as analysed above, in the case quoted *sub* (b), the question arises who is "carrier" within the meaning of the Warsaw Convention and which are the consequences of this business operation for the régime of liability. A situation is occasioned in which an air transport undertaking concludes a contract of carriage with passengers or consignors of goods whereas another air transport undertaking performs the acts of transport. In such a situation may the damaged passenger or consignor of goods take direct action against the "actual carrier" whose fault has caused the damage or may he claim damages only from the "carrier" with whom he entered into the contract of carriage? May the "actual carrier" avail himself of the advantages of the régime of liability as established by the Warsaw Convention (limitation of the extent of liability) when the existence of a contract of carriage constitutes a basic condition of the applicability of the Warsaw Convention? May the presumption of fault under art. 20 (1) of the Warsaw Convention also be applied to the "actual carrier"? May this presumption be applied to the "carrier" who has only entered into the contract of carriage but took no part in the actual performance of carriage?

In practice these questions may also give rise to a number of doubts. Difficult lawsuits can be avoided only by systematically applying the

"Warsaw clause" in all agreements, passenger tickets, baggage checks and air consignment notes.

Also in this sphere Convention for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Party might clarify the matter in many respects.

C) AIR FREIGHT-FORWARDING OPERATIONS

In certain states, particularly in the U. S. A., a specific form of forwarding has developed in the field of carriage by air. This form considerably expanded in the economic life of society and frequently influenced not only the tariff policies of the air transport undertakings but also contributed to a certain extent to the development of the air carriage of goods.

The "forwarder" within this specific meaning (air freight-forwarder, *groupeur de fret aérien* or *commissionaire-groupeur de fret aérien, Luftfracht-Sammelladungspediteur* or *Luftfracht-Verkehrsführer)* is a person who —

a) receives from a considerable number of consignors goods and prepares them for common carriage (consolidated shippment);

b) assumes, with regard to consignors, liability for the carriage of different packages from the place of receiving to the place of destination;

c) employs the services of an air carrier for the carriage of the commonload[151].

The "air freight-forwarder" in this sense is a person who is himself not engaged in carriage by air but receives goods for carriage by air and dispatches them in his name through an air carrier. In respect of the consignor he is himself the carrier but in respect of the actual air carrier he is himself consignor of the same goods[152].

The economic sense and purpose of the activities of such an "air freight-forwarder" consist in collecting small individual packages and dispatching them later in consignments as a bulk freight (consolidated shippment). Such a bulk cargo is transported at a substantially lower rate as compared to small individual packages. The difference between the freightage of such a cargo and that of individual packages is so

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[151] A. Rudolf, Die Rechtstellung des Air-Freight-Forwarder in den Vereinigten Staaten, Zeitschrift für Luftrecht und Weltraumrechtsfragen, No 2 (1960), p. p. 141—148; on p. 142.

[152] See ICAO Doc. 8101/LC 145 Summary of the work of the Legal Committee during its XIII[th] Session, p. 10, item 5.

substantial that the "air freight-forwarder" is able to offer to the consignors considerably reduced freight rates and thus make them use his services, and yet he gains business profit. These commercial operations are said to have promoted in the U. S. A. the development of the air carriage of goods[153].

The juridical qualification of the business operations, as formulated by the ICAO Legal Committee at its XII[th] Session (see note 152) has a basic importance for the consideration of our problem, *viz.:* with regard to the consignor of the goods, the "air freight-forwarder" is himself carrier but with regard to the actual air carrier he himself is consignor of the same goods.

Thus again we have a case where it is contestable who really is "carrier" within the meaning of the Warsaw Convention — whether the "carrier" who has concluded the contract of carriage with the consignor of goods or the person who has actually performed the carriage? Can this "actual carrier", under the rules of the Warsaw Convention, be sued by the initial consignor of goods with whom he is in no contractual relation? Who is in the given case protected by the advantages of the limitation of the extent of liability and against whom is the presumption of the carrier's fault directed?

In the field of these problems all controversial questions which have arisen in the sphere of the charter and of the interchange of aircraft again come to the fore. Here again the problem is a consequence of the fact that carriage is performed by a person other than the "contracting carrier", i. e. by person who has not entered into the contract of carriage.

In view of the fact that the Warsaw Convention does not define the idea "carrier", a uniform judicial settlement of the possible lawsuits arising from liability cannot be expected.

Also in these cases the Convention dealt with in the following part might be of great help.

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[153] Elggreen, What Part Shall Air Freight Forwarders Have in the Development of the Air Freight Industry, Journal of Air Law and Commerce, Vol. 1947, p. p. 170 *et seqq.;* A. Rudolf, l. c., p. 142.

D) THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR PERFORMED BY A PERSON OTHER THAN THE CONTRACTING CARRIER

a) THE HISTORY OF THE ORIGIN OF THE CONVENTION

In the period after World War II, the volume of international carriage by air underwent a vast development. The specific commercial forms of the operation of internatonal air services also developed as was induced by the competition struggle between the different air companies. The "flight to order" or the "air charter" is used to an ever increasing extent as it is a very efficient instrument of fierce competition enabling the performance of carriage at essentially lower rates in comparison with the tariffs which have been approved on an international scale in scheduled line carriage. At the same time the air companies retain full profit for in case of the "air charter" they are guaranteed the full use of the capacity of the aircraft, whereas in regular line carriage the load factor of the aircraft is showing a downward trend and on the world scale does not even reach 60 per cent of the total offered capacity[154].

The full utilization of the capacity of aircraft naturally brings about an increased risk as far as the liability of the air companies is concerned. In this respect it is necessary to point out that the biggest disasters in the history of international aviation occured in flights to order: 130 people were killed when a Boeing 707 of Air France crashed at the Orly airport on June 3, 1962 on a chartered flight to Atlanta and the destruction of the Constellation of the Flying Tigers company on March 16, 1962 took a toll of 107 lives.

The solution of the questions of liability in case of the air charter may cause serious difficulties as the actual carrier is not necessarily always also the "contracting carrier" within the meaning of the Warsaw Convention. Analogous problems arise in cases of the interchange of aircraft and in air freight-forwarding operations; these forms of business operations in international carriage by air have also considerably expanded.

The Conference on Co-ordination of Air Transport held in Strasbourg in April—May, 1954, in its Resolution No 12, called the attention of the

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[154] The world-wide average of the utilization of the capacity of aircraft on international lines amouted to 61,7 per cent in 1956, to only 59,6 per cent in 1959, to 58,8 per cent in 1960, and only to 53,3 per cent in 1961. See Development of Civil Air Transport, Traffic Statistics, ICAO Bulletin, Vol. XVII. No 3 (1962), o. 42.

ICAO Council to the practical necessity of adopting an international convention which would unify the rules relating to liability in case of the air carriage services where another subject enters into the contract of carriage and another performs actual carriage.

On March 22, 1955, the ICAO Council charged the ICAO Legal Comittee with setting up a sub-committee for the study of this problem.

The Hague Conference which adopted the Protocol to Amend the Warsaw Convention, in September, 1955, also dealt with the problems of the air charter. The Conference stated in its Final Act that the problem is too complex and that it is impossible to include it in the Protocol to Amend the Warsaw Convention. Nevertheless the Conference arrived at the conclusion that this question was of a singular practical importance, and recommended that ICAO continue to deal with it[155].

The ICAO Legal Committee's Sub-Committee discussed the elaboration of a draft convention at its sessions in Caracas (1956) and Madrid (1957). In September 1957 the XIth Session of the ICAO Legal Committee adopted the text of a preliminary draft convention[156]. On receiving of comments from different states, the ICAO Legal Committee's Sub-Commitee again discussed the draft convention at its meeting in Paris in spring 1960 and the ICAO Legal Committee adopted the final draft convention at its XIIIth Session in Montreal, in September 1960[157].

A Diplomatic Conference met under the auspices ICAO in Guadalajara, Mexico, from August 29 to September 18, 1961, to discuss this final draft. The Conference was attended by representatives of 40 states. At the end of the Conference, on September 18, 1961, a convention was signed entitled "Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier".

The Convention was signed by 18 states[158] on September 18, 1961 and has so far not been ratified by a single one of them.

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[155] See point II. D of the Final Act of the Hague Conference, ICAO Doc. 7686-LC/140, Vol. II, p. 31.

[156] For the English, French and German texts see the Zeitschrift für Luftrecht, No 1 (1958), p. p. 28—32.

[157] ICAO Doc. 8101/LC/145, p. p. 15 *et seqq.*

[158] Brazil, the Byelorussian S.S.R., China, the Czechoslovak Socialist Republic, France, the German Federal Republic, Great Britain, Guatemala, Honduras, Hungary, Mexico, the Netherlands, the Philippines, Sweden, Switzerland, the Ukrainian S.S.R., the U.S.S.R., and the Vatican. — Already at the meeting of September 14, 1961, the U.S. delegation declared that it would not sign the Convention for the time being, because the new administration wanted to re-examine its adherence to all conventions on aviation, particularly the Warsaw Convention.

b] THE MAIN PRINCIPLES OF THE GUADALAJARA CONVENTION

From the formal aspect, the Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier is an independent international treaty. Its close connection with the Warsaw Convention is nevertheless evident from its title and tenor; in fact, the Guadalajara Convention is nothing but a supplement to the Warsaw Convention, its every term proceeds from it and it settles only a partial aspect of the relations which are otherwise subject to the régime of the Warsaw Convention. It is essentially impossible for a state to be bound by the Guadalajara Convention if it is not at the same time bound by the Warsaw Convention. The Guadalajara Convention only fills a certain gap of the Warsaw Convention and otherwise fully refers to the régime of the latter and is therefore not a treaty which could exist independently of the Warsaw Convention.

In consequence, the Conference might rightly be expected not to adopt a "convention" but to give to the agreed stipulations the form of a "protocol supplementary to the Warsaw Convention". However, the Conference intentionally avoided this, pointing out that the Hague Protocol of 1955 hat not yet been ratified and that it would therefore not be tactical to submit to the Parliaments of the different states another "protocol" to amend the Warsaw Convention[159]. Although this motivation of the title and form of the Convention is certainly somewhat peculiar, it can on the other hand not be denied that in present contractual practice the titles and forms of international treaties are frequently employed inconsistently, and tendencies more than rules can be deduced from practice.

The preamble of the Guadalajara Convention is of extraordinary importance for the interpretation of the Warsaw Convention; it states that the Warsaw Convention *does not contain* particular rules relating to international carriage by air performed by a person who is not party to the agreement for carriage. The obvious conclusion ensues therefrom that "carrier" within the meaning of the Warsaw Convention is only a person who has in his own name *entered into the contract* of carriage, and not a person who has only actually performed the carriage. The Warsaw Convention has consequently not regulated the régime of the liability of the "actual carrier" and it is this gap that the Guadalajara Convention should fill.

Article I of the Convention is formulated under the marked influence

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[159] Meeting of August 30, 1961, SR/19, 3, SR 20, 1.

of Anglo-American legislative conceptions. Before settling the actual merits of the respective problems, it defines the three basic notions which the Convention most frequently uses, *viz.:*

a) the "Warsaw Convention" means the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on October 12,1929, or the Warsaw Convention as amended at The Hague, 1955, according to whether the carriage is governed by the one or by the other;

b) the *"contracting carrier" (transporteur contractuel, transportista contractual)* means a person who makes an agreement for carriage governed by the Warsaw Convention with a passenger or consignor or with a person acting on behalf of the passenger or consignor;

c) the "actual carrier" *(transporteur de fait, transportista de hecho)* means a person, other than the contracting carrier who, by virtue of authority from the contracting carrier, performs the whole or part of the carriage contemplated *sub* b).

Another moment must be included in the notion of "actual carrier"; he may not be a "successive carrier" within the meaning of art. 30 of the Warsaw Convention, because the carriage performed by various successive carriers is deemed a single carriage, insofar as the contracting parties have intended it to be a single operation; such a "carriage performed by successive carriers" is automatically subject to the régime of the Warsaw Convention under its art. 1 (3) and its art. 30.

The definitions of the basic notions illustrate in themselves the close connexion of the Guadalajara Convention and the Warsaw Convention.

The proper scope and sense of the Convention is defined in art. II as follows: if an *actual carrier* performs the whole or part of carriage which, according to the agreement for carriage, is governed by the Warsaw Convention, both the *contracting carrier* and the *actual carrier shall be subject to the rules of the Warsaw Convention,* the former for the whole of the carriage contemplated in the agreement for carriage, the latter solely for the carriage which he performs.

By means of this provision, the Guadalajara Convention attains its objective: it extends the applicability of the régime of liability established by the Warsaw Convention to the person who is not the party to the contract of carriage under the Warsaw Convention, although he himself actually performs the acts of carriage.

This results in the following practical consequences for the "actual carrier":

a) *the extent of his liability is limited* by the limits established by the Warsaw Convention (naturally unless the "actual carrier" commits a qualified fault within the meaning of art. 25 of the Warsaw Convention).

This may be regarded as an advantage from the point of view of the "actual carrier". This fact prevents those who use carriage by air (passengers and consignors of goods) from trying to elude the provisions of the Warsaw Convention (which limit the extent of the liability of the carrier) by suing for damages the "actual carrier" to whom the régime of the Warsaw Convention does not apply;

b) the "actual carrier" is liable for fault, yet the *presumption of fault* is set down, and the "actual carrier" himself must prove the facts which might bring about his discharge (reversal of the burden of proof). This provision has evidently been laid down for the benefit of those who use carriage by air.

The provision of article II might, in fact, suffice for setting forth the basic idea and the purpose of the Guadalajara Convention, i. e., to make the "actual carrier" subject to the régime established by the Warsaw Convention. All following stipulations exceed this framework in a certain sense, *viz.:*

Article III lays down *joint and several liability* of the carrier, who has entered into the contract carriage, and of the carrier, who has actually performed the respective carriage. Paragraph 1 provides that "the acts and omissions of the actual carrier and of servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the contracting carrier". This provision is by no means unusual. In most legislations the principle is absolutely current that the contracting party is liable for the acts of the person whom it has employed for the implement of its obligation (see, e. g., sections 344, 449, 479 (1) and 480 of the Civil Code, section 278 of the German Civil Code, BGB, etc.). Nevertheless quite unusual is the provision of art. III (2) in pursuance of which "the acts and omissions of the contracting carrier and of his servants and agents acting within the scope of their employment shall, in relation to the carriage performed by the actual carrier, be deemed to be also those of the actual carrier". By virtue of this provision, a person who is not party to the contractual relation (the "actual carrier") is thus jointly and severally liable for the acts and omissions of the "contracting carrier" — the person who has directly assumed a contractual obligation! No analogy to such a rule may be found in national laws.

However, the Guadalajara Convention provides for certain exceptions from the principle of the joint and several liability of the "actual carrier" for the acts and omissions of the contracting carrier, *viz.:* no act or omission of the contracting carrier shall subject the "actual carrier" to liability exceeding the limits of the extent of liability specified in art. 22 of the Warsaw Convention; therefore the "actual carrier" is

not liable for the qualified fault of the contracting carrier and is not subject to the sanction of art. 25 of the Warsaw Convention in respect to those acts which have not been performed through any fault of his own. Moreover, any special agreement under which the contracting carrier assumes special obligations not imposed by the Warsaw Convention shall not automatically affect the "actual carrier"; such a special agreement might be, for instance, the obligation of the contracting carrier to asume liability to a greater extent than that provided in art. 22 of the Warsaw Convention, or the receipt of goods with "a special declaration of value at delivery" within the meaning of art. 22 (2) of the Warsaw Convention, or "a special declaration of interest in delivery at destination" contemplated in art. XI of the Hague Protocol, or finally, a special obligation of the contracting carrier to perform the agreed carriage within a precisely fixed period of time.

The joint and several liability of the "actual" and "contracting" carriers is further stressed by the provision of article IV, by virtue of which any complaint to be made or order to be given under the Warsaw Convention to the carrier shall have the same effect whether addressed to the contracting carrier or to the "actual" carrier. The only exception are the orders referred to in art. 12 of the Warsaw Convention (which concern the disposal of the carried goods and the exact destination thereof); these orders shall only be effective if addressed to the contracting carrier. The practical purpose of this provision is to secure that the rights of the consignor of goods be not extinguished only because he has addressed his orders or complaint only to the contracting carrier or only to the "actual" carrier. This provision may be practical, for instance, in case of an order placed by the consignee in respect to the modalities of the delivery of goods (art. 13 of the Warsaw Convention), or in case of complaints made by the person entitled to delivery of goods not having been delivered, or of goods or luggage having been damaged during the carriage (art. 26 of the Warsaw Convention).

The principle of joint and several liability has also procedural consequences, *viz.:* an action for damages may be brought, at the option of the plaintiff, against the contracting carrier or the "actual" carrier, or against both together or separately; if the action is brought against only one of those carriers, the defendant shall have the right to require the other carrier to be joined in the proceedings, the procedure and effects being governed by the *lex fori* of the court seised of the case (art. VII). It ensues from a detailed analysis that this provision is only a rule relating to the conflicts of laws; it does not directly unify the rights and obligations of the parties, but proceeds to the *renvoi* to

lex fori. Let us note that only the *way* of joining the intervener is a purely *procedural question* — the *renvoi* to *lex fori* is naturaly superfluous here because the application of *lex fori* is beyond all dispute. But on the other hand introducing the intervener into the action is in the given case based on a *notice to third party* (cf. section 230, Civil Code), and this is an act of substantive law and bears *consequences in the field of substantive law.* The provision of article VII of the Guadalajara Convention is a rule relating to the conflicts of laws and it seems that in the settling of these consequences (in the field of substantive law!) it proceeds to the *renvoi* to *lex fori.* This at least ensues from the literal interpretation of art VII, and this construction seems to be confirmed by the provision of art. X, that "nothing in this Convention shall affect the rights and obligations of the two carriers between themselves". (In consequence, the Convention does not regulate the mutual settlement in the form of recourse between the contracting carrier and the actual carrier and leaves it to the national law which is applicable by virtue of rules governing the conflicts of laws).

Such a literal interpretation of the provision of article VII was certainly not intended by the authors of the Convention as it would bear peculiar consequences, *viz.:* Under article VIII, any action must be brought, at the option of the plaintiff, either before a court provided in art. 28 of the Warsaw Convention (i. e., a) the court having jurisdiction where the contracting carrier is ordinarily resident, or has his principal place of bussiness; b) the court having jurisdiction where the contract of carriage has been made, provided the contracting carrier has his establishment there; c) the court having jurisdiction at the place where the "actual carrier" is ordinarily resident or has his principal place of business. *Lex fori* of any of these courts might be taken into account for determining the *manner* and the *consequences* of introducing one of the carriers into the action in the form of a notice to third party. It is, however, obvious that the place of destination may be an absolutely accidental element in the concrete case and that it hardly can bear any influence on the mutual relations between the contracting and the "actual" carriers.

Let us cite a hypothetic example: a Pakistan travel agency in Karachi (the contracting carrier) charters an aircraft of the American air company Flying Tigers (the "actual carrier") to transport pilgrims to Mecca (the place of destination). The action for damages may be brought in Saudi Arabia. Would it be logical if, in this case, *lex fori* influenced the consequences which the introducing of the intervener would bring about in the field of substantive law? The mutual relation of the Paki-

stani and the American firms may be subject to their own specific *lex causae,* and a rather accidental question of the said relation (the place of the destination of the flight in Saudi Arabia) cannot conclusively justify the application of the law of Saudi Arabia to this mutual relation.

It is therefore evident that article VII of the Gauadalajara Convention should be interpreted restrictively so that only the form and the procedural consequences of the introducing of the intervener should be considered under *lex fori.* Naturally, some may object to the interpretation that the application of *lex fori* to questions which are exclusively in the field of procedure is absolutely obvious, and that it was not necessary to settle this problem.

The Guadalajara Convention avoided the unification of the regulation of the mutual claims of the contracting carrier and the "actual carrier". In pursuance of article X, the Convention does not affect these mutual rights. But the Convention systematically laid down the principle of joint and several liability which brings about the complex question of the mutual settlement of the rights and obligations of the two carriers. This question must be solved under the municipal law according to the *renvoi* established by the rules governing the conflicts of laws. (In this respect the question may arise; *which* rules governing the conflicts of laws should be applied? It is beyond reasonable doubt that in practice each court admitting its jurisdiction would apply its own law governing the conflicts of laws.)

The subrogating or preventive recourse of one carrier to the other should evidently be qualified as a claim resulting from unjust enrichment, or, more precisely, as expenes incurred on behalf of another person (section 365, Civil Code). As exposed on p. 62., literature recommends[160] the comparing of the claims resulting from unjust enrichment to claims for damages, and to consider *"lex loci delicti commissi"* to be the criterion in the field of the conflicts of laws. This solution cannot be deemed satisfactory or practical. The claim resulting from the recourse of one carrier, who has satisfied the claims of a certain plaintiff, to another carrier can by no means be regarded as a claim *ex delicto;* even in view of the diction of the Civil Code (section 211), it is an obligation *sui generis.* Even if we should admit that an obligation *ex delicto* is concerned, the criterion *"lex loci delicti commissi",* as point of contact, would by no means contribute to the solution of the problem, because it is imposible to conclusively localize the respective "delict". The view

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[160] R. Bystrický, l. c., p. p. 313—314.

advocated by some authors[161] may therefore be accepted, namely that the *principal place of business of the debtor* should be the point of contact applicable to obligations resulting from unjust enrichment (which in our view include claims resulting from recourse).

The principle of the joint and several liability of the contracting carrier and of the "actual" carrier is also emphasized in article VI, aimed at preventing the injured persons from trying to get damages exceeding the limits established by the Warsaw Convention in bringing before different courts separate actions against the two carriers and, as the case may be, against their agents. Article VI provides that the *aggregate* of the amounts recoverable from the "actual" and contracting carriers, and from their servants and agents, shall not exceed the highest amount which could be awarded against either the contracting carrier or the "actual" carrier — consequently the limits established by the Warsaw Convention constitute the maximum limit of the extent of liability.

Such are the basic operative provisions of the Guadalajara Convention.

Summing up in general, it may be stated that the Guadalajara Convention usefully amends a deficiency of the Warsaw Convention which proved grave in practice. The Convention therefore forms a positive step towards a further unification of the rules which in the field of substantive law apply to international carriage by air. On the whole, it may rightly be expected that the Convention will soon come into force (at least within a restricted scope of participants) because — in contradiction to the Hague Protocol — the ratification of only five states is required under article XIII.

The unification realized by the Convention is, however, not consistent. Municipal law, applicable by virtue of the rules governing the conflicts of laws, continues to be decisive to the questions of the form and consequence of the notice to third party in proceedings and in particular to the problems of the claims resulting from recourse which are the reverse of the principle of the joint nad several liability of the contracting carrier and the actual carrier. And these are the very problems where the settlement of the conflicts of laws is singularly difficult and disputable.

Another deficiency of the unification at its present stage is in that the Convention did not set forth any provision relating to the enforcement of the judicial decisions, rendered by its virtue, in the Contracting States. Practice shows that the best possible unification of the rules in force in the field of substantive law is only of a restricted importance unless

[161] See, e. g., László R é c z e i, l. c., p. p. 345—346.

it is simultaneously secured by an easy, speedy and effective execution of the judicial decisions.

The Convention also shows a number of deficiencies the roots of which can be found in the present state of international relations and in the imperialistic "cold war" policy, *viz.:*

The aim of any convention unifying law should be to extend as much as possible the scope of its applicability — its universality. In spite of this logical requirement, the U.S. delegation, with strong backing by the delegation of the German Federal Republic, pushed through[162] the provision of art. XI under which the Convention shall remain open for signature on behalf of any state which at the material date is a member of the United Nations or of any of the Specialized Agencies[163]

The purpose of this stipulation is obvious — to prevent adherence to the Convention of the German Democratic Republic, the People's Republic of China and the Asian People's Democracies, while enabling the German Federal Republic to adhere, since she is Member of Specialized Agencies, the same as Chiang Kai-shek's Taiwan. It is illogical that this provision prevents those states from adherence which are fully recognized as Contracting Parties to the Warsaw Convention. The German Democratic Republic even ratified the Hague Protocol and — in spite of the "Hallstein doctrine" — is on the official list of the signatories of the Warsaw Convention and of the Hague Protocol. Statements by U.S. delegate Boyle and delegate of the German Federal Republic Wolf must be regarded as a deplorable comedy. According to them a conference on air law cannot consider whether different states are subjects of international law and whether or not different governments enjoy the ability to commit themselves. The representatives claim that this would not be a question of "air law" but a political issue to be settled by other authorities.

Article XIV contains analogous provisions limiting the admission to the Convention.

Article XVI (1) contains the traditional "colonial clause", which will most probably become obsolete even before the Convention comes into force. The "colonial clause" in a multilateral international treaty of today is a vestige of the past. Its stipulation in the Guadalajara Convention grossly contradicts to the "Declaration on Granting Independence to Colonial Countries and Peoples"[164] solemnly adopted by the XVth General Assembly of the United Nations.

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[162] Afternoon meeting of September 13, 1961.

[163] An analogous clause was also carried through into the Vienna Convention on Diplomatic Intercourse and Immunities of March 18, 1961 (art. 48), and the Geneva Convention on the Law of the Sea of 1958.

[164] See U.N. Res. 1514/XV.

The provision of article XVII, prohibiting any reservation to the Guadalajara Convention, is equally questionable. Even the International Court of Justice at The Hague, in its advisory opinion on the Convention on Genocide, has recognized that it is the sovereign right of any state to present such reservations to multilateral international conventions as are compatible with the substance and the purpose of the respective convention.

In spite of these critical observations, the Guadalajara Convention may be deemed a useful step towards the further unification of law in the field of carriage by air and its ratification can be recommended. Its operative provisions are not contrary to the law in force, and its putting into force would require no legislative measures except publication in the Collection of Laws.

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Part IV

THE LIABILITY OF THE OPERATOR OF AIRCRAFT FOR DAMAGE CAUSED ON THE SURFACE

(Liability for "Third Parties")

In air transport certain categories of damage may be occasioned which are not sustained by passengers or owners of luggage or goods but by third persons, i. e., by those who do not take part in the carriage and who are in no contractual relation with the operator of the aircraft.

Such a damage may first of all occur in the event of a crash of the aircraft to the surface. Tremendous damage to life, health and property may result when the aircraft hits the surface and an explosion of fuel and a fire result. Thus for instance, before Christmas 1959, a Vickers Viscount crashed on a crowded street of the shopping centre of Munich and caused vast damage. On December 16, 1960, aircraft of the UAL and TWA crashed directly over New York, the wrecks of the aircraft fell into densely inhabited quarters, a fire broke out and in addition to 125 passengers and the crews of both aircraft 17 persons lost their lives on the surface. A detached wheel of the under-carriage killed a farmer working in a field when a Boeing-707 of the SABENA airlines crashed on February 15, 1961. In the crash of a Boeing-707 of the Air France company on June 3, 1962, the detached wrecks of a single engine destroyed two family houses!

Experience shows that this kind of damage occurs quite often. Statistics also prove that an overwhelming majority of air accidents take place during landing and take-off manoeuvres — and thus in the close proximity of airports which are usually situated in the near vicinity of densely inhabited areas. This even more increases the risk of damage to persons who take no part in the air traffic and have no contractual relation with the operator of the aircraft.

In an overwhelming majority of air crashes two categories of claims for damages come into being against the operator of the aircraft, *viz.:*

I. the claims of the injured passengers and consignors of luggage or goods. In regard to these persons the operator of the aircraft (i. e., in the given case the "carrier") is bound by a contractual obligation which results from the contract of carriage. If a contract of carriage involving foreign elements is concerned, the conflict questions of liability under

this contract are solved, in pursuance of general practice[165], by virtue of the *lex obligationis* of the respective contract of carriage (as shown above, the liability for damages resulting from the contract of carriage will in practice mostly be considered in pursuance of the Warsaw Convention);

2. the claims of third persons whose lives, health or property sustained damage on the suface and who are in no contractual relation with the operator of the aircraft.

The claims quoted *sub* 2. result from an obligation which does not come into being by virtue of any accordant declaration of will of two parties. These claims come into being by operation of the law which links a sanction — the liability for damages — with the fact that damage has been caused. These are obligations arising from a *civil delict* (tort).

If the respective legal relation involves certain foreign elements, the question arises by which law it should be governed. The solution of this question arising in the field of the conflicts of laws has far-reaching consequences for the settlement of the merits of mutual rights and claims of the parties. The legislations of different states show essential differences in the domain of the substantive law governing liability for damages arising from illicit acts in general and, concretely, in the domain of substantive law governing the claims which arise from liability in the operation of motor vehicles or aircraft. Certain municipal laws base the origin of liability on the *fault* of the operator of the aircraft and the burden of proof lies on the injured person; other municipal laws provide for the presumption of the fault of the operator of the aircraft (the burden of proof is reversed); and still other municipal laws set down *objective liability* (liability for the result, without any fault) and exoneration is possible for the most various reasons of discharge whose conception also substantially differs in different municipal laws. Subtantial differences also exist in the conception of the mode and extent of compensation, in the definition of the categories of damage to be compensated and in the definition of the categories of persons entitled to damages.

It is an almost generally established principle that liability for damages arising from illicit acts is governed by the law applicable in the place where the illicit act or its damaging result has taken place. In most countries, *lex loci delicti commissi* is the criterion applicable to the conflicts of laws and governing the conditions and the consequences

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[165] See, e. g., M. Wolff, l. c., p. 452, paragraph 434; Bystrický, l. c., p. p. 255 and 309.

of liability for damages (see, e. g., section 48 of Law No 41 [1948], Collection of Laws).

The settlement of the conflicts of laws according to *lex loct delicti commissi* is however not accepted unequivocally. According to the theory of K. Savigny[166], the rules of law relating to punishable and other illicit acts are included in the public order of each country and therefore the claims *ex delicto* or *ex quasi-delicto* must be considered unted *lex fori.* British practice, for instance, in principle conforms to this theory. In regard to liability for damages resulting from illicit acts (torts) which have taken place abroad, British law lays down a principle which Dicey[167] formulates as follows:

"An act done in a foreign country is a tort actionable as such in England, only if it is both:

1) actionable as a tort, according to English law, or in other words, is an act which, if done in England, would be a tort; and

2) not justifiable, according to the law of the foreign country where it was done."

In consequence, British law governing the conflicts of laws considers the chief question — the qualification of the unlawful character of the act — not only under *lex loci delicti commissi* but also under *lex fori.* As to this problem, British theory and practice are most explicit but it is beyond any doubt that *lex fori* also constitutes an important criterion before the courts of other states when they consider claims arising from unlawful acts done abroad. Soviet theory also clearly adopts the view that a Soviet court would not be authorized to award damages for such acts which, according to *lex fori,* are not unlawful although they are unlawful under the law applicable in the place where they have been done[168]. Analogously under art. 12 of the Introductory Law to the German Civil Code, no higher claims than those laid down by German law shall be actionable against a German citizen, even if the act has been done abroad.

In consequence, *lex loci delicti commissi* is not an unequivocal point of contact, for the court of any state, considering the claims for damages arising from an act done abroad, cannot ignore its own *lex fori,* at least within the limits of the requirements of public policy. This is undoubtedly also applicable to Czechoslovak practice, even if section 48 of the Law No 41 (1948), Collection of Laws, apodictically refers to the law of the

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166 System des heutigen römischen Rechts, 1848, Band VIII., p. p. 278—279.

167 Dicey's Conflict of Laws, 6th Edition, 1949, rule 174, p. 800.

168 I. S. Peretersky, S. B. Krylov, Mezhdunarodnoye chastnoye pravo, 2nd edition, Moscow 1955, p. 146; L. A. Lunc, Mezhdunarodnoye chastnoye pravo, Moscow 1949, p. p. 274—276.

place where the damaging act or event have been occasioned. A Czechoslovak court could certainly not adjudicate claims which — although justified under foreign law — would be contrary to the conception of public policy (section 53 of the Law No 41 (1948), Collection of Laws). It could also not adjudicate claims which are not set forth by Czechoslovak law.

Even if *lex loci delicti commissi* would constitute an absolutely undoubtable point of contact in the practice of all states, in would not eliminate all doubts: for the question of qualification has arisen as to what is to be deemed *locus delicti commissi.* Three conceptions may be deduced from theory and practice, *viz.:*

a) The place where the act has been done shall be decisive. This conception is held by courts in France, Italy, Switzerland and the Scandinavian countries;

b) the place shall be decisive where *the damaging effects of the event* causing the damage have taken place. This principle is expressed in the American Restatement;

c) the injured person may proceed to the choice of either the law applicable in the place where the *act* has been done or the law applicable in the place where the *damaging result* has taken place. Such is the practice in Germany and, in view of section 48 of Law No 41 (1948), Collection of Laws, this conception is also acceptable for Czechoslovak practice[169]:

A) THE ROME CONVENTION, 1933 AND THE BRUSSELS PROTOCOL, 1938

It is evident from the foregoing survey that the problems arising in the field of the conflicts of laws relating to liability for damages resulting from civil delicts (torts) are complex and contestable and that they are not settled in a uniform way. For the practice of air traffic on the international scale, this situation may result in problems caused by the lack of legal security. The operator of an airline crossing the territories of a number of states faces a situation in which claims may be made against him under different municipal laws — in every country he is more or less exposed to a different risk, according to the concrete legislation of the respective country. This situation makes it difficult for the operator of the aircraft, among others, to effectively insure his risks.

[169] M. Wolff, l. c., p. p. 493 et seqq.; R. Bystrický, l. c., p. 310.

An appropriate unification of the rules of civil law would therefore be specially useful in this field. Almost fourty years have already elapsed since the first attempts were made to reach an international unification of the rules of substantive law relating to the liability of the operator of aircraft for damage caused to third parties but none of the adopted texts has yet been generally accepted and the importance of the unification achieved so far is insignificant.

The I[st] Conference on "Private air law", which met in Paris on October 26, 1926, already expressed the opinion that a committee should be set up to study the question of the unification of the liability of the operator of the aircraft for damage caused by aircraft to property and persons on the surface[170]. The text was elaborated by the CITEJA at a quick pace. On May 29, 1933, on the III[rd] International Conference in Rome, the Convention for the Unitification of Certain Rules relating to Damage Caused to Third Parties on the Surface was signed; it is generally called the Convention of Rome, 1933[171]. This Convention has only been ratified by Belgium, Brazil, Guatemala, Rumania and Spain. The question is justly raised of why this attempt to unify law failed. Was perhaps the Convention of Rome of 1933 an imperfect instrument which did not reasonably reflect the interests of states? The solution of this question should be preceded by a brief analysis of the Convention of Rome of 1933 even though it did not become a widely accepted legal instrument.

The chief principles of the régime of the liability of the operator of the aircraft, as established by the Convention of Rome of 1933, may be summarized, as follows:

a) the operator of the aircraft is charged with objective liability (liability for the result, liability not requiring fault);

b) the amount of the liability of the operator of the aircraft is limited to fixed sums;

c) the fulfilment of the obligation arising from liability is secured by the requirement of obligatory insurance or of another guarantee.

Ad a) The operator of the aircraft is charged with objective liability. Under article 2 of the Convention of Rome, damage caused by an aircraft "in flight" to persons or property on the surface gives a right to compensation on proof only that the damage exists and that it is attributable to the aircraft.

This provision is not worded too well. It should have expressed the

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170 Conférence Internationale de Droit Privé Aérien, Impr. Nationale, Paris, 1926.

171 Convention pour l'unification de certaines règles relatives aux domages causés par les aéronefs aux tièrs à la surface. See the English text e. g. in Shawcross and Beaumont, l. c., p. p. 608—613, and the French one e. g. in RFDA, 1947, p. p. 178 *et seqq.*

main idea — namely that the operator of the aircraft is liable for damage caused by the aircraft on the surface regardless of his fault. It is sufficient for the injured person to prove the damage occasioned and the causal connection of the damage occasioned and the effect of the aircraft, i. e., of the "flying" aircraft — the aircraft "in flight" *("en vol")*. In pursuance of paragraph 3 of article 2, the aircraft is deemed to be "in flight" from the beginning of the operations of departure until the end of the operations of arrival *("du début des opérations de départ jusqu'à la fin des opérations d'arrivée")*. This provision was aimed at eliminating any damage which might be occasioned, for instance, by the fire of an aircraft standing in the airport or in the hangar, etc. In spite of this it is evidently unprecise, as it is difficult to qualify, for instance, the moment of the actual beginning of the operations of departure (at the moment when the engines are set going? at the moment of the first movement of the aircraft on the surface? at the beginning of take-off on the runway?).

The texte of the Convention of Rome consequently charges the operator of the aircraft with a very rigorous liability — with liability for the result regardless of fault. The Convention provides for only one reason for exoneration: the fault of the injured person; in that case, the liability of the operator of the aircraft can be set aside or, in the event of contributory negligence of the injured person, it can be diminished.

Settling this question, the authors of the Convention were evidently inspired by the risk theory of liability *(théorie de risque)*. They proceeded from the fact that aviation creates considerable risks even for persons who take absolutely no part in the exploitation of air traffic, and that such persons must enjoy full protection[172]. The authors of the Convention explicitly refused to adopt the régime of liability, based on fault with the presumption of the fault of the operator of the aircraft. But even this solution would in a satisfactory way meet the interests of third parties on the surface. It would take into account that in the contemplated air accidents the injured person hardly has real possibility of proving the fault of the operator of the aircraft. Big air disasters usually result in the complete destruction of the aircraft and its equipment, and as a rule no one of the crew survives the accident and is thus not able to explain the proximate causes of it. Therefore it is difficult and even almost impossible to prove the fault of the operator and the presumption of his fault would be a sufficient protection of the injured person. The burden of proof would on the other hand lie on the operator of the aircraft. He would be obliged to produce, on the one

[172] Coquoz, l. c., p. 177.

hand, negative proof that he did not cause the damage by his fault and on the other hand positive proof that the damage was occasioned by a coincidence which could not be avoided, by a *force majeure,* etc. Such conception of the régime of liability would certainly be more acceptable. The rigorous conception of liability without fault, which does not admit even *vis major* as a justification of exoneration, is of an excessively "fatal" character and lacks the stimulating factor for prevention.

Ad b) The Convention of Rome of 1933 restricts the amount of the liability of the operator of the aircraft to fixed maximum limits. The reasons of the limitation of the extent of liability may be appreciated as regards aspects analogous to those of the Warsaw Convention[173]. However, in the course fo the discussion on the wording of the Convention of Rome the argument *"quid pro quo"* was mostly put forward: the limitation of the amount of liability of the operator of the aircraft is a correlate of the exceptionally rigorous system of liability which actually does not make the operator's exoneration possible.

The amount of liability is calculated according to the maximum weight with total admissible load. Under art. 8, the operator of the aircraft is liable up to an amount determined at the rate of 250 francs for each kilogramme of the weight of the aircraft; nevertheless the limit of his liability shall not be less than 600,000 francs, nor greater than 2.000,000 francs; this sum is divided between the different cases of damage so that one- third of the amount shall be appropriated to compensation for damage caused to property, and the other two- thirds to compensation for damage caused to the lives or health of persons on the surface. The total sum appropriated to compensation for the injury or death of one person may not exceed 200,000 francs. In pursance of art. 19, the sums given in francs refer to the French franc, consisting of 65½ milligrammes of gold of millesimal fineness 900, analogously to the Warsaw Convention; the sums in francs may be converted into other currencies.

The idea of the limitation of the amount of the liability of the operator of the aircraft is certainly an acceptable *"quid pro quo"* from the angle of air companies, in view of the rigorous régime of liability. In a number of countries this very problem, however, was the cause of the refusal of the ratification of the Convention of Rome of 1933. The arguments set forward stated that the limitation of the extent of the liability of the carrier, as established by the Warsaw Convention, is acceptable, as the Warsaw Convention has settled the liability resulting from the contract of carriage. The parties to the contract (especially the passen-

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[173] See above, p. 41—47.

gers), when entering into the contract, are aware of the régime of liability as applicable to the contract and they may individually insure themselves against the risks of the carriage by air; on the other hand it would be unacceptable to limit the claims of the third parties on the surface, who take no part in air traffic, can reasonably foresee no risk and are unable to defend themselves against the latter (for instance, by means of insurance).

The dependence of the amount of liability on the weight of the aircraft may be considered as an interesting solution which is, however, not quite conclusive. At first sight it seems to be logical that a heavier aircraft must necessarily cause bigger damage when crashing on the surface. However, the biggest type of aircraft, with an almost exhausted supply of fuel may cause smaller damage when crashing than a relatively small aircraft with a big reserve of fuel. It is nevertheless difficult to find another criterion for the calculation of the extent of liability.

The operator of the aircraft may not avail himself of the advantages of the bulk limitation of the amount of liability if the injured person proves that a qualified fault is imputable to the operator, i. e., that the damage results from the gross negligence *("faute lourde"* or wilful misconduct *("dol")* of the operator, except where the latter proves that a nautical fault of the crew took place (art. 14).

Quite obscure is the provision of art. 14 (b) pursuant to which the operator is not entitled to avail himself of the limitation of the amount of liability if he has failed to comply with his obligation to furnish a security (e. g., an insurance policy) under the Convention of Rome. This provision was aimed at enforcing the realization of the third main principle of the Convention of Rome of 1933, treated *sub* c).

Ad c) The fulfilment of the obligation arising from liability is secured by the requirement of obligatory insurance or another guarantee. Under art. 12 of the Convention of Rome, 1933, every aircraft registered in the territory of a Contracting Party shall, for the purpose of flying above the territory of another Contracting Party, be insured, within the limits of the maximum amount of liability fixed by art. 8, in respect of the damage to which this Convention relates. The municipal law of each Contracting Party may admit to substitute for insurance another form of guarantee — e. g., the operator may make a deposit of money with a bank authorized for that purpose or with another state institution in the territory in which the aircraft is registered, any such deposit of money being made up to the full amount of his liability (according to the weight of the aircraft); or he may substitute for insurance a guarantee given by a bank. Art. 13 requires that the existence of the insurance or

of another security be vouched by an official certificate. The rules of the Convention of Rome which relate to obligatory insurance are deemed to be so imperative that the non-fulfilment of the operator's obligations established by art. 12 results in a severe sanction — the loss of the advantages offered by the limitation of the amount of liability.

The provisions governing obligatory insurance gave rise to many doubts and to mistrust as regards the Convention of Rome, as it leaves to the respective legislation the question of the insurer's obligations in regard of the insured persons. The contract of insurance concluded between the operator of the aircraft and the insurer is subject to a certain *lex causae,* to a certain municipal law. It is, however, a *pactum in favorem tertii,* the entitled person, i. e., the injured person, being an alien subject. Which reservations or objections to the payment of the sum insured may be raised by the insurer with regard to the injured person? Were he able to apply all objections and reservations concerning payment which the *lex causae* of the respective contract of insurance offers him, the purport of the unification of law and the aim of obtaining effective securities that the damage really will be compensated might be frustrated.

The IVth Conference on Private International Air Law tried to remove this evident deficiency of the Convention of Rome of 1933. On September 29, 1938, it adopted in Brussels the Protocol supplementing the Convention of Rome, generally cited as the "Brussels Protocol".[174]

The Brussels Protocol provides that the insurer may interpose only the following defences against the injured persons' claims for the payment of the sum insured which are based upon the application of the Convention of Rome:

a) the damage occurred after the insurance ceased to have effect;

b) the damage occured outside the territorial limits prescribed in the insurance contract;

c) the damage was the direct consequence of international armed conflict or civil disorder.

These provisions of the Brussels Protocol exceeded the framework of the Convention of Rome and tried to unify the law governing the "international policy of insurance". Yet not even the Brussels Protocol came into force; for it was ratified by only two states.

The Convention of Rome of 1933 was consequently a failure. Can one believe the assertion that a broader ratification of the Convention of Rome of 1933 and of the Brussels Protocol of 1933 was hampered by

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[174] For the French text see e. g. Revue française de droit aérien, 1947, p. p. 183 *et seqq.*; and for the English text see e. g. Shawcross and Beaumont. l. c., p. p. 622—624.

World War II? The small success of new post-war attemps to realize the unification of the question of the operator's liability for the damage caused to third parties on the surface does not testify to this.

The causes of the failure of this unification attempt must be sought in another sphere. The basic cause seems to be the fact that most states do not consider the settlement of these problems as an urgent task. The states showed little readiness to unify a question which does not seem to be a very practical one. Moreover, the legislative conceptions of certain states ignore the idea of the limitation of the amount of liability; this applies especially to the United States where at present even the Warsaw Convention is being met with an emphatic resistance and the government is preparing a fundamental re-examination of the adherence to all conventions which unify air law[175]. On the other hand, it is surprising that the Convention has been ratified by states whose importance is insignificant in international aviation (for instance Guatemala, Spain, Rumania); they are countries within whose territories a foreign aircraft is more likely to cause damage than their own aircraft within foreign territories; and these states adhered to the limitation of the amount of the liability of the operators of foreign aircraft within their respective territories! These very states may be expected to insist on the application of their territorial law. On the contrary it can be expected that those powers whose air companies take the most important part in the total volume of international carriage by air show more interest in adherence to the Convention.

Doubts are also aroused by the principle of a rigorous liability for the result (without any fault) which in fact excludes any possibility of the discharge of the operator of the aircraft.

If we further consider the rapid development of international aviation after World War II, as well as the new and modern conditions of aviation as regards technology and organisation we are not surprised that after the end of the war states began to look for a new solution of these questions.

B) THE ROME CONVENTION, 1952

The question of a revision of the Convention of Rome of 1933, of its improvement and adjustment to the present conditions in the field of the technology and the organization of international aviation were raised as early as at the first ICAO Assembly in September 1947. The

[175] See note 158.

ICAO Legal Committee constituted a sub-committee to prepare a new draft convention. This sub-committee completed its work in 1949 and the Legal Committee adopted the draft convention at the beginning of 1950 at its session at Taormina.. After comments were brought up by the ICAO Assembly, the final text of the draft was adopted in January 1951 and circulated to the different states. In December 1951 the ICAO Council decided to convene an international conference which would adopt the new convention.

The International Diplomatic Conference was held in Rome from September 9 to October 7, 1952, and at its close the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, usually called the Rome Convention, 1952, was signed[176].

So far twenty states have signed, and five other states have adhered to, the Rome Convention, 1952[177]. TheU.S.A. did not sign the Convention. This has aroused bitter feeling in the Western world in view of the share of this country in carriage by air.

Today, ten years after the signature of the Rome Convention of 1952, the inflow of ratifications is so negligent that the well-founded opinion is voiced in literature that the new Rome Convention is a disaster from the political aspect and that certain progress made in the field of its juridical contents as against the Convention of 1933 cannot conceal its utter failure.[178]

By April 1, 1962, only 11 states had ratified the Rome Convention, 1952.[179] Although the Convention has come into force, — since the ratification of at least five states is required under art. 33 (1) — it has only been ratified by such states whose share in the international carriage by air is by far not decisive. Therefore the purport and importance of the realized unification of law are very insignificant.

The Rome Convention of 1952, is not a revision of the Convention of Rome of 1933. It is a new and separate convention, which, by virtue of its art. 29, explicitly supercedes the Convention of 1939 as between Contracting States which have ratified both treaties. The Convention of 1952, however, maintains the basic ideas of the régime of liability which were already expressed — although less perfectly from the angle of

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176 Convention relative aux dommages causés par les aéronefs aux tiers à la surface. — For the texts see ICAO Doc. 7379/LC 134, vol. II.

177 Argentina, Australia, Belgium, Brazil, Denmark, the Dominican Republic, Egypt, France, Israel, Italy, Liberia, Luxembourg, Mexico, the Netherlands, the Philippines, Portugal, Spain, Switzerland, Thailand, and the United Kingdom. Adhered: Ceylon, Ecuador, Haiti, Honduras, and Mali.

178 P. Pluchon, "La responsabilité de l'exploitant de l'aéronef dans la Convention internationale de Rome du 7 octobre 1952", RGA, No 2 (1961), p. 125.

179 Ecuador, Egypt, Canada, Luxembourg, Pakistan, Spain, Austria, Ceylon, Honduras, Haiti, and Mali; see ICAO Doc. 8219, p. 79.

law — in the Convention of 1933. This again concerns the following basic principles:

a) *objective liability* is imposed on the operator of the aircraft for damage caused to third parties on the surface (liability without any fault);

b) the extent of the liability of the operator of the aircraft is *limited* to fixed sums;

c) the fulfilment of the obligation resulting from liability is *guaranteed* by the requirement of obligatory insurance or another security.

The Rome Convention in addition contains detailed rules of procedure which especially lay down the enforcement of judicial decisions within the territories of the other Contracting Parties.

Ad a) The main principle of the régime of liability as established by the Rome Convention of 1952 is that of the rigorous objective liability of the operator of the aircraft. Under art. 1, any person who suffers damage on the surface shall, upon proof only that the damage was caused by an aircraft "in flight" *("en vol")* or by any person or thing falling therefrom, be entitled to compensation. A fault of the operator of the aircraft is not the condition of the coming into being of liability: it is sufficient for the injured person to prove the causation of the effect of the flying aircraft and the damage occasioned.

The Rome Convention, 1952 only applies to damage caused *on the surface* in the territory of a Contracting State by flying aircraft registered in the territory of another Contracting State (art. 23). In consequence, it does not apply to damage occasioned in the event of a collision of aircraft in the air. An aircraft is considered to be "in flight" from the moment when power is applied for the purpose of actual take-off until the moment when the landing run ends (art. 1 [2]). This virtually means that the Convention only applies to that damage which an aircraft causes from the moment when it carries out the prescribed ten-second engine test at the bottom end of runway, receives permission to take off and applies power for the purpose of actual take-off. Consequently, excluded is such damage which the aircraft may cause when taxiing on the landing field, be it before take-off after landing. The Convention shall also not apply to damage caused by military, customs or police aircraft (art. 26).

The liability for compensation shall attach to the operator of the aircraft, i. e. to the person who was making use of the aircraft at the time when the damage was caused; the rebuttable presumption is laid down that the owner of the aircraft is its operator (art. 2).

These basic principles of the régime of liability have aroused most

doubts and it seems that they are the main reason of the fact that the Rome Convention of 1952 has not been widely adhered to. The principle of the objective liability of the operator of the aircraft is conceived so rigorously in the Convention as to virtually make any exoneration impossible. The operator of the aircraft may release himself from liability only if the damage is the direct consequence of armed conflict or civil disturbance (art. 5), or if he proves that the damage was caused solely through the own fault of the person who suffers the damage (art. 6). Exoneration may not be justified even by the circumstance that it was impossible to avoid the damage and that it has not been occasioned in the operation *(vis major)* or that it has been caused by acts of a third person which could not been avoided.

The conception of the basis of liability, if thus conceived, is hardly acceptable. It is of an explicitly fatal nature, it proceeds only from a mere causation of phenomena and it does not take into account the subjective relation of the person charged with liability to the damaging result which has been occasioned. Such a conception of liability also has no mobilizing or stimulating effect on the prevention of damage. Liability simply becomes a fatal consequence accompanying a certain form of activity, irrespective of the fact that the operator of the aircraft might have taken all necessary measures to avoid the damage. Liability may thus become a sanction of the result which the liable person did not intend and to which he did not contribute by the neglect of any obligation.

The authors of the Rome Convention of 1952 accepted the principle of objective liability, "moved by a desire to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft . . ."[180]. They proceeded from the idea that it is necessary to grant increased protection to those persons who do not take any part in the air traffic, enjoy no advantages therefrom and should therefore be efficiently protected against the risks of air traffic. However, it is impossible to agree with such an argumentation. The statistics of the rate of accidents prove that at present aviation cannot be considered as an activity which creates extraordinary risks. An efficient protection of third parties on the surface may be realized equally well if the liability of the operator of the aircraft were based on fault. The protection against the "emergency in the field of proving" on the side of the injured persons might consist in the presumption of the fault of the operator which would reverse the burden of proof. In view of the presumption of fault, the operator of the aircraft would not be able to

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[180] The preamble of the Rome Convention of 1952.

obtain exoneration in those cases in which the cause of the accident has remained unknown (as it is in practice in a great number of cases); but he would be able to discharge himself by proving that he had taken all adequate measures to avoid the damage, that the damage was not occasioned in the traffic and that it was impossible to avoid it, that it was caused by the activity of a third person which could not been avoided, etc. Such a conception of the basis of liability is being asserted in the doctrine[181] and was also energetically advocated by some delegations to the Rome Conference of 1952; these delegations explicitly stated that the principle of the rigorous objective liability of the operator of the aircraft, a principle which virtually does not admit exoneration, would constitute for their countries an insurmountable obstacle to the ratification of the Rome Convention[182].

Also in the Czechoslovak Socialist Republic the ratification of the Rome Convention of 1952 would be contrary both to the general conception of liability, as established by the Civil Code, and to the special rules set forth by Law No 63 (1951), Collection of Laws, on the Liability for Damage Caused by Means of Transport; section 4 of the latter admits the discharge of the operator for a number of reasons and, in consequence, opposes the fatalistic causal liability. The conception of liability without fault "degrades the conduct of human beings themselves to the level of blind natural cause, and their consciousness and volition are by no means material or interesting"[183].

Ad b) The extent of the liability of the operator of the aircraft is *limited.* This principle met with general agreement at the Rome Conference, there was no discussion as to its justification, and the main idea of the Convention of Rome of 1933 has simply been adopted. The text of 1952 also conceives the limitation of the amount of liability as a *"quid pro quo"* in view of the exceptionally rigorous system of objective liability. There were no doubts at the Conference as to the usefulness of the limitation of the amount of the liability; adoption of this principle was particularly stressed with regard to the calculation of the insurance premium. More serious discussion was aroused by the question of what extent of liability should be fixed. It was obvious that the limits established in the Convention of Rome of 1933 are low and do not correspond to the present stage of technical and economic conditions prevailing in international aviation. However, certain delegates warned against a

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[181] See, e. g., D. N. Stanesco, La responsabilité dans la navigation aérienne, Paris, Les Editions Internationales 1951, p. 143; Pluchon, l. c., p. p. 127 *et seqq.*

[182] See ICAO Doc. 7379 LC/134, p. p. 13—14.

[183] V. Knapp, Některé úvahy o odpovědnosti v občanském právu, Stát a právo, No 1 (1956), Prague, Publishing House of the Czechoslovak Academy of Sciences, p. 82.

radical increase of the extent of liability because a substantial increase of the amount of liability might in practice hinder the development of aviation in countries with smaller financial possiblities than in other countries[184]. Consequently, the obvious aim of the Rome Convention of 1952 is not so much the protection of third parties on the surface, as it is solemnly proclaimed in the preamble of the Convention, but rather the protection of the capitalist interests of different air companies and insurance institutes.

Analogously to the Convention of 1933, the amount of liability is commensurate to the weight of the aircraft in the Convention of 1952, but the sums are substantially raised. Under art. 11, damages shall not exceed:

a) 500,000 francs for aircraft weighing 1,000 kilogrammes or less;

b) 500,000 francs plus 400 francs per kilogramme over 1,000 kilogrammes for aircraft weighing more than 1,000 but not exceeding 6,000 kilogrammes;

c) 2,500,000 francs plus 250 francs per kilogramme over 6,000 kilogrammes for aircraft weighing more than 6,000 but not exceeding 20,000 kilogrammes;

d) 6,000,000 francs plus 150 francs per kilogramme over 20,000 kilogrammes for aircraft weighing more than 20,000 but not exceeding 50,000 kilogrammes;

e) 10,500,000 francs plus 100 francs per kilogramme over 50,000 kilogrammes for aircraft weighing more than 50,000 kilogrammes.

"Weight" means the maximum weight of the aircraft authorized by the certificate of airworthiness for take-off, excluding the effect of lifting gas when used.

The said sums represent the maximum total of the extent of liability in the event of an accident of one aircraft. Of this the damages in respect of loss of life or personal injury shall not exceed 500,000 francs per person killed or injured. This, in comparison with the limits laid down by the Warsaw Convention, represents a quadruple sum, and a double sum as compared to the Hague Protocol of 1955. This difference is explicable. The Warsaw Convention sets forth rules relating to the liability of the carrier for the passengers and this liability results from the contract of carriage; the passenger is in advance aware of the possibility of limiting the extent of the carrier's liability and is able to insure against his risks. But a "third party" on the surface takes no part in air traffic and cannot reasonably envisage any risk.

The limitation of the amount of liability shall not be applicable, if the

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[184] ICAO Doc. 7379 LC/134, p. 123.

person who suffers damage proves that it was caused by a deliberate act or omission of the operator of the aircraft, his servants or agents, done with intent to cause damage (art. 12). Juridically this provision is better formulated than the analogous stipulation of the Convention of Rome of 1933. The text of 1952 deprives the operator of the aircraft of the advantages of the limitation of the extent of liability only in case of direct intention *(dolus directus)*, whereas the text of 1933 linked this consequence even with the operator's gross negligence *(faute lourde)*. However, the notion of "gross negligence" is unknown, for instance, in British law which includes it in the broader category of intention (wilful misconduct). However, the question arises why the Rome Convention of 1952 does also not link the same consequences with indirect intention. A juridically satisfactory conception of indirect intention is contained, for instance, in art. XIII of the Hague Protocol of 1955, which deprives the carrier of the advantages of the limitation of the extent of liability in case of an act or omission of the carrier, his servants or agents, done "... recklessly and with knowledge that damage would probably result". A direct intention to cause damage will certainly be quite unpractical. The third persons should, however, be protected by a more severe sanction against the operator of an aircraft who would, for instance, with knowledge allow the flight of an aircraft which shows a patent defect from the aspect of the security of traffic and who would not provide for due repair and maintenance. In consequence, not even here does the Rome Convention of 1952 provide for measures aiming at the prevention of damage and its rules have no stimulating effect on the operator of the aircraft.

The limitation of the amount of liability is also not applicable, if a certain person wrongfully takes and makes use of an aircraft without the consent of the operator and then causes damage in flight, provided the damage is governed by the Rome Convention (art. 12).

The Rome Convention of 1952 expresses the limits of the amount of liablity in "francs" which are, however, no more defined as "French", but refer to an abstract currency unit consisting of 65½ milligrammes of gold of millesimal fineness 900. They may be converted into national currencies conformably to the principles we have explained when dealing with the Warsaw Convention[185].

Ad c) The fulfilment of the obligation resulting from liability is guaranteed by the requirement of obligatory insurace or another security. In contradiction to the Convention of Rome 1933, the requirement of the insurance of liability to the extent of the limits established by the

[185] See p. 50 above.

Convention is not imperative in the text of 1952. The same sanction is not taken in case of the non-fulfilment of the operator's obligation of insurance as that established by the Convention of 1933, i. e. the impossibility of availing himself of the limitation of the extent of liability. Under art. 15, any Contracting State *may* require that the operator of an aircraft registered in another Contracting State shall be insured in respect of damage governed by the Rome Convention and sustained in its territory. The insurer must be authorized to effect such insurance under the laws of the state where the aircraft is registered or of the state where the insurer has his residence or principal place of business. The financial responsibility of the insurer must be verified by either of those states. The Contracting States may however require that the insurer shall be authorized to effect this form of insurance in a *Contracting* State adhering to the Rome Convention.

Instead of insurance, another security may be offered for the satisfaction of possible claims resulting from liability, e. g., a cash deposit, a guarantee given by a bank authorized to do so by a Contracting State and, finally, a guarantee given in respect of the operator by the Contracting State where the aircraft is registered, if that State undertakes that it will not claim immunity from suit in case of judicial proceedings concerning the respective claim.

Article 16 of the Rome Convention of 1952 adopted the main ideas of the Brussels Protocol of 1938 and exceeds the framework of rules directly relating to the liability of the operator of the aircraft for third parties on the surface; it is principally a step towards the unification of certain aspects of the contract of insurance. Under this provision, the insurer may set up only a precisely defined ambit of defences against the payment of the sum insured. He may raise the following defences: all the defences avaible to the operator of the aircraft (for instance that damage has been caused by the injured person himself, that damage is the consequence of armed conflict, that damage has been caused by a person who unlawfully and without the consent of the operator took hold of the aircraft); the defence of forgery of the documents of insurance; the defence that the damage occurred after the insurance policy ceased to be effective; or the defence that the damage occurred outside the territorial limits provided for by the insurance policy. The insurer may not set up other defences even if they were admitted by the *lex causae* of the contract of insurance concluded between him and the operator of the aircraft. In this sense the Rome Convention of 1952 to a certain extent unifies the provisions governing the contract of insurance.

In its articles 19—22, the Rome Convention of 1952 lays down very

detailed rules of procedure. The chief procedural principle established by the Convention is that providing that actions concerning liability under the provisions of the Rome Convention may be brought only before the courts of the Contracting State where the damage occurred *(forum loci damni commissi)*. By agreement between any claimant and any defendant, such claimant may take action before the court of any other Contracting State, but no such proceedings in another state shall have the effect of prejudicing the rights of persons who bring actions in the place where the damage occurred. The parties may also agree to submit disputes to arbitration in any Contracting State[186].

Each Contracting State shall so far as possible ensure that all actions arising from a single accident are consolidated for disposal in a single proceeding before the same court.

Any final judgement pronounced by a court of one Contracting State shall be enforceable, upon compliance with the formalities prescribed by the *lex fori* of the court before which execution is applied for, in the Contracting State where the judgement debtor has his residence or principal place of business. If the defendant's assets available in that state are insufficient to satisfy the claim, execution of the decision may be applied for within the territory of any Contracting Party where the defendant has assets.

Actions shall be subject to a period of limitation of two years from the date of the incident which caused the damage (art. 21). But if the injured person has not brought the action within a period of six months from the date of the incident which gave rise to the damage, he shall only be entitled to compensation out of the amount for which the operator remains liable after all claims made within that period have been met in full (art. 19).

Such is a very brief summary of the fundamental operative provisions of the Rome Convention of 1952.

From the angle of law, the text of this Convention contains a number of improvements upon the Convention of 1933. However, the Convention hat not been adhered to on a broad scale, and its purport is very insignificant in respect of the unification of the rules relating to the liability of the operator of the aircraft for damage caused on the surface.

The main reason of the indifference of states as to the ratification of this Convention should be viewed in the fact that the Convention

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[186] The Warsaw Convention, in its art. 32, admits arbitration only for disputes concerning the carriage of *goods*. The Rome Convention of 1952 evidently does not exclude arbitration even for deciding claims resulting from personal injury or loss of life of persons. But the question of the admissibility of arbitration for these categories of claims should be solved under the *lex fori* applicable in that state where the arbitration took place.

seemingly settles but marginal problems. It lays down rules governing only the liability of the operator of foreign aircraft for damage occasioned within the territory of another state. Consequently, it does not settle the liability of the operator of the aircraft in a comprehensive way, but only for a single aspect of international aviation.

Further, the principle of rigorous objective liability is alien to and inacceptable for the conception of a number of states (not excluding the Czechoslovak Socialist Republic); this principle renders exoneration almost impossible and is not a stimulating factor as to prevention. In other states — such as the United States — more and more objections have recently been raised also to the principle of the limitation of the amount of liability[187]; in the U. S. a basic re-examination of adherence to the Warsaw Convention is even being prepared.

The present Contracting Parties put the Rome Convention of 1952 into effect only imaginarily. It is applicable to states which take a more or less unimportant part in international aviation, and so far the stipulations of the Convention have not been applied to a single case by the signatories. For the time being the Convention is therefore unpractical and does not achieve the goal it aimed at in the sphere of law and economy.

The ratification of the Rome Convention of 1952 cannot be recommended as no practical aspects speak in favour of the ratification, and in addition the conception of the régime of the liability of the operator of the aircraft is contrary to Czechoslovak legislation, in particular to Law No 63 (1951), Collection of Laws.

It is not without interest that the fundamental régime established by the Rome Convention of 1952 (rigorous objective liability, the limitation of the amount of liability, the securities in respect of the fulfilment of the obligations resulting from liability) have of late been contemplated as a possible conception of the unification of the liability for damage caused by the uses of atomic energy for peaceful purposes and for damage caused on the surface by artificial satellites[188].

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[187] See p. 45.

[188] See, e. g., H. H. Wimmer, Suggestions for an International Convention on Damages Caused by Spacecraft, Zeitschrift für Luftrecht und Weltraumrechtsfragen, No 1 (1962), p. 51.

Part V

LIABILITY IN CASE OF COLLISIONS BETWEEN AIRCRAFT

A) THE OUTLINE OF THE PROBLEMS

The vast expansion of air traffic in the course of the recent years has given rise to a number of new problems as regards security. The frequency of flights increases continuously, modern air technology allows flights without direct visibility, in clouds and at night. Therefore the share and importance of the ground control agencies in the safeguarding of the security clearly increase. These agencies have information on the flights of all aircraft within a certain area, they track them by radars and by other technical means, co-ordinate their flights and, in particular, they direct their take-offs and landings. These are very responsible and complex tasks; it is sufficient to realize that 1000—2000 aircraft take off and land at the world's most important airports daily at a rate of one take-off or landing per minute[189]. Aircraft must frequently for a long time circle in the waiting zone before they can be given permission to land. Figuratively, "crowds" of aircraft form in the area surrounding the airport and at night and in cloudy weather the crew of one aircraft cannot see the other aircraft. In such conditions modern aircraft move at a speed of 200—300 m./sec.! In such conditions the biggest disaster in the modern history of aviation occurred — on December 16,1960, a Super G-Constellation of the TWA collided over New York with a DC-8 of the United Airlines while waiting for permission to land. A total of 142 people were killed in the collision!

Yet the danger of the collisions between aircraft arises not only within the waiting zones but virtually everywhere. At present all flights (except flights of military and other state aircraft) are exclusively performed within the prescribed "airways", i. e: in a strictly prescribed direction which may be compared to an "air highway". According to the recommendation of ICAO, the width of the airway is, as a rule, 18—20 km., and each aircraft is bound to observe the airway and not to fly more than 10 km to the right or left of the airway's centre. A "flight level" is fixed for different aircraft in the airway, i. e. the altitude they should

[189] Chicago, New York, Moscow, Paris, and Rome are considered to be the airports with the biggest traffic in the world. See S. Wiloński, Krise letecké bezpečnosti na Západě, Letecký obzor, No 7 (1962), p. 216.

observe is perscribed. In view of the tremendous frequency and speed of flights, collisions between aircraft may occur even within the airways in spite of these security precautions. This fact may be proved by the collision between the aircraft of the companies United Airlines and TWA, over Grand Canyon, Colorado, on July 1, 1956; in this accident 128 persons were killed.

The high frequency of flights not only gives rise to the danger of direct collisions between aircraft. Air traffic may also be endangered when two aircraft closely approach each other, the pilot sees the other aircraft in his immediate proximity only at the last moment and tries to avoid the collision by a sudden manoueuvre. In case of such a manoeuvre (sudden and vehement change in altitude or direction), the passengers on board may suffer injury and under certain adverse conditions the pilot may lose control and the plane may crash. The crash may also result from the fact that another (especially supersonic) aircraft flies under the airway of the aircraft; the aircraft flying in the top airway may crash without any collision.

Very complicated problems of liability arise from collisions and other forms of interference between aircraft. There are the difficult questions of the claims for damages between the operators of the collided aircraft, of the claims of the passengers and consignors of goods against the carrier with whom they have concluded the contract of carriage, or — as the case may be — against the operator of the aircraft which has caused the collision. There is also the issue of the carrier's recourse to the operator of the aircraft which caused the collision, in respect of the indemnisation the carrier had to pay to the injured passengers on board his aircraft. In concrete cases (such as the disaster over New York, on December 16, 1960) there may also be problems of the liability for the damage caused to third parties on the surface.

Not only the question of law but as rule also the question of fact, which concerns the fault through which the collision between aircraft has been caused, is extraordinarily complicated. The collision may be caused by the crew of the aircraft who did not observe the prescribed airway and flight level and crossed the way of another aircraft by a wrong manoeuvre. The fault may naturally be imputable also to the ground control agencies which wrongly located the position of the aircraft or gave the crew incorrect instructions. The pilotage of an aircraft and the control of air traffic from the ground is an extremely complicated activity in darkness, foggy or cloudy weather, and it is not easy to decide at which stage of the co-operation of the crew and the ground control agencies the mistake was made and to whom it is imputable.

As said above present modern aircraft reach a speed of 200—300 m. per second. Their actual position consequently changes several kilometres in every 10—20 second. However, it takes at least one minute to locate from the ground the position of an aircraft and to give the board-navigator the respective instruction to change the course. The collision between the two aircraft over New York occurred 2—3 seconds after the emergency warning was given advising of the presence of another aircraft in the immediate proximity[190]. Where should fault be found in the given case?

The solution of the question of law resulting from collisions between aircraft would be complicated if aircraft registered in different states were involved and if in this case the collision moreover occured above the territory of a third state (such a case has not yet occurred in the practice of international civil aviation).

In such a case first of all the question would arise under which law the mutual rights and liabilities of the parties should be considered.

This question — the finding out of competent law — would undoubtedly be solved by courts in pursuance of *lex loci delicti (damni) commissi.* The questions of fault, of the mode and extent of indemnisation, etc., in the relation between the operators of the collided aircraft would be solved under the substantive law of that state to which this point of contact refers. The claims of the third parties who suffered damage on the surface would be considered in conformity with the same law (unless they were governed by the Rome Convention, 1952). The issue of the liability of ground control agencies would also be considered under *lex loci delicti commissi;* but as to the jurisdiction of courts, it must be noted that almost in all parts of the world these organs enjoy the character of administrative state organs and that as such they may claim immunity before a foreign court.

The claims of the injured passengers and consignors of goods against the carrier would naturally be governed, even in the case of a collision between aircraft, by the Warsaw Convention or the competent *lex obligationis* applicable to the respective contract of carriage. The eventual recourse of the carrier to the operator of the aircraft or the ground control agency who have caused the collision should be considered under the law applicable in the debtor's principal place of business[191].

The basic subject under consideration in this part of the study is the problem of civil liability in the field of mutual relations beween the operators of the aircraft which have been registered in different states

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[190] S. Wiloński, *ibid.*

[191] Cf. the argumentation on p. p. 63 and 102—3.

and took part in a collision or some other form of interference between aircraft. The problems of the liability of ground control agencies can obviously not be omitted.

The issues of the conflicts of laws in the field of these relations will undoubtedly be solved in the practice of courts under *lex loci delicti commissi.* It has been pointed out above — in the introductory notes to part IV — that the point of contact referring to *lex loci delicti commissi* is rather controversial and that the substantive law of different states, to which this point of contact may refer, lays down widely differing rules relating to the obligations to compensate damage resulting from a civil delict or quasidelict[192]. This heterogeneity of legislations is evidently very unfavourable for the practice of international air traffic. In case of a collision between aircraft, the operator of the aircraft is in every country virtually subject to another risk under the concrete law applicable in the respective country. This situation also renders difficult an effective and at the same time cheap insurance of all possible risks of air traffic.

It would also be almost impossible to solve, in conformity with the current points of contact, questions of the liability for collisions between aircraft of different nationality if the collision took place over the high seas. These problems (torts on the high seas) are treated with much hesitation in literature on private international law[193]. In view of the fact that no state may enforce its jurisdiction on the high seas, the idea of the application of *lex loci delicti commissi* itself is unthinkable. The sole practical solution may obviously be in the application of the *lex fori* of the court which would find itself competent.

It ensues from this brief outline of the respective problems that the unification of the rules of substantive law relating to the liability resulting from the collision between aircraft would be very useful. At first sight the problems concerned are marginal and not very practical but the international character of the carriage by air sets forward the requirement of legal security in all possible relations, the requirement of the elimination of any unnecessary heterogeneity of the rules governing the questions which may have influence upon the development of international aviation. In this connection, it can also be emphasized that a reasonable unification of the régime of liability for collisions between aircraft could also have positive influence from the aspect of the prevention of damage.

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[192] See p. 108.

[193] M. Wolff, l. c., p. 497; G. C. Cheshire, Private International Law, 4th Edition, Oxford, Clarendon Press 1952, p. p. 273—275.

B) ATTEMPTS AND PROPOSALS FOR UNIFICATION

Attempts to unify the rules of substantive law which relate to the liability resulting from collisions between aircraft began long ago. At the 11th session of CITEJA in Bern, in 1936, a working draft convention was elaborated which was submitted to the IVth International Conference on Private Air Law held in Brussels in September 1938[194]. However, the Brussels Conference dit not discuss the draft, and unification work was suspended until the post-war period.

The CITEJA draft of 1936 is characterized by the following main ideas: The operator of the aircraft is the liable subject (art. 3 [1]), liability is based on fault (art. 4 [1]), and the burden of proof lies in the injured person. The operator of the aircraft may discharge himself by proving that the collision was caused by a fortuitous event *(cas fortuit)* or by *vis major*. Where both operators are to blame in respect of the collision, liability is divided in proportion to the degree of fault; if the degree of fault cannot be determined, both are equally liable (art. 5). The extent of liability is limited to 250 gold francs per kilogramme of the weight of that aircraft which has caused the collision but the minimum compensation must amount to 600,000 francs, and the maximum to 20,000,000 francs; of this one third should be paid to compensate damage caused to property, and two thirds to persons to meet claims in respect of personal injury or loss of life; damages paid to one person must not exceed 125,000 francs. The operator may not avail himself of the advantages of the limitation of the amount of liability if it is proved that the collision was caused by wilful misconduct *(dol)* or gross negligence *(faute lourde)*.

The draft is seriously deficient in its general conception and in details and it does not in the least comply with the present technical, organization or economic conditions of civil aviation. Therefore it did not become the basis for new unification work in the post-war period.

After the liquidation of CITEJA in 1947, certain aspects of the liability resulting from the collisions between aircraft were placed on the agenda of the ICAO Legal Committee, in connection with the work on a revision of the Convention of Rome. The 9th session of the ICAO Legal Committee, in September 1953, set up a sub-committee, which at the beginning of 1954 prepared a new draft convention on aerial collisions.[195]

The 10th session of the Legal Committee further elaborated this draft

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[194] See the text of the draft in IVe Conférence de Droit Privé Aérien, vol. II; Documents, Brussels 1938, p. 10.

[195] Draft Convention on Aerial Collisions, ICAO Doc. L. C. Working Draft No 465 of January 28, 1954.

but did not achieve an acceptable form, and this work was suspended for some time. The 12th session of the ICAO Legal Committee which met in September 1959 again set up a sub-committee which prepared a new draft at its meeting in Paris[196], in April 1960. This new draft was dealt with at the 13th session of the Legal Committee in Montreal, in September 1960[197], and on the basis of comments brought up at this session, again by the sub-committee in Paris, in June 1961[198].

This draft which is the last so far will again be placed on the agenda of the 14th session of the ICAO Legal Committee which will meet in Rome, on August 28, 1962[199].

In view of the present stage of unification work it is not probable that in a near future it would be possible to convene an international conference and to adopt a convention on the questions of liability for collisions between aircraft. The latest draft convention of 1961 — although much improved and very thoroughly elaborated — still shows certain deficiencies as regards its general conception.

The fundamental deficiency in the conception of the latest draft is the fact that it does not tackle the unification of the rules of substantive law relating to the régime of liability for collisions between aircraft in a really comprehensive way. The draft intentionally omits the settlement of the liability of ground control agencies and lays down only the rules governing the mutual liability of the operators of aircraft registered in different states.

It may justly be objected that the unification of solely these questions would be of very restricted practical importance. In the present state of air technology ground control agencies undoubtedly play a key role in the field of ensuring the security of air traffic and eliminating collisions. The importance of ground control agencies for the security of traffic will continue to increase simultaneously with the increase of the average cruising speed of modern aircraft. In default of rules governing the liability of the ground control agencies. the purport of any unification will be only very imaginary.

Both the Legal Committee of IATA[200] and the Committee for Air Trans-

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196 ICAO Doc. L. C./Working Draft 642.

197 ICAO Doc. 8101/L. C./145.

198 See JALC. Vol. 27, No 4.

199 This study was closed on August 15, 1962, and it can no more take into consideration the results of the forthcoming session of the ICAO Legal Committee. But it is impossible to expect that a decisive step towards the adoption of the draft convention will be made at that session. The problems connected with the collisions between aircraft will only be the subject of a technical report presented there by the ICAO Secretariat. This ensues from the provisional agenda of the 14th session of the ICAO Legal Committee.

200 See JALC, Vol. 28, No 1, p. 70.

port of the International Chamber of Commerce[201] arrived at these critical conclusions of the last draft convention.

Another criticized deficiency in the conception of the draft convention is the provision of article 16, under which the states may make the reservation that the convention shall not apply to their state aircraft (i. e. aircraft used in military, customs and police services). It is hardly possible to agree with this criticism which was also expressed on the forum of the International Chamber of Commerce. It is beyond doubt that military aircraft, reaching tremendous speed and flying even outside the regular airways, may potentially constitute a great danger of collisions. But it would be a dangerous concession made in the field of state sovereignty if states should renounce the unquestionable application of their respective municipal laws and, as the case may be, even the exclusive jurisdiction of their courts in respect of their state aircraft.

The main ideas of the Paris draft of 1961 may briefly be summarized as follows:

The convention should apply to the collisions or interferences between two or more aircraft in flight, if the collision occurs in the territory of a Contracting State and at least one of the aircraft involved is registered in another Contracting State, or if the aircraft involved are registered in different Contracting States, irrespective of where collision occurs. The definition of the "aircraft in flight" is formulated in the same words as in the Rome Convention of 1952[202], so as to exlude from the respective rules the collisions occurred, e. g., on the surface between aircraft taxiing on the runway and airfield.

Liability shall attach to the operator of the aircraft (art. 2.) The draft convention does not apply to the contractual obligations assumed by the operator of the aircraft in his capacity as carrier, in respect of the passengers or owners of goods on board his aircraft (art. 3), but ensures his recourse claims, with regard to the operator of the aircraft having caused the collision, for any amount he has paid under his obligations as compensation (art. 4 [d]).

Under the draft convention, the liability of the operator of the aircraft is based on *fault* (art. 4 and 5). The burden of proof lies on the injured person, as far as damage to the property of the injured operator of the aircraft is concerned (e. g., loss of or damage to the aircraft, damage caused to any other property on the aircraft and belonging to its

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[201] Doc 310/157, Paris, February 9, 1961; see Zeitschrift für Luftrecht und Weltraumrechtsfragen, No 4 (1961), p. 292.

[202] See p. 117.

operator). But in case of death, injury or delay caused to passengers and loss, damage or delay caused to the cargo on the aircraft involved in the collision the presumption of fault is set down and the burden of proof is reversed in respect of the operators of each of the aircraft involved. Analogously to the Warsaw Convention the operator of the aircraft may discharge himself only if he proves that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures (art. 5 [1] and [2]). This formulation of the presumption of fault clearly shows that the operator of the aircraft can never discharge himself if the cause of the accident is not reliably ascertained[203].

If the damage has been caused by the fault of two or more operators of aircraft, each of the operators shall be liable in proportion to the degrees of fault respectively committed; if the respective degrees of fault cannot be ascertained, liability shall be shared equally by all of them. This principle has evidently been adopted from the Convention for the Unification of Certain Rules of Law Respecting Collisions between Vessels, signed at Brussels on September 23, 1910.

The draft convention did not adopt the idea of the overall limitation of the amount of the liability of the operator of the aircraft. The provision of art. 10, which deals with the amount of liability, leads to the consideration whether the authors of the draft convention did not emphasize too much the desire to grant maximum protection to the interests of air companies and insurance institutions.

One aspect of the proposed rules should be appreciated: the draft abandons the old conception of CITEJA according to which the amount of damages should have been in proportion to the weight of the aircraft causing the collision. This criterion is at present unjustifiable because even a small air-taxi may cause the crash of the biggest type of aircraft. In consequence, the weight of the aircraft does not constitute the criterion of the amount of damages according to the draft. The amount of damages is limited only as regards the claims of the passengers and the owners of luggage and goods on board the aircraft. For death, injury or delay caused to a person, maximum damages of 250,000 gold francs are fixed for each such person (art. 10 [c]); for all the objects which such a person has in his charge, maximum damages amount to 5,000 francs per person (art. 10 [d]); for loss, damage or delay caused to any other property on board the aircraft not belonging to the operator of that aircraft, maximum damages are 250 francs per kilogramme (art. 10 [e]). The draft convention thus lays down quantitatively the same

[203] See the argumentation concerning art. 20 (1) of the Warsaw Convention, p. 69.

limitation of the extent of liability for these categories of damage as that provided in the Warsaw Convention as amended by the Hague Protocol.

On the other hand, however, the draft convention does not foresee any limitation of the amount of liability as to damage caused to the other aircraft. Not only real damage but — by a certain bulk sum — also the profit lost by the operator of the damaged or destroyed aircraft are compensated! Under article 10 (a) and (b) of the draft convention, for loss of or damage to the aircraft including the equipment and accessories thereof and any other property belonging to its operator, damages are paid which amount to the proved value of such property at the time of the collision or the cost of repairs, whichever is the least. Consequently, the amount of liability is not limited — compensation is paid for the actual damage. Under article 10 (b), in addition even damage caused by "loss of use" of the aircraft shall be compensated, by a bulk sum amounting to 10 % of the value of the aircraft as determined under subparagraph (a). This bulk sum should represent the compensation of the damage caused by the putting of the damaged or lost aircraft out of operation; it is actually a bulk compensation of profit lost.

It is worth noting in this connection that the purchase value of the most modern aircraft at present amounts to about 5—7 million dollars[204]. Enormous sums of money must consequently be paid in the event of a collision and loss of an aircraft. In comparison with them the sums to be paid according to the draft convention to the survivors of passengers would represent only a small fraction (250,000 francs per passenger equals to about U.S. $ 16,583). The draft convention thus shows an obvious tendency to a preferential treatment of the interests of air companies. The only juridical argument which can be brought forward in favour of this conception is that the draft convention grants the passengers and consignors of goods an advantage in the form of the presumption of the fault of the operators of the collided aircraft. The passengers and consignors of goods are not obliged to prove the operators' fault; in view of the complex nature of the direction of modern air traffic, this would as a rule be very difficult. With regard to this presumption of fault, of which it is difficult to discharge oneself, the limitation of the extent of liability may be regarded as a *quid pro quo.*

The presumption of the fault of the other operator is not to be applicable to the damage caused to the aircraft or to some other property of the operator of the aircraft in the event of a collision. The injured

[204] See, e. g., ICAO Bulletin, Vol. XV, No 8 (1960), p. p. 140 and 141.

person must prove the fault, and therefore his claim should not be restricted by limiting the amount of liability.

Under the draft convention, the limitation of the amount of liability should not apply to the passengers and consignors of goods, if the collision resulted from an act or omission of the operator of the aircraft, his agents or servants, done with intent, or recklessly and with knowledge that collision would probably result, or if the collision has been caused by a person who has wrongfully taken and made use of the aircraft (art. 11). This provision of the draft essentially adopts the Hague Protocol and the Rome Convention of 1952.

Actions under the provisions of the draft convention should be brought before a competent court of any Contracting State in which the collision occurred or in which the defendant has his domicile or principal place of business (art. 14).

This draft convention will be submitted to a number of discussions and comments by the different states and will certainly be modified in several respects before an international conference is convened for its adoption.

In order to become an actually practical instrument contributing to the unification of law in the field of international carriage by air, its conception itself should be reviewed and it should solve in a really comprehensive way the question arising from collisions between aircraft.

This means first of all that it should also embrace rules relating to the liability of ground control agencies whose activities are of a decisive importance for the prevention of collisions between aircraft.

CONCLUSION

This study aimed at presenting an analytical and critical outline of the basic problems of civil liability which arise in the practice of international carriage by air, this both from the aspect of the settlement of the conflicts of laws and especially from the aspect of the interpretation and application of the unified rules themselves.

The plurality of foreign elements in these relations, the instability of the points of contact serving to find out competent law and the great differences in the substantive laws governing these relations in various states conduce to a single conclusion: In the field of international carriage by air, it is necessary to make every effort for an effective unification of law on a broad multilateral basis. The almost universal adoption of the Warsaw Convention proves that this task is realistic.

The international carriage by air constantly develops and expands and the social relations connected therewith are developing and differentiating as well. These relations require an effective legal regulation which would eliminate all the existing chaotic moments as well as the lack of legal security.

The law governing international carriage by air has in our country not yet been theoretically studied in due proportion to the importance and share of the Czechoslovak Socialist Republic in international carriage by air. The development of the studies of the rules governing international aviation is indispensable not only from the angle of the management of an important branch of national economy — and carriage by air undoubtedly is such a branch — but also from the angle of the importance of aviation in its capacity as a momentous expression and means of international co-operation.

Prague, August 15th, 1962.

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II. Periodical Articles

(Abbreviations:

ICLQ — The International and Comparative Law Quarterly
JALC — The Journal of Air Law and Commerce
RFDA — Révue française de droit aérien
RGA — Révue générale de l'air
RGDA — Révue générale de droit aérien
ZLR — Zeitschrift für Luftrecht
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