National Airlegislations and the Warsaw Convention

Dr. D. GOEDHUIS

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NATIONAL AIRLEGISLATIONS AND THE WARSAW CONVENTION

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BY

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PREFACE

At its XXXVIIth Session held in Paris in July 1937, the International Air Traffic Association following on a report by the author of this study, decided to approach the Governments of those countries which have not as yet brought their national legislation into harmony with the Warsaw Convention and to draw the attention of these Governments to the importance of applying the rules of this Convention to all carriage by air without exception.

In the first Chapter the reasons national air carriage must necessarily be governed by the same principles of liability as international air carriage, have been explained: it will be seen that all over the world the extension of the régime of liability of the Warsaw Convention to internal air carriage is steadily progressing.

In the second Chapter the Warsaw Convention itself has been examined. As regards the contents of this Chapter it should be noted that the I.A.T.A. has not yet made definite proposals regarding the revision of the Warsaw Convention. The interpretations of the articles of the Convention and the proposals made in this study regarding their modification represent the personal point of view of the author for which he alone is responsible.

D. GOEDHUIS

The Hague, October 1937.

INTRODUCTION

The most particular characteristic of air traffic, as opposed to other means of transport, is that air services, not being hampered by any geographical obstacles, can by themselves alone connect all the important points of the earth. As a consequence, the tendency of air commerce is towards the operation of world airlines encircling the globe [1].

From the very beginning the operation of regular airlines has been international [2]. In the early days of air line operation national air lines did not play any role of importance. After 1927 when the United States of America embarked upon their extraordinary development of aviation, the role of purely national lines in the field of air traffic in general grew in importance. However, when in the coming years the transoceanic lines will have developed to their expected extent, an important part of the American lines, which are now purely national, will become of international significance.

The predominantly international character of aviation entails the adoption of certain basic principles by which air traffic in general must be governed If uniformity of rules regulating public as well as private law is useful for international carriage by sea and land, such uniformity is an absolute necessity for carriage by air.

Immediately after the great war a need was felt for uniformity in public aviation law in order to assure a solid and efficacious

1. In 1935 the line to Indo China operated by the "Air France" was prolonged to Hanoi and in the beginning of 1936 "Imperial Airways" inaugurated a service between Penang and Hongkong. Europe was thus connected with the Chinese airnet. On the 30th March 1936 the "Deutsche Zeppelin Reederei" started a regular service between Francfort and New York and since 21st October 1936 the "Pan American Airways" carry passengers on their San-Francisco–Manilla line. As soon as this last line is prolonged to China, which is to be expected in the near future, the first airline circle round the world will be complete.
2. The first regular air service started between Paris and Brussels on March 22nd 1919.

organisation of air navigation. The Allied Powers assembled in Paris for the Treaty of Versailles met to exchange points of view on the elaboration of uniform regulations concerning public air law. This meeting drew up the Convention relating to the regulation of aerial navigation dated October 13th 1919 fixing i.a. the principle of the sovereignty of the State over the subjacent air space, freedom of innocent passage, as well as technical questions such as certificates of airworthiness, registration marks, licences for the crew etc. This Convention was followed by two more or less analogous Conventions, the Ibero-american Convention of 1926 and the Panamerican Convention of 1928.

In the domain of private law the necessity of a special regulation was not felt to be as urgent as in the domain of public law. The fundamental rules of private law, owing to their greater development and their generality, can adapt themselves more naturally to a situation as new as that created by aviation. However, owing to aviation's essentially international character, here also it was felt that special regulations had to be made. An example of a case which may arise at the present moment, will illustrate this necessity.

A passenger takes a ticket for a journey by air from London to Vienna via Amsterdam–Stockholm–Reval–Riga–Warsaw–Prague. As Austria, at the moment of writing, has not yet ratified the Warsaw Convention, the carriage does not come under the rules of this Convention. The ticket issued to the passenger stipulates that actions must be brought before the Court of the carrier's principal place of business and that the national law of the Court seized of the case, shall apply.

The first part of the journey, London–Amsterdam, is operated by an English, a Dutch and a German Company. The second part, Amsterdam–Copenhagen–Stockholm by a Dutch, a French, an English, a Swedish, a Danish, a German and a Belgian Company. The third part of his journey, Stockholm–Reval, by a Swedish and a Finnish Company, the fourth part, Reval–Riga by a Russian and a Polish Company. The fifth part, Riga–Warsaw, by a Polish Company. The sixth part, Warsaw–Prague, by a French Company. The seventh and last part, Prague–Vienna, by an English, a Czechoslovakian, a German, a French and a Dutch Company. As the lines on which the passenger is travelling are

operated in pool, it will as a rule not be possible for the passenger to know what company will carry him in the course of his journey.

As the ticket states that actions must be brought before the Court of the carrier's principal place of business and that the national law of the Court seized of the case shall apply, it follows that for such a journey the Courts of nine countries are competent, and that these Courts, if seized of the case, will apply their own law.

We will see that the law systems of several of these countries, are completely different. Let us suppose that the ticket contains a clause exonerating the carrier from all liability. As we will see in the second chapter, such a clause in some countries will be considered to be valid whereas in other countries it will be considered null and void. In another country again the passenger will have an option to sue in contract or in tort and the exemption of liability will be considered valid as far as contractual liability is concerned, but void as regards liability for tort. In the case of the death of the passenger, the question of the deceased's representatives arises. Which persons can claim on his behalf? Does the exemption clause prevent the representatives from claiming or does the exemption clause have no effect on the representatives' claim as it is a separate one? The answers to these questions will differ in the different countries.

From the point of view of passengers and shippers of goods as well as from the point of view of air carriers, uniformity of laws governing carriage by air is an absolute necessity. It is, however, not sufficient to agree on the necessity of regulating the liability of the air carrier internationally. The time when the regulation is to be made has also to be determined.

In inaugurating the VIth Congress of the International Legal Aviation Committee, which was held in Rome in 1924, M. Mussolini warned the delegates against the danger of too much legislation. "Air navigation has not yet attained the technical perfection that it will indubitably have tomorrow; civil air traffic is not intense enough to permit of all the various problems, which its development will certainly bring about, being considered. That is why it is necessary not to create legislative texts that events will prove practically inadequate and useless, but to leave legal conscience to confront the problems as they arise under their

new aspects, so that necessity and experience precede the rules of the laws. The Romans, in their great legal knowledge, followed this principle. Life always precedes law. Law can thus adapt itself to the necessities of life and express its needs without cramping it into the narrowness of laws too rigourous because premature".

Whereas, on the one hand, when air navigation was still in its infancy, the opinion was held that in edicting international law relating to it, prudence and circumspection should be used owing to lack of experience and that above all great care should be taken regarding the reaction that these laws might produce on the new means of transport, it was feared on the other hand that if an international law on the subject was not created in time, each country would make its own laws on this matter and these might differ too much between themselves to be easily adapted later to an international Convention.

History of the Warsaw Convention

On the 17th August 1923, M. Poincaré addressed a letter to the diplomatic representatives accredited in France in which he stated that the French Government has been led to studying the question of the liability of the air carrier. However, seeing that this important question could only be solved by an international convention, the French Government proposed to convene in Paris, in November, an International conference on private air law which should:

a. draw up a Convention on the liability of the air carrier;

b. decide whether it was desirable to continue the study of the international unification of private law with regard to aeronautics.

The majority of Governments, though recognising the utility of a Conference as proposed by the French Government, desired that the projects to be discussed should be communicated several months before the Conference. For this reason, the Conference was adjourned on two occasions. The 30th June 1925, the French Government addressed another letter to the diplomatic representatives, submitting a draft international Convention relating to the liability of the air carrier. In this letter the date of the first International Conference on Private Air Law was fixed for 26th October 1925, in Paris. Seventy-six delegates representing forty-one States took part in the Conference. Further to the delibera-

tions during the meetings held from 27th October to 6th November, it was decided to submit to the approval of the Governments represented at the Conference, with a view to a favourable examination and later signature of an international Convention, a "draft Convention relating to the liability of the carrier in international carriage by aircraft". The Conference, considering the importance, the urgency, the complexity and the technically legal nature of these questions, then expressed the wish that a Special Committee of Experts should very shortly be appointed to prepare the continuation of the works of the Conference. The French Government complied with this wish and, in January 1926, asked each of the States represented at the Conference whether they wished to appoint an expert in the proposed Committee. Twenty-eight of these Governments appointed experts who met in Paris, in May 1926, and decided to name the Committee thus constituted "Comité International Technique d'Experts Juridiques Aériens (C.I.T.E.J.A.)". Other Governments later joined the first group. At the present moment the experts composing the Committee belong to thirty-three States.

The C.I.T.E.J.A. first studied a draft consignment note for the regulation of international carriage of goods by aircraft and then took up again the study of the draft Convention of the 1925 Conference relating to the liability of the air carrier. The Committee, deeming that these two questions should be studied together, prepared in 1927 and 1928 a draft Convention treating the supplementary questions of traffic documents and liability in the case of non-performance of international carriage. This draft was addressed by the intermediary of the French Government to all the Governments who took part in the 1925 Conference, before being submitted to the second International Conference onPrivate Air Law.

This Conference took place on the initiative of the Polish Government, at Warsaw, from the 4th to the 12th October 1929 and adopted the Convention for the unification of certain rules relating to international carriage by air, which will be treated later. The 15th November 1932 the French Government deposited the instruments of ratification of the Convention of Warsaw in the archives of the Ministry for Foreign Affairs of Poland. On this date, four countries, Spain, Yougoslavia, Rumania and

Brazil having already ratified the Convention of Warsaw, in conformity with article 37, the Convention of Warsaw came into force as between the five countries having ratified, ninety days after the deposit of the fifth ratification, therefore on 13th February 1933. In Appendix B a list is given of the countries which, on the 1st January 1937, have ratified or adhered to the Convention.

Necessity of applying the rules of the Warsaw Convention to internal carriage

The Warsaw Convention is an extremely important step towards the ideal of uniformity of rules relating to the liability of the air carrier. In order to obtain the greatest benefit from it, it is however indispensable for the countries having ratified the Convention, to make their internal legislation in harmony with the provisions of the Convention. Two examples may illustrate this necessity.

A person takes a ticket for a journey by air from Berlin to San Francisco. The first part of the journey Berlin–Francfort is performed by the "Deutsche Lufthansa", the second part, Francfort–New York, by the "Deutsche Zeppelin Reederei" and the third part New York–San Francisco, by an American air traffic company. As Germany has ratified the Warsaw Convention and the U.S.A. have adhered to it, such carriage, if it has been regarded by the parties as a single operation, falls under the régime of the Convention [1].

Let us suppose that the same person takes a ticket from Berlin to New York. Having arrived at New York, he wants to continue immediately to San Francisco and buys a ticket for this journey. In this case the last part of his journey from Berlin to San Francisco will fall under the general rules of American common law. The differences between the two régimes of liability will be examined later *in extenso*. One example is to be given here. Under the régime of the Warsaw Convention the liability of the carrier, even in the case of his negligence, will be limited to the amount of Ffcs. 125.000. Under the régime of the U.S.A. common law the

1. Any carriage by air in the U.S.A., if it constitutes a stage of an international line, may therefore become subject to the rules of the Warsaw Convention.

liability of the carrier, in the case of his negligence, cannot be limited to a certain sum.

A passenger making the same journey with the same aeroplane can therefore be submitted to two completely different law systems according to the place where he bought his ticket.

Another example which actually happened in practice may illustrate to what unfavourable consequences for a passenger differences in national and international legislation relating to the liability of the air carrier, can lead.

The International Air Traffic Association [1] at its XXIVth Session, held in Antwerp in September 1930, established conditions of carriage for passengers and goods. These conditions which are based on the rules of the Warsaw Convention entered into force for all the members of the I.A.T.A. on 13th February 1933, date on which the Warsaw Convention itself came into force.

At the above mentioned Conference the I.A.T.A. decided to apply the conditions in question not only to carriage coming under the Warsaw Convention, but also to international carriage falling outside the scope of the Convention and further to internal carriage [2]. As we will see later the carrier, by virtue of these conditions, is liable in the case of death or wounding of a passenger

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1. The object of this Association, which was founded in 1919, is the establishment of unity in the operation of airlines of affiliated organisations whose systems are of international importance. At the moment 30 companies operating air services in Europe, South America, Africa and Asia are members of the I.A.T.A.

2. As the I.A.T.A. Conditions of carriage are used on airlines all over the world the influence of this decision has been farreaching. On 1st January 1937 the I.A.T.A. conditions were in use:
In Europe: on the lines of 30 air traffic companies flying over all European countries.
In Africa: on the lines of "Imperial Airways" and their associated companies to Cape Town and to the East and on the line Khartoum-Lagos; on the lines of "Ala Littoria" from Rome to the Italian Colonies in Africa; on the lines of "Air France", "Deutsche Lufthansa" and "Deutsche Zeppelin Reederei" to South America; on the line of "Air France" to Tunis and Algiers; on the lines of "Sabena" and "Régie Air Afrique" between Belgium and the Congo, and France and Madagascar; on all the lines of "Misr Airlines".
In Asia: on the lines of "Air France", "Imperial Airways", "K.L.M." and their associated companies, to India and China; on the lines of the "K.N.I.L.M." in the Dutch East Indies.
In Australia: on the lines of "Quantas Airways", a company in association with "Imperial Airways".
In America: on the Francfort–New York line of the "Deutsche Zeppelin Reederei"; on the lines of the "Deutsche Lufthansa", "Deutsche Zeppelin Reederei" and "Air France" to Rio de Janeiro and Santiago respectively; on all the lines of "Syndicato Condor"; on the lines of "K.L.M." in the West Indies.

and in the case of loss or damage to goods, unless he proves that he has taken the necessary measures to avoid the damage.

The national law of several countries in which companies members of the I.A.T.A. reside, permit the carrier to exonerate himself completely of his liability. Notwithstanding this fact all the companies members of the I.A.T.A. were willing to carry under the conditions of the I.A.T.A. though this involved the acceptance of a liability which was not imposed on them by law.

The reason why the Conference unanimously accepted the decision relating to the application of the above conditions to all carriage, was that the advantage of having uniform rules for all carriage was considered to outbalance completely the disadvantage of accepting a certain liability.

The British air traffic companies originally also applied the I.A.T.A. conditions. However, in view of the special circumstances of English law, they found it necessary to propose at the XXXVth Session of the I.A.T.A. that an alteration in the conditions of carriage should be made. These companies pointed out that at English common law, in the event of the death of a passenger, the limitations of liability stipulated in the I.A.T.A. conditions of carriage are not binding upon the defendants. In order to save them from the risk of unlimited liability towards the dependents of the passengers, they found it essential to provide in their conditions of carriage that the passengers shall have no rights at all against the carrier in cases which do not come under the Warsaw Convention. In connection herewith the I.A.T.A. decided to add to the conditions of carriage a clause stating that in cases to which English law is applicable, carriage which does not come under the Warsaw Convention is subject to a special condition by which all liability of the carrier towards passengers is excluded [1].

This example clearly proves to what an unfavourable situation differences between national and international legislation can lead as regards the passengers by air. The only possibility to ameliorate the situation of the passengers falling under English law, is to apply the rules of the Warsaw Convention in England to all carriage by air.

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1. See Information Bulletin of the I.A.T.A. No. 25, p. 52.

Not only the air carriers realised the necessity of extending the rules of the Warsaw Convention to all carriage performed by them. Textwriters in different countries are unanimous in recognising the necessity of making the national legislation in harmony with the international one [1].

It further is of great importance to note that the Third International Conference for Private Air Law held in Rome in May 1933, in which participated the delegates of forty-one countries, expressed the wish that the High Contracting Parties should make their national legislation in harmony with the provisions of the Conventions adopted at the Conferences on private air law.

In the first Chapter of this study we will see that Italy, Begium, the Netherlands, Denmark, Finland, Norway and Sweden complying with this wish have already passed laws which make the rules of the Warsaw Convention applicable to internal air carriage, and that the Governments of Argentine, Brazil, Estonia, France, Germany, Hungary, Rumania, Poland and Switzerland are preparing the way to bring the internal legislation in their respective countries in harmony with the provisions of this Convention. In view of the fact that the International Air Traffic Association at its XXXVIIth Session held in Paris in July 1937, decided to approach the Governments of the countries which have not as yet made their internal legislation in harmony with the Warsaw Convention, drawing their attention to the interest that lies in applying the rules of this Convention to all carriage by air without ex-

1. Wingfield: "Liability of an International Air Carrier" Minutes of the 5th International Congress of Air Navigation, p. 1186.
Constantinoff: "Le Droit aérien français et étranger", p. 252.
Kilkowski: "Die Haftung für Luftverkehrsschaden nach deutschem, schweizerischem, österreichischem, tschechoslowakischem, französischem und polnischem Recht", p. 122.
Ripert: "L'unification du Droit Aérien", Revue Générale de Droit Aérien 1932, p. 251.
Giannini: "Saggi di Diritto Aeronautico" 1932, p. 360.
Ambrosini: "L'Universalité du Droit Aéronautique", Revue Aéronautique Internationale 1933, p. 187.
Goedhuis: "La Convention de Varsovie", p. 84.
Blanc-Dannery: "La Convention de Varsovie et les Règles du Transport Aérien International", p. 11.
Oppikofer: "Zur neueren Entwicklung des Luftrechts", Zeitschrift der Akademie für Deutsches Recht 1935, p. 818.
Lincoln H. Cha: "The air carrier's liability to passengers in international law", Air Law Review, January 1936, p. 33.
McCormick: "Aviation Law, its Scope and development", Air Law Review, October 1935, p. 286.

ception, it is to be expected that several other countries will follow the example of the above mentioned countries.

By reason of the preceding, it is evident that when one examines carrier liability in national and international air commerce, the greatest stress must be laid on the Warsaw Convention. Many national laws relating to the liability of the air carrier which at the present moment are still in force will soon become only of historical interest.

When all countries linked up by air have made their internal legislation in harmony with the international legislation, the second phase leading to the desired uniformity of rules relating to liability will have been accomplished. It is, however, not sufficient to have uniformity of text but one must have certain guarantees that there also will be uniformity of interpretation. It is to be feared that the national Courts will arrive at different interpretations of the articles of the Convention. As there is not yet an international Court which as highest instant could watch over uniformity of interpretation, it is useful to consider what measures have to be taken to prevent as much as possible, differences in the judgments of analogous cases. In our second chapter we will see that in some of the articles of the Warsaw Convention the original meaning has become confused in the final text. The real meaning can only be brought out by a careful investigation into the historical development of the article from the first draft convention onwards. In some cases it will be felt that revision of the article is necessary. The necessity of revision has been fully realised by the authors of the Convention stipulating in art. 41 that any High Contracting Party shall be entitled not earlier than two years after the coming into force of the Convention, to call for the assembly of a new international Conference in order to consider any improvements which may be made in the Convention.

CHAPTER I

NATIONAL AIRLEGISLATIONS

ARGENTINE

Argentine has not yet ratified the Warsaw Convention. However, in view of the fact that the Pan American Commercial Conference accepted on June 15th 1935 a recommendation that the States of the Pan American Union should ratify the Warsaw Convention, the Director of Civil Aviation in Argentine expects that in the near future ratification of the Convention will be made by the Argentine Government.

As regards internal carriage it is to be pointed out that at the Second National Air Conference, held in Mendosa in 1934, the Secretary General of the Argentine Permanent Air Committee presented a draft Law relating to civil aviation which was accepted unanimously.

In this draft the provisions of the Warsaw Convention regarding the documents of carriage as well as regarding the liability of the carrier have been accepted *in toto*. The same method has been followed in the draft Law relating to civil aviation presented to the Argentine Minister of Foreign Affairs by the Special Committee appointed to this effect. Therefore as soon as this law is accepted by parliament, internal air carriage in Argentine will be governed by the rules of the Warsaw Convention.

At the moment of writing there are no special provisions in force in Argentine regulating the liability of the air carrier. The rules laid down in the 1st Book, 4th Title, 5th Chapter of the Commercial Code (art. 162–206) are considered to be applicable.

As regards the carriage of goods, the carrier is under the

obligation to deliver the goods at the place of destination, undamaged and in the time fixed by agreement or by law for the completion of the carriage. The carrier can relieve himself of liability by proving a case of force majeure or contributory fault of the consignor. As regards the carriage of passengers, the carrier is under the obligation to carry the passengers safely to their destination; he is liable for damage sustained in the event of death or wounding of a passenger unless he proves a case of force majeure or fault of the passenger himself.

Art. 204 of the Commercial Code prohibits clauses by which the liability of the carrier is excluded or limited.

Of the air traffic companies operating services in Argentine, Air France and Syndicato Condor operate under the conditions of carriage of the I.A.L.A. which are based on the Warsaw Convention.

In the rules under which Pan American Airways operate their services, the following clause relating to liability is inserted: "None of the Carriers shall be liable for any act, default, negligence, failure or omission of any of the other Carriers, or for any injury, loss, damage or delay not occurring on its own line. Transportation shall be subject to the rules relating to liability established by the Convention of Warsaw of October 12, 1929, if such Convention, by its terms, is applicable thereto. The Carriers reserve the right to alter intermediate stopping places in case of necessity, but no such alterations shall have the effect of depriving transportation of such international character as it would have irrespective of such alteration" [1].

AUSTRALIA

On 12th April 1935 the Commonwealth of Australia passed an Act to give effect to the Warsaw Convention (Carriage by Air Act 1935).

1. In this connection it is to be observed that conditions of carriage are at the present moment under development by the Airtransport Association of America. As soon as these conditions have been drawn up, steps will be taken to reconcile them with the I.A.T.A. conditions in order to obtain a set of conditions which can be used by air traffic companies all over the world.

In Section 5 of this Act power is given to the Governor-General to make regulations applying, with such exceptions, adaptations and modifications (if any) as he thinks fit, the provisions of the Convention, to carriage by air, not being international carriage as defined in the Convention.

As this power has not yet been exercised contract of carriage in carriage by air which is not international within the meaning of art. 1(2) 1st Schedule, will be governed by the ordinary rules of English common law.

These rules will be discussed when we consider the liability of the air carrier in England. As we will see, according to these rules the carrier may, if he wishes, disclaim all liability by the terms of his contract with passengers as well as with senders of goods.

The Australian Civil Aviation Board affirmed this opinion by informing us that according to the general opinion in Australia there is no reason in principle why an air carrier operating regular services could not be regarded as being a common carrier but that in the absence of any special legislation to the contrary, the air carrier can exonerate himself from all liability by a special clause in the contract of carriage.

The Empire airline (Imperial Airways in cooperation with the Australian Company Q.A.N.T.A.S.) is operated in Australia on the I.A.T.A. conditions of carriage.

AUSTRIA

Austria is one of the countries in Europe which have not yet ratified the Warsaw Convention. According to information received from the Federal Department for Commerce and Communication, the Austrian Government will in the near future take steps to ratify the Warsaw Convention. After the ratification the possibility of applying the rules of the Warsaw Convention to internal air traffic in Austria will be taken into consideration. Though the Federal Department for Commerce and Communication has not yet thoroughly examined this question, it is of opinion that in principle no objections will be made against making the national rules in harmony with the international rules of the Warsaw Convention.

As regards the present situation of the air carrier in Austria, air navigation has been regulated provisionally by the law of 10th December 1919 [1]. Concerning the liability for damages caused by aircraft art. 16 of the above law refers to the Automobile law of 9th August 1908 (Kraftfahrzeuggesetz). The same article stipulates however that the rules of liability of the "Kraftfahrzeuggesetz" are not applicable to damages to passengers or goods carried. The contractual liability of the air carrier is therefore at the present moment only governed by the general rules of liability of the Austrian Civil Code (part. 1293–1341 A.B.C.B.) which are based on the theory of fault. In order to render the carrier liable the plaintiff will have to prove that the carrier has committed a default.

Opinions differ on the question as to whether the carrier can exonerate himself from liability by a special clause. Art. 13 of the "Kraftfahrzeuggesetz" prohibits agreements by which the provisions of that law are excluded. The air navigation law has stipulated that the rules of the "Kraftfahrzeuggezetz" are applicable to aviation, except that in so far as carriage of passengers and goods is concerned, the provisions of art. 1 and 2 of this law are not to be applied. It has therefore been pretended that since art 13 is not expressly excluded by the air navigation law, this article also is applicable to the liability of the air carrier [2].

We do not think it possible to accept this point of view.

Art. 1 and 2 of the "Kraftfahrzeuggesetz" fix a liability which is much heavier than the liability of the Austrian Civil Code. According to the general principles of this Code exoneration clauses are permissible. Is it obvious that the authors of the "Kraftfahrzeuggesetz" wanted to prevent the rules of this law to be made illusory by special clauses and for that reason art. 13 prohibits such clauses. The "raison d'être" of article 13 is to be found in art. 1 and 2. The non-application of these last articles entails, in our opinion, the non-application of art. 13.

The reason why the air navigation law excluded the application of art. 1 and 2 of the "Kraftfahrzeuggesetz" to passengers and

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1. Gesetz vom 10. December 1919 betreffend die vorläufige Regelung der Luftfahrt. The text is published in "Nachrichten für Luftfahrer", August 1921, p. 489.
2. See Kilkowski "Die Haftung für Luftverkehrsschaden" Marburg, 1930, p. 82.

goods carried by air was that one considered the liability imposed by this law too heavy to be imposed upon the air carrier. The authors of the law intended the ordinary rules of liability to govern the relation of the air carrier towards passengers and consignors. According to these rules the carrier can contract out of his liability by a special clause [1].

It is to be observed that the Austrian air traffic Company "Oesterreichische Luftverkehrs A.G." operates all its services, national as well as international, under the conditions of carriage of the International Air Traffic Association, which are based on the Warsaw Convention. This Company has introduced a compulsory accident insurance for passengers in order to compensate the liability flowing from the conditions of carriage. The payment of indemnities [2] is made under the condition that the passenger and his representatives renounce from taking action for civil liability.

BELGIUM

As has been observed, Belgium is one of the countries which have already applied the rules of the Warsaw Convention to internal air carriage as well as to international air carriage which is not subject to the rules of the Convention.

Article 2 of the Law of 7th April 1936 [3], by which the Warsaw Convention was approved, provides that the rules of the Convention are applicable to all carriage of persons, luggage or goods even if the place of departure and the place of destination are situated within Belgian territory.

As regards the liability of the air carrier before 7th April 1936,

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1. Le Goff in "Traité Théorique et Pratique de Droit Aérien", p. 682; Prochasson in "Le Risque de l'Air", p. 123 and Beaumont in "Information Bulletin" of the International Air Traffic Association, No. 4, p. 6 conclude to the possibility of exoneration clauses in Austrian law.
2. The amounts paid to the passengers are: S. 54.000 in case of death and of total permanent infirmity; S. 54.— per day in case of temporary incapacity; S. 2100 for treatment costs.
3. "Loi approuvant la Convention internationale pour l'unification de certaines règles relatives au transport, aérien international et le Protocole additionnel, signés à Varsovie le 12 octobre 1929", Moniteur Belge 24th September 1936.

opinions differ as to what rules were to be applied. Some textwriters maintain that article 4 of the Belgian law of 25th August 1891 on the contract of carriage is applicable [1]. This article is an application of the principle contained in art. 1147, 1148 and 1784 of the Belgian Civil Code which imposes on the carrier a presumption of liability in the case of non-performance of the obligation incumbent on him. Other textwriters consider that only art. 1382 of the Civil Code, which relates to the liability *ex delicto* can be applied.

As regards the Law of 1891, the parliamentary discussions on this law [2] prove that the authors of the law had in mind only carriage by land. For that reason the application of this law to air carriage has been rejected. Though in principle objections must be made against the application of special rules of carriage by land, by analogy to carriage by air, we think that through a different channel one must arrive at accepting the rules underlying the law of 1891. These rules, as we observed, reproduce the general rules of contractual liability. When discussing the liability of the air carrier in France, we will explain the reasons why, in our opinion, the liability of the carrier towards passengers and shippers of goods is contractual by nature. It is however to be observed that the Belgian High Court considers the law of 1891 as having fixed new legal obligations which do not find their basis in preceding legislation [3].

Sabena v. Kreglinger

The question of what régime of liability is applicable to the carriage by air in Belgium before 7th April 1936, is of actual interest, as a case is pending before the Court of Brussels in connection with an accident which occurred on 28th March 1933 at Ruysselede (in Belgium) to the aeroplane "City of Liverpool" belonging to Imperial Airways. The representatives of a passenger M. Kreglinger, who lost his life in this accident, brought an action against the Belgian air traffic Company Sabena which, acting as agent for Imperial Airways, had issued the ticket to the deceased passenger. The Sabena contended before the Civil Tribunal of

1. Stevens and Henning "Le Contrat de Transport" (1931).
2. See Dupont et Tart XXVIII No. 240 et seq.
3. Judgment of the High Court of 5th October 1893 Pas. 1893 I 321.

Brussels that the case did not fall under the competence of the Tribunal because on the ticket delivered to M. Kreglinger it was expressly stipulated that the passenger or his representative could take action only against the carrier who performed the carriage during which the event giving rise to the action occurred and that actions must be brought before the Court of the carrier's principal place of business [1]. As the accident took place during carriage performed by Imperial Airways, the principal place of business of which is London, the Sabena considered the tribunal of Brussels as not competent.

The Tribunal however, considering that the action brought against the Sabena, was also based on art. 1382 of the Civil Code, relating to the liability *ex delicto*, declared itself competent. The Sabena gave notice of appeal and at the present moment the case is pending before the Brussels Court.

If the rules of the Warsaw Convention had been applicable to this case the Tribunal would have had to come to a different conclusion. As we will see in Chapter II of our study, art. 24 of the Warsaw Convention provides that any action for damages, *however founded*, can only be brought subject to the conditions and limits of the Convention. The "raison d'être" of this article is to prevent the carrier from falling under a régime of liability other than that of the Warsaw Convention in the event of the victim bringing an action against him for liability *ex delicto* [2].

Conditions of carriage used in Belgian air traffic

The Belgian air traffic company Sabena, operating all Belgian national and international airlines, operates under the I.A.T.A. conditions. All foreign companies running lines to Belgium also use these Conditions.

BRAZIL

Brazil was one of the first countries to ratify the Warsaw Convention. On the 2nd May 1931 the Brazilian Government

1. The carriage was performed under the conditions of carriage of the International Air Traffic Association.
2. See page 267.

deposited the instruments of ratification of the Convention.

As regards internal air traffic it is to be pointed out that a Brazilian Air code is at the present moment under consideration by the Brazilian Congress. According to information received from the Director of Civil Aviation in Brazil, it is to be expected that in the near future the Code will be approved of and will then come immediately into force.

Before considering the contents of this Code examination should be made of the rules which at the moment of writing still govern the liability of the air carrier.

Decree on air navigation of 22nd July 1925

Chapter VII of the Decree relating to air navigation of 22nd July 1925 contains certain provisions relating to the liability of the air carrier.

The later Decree on air navigation of 6th January 1932 does not contain any rules concerning the question of liability and leaves the first Decree in force for all subjects on which the Decree of 1932 made no special provisions.

As regards the liability of the carrier for goods, art. 73 of the Decree of 1925 refers to the rules and regulations concerning railway carriage. The Decree on railways (No. 2.681) of 1912 is applicable. According to this Decree the carrier is liable for damages in the event of loss of or damage to goods accepted for carriage. The carrier can relieve himself of this liability by proving a case of force majeure or a fortuitous event or by proving that the damage was due to the inherent vice of the goods. These provisions correspond to the provisions laid down in art. 102 and 103 of the Brazilian Commercial Code.

As regards the liability of the carrier for passengers, the Air navigation Decree of 1925 does not contain any provisions on this subject. Since some decades, doctrine and jurisprudence in Brazil are in agreement that art. 102 and 103 of the Commercial Code, to which we have just referred, are, by way of analogy, to be applied to the carriage of passengers. As regards railway carriage this principle has been fixed by law. (Decree on railways, No. 2.681, 1912) In the last years this Decree has been constantly applied not only to railway carriage but also to carriage by tramway and carriage by automobile. In view of the tendency

to apply the rules of the railway Decree to all other modes of transport, it is to be expected that the same rules will be applied to carriage of passengers by air before the Brazilian Code enters into force. According to these rules the carrier is liable for damage sustained during carriage, in the event of death or wounding of a passenger or any other bodily injury suffered by the passenger. The carrier can relieve himself by proving a case of force majeure, a fortuitous event or a fault of the passenger without there being a fault of the carrier.

Brazilian Air Code

This Code which was drafted by the Brazilian delegates in the C.I.T.E.J.A. contains in Chapter III, IV and V of the second part provisions relating to the carriage by air and the liability of the air carrier. These provisions are based on the Warsaw Convention though there are certain divergencies to which attention should be drawn. In the first place, "carrier" has been defined.

Art. 68 stipulates that "carrier" in the meaning of the Code is the natural or juridical person who performs carriage by air for reward. As we will see, the Warsaw Convention has not given a definition of the word "carrier". The difficulties to which the interpretation of the meaning of carrier under the Warsaw Convention gives rise will be considered in Chapter II. The Convention only considers the regulation of the relation existing between the person or undertaking concluding a contract of carriage and the passengers or consignors with whom the contract was made [1].

In Chapter IV provisions concerning the documents of carriage have been made. These provisions correspond to the provisions of the Warsaw Convention on the same subject with the following exceptions.

The particular "agreed stopping place" which, according to the Warsaw Convention, must be inserted in the documents of carriage, is not required by the Brazilian Code.

In international carriage, the agreed stopping places must be inserted in the documents of traffic, in order to know whether a carriage falls under the régime of the Warsaw Convention [2]. But this particular also serves another purpose. The Convention gives

1. See further page 133.
2. See page 122.

the consignor the right to dispose of the goods by stopping them in the course of their journey. In order to be able to exercise this right, the consignor must know at what aerodromes the aeroplane, in the course of its journey, is going to land. As the consignor in internal carriage has the same right to dispose of the goods by stopping them, we are of opinion that the agreed stopping places have also to be mentioned on the consignment note made out for internal carriage [1]. As in the conditions of carriage used by air traffic companies it is generally provided that luggage can be delivered at a stopping place against delivery of the luggage ticket, the same remarks apply to this document.

We are of opinion that in national as well as in international air traffic, the passenger and consignor must know beforehand at what places the aeroplane will land in the course of its journey.

Another divergency with regard to the Warsaw Convention concerns the luggage ticket. In the Convention it has been provided that the luggage ticket shall contain a statement that delivery of the luggage will be made to the bearer of the luggage ticket. The carrier has therefore not to verify whether the bearer of the luggage ticket is entitled to take delivery of the luggage. This particular, by virtue of the Brazilian Code, is not to be inserted on the luggage ticket for internal carriage in Brazil.

As regards the air consignment note the Warsaw Convention requires as one of the particulars "the apparent condition of the goods and of the packing". We will see that some uncertainties exist regarding the insertion of this particular [3]. In the consignment note provided by the Brazilian law no mention is made of the apparent condition of the goods.

As regards the liability of the carrier, art. 84 of the Brazilian Code states that the carrier is liable for damages sustained in the event of the death or wounding of a passenger, if the accident which caused the damage took place on board the aircraft in

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1. We will see that this can be done by mentioning on the consignment note the number of the airline on which the goods will be carried. The consignor, by consulting the publications of the carrier (timetables) will be able to find out the stopping places.
2. It will be seen that in the Italian law of 22nd January 1934 which applies the rules of the Warsaw Convention to internal carriage in Italy, the particular "agreed stopping place" is also omitted. The Dutch law of 10th September 1936, on the contrary, maintains this particular.
3. See page 176.

flight or in the course of any of the operations of embarking or disembarking and if the damage was caused:

a. by a defect in the aeroplane,or

b. by the fault of the crew [1].

The first part of this article corresponds to art. 17 of the Warsaw Convention except that the words "in flight" have been added to "on board the aircraft". Consequently a passenger who has embarked and suffers damages before the aeroplane is actually in flight, will not be able to base a claim on art. 84. This does not seem reasonable to us. Furthermore, art. 17 of the Warsaw Convention does not contain the restriction mentioned in the last part of art. 84 of the Brazilian Code tending to declare the carrier liable only in the case of a defect in the aeroplane or a fault of the crew.

As regards the question of the liability for defect in the aeroplane we will see in Chapter II that the carrier under the régime of the Warsaw Convention is not liable for such a defect, if he has used an aircraft constructed by the average type of good constructor [2].

The Brazilian Code is therefore on this point more severe for the carrier than the Warsaw Convention. As, however, the only other cause for liability mentioned in the Brazilian Code is the fault of the crew, for which the carrier — in the carriage of passengers [3] — is also liable under the Warsaw Convention, the total liability imposed on the carrier by the Brazilian Code is less than the total liability imposed on the carrier by the Warsaw Convention.

Art. 88 of the Brazilian Code contains another divergency with regard to the Warsaw Convention. This article provides that the carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage, or goods, in the proportion of 10% of

1. The French translation of art. 84 of the Code given by the Brazilian "Departamento de Aeronautica Civil" is as follows: "Le transporteur répond de tous dommages provenant de mort ou lésion corporelle du voyageur, dans les accidents survenus à bord de l'aéronef en vol, ou dans les opérations d'embarquement et de débarquement, du moment que ces dommages proviennent de *a.* défaut de l'aéronef, *b.* de la faute de l'équipage".
2. See page 251.
3. In both the Warsaw Convention (art. 20) and the Brazilian Code (art. 90) the carrier in the carriage of goods can exonerate himself from liability by proving that the damage was caused by negligent pilotage, or negligence in the handling of the aircraft or in navigation.

the prejudice suffered and proved by the passenger and in the other cases in proportion to the value of the goods. In the Warsaw Convention, in the case of delay, the same limitations apply as those applicable to the liability for death or injury to the passenger and loss of or damage to luggage or goods. In Chapter II we will criticize the system applied by the Warsaw Convention and we will propose the acceptance by the Warsaw Convention, at the next revision, of the same system as that used by the C.I.M. This last system seems to us also preferable to that of the Brazilian Code.

All other provisions concerning the liability of the air carrier in the Brazilian Code correspond to those of the Warsaw Convention.

In our opinion it is to be regretted that the Brazilian Code contains a restriction on the liability stated in art. 17 of the Warsaw Convention. This does not, however, alter the fact that the adoption of the general principles of the Warsaw Convention in the Brazilian Code will prove of great importance.

The Brazilian air traffic Company "Syndicato Condor Ltda." and the French air traffic Company "Air France" operating internal services in Brazil, make use of the I.A.T.A. conditions of carriage which are based on the Warsaw Convention [1].

BULGARIA

The Bulgarian Law relating to aeronautics of 25th July 1925 has stipulated in art. 24 that the liability of the air carrier is governed by the civil laws of the State [2]. These laws are the Code relating to obligations and contracts and the Commercial Code.

The general principles of the Code relating to obligations are based on the theory of fault. The carrier is not liable if he proves a case of force majeure.

The Commercial Code contains provisions relating to the

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1. The line Francfort–Rio de Janeiro of the Deutsche Zeppelin Reederei also operates under these conditions.
2. A French text of this Law is published in the "Bulletin de la Navigation Aérienne" 1929, p. 1928.

liability of the carrier of goods, which are based on the C.I.M. (Berne Convention) [1]. The carrier can, however, in the carriage of goods, exonerate himself from liability or limit his liability by a special clause. Such clauses in the carriage of passengers are not permitted.

The French air traffic company "Air France", the German air traffic company "Deutsche Lufthansa" and the Polish air traffic Company "Polskie Linje Lotnicze "Lot" which operate services to and from Bulgaria, use the conditions of carriage of the I.A.T.A. which are based on the Warsaw Convention. These conditions have been approved by the Bulgarian Government. In practice air commerce in Bulgaria is therefore governed by the rules of the Warsaw Convention, though this Convention has not yet been ratified by the Bulgarian Government.

According to information received from the Bulgarian Director of Aeronautics, the ratification of the Warsaw Convention has been delayed because of the fact that the Bulgarian Government intends first to modify the law relating to aeronautics. It is therefore to be expected that after this law will have been made in harmony with the provisions of the Warsaw Convention, ratification of the Warsaw Convention will follow. The application of the rules of the Warsaw Convention to air carriage in Bulgaria will then be done by law and not, as at present, by simple agreement between the carrier and his contracting parties.

CANADA

The ratification of the Warsaw Convention and the action necessary to apply its rules to internal transport in Canada are now under consideration by the Canadian Government but so far no decision has been announced.

In the absence of any special rules relating to the liability of the air carrier in respect of passengers and goods carried by him, the question of liability will be governed by the general rules of English common law. The application of these rules to the con-

1. In our second Chapter we will compare the provisions of this Law regarding liability, with the rules of the Warsaw Convention.

tract of carriage by air will be treated later when the liability of the air carrier in England is considered [1].

CHILI

The Air navigation law of 14th October 1925 [2] contains certain provisions relating to the liability of the air carrier. This law has adopted the general provisions of liability of the French Air navigation Law of 31st May 1924, the contents of which will be considered later *in extenso*.

Art. 43 of the Chilean law stipulates that the rules of carriage by air shall conform to the provisions of Chapter V of the Commercial Code relating to carriage over land, by water, by canals or navigable rivers, in so far as they are not contrary to the present law. This article corresponds to art. 45 of the French Air navigation Law.

Art. 45 of the Chilean law provides that the carrier can, by a special clause, exclude all liability which he incurs by reason of the risk of the air and the faults committed by any person employed on board in the conducting of the aircraft; this applies to passengers as well as goods. This clause only exonerates the carrier from his liability if the aircraft was in a good condition of navigability on departure and if the crew were in possession of the proper certificates and licences.

This article corresponds to art. 42 of the French air navigation law; the latter Article, however, contains an addition which states that the special administrative certificates are a presumption in favour of the aircraft and crew, which can be combatted by proof to the contrary. For a discussion of the provisions of this article we refer to page 000 et seq.

Art. 53 states that the proprietor, the commander of the aircraft and the author of the damage shall be jointly and severally responsible for all damage and prejudice caused by the aircraft to

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1. See page 129 et seq.
2. A French text of this law has been published in the "Bulletin de Renseignements" of the I.C.A.N., 14th March 1929, No. 343.

persons or property, either consequent on a contract of employment or consequent on a contract of carriage or to a third party.

The estimation of the damage is subject to reduction in the event of imprudence on behalf of the victim or in the event of the victim's participation in the act.

This article shall not apply in the event of the damages and prejudices being caused by forced landings in the conditions provided by article 26 [1]. This exception is not applicable if there is wilful misconduct or negligence by the crew of the aircraft.

CHINA

According to information received from the Chinese Ministry of Communications, the Chinese Government is studying the question of the ratification of the Warsaw Convention. As regards internal air traffic, the Government is at the moment elaborating a draft law in which the principle of the limitation of the liability of the carrier is adopted.

As far as the present situation of the air carrier in China is concerned, he is not submitted to any special rules of liability.

In the case In Wen-Long, the Court of Appeal of Kiang-Sou declared the general rules of liability for the carriage of passengers of the Chinese Civil Code applicable to carriage of persons by air (Judgement of the Court of Appeal of 9/9/32)'

Art. 654 of the Chinese Civil Code (Book II, Obligations, Chapter XVI: Carriage) reads as follows:

"The carrier who carries passengers is liable for any damage "sustained by the passenger arising from the carriage and for all "delay, unless the damage was caused by *force majeure* or the "fault of the passenger".

As regards the liability of the carrier for his employees, art. 188 of the Chinese Civil Code states:

"If an employee harms the rights of other persons in an illicit "manner within the scope of his employment, the employer must, "solidarily with the employee, repair the prejudice. But the

1. This article refers to landings made at the command of postal, police or customs authorities.

"employer is not liable for the prejudice if he took reasonable care "in the choice of the employee and in the supervision of his work, "or if the prejudice could not be avoided, notwithstanding reason- "able care being taken".

In the above mentioned case In Wen-Long concerning the liability of the China Air Corporation for an accident which occurred on 9th December 1930 and as a consequence of which the passenger died, the China Air Corporation was condemned to pay an indemnity of 15.000 dollars.

Air France and Imperial Airways both operate branches of their Far-East services to China; the former Bangkok–Vientiane–Hanoï and the latter from Penang to Hong-Kong. On these lines traffic is performed under the I.A.T.A. Conditions of carriage.

CZECHOSLOVAKIA

The liability of the air carrier in internal carriage in Czechoslovakia is regulated by the law of 28th July 1925 [1]. This law fixes the liability of the carrier towards third parties as wel as towards passengers. Art. 29 states the liability for all damages caused to persons by the operation of aircraft.

By virtue of art. 31 of the above law, the carrier can exonerate himself from liability by proving that the damage was caused by the fault of the injured party or by the fault of a third party.

In the second par. of art. 31 the law mentions the persons who cannot be considered as third parties, namely, members of the crew and employees, owners of establishments rendering services to the air navigation enterprise and their employees and persons participating in the flight. The proof of force majeure being the cause of the damage will not exonerate the carrier from liability. Whereas the general rules of liability of Czechoslovakian law are based on the theory of fault, the law of 18th July 1925 is divergent by declaring the carrier liable even in cases where he has committed no fault.

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1. See on this law Kilkowski: "Die Haftung für Luftverkehrsschaden nach deutschem, schweizerischem, oesterreichischem, tschecoslovakischem, französischem und polnischem Recht".

Is the carrier's liability then based on the theory of risk? We do not think so because the theory of risk would mean that the carrier, even in the event of the fault of a third party, would be responsible. The law of 1925 however, relieves the carrier of liability in such a case. Nevertheless, a system which imposes liability on the carrier without his having committed a fault, seems to us rejectable. The adoption of such a system is justified for damages caused by aircraft to persons on the ground because of the inequality of position between the author of the damage and the victim. The position between the carrier and the passenger (or consignor) is quite different. A person making use of an aircraft voluntarily accepts the risks accompanying this form of locomotion. There is no reason to impose on the air carrier liability in cases where he has committed no fault.

Art. 39 of the law, however, allows the carrier to exonerate himself by a special agreement from the liability to persons carried, fixed by the law and also from the liability to persons who would base their claim on the general rules of liability of the Civil Code. All liability, except for wilful misconduct, can be excluded.

It should be pointed out that the Courts are not favourable to negligence clauses and in several instances have, on different pretexts, refused to give them effect.

In the first place the Courts require the air traffic companies to furnish direct proof of the acceptance of the clause by the passenger before the departure of the aeroplane [1].

A judgment which is open to serious criticism is that given by the Court of Prague on 26th October 1927 in Cidna v. Schuster. The Court refused to give effect to an exoneration clause worded in French and in Czechoslovakian, because the victim pretended not to be able to read these two languages [2]. The consequence of this judgment would be that the air traffic companies would have to word their conditions of carriage in all the languages of the universe.

Since 13th February 1933 all air commerce in Czechoslovakia

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1. Judgment of the Czechoslovakian High Court of 27th October 1926 in the case Compagnie Franco-Roumaine v. Kaufmann.
2. Another judgment on the same lines was given by the Court of Prague in the case Cidna v. Griebsch, see Prochasson, "Le Risque de l'Air", p. 142.

is operated under the I.A.T.A. conditions of carriage which, being based on the Warsaw Convention, limit the liability to certain sums.

Both Czechoslovakian air traffic Companies, the Ceskoslovenska Letecka Spolecnost and the Ceskoslovenske Statni Aerolinie have introduced a compulsory accident insurance for passengers, in order to compensate the liability fixed by the conditions of carriage. The payment of the indemnities [1] is made under the condition that the passenger and his representatives renounce from taking action for civil liability.

By the law of 17th November 1934 the Warsaw Convention came into force in Czechoslovakia. The Czechoslovakian Government has not yet considered the possibility of making its internal legislation in harmony with the rules of this Convention.

DENMARK–FINLAND–NORWAY–SWEDEN

In 1935, a Scandinavian Committee, composed of delegates of Denmark, Finland, Norway and Sweden, was appointed to prepare a draft law for all Scandinavian countries concerning the ratification of the Warsaw Convention and the incorporation of the rules of this Convention in the internal legislation of the above mentioned four countries. The members of the Committee having finished their studies on this subject, presented in 1936 to their respective Governments a draft law which reproduces textually the rules of the Warsaw Convention [2]. The provisions of this law are to govern internal as well as international air traffic.

The draft, however, contains an article 34 by virtue of which the civil aviation departments in the respective countries are entitled to lay down provisions for internal carriage deviating from those laid down in art. 3 (par. 1), art. 4 (par 2) and art. 8, concerning the particulars which the passenger ticket, luggage ticket and consignment note must contain. One of the particulars required by the Warsaw Convention is a statement that the

1. The amounts paid to the passengers are: Kč. 198.000 in case of death or total permanent infirmity; Kč. 198 per day in case of temporary incapacity.
2. See for the text of this law "Indberetning fra de Danske Medlemmer af den Nordiske Luftprivatretskomité" Copenhagen 1936; see also "Förslag till Lag om Befordran met Luftfartyg", Stockholm 1936.

carrier is subject to the rules relating to liability established by the Convention. This particular is of course not necessary for internal carriage. Art. 34 makes it possible to provide the omission of this particular (and others, if necessary [1]) in the traffic documents to be used in internal carriage.

In the summer of 1937, the Parliaments of Denmark, Finland, Norway and Sweden accepted the above mentioned law and on 1st October 1937 this law entered into force in each of the four countries. An important step towards the desired uniformity of rules of liability of the air carrier in internal and international traffic has thus been made.

The Danish air traffic company Det Danske Luftfart Selskab A/S, the Finnish air traffic company Aero O/Y, the Norwegian air traffic company Det Norske Luftfartselskap Fred. Olsen & Bergenske A/S and the Swedish air traffic Company A.B. Aerotransport operate all their services under the I.A.T.A. conditions of carriage.

ENGLAND

The rules of the Warsaw Convention have been adopted in England by the "Carriage by Air Act 1932". Section 4 of this Act gives power to the Crown by order in council to apply the rules of the Warsaw Convention to internal carriage in the United Kingdom. As this power has not yet been exercised, [2]. all contract of carriage in a carriage by air which is not international within the definition of the Carriage by Air Act 1932 art. 1 (2) 1st Sched., if made in England, will in the ordinary way be governed by the general rules of common law. In considering these rules, a distinction must be made between the rules of liability regarding goods and those regarding passengers.

Liability of the carrier for goods carried

The first question to arise is of whether the air carrier of goods,

1. As regards the omission of the particular "agreed stopping place" in internal carriage, see p. 20.
2. According to information received from the British Air Ministry the air transport industry in England has been consulted as regards the application of the rules of the Warsaw Convention to internal traffic and it is hoped shortly to receive from them definite proposals in the matter.

unless specially provided, can be considered a common carrier. The opinions of English text writers on this subject are divergent. McNair [1] points out "I can see no reason in principle why the carrier by air is *ex limine* ruled out of the category of common carrier by the fact that, except for the trifling space of time at each end of his transit when his vehicle is taking off or landing he performs his task in a different medium, namely in the air". This opinion is shared by Marshall Freeman [2], and Moller [3]. On the other hand, Fletcher [4] in his book "The Carrier's Liability" urges that there are several considerations which are opposed to treating the air carrier as a common carrier. Also Beaumont [5] considers that the air carrier cannot be considered *eo ipso* as common carrier while Nokes and Bridges [6] are of opinion that the circumstances should be taken into consideration, without however determining what circumstances.

Since the 11th April 1933, the opinion of those writers considering the air carrier to be common carrier, has been confirmed by English jurisprudence. In "Aslan v. Imperial Airways Ltd." [7] the judge expressed the opinion that in principle there was no reason for the air carrier not to be considered as a common carrier. Nevertheless, he added that a common carrier may repudiate the status by an express clause, which Imperial Airways have always done, by inserting the following clause in the consignment note: "The Company.... are not common carriers and do not accept the obligations or liability of common carriers". The air carrier having repudiated the status of common carrier becomes private carrier. While the former, according to common law is liable "for any loss or damage happening to the goods which he cannot prove to have resulted from the act of God, the Kings enemies, inherent vice or defect of the goods, or the negligence of the owner of the goods himself" [8], the latter must be considered as an ordinary

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1. The law of the air p. 114.
2. Air and Aviation law p. 90.
3. The Law of Civil Aviation, p. 284.
4. See Law Times 1933 p. 306.
5. I.A.T.A. Information Bulletin No. 4 p. 4.
6. The Law of Aviation p. 107.
7. Judgment of the Kings Bench Division of the High Court of Justice of 11th April 1933, see Revue Générale de Droit Aérien 1933, p. 315.
8. By reason of the heavy liability, based on the idea of risk, the common carrier is often termed "insurer".

bailee and is only liable when he himself or his agents have committed a fault [1], a thesis which was also confirmed by the above judgment.

No absolute warranty of airworthiness

Is there in the carriage of goods by air an implied warranty as to the fitness of the vehicle or conveyance supplied by the carrier? Mr. Justice Mackinnon, making abstraction of the clause of non-liability inserted in the consignment note of the carrier, in the above judgment considered that he ought not to import into the contract of carriage by air such a warranty of seaworthiness or fitness as was imported into a contract by a ship: Steel v. State Line (1877); and extended by later cases. Relying on the decision in Readhead v. Midland Railway (1869), where the question was as to how far a railway company warranted the fitness of a carriage in which a passenger was to travel, the judge was not prepared to read into the contract of carriage by air any more than an implied undertaking to provide by the exercise of reasonable skill and so far as was consistent with the construction of a flying machine, a vehicle reasonably safe for the carriage of goods of the nature of those carried, which in the particular case under review was a cargo of bullion.

Clause denying liability with regard to goods

A carrier whether he be a common or private carrier can deny all liability [2], unless this is expressly forbidden by law [3]. English jurisprudence is very severe with regard to the validity of exoneration clauses and requires that they should be worded without ambiguity.

Let us consider the clauses as they were inserted by Imperial Airways in their consignment notes, before they carried under the conditions of the Warsaw Convention. "The air traffic companies, their employees and the undertakings and individuals which the air traffic companies employ in the performance of their obligations accept freight for carriage only at the risk of the senders or their authorised agents. No responsibility is accepted for loss,

1. See Marshall–Freeman op. cit. p. 90: Nokes and Bridges op. cit. p. 107.
2. McNair, The Law of the Air, p. 110.
3. For carrier by sea f.i. in the "Carriage of Goods by Sea Act 1924".

damage, or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. This refers to all obligations of the Company either in respect of carriage, storage or any other operations in connection with goods". Since the clause contemplates all the obligations of the company, it also includes the obligation of the company, as private carrier, of not being negligent. McNair [1] considers that the clause, in the above wording, does not provide sufficient protection to the carrier. He is of the opinion that though the air carrier making a contract on the basis of the above conditions must be considered as an "ordinary bailee" he would have, according to common law, the obligation to provide a vehicle "which is as reasonably fit for transport as human skill and care can make it". The carrier — according to McNair — will not be able to disengage his liability by a clause "which can receive adequate effect by being applied to the conduct of the voyage but not to the state of things existing before the voyage began", thus in relation to the existing state of the aircraft on departure. In admitting this point of view, the clause will not cover the case where the damage is suffered by the consignor consequent on a forced landing caused by an engine of the aeroplane not being sufficiently controlled on departure.

This thesis cannot be maintained. The clause contemplates all damages that could arise during carriage, without making any distinction between the case where the damage occurred owing to the state of the aircraft before departure and the case where the cause of the damage was, for example, negligent pilotage. Besides, the clause expressly stipulates that even if the damage is caused indirectly during carriage by air or in correlation with this carriage, the carrier will not be liable. It seems to us that one cannot have any doubt as to the range of this clause.

Jurisprudence relating to the validity of the non-liability clause in the carriage of goods

The only judgment existing on this subject is that of the Kings Bench Division of the High Court of 11th April 1933 [2]. This dealt with an action by Aslan who wished to make Imperial Airways

1. The Law of the Air, p. 200.
2. See Revue Générale de Droit Aérien 1933, p. 315.

liable for the loss of a consignment of gold, which had disappeared during carriage by aeroplane between Baghdad and London. There was nothing to indicate how this loss had occurred. Mr. Justice Mackinnon, in giving his jugdment, declared that, if abstraction was made of the clause of non-liability, the defendant having excluded the status of common carrier was liable only in the case where he had been negligent in the carriage of goods, and in the case where he had not taken "reasonable care and skill to make the aeroplane fit for the carriage". The judge concluded "and as the Defendants' only liability was for negligence condition 9, though in general words and not mentioning negligence specifically, *was sufficient to protect the Defendants*".

Liability of the carrier with regard to passengers carried

We will not consider the question of whether in principle an air carrier in England has the obligation to carry all who apply for carriage. If there is such an obligation it is certain that it can be repudiated by an express clause, unless this repudiation is prohibited by a special law [1]. The conditions of carriage found on the passenger ticket of Imperial Airways contained a paragraph 10 so worded: "The Company reserves the right to refuse to carry any passenger on any flight without assigning any reason for such refusal, and upon such refusal the Company shall be under no obligation to the passenger except to return the fare paid, provided that the application be made by the passenger within 15 days of such refusal". In the present state of air navigation, the right of refusing to conclude a contract of carriage is indispensable for the carrier, and, as we will see, is expressly stipulated in the Warsaw Convention [2]. As regards the liability of the maritime carrier and the surface carrier, textwriters and decided cases [3] are agreed that at common law, the carrier must:

a. furnish a vehicle for the carriage of passengers as fit for the purpose as skill and care can render it.

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1. See McNair op. cit. p. 126; Nokes and Bridges op. cit. p. 107; Halsbury "The Laws of England" volume IV p. 5.
2. An airplane in flight is so greatly affected by the safety factor that it must be left entirely to the discretion of the air carrier to reject any person who in his opinion will increase the hazards of travel.
3. See Halsbury op. cit. IV p. 45; McNair op. cit. p. 137; Marshall-Freeman op. cit. p. 93; Nokes and Bridges op. cit. p. 107.

b. to exercise reasonable care and skill in carrying them.

No absolute guarantee is however given regarding the safety of the vehicle or the ship, nor the security of the passenger. The English textwriters are agreed that these principles should also be applied to air carriers [1]. The liability of the air carrier carrying passengers according to common law is therefore based in England on the theory of fault. The criterion of the good carrier is here absolutely decisive. If the carrier has taken reasonable measures, he will not be liable because he has not committed a default. The nature of these reasonable measures must be appreciated *in abstracto*. Where an emergency arises it may be negligence on the part of the carrier not to act with the best judgment in the circumstances [2]; the carrier will therefore be at fault, even if, in the given case, he could not act otherwise. It is the confirmation of the principle of the carrier having to be capable of performing carriage.

Res ipsa loquitur

The passenger has right of action if he is injured through the want of reasonsable care of the carrier. But what proof has the passenger to give in order to render the carrier liable for negligence?

The question whether or not the doctrine of res ipsa loquitur ought to be applied to air accidents has in the last years been much debated, especially in the United States.

In order to arrive at a clear understanding of this matter it is to be observed that res ipsa loquitur in common parlance has two meanings. It is used sometimes as meaning no more than the principle of evidence, that where in a given case the surrounding circumstances all seem to point one way, the resulting inference will be drawn by the Court unless the defendant gives evidence to the contrary. "Where proof is given that something has happened which as a rule would not have happened if proper care and skill had been used, res ipsa loquitur and there is evidence of negligence.... In such cases the happening of the accident is not conclusive but only prima facie proof of negligence and the onus

1. McNair op. cit. p. 128; Nokes and Bridges op. cit. p. 106; Marshall–Freeman op. cit. p. 93.
2. Halsbury op. cit. IV, p. 45.

is on the defendant to rebut the presumption which arises" [1].

The other use of the expression is its literal meaning: that the circumstances *do* speak: and that when they have spoken there is an end of the matter. It is enough for example for the plaintiff to prove that the accident occurred; once that proof is established the inference is incapable of rebuttal: res ipsa loquitur and the defendant pays.

The distinction between those two meanings is that in the first place it is possible to have the principle of res ipsa loquitur applying and yet the defendant succeeding in his proof and rebutting the inference, in the second case the meaning attributed to res ipsa loquitur involves the defendant's failing to rebut the inference.

An analysis of the articles published on the subject of the application of the res ipsa loquitur doctrine in aviation matters shows that the expression is used one time in the first meaning another time in the second. It must be understood that the question to be examined here is: Will the Courts in cases where they have in effect only the evidence that an accident took place, tend to draw inferences against the carrier?

The fundamental principle of Anglo-Saxon Law of evidence is that a plaintiff in order to render the defendant liable of negligence has to give affirmative proof thereof. In railway cases in England, the plaintiff has always been seeking to establish negligence against the defendant: that means to establish either actual specific acts of negligence, or a train of circumstances pointing so strongly to the inference of negligence that that inference must be drawn.

The mere fact of a collision taking place at a level crossing between a train on the railway and a cart on the road raises, as it has been held, no presumption of negligence against the railway. But if the plaintiff can show that the collision of which he is complaining was a collision between two trains: that both trains were owned by the same company and that the same company owned the line, then he begins to have not only his own voice giving evidence in his support but the voice of the facts as well: because he has established a case where, two trains under the control of the same company being on the same piece of railway

1. Halsbury, The Laws of England, IV 64.

at the same time, there is a presumption of negligence from the facts themselves which have, if one may put it that way, by reason of their logic attained a life of their own and begun to give evidence in his support.

But all that means in fact that the plaintiff has discharged his burden of proof: it has shifted to the shoulders of the defendant to show how in spite of the prima facie inference from the facts established he is nevertheless clear of any negligence: he must show how those two trains were on the same section of railway line consistently with his care and skill. And if he does establish that part of his proof then back the burden of proof goes again to the plaintiff to show how in spite of what the defendant has said he can still get his proof of negligence home against the defendant.

Now as regards aviation, must it be assumed that an accident occurring during the flight of an aeroplane is sometimes so out of all the ordinary course of things as of itself to raise a presumption of fault? It must not be forgotten that aviation is still in a phase of development and will remain so for quite a number of years. Instruments are not so far perfected, aerodynamics are not so thoroughly understood, engines are not so completely reliable that one can say that an aviation accident is necessarily preceded by negligence of the air carrier. To justify our opinion we may give one example. Several crashes happening with aeroplanes in the last few years were due to ice formation, a danger unique to aircraft [1]; it is firmly believed that many crashes which happened in the first stages of air navigation and of which the cause remained unknown, were really due to this phenomenon, with which at that time one was not yet acquainted. Though different methods are devised to prevent the accretion of ice on aeroplanes, there is at the present moment not yet a completely efficient remedy against this danger. This one example is considered to be sufficient to prove that an air accident is not necessarily preceded by negligence of the air carrier. Other causes

1. Under certain meteorological conditions, ice may deposit at all leading edges of the aeroplane, and grow to windward, at critical regions of the relative airflow, in shapes which increase drag and seriously increase drift. The accumulated ice adds to the weight. Unsymmetrical ice deposits on the air screw blades cause dangerous engine vibrations which can only be kept in check, if at all, by throttling back at the expense of thrust. Venturis and pressure head orifices become blocked with ice, rendering the instruments they serve useless. External controls may become jammed.

than negligence of the carrier may with equal, or even greater probability have caused or contributed to the airplane disaster.

We therefore are of opinion that, though there may be exceptional cases when the accident is of such a nature that negligence may be presumed from the occurrence of it, as a general rule it is not sufficient for the plaintiff merely to prove the occurrence of an accident and rely upon that as prima facie evidence of negligence [1].

In this opinion we are fortified by that part of Lewis J.'s judgment in the case of Grein v. Imperial Airways which dealt with the burden of proving neglect.

In that case an aeroplane which knew there was fog ahead proceeded on a voyage which must lead through that fog at a height above the ground not great enough to enable her to clear a bit obstruction of which she knew.

> "Now it seems to me that it may have been open to the plaintiff merely to prove that the aeroplane collided with the radio station to establish by that fact alone that there was a prima facie case of negligence. I think that he might have been entitled to say that the accident was one which in the ordinary course of things does not happen if those who have the management and the control of an aeroplane use proper care ... The plaintiff did not take this course. She proceeded to call a considerable amount of evidence to prove negligence on the part of the Defendant. In any event, unless she has satisfied me that there was negligence on the part of the defendant the defendant is entitled to succeed".

Even in that case which raised a much stronger presumption of negligence against the aeroplane than an ordinary accident, even in that case the plaintiff's advisers decided that it would be unsafe to rely on any presumption of negligence from an aeroplane accident and they went to all manner of trouble to establish in great detail the way in which in their contention the air carrier had been guilty of neglect.

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1. Contra McNair in The Law of the Air, p. 52, who submits that the res ipsa loquitur doctrine ought to apply in the case of injury done by an aircraft which crashes. He cites Sir John Salmond who considers the res ipsa loquitur doctrine to be applied when "it is so improbable that an accident would have happened without the negligence of the defendant, that a resonable jury could find without further evidence that it was so caused". McNair does not prove however that it is so improbable that an air accident happens without the negligence of the carrier.

It must be admitted that, in view of the special character of aviation, the plaintiff will in many cases be so situated that it is impossible for him to see and equally impossible for him to discover what went wrong and resulted in his injury or loss and we therefore consider it in principle advisable that the plaintiff is relieved of the burden of proving the negligence of the carrier; but we think it unjustifiable to arrive at this object by the application of the res ipsa loquitur maxim because, as has been remarked, the basis on which the res ipsa loquitur doctrine is founded, fails in air accidents. Moreover the general application of the res ipsa loquitur doctrine to air accidents would lead to impose on the air carrier a too heavy liability, because the invocation of this rule will often result in rendering the air carrier liable in cases where the cause of the accident remains unknown [1]. A system of liability must be arrived at by which the injured party is relieved from the burden of proof without this resulting in declaring the carrier liable when he has committed no fault. Before considering how one can arrive at this object the question of the exemption clauses has first to be considered.

Exemption of liability clause with regard to passengers

On the passenger ticket of the British companies, members of the I.A.T.A., is found a clause worded as follows: "Notwithstanding the provisions of art. 1, par. 1, art. 18, art. 19, par. 1, subpara. 1 and par, 2, art. 22 and art. 23 of the General Conditions of Carriage of Passengers and Baggage, it is expressly declared that, so far as concerns carriage which is not International Carriage as defined in art. 1, par. 2 and 3 of the General Conditions and art. 1, par. 2 and 3 of the Convention of Warsaw of 12th October 1929, passengers and baggage are accepted for carriage only upon condition that the carriers, their servants or agents shall be under no liability in respect of or arising out of the carriage; and that passengers renounce for themselves, their representatives and dependants all claims for compensation for damage, sustained on board the aircraft or in the course of any of the operations of flight, embarking or disembarking, caused directly or indirectly to passengers or their belongings or to persons who, except for

1. This question will be further examined when discussing the res ipsa loquitur doctrine as it is applied in the U.S.A.

this condition, might have been entitled to make a claim, and whether caused or occasioned by the act, neglect or default of the carriers, their servants or agents, or otherwise howsoever".

As to the validity of the clause, the English Courts have not been called upon to express an opinion hereon. However, seeing that in surface transport and maritime transport [1] these clauses of non-liability have been entirely validated, it is expected that the Courts will observe the same attitude concerning carriage by air. The clause will nevertheless not have effect according to English common law, when the carrier has committed wilful misconduct or fraud. The clause is in this case considered against public policy.

Application of the rules of the Warsaw Convention to internal carriage in England

We have seen that Section 4 of the Carriage by Air Act 1932 gives power by order in council to apply the rules of the Warsaw Convention to internal carriage in the United Kingdom.

The reasons why in principle it seems necessary to us to extend the regime of the Warsaw Convention to all carriage have been explained in the introduction. Except for those general reasons there is in England still a special argument militating in favour of the application of the Warsaw Convention to internal carriage and international carriage not falling under this Convention. The members of the I.A.T.A. decided at the XXIVth Session of this Association to apply the general conditions of carriage based on the Warsaw Convention to *all* carriage performed by them.

At its XXXVth Session, held in Berlin in January 1936, the I.A.T.A. decided that an exception to this decision would be made for the companies Imperial Airways, British Airways and British Continental Airways. The reason for this was the following. The legal adviser of Imperial Airways remarked that at English common law in case of the death of a passenger the limitations of liability stipulated in the Conditions of Carriage of the I.A.T.A. and corresponding to the limitations provided in the Warsaw Convention, are not binding upon the dependants. In order to save the carrier from the risk of unlimited liability towards the depen-

1. Halsbury op. cit. IV p. 55; Duckworth: "The Principles of Marine Law" (3rd edition), p. 48.

dants of the passengers he found it essential as far as the British companies were concerned to provide in the Conditions of Carriage that the passengers shall have no rights at all against the carrier in cases which do not come under the Warsaw Convention.

In this connection it is remarkable to note that in the judgment delivered on the 13th July 1936 by Lord Justice Greene and Mr. Justice Talbot in the case Imperial Airways Ltd. and Grein it was decided that if the carriage by air is not "international carriage" as defined by the Warsaw Convention the dependants of a deceased passenger travelling under a contract of carriage which incorporates the I.A.T.A. conditions of carriage (such as they were fixed by the XXIVth Session of the I.A.T.A., thus without the special clause just referred to) cannot recover any damages at all against the carrier in an action brought in England under the Fatal Accidents Act, 1846, otherwise known as Lord Campbell's Act.

Lord Justice Greene and Mr. Justice Talbot (Lord Justice Greer dissenting) decided that the I.A.T.A. Conditions of Carriage do not contain any express or implied condition to carry safely, but do contain (in art. 18 (5)) a denial of all liability except that expressly provided for in the Conditions, with the consequence that, in the event of the death of a passenger, the only obligation of the carrier is to pay a certain sum of money to the personal representative of the passenger; and that the only act, neglect or default in respect of which the dependants of the deceased passenger could claim in this case was that the carrier had not paid the said sum of money. As the failure to pay this money was not an act, neglect or default which caused the death of the passenger within the meaning of section 1 of Lord Campbell's Act, it was decided that Lord Campbell's Act had no application on the facts of this case and that the Plaintiff was not entitled to recover anything under the terms of that Act.

From this judgment it can be concluded that the modification of the I.A.T.A. conditions of carriage, made in January 1936, was after all not necessary. It is not to be expected that the members of the I.A.T.A., after having excluded all liability to passengers in England, will now, because of this judgment, accept again the same liability as that provided in the Warsaw Convention.

The only way to ameliorate the present position of the pas-

sengers is to make the English law in harmony with the provisions of the Warsaw Convention.

ESTHONIA, LATVIA, LITHUANIA

At the present moment only international airlines are operated in Esthonia, Latvia and Lithuania. The Swedish air traffic company A.B. Aerotransport, and the Finnish company Aero O/Y operating services in the above States make use of the I.A.T.A. conditions of carriage.

Only Latvia has ratified as yet the Warsaw Convention. The Lithuanian Government declared itself willing to apply the provisions of the Warsaw Convention to international air traffic is so far as it is provided for by particular agreement with the International Air Traffic Association.

According to information received from the Inspector of Civil Aviation in Esthonia, the internal legislation in that country will be made in harmony with the provisions of the Warsaw Convention.

FRANCE

The liability of the air carrier in internal carriage is governed in France by the Air navigation law of 31st May 1924. In the near future the French Airminister will present to Parliament a revised text of this law. In this revised text the essential provisions of the Warsaw Convention relating to the liability of the air carrier are reproduced [1]. We will see that the provisions of the Air navigation law of 1924 differ on several points from the rules of the Warsaw Convention. The decision of the French Airminister to make the provisions of this law in harmony with those of the Warsaw Convention is therefore of great importance. The importance of this decision is all the greater because it is to be

1. Information received from the French Airministry.

expected that countries like Chili, which adopted the principles of the French law of 1924, will follow the French example now that in France the Law of 1924 is considered as not meeting anymore the requirements of air commerce in its present state.

Before considering the Air navigation law of 1924, the interest of which will soon be purely retrospective, it seems necessary to us first to examine shortly the general principles on which civil liability in France is based. On reading Chapter II one will find that the Warsaw Convention is a compromise between anglo-saxon and continental law.

Though the division of the law systems of the world in these two categories is to a certain extent arbitrary, one is justified in considering the principles on which the French Civil Code is based as representative of the legal system which is generally known as "continental law".

As regards the liability of the debtor in case of the non-performance of his obligation, he will be ordered to pay damages unless he can show that owing to *force majeure* or a fortuitous event he was prevented from performing the contract.

First it is necessary to consider the two theories which, in the domain of civil liability, oppose each other, viz. the theory of fault and the theory of risk.

Theory of fault and theory of risk

The theory of fault is that which the draftsmen of the French "Code Civil" accepted. It is based on the principle that there is no civil liability without fault [1]. The other theory, which came into being at the end of the XIXth century, rejects the necessity of a fault being committed, for the civil liability of the defendant to be engaged. As civil law has long ago abandoned the idea of punishment, the supporters of this theory considered that there is no reason for maintaining the notion of fault [2].

Without wishing to express an opinion on whether the theory of risk should or should not be recognised in exceptional cases, we consider that in contractual matters there is no reason for not remaining faithful to the traditional principle of fault. Let us

1. See Mazeaud (Henri et Léon) "Traité théorique et pratique de la responsabilité civile, délictuelle et contractuelle". No. 55.
2. See Mazeaud op. cit. No. 64 et seq.

consider this question from the point of view of the contract of carriage. The acceptance of the theory of risk in this matter was propagated above all by M. Exner [1]. He considered as a distinctive sign of *force majeure* the fact that the event comes from outside to break in into the circle of the enterprise; its reality must be beyond all discussion, and its intensity must be greater than that of ordinary cases, occurring in the normal course of events. M. Josserand took up this theory and rectified it. In his opinion, only the exteriority of the event can constitute a case of *force majeure*. "The idea of exteriority implies the adoption of a purely objective theory of liability and more precisely of the theory of risk, since damage arising from an internal cause, not due to fault, is the realisation of the risk attached to a thing or the exercise of an activity" [2].

The two following arguments have been used to support the theory of exteriority:

a. A legal argument:

Article 1147 of the French "Code Civil" mentions an outside cause which cannot be charged to the defendant [3]. By admitting that articles 1147 and 1148 have the same meaning, expressed twice in a different way, the *force majeure* of article 1148 is no other than the outside cause. The Code itself requires, therefore, exteriority. M. Radouant [4] and M. Mazeaud point out that the expression "outside cause which cannot be attributed to him" forms a whole. In the minds of the draftsmen of the Code the cause is outside the defendant, when it cannot be charged to him. Non-attributability and absence of fault are synonyms [5]. The Code does not therefore at all require an event to be outside the undertaking for it to exclude liability.

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1. Exner "La Notion de la force majeure", 1892. For a thorough discussion of this theory see Mazeaud, op. cit. No. 155.
2. Josserand, "Les Transports" No. 573.
3. *Art.* 1147: "A debtor shall be ordered to pay damages, if there is occasion therefor, either on account of non-performance of the obligation or on account of delay in performing it, whenever he does not establish that the non-performance is due to an outside cause which cannot be charged to him, provided there is no bad faith on his part".
   Art. 1148: "No damages shall be due when the debtor has been prevented from giving or doing what he had bound himself to do, or has done what was prohibited, in consequence of superior force or fortuitous event".
4. Radouant "Du cas fortuit et de la force majeure", Paris 1920.
5. Demogue "Traité des obligations en général" II, Tome VI, p. 662 (Paris 1932).

b. An argument of a practical kind.

With regard to undertakings which are great and rich, the proof to be given by the victim is often very difficult. Besides, these undertakings can well bear a heavy responsibility.

Burden of proof

First, as regards the burden of proof. If a passenger is injured consequent on an accident in connection with the carriage, this fact must be considered as constituting a presumption of breach of the obligation of taking all the reasonable measures for the safety of the passenger, and falls therefore on the transport undertaking. To exclude all liability, the undertaking will have to prove either that the damage is due to an event which excludes fault, or that the undertaking had taken all the necessary precautions, proving in this way that it was not guilty of the faults usually committed in such circumstances. It is therefore not for the victim to make a difficult proof.

As regards the argument that the rich undertaking can bear a heavy responsibility, it is difficult to admit this point of view if one considers the financial difficulties with which the great transport companies have to struggle. It must not be forgotten that the imposition of a purely objective liability on the carriers, will necessarily entail an increase in the cost of carriage.

French jurisprudence admits almost unanimously the necessity of a fault as a constituent element of contractual liability [1]. Nevertheless, although the theory of risk has been rejected by French jurisprudence, it seems in some degree to have been influenced by the principles on which this theory is based. Amongst French textwriters, the theory of risk has lost much ground. Mazeaud [2] points out that only Josserand, Demogue and Savatier remain the supporters of civil liability without fault.

Force majeure or casus fortuitus.

French jurisprudence is more or less unanimous in affirming the unity of the notions of *force majeure* and *fortuitous event.* Nevertheless, as it has already been pointed out, different French writers are prepared to establish a distinction between the cases

1. Radouant op. cit. p. 241.
2. Mazeaud op. cit. No. 73.

of *force majeure* on the one hand, and of *fortuitous event* on the other hand, either to increase the number of cases of exoneration, or to decrease them. M. Mazeaud, using the history of the "Code Civil" as basis, observes that the supporters of the theory making the distinction, are in opposition to the intentions of the draftsmen of the Code, for they make a distinction where none was desired.

Characteristics of force majeure

For there to be a case of *force majeure*, the defendant must have been in the impossibility of acting other than he did act, and also in the impossibility of foreseeing the event, which dominated over him. Decided cases and textwriters agree that an absolute impossibility is required and not a relative impossibility [1].

"Absolute impossibility" as first characteristic of force majeure

Has absolute impossibility to be interpreted as an impossibility arising from an irresistible obstacle, unforeseen and unforeseeable, such as a storm, lightning, earthquake, war or act of princes? We have already pointed out that this theory, called theory of exteriority, which is based on the principle that only events outside the enterprise may liberate the defendant, implies the adoption of the theory of risk. French jurisprudence, having rejected the theory of risk, gives a wider meaning to absolute impossibility than that quoted above. The French Courts, in determining whether or not there is an absolute impossibility, compare the situation of the defendant with that of other defendants of the same kind of affair, at the same time, in the same economical sphere [2]. Some examples taken from transport cases are here reproduced. It was judged that the carrier by rail was not liable for the breach of a contract of carriage, although he could have performed the contract by forming a special train for two passengers [3]. In the same way, the carrier was not judged at fault for not being able to carry owing to an obstruction, if this obstruction was caused by an exceptional movement in goods [4]. The carrier was judged not at fault when goods froze during carriage and, owing to this, were damaged [5].

1. See Demogue, op. cit. p. 571; Mazeaud, op. cit. No. 1572; Radouant, op. cit. p. 47.
2. See Radouant, op. cit. p. 241; Demogue, op. cit. p. 652.
3. Demogue op. cit. p. 674.
4. Demogue op. cit. VI p. 592; Radouant op. cit. p. 154.
5. Mazeaud op. cit. No. 1571; see also Demogue, op. cit. p. 653.

At first sight, one would say that there was no absolute impossibility for the carrier to avoid the damage in these three cases. He could have avoided damage by taking exceptional measures such as forming a special train, heating goods trains. How then to explain the non-liability of the carrier? The reason is that the carrier did not commit a fault since the contract did not require him to take quite exceptional measures.

The foreseeability as second characteristic of force majeure

The carrier is considered liable for occurrences which he could have foreseen, because the foreseeability of an occurrence enables him to avoid being in a position which would make it impossible for him to perform the contract. It can, however, be maintained that all occurrences except those that happen for the first time are foreseeable.

To obtain a rational appreciation of unforeseeability, doctrine and jurisprudence in France agree that the question which should be asked is: could the accident which prevented the performance of the obligation have been foreseen *as rather probable?* One should foresee normal occurrences and not exceptional ones [1]. Also in this domain, the judge in interpreting the contract of carriage, should consider what a good carrier would have foreseen as probable.

But here the difficulty of the interpretation of the contract arises. For example, it has been decided that an engine accident was not a case of *force majeure*, because the occurrence was not unforeseeable by the railway. Radouant approves this judgement and indicates "qu'il y a des eventualités dont les circonstances ou la nature même du contrat imposent la prévision" [2].

We cannot share this opinion. The above judgement, obviously based on the theory of exteriority, according to which occurrences happening within an undertaking cannot liberate the carrier from his liability, ascribes to the carrier the intention of taking on himself all the risks of carriage. Such an interpretation of the contract does not seem right to us. To support this liability the argument is used that the carrier has all the benefit from the contract of carriage and that, consequently, it is reasonable for

1. Demogue op. cit., p. 673; Mazeaud op. cit. No. 1576; Radouant op. cit. p. 153.
2. Radouant, op. cit. p. 155.

him to bear all the risks. It seems to be forgotten that the passenger and the consignor also benefit from the contract; they have also seen in the contract a means of receiving more than they gave.

Contents of contract

If one wants to determine *force majeure*, it is always in the first place the question of the interpretation of contract which arises. Such interpretation is often made difficult because generally the contracting parties have expressed no wishes concerning the accessory conditions of the contract. For example, in the contract of carriage, has the carrier assumed an obligation of safety towards the passengers? Since the decree of the French *Cour de Cassation* on 27th November 1911, French jurisprudence recognises an obligation of safety by the carrier. Several textwriters have objected against this thesis. If it is incontestably true — they say — that the passenger desired to arrive at his destination safe and sound, can the carrier be considered to have taken on himself all the risks of carriage and to have promised to return the client in the same state as on departure [1]?

Especially in the field of aviation, it has been felt that this principle could not be applied to it with all its consequences. Discussing the decision of the Cour de Cassation in which the Court came to the conclusion that air carriage is used by "une clientèle avertie", Professor Ripert remarks that the obligation of security does not exist in all contracts of carriage with the same character. One could even think, continues Professor Ripert, that in this means of carriage a tacit exemption agreement exists which can be assimilated to an express agreement. This reasoning, in our opinion, clearly proves that the *Cour de Cassation* by attributing to the carrier the intention of guaranteeing the safety of the passenger put a wrong construction on the contract. The only possible interpretation to be put on the contract is that the carrier concluding a contract of carriage *undertakes to carry by means commonly used with regard to carriage, that is, he undertakes to take all the measures which a good carrier must take.* On accepting this

1. Brun "Rapports et domaines des responsabilités contractuelle et délictuelle", Paris, 1931, p. 207.

point of view, it becomes immediately clear why the carrier was not liable in the above cases.

The contents of the contract being determined, the question of the contractual liability then arises. Has or has not the carrier failed in the obligation under which he was put by the contract of carriage? Since the contract put him under the obligation of carrying by the means commonly used in carriage and of being a good carrier, he has committed no fault if he proves that he has taken all the measures which a good carrier must take. What is to be considered as a good carrier is left to the discretion of the judge, who will use the average as a basis.

Since air navigation is a means of carriage which is developing, it is evident that the criterion of a good carrier to-day must be different from that of a good carrier in 1919, who did not have, as has the carrier of to-day, multi-engined aeroplanes ,perfected wireless apparatus, instruments for blind flying, etc.

Seeing that the conduct of the carrier will be compared to that of an abstract type of good carrier, it follows that the proof of the carrier that he has taken all necessary measures which he *personally* could take at a certain moment, would not be sufficient to exclude his liability: for as soon as he has failed to take measures which one would expect from a good carrier, he has committed a fault. In contractual matters the fault is therefore an objective notion.

Proof of force majeure

During carriage by air, a passenger is injured consequent on a fire on board the aircraft. As we have seen, the carrier, by virtue of the contract of carriage, must take all the measures of a good carrier to undertake the carriage. The fact that the passenger was injured owing to an accident occurring during carriage, must be considered as a fact constituting presumption of breach of the carrier's obligation. The passenger will therefore not have to prove negligence of the carrier but only the contract of carriage, the injury and the connection between the injury and the carriage.

What is the proof which the carrier must provide to exclude his liability?

Whether law or jurisprudence consider unforeseeable and

irresistible events or outside cause not chargeable to the carrier, the criterion is the same; that of absence of fault. In admitting this principle, it seems to us logical that the defendant should be able to exempt himself from liability by proving that he committed no fault. French textwriters do not nevertheless agree on the question of whether the Courts consider that in the cases where the non-performance of an obligation is without fault, there is *force majeure*. Mazeaud [1] writes that the Courts will free the defendant not only if he proves that the reason for the non-performance is foreign to him, but when he shows that he has taken certain precautions, that he has not been imprudent in such and such a direction, or negligent in such and such a way *and that the Courts exclude the carrier from liability also when the reason for the non-performance is unknown.* Radouant [2] on the contrary, points out that a number of decrees require the defendant not only to prove that he has not committed any fault, but also to state precisely the cause of the damage. Demogue [3] considers that jurisprudence clearly requires direct and positive proof of *force majeure.*

As it often happens that the cause of an aeroplane accident remains unknown, it is clear that the question of what proof is sufficient to relieve the carrier from his liability, is an extremely important one in the field of aviation. If, in the above case, the carrier can prove that lightning has been the direct cause of the fire, he will be relieved from his liability as lightning excludes all possibility of the carrier's fault. But in most cases, as we have just remarked, the cause of the fire is unknown. To hold the carrier liable for injuries resulting from "accidents anonymes" would correspond to relieving the passenger from the rule of assumption of risk, which in the field of aviation has been well established by textwriters and decided cases. One has to admit that the proof of *force majeure* has to be made by presumption. When the carrier can prove that he is not guilty of faults which are usually made under such circumstances or rather when he indicates the precautions he has taken, which gives the proof its positive aspect,

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1. Mazeaud op. cit. No. 672.
2. Radouant op. cit. p. 276.
3. Demogue op. cit. p. 650.

the judge will have to conclude that a case of *force majeure* has caused the damage.

Consequently, whether the proof of absence of fault is considered sufficient to relieve the defendant from his liability, or whether the proof of force majeure is considered to be indispensable, proof by presumption being recognised, the practical result will be the same. We quote as example, the summary of a decision of the Rouen Court [1]:

"Si dans certains cas le capitaine du navire peut et doit indiquer la cause directe de l'incendie, il serait injuste d'exiger de lui cette preuve, lorsque par la force des choses, elle est impossible; dans ce cas tout ce qu'on peut lui demander c'est qu'il établisse qu'il n'y a pas eu faute ou négligence commise, soit par lui-même, soit par les gens de son équipage".

It should be observed that in the Brussels Convention, if the loss is due to fire, the carrier will not be liable unless the plaintiff proves his negligence.

Jurisprudence relating to the position of the air carrier before 31st May 1924

We will not discuss all the different judgments of the French Courts on the liability of the air carrier before 31st May 1924 as their interest is purely retrospective. We will, however, give a short résumé of the three decisions of the "Cour de Cassation" on this subject.

In the first judgment of 12th May 1930 [2], the validity of the clause of non-liability as appearing on the ticket of an air company was considered.

The "Cour de Cassation" was of the opinion that no text, even before the law of 31st May 1923, or public policy, prohibited the carrier from excluding his liability for damages arising from risks inherent in a means of carriage which has not yet attained perfection. Exclusion of liability for accidents attributable to his own fault was, however, in the opinion of the "Cour de Cassation" not possible.

The "Cour de Cassation", in principle recognising the validity of clauses of non-liability, decided that it pertained to the Courts

1. 3rd May 1844, D 1844, II 185.
2. Gazette du Palais 1930, 2, 118.

to discriminate, according to the legal consequences which can be drawn from it, between what they contain which is licit and what is illicit as against public policy.

In the second judgment, of 21st July 1930 [1], the "Cour de Cassation" decided that the validity of the clause printed on the ticket issued to passengers by which the carrier declines all liability arising from any accident, cannot be contested in so far as it exonerates the carrier from the risks of the air.

This second judgment is of special importance as, in amplifying the judgment, the Court expressed the opinion that carriage by air is only made use of by a "clientèle avertie" and that the person carried accepted a risk which he would generally be able to avoid by travelling over land or by sea.

The third judgment of 11th February 1931 [2], confirms the two first judgments. Though the clause of non-liability considered by the Court was worded in general terms, excluding all liability, also for wilful misconduct, the Court considered that the judge was not authorised to refuse giving effect to this clause, since it was not invoked by the company to avoid the consequences of its own fault, but to avoid liability devolving from the general principles of the contract of carriage without a fault being proved.

The following conclusions can be drawn from these judgments. The Court wishes to confirm, also in carriage by air, the thesis of French jurisprudence by which liability *ex delicto* being of public policy, cannot be avoided by a non-liability clause.

Mazeaud in "Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle" criticising this jurisprudence clearly proves that one cannot consider the non-liability clause *ex delicto* as contrary to public policy. He believes that French jurisprudence will soon change its attitude on this subject [3]. It is to be observed that as far as the negligence clauses are concerned in carriage by sea, French jurisprudence admits that they completely exonerate the carrier not only from liability *ex contractu* but also *ex delicto*.

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1. Gazette du Palais 1930, 2, 373.
2. Gazette du Palais, 1931, 1, 425.
3. Mazeaud op. cit. No. 2571.

The law of 31st May 1924

Article 41. "The carrier is liable for the loss or damage of the goods carried, except in cases involving *force majeure*, or inherent vice in the goods.

If, however, the value of the goods has not been declared by the consignor, the liability of the carrier is limited to 1000 francs per parcel".

Article 42. "The carrier can, by a special clause exclude all liability which he incurs by reason of the risk of the air and the faults committed by any person employed on board in the conducting of aircraft; this applies to passengers as well as goods.

This clause only exonerates the carrier from his liability if the aircraft was in good condition of navigability on departure and if the crew were in possession of the proper certificates and licences; the special administrative certificates are a presumption in favour of the aircraft and crew, which can be combatted by proof to the contrary".

Article 43. "Any clause purporting to exonerate the carrier from his liability for his own act, and that of his agents relative to the sending, preservation and delivery of the goods, is null and void. Any clause purporting to exonerate the carrier from liability for his own faults is also null and void".

Article 48. "The carrier may be relieved of liability by reason of accidents occurring to passengers under the circumstances considered in article 42 above mentioned".

The first sub-paragraph of article, 41 in reproducing the contents of article 103 of the French Code de Commerce, has confirmed the principle of the contractual liability of the air carrier.

In the second sub-paragraph of this article a legal limitation of the liability is provided. Except in the case of a declaration of value, the liability of the carrier is limited to 1000 francs per parcel. "The seriousness of the risk inherent in the carriage by air has been the reason for setting up a limited liability of the carrier" [1].

In article 42 the validity of the non-guarantee clause has been recognised; seeing that, in article 43 however, it has been provided that the clause does not cover the carrier's own fault, the clause instead of exonerating the carrier completely from his liability, only has the effect of putting the burden of proof on the

1. Josserand op. cit. No. 618 *b*.

other party. The discrimination in the contract of carriage between liability *ex contractu* and *ex delicto* made by French jurisprudence, has therefore been confirmed again in the law of 31st May 1924.

The law then wishes to bring out that the commercial faults, or the faults made whilst still on land, are not peculiar to carriage by air. Their régime is therefore the same as that instituted by the Rabier law (article 103 sub-paragraph 2 of the "Code de Commerce"), which renders the non-liability clauses null and void in the carriage of goods.

The text of this Rabier law relates to the liability of the carrier with regard to loss or damage and therefore does not consider delay. Article 43 prohibits clauses purporting to exclude the carrier's liability with regard to loading, preservation and delivery of the goods, which necessarily includes liability for delay in delivery. Consequently, on this point, the law of 31st May 1924 is more rigorous than the Rabier law which does not include delay.

As regards risks of the air, and faults committed by any person employed on board in flying the aircraft, as they are peculiar to carriage by air, the law validated the non-liability clause.

It should be pointed out that only faults committed by a person in the flying of the machine are considered. In consequence the clause does not cover for example, the fault of a steward employed on the aircraft. As regards the validity of the clause, it is, in our opinion, right that no distinction is made between passengers and goods [1].

By virtue of sub-paragraph 2 of article 42, the passenger or the consignor are given the faculty of proving:

a. that, notwithstanding the certificate of airworthiness normally issued, the machine was not in a navigable state on departure.

b. that the pilot, though provided with the proper licences and certificates, was not fit for the exercise of his profession.

The proof considered under *a*) will, in practice, be extremely difficult to make. With regard to the proof considered under *b*)

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1. As we will see the Warsaw Convention made such distinction in its article 20.

M. Ripert [1] pointed out that the "carrier must establish that the machine was piloted and manned by personnel provided with proper licences and certificates. If this is established, there is no presumption which can allow proof to the contrary. This proof to the contrary would consist in establishing that, notwithstanding the issue of proper certificates, the pilot was not in a fit state to pilot the machine. The carrier is obliged to trust to the administrative certificates of competence and except when he commits a fault himself, he cannot be reproached for the incapacity of his pilot". The carrier commits a fault himself when, for example, he entrusts an aeroplane to a pilot who he knew was drunk.

In article 48, it is stipulated that the carrier may deny liability for accidents occurring to passengers, in the same conditions as those provided for goods. Owing to the fact that article 48 refers only to article 42 (non-liability clause) and not to article 41 (confirmation of the principle of contractual liability as regards goods) M. Ripert considers that the conclusion to be drawn is that the carrier is not contractually liable for accidents occurring to passengers and that it is for the passenger to prove a fault of the carrier in order to obtain damages. In his opinion, there is with regard to the air carrier a derogation from the general rule of carriage of persons.

M. Josserand considers that the text of article 48 is written in terms vague enough not to prejudice the *ex delicto* or *ex contractu* character of the carrier's liability towards the passengers of the aircraft.

M. Roger [2] on the other hand, considers that the reference made to carriage of goods, which allows by an analogy the same principles to apply with regard to the determination of the efficacy of the exclusive or limitative clauses, leads to the conclusion that the liability of the carrier of persons has the same basis as the liability of the carrier of goods, for if this is not so, the legislator would have confirmed it by a formal text. M. Tissot [3] is of the

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1. See Ripert in the Revue Juridique Internationale de la Locomotion Aérienne. 1932, p. 362.
2. Roger "La limitation conventionelle de responsabilité dans le contrat de transport" Paris, 1929, p. 365.
3. Tissot "De la responsabilité en matière de navigation aérienne", Paris, 1925, p. 106.

same opinion because the draftsmen of the law, who wished to keep within the general rules of French law, would not have broken away from the jurisprudence at present in force, without an express statement.

Indeed, as we have pointed out, since 1911 French jurisprudence recognises unanimously the contractual basis of the liability of the carrier with regard to passengers.

For the following reason, we consider that it is impossible for the law of 31st May 1924 not to have intended to accept the principle of contractual liability also for passengers. We have observed that this law confirmed the principle of French jurisprudence concerning the clause of non-exoneration. In the opinion of French jurisprudence, the clause cannot cover the carrier's own faults, since liability *ex delicto* is of public order. Since article 48 validates the exoneration clause regarding carriage of passengers, it naturally follows that the liability of the carrier towards passengers must have a basis other than that on which liability *ex delicto* is based.

Interpretation of "carrier"

Who is carrier within the meaning of the law of 31st May 1924? From the articles that have been quoted one can affirm that the carrier is he who concludes directly the contracts of carriage with the passengers and consignors. It is therefore possible for the carrier not to be the owner but the charterer of the aeroplane. In Chapter III of the law, provisions have been taken with a view to giving the passengers and consignors a guarantee against an insolvent charterer. The owner of the aircraft will be liable jointly and severally with the charterer for the breach of the legal obligations.

The owner will be liable not only when he has put at the disposal of the charterer an equipped aeroplane of which the commander, pilot and crew are in the owner's service, but also when an aeroplane alone is hired. There is an exception to this rule regarded in the second sub-paragraph of article 50. If the contract of hire is inscribed in the aeroplane register and if the hirer fulfills the required conditions, with regard to the ownership of a French aeroplane, the owner will not be liable and the hirer alone will be bound by the legal obligations. The conditions

required, and which must be fulfilled by the hirer, are defined in article 5 of the same law [1].

A French owner will therefore be liable by virtue of article 50 when hiring an aircraft to a foreigner.

Risk of the air and force majeure

In article 42, it is stipulated that the carrier can exclude his liability falling on him owing to the risks of the air.

What is the meaning of "Risk of the air"?

One will see, in considering the definitions given by the different textwriters, that opinions differ on this subject.

M. Ripert [2] considers that the risks of the air are the normal accidents of navigation arising from the state of the atmosphere.

M. Prochasson [3] gives the following definition: "The risk of the air are all those dangers of navigation, which cannot be foreseen by the carrier in the present state of aeronautical science, and which do not constitute a fault of the agents, a *casus fortuitus*, or *force majeure*".

M. Tissot [4] considers risk of the air as accidents and damages which are liable to place the aircraft in danger, without it ever being possible to determine their exact cause, for if the exact cause was known, it would either be a case of *force majeure* or the result of faults attributable to the transport undertaking or its agents.

M. Cassvar [5] considers that the risk of the air is the danger of navigation in high altitudes, winds, weather, and which for the time being the navigators of an aircraft are not always able to foresee or avoid.

M. Kaftal [5] includes in risk of the air: all risks which normally entail the contractual liability of the carrier without however including fault, that is atmospherical conditions (fog, storm) and inherent vice in the aeroplane.

1. "Un aéronef ne peut être immatriculé en France que s'il appartient à des Français. Une société ne peut être enregistrée comme propriétaire d'un aéronef que si elle possède la nationalité française. En outre, dans les sociétés de personnes, tous les associés en nom ou tous les commandités et dans les sociétés par actions, le président du conseil d'administration, l'administrateur délégué et les deux tiers au moins des administrateurs doivent être Français".
2. Ripert: "La responsabilité du transporteur aérien d'après le projet de la Conférence Internationale de Paris, 1925", in the Revue Juridique Internationale de la Locomotion Aérienne 1926 p. 1.
3. Prochasson Le Risque de l'Air p. 15.
4. Tissot, op. cit., p. 80.
5. Quoted by Prochasson, op. cit. p. 16.

M. Le Bourhis [1] has defined the risk of the air as follows: the accidents arising from atmospherical conditions other than those of *force majeure*, fog, storm, and accidents occurring in the air without it being possible to attribute their cause to some precise happening.

M. Le Goff [2] considers that the risk of the air should include accidents due to atmospheric conditions and accidents due to an unknown cause.

In summarising these definitions, one can say:

A. Most textwriters consider that the risks of the air are constituted by atmospherical conditions. The example always quoted is the storm.

B. Two writers state that the notion of the risk of the air requires that the occurrence could not have been foreseen.

C. Two writers consider as risks of the air accidents of which the cause is unknown.

A. As regards point *A*, the question arises of knowing whether at common law a storm is an event for which the air carrier is answerable. In favour of liability under these circumstances, the following argument is used: The person who takes an aeroplane up in the air should foresee the atmospherical conditions which might occur. Atmospherical conditions can never, therefore, be considered as *force majeure*, since one of the elements of *force majeure*, that is unforeseeability, is lacking.

This argument is incorrect. It has been said while considering the notion of *force majeure* at common law, that really all occurrences except those happening for the first time can be foreseen, and that in order to arrive at a rational appreciation of an occurrence which could not be foreseen, doctrine and jurisprudence agree that the question to be asked is: should the occurrence which prevented the carriage from being performed have been foreseen as probable [3].

In carriage over land and carriage by sea, a storm has always been considered as an occurrence which could not have been foreseen by the carrier, because it is possible, but not probable [4].

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1. Quoted by Prochasson, op. cit. p. 620.
2. Le Goff, op. cit. p. 620.
3. See p. 46.
4. See Josserand, op. cit. No. 586; Demogue, op. cit. p. 577.

In our opinion, it is incorrect to maintain the thesis that a storm is an occurrence which could not have been foreseen by the carrier by sea, but which could have been foreseen by the carrier by air.

B. Let us now consider the opinion given under *B*: the risk of the air is constituted by atmospheric conditions that could not have been foreseen. To give an example which can arise in practice: an aeroplane took off after having received the available meteorological information. During its journey ice formed on its wings and it was forced to land [1]. The goods in the aeroplane were damaged during the landing. Is there here a risk of the air for which the carrier must answer? At French common law, the carrier, in order to exempt himself from liability, must prove that *force majeure* prevented him from executing his obligation.

One of the constituent elements of *force majeure*, unforeseeability, being present, it is for the carrier to prove that the occurrence (ice formation) made it impossible for him to execute his obligation. He will make this proof by showing that owing to the ice formation the pilot would not have been right to continue his journey. The judge would have to decide if this proof is sufficient, by comparing the measures taken by the pilot in question with the measures which would have been taken by a good pilot *in abstracto.*

Therefore to pretend that ice formation is a risk of the air for which the carrier is answerable at common law, is not right.

C. There remains to be examined the opinion of the writers according to which risks of the air are the accidents the cause of which remains unknown.

What is the position of the carrier who has been prevented from executing his obligation owing to an accident of which the cause is unknown? At common law, is he able to prove that there was a case of *force majeure?* We have pointed out that the proof of *force majeure* [2] can be made in any legal way, therefore also by presumption.

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1. M. Kaftal's opinion expressed in his study "La réparation des dommages causés aux voyageurs dans les transports aériens", that unless there is negligence on the part of the carrier who did not consult the meteorological bulletins or was imprudent because he required a departure in clearly unfavourable circumstances, an accident caused by atmospherical conditions will not be possible, is at complete variance with reality as every pilot will confirm.
2. See page 48.

"The courts in general liberate the defendant not only when he proves "an outside cause", but also when he shows that he took certain precautions, that he was not imprudent in such and such a way, or negligent in such and such a way, and also when the cause is unknown". This is Professor Mazeaud's opinion [1]. At common law, the carrier will therefore not be liable for an accident of unknown cause if he can prove that he took all the precautions which must be taken by a good carrier.

We are led, by the above, to the conclusion that occurrences which, in the opinions of the different writers, constitute risks of the air, are occurrences which can constitute *force majeure* at common law. M. le Goff seems of the same opinion, observing: "Même si aucune clause d'exonération ne figure dans le contrat de transport relativement aux risques de l'air, et qu'on soit ainsi placé sous le pur régime du droit common on doit admettre que le transporteur peut invoquer le risque de l'air comme devant être assimilé à la cause étrangère qu'on peut ni prévoir ni empêcher qui constitue la force majeure" [2].

It appears that the legislator of 1924 wished to impose on the air carrier also with regard to contractual matters [3] a liability which to a certain extent is objective. The notion of *force majeure* within the meaning of the law of 31st May 1924 should therefore be interpreted in a stricter manner than the notion of *force majeure* at French common law [4].

It appears that the *force majeure* in the law of 31st May 1924 is constituted by an occurrence of an abstract injurious force which has not been brought on even indirectly, by the defendant [5]. We have already observed that this theory, called the theory of exteriority, which is based on the theory of risk, has not been

1. Mazeaud op. cit. No. 672.
2. Le Goff op, cit. p. 634.
3. In article 53 the law adopted the principle on which the theory of risk is based, by establishing a liability outside all fault attributable to the operator of the aircraft, when the damage is caused *to persons or property on the ground.*
4. Kaftal, in saying that the risks of the air are risks which would normally entail the liability of the carrier *without however constituting a fault,* is mistaken in thinking that at French common law, the carrier could be liable *ex contractu* without fault.
5. See however Josserand No. 1023:
"It is true that for the carriage of persons and goods the law of 31st May 1924 admitted *force majeure* its usual value for exoneration, in the relations of the carrier with his clientèle, but this clientèle, just because it has treated with the carrier, has accepted to a certain extent the risks of transport which could not have remained unknown."

accepted by the French jurisprudence in other domains of law.

Why should there be imposed on the air carrier a heavier liability *ex contractu* than is imposed on other carriers? It is true that the possibility of denying this liability has been provided for in the law of 1924, but why assume the principle that this liability exists?

Comité Juridique International de l'Aviation on atmospherical conditions

Before ending the remarks on the subject of the risk of the air and *force majeure*, we wish to point out that the question of the interpretation of the notion of *force majeure* with regard to carriage by air has been the subject of discussions within the Comité Juridique International de l'Aviation during its 8th Congress in Madrid in 1928 [1]. These discussions ended in a decision, of which the text reads as follows:

"The atmospherical conditions can never be considered as *force majeure* in the carriage by air of persons and goods and thus free the carrier from his liability".

It seems to us impossible to accept this conception, which would have very harmful consequences on air navigation.

Before considering the reasons which brought the delegates of the Madrid Congress to adopt the above decision, the meaning of "atmospherical conditions" should be examined. The minutes show that one of the delegates proposed to amend the text of the Committee, by using *ordinary* atmospherical conditions. M. Ripert, who was the reporter, opposed this amendment, saying: "It is certain that nobody can consider making ordinary atmospherical conditions a case for exemption and when we wish to exclude atmospherical conditions from *force majeure*, there can only be question of atmospherical conditions "qui ne peuvent pas entrer dans les prévisions humaines" [2]. Therefore according to the decision, the carrier cannot liberate himself on the basis of atmospherical conditions which cannot be foreseen.

The arguments used to support this thesis are the following:

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1. See the Minutes of the 8th Congress of the Comité Juridique International de l'Aviation, p. 133 and following.
2. Minutes of the 8th Congress of the Comité Juridique International de l'Aviation, p. 138.

A. 1. The atmosphere is the medium in which the carrier works, and just as a railway is answerable for the rails on which the trains run, so is the operator of an aircraft answerable for the state of the atmosphere.

2. The person taking an aeroplane into the air is obliged to foresee the atmospherical conditions which may arise, and cognisant of the fact that it is a question of carriage by air, he has assumed with regard to passengers and goods, the charge of carrying them to their destination under the conditions in which he most often performs the carriage. He has taken certain risks on himself in advance, which doubtlessly do not depend on his will, but which are connected with his activity.

3. He will be able to foresee the atmospherical conditions and will in all cases be able to land if a storm or a cyclone is met. Even if he cannot foresee the occurrence, he will therefore be able to prevent any harmful consequences from arising when the occurrence does take place. And then, the impossibility of preventing the occurrence, a constituent element of *force majeure*, disappears.

B. By recognising that the air carrier can deny liability, by showing that the atmospherical conditions were unfavourable the carrier will really always be completely exonerated because, in the discussion of the atmospherical conditions, the carrier is much better placed than his contractant; it will, indeed, be always impossible, either for the consignor or the passenger, to show that the atmospherical conditions were normal and that the carrier could have foreseen them.

Let us examine whether these arguments are convincing.

A. 1. A comparison between the rails on which the trains run and the atmosphere made use of by the carrier seems to us impossible. The good condition of the rails depends on the railways themselves, they must keep them in good repair and are responsible if they have been negligent in this matter. It is difficult to admit that the carrier should be answerable for the state of the atmosphere. But, without going into these considerations, there is no doubt that if a train had an accident owing to the rails being destroyed by a cyclone, liability would be excluded on the ground of *force majeure*.

2. A cyclone, a gale and similar occurrences cannot be considered as the conditions under which the carrier most often

performs his carriage; on this subject there is no difference with the maritime carrier [1].

The opinion that the carrier by air has taken beforehand on himself the risks not dependant on his will does not seem to us reasonable. The point of view of one of the delegates at the Madrid Conference should be quoted:

"Two persons, the carrier and the carried both commit themselves to the air, each looking to how he can best serve his own interest, whence two different interests. The carried person who pays a certain sum to the carrier, *does not pay for a guarantee against the risks of the air:* he pays for special transport because he wishes to travel faster, to gain time. Every one risks that which he commits to the air. The passenger risks his life; nobody compels him to do so; if he does not wish to risk his life, he can travel by surface transport".

3. Since the reporter pointed out that only unforeseeable atmospherical conditions were under consideration, we do not understand how the argument that the carrier can always foresee the atmospherical conditions, can be used. Putting aside this inconsistency, can the carrier foresee all atmospherical conditions? Nobody "au courant" with aviation will contend that even if the carrier, before the departure of his aeroplane, had received and verified the meteorological conditions by the means put at his disposal by the present knowledge of the subject, there is always in winter a possibility of ice formation arising during the flight which could not have been foreseen [2].

Further it is not true to say that when an aeroplane meets a cyclone, it can always land and thus prevent any harmful consequences. One has only to think of aeroplanes flying over the High Seas. The element of unforeseeability of certain atmospherical conditions is present with the fullest extent of the word.

B. The argument that the passenger or the consignor can never prove that there is question of normal atmospherical conditions, is not correct.

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1. Contra: Tissot op. cit. p. 147. "The intervention of the forces of nature which ordinarily is foreign to the profession is here included in professional risks for the worker is here incessantly and fatally submitted to the action of its forces."
1. Cf. Frank E. Quindry in Journal of Air Law April 1936, p 295, who remarks that in the U.S.A. there have been some instances to illustrate that weather conditions cannot always he foreseen even under the best circumstances.

What is the position?

Let us take for example the case where the goods of a consignor were damaged consequent on a forced landing. The consignor would only have to prove the contract of carriage and the damage which he suffered owing to the injury of his goods.

To exonerate himself, the carrier, in our opinion, would have to prove that he could not prevent the occurrence which forced the pilot to land and so caused the damage by showing that he had taken all the possible precautions. The carrier will not be able to exonerate himself when, for example, there was a gale which he should have foreseen by reading the meteorological information bulletins. Let us quote a case which happened in practice.

The "Tribunal de commerce de Bruxelles" by its jugdment of 14th January 1929, condemned the Belgian company Sabena to pay a sum of 580,50 frs. as damages for a package of natural flowers that the Sabena had stated it could not carry owing to unfavourable atmospherical conditions [1]. The Court, after having examined the meteorological observations of the Royal Belgian Meteorological Institute on 22nd 23rd and 24th December 1928, came to the conclusion that they were not such as to prevent air services being operated.

It clearly follows that it certainly will not always be possible for the carrier to exonerate himself from liability by establishing that the atmospherical conditions were unfavourable.

We hope that we have shown that it is unreasonable not to consider certain atmospherical conditions as constituting a case of *force majeure* for the carrier. The passenger or the consignor who treats with an air carrier has accepted the risks arising from air navigation.

In conclusion we consider that the tendency to make the liability of the air carrier heavier by giving a narrow meaning to the notion of *force majeure*, which has to a certain extent made itself felt in the law of 31st May 1924 and to a greater extent in the decision of the Comité Juridique International de l'Aviation, should be combatted.

In analysing the contract of carriage, the carrier can never be given the intention of taking on himself the occurrences arising from unforeseeable atmospherical conditions. Further, it seems

1. See Droit Aérien 1930 p. 353.

that it is often forgotten that air navigation, which is a means of carriage in development, must be subject to laws *less* — and not more — rigourous than those in force for other means of carriage having a vast experience behind them.

Jurisprudence relating to the position of the carrier by air after the coming into force of the law of 31st May 1924

Vacher (Syndic of Compagnie Générale Aéropostale) v. Veuve de Leusse [1].

The case dealt with a claim for damages put forward by the widow of a passenger who was killed consequent on the fall of a machine belonging to the Compagnie Aéropostale. Madame de Leusse wished to make the liability of the Compagnie Aéropostale devolve from the fault of the commander of the Barcelona airport who, in view of the unfavourable atmospherical circumstances, should not have authorised the departure of the aeroplane carrying de Leusse.

On the ticket issued to de Leusse, there was a clause excluding liability devolving from risks of the air and faults committed in the flying of the aeroplane, and reproducing the terms of article 42 of the law of 31st May 1924. Below this clause were the words "Read and approved" under which de Leusse signed. The Cour d'Appel of Toulouse, by its decree of 8th February 1932, rejected the claims of Madame de Leusse, reforming the judgment given in first instance by the Cour de Toulouse on 18th July 1930 for the following reasons:

"that since the representatives of de Leusse invoked against the Compagnie Aéropostale a *quasi ex delicto* fault, it is all the more necessary for them to provide proof of such fault....

"that one could not reproach the commander of the airport of Barcelona for not having received meteorological information concerning the journey, since no service of this kind was organised in Spain and the possible existence of fog over the Pyrenees or its sudden formation against all forecasts, was not a fact to prevent departure owing to the two possibilities of following an easier route or returning to Barcelona if conditions became unfavourable; that the representatives of de Leusse had not given proof of

1. See Revue Générale de Droit Aérien 1932 p. 750.

grave default of the pilot or even proof of *culpa lata* of any of the servants of the Compagnie Aéropostale.

Conditions of carriage used by French air traffic Companies

The French air traffic company "Air France" operating national and international air services [1], uses on all its lines the I.A.T.A. conditions of carriage [2].

The French State operates an air service from Algiers to the Congo. On this service also the I.A.T.A. conditions of carriage are used. As these conditions are based on the Warsaw Convention and at certain points conflict with the air navigation law of 1924 [3], it is possible that the French Courts will consider these conditions as not applicable to internal carriage. This difficulty will be overcome when the revised text of the Law of 1924, which will be proposed by the French Air Minister, is adopted.

GERMANY

The Deutsche Lufthansa, the air traffic company operating all internal air lines in Germany and all German international airlines with the exception of those operated by the "Deutsche Zeppelin Reederei" [4], recently proposed to the German Government to extend the régime of the Warsaw Convention, which was ratified by Germany on 30th September 1933, to internal air traffic. The

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1. Besides the air services in Europe, Air France runs airlines to and in South America and Indo-China.
2. Air France has introduced a compulsory accident insurance for passengers in order to cover the liability flowing from the contract of carriage. The payment of the indemnities (Ffcs. 125.000 in case of death and of total permanent infirmity; Ffcs. 125.— per day in case of temporary incapacity) is made under the condition that the passenger and his representatives renounce from taking action for civil liability.
3. In the French air navigation law of 1924 it is stated that the carrier cannot exonerate himself from liability for his own fault. In the I.A.T.A. conditions the liability even in the case of the carriers' own fault, is limited to a certain sum. By virtue of the French air navigation law the carrier, to relieve himself of liability, must prove a case of force majeure. By virtue of the I.A.T.A. conditions the carrier can relieve himself by proving that he has taken the necessary measures.
4. The German-Russian Company "Deruluft" operating services between Germany and Russia, went into liquidation on 31st December 1936 because of the five year agreement between the Deutsche Lufthansa and the Aeroflot expiring at that date.

German Government being in favour of this proposal, invited the Committee for Air Law of the Academy for German Law to prepare a draft law on this subject. This draft is under preparation at the present moment and it is to be expected that in the course of 1937 it will be submitted to the German Government.

The passing of this law will make an end to the illogical situation at the present moment existant in Germany, by virtue of which the carriage performed on the same air line in Germany can be subject to two completely different régimes of liability, namely the liability of the Warsaw Convention, based on fault, and the liability of the German law of 21st August 1936, (revised text of the law of 1st August 1922) based on risk. In practice, the differences in régime have not been strongly felt, because since 13th February 1933, the Deutsche Lufthansa operates all its services under conditions of carriage which are based on the Warsaw Convention and fixed by the I.A.T.A. These conditions limit the liability of the air carrier to a certain sum in cases where passengers or consignors have suffered damages and the carrier cannot prove to have taken the necessary measures to avoid these damages.

As we will see, the German air traffic law does not prevent the carrier from limiting (or even excluding) his liability and the above mentioned conditions are therefore considered to be entirely valid in Germany.

The liability of the air carrier under the air traffic law is regulated by its articles 19–30. Article 19 is worded as follows:

"If through an accident which occurred in the operation ("beim Betrieb") of an aircraft a person is killed or suffers injury to body or health or if a thing is damaged, the operator ("Halter") of the aircraft is obliged to compensate the damages.

"Any person who makes use of an aircraft without the knowledge and consent of the aircraft operator, is obliged to compensate the damage instead of the operator. The operator is nevertheless obliged to compensate the damage if the use of the aircraft has been made possible through his fault".

Article 20, which refers to article 254 of the German Civil Code, stipulates that if the damage is due partly to the fault of the injured party, the obligation to compensate the injured party and the extent of the compensation to be made, depends upon the circumstances, especially how far the injury has been caused

chiefly by the one or the other party. This is the only exception to the liability of the operator. In all other cases, even in the case of force majeure, the operator will be liable. The liability of the air traffic law is therefore purely objective and the régime of liability of this law must be considered as the most stringent régime existing in Germany [1].

Although one may agree to the application of the theory of risk with regard to the liability of the air carrier towards third parties on the ground, as has been done by the Rome Convention of 29th May 1933 (for the unification of certain rules relating to damages caused by aircraft to third parties on the surface), this theory is inadmissible as regards the liability of the carrier towards the parties with whom he has concluded a contract of carriage. In the event of a third party on the surface extraneous to aviation suffering damage, the position between the author of the damage and the victim is unequal, and it is therefore just to give the victim a special protection. In the case of persons making use of aviation, the situation is completely different, as there the author of the damage and the victim are on equal terms.

As we will see, the authors of the Warsaw Convention rightly based themselves on the idea that persons making use of air navigation accept the risk inherent in this mode of transport, and the authors therefore adopted the principle that the air carrier is not liable without fault.

It should further be noted that the liability of the carrier, provided in the air traffic law, is much heavier than the liability of the carriers under the general rules of the Civil Code. According to articles 275 and 276 of the German Civil Code the liability of the carrier is based on fault.

As far the special German laws regarding liability are concerned attention should be drawn to the Employers' Liability Act (Reichshaftpflichtgesetz) which, in article 1, recognises force majeure as a reason for exemption of liability. The Prussian Railroad Law (Gesetz über die Eisenbahnunternehmungen) provides in article 25 that the carrier can avoid liability by proving that the damage was due to the fault of the injured party or to an occurrence, outside the enterprise, which could not have been

1. See Schleicher, Luftverkehrsgesetz (1933) p. 97.

averted. Finally the Automobile Law (Kraftfahrzeuggesetz) only regulates liability towards third parties. As regards passengers and goods carried by automobile, one must therefore turn to the general rules of civil law which, as has been observed, are based on the theory of fault.

In only one respect the air traffic law favours the carrier. Article 23 provides that the liability of the carrier is limited to certain sums. Before considering this article, examination should be made of what is meant in article 19 by "Halter" and "beim Betrieb".

Interpretation of the terms "Halter" and "beim Betrieb"

The term "Halter" is used in the same sense as it is in the Automobile Law. According to fixed jurisprudence, "Halter" is he who uses the instrument of carriage for his own account, and has that right of disposition over it as presupposes such use [1]. As to the term "beim Betrieb", it is generally considered in Germany that the "Betrieb" of the aircraft begins with the starting of the engine and ends when the aircraft comes to a stop on the ground [2].

Compensation of damages

As regards the damages to be compensated, article 21 stipulates that in the event of death the compensation for damage includes the costs of medical care as well as the financial disadvantage which the deceased has sustained thereby, considering that during the period of illness, his earning capacity has been destroyed or impaired or his advancement has been rendered more difficult or his necessities have been increased. Moreover, funeral expenses are to be refunded to the person on whom the obligation of bearing such expenses lies.

Paragraph 2 of article 21 is worded as follows:

"If the deceased, at the time of the accident, stood in a relation to a third party by virtue of which he was or might be bound by law to furnish maintenance to such third party, and if, in consequence of his death, such third party is deprived of the right to maintenance, the person bound to make compensation shall

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1. See Kilkowski "Die Haftung für Luftverkehrsschaden" Marburg 1930 p. 29.
2. Kilkowski op. cit. p. 6.
See also Bredow-Müller "Luftverkehrsgesetz" (1922) p. 229; Schleicher op. cit. p. 98.

compensate the third party by the payment of a money annuity, in so far as the deceased would have been bound to furnish maintenance during the presumable duration of his life. The obligation to make compensation arises even if at the time of the accident, the third party was not yet born".

The principle laid down in the first paragraph is based on article 10 of the Automobile Law. As regards the second paragraph, this reproduces article 844 paragraph 2 of the Civil Code.

Concerning damage sustained in the event of injury to body and health, article 22 stipulates:

"In case of injury to body or to health, the compensation of damage includes the cost of recovery as well as any financial disadvantage which the injured party has sustained, from the fact that consequent on the injury, his earning capacity is destroyed or impaired either temporarily or permanently, or his increased prosperity is rendered more difficult, or his necessities have been increased".

This article is partly based on the Automobile Law (article 11) and partly on the Civil Code (articles 823, 842 and 843).

Limitations of liability

It has been said above that article 23 limits the liability of the operator to certain sums. The limitations fixed by this article are as follows:

a. for aeroplanes under 2500 kg weight, up to an amount of 100.000 Reichsmark;

b. for larger aeroplanes to 40 Reichsmark for each kg of the weight of the aircraft, up to a maximum of 300.000 Reichsmark.

One third of the amount arrived at as above shall be appropriated to compensation for damage caused to property and the other two thirds to compensation for damage caused to persons, provided that in the latter case the compensation payable shall not exceed 30.000 Reichsmark in respect of each person injured.

The limits correspond to those fixed in the Rome Convention of 29th May 1933. Although Germany has not yet ratified this Convention, it was considered useful to take these limitations into account in the air traffic law of 1936, in order to avoid the

modification anew of the limits of liability when this Convention comes into force for Germany [1].

It should be noted here that the original text of article 23 of the air traffic law limited the damages payable to each passenger to 25.000 RM in capital or 1.500 RM a year (the indemnity payable for baggage was fixed at a maximum sum of 5.000 RM). The maximum sum for which the liability of the air company could be engaged in an accident was fixed at 75.000 RM (or 4.500 RM in interest). The fixing of this maximum had curious consequences. A passenger would prefer to travel in an aeroplane having accommodation for four persons rather than in a modern twenty or more seater aeroplane, because, in the case of an accident occurring, the indemnity would be greater if there were four passengers than if there were twenty. This system has rightly been abolished by the new text of 1936.

Another article of the air traffic law which deserves special attention is article 28, which provides that there is no change in the provisions of the laws of the Reich, according to which the operator or the user or the pilot or any other person incurs liability to a greater extent by reason of damage caused in the operation of an aircraft. This article makes it clear that the rules of liability of article 19 of the air traffic law can only be considered as an amplification of the general rules of liability.

A passenger who has suffered damages in an air accident can base a claim, not only on article 19 of the air traffic law, but also on article 823 paragraph 1 of the Civil Code, which stipulates that a person who wilfully or negligently injures the life, body, health, freedom, property or any other right of another, is bound to compensate him for any damage arising therefrom.

The second paragraph of this article stipulates that the person who infringes a statutory provision intended for the protection of others, incurs the same obligation. If, according to the purview of the statute, infringement is possible even without any fault on the part of the wrongdoer, the duty to make compensation arises only if some fault can be imputed to him.

In the event of the victim of an air accident basing his claim on these articles, the operator will be liable to a greater extent

1. See Wegerdt "Das Luftverkehrsgesetz und die Verordnung über Luftverkehr vom 21.8 1936", Archiv für Luftrecht July–December 1936, p. 164.

because the limitations of liability provided in article 23 of the air traffic law do not apply in such cases. Further, the provision of article 26 of the air traffic law by virtue of which the injured party is obliged to make a declaration to the operator within three months following the moment at which he had knowledge of the accident, is not applicable. Moreover, articles 845 and 847 of the Civil Code provide for damages which are not covered by the air traffic law, and finally according to article 852 of the Civil Code, the period of prescription is three years whereas under article 25 of the air traffic law it is two years.

Non-liability clauses

In the official explanation of the air traffic law of 1922, it is said that the right of the carrier to attenuate his liability within admissible limits by special agreement has not been encroached upon. In order to determine whether a non-liability clause in German air traffic is valid, one therefore must have recourse to the general principles of the German civil law. According to these principles, clauses of non-liability must be considered valid as long as they are not *contra bonos mores* (article 138 of the Civil Code) and in so far as there is no wilful misconduct by the carrier himself (article 276 of the Civil Code).

As regards fault committed by agents, a non-liability clause is valid completely, as article 278 of the Civil Code par. 2, allows the exoneration of liability even in the case of wilful misconduct by a representative or mandatory.

The principle of the carrier being allowed to exclude his liability by special agreement has been confirmed by German jurisprudence. It does not seem useful to discuss here the different judgments of the lower German Courts on this subject. It is sufficient to refer to the judgment of the German Supreme Court of 19th May 1927, by which clauses of non-liability were expressly validated [1]. The Court expressed the opinion that the provisions of the Civil Code do not preclude the waiving of liability in connection with the carriage of passengers by aircraft. The Court considered that in 1925 when the accident happened, it was not *contra bonos mores* for such a young industry as aviation to relieve

1. See on this judgment, Döring: "Das Reichsgericht zur Enthaftungs Klausel im Luftverkehr", Zeitschrift fur das gesamte Luftrecht" 1927, p. 209.

itself of liability for aircraft accidents to passengers by special agreement. The Court considered that the validity of non-liability clauses should be upheld as long as the aviation industry does not enjoy a monopoly of traffic. Can one at the present moment consider the situation of air traffic as entailing a monopoly? As we will see, the Warsaw Convention gave the carrier the right to refuse to conclude a contract of carriage without giving any reasons. If one could consider the air carrier as enjoying at the present moment a general monopoly of traffic, such a right certainly would not have been given to him.

The question arises of whether a clause of non-liability worded in general terms can exclude, besides the liability *ex contractu* of the carrier also the liability *ex delicto*. We have seen that in France the Courts consider that the liability *ex delicto* cannot be avoided by a non-liability clause [1]. German jurisprudence on the contrary rightly considers clauses of non-liability as also excluding the liability *ex delicto* [2].

The clauses of non-liability which were used by the Deutsche Lufthansa before it applied to all its traffic the general conditions of carriage based on the Warsaw Convention, covered not only the passenger himself but all "etwa in Betracht kommenden anderen Personen". The intention of this clause was to cover all relations of the deceased passenger and other parties who would normally be entitled to claim in the case of death of or injury to a passenger.

We have seen that paragraph 2 of article 21 reproduces article 844 of the Civil Code. The Supreme Court at different times has judged concerning this paragraph that a clause of non-liability also affects the actions of the relations mentioned in this paragraph. By way of analogy it is therefore to be expected that the non-liability clause as regards the contract of carriage by air will also have effect as regards the people mentioned in article 21 paragraph 2 of the air traffic law.

Notwithstanding the fact that the air carrier lawfully can exonerate himself from liability by a special clause, such clauses since 13th February 1933 are no longer used in German air commerce. From that date the general conditions of carriage of the I.A.T.A., which are based on the Warsaw Convention, have been

1. See p. 51.
2. See Crome, "System des bürgerlichen Rechts", p. 488.

applied by the German Company Deutsche Lufthansa as well as by the German–Russian Company Deruluft, both members of the I.A.T.A. [1].

It is to be observed that the "Deutsche Zeppelin Reederei" which operates services by airship to North- and South America, though not being a member of the International Air Traffic Association yet, also uses on its services the conditions of carriage of this Association.

The Deutsche Lufthansa has introduced a compulsory accident insurance for passengers. This insurance is made in order to compensate the liability flowing from the General Conditions of Carriage. Payment of the indemnities [2] is made under the condition that the passenger or his representatives renounce from taking action for civil liability.

GREECE

Art. 35 of the Law of 3rd June 1931 relating to air navigation stipulates that as regards the liability of air traffic companies all air carriage will be considered as international independent of whether the point of departure and the point of destination are situated on Grecian territory without a landing being made in a foreign country. This means that when Greece has ratified the Warsaw Convention — which at the present moment it has not yet done — the rules of liability of this Convention will also be applied to internal carriage.

No special regulations regarding the liability of the air carrier are at the moment of writing in force in Greece. The provisions of the Commercial Code and the general rules regarding liability of the Civil Law are applicable.

As the Commercial Code does not contain any provisions relating to the carriage of passengers, the question arises as to whether in the case of a damage suffered by a passenger, the

1. The latter Company — as has been observed — went into liquidation on 31st December 1936.
2. The amounts paid to the passenger are:
   25.000 R.M. in case of death or of total permanent infirmity;
   25 R.M. per day in case of temporary incapacity.

carrier is liable *ex contractu* as in the carriage of goods, or whether he is liable *ex delicto*.

Doctrine and jurisprudence in Greece are in agreement that the liability of the carrier in the carriage of passengers is governed by the principles of the civil delict (damnum injuria datum) [1].

The adoption of this principle entails the following consequences. The carrier is liable for *culpa levis* and according to general opinion in Greece he will not be able to exonerate himself from liability as exoneration for liability *ex delicto* is considered contrary to public policy [2]. The passenger, in order to render the carrier liable, will have to prove the fault of the carrier [3].

As regards the carriage of goods, which is regulated by the Commercial Code, the liability of the carrier is contractual by nature. In case of destruction or loss of, or damage to the goods, the carrier will be liable unless he proves a case of force majeure. The carrier can, however, by a special clause, exonerate himself from liability for damage to goods carried, except in the case of wilful misconduct.

In practice air traffic in Greece is operated under the rules of the Warsaw Convention. The "Société Hellénique de Communications Aériennes S.A." being a member of the I.A.T.A., applies to all its national as well as international traffic the conditions of carriage of this Association. The other air traffic Companies operating lines from and to Greece also make use of these conditions.

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1. Crokidas "Droit Commercial" No. 1181, 1189; Anastasiades "Droit Commercial" par. 292 note 5; Athens Court of Appeal 1307 (1901), Themis Tome 13, p. 262; High Court 239 (1934), Journal de Jurisprudence Hellénique, p. 564.
2. On page 51 we have maintained that exoneration from liability ex delicto cannot in principle be considered as being against public policy.
3. It is to be observed that art. 31 of the Aviation law of 1931 stipulates that the issue of a passenger ticket or of a consignment note for air carriage is considered as a convention between the carrier and the passenger or consignor, from which all legal rights flow. In view of art. 7 of the law providing that the laws on carriage by land or by sea are applied "mutatis mutandis" to carriage by air, it could be maintained that, as the issue of the ticket is considered as a convention between the carrier and the passenger, the liability flowing from this convention is contractual. Since it has, however, not been specified whether this convention falls under the rules of the Commercial Code, this Code is generally considered in Greece not to be applicable to the carriage of passengers by air.

HUNGARY

The Hungarian Air Traffic Company "Malert" carrying out a decision of the International Air Traffic Association, of which Malert is a member, approached their Government with the request to take the necessary measures for applying the rules of the Warsaw Convention to internal air carriage in Hungary.

The Government, being favourable to this suggestion, decided to propose in the near future a law to Parliament by which the rules of the Warsaw Convention, which came into force in Hungary on the 27th August 1936, will be extended to internal carriage in Hungary.

At the present moment no special provisions concerning the liability of the air carrier in national carriage are in force in Hungary.

Art. 30 of law VII of the year 1922 authorised the Government to regulate the questions concerning air navigation provisionally by decree.

Art. 19 of the Decree of 14th December 1922 permits the air carrier to exonerate himself from liability in the carriage of passengers and goods or to limit this liability .

The Government accepted this provision only unwillingly. It was considered however, that owing to the financial situation of the Hungarian air traffic Company at that time, the adoption of a heavier liability would not be possible [1].

In cases where the liability is not expressly excluded, art. 398 of the Commercial Code is applicable to air carriage of goods. This article is worded as follows.

"The carrier is liable for all damages sustained in the event of loss or damage to goods, from the time when the goods were handed in to the carrier up to the time of delivery of the goods, unless the carrier proves that the damage arises from *force majeure*, inherent vice or unapparent defects in the packing. With regard to money or other valuables, the carrier is only liable if the quality or value of these goods were declared to him".

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1. See Ludwig Urbach "Ungarisches Luftrecht", Zeitschrift für Ostrecht 1933, p. 1029.

As no special provisions have been made relating to the carriage by air of passengers, the general rules of the civil and commercial Code must be applied. As these rules are based on the principle of contractual freedom and as the above mentioned Company operates all its services under the conditions of the International Air Traffic Association, which are based on the Warsaw Convention, it is clear that in practice the air carrier of passengers, after the new Hungarian Law has been passed, will be much in the same position as he is at the present moment.

Finally it should be noted that at the present there is no jurisprudence in Hungary concerning the liability of the air carrier.

IRELAND

The Irish Free State Government adhered to the Warsaw Convention and deposited the instrument of adherence with the Polish Government on 20th September 1935. By the Air Navigation and Transport Act 1936, passed by the Direachtas of Savistat Eireann on 14th August 1936, the Warsaw Convention has been given the force of municipal law in Ireland. Art. 20 of the Act has given to the Minister for Industry and Commerce power by an Order under the Act, to extend the provisions of the Warsaw Convention to carriage by air which is not international.

As no such Order has as yet been made and as no special provisions concerning the liability of the air carriers exist in Ireland, the general rules of English Common law are to be applied.

Since we have already considered these rules, it is not necessary to further examine this question here.

It should be pointed out that the Irish air traffic Company "Aer Lingus Teóranta" operates all its services under the I.A.T.A. conditions of carriage. To these conditions is added the special clause applicable to journeys which are not international carriage, as adopted by the British air traffic Companies [1].

1. See p. 40.

ITALY

Italy was the first country to make legal provisions by virtue of which the rules of the Warsaw Convention were made applicable to internal carriage. The Italian Decree relating to the contract of carriage by air of 28th September 1933 [1], converted into law on 22nd January 1934, reproduces nearly textually the rules of the Warsaw Convention, which was ratified by the Italian Government on 14th February 1933 [2].

Before considering this law some remarks should be made on the régime of liability based on the Decree of 20th August 1923 to which the air carrier in Italy was subject before the Decree of 1933 came into force.

The Decree of 20th August 1923

Art. 35 of the Decree of 20th August 1923, convented into law on 31st January 1926, applied to the liability of the air carrier, the general rules of the Italian law dealing with the liability for land and maritime carriage, with the exception of those rules which were in contradiction with the provisions of the Decree.

It is generally conceded in Italy that the liability of the carrier is contractual in nature. The carrier in the event of an accident, is liable unless he proves a case of force majeure. In principle the carrier is free to exonerate himself from liability by a special agreement, unless this is forbidden by a special law. In art. 36 of the Decree such an interdiction was provided for the air carrier.

However, the carrier, by virtue of art. 42 of the Decree, had the possibility of attenuating his liability in another way. This article introduced the maritime concept of abandonment by virtue of which the owner of a ship relieves himself of liability by

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1. "Norme concernenti il contratto di transporto aereo".
2. It is necessary to point out that the remarks on the liability of the air carrier in Italy made by Cha in his article "The Air carrier's Liability to Passengers — Anglo-American Law — French law", Air Law Review, April 1936, bear upon the situation of the air carrier before 28th September 1933, and not upon the present situation of the air carrier in Italy.

surrendering the ship and freight to a creditor who has become such by contracts made by the master [1].

Art. 42 stipulated that the carrier could free himself from liability by abandoning to all creditors or some of them the aircraft and the freight. The system of abandonment is in practice entirely useless for the victims of an aviation accident. It must be borne in mind that the value of an aeroplane which has crashed, is in the great majority of cases nil. The air carrier could abandon the worthless wreck of the demolished aeroplane and at the same time collect his insurance on it [2].

Moreover the Decree of 1923 also provided the possibility of mortgaging the aircraft. Though the passengers, by virtue of art. 3 of the Decree, were to a certain extent privileged creditors, the law did not forbid mortgaging where there was no credit outstanding for damages to passengers. It was therefore quite possible that the aeroplane was already sold before the passenger, whose name should have been entered in the aeronautical register in order to become a creditor, had the time to claim [3].

Since abandonment is useless to the victim of an aviation accident, the Italian system in force before 1933, arrived in practice at the same results as the French system fixed by the law of 1924.

We have seen that in France the carrier can exonerate himself for risks of the air and errors of navigation, but that he cannot exclude liability for his personal fault. The result of this system is that the victim, in order to render the carrier liable, will have to prove that the carrier committed a fault. Under the former Italian régime the situation of the victim was practically the same. We have already critisized the principle by which the burden of proving the fault of the carrier is laid on the shoulders of the victim. In view of the special character of aviation it will in many cases be impossible for the victim to bring the necessary proof.

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1. It is to be observed that in the modern maritime laws such as f.i. the Dutch Maritime Law of 1st February 1927, the system of abandonment has been dropped, because it does not give sufficient protection to the creditors of the owner of the ship.
2. See Giannini's criticism of the system "L'abandonno al creditori nella lege italiana sulla navigazione aerea", Il Diritto Aeronautico, 1925, p. 424.
3. See Kaftal: "La réparation des dommages causés aux voyageurs dans les transports aériens" 1930.

It is well that the principle of abandonment has been dropped and that the system of the Warsaw Convention has been accepted [1].

The Decree of 28th September 1933

As has been remarked, the Decree reproduces nearly textually the rules of the Warsaw Convention.

There are however some divergencies. The most important one is the abolition in the Italian Decree of the sanction provided by the Warsaw Convention against the air carrier who accepts passengers without a passenger ticket or who accepts luggage or goods without respectively a luggage ticket and an air consignment note containing certain obligatory particulars. In such cases the carrier, according to the Warsaw Convention, will not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability.

In our second Chapter we will consider the objections which, in our opinion, have to be made against this system and we will make a proposal to revise the Warsaw Convention on this subject. We are strengthened in our opinion by art. 49 of the Italian Decree which stipulates that the absence, irregularity or loss of the passenger ticket, luggage ticket and consignment note does not entail the non-application of the limits of liability provided in the Decree, but that, in such cases art. 53 of the Italian Commercial Code will be applicable, which means that it will not be possible to prove the contract of carriage by witnesses.

Another divergence with the Warsaw Convention is found in the particulars which must be inserted in the passenger ticket and consignment note. One of the particulars required by the Warsaw Convention is "the agreed stopping places". This particular which, in international carriage, is considered necessary in order

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1. In this connection attention should be drawn to the "Merchant Airship Act, 1932" proposed in the U.S.A. According to this Act the liability of the owner of an airship engaged in oversea transport to passengers is limited to the amount of the interest of such owner in such airship and the freight pending. This Act has been indefinitely postponed by the United States' Senate (see Cha "Air carrier's liability to passengers" Air Law Review, April 1930, p. 187). As the U.S.A., on 31st July 1934, adhered to the Warsaw Convention, it is to be expected that the idea of introducing abandonment in international air transport, will have been definitely abolished in the U.S.A.

to know whether the carriage falls under the Warsaw Convention, is not required by the Italian law [1].

As regards the consignment note art. 8 of the Warsaw Convention requires as one of the particulars: "the name and address of the consignee if the case so requires". The underlined words were added by the authors of the Warsaw Convention in order not to exclude the possibility of consignment notes to order or to bearer. In the Italian Decree the underlined words have been abolished, but in art. 21, par. 2 of the Decree it has been provided that "the consignment note can be to order or to bearer". The principle therefore remains the same.

The importance of Italy taking the head in making their internal legislation in harmony with the Warsaw Convention, cannot be overestimated.

When the Government of a country proposes to make the national legislation in harmony with the international one, there is in every country a certain opposition which must be overcome, made by those in favour of keeping the national legislation. In countries where special rules concerning the matter under consideration have been fixed, the opposition is naturally stronger than in countries where no special rules are in force. As Italy belonged to the first category of countries, the value of the example given by Italy, to be the first country to incorporate the rules of the Warsaw Convention in their national legislation, is all the greater.

JAPAN

There are not at the moment any special laws by which the liability of the air carrier in Japan is regulated. The principles concerning the liability of carriers in general, as laid down in the Third Book of the Japanese Commercial Code, will have to be applied.

As regards the carriage of goods, the carrier, by virtue of art.

1. When we considered the Brazilian Aircode we gave the reasons why the mentioning of "Agreed stopping places" in our opinion is also necessary for internal carriage. See page 20.

337 of this Code, will be liable for damages due to loss of, injury to or delay in arrival of the goods, unless he proves that neither he nor his agents have failed to exercise due care in connection with the receipt, delivery, custody and carriage of the goods.

As regards the carriage of passengers, art. 350 stipulates that the carrier will be liable for damages, for any injury sustained by the passenger by reason of the carriage, unless the carrier proves that neither he nor his agents have failed to exercise due care in connection with the carriage.

As regards the carriage of hand baggage of the passenger of which the passenger takes charge himself, the carrier is not liable unless the passenger proves that there has been negligence on the part of the carrier or any of his employees.

The basic principles of this liability correspond to those of the Warsaw Convention. The injured party is relieved of the burden of proving negligence of the carrier. In the special domain of aviation this is of great importance to the injured party because when an aviation accident has happened the victim will generally be so situated that it is as a rule impossible for him to discover what went wrong and resulted in his injury. In both the Japanese Commercial Code as in the Warsaw Convention the carrier's liability is based on the theory of fault; he will not be liable if he proves that he and his agents have taken the reasonable measures to avoid the damage.

As we will see, the Warsaw Convention is in two respects more advantageous to the carrier than the Japanese Commercial Code. In the first place the liability of the carrier, if he cannot prove that he and his agents have taken the necessary measures, is limited to a certain amount. [1] The Japanese Code does not contain such a provision. Further, as regards the carriage of goods, the carrier, under the régime of the Warsaw Convention, will not be liable if he proves that the damage was occasioned by negligent pilotage. The carrier under the régime of the Japanese Code will, on the contrary, be liable because he will not be able

1. It is to be observed that as regards hand baggage the Warsaw Convention limits the liability of the carrier to the sum of 5000 French francs without, however, the rules of the Warsaw Convention being applicable to the carriage of hand baggage. This question will be further discussed in Chapter II when we consider art. 22 of the Convention.

to prove that his agents (*in casu* the pilot) have exercised due care.

Attention should be drawn to the fact that the Japanese Commercial Code has expressly stipulated that the carrier is only liable for damages sustained by the passenger *by reason of the carriage*. The passenger, in order to render the carrier liable will therefore have to establish that the damage arose from the carriage. This provision, in our opinion, is absolutely necessary because it prevents a passenger injured before the carriage began, to claim against the carrier. As we will see the Warsaw Convention omitted to make an analogous provision [1].

It is to be observed that Japan, though being a High Contracting Party to the Warsaw Convention, has not yet taken measures to ratify this Convention.

MEXICO

The Mexican Law of Civil Aeronautics of June 30th 1930 [2] contains provisions on the liability of the owner of the aircraft.

The owner of the aircraft is responsible for the damages caused by it to persons or properties. Art. 102 of the law provides that the owner of an aircraft who rents it or lends it to another person for commercial services shall be held as being equally responsible with the latter if the Department of Communication is not opportunally notified in regard to the operation.

According to art. 104 of the Law, in the carriage of passengers, the owner and the flying personnel shall not incur any liability if they prove that they took every reasonable and technical measure as indicated, for the avoidance of the damage.

If the owner cannot furnish this proof he will be liable but only to the amount of 10.000 pesos, national gold, per person.

Art. 109 of the Law stipulates that all arrangements or agreements tending towards exoneration or change of the limits of liability of the carriers as established in the Law, shall be null and void.

1. See page 200.
2. An English translation of this Law has been made by Major Holstein, Secretary of the American Chamber of Commerce, Mexico, and published in the Journal of Air Law, October 1931, p. 557.

As regards goods, the carrier, by virtue of art. 113, is responsible for loss or damage unless it is proved that the damage is due to the negligence of the sender, to insufficient or defectual packing, to the defects or peculiar nature of the goods, to a case of force majeure or of fortuitous circumstances. In the carriage of goods no limits of liability have been fixed as has been done in the carriage of passengers.

It should be observed that the Mexican Law considers not only the liability *ex contractu*, but also the liability *ex delicto*. Such a system has the advantage that it avoids the carrier from falling under a different régime of liability in the event of the passenger or consignor bringing an action against him *ex delicto*. However, this principle has not been consistently followed.

Let us take the example of a passenger who has concluded a contract of carriage with the owner of an aircraft and sustains damages in an accident. If the owner cannot prove that he has taken all reasonable and technical measures to avoid the damage, by virtue of art. 104, he will be liable, but according to art. 105 only to the amount of 10.000 pesos. Art. 104, however, not only considers the liability of the owner, but also that of the flying personnel. As in art. 105 nothing has been said about the flying personnel one must conclude that if the flying personnel cannot prove to have taken the necessary measures they will be liable without limitation.

It seems unreasonable to us to limit the liability of the owner and not to limit the liability of the flying personnel.

When discussing the Warsaw Convention, we will see that, as regards the carriage of passengers, there are many analogies between this Convention and the Mexican Law. In both the Convention and the Mexican Law, the liability of the carrier is limited to a certain amount for each passenger and they both stipulate that any provision tending to relieve the carrier of liability or to fix a lower limit of liability shall be null and void.

As regards the proof to be furnished by the carrier in order to relieve himself of liability, it is to be observed that the carrier under the régime of the Mexican Law will be in a more favourable position than the carrier under the régime of the Warsaw Convention. The former régime requires the carrier to prove that he

himself took reasonable measures to avoid the damage, whereas the latter régime requires the carrier to prove that also his agents took such measures. This question will be further considered in Chapter II [1].

As to carriage of goods the situation is different. The Warsaw Convention has followed the same system as regards passengers with the exception that the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation. According to art. 113 of the Mexican law, the carrier is not liable if he proves a case of force majeure. As negligent pilotage does not of course constitute a case of force majeure for the carrier, he will in such an event be liable.

Contrary to the Warsaw Convention ,which limits the liability of the carrier in the carriage of goods to the amount of 250 francs per kilogramme, the Mexican Law has not fixed a limit of liability in such carriage.

As Mexico, on 14th February 1933, adhered to the Warsaw Convention ,it is to be hoped that the Mexican Law will be modified so as to make it in complete harmony with the provisions of the Warsaw Convention.

NETHERLANDS

The 10th September 1936 the Dutch Parliament passed a law containing provisions relating to carriage by air [2]. Before considering the contents of this law which reproduces nearly textually the rules of the Warsaw Convention of 1929, it is to be observed that from the beginning of the operation of air services in the Netherlands in 1919 until the date on which the above law came into force, only the general rules relating to liability of the Dutch Civil Code were applicable to the air carrier. These rules, which in general correspond to the rules of the French Civil Code, are based on the theory of fault [3]. The High Court of the Netherlands

1. See page 220.
2. Published in "Staatsblad van het Koninkrijk der Nederlanden", No. 523.
3. For a complete survey of the general rules of liability applied to the air carrier in the Netherlands before 10th Sept. 1936, see Goedhuis "La Convention de Varsovie", p. 6 and following.

considers that the faculty of pleading force majeure, given to the debtor in the articles 1280 and 1281 of the Civil Code, proves that the liability of the debtor as far as damage in the case of breach of contract is concerned, only exists in the case where the debtor has committed a fault [1].

Before the Warsaw Convention came into force, the conditions of carriage used by the members of the International Air Traffic Association, excluded all liability in the carriage of passengers and goods [2]. The Dutch air traffic Company K.L.M. being a member of this Association carried under these conditions. It is generally conceded that the principles of freedom of contract accepted in art. 1374 of the Dutch Civil Code (which corresponds to art. 1134 of the French Civil Code) entails the validity of exoneration clauses, unless a special law or considerations of a public order limit this freedom. The Dutch law contains no special provision which prohibits the carrier from excluding liability; as far as public order is concerned, this would only be threatened if the exoneration clause regarded non-liability in the event of wilful misconduct by the carrier.

Jurisprudence on exoneration clauses used by the air carrier

This opinion has been confirmed by the Judgment of the District Court of the Hague of 28th February 1935 in the case of K.L.M. versus Bodart. The Court was of opinion that article 6 of the Conditions of Carriage of the K.L.M. which was worded as follows:

> "By accepting a ticket or taking a flight the passenger renounces for himself and other persons who might otherwise be entitled to claim on his behalf, all claims for compensation for any damage that may occur to him or his luggage directly or indirectly,

1. Judgment of the High Court of Justice of the Netherlands of June 20th 1919. "Weekblad van het Recht", No. 1470.
2. The members of the International Air Traffic Association decided at its 24th Session to apply the General Conditions of Carriage, based on the Warsaw Convention, from the date on which the Convention itself came into force, that is on the ninetieth day after the deposit of the fifth ratification. These Conditions apply to all carriage, internal and international, performed by members of the I.A.T.A. Though the K.L.M., according to Dutch law had the faculty to exclude all liability, this Company for reasons of uniformity, decided as a member of the I.A.T.A. to accept the liability of the Warsaw Convention for all carriage performed by it.

however caused, while using an aeroplane or otherwise in connection with a flight".

excluded all liability *ex contractu* as well as *ex delicto* of the carrier.

According to the Court this clause even excluded gross negligence of the agents or servants of the carrier.

The case came up before the Court of Appeal at The Hague and this Court gave judgment on February 17th 1936; though also in the opinion of this Court exoneration clauses are in general valid, it considered that the clause used by the K.L.M. was not sufficient to debar the widow and children from making a claim *ex delicto* since the clause only aimed at persons who claim *on behalf of the carrier*. The Court considered that persons claiming in their own name, were not affected by the clause. It should be pointed out here that the clause in question was originally worded in German by the Legal Adviser of the Deutsche Lufthansa at a Session of the I.A.T.A. held in Vienna on 18th and 19th February 1927. The following text was proposed:

"Mit der Annahme des Flugscheines oder der Teilnahme am Fluge verzichtet der Fluggast insbesondere für sich und etwa in Betracht kommende andere Personen auf den Ersatz des Schadens der ihm mittelbar oder unmittelbar bei der Benutzung des Flugzeuges oder sonst im Zusammenhange mit der Luftreise, insbesondere im Zubringerdienst an seiner Person, seinen Sachen oder dem aufgegeben Gepäck erwächst".

It is clear that the term "persons who might be entitled to claim on his behalf", used in the English translation of the clause, does not cover all the people included in the German term "etwa in Betracht kommende andere Personen". The *intention* of the air traffic Companies was to cover all relations of the deceased passenger and other parties who would normally be entitled to claim in the case of death of or injury to a passenger. The Court of Appeal however rightly considered that the clause did not clearly express this intention to the contracting party of the carrier. As the K.L.M. stated that, when the passenger bought his ticket the agent of the K.L.M. offering the passenger an insurance policy, expressly drew the attention of the passenger to the fact that in case of his death neither his widow nor his

children would be able to claim, the Court allowed this Company to prove by witnesses that the passenger consented verbally in the exclusion from all liability of the K.L.M. towards his survivors.

At the moment of writing a final decision on this subject has not yet been given.

Law of 10th September 1936 concerning provisions relating to carriage by air

It has already been observed that this law reproduces nearly textually the rules of the Warsaw Convention of 1929 which was ratified by the Dutch Government on July 1st 1933.

Not only carriage between two points situated on Dutch territory is subject to the rules of the law of September 10th 1936, but also carriage between the Netherlands and a country which has not ratified the Warsaw Convention. The latter carriage does not fall under the Warsaw Convention. If the Dutch law had not extended its rules to such carriage, the common law would have to be applied. In order to obtain the greatest uniformity possible, the Dutch Government rightly applied the rules of the law to all carriage which does not fall under the Warsaw Convention [1].

There are certain divergencies between the law under consideration and the Warsaw Convention, the most important of which concerns the liability for delay. By virtue of art. 19 of the Warsaw Convention the air carrier is liable for delay. In art. 28 of the Dutch law it is provided that *unless stipulated to the contrary*, the carrier is liable for delay. By virtue of this article the carrier can thus exclude his liability for delay by a special clause, faculty which is not given to the carrier in the Warsaw Convention. The reasons why the Dutch Government made this modification will be explained in the second Chapter of our study when the question of delay in the Warsaw Convention will be dealt with [2].

Another divergence with the Warsaw Convention relates to the proof to be given by the passenger in order to render the carrier liable. By virtue of art. 24 of the law, for the carrier's liability to

1. See Kan "Civielrechtelijke Regeling van het Luchtvervoer" in Nederlandsch Juristenblad, 7th November 1936.
2. See p. 215.

be involved the damage must have taken place *in relation to the carriage by air.*

Whereas according to art. 17 of the Warsaw Convention the passenger has only to prove the damage and the accident, according to art. 20 of the Dutch law the passenger must also establish the relation between the accident and the carriage by air, which prevents the carrier from being declared liable for accidents having no relation with the operations of the air traffic company [1].

Finally the Dutch law contains certain provisions for cases where the consignee does not come to fetch the goods, or refuses to accept them or to pay outstanding debts on them, or when the goods are seised. These provisions do not appear in the Warsaw Convention.

We consider that the Dutch law might well serve as an example for those countries which have not yet made their internal legislation in harmony with the Warsaw Convention.

The Dutch airtraffic company K.L.M. operates all its services — including the service Amsterdam–Batavia — under the I.A.T.A. conditions of carriage.

POLAND

The Presidential Decree of the 14th March 1928 [2] contains provisions relating to the liability of the owner of the aircraft. Art. 59 of the Decree provides that the owner is liable, in principle, in respect of all damage or loss caused to persons or property. If the owner lets the aircraft to another person, who uses it for his own account, and if the location has been entered in the State register, the liability falls on the person who has used the aircraft for his own account.

Art. 60 provides that the operator is relieved of all liability if he proves that the damage was due to force majeure or the fault

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1. See further on this subject p. 200.
2. A translation in English of this Decree has been published in the Bulletin of Information No. 471 (13th August 1931) of the International Commission for Air Navigation.

of the injured party, or if the operator has taken all possible measures to avoid the damage.

In case of the death of or injuries to passengers, the liability of the carrier is limited to the amount of 20.000 zlotys for each passenger [1].

Agreements made with a view to exonerating the carrier from his liability or with a view to limiting it to a sum below the limit fixed, are null and void.

As to goods, the carrier is liable in respect of loss or damage from the moment of the conclusion of the contract to carry, to the moment of delivery, unless he proves that the loss or damage results from fault of the consignor, insufficient packing, a vice inherent in the goods or a case of force majeure. The liability for goods is limited to 200 zlotys per package.

Art. 63 stipulates that the carrier is not liable in respect of the non-performance of the journey, of delay in the departure or arrival of the aircraft, or in the event of a connection being missed.

When examining the rules of the Warsaw Convention we will see that there are many analogies between the Convention and the Polish Decree. The Decree dates from 1928 and it seems that the authors based themselves on the draft convention drawn up by the Ist International Conference for Private Air Law, held in Paris in 1925. The most important divergencies between the Convention and the Polish Decree should be pointed out here.

In the carriage of passengers the carrier, by virtue of art. 60 of the Decree, can exonerate himself from liability by proving that he has taken all possible measures to avoid the accident. What is to be considered as "possible measures" is left to the discretion of the judge. It is, however, to be expected that the proof of the crew being in possession of the licences provided in art. 19 of the Decree, and of the aircraft having been examined by the competent authorities as has been provided in art. 27, will be sufficient to relieve the carrier of liability [2].

Art. 20 of the Warsaw Convention stipulates that the carrier can exonerate himself from liability by proving that he and his agents have taken all necessary measures to avoid the damage.

1. For the quantum of damages to be compensated see Kilkowski, op. cit. p. 64.
2. Cf. Kaftal, "Liability and Insurance", Air Law Review, April 1934, p. 164.

It will therefore not be sufficient for the carrier to prove that he himself took the necessary measures, which is the proof to be furnished by the carrier by virtue of the Polish Decree, but he also will have to prove that his agents, including the crew of the aircraft, had taken such measures. The manner in which the carrier will have to furnish proof, will be considered *in extenso* in our second Chapter. It is however obvious that the proof required of the carrier by the Warsaw Convention in the carriage of passengers, is heavier than the proof required of the carrier in the Polish Decree.

In cases of negligent pilotage in the carriage of passengers the carrier, by virtue of the Warsaw Convention, will be liable because he will not be able to prove that his agents (in casu the pilot) have taken the necessary measures. The carrier under the régime of the Polish Decree, on the contrary, will not be liable if he proves that he himself took all possible measures to avoid the damage.

It has been seen that the Polish Decree has expressly stipulated that the carrier can also exonerate himself by proving a case of force majeure. This seems illogical to us. If there is a case of force majeure the carrier will be exonerated from liability because he will be able to prove that he has taken all possible measures to avoid the damage. If he cannot make this proof, he ought not to be relieved of liability.

When we discussed the rules of liability governing the air carrier in France, we already considered the questions arising in connection with the notion of force majeure. We will therefore not examine this question further here [1]. A comparison between the proof of force majeure and the proof of having taken all necessary measures will be made when we examine art. 20 of the Warsaw Convention.

Up till now we have only considered the question of liability as regards passengers. It is remarkable to note that as regards the liability for goods, the situation of the carrier under the régime of the Warsaw Convention and under the régime of the Polish Decree is just reversed.

By virtue of art. 64 of the Decree, the carrier will be liable for

1. For the interpretation of force majeure in Polish law see Kaftal "Lotnictwo a prawo cywilhe", Warsaw 1926, p. 68.

damage unless he proves that the loss or damage results from the fault of the consignor, insufficient packing, a vice inherent in the goods, or a case of force majeure. In the case of damage due to negligent pilotage in the carriage of goods, the carrier will therefore be liable because he will not be able to prove a case of force majeure. The carrier under the régime of the Warsaw Convention, on the contrary, will not be liable. Art. 20 par. 2 of the Convention expressly provides that in the carriage of goods the carrier is not liable if he proves that the damage was occasioned by negligent pilotage. It seems to us that both systems should be rejected because there is no legal reason to make a difference on this subject between passengers and goods. The arguments on which we base our opinion will be set forth in Chapter II [1].

Another important divergence from the Warsaw Convention is that regarding liability for delay. Under the rules of the Warsaw Convention the carrier is liable for delay. He cannot avoid this liability by a special clause. Art. 63 of the Polish Decree on the contrary, expressly provides that the carrier is not liable for delay. It has been observed that the Dutch law of 10th September 1936 by which the rules of the Warsaw Convention have been applied to all carriage by air in the Netherlands, provides the possibility for the carrier to exonerate himself by a special clause. In view of the fact that aviation is still, to a great extent, subject to weather conditions we consider it necessary to grant such a faculty to the carrier.

Finally it is to be observed that the Polish Government is preparing a new air navigation law. According to information received from the Polish airtraffic company Polskie Linje Lotnicze "Lot" this new law will apply the rules of the Warsaw Convention also to internal airtraffic. The "Lot" being a member of the International Air Traffic Association operates all its services under the conditions of carriage of this Association, which are based on the Warsaw Convention.

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1. See p. 229. et seq.

RUMANIA

The Rumanian Airministry has drawn up a draft law relating to air navigation, in which the internal legislation is made in harmony with the provisions of the Warsaw Convention, as well as with the provisions of the Rome Convention. Both these Conventions have been ratified by Rumania [1].

It is to be expected that in the course of 1937 this law will be accepted by the Rumanian Parliament. At the moment of writing there are, however, no special provisions regulating the liability of the air carrier in national transportation.

In the first place the general rules of liability laid down in the articles 998 et seq. of the Rumanian Civil Code will be applied. These rules correspond to the rules fixed in the articles 1382 and following of the French Civil Code and are therefore based on the theory of fault.

It is conceded that besides the general rules of liability, the special rules of the Rumanian Transport Code pertaining to carriage by land, will by analogy be applied to carriage by air [2].

Art. 441 of this Transport Code prohibits railway companies

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1. Attention should be drawn to the fact that at the present moment only two countries (Rumania and Spain) have ratified the Rome Convention. The International Air Traffic Association, at its 35th Session, took the following decision:
"Insurance of the liability of the operator towards third parties.
1. The XXXVth Session of the I.A.T.A. has duly noted the decision of the C.I.T.E.J.A. concerning the insurance to be effected by an operating Company to cover its liability to third parties on the ground as well as the letter which it is proposed to address to the French Government on this subject (Document No. 275 of the C.I.T.E.J.A.) As it appears doubtful whether it is possible to avoid the difficulties to which art. 14*b* of the Rome Convention may give rise by means of an agreement or additional convention, the I.A.T.A. submits that the next Diplomatic Conference should give consideration to an amendment of this article.
2. The members of the I.A.T.A. are asked to approach their Governments with the request that ratification of the Convention should be delayed until after the Diplomatic Conference of 1937 and to ask this Conference to re-examine article 14*b* of the Convention".
By virtue of the 2nd paragraph of this decision, the members of the I.A.T.A. have approached their Governments. Up till now 6 countries viz. Denmark, Finland, Great Britain, the Netherlands, Norway and Switzerland have decided not to ratify the Rome Convention at the present moment. It seems therefore probable that the next International Conference for Private Air Law, which will be held in 1937, will re-examine and modify art. 14*b* of the Convention.
2. Prochasson "Le Risque de l'Air", p. 124.

from excluding their liability or from limiting it where the limitation of liability carries with it a decrease in the cost of carriage as shown in the ordinary tariffs.

This article has been interpreted restrictively and has only been applied to carriage by rail. Consequently, as no special law prohibits the air carrier from relieving himself of liability by exonerationcl auses, such clauses must be considered as valid. According to Rumanian jurisprudence exoneration clauses on passenger tickets are only valid if they have been signed by the passenger.

The Rumanian Air traffic Company L.A.R.E.S., a Company operated by the State, is using for all its carriage, national as well as international, the conditions of carriage of the J.A.T.A. These conditions, as has been observed, reproduce the rules of the Warsaw Convention.

SIAM

The law relating to air navigation B.E. 2465 (1922) has made in its Chapter X provisions on the liability of the air carrier [1].

Art. 113 of this law stipulates that the air carrier of passengers and goods has the same duties and bears the same responsibilities as any other carrier.

The liability of the carrier in general is regulated in Siam by Title VIII of the Siamese Civil and Commercial Code which came into force on November 11th 1926. As regards the carriage of goods, art. 616 of this Code provides that the carrier is liable for any loss, damage or delay in delivery of the goods entrusted to him unless he proves that the loss, damage or delay is caused by force majeure or by the nature of the goods or by the fault of the consignor or consignee.

In the carriage of passengers the carrier, according to art. 634 of the Code, is liable for personal injuries or for the damages immediately resulting from a delay suffered by reason of the

1. French text of the law has been published in Bulletin de la Navigation Aérienne, 1929, p. 1876.

transportation unless the injury or delay is caused by force majeure or by the fault of such passenger.

Clauses in transport documents excluding or limiting the carrier's liability towards passengers or for goods, are valid on the condition that the passenger or consignor have expressly agreed to this exclusion or limitation of liability. The air traffic Companies Air France, Imperial Airways and K.L.M. operating services to and from Bangkok use for their carriage the conditions of the I.A.T.A. which are based on the Warsaw Convention.

SPAIN — PORTUGAL

Neither Spain nor Portugal have as yet fixed special rules governing the liability of the air carrier in internal carriage [1]. The general rules of liability of the Civil Codes are to be applied.

Art. 1101 of the Spanish Civil Code stipulates that the persons who perform their obligations in bad faith, with negligence or with delay, and those who, in any way whatsoever contravene against the clauses of their contract, are under the obligation to compensate the damages caused.

Art. 1104 stipulates that in general the care with which the obligation should be performed is that of a "bon père de famille".

Art. 705 of the Portuguese Civil Code states that in the event of non-performance of the obligation, the debtor is liable for damages unless the non-performance is due to the fault of his contracting party, a case of force majeure or a fortuitous event.

The principles of liability of both Codes are based on the French Civil Code. The questions which arise in connection herewith have been considered under the heading "France". As regards the question as to whether the carrier's liability towards passengers is *ex contractu* or *ex delicto* it is to be observed that M. Gay de Montella, a Spanish authority on air law, expresses the opinion that the carrier's liability must be considered as contractual. We have seen that in France the "Cour de Cassation" is, since 1911, of the same opinion.

1. Spain was the first country to ratify the Warsaw Convention. On 31st March 1930 the Spanish Government deposited the instruments of ratification.

As regards the question of non-liability clauses M. Gay de Montella considers that the reasons which permit the maritime carrier to make use of non-liability clauses also militate in favour of declaring valid the non-liability clauses used by air carriers [1]. The Spanish air traffic Company L.A.P.E. and the Portuguese air traffic Company Aero Portuguesa use on all their services the I.A.T.A. conditions of carriage.

SWITZERLAND

The Committee for the preparation of a new Swiss law on air navigation, appointed by the Head of the Federal Department of Post and Railways decided at its last Session to recognize the principles of the Warsaw Convention, which was ratified by the Swiss Government on 9th May 1934, for *all* carriage by air, including national carriage. It is therefore to be expected that in the future Swiss Law relating to air navigation the provisions of the Warsaw Convention will be adopted completely for all carriage by air performed in Switzerland [2]. The reasons why we consider the application of the rules of the Warsaw Convention to internal carriage to be an absolute necessity have been explained *in extenso* in the Introduction. In the special case of Switzerland this is all the more necessary as the Decree of the Federal Council of January 1920 [3], by which at the present moment internal air carriage in Switzerland is governed, imposes upon the carrier a purely objective liability.

Art. 26 of this Decree declares the air carrier liable without limitation for damages, to persons or property, arising out of air navigation. This liability is based on the theory of risk. The carrier cannot exonerate himself from liability by proving absence of fault. Only in case of fault of the victim the judge *can* pronounce total or partial exoneration of the carrier. This is however left entirely to the judge's discretion.

1. "Las Leyes de la Aeronautica" p. 70 et seq.
2. Information received from the Swiss Federal Air Office.
3. For French text of the Decree, see Bulletin de la Navigation Aérienne, Paris, 1920, p. 10; for a complete survey of Swiss Air Law see Hess "Schweizerisches Luftrecht" Zürich 1927, and "Archiv für Luftrecht" 1936 I, p. 1.

We have already cited the objections which, in our opinion, must be made against the application of the theory of risk to the air carrier's contractual liability. Only in cases where the position of the author of the damage and that of the victim are unequal, as in the case f.i. of a third party on the ground extraneous to aviation suffering damages, the application of the theory of risk can be justified.

The authors of the Warsaw Convention rightly based themselves on the idea that persons making use of air navigation accept the risks inherent in this mode of transport and that the air carrier ought not to be liable without fault.

The question arises of whether the air carrier under the régime of the Decree of 1920 can, by a special agreement, exonerate himself from the liability imposed on him.

The Decree does not contain any special provision on this subject. Art. 31 stipulated however that the rules of the Federal Code relating to obligations are applicable in so far as the provisions of the Decree do not provide to the contrary. Subject to certain limitations the carrier, by virtue of the Federal Code relating to obligations, has the faculty of exonerating himself from his liability. According to art. 100, par. 2 of the Code, such agreements are null and void in so far as they exclude liability for wilfull misconduct and gross negligence. Even in the case of slight negligence the judge may in his discretion hold them void if they concern the liability of enterprises which are licenced by the Government. As by virtue of art. 16 of the Federal Decree all air transport activities are necessarily licenced by the Government, it is clear that exoneration clauses will not be of much avail to the air carrier [1].

The position of the internal air carrier, when the new Swiss law is passed, will therefore be much more favourable than that at the present moment.

Finally it should be observed that the Swiss air traffic Company "Swissair" performs all its services — international as well as internal — under the conditions of carriage drawn up by the International Air Traffic Association, conditions which are based on the Warsaw Convention. Since a few years this company has

1. As to the quantum of damages to be compensated by the carrier, see Kilkowski op. cit. p. 57.

introduced a compulsory accident insurance for passengers. This insurance is made on principle in order to compensate the liability flowing from the conditions of carriage. The payment of the indemnities [1] is made under the conditions that the passenger and his representatives renounce from taking action for civil liability.

TURKEY

At the present moment Turkey has not yet passed a special legislation regarding the liability of the air carrier. The rules of the Code relating to obligations and those of the Commercial Code must therefore be referred to.

The Commercial Code in its art. 88 expressly stipulates, however, that its rules relate to the carrier on land and on sea. It has therefore been maintained that the provisions of this Code cannot be extended to carriage by air [2]. Nevertheless it is to be expected that, as the rules of the Commercial Code are the only rules on which the Courts can base themselves with regard to passengers — the Code relating to obligations only considers carriage of goods — in the event of a passenger by air sustaining damage through an accident, the rules of the Commercial Code will be applied analogously.

Art. 928 of the Commercial Code provides that the carrier is not liable for accidents sustained by passengers during the journey unless it is proved that the accident was caused by an act or default committed by the carrier or persons for whom he is answerable. Nevertheless, in the event of an accident arising from an extraordinary occurrence or force majeure, the carrier is held to be liable if he committed a fault preceding the occurrence from which the accident resulted.

It should be pointed out that this provision is favourable to the carrier in so far as it imposes the burden of a breach of contract on the passenger. We have already remarked that in air

1. The amounts paid to the passenger are:
   Sfcs. 25.000 in case of death;
   „ 50.000 in case of total permanent infirmity;
   „ 25.— per day in case of temporary incapacity.
2. See Prochasson "Le Risque de l'Air", p. 128.

navigation the plaintiff will in many cases be so situated that it is impossible for him to see and equally impossible for him to discover what went wrong and resulted in his injury or loss. As we will see the Warsaw Convention therefore shifted the burden of proof from the shoulders of the plaintiff to the shoulders of the air carrier.

As to the carriage of goods, the Turkish Code relating to obligations will probably be applied. This Code which is based on the Swiss Federal Code of obligations recognises liability based on the theory of fault. As to exoneration clauses the Code declares such agreements as null and void in so far as they exclude liability for wilful misconduct and gross negligence. Even in the case of slight negligence, the judge may in his discretion hold them void if they concern the liability of enterprises which are licenced by the Government.

UNION OF SOUTH AFRICA

No special rules concerning the liability of the air carrier in South Africa have as yet been fixed. All regular air services in the Union are operated by South African Airways, a company belonging to the South African Railways and Harbours Administration. The Railways and Harbours Administration operates its air services as a common carrier under common law.

As regards the carriage of passengers, art. 7 of the conditions of carriage issued by the Administration stipulates that carriage is untertaken at the sole risk and responsibility of the passenger, without any liability on the part of the Administration, its servants or persons contracting with or serving the Administration as agents, carriers or in any other capacity. Art. 8 provides that by virtue of his acceptance of the ticket or on his participation in the flight, the passenger expressly recognises that no claim for compensation shall arise directly or indirectly against the Administration for injury to his person or damage to or loss of his luggage.

It is to be observed however, that this contract with the passenger does not relieve the Administration from any liability

to a dependent of a passenger who is killed, if it can be shown that the accident was due to the negligence of the Administration or its servants.

The effect of this situation is that a passenger having suffered injuries through an air accident can not claim any damages though he may remain permanently infirm and will no longer be able to support his dependents.

If the passenger had been killed, the dependents would financially have been in a more favourable position because in that case they would have had the possibility of bringing a claim for compensation of damages.

As regards the carriage of goods, art. 36 of the Conditions of carriage stipulates that the Administration shall not be liable for loss, damage or delay except upon proof by the consignor or consignee that such loss, damage or delay was occasioned by and through the wilful misconduct or malfeasance of the Administration's servants. This means that practically all liability of the carrier is excluded.

According to information received from the Director of Civil Aviation, the Government of the Union of South Africa has the intention of ratifying the Warsaw Convention, but does not intend, however, to make the rules of the Convention apply to internal traffic.

A passenger travelling from A to B, two towns in South Africa, and then continuing his journey to C, a town in a country which has ratified the Warsaw Convention, will fall under a régime of liability which is much more favourable to him than the régime of liability under which he would fall if he travelled from A to B without continuing his journey to C. As we observed already, we are of opinion that in practice it will prove impossible to maintain two completely different régimes of liability for national and international air traffic.

UNITED STATES OF AMERICA

At the present moment there is in the United States no special uniform law governing the liability of the air carrier to passengers and for goods.

The standing committee on aeronautical law of the American Bar Association submitted in September 1931 a report in which a text of a "Uniform Aeronautical Code" was proposed. Section 8 of this Code relating to the liability to passengers, stipulated that the liability of the operator of an aircraft carrying passengers, for injury or death to such passengers shall be determined by the rules of law applicable to torts on land arising out of similar relationships. In the report the "raison d'être" of section 8 is explained as follows:

"In sections 7 and 8 the committee has restated the old rule as to passengers and as to collisions with some language to clear it as previously stated by the uniform Aeronautics Act. The Committee is not yet ready to announce a new or all inclusive rule covering the complicated relations between passenger and carrier, and involving first the question of common carrier and second the question of private carrier for hire and lastly, the question of guest passengers. Until these matters are more fully worked out, the Committee believes they should not be the subject of state enactment, but should be left to the present policies within each state" [1].

Nineteen States, namely, Arizona, Georgia, Idako, Indiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, North Carolina, North Dakota, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermout and Wisconsin have adopted section 8 of the Code in question [2].

Pensylvania has enacted a statute to the same effect.

As to the extent of the liability of the air carrier two States, Arizona and Connecticut provide expressly for unlimited liability in the case of death of a passenger caused by negligent operation of aircraft.

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1. See Journal of Air Law October 1931, p. 549.
2. See Journal of Air Law, July 1935, p. 389.

Maryland provides that the liability of the owner of aircraft engaged in interstate commerce for any loss incurred without his privity or knowledge shall be limited to the amount or value of his interest in the aircraft and her freight then pending [1].

California passed a statute providing that gratuitous passengers shall have no action for damages for injury or death during flight, unless the accident resulted from the intoxication or wilful wrong of the pilot.

Two States, Louisiana and Virginia approach the problem of liability of the air carrier through the medium of insurance; in Louisiana the air carrier is obliged to procure and execute an indemnity bond with the obligation running in favour of any person who may be injured in person or property. As the only proof necessary to recover under the bond is a showing of loss or damage as the result of the operation of the airplane, it must be concluded that Louisiana has imposed an absolute liability upon the air carrier [2].

In Virginia an analogous situation exists. The air carrier must obtain a liability insurance of $ 5000 for loss sustained by the insured by reason of bodily injury to or death of anyone passenger, of $ 10000 for loss sustained by reason of bodily injury to, or death of more than 1 passenger [3].

In connection with the thesis put forward according to which the national legislation should harmonize with the rules of the Warsaw Convention, it is useful to note finally that fifteen States, Wisconsin, Connecticut, Illinois, Indiana, Kansas, Missouri, New Hampshire, Oregon, South Dakota, Virginia, West Virginia, Massachusetts, Minnesota, Colorado and Maine have set a maximum limit of recovery in their death by wrongful act statutes. (the amounts of damages varying from $ 500 to $ 12.500).

The short survey of the existing state aeronautical legislation

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1. "This Act is copied from United States' Code, Title 46, par 183 (q.v.) and may receive the construction, as that section has, that it applies to injuries to passengers. But the surrounding sections of the Chapter are all directed towards the carriage of goods and since the working of this one is not entirely clear, the doctrine of "noscitur a sociis" may be applied to limit it to the carriage of goods". Rittenberg in Journal of Air Law, July 1935, p. 398.
2. See Greer "The Civil liability of an Aviator as Carrier of Goods and Passengers" Journal of Air Law, July 1930, p. 241.
3. See Journal of Air Law, October 1930, p. 477.

as concerns the liability of the air carrier to passengers and for goods leads to the conclusions that this subject is hardly dealt with. In most states the general rules of common law have to be applied.

Air carriers to be considered as common carriers

The first question to be considered is whether air carriers are common carriers.

The Air Commerce Act of 1926, though making no definite statement, implies that air transport Companies are common carriers [1]. Though some textwriters [2] contest that the air carrier comes within the accepted definition of a common carrier, the great majority of law review articles on the subject express the opinion that air transport companies have to be regarded as common carriers [3].

This opinion has been confirmed by the Courts which considered air traffic companies operating regular lines as common carriers [4]. We have seen that in England in the case Aslan v. Imperial Airways Mr. Justice Mackinnon also arrived at the conclusion that in principle there is no reason for the air carrier not to be considered as a common carrier [5].

Granted that an air traffic company is a common carrier can it avoid this status by an express clause? Whereas in England it is conceded that repudiation of the status of common carrier is allowed, in the United States clauses to this effect are uniformly considered to be of no avail [6].

Exemption or limitation of the liability of the air carrier

It being admitted that an air traffic company is a common carrier can it by special contract stipulate for exemption from or limitation of liability?

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1. See Lupton, "Civil Aviation Law", paragraph 71.
2. Harriman in Journal of Air Law, January 1930, p. 36; Cuthell in Journal of Air Law, October 1930, p. 523.
3. See the textwriters quoted by Quindry in Journal of Air Law, October 1932, p. 481, note 6.
4. Curtiss Wright Flying Service Inc. v. Glose, 66 F (*2d*) 710, 1933; See on this case Logan in Journal of Air Law, October 1934, p. 555.
5. See page 30.
6. See Edmunds in Journal of Air Law, July 1930, p. 324; Quindry in Journal of Air Law, October 1932, p. 479. It has to be observed that the uniform consignment note used by the members of the International Air Traffic Association provides expressly that the Companies are not common carriers.

There again English and American opinions differ. In England a carrier whether he be a common or a private carrier can deny all liability unless this is expressly forbidden by law [1]. The prevailing American doctrine is that a common carrier cannot stipulate for exemption from or limitations of his liability in case of negligence [2]; and the Courts have generally refused to honour such attempts [3]. However from the case Conklin v. Canadian Colonial Airways Inc. 266 N.Y. 244 (1935) the conclusion can be drawn that in the opinion of the Court a common carrier may limit his liability for negligence in those cases where he offers the passengers the alternative of purchasing a ticket at a higher price by which the carrier accepts full liability. Where the passenger voluntarily chooses the lower priced ticket, the liability of the carrier is limited [4].

It is remarkable to note that, whereas in nearly all countries the limitation of liability of the air carrier for negligence is felt to be in no way against public policy and generally even is felt to be an economic necessity, the Committee of the American Air Transport Association in a report on the question of a uniform Ticket Contract and Standard Ticket form considered any attempt to limit liability of the carrier where the damage is caused by the carrier's negligence as against public policy [5].

What is the reason for considering clauses limiting the liability of the air carrier for negligence as being against public policy?

The main argument invoked against such clauses is that they might tend to result in the exercise of less care by the carrier. This argument is certainly not convincing. To increase their volume of traffic, air carriers are in the absolute necessity of increasing their safety. An analysis of the statistics of airline operation

1. See McNair, The Law of the Air, p. 116.
2. See Allen in Journal of Air Law, July 1931, p. 328; see also Cha "Aircarriers Liability to Passengers — Anglo-American Law — French Law", Air Law Review, April 1936, p. 154. It is to be observed here that the title of this article is in a certain sense misleading because the author considers the question of the air carrier's liability only from the point of view of American Law and not of English law. The differences between the English and American law as regards the possibility of repudiating the status of common carrier and as regards exemption from or limitation of liability have not been brought out.
3. See Lupton, Civil Aviation Law, par. 76; Rittenberg in Journal of Air Law, July 1935, p. 370.
4. See Air Law Review, April 1935, p. 192.
5. See Greer, "The civil liability of an aviator as carrier of goods and passengers", Journal of Air Law, July 1930, p. 251.

shows that the traffic of a company, of which an aeroplane has had an accident, immediately shows a strong decrease. Moreover, it must not be forgotten that injuries to passengers are as a rule caused by accidents which result in serious damage to the equipment. These factors should allot all fears that the care of the air carrier will decrease when his liability is limited [1].

Different textwriters suggested that legislation in the United States be enacted by which the liability of the air carrier is limited [2].

As we will see the delegates of the 31 States participating in the IInd International Conference for Private Air Law held at Warsaw in October 1929, considered the limitation of liability of the air carrier, even in the case of his negligence, as an economic necessity. For that reason the Warsaw Convention in its article 22 fixed certain amounts to which the liability of the carrier is limited. The fact that the United States' Government adhered to this Convention proves that the Government realised the necessity of limitation of liability in international air traffic. The arguments militating in favour of limitation of liability in international air traffic have the same force in national air traffic [3].

Liability of the air carrier as a common carrier

Whereas the air carrier as a common carrier of goods is liable for any loss or damage occurring to the goods which he cannot prove to have resulted from the act of God, the Kings enemies, inherent vice or defect of the goods or the negligence of the owner of the goods himself, the air carrier of passengers is liable when he has not furnished a vehicle for the carriage of passengers as fit for the purpose as skill and care can render it or has not exercised reasonable care and skill in carrying them. No absolute guarantee

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1. Cf. Rittenberg, "Limitation of Airline Passenger liability", Journal of Air Law, July 1935, p. 365.
2. See f.i. O.Ryan "Limitation of Aircraft Liability", Air Law Review, January 1932, p. 27; Ball "Compulsory Airplane Insurance", Journal of Air Law, January 1933, p. 52; Rittenberg, op. cit. p. 265; Knauth "Aviation and Admiralty", Air Law Review, October 1935, p. 309.
3. It has to be observed that the Marine Limitation of Liability Act passed by the United States' Congress in 1851 was the result of the weak financial position of the industry and the need of attracting capital to it. The same factors apply to the air industry in its present stage. See Cooper, "Rules of Aircraft Liability in the Proposed Federal Merchant Shipping Act", Air Law Review 1931, p. 327.

is however given regarding the safety of the vehicle nor the security of the passenger.

Burden of Proof

The analysis of French law has shown that the fact of a passenger being injured consequent on an accident which occurred in connection with the air carriage, must be considered as a presumption of breach of obligation incumbent on the carrier[1].

The burden of proving that the damage was due to an event which excluded fault on the carrier's part, falls on the carrier.

As to English law, we have seen that according to the fundamental principle of Anglo-Saxon law of evidence, the plaintiff in order to render the defendant liable of negligence must give affirmative proof thereof; the negligence proven, must be further proven to have been a proximate cause of the damage. On certain cases, by the application of the "res ipsa loquitur" maxim, the burden of proof can be shifted upon the defendant.

Is the maxim of Res ipsa loquitur applicable to air accidents?

Concerning the application of the res ipsa loquitur maxim to air navigation accidents it has been observed [2] that the inference of negligence cannot reasonably be raised from the occurrence of an accident because in the present stage of air navigation many things besides negligence of the carrier can cause an aeroplane to fall. In the United States neither the Courts, nor the textwriters agree on the question of whether the doctrine of res ipsa loquitur should generally be applied to air accidents.

Cases in which the Courts applied the res ipsa loquitur maxim

In the state of California the res ipsa loquitur maxim has been regularly applied to air accidents [3]. First in the case of *Smith v. O'Donnell* [4] the Supreme Court of California in 1932 considered that an air accident raised the presumption of negligence which the defendant must overcome by proof that there was in fact no negligence.

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1. See page 44.
2. See page 36.
3. McCormick, Aviation Law, Air Law Review, Oct. 1935, p. 299.
4. 215 Cal. 714, 12 P (*2d*) 933 (1932).

In the case of *Thomas v. American Airways* [1] the Federal District Court for the Southern District of California gave an instruction on res ipsa loquitur in which the Court said: "This imports what is called the rule of res ipsa loquitur which means that the happening speaks for itself by indicating that some negligence must have produced the damaging result".

In the Trial Division of the New York Supreme Court an instruction on the doctrine of res ipsa loquitur was likewise given by the Court in the case *Stoll v. Curtiss Flying Service* [2].

In the case *Seaman v. Curtiss Flying Service* [3] the Court held that where an airplane left the ground in prefect condition and crashed shortly after the takeoff the doctrine of res ipsa loquitur applied.

Cases in which the Courts did not want to apply the res ipsa loquitur doctrine

The Massachusetts' Supreme Court in the case of *Wilson v. Colonial Airways* [4] held that where the engine of a passenger plane suddenly stopped shortly after the take-off, the plaintiff cannot recover unless the plaintiff can prove what caused the stopping of the engine.

The Arkansas' Supreme Court in the case of *Herndon v. Gregory*[5] decided on April 22nd 1935, came to the same conclusion as the Massachusetts' Supreme Court. In the opinion of that Court the res ipsa loquitur doctrine could not be applied because many things besides negligence can cause an aeroplane to fall [6].

An analysis of the articles published on the subject of res ipsa loquitur in aviation shows that the opinions of the authors are as divergent as are the opinions of the Courts.

Textwriters concluding that the res ipsa loquitur doctrine should be applied

M. Greer thinks[7] it would be wise to apply the doctrine of res

1. 235 C.C.H. 1205 (1935).
2. 1930 U.S.A. v. R. 148 (1930).
3. 1931 U.S.A. v. R. 229 (1931).
4. 1931 U.S.A. v. R. 109 (1931).
5. — Ark. —, 81 S.W. (2*d*) 849 (1935).
6. For further cases where the res ipsa loquitur doctrine was applied, for instance, in the case of damage towards third parties see Logan, Review of 1935 Aeronautical Law, Journal of Air Law, October 1935, p. 414; and Lupton, "Civil Aviation Law", paragraph 108.
7. "The civil liability of an aviator as carrier of goods and passengers", Journal of Air Law, July 1930, p. 260.

ipsa loquitur to air accidents. Mere proof of the contract of carriage and damage, loss or injury resulting therefrom would make out a *prima facie* case so as to shift the burden upon the defendant of showing that the damage was not the result of negligence.

M. Allen [1] remarks that even if the accident is due to an unknown cause, the carrier may be held liable by the application of res ipsa loquitur.

M. Axelrod [2] points out that as it frequently happens that evidence of aircraft disasters is practically unobtainable, the doctrine of res ipsa loquitur should be applied.

M. Gates [3] of is opinion that the doctrine of res ipsa loquitur achieves approximately the same beneficial results for the public as the rule of absolute liability.

M. Logan [4] expresses the opinion that there is already a preponderant weight in favour of the rule that res ipsa loquitur does apply in unexplained air accidents.

M. Bohlen [5] considers the invocation of the maxim necessary to prevent the injustice of denying recovery to a probably meritorious plaintiff.

Textwriters concluding that the res ipsa loquitur maxim cannot be applied to accidents of air navigation

M. Edmunds [6] writes that the mere fact of an accident without testimony or other evidence of violation of rules and regulations or failure to provide proper equipment and safety devices should not raise a presumption of negligence against the carrier sufficient to form a basis of recovery.

M. Wikoff [7] is of opinion that to hold the air companies, affirmative proof of negligence must be given by the passengers.

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1. "Limitation of liability to passengers by air carriers", Journal of Air Law, July 1931, p. 331.
2. Journal of Air Law, October 1932, p. 667.
3. Journal of Air Law, July 1933, p. 435.
4. "Review of 1935 Aeronautical Law", Journal of Air Law, October 1935, p. 533.
5. "Aviation under the Common Law", Air Law Review, April 1935, p. 165; it should be pointed out that M. Bohlen considers the question principally from the point of view of third parties.
6. "Aircraft Passenger Ticket Contracts", Journal of Air Law July 1930, p. 332.
7. "Uniform Rules for Air passenger Liability", Journal of Air Law, October 1930, p. 515.

M. Osterhout [1] points out that in aeroplane accidents there often is doubt as to the exact cause of the accident and concludes to the non-application of the res ipsa loquitur presumption of negligence where other unknown and uncertain causes including external forces of nature, may with equal probability have caused or contributed to the airplane disaster.

M. McCormick [2] considers that there is a natural reason of compelling force for opposing the adoption of the res ipsa loquitur maxim and presuming negligence on the part of the aeronaut in an event. The majority of aviation accidents are extremely serious with many fatalities. Man is not presumptively negligent with his own life and therefore not presumptively negligent with the instrument which preserves his life during flight.

M. Cha in the summary of his article on Air Carrier's Liability [3] expresses the opinion that the principle of res ipsa loquitur applies when the carrier has the sole control of the means of carriage, when there is sufficient common experience to justify a presumption, and when the accident is not attributable to an act of God or some unknown cause or negligence. This general statement does not give an answer to the question whether in M. Cha's opinion at the present stage of development of air navigation there is sufficient common experience to justify the presumption of negligence. However at another part of his article he writes: "One can perhaps remark here that so long as the use of due care does not guarantee the absolute absence of accidents, there is no ground for the application of the res ipsa rule". We conclude herefrom that M. Cha at the present moment is not in favour of a general application of the res ipsa rule to air navigation accidents.

From the jurisprudence and the doctrine on the application of the res ipsa loquitur maxim the following conclusions can be drawn. The main argument put forward by those in favour of the

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1. "The Doctrine of Res Ipsa Loquitur as applied to aviation", Air Law Review, January 1931, p. 9.
2. "Aviation Law — Its Scope and Development", Air Law Review, October 1935, p. 299.
3. "The Air carrier's Liability to Passengers — Anglo-American Law — French Law", Air Law Review, April 1936, p. 154.

application, is the necessity of helping the plaintiff who would be in a too disadvantageous position if in the case of an air accident, he would have to prove affirmatively the negligence of the air carrier.

Though we also are of opinion that the plaintiff must be relieved of the burden of proving negligence of the carrier, we nevertheless think it legally unjustifiable to arrive at this object by the invocation of the res ipsa loquitur maxim. The first objection to be made against the application of the rule is of a theoretical nature. It is uniformly conceded that the foundation of the doctrine is based upon:

a. probabilities,

b. convenience.

"When it is shown that the occurrence is such as does not ordinarily happen without negligence on the part of those in charge of the instrumentality and that the thing which occasioned the injury was in charge of the party sought to be charged, the law operating upon the probabilities and the theory that if there were no negligence the defendant can most conveniently prove, it raises a presumption of negligence which defendant must overcome by proof that there was in fact no negligence".

As has been observed the advocates of the application of the doctrine base themselves on "convenience" but the question of the "probability" is generally not considered. But in our opinion it is just the question of "probability" which opposes the invocation of the doctrine. In the present stage of development of air navigation it is impossible to maintain that an accident does not ordinarily happen without the negligence of the air carrier.

Without wanting to enter into technical detail we think it useful, in order to justify our opinion, to draw attention to the relatively new phenomenon of iceformation on aeroplanes [1].

Several crashes with aeroplanes which occurred in the last years were due to this danger unique to aircraft; and it is firmly

1. Under certain meteorological conditions, ice may deposit at all leading edges of the aeroplane, and grow to windward, at critical regions of the relative airflow, in shapes which increase drag and seriously increase drift. The accumulated ice adds to the weight. Unsymmetrical ice deposits on the airscrew blades cause dangerous engine vibrations which can only be kept in check, if at all, by throttling back at the expense of thrust. Venturis and pressure heads orifices become blocked with ice, rendering the instruments they serve useless. External controls may become jammed.

believed that many crashes which happened in the first stages of air navigation and of which the cause remained unknown were really due to this phenomenon. Though different methods are devised to prevent the accretion of ice on aeroplanes, there is at the present moment not yet a completely efficient remedy against this danger.

This one example seems already sufficient to prove that other causes than negligence of the carrier may with equal or even greater probability have caused or contributed to the airplane disaster.

Accidents due to unknown cause

The second objection to be made against the application of the doctrine is the following. Though it is conceded that the res ipsa loquitur maxim is not a principle of liability but simply a rule of evidence, it is to be feared that in aviation cases it wil materially affect the liability of the air carrier. In many air accidents the cause of the accident has remained unknown. Taking into account the very large tracts of water which will be flown over by regular airlines in the near future, it is to be expected that the causes of accidents to aeroplanes flying over the high seas will often remain unexplained [1]. Different textwriters maintain that if an accident is due to an unknown cause the carrier will be held liable by the application of the res ipsa loquitur doctrine [2]. A system the application of which leads to making the carrier liable in all cases where he cannot show affirmatively the cause of an accident, has to be rejected.

To impose on the carrier liability for damages resulting from any unexplained accident would be to relieve the passenger from the well-established rule of assumption of risk [3]. If a carrrier, in the case of an accident of which he cannot affirmatively show the cause, proves that he exercised reasonable care in inspecting the

1. See note 1 on p. 236.
2. See for instance Harriman "Carriage of Passengers by Air" Journal of Air Law, January 1930, p. 3; Allen "Limitations of Liability to passengers by air carriers" Journal of Air Law, July 1931, p. 331.
3. In Conklin v. Canadian Colonial Airways, 242 App. Div. 625, 271 N.Y Supp. 1107 (1934) the Court held that passengers assume all the usual and ordinary perils of air navigation; See further Edmunds, "Aircraft Passenger Ticket Contracts", Journal of Air Law, July 1930, p. 331; Bohlen "Aviation under the Common Law", Harvard Law Review 1934, p. 222; Lupton, "Civil Aviation Law", par. 110.

plane before departure, in taking all measures necessary for the safe operation of the air service, such proof ought to be sufficient to exonerate himself from liability.

Necessity of applying the rules of the Warsaw Convention to internal carriage in the United States

To arrive at a right balance of the interests of the passengers and those of the carriers, a system must be adopted by which the passenger is relieved of the burden of proving the negligence of the carrier and by which the carrier is exonerated from liability when he proves to have taken the reasonable measures to avoid the damage suffered by his contracting party.

As we will see, such a system has been laid down in the Warsaw Convention; when discussing art. 20 of this Convention we will further consider the advantages of this system [1].

At the present moment an American Court applying common law may arrive at the same results as those given by the Warsaw Convention if the Court applies the res ipsa loquitur doctrine and if the Court allows the carrier to prove negatively that he is not guilty of a fault.

However, in the case of the carrier not being able to furnish such proof, his liability at American common law will, as a rule, be unlimited, whereas under the régime of the Warsaw Convention, his liability will be limited to 125.000 Ffcs. Let us take the example of an accident happening on the line Brownsville–New York arising from the negligence of the carrier. The passenger travelling on this line will be able to recover unlimited damages. If the same passenger had started his journey at Tampico he would in the event of an accident happening, through the negligence of the carrier, between Brownsville and New York, only be able to recover damages up to 125.000 Ffcs.

M. McCormick in an article published in the Air Law Review [2] expresses the opinion that air carriers whose routes bring them near international boundaries could, by extending their lines into foreign territory, become amenable to the provisions of the Warsaw Convention with its resulting benefit, thereby giving

1. See page 235.
2. "The Rome Convention — its constitutionality — its purpose — its scope" Air Law Review, July 1935, p. 207 et seq.

them a distinct advantage over others less fortunately situated. We do not think that this can happen in practice because one cannot expect that a passenger wanting to travel from A to B in a country which ratified the Warsaw Convention, will be willing to contract for a journey starting at X, being a town across the boundary in another country which has also ratified the Warsaw Convention.

This does not however alter the fact that we fully agree with M. McCormick's opinion that uniformity of laws for national and international air traffic is necessary in order to attain equal and universal advantage to the aviation industry as an entirety. The Warsaw Convention is based on the principle that the air carrier must be submitted to a special régime of liability. The fact that the U.S.A. Senate on June 15th 1934 gave its advice and consent to adherence to this Convention, proves that the U.S.A. also realised the necessity of submitting the air carrier to this special régime.

The recognition of this principle in international air carriage entails as an inevitable consequence the recognition of the same principle in national air carriage [1]. The particular character of aviation makes a distinction between these two kinds of carriage impossible.

A consideration of the steps to be taken in the U.S.A. [2] in order to make the rules of liability governing national air carriage (interstate as well as intrastate) in harmony with the rules of liability governing international carriage, is outside the scope of this study [3].

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1. We already pointed out that several American textwriters suggested that legislation be enacted by which the liability of the air carrier in internal carriage is limited, see note 2 page 104 and also Lupton "Civil Aviation Law", para. 77.
2. McCormick in his article "Federal Jurisdiction over Aviation via International Treaties", Air Law Review January 1935, p. 13 et seq., expresses the opinion that the U.S.A. is able by the exercise of her constitutional treaty-making prerogative, to clothe herself with all the necessary power and authority she may need to intelligently regulate and control aviation. See for a complete survey of the problem of aviation legislation in the U.S.A.: Fredd D. Fagg Jr. "National Transportation Policy and Aviation", Journal of Air Law, April 1936, p. 155 et seq.
3. After the present study went to print we received the Tentative Draft No. 1 of the Joint Committee on Uniform State Aviation Laws of the National Conference of Commissioners on Uniform State Laws, American Bar Association, and American Law Institute. This Draft was presented to the National Conference at its annual meeting in Kansas City on September 20th, 1937.
In Title II of this Draft it is stipulated that the owner of aircraft carrying passengers for compensation shall be liable, *regardless of negligence*, for injury to a passenger

U.S.S.R.

Chapter IX of the Law Relating to Airnavigation of 7th August 1935 contains provisions relating to the liability of the air carrier.

By virtue of art. 78 of this law the air carrier is liable for the death and bodily injuries occurring to passengers during the take off, flight or landing unless he proves that the damage has been the result of wilful misconduct or gross negligence on the part of the victim.

In the carriage of goods the carrier, by virtue of art. 80, is liable for loss or damages unless he proves that the loss or damage is due:

a. to wilful misconduct or gross negligence of the carrier;

b. to force majeure if the loss or damage did not occur during flight;

c. to the peculiar characteristics of the objects carried;

d. to the carriage of the goods without the required packing or with inadequate packing;

e. to the nutaral shrinkage of the volume of the goods.

Art. 82 stipulates that the carrier is not liable for handbaggage which has not been registered.

As regards delay, art. 84 provides that the carrier is responsible for the arrival in time of the freight at the place of destination. All agreements of the air traffic Company with passengers or consignors modifying the provisions of the law under consideration are forbidden by art. 85 of the law.

Considering the above articles, it appears that the liability of the carrier for carriage by air is based on the theorie of risk. The

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or death resulting therefrom from any cause, unless the injury or death shall be shown to have been caused by the wilfull misconduct of the passenger. This stipulation, by which an absolute liability is imposed on the air carrier, has been rightly criticized by the committee appointed by the Air Transport Association of America of which the seventeen most important air traffic companies in the U.S.A. are members, (see: Criticisms and suggestions to the proposed Uniform Aviation Liability Act. submitted by Paul M. Godehn, Gerald B. Brophy, Francis D. Butler and Hamilton, O. Hale, a committee appointed by Colonel Edgar S. Gorrell, President of the Air Transport Association of America, on September 3 ,1937) and the difficulties for air traffic arising from such departure from the principles of the Warsaw Convention, have been put forward.

proof of a case of force majeure will not relieve him of his liability.

It should be pointed out that art. 78 governing the carriage of passengers, considers the liability for damages *during the take off, flight and landing.*

Art. 80 concerning the carriage of goods, stipulates that the carrier can exonerate himself of liability for loss or damage to goods by proving a case of force majeure unless the loss or damage occurred *during flight.*

As art. 80 only considers flight and does not consider — as art. 78 does — take off and landing, should it therefore be concluded that if the loss or damage of the goods occurred during take off and landing, the carrier is allowed to exonerate himself by proving force majeure?

On considering art. 80 in connection with the other articles concerning liability, one can indeed arrive at such a conclusion.

This interpretation however, leads to a very illogical situation. Take off and landing are of course inherent in the proper flight of aircraft. It can hardly have been the intention of the authors of the Russian law that liability for damages having occurred during taking off or landing should fall under a different régime than that under which falls liability for damages having occurred during flight.

We have already critisized the principle of applying the theory of risk to the contractual relationship between the carrier and passengers or consignors. In countries like Germany and Switzerland where up till now the theory of risk has also been recognised in the carriage by air, the objections to this system have not been felt in practice because the carrier has the faculty of exonerating himself from liability by special clauses. In Russia, however, such clauses are forbidden..

It is to be observed that on the 20th August 1934 the Government of the U.S.S.R. ratified the Warsaw Convention. Consequently, at the present moment, a Russian air passenger travelling on an air line between A and B in Russia, falls under a régime of liability based on the theory of risk, whereas when he travels in Russia from A to B but continues his journey to C being a town in a country which also has ratified the Warsaw Convention (Germany f.i.), he falls under a régime of liability based on fault. We are firmly convinced that with the development of international

air lines between Russia and the other countries, the impossibility of maintaining two completely different régimes of liability for national and international carriage will be felt and the aviation law will be modified [1].

VENEZUELA

The Venezuelan Aviation Law of 16th October 1936 which replaces the Aviation Law of 25th July 1930 makes provisions relating to the liability of the air carrier.

By virtue of art. 38 of this Law the air carrier is liable in respect of loss, damage or delay suffered by passengers or objects carried, unless it is proved that the prescribed technical precautions were taken to avoid the damage.

Art. 39 provides that the air carrier is also liable in respect of a damage caused by his subordinates or employees unless he produces the proof referred to in art. 38.

In art. 40 the liability of the air carrier is limited to the amount of 20.000 bolivars for each passenger. [2] The passenger may, however, by special agreement with the carrier, fix a higher limit of liability.

As regards the carriage of goods, the liability of the carrier is regulated by the provisions of the Commercial Code [3]. Any clauses exempting the air carrier from the liability above stated shall be null and void,

The basic principles of the liability of the air carrier of passengers in Venezuela are the same as those of the Warsaw Convention. In the event of an accident, the carrier is presumed at fault,

1. The international lines operated to and from Russia at the present moment are:
   a. Prague-Moscow operated in pool by the Russian Company Aeroflot and the Czechoslovakian Company Ceskoslovenske Statni Aerolinie;
   b. Königsberg–Moscow and Königsberg–Leningrad operated in pool by the Deutsche Lufthansa and the Aeroflot from the 1st January 1937. (These two lines were operated before that date by the Deruluft which Company went into liquidation on the 31st December 1936 because of the five year agreement between the Deutsche Lufthansa and the Aeroflot expiring at that date).
   c. Stokholm–Moscow operated in pool by the A. B. Aerotransport and the Aeroflot.
2. In the Aviation Law of 25th July 1930 the maximum liability amounted to 10.000 bolivars.
3. In the Aviation Law of 25th July 1930 the liability of the carrier in the carriage of goods was limited to the sum of 200 bolivars for each package.

unless he proves that he has taken certain measures to avoid the damage. If he cannot bring such proof, he will be liable, but his liability will be limited.

However the air carrier under the régime of the Venezuelan Aviation Law is in a more favourable position than the air carrier under the régime of the Warsaw Convention, because the proof of the measures to be taken will be easier under the former régime than under the latter. The Venezuelan law requires proof of the carrier having taken the prescribed measures. The carrier can furnish this proof by showing that the certificate of airworthiness of the aeroplane and the licences of the crew, prescribed by the Venezuelan law, were in good order.

The Warsaw Convention requires the proof that the carrier and his agents have taken the necessary measures. In Chapter II of our study we will consider *in extenso* what this proof involves. It is sufficient to state here that the proof of having taken the necessary measures which includes the measures to be taken by the crew after the departure of the aeroplane, is more extensive than the proof of having taken the *prescribed technical* measures required by the Venezuelan Aviation Law.

JUGOSLAVIA

On 27th May 1931, Yugoslavia ratified the Warsaw Convention. The Yugoslavian Government has as yet not considered the possibility of making its internal legislation in harmony with this Convention. The liability of the air carrier in internal carriage is governed by the Air navigation law of 22nd February 1928 [1].

As regards the carriage of goods, art. 68 of this Law states that the air carrier is liable in the event of loss or damage or in the event of delay, except when there is a case of *force majeure*, or the damage or delay is due to the inherent vice of the goods.

Unless a special declaration of value has been made, the liability of the carrier is limited to 1000 dinars per package. The carrier can, by special agreement, exonerate himself from liability

1. A French translation of this Law has appeared in "Droit Aérien" 1930, p. 320.

for damage caused by atmospherical conditions [1] or by negligent pilotage. If the damage is due to the unairworthiness of the aircraft, non-liability clauses are unavailable unless the carrier proves that he has used due diligence to make the aircraft airworthy before departure, and that the crew was in possession of the proper licences.

The carrier cannot, however, contract out of his liability for personal faults or for commercial faults of his personnel.

According to art. 75 of the Law, the provisions of art. 68 apply *mutatis mutandis* to passengers. This article further declares that in so far as the air navigation law does not provide to the contrary, the provisions of the Civil and Commercial Code are applicable [2].

The liability of the carrier in the event of the death or wounding of a passenger is limited to the sum of 100.000 dinars per passenger.

The non-liability clause permitted by the Yugoslavian air navigation law corresponds to that permitted by the French air navigation law.

The clause does not cover the personal fault of the carrier; it has only the effect of putting the burden of proof on the other party [3].

The Yugoslavian air company "Aéropout" operates all its services, internal as well as international, under the I.A.T.A. conditions of carriage which are based on the Warsaw Convention.

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1. For an examination of the rules of these Codes relating to liability, see Mitrovitch "L'Aviation au point de vue économique et juridique" Belgrade, p. 78 et seq.
2. As regards the question of the liability of the air carrier for atmospherical conditions, see page 60.
3. See further on this subject page 52.

CONCLUSION ON CHAPTER I

The examination of the national legislations made in the preceding pages leads to the conclusion that the principles laid down in the Warsaw Convention penetrate more and more into national air legislation of the countries all over the world. Belgium, the Netherlands, Italy, Denmark, Finland, Norway and Sweden, have already passed laws relating to the application of the Warsaw Convention to internal carriage.

The Governments of Argentine, Brazil, Estonia, France, Germany, Hungary, Rumania and Switzerland are preparing laws tending to the extension of the régime of liability of the Warsaw Convention to internal air carriage.

In Austria and Poland the possibility of applying the rules of the Convention to internal air carriage is under consideration by the Departments of Civil Aviation. Taking into account that the national air traffic companies of these two countries, being in favour of uniformity of national and international rules, approached the competent authorities on this subject [1] one is justified in expecting that laws to this effect will soon be proposed.

In Bulgaria the Law relating to aeronautics of 25th July 1925 will first be made into harmony with the Warsaw Convention, before the ratification of the Convention. In Greece the Airnavigation law of 3rd June 1931 has stated that as regards the liability of the air carrier, all carriage will be considered as international. This means that as soon as the Warsaw Convention enters into force in Greece, the rules of the Convention will automatically also govern internal air carriage.

The Air navigation Acts of England, Australia and Ireland have

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1. In most countries in Europe a strong relation exists between the Governments and the national air traffic companies. The granting of subsidies is generally made subject to the condition that representatives of the Government be appointed members of the Board of Directors.

given power to the competent authorities to apply the rules of the Warsaw Convention to internal carriage in these countries by Order in Council. As regards the first country, according to information received from the British Airministry, the British airtransportindustry has been consulted on this subject and it is hoped shortly to receive from them definite proposals in the matter.

Finally as far as the U.S.A. are concerned, we have seen that in the Draft Uniform State Aviation Law, proposed to the National Conference of Commissioners on Uniform State Laws, an absolute liability has been imposed upon the aircarrier of passengers. In view on the opposition made by the Air Transport Association of America to such departure from the rules of the Warsaw Conventions it is to be hoped that the draft will be modified so as to follow the basic principes of the Warsaw Convention.

The recognition of a regime of liability based on fault in international air carriage entails as an inevitable consequence the recognition of the same regime in national aircarriage.

CHAPTER II

THE WARSAW CONVENTION [1]

SECTION I

SCOPE-DEFINITIONS

Article 1.

"1) This Convention 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.

2) For the purposes of this Convention the expression "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 High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.

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

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1. The translation of the official French text of the Convention given here, is taken from the British Carriage by Air Act of 1932.

Article 2.

"1) This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2) This Convention does not apply to carriage performed under the terms of any international postal Convention".

International carriage

It is first necessary to take into consideration the elements constituting international carriage within the meaning of the Warsaw Convention.

From the words "according to the contract made by the parties" of paragraph 2, article 1, one must conclude that to determine the international character of carriage, the intentions of the parties must be used as basis. This has the advantage of making the application of the Convention unaffected by an involuntary or accidental event, such as a forced landing or abandonment of a voyage before its destination is reached.

Consequently, carriage on the Paris–London line, as it is carriage of which the point of departure and the point of destination, according to the contract made by the parties, are situated in the territory of two High Contracting Parties, must be considered as international carriage within the meaning of the Warsaw Convention, even if the aeroplane leaving Paris for London ends its journey for one or other reason in France. On the other hand, if a commercial aeroplane, on an internal service, lands owing to ice formation on its flight, on the territory of another High Contracting Party, the carriage does not become by this international within the meaning of the Warsaw Convention.

Sub-paragraph 2 also provides for carriage in which the point of departure and the point of destination are situated on the territory of *one* High Contracting Party, if there is an agreed stopping place within the territory subject to the sovereignty, suzerainty, mandate or authority of another Power.

Interpretation of place of departure, place of destination and agreed stopping place

In the meaning of the Warsaw Convention the place of departure and the place of destination are the places at which the contractual carriage begins and ends. Agreed stopping place

means any place at which under the contract of carriage the aeroplane is to descend in foreign territory between the points of departure and destination [1].

It should be pointed out that for the carriage to be international, it is not necessary for a stop to be actually made at the stopping place, but only for a stop to be provided for on the contract of carriage being concluded.

Let us take for example carriage between Marseilles and Dakar. Within the meaning of the Convention, this carriage is not international. On the other hand, Marseilles–Barcelona–Dakar falls under the régime of the Warsaw Convention. It is, in principle, right to make this distinction between these two carriages. By making a landing within the territory of another country, a legal conflict may arise, to which the rules of the Warsaw Convention should be applied. This may, nevertheless, give the carrier a means of making the Warsaw Convention illusory. In the case of carriage between the territories of the same country, it is possible for the carrier not to provide for a stopping place, but to leave the pilot to decide whether to make a landing at a foreign aerodrome or not.

If a carrier considers that the national law is more favourable to him than the Convention of Warsaw, he could refrain from mentioning in the contract of carriage the stopping place which gives the international character to the carriage, by leaving the pilot to decide whether or not he should land at the stopping place. The necessity to avoid divergencies on this subject is yet another reason for incorporating in national legislation the rules of the Warsaw Convention.

In an article published in the Journal of Air Law [2], M. Sullivan points out that often flights are scheduled between two terminals with provisions that intermediate stops will be made to pick up passengers on flag signals (or radiomessages). He puts the question whether such landings would be regarded as agreed stopping places in the meaning of the Convention. In our opinion this question has to be answered in the affirmative. If in a timetable of an air carrier the possibility of an intermediate stop is

1. Cf. Greene L. J., *Grein v. Imperial Airways Ltd.* (1936) 52 T.L.R. 681.
2. "Codification of Air Carrier Liability by International Convention", Journal of Air Law, January 1936, p. 6 et seq.

foreseen, the passenger, under the contract of carriage, has agreed to this stopping place, even though it may not actually be made.

M. Sullivan supposes another situation which he thinks difficult. He gives the following example.

M. a passenger, boards a plane at Detroit to fly non stop to Buffalo. Another passenger, N, purchases a ticket for St. Thomas Ontario, the carrier agreeing that a stop will be made at that point to put him down. He supposes that the plane crashed while still within the Michigan boundaries. He remarks rightly that the carrier's liability to N. could not come within the scope of the Convention. As regards the liability to M. the meaning of agreed stopping place would in his opinion become crucial. Under what régime will M. fall? The following reasoning must in our opinion be followed. The contract between M. and the carrier is the primary matter to be regarded. In art. 1, par. 2 it has been stated that "international carriage" means any carriage in which *according to the contract made by the parties* the place of departure and the place of destination.... etc. As in this contract the place of departure and the place of destination are within the territory of a single State without a stopping place being agreed between M. and the carrier in the territory of another State, the rules of the Warsaw Convention cannot, in our opinion, be applied. Another question is of whether the carrier, by agreeing a stopping place with N. has not committed fraude against M. If M. suffers damages because being under a régime of liability which is less favourable to him than the régime of the Warsaw Convention, he would as a rule be able to bring at common law an action against the carrier, but this does not affect the non-application of the Convention.

It must nevertheless be recognised that the system followed by the Warsaw Convention in this respect will lead in practice to difficulties. The only possibility to overcome these difficulties is by incorporating the rules of the Warsaw Convention in all national legislations. In this connection it should be observed that M. Sullivan in the above article proposes, in order to give the widest possible extension to the terms of the Convention, to include in the Convention a proposition to the effect that, where the point of departure is in a contracting State, and the point of

destination is in a non Contracting State, but where one or more stopping places are located within the territory of Contracting States other than the High Contracting Party in which the point of departure is located, the Convention shall apply to that part of the transportation performed up to the time of the last stopping place situated within the territory of a High Contracting Party.

Though the idea of giving the widest possible extension to the terms of the Convention cannot be too warmly commended, we do not think that the proposal of M. Sullivan is acceptable because it entails even greater complications in the domain of the liability of the air carrier than are existant at the present moment. The acceptance of this proposal would mean that a passenger on the same aeroplane on the same journey in the same country would be subject in a part of this country to the régime of the Warsaw Convention and in another part of the same country to the internal régime which in many countries is completely different from the first régime. At the present moment, though the passenger may come under different régimes of liability in the course of his international journey, the régime of liability during his journey in a country is the same.

Return ticket in connection with international carriage

In the recent case "Grein v. Imperial Airways" [1] a question arose of whether the Warsaw Convention was applicable when a passenger travelling from a country which has ratified the Convention to a country which has not, is in possession of a return ticket. In the case referred to, Mr. Grein had a return ticket from London to Antwerp. Since Belgium had not ratified the Warsaw Convention at the time of the journey, the question arose of whether or not the journey was an international one in the meaning of the Warsaw Convention. What should be considered as the place of destination in the given case? Was it Antwerp, or London where the contractual carriage ended? Lord Justice Greer expressed the opinion that the contract was one in which Imperial Airways undertook to carry the deceased from London as the place of departure to Antwerp as the destination with an additional undertaking, subject to certain conditions, to carry him back from Antwerp to London.

1. *Grein v. Imperial Airways Ltd.* (1936) 52, T.L.R. 681.

Lord Justice Greene, considering the same question, came to the conclusion that there was one contract made at one time and place, conferring a right to be conveyed, on the conditions stated in it, from London to Antwerp and back and that was a contract and a carriage representing a journey of which London was the place both of departure and destination, and one therefore which a stop at an agreed stopping place in Belgium made international carriage in the meaning of the Warsaw Convention. Mr. Justice Talbot, being of the same opinion as Lord Justice Greene, the carriage was considered to come under the rules of the Convention.

As far as we can ascertain from the minutes of the C.I.T.E.J.A.-meetings, the question of return journeys has never been considered. When trying to give an answer to this question it will therefore only be possible to base ourselves on the actual wording of the second paragraph of article 1.

As in a case of a return journey there is in our opinion one contract, and as the contract between the parties is the primary matter to be regarded, we are inclined to agree with the judgment of the Court of Appeal of July 13th 1936. It has to be recognised, however, that by putting such an interpretation on paragraph 2 of article 1, one arrives at an illogical situation. If the passenger took one ticket outwards for London to Antwerp and another for Antwerp to London, neither the carriage from London to Antwerp nor the carriage from Antwerp to London would come under the Warsaw Convention, nor would a passenger taking a return ticket from Antwerp to London fall under the rules of the Convention. On the other hand it is obvious that an interpretation widening the applicability of the Convention, is preferable to an interpretation restricting it. In any case it will be necessary when revising the Convention, to make a special provision concerning return- and also circular journeys. As to the latter category, we will return to this subject when considering charter contracts.

Reward

The second condition which carriage must fulfill for the rules of the Warsaw Convention to be applied to it, is that it must be performed for reward. Whether the carriage is performed by an air transport undertaking or whether the carriage is performed by a person who is not a carrier but nevertheless for reward, it is

ruled by the Warsaw Convention. The question arises of how the term "reward" should be interpreted.

The reporter of the Warsaw Convention, in a report on private aviation, presented to the Second Commission of the C.I.T.E.J.A. at its Session held at Stockholm in July 1932 [1] declared that, in his opinion, the reward should be considered as a return for services rendered, "contrepartie qui peut exister en numéraire, mais également en nature, fourniture de travail ou autres matières".

According to the reporter, it is the intention of the parties which is important. The carrier and the carried render each other, in common agreement, a service which can be evaluated. Using this principle as basis, the intention of the parties must be shown before the carriage, because the nature of the carriage is such that it cannot be modified later by a service rendered by the person carried.

Let us take the example of an amateur pilot who consents to carry a person or a package under the condition that the interested person would pay part of the petrol costs. Should this carriage be considered as carriage for reward? The reporter of the Warsaw Convention considers that the question which must be asked is: have the carrier and the carried rendered each other a service, but he adds that the intention of the parties must be shown before departure.

Has the carrier assumed the obligation of performing the carriage? In the given case, he has indeed assumed this obligation and one can say that he therefore renders service to the person carried. Does the person carried, by undertaking to pay the carrier part of his petrol expenses, render service to the carrier? Before answering this question, it should be pointed out that M. Pittard, one of the authors of the draft of the Warsaw Convention, examined what should be considered as remuneration within the meaning of the Warsaw Convention, in an article published in the Droit Aérien [2]. He distinguishes between the element of profit and the element of compensation, and points out that reward for services rendered does not necessarily contain the element of profit.

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1. Minutes p. 5 et seq.
2. De la responsabilité en matière de transport occasionnel gratuit, Droit Aérien 1931, p. 169 et seq.

Bearing in mind the above principle, the question of reward is nothing other than the question of whether the carrier acted with a view of obtaining profit. It seems to us right that the person who carries with an interest in view, should be submitted to the provisions of the Convention, while he who does not carry for gain and who is not an air transport undertaking, should not be submitted to these provisions. Reverting to whether the person carried, by paying the carrier a part of the petrol expenses, renders him a service, the question should be put of whether this partial payment of expenses is to be considered as a profit for the carrier, or only as a compensation. In the first case the carriage will be for reward and will come under the Warsaw Convention, in the second case, the rules of the Warsaw Convention will not be able to be applied. Whether the carrier has acted for gain or not will be decided by the competent court.

Gratuitous carriage

Before considering the solution given by the Warsaw Convention to gratuitous carriage, one should examine the difficulties there are in determining the legal nature of this kind of carriage.

Two questions arise:

1. if the carrier acts without reward, can there be a contract;
2. in the affirmative, what are the contents of this contract.

As regards the question under 1, we believe that a distinction should always be made between

a) the carriage performed by a carrier and

b) by a person who is not a carrier.

a. A carrier, even in the case of gratuitous carriage, will deliver a ticket. The carrier, having thus undertaken to perform a determined carriage, has in such a case concluded a contract of carriage with the person to be carried. Then arises the question of the contents of the contract as mentioned under 2. Has the carrier undertaken to perform the carriage under the same conditions and with the same care with which he performs carriage for reward, or do his obligations go less far?

It must be admitted that, with regard to the intentions of the parties, the only modification made in the contract of carriage concluded for reward, is that regarding the gratuity of the carria-

ge [1]. It is right that the carrier should be submitted to the same rules relating to liability in the case of gratuitous carriage as in the case of carriage for reward [2]. Further, in most cases, the fact that the carriage is gratuitous is only apparently so. In general, the free passage is compensated by other advantages from which the carrier benefits [3].

We reproduce an example in air carriage. When the air companies began operating, they issued a great number of free tickets. It is not difficult to find the reason for this; it was a way of advertising. It cannot be said that these free passages were made by the carrier out of pure kindness. Publicity was the service rendered by the passenger in exchange for the carriage.

b. The question under 1, has an entirely different aspect when the person performing the carriage acts for no reward and is not a carrier but, for example, an amateur pilot who takes up a friend. In most cases there will be no contract between the person performing the carriage and the person being carried. "The person performing a carriage as a favour or for friendship, no more assumes an obligation than the person being carried demands one" [4].

Gratuitous carriage in the Warsaw Convention

What solution is given by the Warsaw Convention to the problem of gratuitous carriage? Let us quote the opinion of the reporter of the Ist Conférence Internationale de Droit Privé Aérien, held in Paris in 1925, on the first draft of the Convention:

"Most legislations recognize that the liability should be greater in contracts for reward than in gratuitous contracts. A distinction should therefore be made between carriage for reward and gratuitous carriage; but on the other hand, this distinction does not

1. Mazeaud op. cit. No. 114. On the question of free passes issued by the railways see Josserand op. cit. No. 799.
2. The new Dutch maritime law which is one of the most modern of the world, gives a definition of a maritime carrier, and does not require the carrier to stipulate a reward. Also in the case of gratuitous carriage the carrier, within the meaning of this law, is submitted to the same rules as for carriage for reward (art. 466 of the Dutch Commercial Code). In the U.S.A., if a person accepts a gratuitous ride from a carrier, he is considered a passenger and entitled to the same degree of care for his safety and protection as paying passengers. If he is wrongfully on the vehicle, the carrier owes him no duty except not to injure him wantonly or wilfully, see Sullivan "Codification of Aircarrier Liability" Journal of Air Law, January 1936, p. 19.
3. See Josserand op. cit. note 2 on no. 910.
4. Mazeaud op. cit. no. 113.

exclude fraud, and it may happen that the liability which we wish to impose on the carrier may be avoided by a more or less free collusion making the carriage seem gratuitous when the remuneration is provided for in another form. The carrier may have to carry passengers "au bénéfice de titres de faveur" [1].

For these reasons the draftsmen of the Warsaw Convention desired that the Convention should also apply to gratuitous carriage performed by air by an air transport undertaking. As we have pointed out, it seems to us, in principle, right that the gratuitous carriage performed by a carrier should be governed by the same rules as carriage for reward. In most cases, the free passage is connected with the position of the person carried (member of the Government, for example).

Carriage of the personnel of the carrier

Do the rules of the Warsaw Convention apply to the carriage of a member of the staff of the carrier? In examining this question distinction must be made between *a*) the personnel of the carrier employed on the aeroplane and *b*) other personnel.

As regards *a*) can one say that a pilot flying an aircraft from A to B is carried by the carrier? Certainly not, the contract between the pilot and the carrier is legally alien to any idea of carriage.

The same applies also to the other members of the crew employed on board the aircraft. The rules of the Warsaw Convention cannot apply in such cases.

As regards *b*), if a representative of an air transport Company is carried by an aeroplane of the Company to regain his post, is there carriage within the meaning of the Warsaw Convention?

The journey made by the representative to regain his post by the aeroplane of the carrier is doubtlessly "carriage".

The Warsaw Convention considers only two categories of carriage, gratuitous carriage and carriage for reward, and so the question arises under which of the two headings this carriage can be included.

The carriage of the representative does not seem to us to be really gratuitous, because the air carrier conveys him to his post and pays him a salary in exchange for the services he renders

1. Minutes of Ist International Conference for Private Air Law, p. 44.

there. Should, therefore, this carriage be considered as carriage for reward? Using the definition of the Reporter on the Warsaw Convention as basis, we consider that the conveyance of a representative is carriage for reward within the meaning of the Warsaw Convention.

It is to be regretted that the Warsaw Convention did not specially exclude from its régime the carriage of the personnel of the carrier. If these carriages are made in the execution of the contract of employment, only the rules of this contract should regulate the relations between the carrier and his personnel [1]. In the present state of affairs it is possible that the carrier will be considered liable by virtue of the Warsaw Convention and by virtue of the legal provisions of his country concerning the contract of employment. M. Riese, who collaborated in drawing up the Warsaw Convention, maintained in an article, which appeared in the "Droit Aérien" [2], that the provisions relating to liability in Chapter III of the Warsaw Convention, do not consider the liability of the carrier regarding his personnel. In view of the text of the Warsaw Convention, we cannot share this opinion. In so far as airtransport undertakings are concerned, the rules of the Warsaw Convention are applicable in all cases of carriage, either for reward or gratuitous. There is nothing to affirm that there exists a third category of carriage, comprising carriage which is neither gratuitous nor for reward, to which the rules of the Warsaw Convention cannot apply [3].

Why is the word "persons" used in article 1

As regards the text of article I, attention must be drawn to the fact that the word *persons* is used, while in the following articles of the Warsaw Convention, the word *passengers* appears. In examining the drafts of the Warsaw Convention, it is found that the word "passengers" was always used in article 1. How-

1. It should be pointed out that in Article 22 of the Convention for the unification of certain rules relating to damage caused by aircraft to third parties on the surface (Rome Convention), it has been expressly provided that the Convention does not apply to damages, the reparation of which is governed by a contract of employment between the injured person and the person upon whom liability falls under the terms of the Rome Convention.
2. "Observations sur la Convention de Varsovie relative au droit privé aérien", Droit Aérien 1930 p. 216.
3. For gratuitous carriage made by a person who is not a carrier see Goedhuis: "La Convention de Varsovie du 12 Octobre 1929" p. 90 et seq.

ever, in the definitive text, this word was replaced by the word "persons" for reasons unknown to us.

A passenger is always a person; but every person who travels need not always be considered a passenger. An individual who has hidden himself on board an aeroplane, without having taken a passengerticket, is a person but not a passenger. Nevertheless, seeing that in the articles dealing with liability the word "passenger" has been maintained, these articles will not be applicable to persons who are not passengers within the above definition.

It seems to us that there is here an inconsistency which should be remedied by substituting the word "passengers" for "persons" in article 1.

Interpretation of the word "aircraft"

In interpreting the word "aircraft" which is found in the Warsaw Convention, one should be prompted by the definition given in Annex A of the Convention relating to the regulation of aerial navigation dated 13th October 1919, which reads as follows: "The word "aircraft" shall comprise all machines which can derive support in the atmosphere from reactions of the air".

Who is a carrier within the meaning of the Warsaw Convention

It is not sufficient only to consider what is meant by international carriage, to clearly determine the scope of the Convention. It is also necessary to fix precisely the meaning that the Warsaw Convention wished to give to the notion of carrier.

The Brazilian delegation made a proposal to define the carrier in the Warsaw Convention at the Conference at Warsaw. This proposal was as follows:

"Seeing that the status of the air transport operator differs, owing to the international character of aircraft, from the rules relating to captains in merchant shipping, masters of river-vessels, the carter in surface carriage, the designation of operator must assimilate the many concepts regarding his liability.

This is all the more necessary as the word carrier, though proportionate to the requirements of its meaning, does not nevertheless exactly correspond to most definitions given by the laws of different countries. It is not used by the French texts of most of the international Conventions, nor by the draft for the

Convention on liability for damages caused to third parties, presented by M. Ambrosini in May, which only considers the proprietor and the operator of the aircraft [1].

If one desires the carrier to be either the air transport undertaking or its operator, with the meaning of economic power over the machine, as in German, Swiss, Hungarian, Dutch, etc. jurisprudence, or the person for whose account the aircraft is operated, as according to Danish law;

If one desires to conform to the convention the concept of solidarity stipulated by the Polish law in article 71, as regards the proprietor and the carrier, or that of Brazilian law between the pilot and the owner;

If one wishes to reconcile to the general formula the English concept of hire, in air carriage characterised by the period of the contract, which exists in the laws of several of the North American States, this object might be attained by giving a definition of carrier as of carriage.

I would like to propose the following on this subject, unless a better wording can be found.

A carrier means he who, either as proprietor, charterer, or conductor of the aircraft, uses it individually or jointly, for the carriage of persons and goods, within the meaning of the Convention, and in conformity with the national regulations" [2].

The majority of the delegates at the Conference considered that the problem was not in the scope of the Convention, and the proposal was returned to the C.I.T.E.J.A. to be taken into consideration.

It is to be regretted that this question was not thoroughly discussed at the Session; unforeseen consequences would have been arrived at.

Since there is no definition of the word carrier, it will be

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1. The draft Convention to which the Brazilian delegation alluded, was accepted by the IIIrd International Conference for Private Air Law (Rome 1933). Art. 4 of the Rome Convention stipulates that the liability imposed by the Convention falls on the operator of the aircraft. The operator of the aircraft means — according to the second par. of art. 4 — any person at whose disposal the aircraft is and who makes use of it for his own account.
2. We have seen that in the Brazilian Air code under consideration by the Brazilian Congress a definition of "carrier" has been given. Art. 68 of this Code stipulates that carrier in the meaning of the Code is the natural or juridical person who performs carriage by air for reward, see page 19.

necessary, in order to arrive at its true meaning, to take the Convention as a whole into consideration.

We are of the opinion that it can be concluded from the text that the Convention only considers the regulation of the direct relation existing between the person or undertaking who concluded a contract of carriage, and the passengers or consignors with whom the contract was made [1].

This opinion is based on the first sub-paragraph of articles 3, 4 and 5 of the Warsaw Convention, which contain provisions that can only be observed by the person or undertaking which is in direct relation with the passengers or consignors. Seeing that a sanction is provided against the carrier who has not drawn up traffic documents in conformity with the provisions of the Warsaw Convention, it must be recognised that the carrier who, owing to the very mode of carriage, performed by him, is unable to satisfy the requirements of the Warsaw Convention — because he is not in direct relation with the passengers and consignors considered in this Convention — cannot be considered as a carrier within the meaning of the Warsaw Convention [2].

Admitting this principle, we consider that there is a serious deficiency in the Warsaw Convention.

Charter contracts

In the present form of air navigation, the greater part of commercial carriage is performed by the air companies concluding contracts of carriage directly with the passengers or consignors. Nevertheless, there are more and more cases of carriage being performed as a result of a charter contract. Carriage under this form met, and still meets very often, difficulties because the respective Governments, in granting their national air companies subsidies, have stipulated in the contracts that the company cannot employ aircraft other than national

1. In the German official explanation of the Warsaw Convention carrier is defined as follows: "Luftfrachtführer im Sinne des Abkommens ist wer es vertraglich übernimmt Reisende, Gepäck oder Güter mittels Luftfahrzeug zu befördern".
2. Sullivan in "Codification of Air carrier Liability by International Convention", Journal of Air Law, January 1936, p. 14, points out that the fact of considering "carrier" to mean the person with whom the contract of transportation is concluded, is in the U.S.A. helpful, particularly where contracts are negotiated with airexpress agencies, in which cases the agency is regarded as carrier rather than the operator or owner of the plane.

aircraft. It is most desirable for the free development of air navigation that the Governments give permission to the air navigation undertakings of their countries to charter or to hire, if need be, foreign aircraft.

The different forms under which, in the present state of air navigation, the charter contract may arise, should be examined, and next we will try to show that the Warsaw Convention cannot be applied to carriage performed under these contracts, unless the charterer is considered as a passenger or consignor within the meaning of the Warsaw Convention.

A. The owner (who can be an air transport undertaking or a private person) puts at the disposal of the charterer an aeroplane equipped to make a specified journey which is international within the meaning of the Convention, for a certain remuneration. The charterer may be

1. a private individual who himself wishes to make the journey,
2. an individual who wishes to carry his own merchandise,
3. an individual who wishes to exercise the business of carrier and to conclude for the journey contracts of carriage and subcharters with passengers or consignors.

Are the rules of the Warsaw Convention applicable in these cases?

Under 1, we think that the owner should be considered as carrier within the meaning of the Warsaw Convention, because the carriage is international and for reward, and because the charterer can be considered as a passenger. This carriage therefore comes under the Warsaw Convention.

As regards the case under 2, it seems to us that, for the same reasons as those given above, the owner should also be considered as the carrier within the meaning of the Warsaw Convention.

In case 3, the owner being obliged to make a journey for account of the charterer, must be considered as carrier with regard to him, however, he will not be able to satisfy the obligations of a carrier within the meaning of the Warsaw Convention.

The charterer who concludes contracts of carriage with passengers or consignors, should, in our opinion, be considered as carrier within the meaning of the Warsaw Convention, which only regards the direct relation. The owner is carrier with regard to the charterer, but is not carrier within the meaning of the Warsaw

Convention, and the relations between these two persons will, unless specially provided, be ruled at common law.

There remain still to be considered the other forms under which the charter contracts may arise.

B. The owner puts at the disposal of the charterer an equipped aeroplane for a certain specified time, and the charterer can determine the journeys to be made.

The charterer may be:

1. a private individual who wishes to make an undetermined circular journey.

2. An individual who wishes to exercise the business of carrier and concludes contracts with passengers or consignors.

The case under 1.

In order to determine whether or not carriage is international within the meaning of the Warsaw Convention, article 1 considers the point of departure and the point of destination. In the above charter the point of departure and the point of destination are not determined. Even if an undertaking puts an aeroplane at the disposal of some person for a specified time at a specified aerodrome and it has been provided that the aeroplane will be returned to the same aerodrome at the end of the journey, it cannot be said that the point of departure and the point of destination of the carriage to be performed, are necessarily this aerodrome. It is possible that the circular journey begins or ends in a different place.

Besides, the Warsaw Convention provides for the issue of documents before departure and a series of provisions (such as the agreed stopping places) which could not be observed in the above case. The rules of the Warsaw Convention can therefore not be applicable to such a carriage.

The case under 2.

As case 3 under A, the charterer becomes carrier within the meaning of the Warsaw Convention with regard to the passengers and consignors, if the carriage is determined beforehand.

The contract between the owner and the charterer is a contract of carriage, because the former is obliged to make a certain number of journeys for account of the charterer, providing both the aeroplane and the services of the pilot and crew. The contract — unless otherwise provided — will be governed by common law.

C. Hire of a non-equipped aircraft cannot be considered as a contract of carriage, and the Warsaw Convention does not apply. In the case of the lessee exercising the business of carrier and concluding contracts of carriage with passengers and consignors, this carriage will be governed by the Warsaw Convention.

The situation described above gives rise to serious complications, from the point of view of carriers and also their contractants.

Objections against the present system

A. from the point of view of the carriers.

What were the most important considerations which led to the elaboration of the Warsaw Convention?

a. the importance of unification, all the more important as the different countries regulated the liability of the carrier in the most various ways.

b. the interest the carrier has in knowing beforehand in what cases his liability will be engaged.

c. the interest the carrier has in knowing the exact amount to which his liability is limited, and for which he can insure.

These considerations have the same value for every kind of carrier, whether he be the owner or the charterer of the aeroplane. However, in the present state of affairs the system of liability, according to which the relation between owner and charterer is regulated, may be totally different to that adopted by the Warsaw Convention which, as we have said, regulates the relation between the charterer and the passengers or consignors. The latter system is based on the theory of fault; the former system could be based on the theory of risk, which in air navigation, is adopted in some countries.

Let us consider the case of a French air company which has put at the disposal of a charterer an aeroplane so that he may exercise the business of a carrier. Consequent on the fall of the aeroplane caused by negligent pilotage, a passenger is injured. According to the Warsaw Convention, the charterer, (the carrier within the meaning of the Warsaw Convention) will be liable for negligent pilotage towards the passengers; the relation between the owner and the charterer is regulated by the law of 31st May 1924, which

permits the owner to exonerate himself for negligent pilotage. It is evident that such a system has to be rejected [1].

B. From the point of view of passengers and consignors.

In the case of a company wishing to elude the obligations imposed on it by the Warsaw Convention, it could employ a charterer as intermediary and exclude all its liability in the charter contract. The passengers or consignors would have no means of coercion if the company employed an insolvent charterer.

How can these difficulties be overcome?

It is desirable that:

a. the national laws incorporating the provisions of the Warsaw Convention in the national law, should also make provisions concerning the liability arising from charter contracts similar to those adopted in the Warsaw Convention;

b. the C.I.T.E.J.A. should study the possibility of either extending the application of the Convention to carriage performed under charter contracts (by fixing also the conditions which the charterparty should satisfy), or to elaborate a special convention to rule this matter.

It is important, before this regulation be made, that the owner, to avoid uncertainties with regard to the régime of liability, before concluding a charter contract with a charterer, should make up a charterparty according to which the charter contract is submitted to the provisions relating to liability which are, as much as possible, similar to those of the Warsaw Convention. Particularly, the owner must stipulate that he will not be liable for a damage if he proves that he has taken the necessary measures (article 20 of the Warsaw Convention) and that, if he cannot make this proof, he will not be liable for a greater amount than the limits given in the Convention.

Carriage performed by the State

Article 2 sub-paragraph 1, considers international carriage performed by the State, or other legally constituted public bodies for remuneration.

At the Warsaw Session, the delegates of Great-Britain declared

1. In Chapter I, p. 41 it has been pointed out that the new French aviation law, relating to internal carriage, at the present moment under consideration by the French Airministry, reproduces the essential provisions of the Warsaw Convention.

that they wished to make a reserve on the subject of this sub-paragraph, for they considered that the Government of the United Kingdom should be allowed the faculty of not applying the Warsaw Convention for carriage performed by the State. This reserve dealt not only with carriage performed by the State in a public interest, but also purely commercial carriage.

Seeing that the English proposal would allow all States, organising commercial carriage themselves, to escape from the rules of the Warsaw Convention, it was rightly combatted by most of the delegates [1].

At present there already exist some Companies directly operated by the State [2]. Moreover, if one takes into consideration that the Governments in nearly all European countries have, by means of the subsidies they grant, a great influence on the private air companies of their country, it is evident that a State which desires its Company to escape from the rules of the Warsaw Convention would not have great difficulties to change the private companies into State companies. Impeding complications would arise owing to the coexistence of divergent rules regulating commercial carriage performed by the State and commercial carriage performed by private companies. There is no reason to treat commercial undertakings of the State in a different way to those of private persons [3].

Notwithstanding these objections, the delegation of Great Britain, having received formal instructions from its Government on this subject, would not give up the reserve in question, and it was decided to add to the Warsaw Convention an additional protocol worded as follows:

"The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority".

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1. See Minutes of the IInd International Conference for Private Air Law, p. 97.
2. The Aeroflot (Russia), the Air-Afrique (France), the C.S.A. (Czechoslovakia.), the L.A.P.E. (Spain).
3. At the Warsaw Conference M. Ripert pointed out that the tendency of all laws, at the present time, is to treat commercial undertakings by the State on a parity with private enterprises.

Nevertheless, it was understood that if Great Britain did not maintain the reserve in the protocol on ratifying the Convention, the other High Contracting Parties would also not exercise the right of not applying the Warsaw Convention to carriage performed directly by the State [1].

Neither Great Britain nor any other States which have ratified the Convention up to date, have reserved the right provided in the additional protocol. Of the States which adhered to the Convention the U.S.A. alone made use of the reserve.

Postal carriage

Sub-paragraph 2 of article 2 considers postal carriage and provides that such carriage, if performed under the terms of any Postal Convention, will not fall under the rules of the Warsaw Convention. It is to be observed that the Universal Postal Convention held in London (1929) contains provisions concerning the carriage of mail by air (letters and parcels) regulating the freedom of transit, taxes and general conditions of admission of air mail etc [2]. It is evident that the carriage already regulated by this earlier international Convention cannot come within the frame of the Warsaw Convention.

Liability for the carriage of air mail

As to the liability of the Postal Administrations, the Postal Convention states in articles 54–60 that the Postal Administrations are liable for the loss of registered consignments. The consignor is entitled to an indemnity fixed at 50 gold francs per object.

The Postal Administrations are exempted from all liability for the loss of registered mail:

a) when the loss is due to *force majeure*; nevertheless, the liability subsists with regard to sending offices which have accepted to cover the risks arising out of *force majeure.*

b) when the contents of the consignments come under certain interdictions (e.g. dangerous matter, opium, etc.).

1. See Minutes of the IInd International Conference for Private Air Law, p. 99.
2. Article 11, sub-paragraph 11 of the Convention relating to the carriage of letter mail by air stipulates that the conditions of use on the long distance services of which the creation and up-keep necessitate special expenses should be settled by private contract between the administrations concerned.

The obligation to pay the indemnity falls on the Administration controlling the post office from which the consignment was sent, the right of recourse against the Administration responsible being reserved.

Unless proof to the contrary, the responsibility for the loss of a registered consignment falls on the Postal Administration which, having received it without making any remarks, and, in possession of all the regular means of investigation, cannot establish either the delivery to the consignee, or if necessary, the regular transfer to the next Postal Administration. If the loss took place during transport and it is not possible to establish over whose territory and in whose service it occurred, the Postal Administration concerned shall bear the expenses of the damages equally. When a registered packet has been lost under circumstances of *force majeure*, the Administration on the territory or in the service of which the loss took place is responsible to the sending Administration only if the two countries have agreed to bear the risks arising out of *force majeure*.

With regard to liability, the provisions concerning the carriage of letter mail by air annexed to the Universal Postal Convention contain in article 8 only the provision that the Administrations assume with regard to registered consignments carried by air the same liability as for other registered consignments.

The Arrangement, concluded the same day, concerning letters and boxes with declared value, stipulates in articles 16–22 and 25 that the Postal Administrations are liable for the loss, spoliation or damage of consignments with declared value [1].

The liability for postal parcels and C.O.D. consignments is settled by articles 29–32 and 37–42 of the Arrangement of the same date concerning postal parcels.

The Postal Administrations are liable for the loss, spoliation or damage to postal parcels. The consignor is entitled to an indemnity corresponding to the real value of the loss, spoliation or damage. Nevertheless for ordinary parcels, this indemnity cannot exceed 3,50 to 10 gold francs per kilogram according to their weight (e.g. 10 gold francs for a parcel up to a weight of 1 kilogram and 70 gold francs for a parcel exceeding 15 kilograms but

1. Air traffic Companies, members of the I.A.T.A., do not accept for carriage postal consignments with declared value.

not greater than 20 kilograms). Indirect damages or profit which has not been realised are not taken into consideration. The Postal Administrations may ask the consignor to insure.

The Postal Administrations are exempted from all liability:

a) In the case of *force majeure*; nevertheless, the liability subsists with regard to sending offices which have accepted to cover the risks arising out of *force majeure*;

b) when the damage has been caused by the fault or the negligence of the consignor or when it is inherent in the nature of the object;

c) when the postal parcels come under certain interdictions.

Unless proof to the contrary (as in the case for registered consignments, see above), the liability falls on the Postal Administration which, having received the parcel without making any remarks and, in possession of all the regular means of investigation, cannot establish either the delivery to the consignee, or if necessary, the regular transfer to the next Postal Administration. If the loss, spoliation or damage occurred during transport and it is not possible to establish over whose territory and in whose service it occurred, the Postal Administrations concerned bear the expenses of the damages equally. When a postal parcel has been lost, spoliated, or damaged under circumstances of *force majeure*, the Administration on the territory or in the service of which the loss took place is liable to the sending Administration only if the two countries have agreed to bear the risks of *force majeure*.

As a general rule it can be said that the air carriers are liable to the Postal Administrations only for the damage caused to the Postal Administrations themselves. It is reasonable that the Postal Administrations should not require an indemnity from the air carriers greater than that which they have to pay to the public by reason of the provisions laid down in the Universal Postal Convention.

The question of "force majeure" in Postal Conventions

Attention should be drawn to an article by Dr. Liebnitz in the "Union Postale" [1], the journal published by the international office of the Universal Postal Union. In this article it is proposed

1. "Haftung für hohere Gewalt im Weltluftpostrecht", l'Union Postale, 1936 no. 9.

to the Postal Administrations to recognise in future Conventions and agreements full responsibility even in cases of *force majeure*. The reason for this proposal is that "force majeure" is very variously interpreted by the legislation and jurisprudence of the different countries. This lack of judicial clearness has led some countries, the U.S.A. for example, to exclude exoneration from responsibility in case of *force majeure* from their inland postal legislation and to give compensation even when the damage is thus caused.

The author of the article is of the opinion that cases of *force majeure* so seldom happen in the postal service that it is not worth, while seeing the difficulties of interpretation, to maintain exoneration from responsibility for the few cases that are recorded.

In principle we cannot see that the differences in interpretation of *force majeure* which, as we have seen in the first chapter, certainly exist, must lead to entirely abolishing this idea and to accepting absolute liability. This remedy only should be accepted if the other remedies have failed completely. As we will see the Warsaw Convention adopted a system of liability which is hoped to lead to a certain uniformity. If in practice this system proves to be satisfactory it seems to us far better that the Universal Postal Union should accept this system instead of a system based on absolute liability.

In any case, as far as the international carriage of air mail is concerned, it would be very illogical to accept a system based on absolute liability while the international carriage of passengers and goods is governed by a system of liability based on fault.

Carriage not falling under the régime of the Warsaw Convention

To summarise, one can say that the carriage to which the rules of the Warsaw Convention cannot be applied are the following:

a. carriage within a country (article 1 *a contrario*)

b. carriage performed not for reward by individuals or groups (article 1 *a contrario*)

c. carriage performed not for reward by the State or other legally constituted public bodies (article 2 *a contrario*)

d. carriage performed under the terms of any international postal Convention (article 2 sub-paragraph 2)

e. carriage performed by way of experimental trial by air navigation undertakings with a view to the establishment of a regular line (article 34)

f. carriage performed under extraordinary circumstances outside the normal scope of an air carrier's business (article 34)

g. carriage performed by an owner under a charter contract if the charterer cannot be considered as a passenger or consignor within the meaning of the Warsaw Convention.

It should be pointed out that the C.I.T.E.J.A. has studied the possibility of elaborating a convention instituting a new régime of liability for:

1) carriage, for any purpose: tourist, scientific, religious or philantropic, performed by individuals or groups not for reward, that is, when there is no prestation of any kind, fixed by common agreement before the departure of the aeroplane;

2) carriage performed by way of first trial by air navigation undertakings, and carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business [1].

General Conditions of Carriage of the I.A.T.A.

Before examining the provisions of the Warsaw Convention dealing with traffic documents, mention should be made of the General Conditions of Carriage (passengers, baggage and goods) accepted by the International Air Traffic Association at its 24th Meeting, held at Antwerp on 9th and 10th September 1930 [2]. These Conditions are based on the Warsaw Convention and came into force for all Companies affiliated to the I.A.T.A. on 13th February 1933, i.e. the 90th day after the fifth ratification of the Warsaw Convention.

In examining the rules of liability to which the air carrier is submitted in national carriage, we alluded to the original conditions of carriage of the I.A.T.A. which were in force up to 13th February 1933 and according to which all liability of the carrier towards passengers and for goods was excluded. As soon as the Warsaw Convention was adopted by the IInd International Conference for Private Air Law on 12th October 1929, the I.A.T.A.

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1. See Döring: Droit Aérien 1930 p. 415.
2. See Information Bulletin of the I.A.T.A. No. 17.

began to draw up General Conditions of Carriage based on the Warsaw Convention. This made necessary the modification of the original conditions of carriage.

As we will see later, the provisions concerning the traffic documents drawn up by the Warsaw Convention correspond, to a great extent, to the provisions of the Berne Conventions concerning the carriage of passengers and baggage by rail (C.I.V.) and the carriage of goods by rail (C.I.M.) of 23rd October 1924 [1].

Since the Warsaw Convention only establishes certain rules relating to international carriage by air, it goes without saying that the air transport undertakings were forced to fix detailed conditions of carriage for international traffic. On examining the manner in which the rules put forward by the Warsaw Convention should be completed in their conditions of carriage, it appeared practical to the I.A.T.A. to use as basis the experience acquired by older forms of carriage, in particular by the railways. The adoption of this system has had the great advantage of already producing an agreement between the I.A.T.A. and the International Railway Union (I.R.U.) on the subject of air-rail carriage [2].

Besides the railway conditions of carriage, the conditions of carriage of the great shipping Companies were also taken into consideration. This appeared necessary in view of the fact that an increasing development of combined air-sea traffic is to be expected. For this reason, the conditions were established in such a way as to make it easily possible later to complete them so as to answer to the requirements of these means of carriage.

The question arose of to what carriage by air the new conditions of carriage should apply:

either *a*) only to international carriage coming under the Warsaw Convention,

or *b*) to all international carriage but not to internal carriage,

or *c*) to all commercial carriage without exception.

This question was discussed at the 24th Session of the I.A.T.A. held in Antwerp on 9th and 10th September 1930 [3], and it was recognised that the admission of the system considered under *a*) would entail, in the event of an accident, claims of a completely

1. The latter Convention was modified by the Convention of 23rd November 1933.
2. See page 303.
3. See Information Bulletin of the I.A.T.A. No. 14.

different nature regarding passengers and goods carried by the same aircraft.

With regard to the system under *b*) the same objections as above arise [1].

There therefore remained the system under *c*) which was adopted by the meeting unanimously.

In the definite text of the Conditions, an exception to this system was made. Certain provisions of the Warsaw Convention, which were judged to be too rigorous for the carriers, were only made applicable to carriage which is international within the meaning of the Warsaw Convention.

These provisions deal with:

1. the obligation to state the agreed stopping places on the traffic documents.

2. the sanction provided in the event of a passenger ticket not being delivered, in the event of the non-delivery of a baggage check or consignment note or any irregularity in these documents.

3. the liability for delay in carriage by air.

4. the prescription of two years for claims resulting from the General Conditions of Carriage.

Let us take as an example the situation in Austria; a country which has, at the time of writing, not yet ratified the Warsaw Convention. At common law the Austrian air traffic Company Oelag can exclude all liability. However, as member of the I.A.T.A., the Oelag has pledged itself to carry under the I.A.T.A. conditions and accepts therefore the liability of the Warsaw Convention. Only for uniformity's sake the Oelag has accepted these conditions though at the present moment it is not by the law obliged to do so.

At the 35th I.A.T.A. Session held in Berlin in January 1936 it was decided that an exception to the decision of applying the conditions of carriage to internal carriage would be made for the English members of the Association. The reasons why this exception was made have been explained when the situation of the air carrier in England was considered [2].

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1. See page 8.
2. See page 39.

Jurisprudence on the I.A.T.A. Conditions of Carriage
Judgment of the British High Court of Justice, Kings Bench Division, June 29th 1936

In *Westminster Bank* v. *Imperial Airways*, the plaintiffs sued the defendants in respect of the loss of three bars of gold which were consigned to the defendants for carriage from London to Paris on 5th March 1935.

The plaintiffs alleged that the contract, contained in the consignment note, was subject to the Carriage by Air Act 1932 and that by the terms of that Act it was incumbent upon the defendants to set out in their consignment note a statement that the carriage was subject to the rules relating to liability established by the Warsaw Convention [1].

The defendants alleged that by the said consignment note the contract therein contained, namely the contract of carriage, was expressed to be subject to the general conditions of carriage of goods which provide that the defendants were not liable for the loss of goods if they prove that they or their agents have taken all necessary measures to avoid the damage.

On the back of the consignment note fixed by the I.A.T.A. and used by Imperial Airways appeared a statement to this effect: "The General Conditions of Carriage of Goods are applicable to both internal and international carriage. These General Conditions are based upon the Convention of Warsaw of 12th October 1929 in so far as concerns international carriage within the special meaning of the said Convention".

In the opinion of Mr. Justice Lewis a statement that the carrier is subject to certain general conditions of carriage of goods which general conditions are based upon the Convention, is not a statement that the carrier *is subject to the rules relating to liability established by the Convention.* The learned judge was unable to hold that the statement on the back of the consignment note was in compliance with the statutory obligation of the Carriage by Air Act. The consignment note did not in his opinion satisfy the requirements of art. 8 (*q*) of the Warsaw Convention.

By virtue of art. 9 of the Convention, if the carrier accepts

1. Art. 8 of the Warsaw Convention fixing the particulars to be contained in the consignment note stipulates under q: "A statement that the carriage is subject to the rules relating to liability established by the Convention".

goods without the consignment note containing all the data indicated by art. 8 (*a*) to (*i*) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of the Convention, which exclude or limit his liability. As, in the opinion of Mr. Justice Lewis, the defendants did not have any defence to the plaintiff's claim, the defendants were found liable for the whole of the damage without limit [1].

Modifications in the traffic documents of the I.A.T.A.

In view of the above mentioned judgment the I.A.T.A. at its 35th Session (Berlin, January 1936) decided to modify the text on the back of the passenger ticket, the baggage check and consignment note, so that the exact wording prescribed by the Warsaw Convention is followed. These modifications dispose of the difficulty referred to in the above judgment.

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1. See further p. 264 on which the judgment is considered in connection with the "special declaration of value at delivery".

SECTION II

DOCUMENTS OF CARRIAGE

Passenger ticket

Article 3.

"1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

a) the place and date of issue;

b) the place of departure and destination;

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

2) The absence, irregularity or loss of the passenger 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 this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability".

Contents of passenger ticket

In the first place, examination must be made of the particulars which must be shown on the passenger ticket:

a. it goes without saying that for administrative reasons, the place and date of issue must be shown.

b. in order to determine whether the carriage is international within the meaning of the Warsaw Convention it is necessary to know the points of departure and destination.

c. the agreed stopping places were also considered a necessary item so as to determine whether or not the carriage was international within the meaning of the Warsaw Convention.

We have already pointed out that carriage between Marseilles and Dakar is internal carriage and that carriage between Marseilles and Dakar with a stop at Barcelona is international within the meaning of the Warsaw Convention.

The particular under *c* was seriously objected to by the I.A.T.A. In the drafts, the particulars of the stopping places were required without the reserve that the carrier could alter them if necessary. The I.A.T.A. drew the attention of the C.I.T.E.J.A. to the fact that unforeseen circumstances such as weather, might make it indispensable for the route to be changed without there being an opportunity to consult either the passengers or the consignors (the particular must also be shown on the air consignment note) and the text as drawn up in the draft would give the passenger or the consignor the right to pretentions regarding such alterations which could not but be considered unjust.

The Warsaw Conference realised that these remarks were true and added a reserve according to which the carrier could, if need be, alter the stopping places.

Nevertheless, this reserve did not carry away all the objections on the part of the carriers. There still remain two of a practical nature.

1) On long distance lines the number of stopping places may be as great as forty or more. It is naturally very inconvenient to show all these stopping places on the passenger ticket.

2) The first carrier and above all the agency which issues the ticket, will often not be able to foresee by which of several possible routes the passenger will be carried in the later part of his journey; consequently, it will often be impossible to show all the stopping places.

The disadvantages ensuing from point 1) may be remedied by allowing the air Companies to mention, instead of the stopping place provided, the number of the line on which the carrier will be carried. Airline numbers have been fixed by the I.A.T.A.[1] and are to be found in the time-tables and other publications of the Companies affiliated to this Association. It will therefore be easy

1. The I.A.T.A. at its last session which was held in Paris in July 1937, adopted a new general aviation code. In view of the adoption of this code, the system of linenumbering used up till now, must be changed. Before the end of 1937, the I.A.T.A. will propose a new system which will take into consideration airlines in all continents.

for the passenger to find out the stopping places by consulting the publications of his carrier [1].

The difficulty pointed out under 2) is more complicated. It must not be forgotten that it is often indispensable for a passenger to know the exact itinerary to be followed by his aircraft. A person who has been exiled from a certain country would not like to land in this country or cross it and run the risk of a forced landing. Furthermore, on long distance lines, he must know what visa he should have for his passport. In order to determine whether carriage falls under the régime of the Warsaw Convention or not, it will be necessary to know the stopping places which may give the carriage its international character. In the event of an agency not being able to tell in advance definitely by which of two (or more) lines the passenger will be carried during his journey, in our opinion, it should mark on the ticket: route by line no. .... *or* by line no. .... In this way, the passenger will not be able to criticise either the route followed or the stopping places, seeing that he is held to know the stopping places of all these lines and that he is presumed to have accepted one or the other of these lines.

It may happen that of two possible routes mentioned on the passenger ticket, one is international within the meaning of the Warsaw Convention, while the other is not. If a passenger carried on the latter route suffers an accident, will he fall under the régime of the Warsaw Convention although this route is not international within the meaning of the Convention? We believe that the answer to this question should be affirmative. We have pointed out that in order to determinate the international character of carriage by virtue of the Warsaw Convention, the intentions of the parties must be borne in mind. Seeing that the parties foresaw *the possibility of a stopping place giving the carriage an international character*, the fact that the aeroplane took the other route cannot entail the non-application of the Warsaw Convention.

d. Certain delegations at the Warsaw Conference proposed to abolish the words "or carriers" in this particular, because it would often be impossible for the first carrier to know by what

1. It is to be observed that on the tickets used by the members of the I.A.T.A. the following mention has been made: "For agreed stopping places see Timetables of Carriers concerned".

other carriers the passenger will be carried in the later part of the journey [1].

Let us take for example the journey Paris–Budapest; the Vienna–Budapest part is operated by three different Companies having a pool contract. It sometimes happens that the aeroplane of one Company is replaced by that of another Company at the last moment, and the latter performs the carriage.

The Conference was not able to accept this modification. Article 30 of the Warsaw Convention stipulates that the passenger may have recourse only against the carrier who performed the carriage when the accident or delay occurred; consequently, the passenger ticket must contain the name of *all* the carriers [2].

e. For understandable reasons, the ticket must contain a statement that the carriage is subject to the rules relating to liability established by this Convention.

Sanction against the carrier

The second sub-paragraph of article 3 is of special importance in the study of the Warsaw Convention. In this sub-paragraph, a severe sanction is provided against a carrier who accepts a passenger without a passenger ticket having been delivered. To bring out its real meaning, the reasons for this sanction being provided in the Warsaw Convention, should be examined.

During the preparatory work on the Convention, the question arose of whether there should be imposed on the carrier an obligation to issue traffic documents, as is provided in the Berne Convention of 23rd November 1933 for railways.

Most delegates were in favour of this obligation for the air carrier.

The British delegation, however, considered that it would be very difficult to make an adequate penal sanction accepted by English legislation. On the other hand this delegation shared the opinion of the other delegations that it would be illogical to allow the carrier to benefit from the régime of liability of the Warsaw

1. See Minutes of the IInd International Conference for Private Air Law p. 100.
2. On the I.A.T.A. Passenger ticket a space is reserved for the name of the carrier; this space is filled in when the name of the Company carrying the passengers is known. As regards the address of the carrier, which is required by the Warsaw Convention, a list of all Companies members of the I.A.T.A. with their addresses is given on the inside of the front cover of the I.A.T.A. ticket. A reference to this list is made under the space mentioned above.

Convention, if he had omitted to draw up traffic documents in conformity with the provisions of the Warsaw Convention. The opinion was held that the carriers should be made to use traffic documents for a contract for international carriage, without however it being considered illegal to do without these documents. Further, it was considered that these documents should contain certain essential particulars.

It was thought that these two objects could be attained by making it materially more advantageous for the carrier to use traffic documents containing the essential particulars, and putting him in a less favourable position if he wished to conclude contracts of carriage either without any documents or with documents not containing the essential particulars.

For these reasons, it was provided in the definite draft presented to the Warsaw Conference that, if the carrier had omitted to issue a traffic document (passenger ticket, baggage check or air consignment note) containing the essential particulars, *he would not be entitled to avail himself of those provisions of the Warsaw Convention which exclude or limit his liability.*

As regards the passenger ticket, article 3 of the draft provided a sanction against the carrier

1. if he had not issued the passenger ticket,
2. if the ticket did not contain the following particulars:

a) the place and date of issue,

b) the place of departure and of destination,

c) summary indication of the route to be followed (via) and the agreed stopping places,

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

With regard to this article, the delegate of the Greek Government at the Warsaw Conference pointed out [1] that the sanction provided in the case under (2) would be much too rigourous if the carrier had omitted to put down the place of issue or the place of destination, or his name and address, just through carelessness. How could this severe sanction against the carrier be justified if the omission was of no interest to the other party and of no injury to him? The Greek delegation proposed the modification of the last sub-paragraph of article 3 of the draft as follows:

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1. See Minutes of the IInd International Conference for Private Air Law p. 101.

"If in international carriage, the carrier accepts a passenger without issuing a ticket, the contract of carriage will none the less be submitted to the rules of the present Convention, but the carrier will not be entitled to avail himself of the provisions in this Convention which exclude in part or entirely his direct liability or his liability for the acts of his agents.

"If the ticket does not contain the particulars given above, the carrier will not be entitled to avail himself of this right if, in the opinion of the court, a damage has been caused in this way to the other party".

The Conference agreed with the Greek point of view, and suppressed the words

"If the ticket does not contain the particulars given above".

The sanction provided for, will only be applied when the carrier has not issued a ticket. As regards the form and the contents of the ticket, no liability devolves on the carrier from the Warsaw Convention. By virtue of the Warsaw Convention, the carrier is free to issue any ticket he wishes, without having to include the particulars regarded in article 3 [1].

As regards the baggage check, article 4 provides for a sanction when the carrier accepts baggage without having delivered a baggage check, or if this check does not contain the number of the passenger ticket, the number and the weight of the packages or a statement that the carriage is subject to the rules relating to liability established by the Convention.

As regards the consignment note, article 9 provides for a penalty against the carrier who accepts goods without an air consignment note or with an air consignment note which does not include particulars considered as essential, that is, the particulars given in article 8 (*a*)—(*i*) and (*q*) which are as follows:

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1. Though the carrier does not incur any liability with regard to the contents of the ticket by virtue of the Warsaw Convention, this does not mean to say that his liability does not come into play at all. The Warsaw Convention only determines *certain* rules of liability; the question of whether the carrier will be liable for damage sustained by a passenger owing to faulty wording, will be solved by common law. Bearing in mind the principle that the non-performance of a contractual obligation results in damages to be paid by the debtor, there is no doubt that the carrier will have to repair the damages inflicted on the passenger.

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

(*b*) the place of departure and destination;

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

(*d*) the name and the address of the consignor;

(*e*) the name and the 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 number upon them;

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

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

The particulars under the letters *a*, *b*, *c*, *d*, *e* and *f* are considered indispensable from the point of view of the execution of the Convention; the particulars under the letters *g*, *h*, *i*, are necessary, because the consignment note must be used as proof for the purpose of identification of the goods.

Objections against the present system

Although at first sight a system tending to prevent the carrier from benefitting from the régime of liability of the Warsaw Convention when he has not delivered traffic documents, seems to have certain advantages, we consider that many objections can be made with regard to the form in which it has been introduced into the Warsaw Convention.

a. The sanction will in most cases be not at all equivalent to the fault committed. Let us take the following example. Owing to the carelessness of one of the carrier's servants, the baggage check delivered to a passenger does not contain the number of the passenger ticket. The aeroplane struck by lightning, crashed to the ground, and destroyed the baggage. The passenger having sustained damages brings an action against the carrier. He produces the baggage check and proves

1) the damage sustained by the loss of his baggage,
2) that the damage occurred during carriage by air.

Let us suppose that the baggage check was in order. By virtue of article 20, of the Warsaw Convention, the carrier will exclude his liability by proving that he took all the necessary measures to avoid the damage, which will not be very difficult for him as lightning excludes all possibility of fault on his part.

Let us now take the case where the check did not contain the number of the passenger ticket. Article 4 of the Warsaw Convention stipulates that if the carrier accepted baggage without the check containing the particulars provided for under letter *d*) (number of ticket), the carrier will not be entitled to avail himself of the provisions of the Convention which limit or exclude his liability. Consequently he cannot make use of the means of excluding his liability given in article 20 [1].

Will the carrier then be deprived of all means of exonerating himself from liability? M. Maschino, in an article which appeared in the "Droit Aérien" of 1930 [2] maintains that the carrier who has not conformed to the provisions of the Warsaw Convention, concerning traffic documents, is subjected to the régime of the national law "which may be more or may be less severe than the international law". We cannot share this opinion.

Attention should be drawn to the words of M. Ripert, who said, during the IInd Session of the C.I.T.E.J.A.: "A very severe sanction has been provided against the carrier who does not use a consignment note; this sanction is: *that the provisions of the Convention will be applicable to him in so far as they are unfavourable to him*, and that he will not be able to avail himself of the exonerations provided in the Convention" [3]. Neither the preparatory work of the Convention nor the text of the Convention give any indication that the carrier will be governed by the régime of common law if he has not carried out the provisions of the Warsaw Convention.

Since the object of the sanction is to put the carrier, who did not draw up the proper traffic documents, in a less favourable

1. By the decision of the English Court in Westminster Bank Ltd. v. Imperial Airways Ltd. it has been decided that, so far as English law is concerned, article 20 is a provision of the Convention which excludes or limits the liability of the carrier (Judgment of the British High Court of Justice, Kings Bench Division, June 29th 1936).
2. Maschino "La Convention de Varsovie et la Responsabilité du Transporteur Aérien" Droit Aérien 1930, p. 4.
3. Minutes of the IInd Session of C.I.T.E.J.A. p. 25.

position than the carrier who conformed to the provisions of the Warsaw Convention, it would be rendered completely illusory, if the point of view of M. Maschino was accepted, because the régime of common law may be less severe than that imposed by the Warsaw Convention. We consider that the following reasoning should be adopted:

It is said in the Warsaw Convention that in the case of any irregularity in the traffic documents, the carrier will not be entitled to avail himself of those provisions of the Convention which limit or exclude his liability. This provision in no way implies that all the rules of the Warsaw Convention should no longer be applied in such cases. On the contrary, all the rules remain in force except those that limit or exclude the liability of the carrier. In the given case, the only article which can be applied is article 18:

"The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air".

The carrier will be liable for the damage sustained by the passenger owing to the destruction of his baggage and this liability will be unlimited. It seems to us that this sanction can never be justified, since the omission of the obligatory particular was not the cause of any damage to the passenger.

Let us now take a case which will most often arise in practice. The carrier has, through carelessness, omitted to state on the baggage ticket the number of packages. Carriage was performed without loss, damage or delay. Nevertheless, on arrival at destination, the servants of the carrier will not hand over to the passenger more packages than are given on the baggage check. Though the passenger here sustains damages, the sanction provided in the Warsaw Convention is of no value to him as it only regards the liability of the carrier for destruction, loss, damage or delay of baggage, and therefore only applies when one of these events has occurred. The question of whether or not the carrier is liable for the damage sustained by the passenger in the given case, will be solved by the rules of common law.

b. Hitherto, we have only considered the sanction with regard to the baggage check. With regard to the passenger ticket, the

sanction has even less value. As it has already been said, the carrier, by virtue of the Warsaw Convention, will be deprived of the benefits of the Convention, if he fails to deliver a ticket, but he will not be deprived of them if he has delivered a ticket which is however not in conformity with the provisions of sub-paragraph 1 of article 3 regarding the form of the ticket. Consequently, he can deliver any kind of ticket, without including any of the particulars required by the Warsaw Convention, since the Convention has not provided for any sanction against such omissions. Let us recall that in the draft Conventions, a sanction was provided also in the case of tickets not containing certain particulars considered obligatory, but consequent on a proposal of the Greek delegation at the Warsaw Conference, article 3 was modified.

As we have pointed out, the scope of the sanction for omitting one of the particulars, whether with regard to the passenger ticket, the baggage check or the consignment note, is out of all proportion to the fault committed by the carrier.

The Greek proposal was therefore very reasonable and the Conference agreed to it immediately. But why did the Conference only restrict the scope of the sanction with regard to the passenger ticket and not with regard to the baggage check and the consignment note? The Greek proposal extended logically to all the traffic documents and not only to the passenger ticket.

Let us return to the beginning. The principles which must regulate the question of traffic documents in the Warsaw Convention are the following:

1) the carrier must make use of traffic documents in the form prescribed by the Warsaw Convention.

2) the carrier must bear the consequences of damage sustained by a passenger or consignor arising from an omission or irregularity on these documents, due to the fault of the carrier.

As we have tried to show, the system at present adopted in the Warsaw Convention cannot attain this object. On the one hand, the sanction goes too far, the liability of the carrier being unlimited though the fault may be but a simple omission; on the other hand, seeing that the sanction will have no value unless the liability of the carrier is engaged by virtue of the Warsaw Convention and that in most cases the passenger or consignor has sustained damage owing to the irregularity of the traffic docu-

ments without liability flowing from the Warsaw Convention being engaged, the sanction will in practice often be rendered completely illusory.

It is to be regretted that the delegations of the Governments in the C.I.T.E.J.A. were unable to come to an agreement with regard to the idea of the traffic documents being declared obligatory in the Warsaw Convention, and of leaving it to the national laws to take penal sanctions for the non-observance of the rules of the Convention on this subject. The British delegation objected to this system on the grounds of the difficulties which would arise, in making English legislation accept a penal sanction on this subject. We would point out that we do not understand very well why the British delegation thought that it would not be possible to admit the obligation of drawing up an air consignment note in the Warsaw Convention, when England, a High Contracting Party of the International Convention relating to the regulation of Air Navigation of 1919, made no objections to article 19 of this Convention which stipulates under (*a*) that every aircraft engaged in international navigation must be provided with bills of lading for the goods which it carries. Seeing that England, by virtue of the 1919 Convention accepts the obligation for the carrier to have consignment notes on board the aircraft, why not recognise in the Warsaw Convention the obligation for the carrier to draw up these consignment notes?

If the delegates of the International Conference, which will in some time meet to study the ameliorations which could be made to the Warsaw Convention, wish to maintain the present system, it would be desirable to meet the objections given above under *a*, *b* and *c*.

In this connection special attention should be drawn to the Italian Decree of 28th Sept. 1933 which has been considered in Chapter I. It has been seen that in this Decree which reproduces nearly textually the Warsaw Convention, the sanction of the non-application of the limits of liability has been abolished [1].

Passenger ticket of the I.A.T.A.

In the General Conditions of Carriage drawn up by the I.A.T.A. a form of passenger ticket is prescribed which must contain:

1. See p. 79.

a. the place and date of issue;
b. the points of departure and destination;
c. the name and address of the carrier or carriers.

With regard to stopping places, we have already remarked that on the ticket has been mentioned "For agreed stopping places see Timetables of the carriers concerned".

It has been observed that the carrier can word a ticket as he pleases since the particulars in article 3 are optional. The members of the I.A.T.A. have therefore the right of not mentioning the stopping places, even in the event of carriage falling under the régime of the Warsaw Convention.

It should be pointed out that the passenger ticket issued by the I.A.T.A. contains two particulars which are not provided in article 3 of the Convention:

A. the fare;
B. the name of the passenger.

A. Fare

Remuneration is one of the clauses of the contract of carriage. Consequently it is desirable that the fare should figure on the passenger ticket, which constitutes the proof of the contract.

Why does article 3 of the Convention not mention the fare, whilst in the draft conventions it was mentioned? In the minutes of the preparatory work on the Convention it can be seen that it was not intended to maintain particulars of a secondary nature (as the fare, in the opinion of the C.I.T.E.J.A.), for the sanction against the carrier, in the event of these particulars not being included, would be too rigorous.

Since the Warsaw Convention has forgone the obligatory character of the particulars in article 3, which no longer have any value except as directions, it is illogical that the particular regarding the fare has not been shown.

B. Name of the passenger

At the Warsaw Conference, the Polish delegation proposed to add to article 3 a sub-paragraph worded as follows: [1]

"On the request of either the carrier or the passenger, the

1. See Minutes of IInd International Conference for Private Air Law, p. 101.

passenger ticket may be nominative and bear the name of the holder and the address of the passenger".

Long discussions arose on the subject of the transferability of the passenger ticket. The Polish proposal was finally rejected by 12 votes against 10. It seems to us that the proposal has no practical use, either from the point of view of the carrier or from that of the passenger. Unless specially provided, the carrier will be able to decide whether or not the passenger ticket drawn up by him will be nominative or to bearer. The right conferred upon the passenger to require a nominative ticket, would not be of great interest to him because if the carrier was not prepared to issue such a ticket, and did not wish to carry under certain conditions, he would be perfectly free, by virtue of article 31 of the Warsaw Convention, to refuse the conclusion of such a contract of carriage.

Tickets for order or for bearer

The aircompanies did not wish to accept order or bearer tickets. As we have seen it is for these reasons that the General Conditions of Carriage of the I.A.T.A. have stipulated that the passenger ticket must contain the name of the passenger. The nominative ticket doubtless has advantages. Control by the carrier is made easier. Furthermore, by virtue of the Convention regulating air navigation of 13th October 1919, the carrier is held to provide a passenger list for aircraft carrying passengers. The drawing up of this list is much facilitated by nominative tickets. In the present state of air navigation, it is useful for the carrier, for several reasons (statistical, political etc.) to know the nationality of the person who is to be carried.

The aircompanies, members of the I.A.T.A., consider that it may be of interest to them, for the passenger ticket to be used exclusively by the person to whom it was issued, and have expressly stipulated in art. 2 par. 4 (2) of their Conditions of Carriage that the passenger ticket is not transferable.

It is to be pointed out that in the C.I.V., in article 6, paragraph 5, the ticket issued by the railway is transferable, unless stipulated to the contrary, only when it is not nominative and when the journey has not begun. In practice the passenger tickets used on railways are for bearer and transferable, unless the journey has begun.

As regards maritime navigation the tickets usually mention the name of the passenger and an interdiction to transfer the ticket [1].

Luggage ticket

Article 4.

1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

3) The luggage ticket shall contain the following particulars:

a) the place and date of issue;

b) the place of departure and 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 amount of the value declared in accordance with article 22 (2);

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

4) 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 this 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 Convention which exclude or limit his liability".

Interpretation of the word "luggage"

The Warsaw Convention has not defined the word "luggage"; paragraph 1 of article 4 only makes a distinction between luggage on the one hand and small personal objects of which the passenger takes charge himself, on the other.

The Conditions of Carriage (Passengers) of the I.A.T.A. also do not give a definition of luggage, but in article 8 the objects which are excluded from carriage as baggage are given. They are:

a) the articles enumerated in Article 6 paragraph 1 (*b*) and (*c*), that is, dangerous articles, especially arms, munitions, explosives,

1. Ripert, Droit Maritime, no. 1968.

corrosives and other articles which are easily ignited; things which are offensive or evilsmelling and other articles of a character likely to inconvenience passengers or which are dangerous to aircraft, passengers or goods, photographic apparatus, carrier pigeons, wireless apparatus and other articles the carriage of which by aircraft is prohibited by law or other authority.

b) articles which, owing to their dimensions, their weight or their character are in the opinion of the carrier unsuitable for carriage in the aircraft of any of the carriers concerned.

c) goods (merchandise).

The notion of luggage within the meaning of the General Conditions of Carriage of the I.A.T.A. is wider than that within the meaning of the C.I.V., since in carriage by rail only objects reserved for the personal use of the passenger on his journey are considered as luggage. There must consequently be a relation between the object and the passenger on the one hand and the object and the journey on the other hand. Title-deeds, valuables, silver etc., which are not necessary on the journey, will therefore be excluded from carriage as luggage on railways [1]. Such objects may very well be considered as luggage within the meaning of the General Conditions of Carriage of the I.A.T.A. unless they are considered as goods in the opinion of the carrier.

Text and form of the luggageticket

The luggage ticket must contain certain particulars given in paragraph 3 of article 4. The particulars under *a*, *b* and *c* are identical with those on the passenger ticket and have already been examined.

The particular under letter *d*) (number of the passenger ticket), lays emphasis on the relation which must exist between the passenger and the baggage. The passenger must show his ticket when he registers his luggage. For several reasons relating to control, the presentation of the ticket is of great utility to the carrier. Above all because in practice the passenger by air, as the passenger by rail, is entitled to a right to free luggage up to a certain amount of kilogrammes (generally 15 kilogrammes). This

1. See Brunet, op. cit. p. 400; see also Ripert, Droit Maritime No. 1967, note 3: "The Passenger Information Book of Steamship Companies only considers linen and personal effects in ordinary use by the passenger, as baggage. It is forbidden to freight goods as baggage. The penalty is an extra freightcharge of 50%".

accessory right to the principal right concerning the person of the passenger is inherent in the right of the seat and must be considered as not transferable [1].

Although the right to register luggage is not transferable, the right to the luggage, once the registration is made, is transferable by the passenger to a third party.

By virtue of the particular under letter *e*), the carrier is held to hand over the luggage to the bearer of the luggage ticket, without having to verify whether the bearer of the luggage ticket is entitled to take delivery of the luggage. Consequently, if the real proprietor of the luggage comes to lay claim to it after a third party of bad faith had withdrawn the luggage from the carrier by handing over the ticket, the carrier is completely relieved of all liability.

The particulars under letters *f*) and *h*) do not give rise to any special remarks. The question of the amount of value declared (mentioned under letter *g*) will be treated when we examine article 22 of the Convention.

The second paragraph of article 4 provides for a sanction against the carrier identical with that stipulated in article 3 (2).

Nevertheless, while article 3 (2) provides for a sanction only in the event of the non-delivery of the passenger ticket, this sanction is equally provided with regard to the luggage ticket in the case of the carrier having omitted to insert the particulars mentioned under letters *d*), *f*), and *h*) in the luggage ticket.

Why are there no provisions in the Warsaw Convention regarding the right of disposition of luggage and the liability resulting from these prescriptions?

The Warsaw Convention contains no provisions regarding:

a. the right of disposition of luggage during the journey by the bearer of the luggage ticket.

b. the liability which may result from the carrier or for the bearer of the luggage ticket from the application of the prescriptions of article 4 (2).

Seeing that the Warsaw Convention has drawn up rules concerning these two questions with regard to the air consignment

1. For carriage of goods by rail in this meaning see Brunet, op. cit. p. 403; Josserand op. cit. No. 950.

note (see article 10 and article 12 which will be treated later), it seems illogical to us that it has not drawn up analogous provisions regarding luggage. The I.A.T.A. has made good this deficiency by the provisions in article 10 of its General Conditions of Carriage (Passengers):

> "Liability of the passenger concerning his baggage.
>
> Paragr. 1: The bearer of the baggage check must observe the provisions of Article 8. He is responsible for all the consequences of non-observance of these provisions.
>
> Paragr. 2: If any contravention is suspected, the carrier has the right to verify if the contents of packages comply with the regulations. The bearer of the baggage check will be called to assist at such verification. If he does not attend or if he cannot be found, verification can be effected by officials of the carrier alone. If a contravention is proved, the cost of verification must be paid by the bearer of the baggage check.
>
> Paragr. 3: In the case of a breach of the conditions of Article 8, the bearer of the baggage check shall pay an extra charge (surtaxe) without prejudice to the supplementary charge (supplément de taxe) and compensation for damage; also penalties, if required".

This article corresponds in its greater part to article 18 of the C.I.V. and is analogous to the provisions established in article 10 of the Warsaw Convention, regarding the air consignment note.

With regard to the right of disposition and delivery of luggage, article 12 of the General Conditions of Carriage (passengers) stipulates:

> "*Delivery.*
>
> Paragr. 1: Delivery of baggage will be made to the bearer of the baggage check against delivery of the baggage check. The carrier is not bound to verify if the bearer of the check is entitled to take delivery.
>
> Paragr. 2: Failing presentation of the baggage check, the carrier is only bound to deliver the baggage if the claimant establishes his right; if such right appears to be insufficiently established the carrier may require security.
>
> Paragr. 3: Baggage will be delivered at the place of destination to which it is registered. Nevertheless, at the request of the bearer of the baggage check, if made in sufficient time and if circumstances permit, baggage can be delivered at the place of departure or at a stopping place against delivery of the baggage check

(without any liability to refund the cost of carriage paid) provided this is not precluded by regulations of the Customs, Revenue (octroi), Fiscal, Police or other administrative authorities.

Paragr. 4: (1) The receipt without complaint of baggage by the bearer of the baggage check or other party entitled is prima facie evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage. In case of damage the passenger must complain to the carrier forthwith after discovery of the damage, and at the latest within three days from the date of receipt of the baggage. So far as concerns international carriage within the meaning of Article 1, paragraph 2, in case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing upon the baggage check or by separate notice in writing despatched within the times aforesaid. Failing complaint within the times aforesaid no action shall lie against the carrier save in the case of fraud on his part.

(2) The expression "days" when used in these Conditions means current days, not working days".

The provisions concerning the right of disposition correspond to those established in the C.I.V.

Nevertheless, the railway can require the presentation of the passenger ticket before handing over the luggage to the bearer of the luggage ticket (article 21 paragraph 4); this faculty is not provided for the air carrier; he is only held to request the presentation of the luggage ticket.

In the draft presented to the Warsaw Conference, article 4 also contained particulars regarding stopping places. This particular was considered unnecessary, since the luggage ticket already contains the passenger ticket number on which the stopping places must appear.

Handbaggage

We will see that in art. 22 the liability of the carrier with regard to the objects of which the passenger takes charge himself is limited to the sum of 5000 francs. However the régime of liability of the Convention is not applicable to the carriage of these objects because the luggage ticket does not cover them and, as it has been observed, it was decided to base the régime of the Convention on the traffic documents. Whether the carrier's liability

will be engaged in the event of loss of hand baggage will be decided by the rules of common law [1].

The I.A.T.A. has taken a desision on hand baggage of which the text reads as follows: [2]

> "The following articles will be carried free of charge in addition to the free allowance of 15 kgs.:
> 1. Ladies hand bags (one per person);
> 2. Coats;
> 3. Rugs and wraps;
> 4. Umbrellas and walking sticks;
> 5. Photographic and cinema cameras for small films;
> 6. Portfolios (one per person).
>
> (Provided that it does not weigh more than 5 kg., it will be carried free. If the weight exceeds 5 kg., it must be treated as registered baggage)".

From the above the following conclusions can be drawn. According to the Convention there is no obligation for the carrier to draw up a luggage ticket.

Nevertheless, the acceptance of luggage without a ticket or with a ticket without the essential particulars entails sanctions against him.

The right to register belongs to the passenger and is not transferable. The right to luggage after registration can be transferred by the passenger by the simple fact of handing over the luggage check.

It is illogical that the Warsaw Convention has not fixed any rules on the subject of the liability of the passenger concerning the statements on the luggage ticket or any rules relating to the right of disposition concerning luggage.

Air consignment note

> **Article 5.**
>
> "1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.
>
> 2) The absence, irregularity or loss of this document does not

1. See further on this subject p. 257.
2. Information Bulletin of the I.A.T.A. No. 25, p. 64.

affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention".

The air consignment note — as the passenger ticket and the luggage ticket — is not obligatory, because, as we have said, the British delegation in the C.I.T.E.J.A. considered that it would be difficult to establish an adequate penal sanction. However, in order to obtain that the carrier uses an air consignment note with certain essential particulars the second par. of art. 5 refers to art. 9 of the Convention, by virtue of which the carrier will be in an unfavourable position if he has concluded a contract of carriage without any document or with a document not containing the essential particulars. The objections which, in our opinion, have to be made against this system have already been explained.

The consignment note establishes the conclusion of the contract, but does not constitute it. The consensus of both parties is sufficient for the contract to be concluded.

In art. 4, par. 1, of the General Conditions of Carriage of Goods of the I.A.T.A. it is stipulated that the consignor *must* make out a consignment note in three original parts.

Article 6.

"1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

3) The carrier shall sign on acceptance of the goods.

4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

The consignment note is therefore made out in three parts destined for the three persons directly concerned in the carriage: the consignor, the carrier and the consignee [1].

1. See Minutes of the IInd International Conference for Private Air Law, p. 105.

In the former drafts, article 6 contained the following paragraph:

"Each of these three parts has the same value". The Warsaw Conference abolished this paragraph and added to the first paragraph the words: .... "by the consignor in three *original* parts", thus showing that the copies are equivalent [1]. During the preparatory work on the Convention, the question arose of whether the consignor or the carrier should make out the consignment note. It was, with reason, decided that the making out of the note should fall on the consignor, who alone can provide the necessary information and guarantee its accuracy.

Paragraph 5 was added at the request of the I.A.T.A., as it often happens in practice that the carrier makes out the consignment note on the request of the consignor, especially with regard to packages handed in for carriage at the last moment. This paragraph besides, corresponds to article 39 of the C.I.M.

Value of the consignment note

It is to be observed that the consignment note as fixed in the Warsaw Convention, bears no resemblance to the bill of lading (French "connaissement") as used in shipping. The consignment note does not symbolise the goods; it is not a document of which any claim to the goods can arise; it is not a document of title and its transfer can not in any circumstances affect either the ownership of the goods or rights against the carrier.

M. Cosentini in his book "International Code of Aviation" [1] critisises the Warsaw Convention because it abolished the bill of lading. He thinks that the abolition of the bill of lading was due to the fact that the German delegation at the Warsaw Conference could not find a term corresponding to the French word "connaissement". The minutes of the sessions of the C.I.T.E.J.A. clearly prove that this opinion is wrong.

Within the Second Commission of the C.I.T.E.J.A. the possible interest there might be in giving the air consignment note the value of a bill of lading, was examined. The Italian delegate maintained that a bill of lading was indispensable for air carriage, which, owing to its great rapidity, must provide greater facilities for the transfer of goods. Other delegates considered that the bill

1. Cosentini: "International Code of Aviation" Mexico 1933, p. 23.

of lading would give rise to extremely complex juridicial relations, the introduction of which into air law cannot be considered. M. Ripert pointed out that there is above all a legal obstacle: "The bill of lading represents the goods because the captain holds them on behalf of the bearer of the bill of lading. It is not the same with regard to carriage by air".

In this connection, it should be pointed out that the question of the regulation of the powers of the commander of aircraft is being studied by the C.I.T.E.J.A. At the Sixth Session, this Committee adopted a draft convention on the legal position of the commander of aircraft, regulating the powers of representation, and the powers of discipline and authority. This draft, in its present form, gave rise to various objections on the part of the I.A.T.A. Above all, the powers of representation conferred on the commander are too extensive [1]. In any case, it is certain that several years will pass before a convention on this subject will be adopted by a diplomatic Conference.

The use of bills of lading in air carriage — in our opinion — cannot be considered before the position of the commander is regulated, before the question of charter contracts is solved, and before air traffic is definitely stabilised on all these points.

The draftsmen of the Warsaw Convention, who were convinced that an international law should envisage the most vast international commerce and should consider the future rather than the present, did not wish to exclude the possibility of consignment notes for order or for bearer. It is for this reason that in article 8, regarding the particulars on the consignment note, is included under letter *f*): "the name and address of the consignee, *if the case so requires*" [2] — eventually in the case of carriage to bearer, the name and address of the consignee could be omitted. The air companies, members of the I.A.T.A., however, did not wish to accept consignment notes for order or for bearer; the General Conditions of Carriage (Goods) stipulate in article 4 that the consignment note must contain *the name and address of the consignor and consignee* [3]. Consequently, only the consignor and

1. See Goedhuis "La situation juridique du Commandant de l'Aéronef" in the "Revue de Droit Aérien International et de Législation comparée" 1933, p. 4.
2. See Minutes of the IInd International Conference for Private Air Law, p. 106.
3. Article 6, par. 6 *d*) of the C.I.M. requires as obligatory particular on the railway consignment note: the name and domicile of the consignee, the addresses to order or bearer not being allowed.

consignee designated can require the performance of the contract. On arrival, the designated consignee may require delivery without even having to produce the consignment note as long as he proves his identity.

As a result, then, the consignment note cannot be transmitted either simply or by endorsement. Nevertheless, this does not mean that the rights supported by the consignment note are not transferable. In general the rights supported by the consignment note can be transferred, taking into account the principle that: *"nemo plus juris in alium transferre potest quam ipse haberet"* and provided that there is no special stipulation forbidding such transfer [1]. Contrary to the provision in the Conditions of Carriage (passengers) of the I.A.T.A. concerning the non-transferability of the passenger ticket, the Conditions of Carriage of Goods have not stipulated the non-transferability of the consignment note.

Comparison between the triplicata of the air consignment note and the duplicata of the railway way bill

It has been maintained that the triplicata of the air consignment note (that is, the copy for the consignor) has the same legal importance as the second copy in the railway way bill [2]. This opinion does not seem to us entirely correct. Although the duplicata contains all the particulars that are to be found on the way bill, it cannot be used as *prima facie* evidence against the carrier, nor serve as basis to the settling of a difficulty arising during carriage. The duplicata remains personal to the individual to whom it was issued, and can in no way be handed over to a third party and can in no way have the same value as the way bill [3].

It is a different matter as regards the triplicata of the air consignment note.

To bring out the fact that the three copies of the air consignment note have the same legal value, it has been stipulated in article 6 of the Warsaw Convention: "The air consignment note shall be made out by the consignor in three *original parts*" [4].

The legal importance of the third copy of the consignment note

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1. Cf. Josserand op. cit. no. 356: Lyon Caen III, No. 574.
2. Döring in Droit Aérien 1930, p. 126.
3. Brunet op. cit. p. 110.
4. See Minutes of the IInd International Conference for Private Air Law, p. 105.

is therefore greater than that of the second copy of the railway waybill.

It must however be recognised that the rôle which is played in carriage by air by the triplicata of the consignment note will be more or loss similar to that played by the duplicata of the way bill in carriage by rail. The consignor, by immediately sending the copy of the consignment note issued to him to the consignee, loses his right of giving new instructions to the carrier (art. 12 (3) Warsaw Convention); he would not have lost this right if he had kept this document. Since the consignor has no longer control over the contract of carriage, the bank of the consignee can advance money on the goods on the transfer to him of the triplicata. In carriage by rail, the duplicata of the way bill enables the consignee to make business transactions on credit [1]. It should, however, be pointed out that the transfer of the air consignment note or the railway way bill does not permit the same commercial or banking operations as in the case of the maritime bill of lading, because the transfer of the first mentioned documents does not transfer the right of disposal of the goods to the person who received these documents.

Copies of the consignment note

In one of the drafts, an article was provided which stated that the carrier could draw up, for purposes of carriage, one or more copies, which would not have the same value as the three original parts of the consignment note. This article has been quite rightly abolished. If the copies have not the same value as the three original parts, they have no legal value. The drawing up of copies is a question of internal régime of the air traffic companies [2].

In order to avoid difficulties, the carriers would be well advised to show clearly on the consignment note whether it is an ordinary copy or a copy for the consignor or consignee.

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1. Seligsohn op. cit., p. 289.
2. It is to be observed that the air consignment note issued by the companies members of the I.A.T.A. are completed in six copies: a first carrier's copy, a consignee's copy, a consignor's copy, a copy for the company of destination, and two copies to serve as customs declaration for the customs of airport of departure and for the customs of airport of destination.

Conclusion of the contract of carriage

As in carriage by rail, the agreement of carriage by air takes the form and nature of a contract of adhesion, the consignor being content with accepting and fulfilling the conditions offered by the carrier. There are, however, two fundamental differences between the conclusion of a contract of carriage by air within the meaning of the Warsaw Convention and the conclusion of a contract of carriage by rail within the meaning of the C.I.M.

a) In article 33 of the Warsaw Convention it is stipulated that nothing contained in the Convention can prevent the carrier from refusing to enter into any contract of carriage, while the C.I.M. in article 5, par. 1, imposes on the railway the obligation to perform all carriage of goods admitted by virtue of the Convention.

b) In article 5 of the Warsaw Convention, it is stipulated that the consignor has the right to demand the carrier to accept the air consignment note, but the absence, irregularity or loss of this document does not affect the existance or the validity of the contract of carriage, which shall be subject to the Warsaw Convention. The right conferred on the consignor by the Warsaw Convention of demanding the carrier to accept the air consignment note will not avail him much, because when the carrier does not wish to accept this document, he can refuse the conclusion of the contract of carriage. Article 6 paragraph 1 of the C.I.M., on the contrary, imposes on the consignor the obligation of handing over a way bill, the contract of carriage being concluded, as soon as the forwarding station has accepted the carriage of goods with the way bill. This contract therefore has a certain formal character.

With regard to the difference considered under *a*), it is evident that the right of refusing a contract of carriage of goods will not often be exercised by the carrier. Furthermore, although the carrier is given, by the Warsaw Convention, the right to refuse the conclusion of the contract of carriage, it may well happen that by virtue of the common law of his country, he may assume a certain liability towards passengers or consignors when exercising this right, if he is bound by offers previously addressed to the public.

With regard to the difference shown under *b*), the air navigation companies affiliated to the I.A.T.A. insist that all consignments

must be covered by a consignment note and, in the Conditions of Carriage of Goods, it is stipulated in article 4 that the consignor *must* establish an air consignment note in three original parts according to the form prescribed by the carrier and hand them over with the goods, and in article 7 of the same Conditions, it is provided that the contract of carriage is made effective when the carrier has accepted goods for carriage with the air consignment note.

In practice, the position of the consignor who sends his goods by air is the same as that of the consignor who sends his goods by rail, from the point of view of the conclusion of the contract of carriage.

Seeing that no particular formalities are attached to the contract of carriage within the meaning of the Warsaw Convention, the contract can certainly exist without the carrier being in possession of the goods to be carried. As we will see later, the Warsaw Convention only considers the liability of the carrier during the time the goods are *in his care.*

The obligations of the carrier, flowing from the contract of carriage, before he has taken possession of the goods, cannot be made subject to the rules of the Warsaw Convention. Recourse must be made to common law to determine the extent and the consequences of these obligations.

Article 8.

"The air consignment note shall contain the following particulars:

(*a*) the place and date of its execution;

(*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, and that if he exercises that 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 value declared in accordance with Article 22 (2);

(*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 this Convention".

Article 9.

"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 Article 8 (*a*) to (*i*) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability".

For a criticism of the provisions established by this article we refer to the remarks made under Article 3 [1].

Article 10.

(1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements".

This article has been inspired by article 7, paragraph 1 of the C.I.M., which reads as follows:

"The consignor is responsible for the correctness of the particulars and statements written by him on the way-bill; he will bear all consequences resulting from the irregularity, incorrectness or incompleteness of the said particulars and statements, or from the fact that these particulars and statements were written in a place other than that reserved for each of them".

1. See p. 154.

It is right that the consignor, on whom falls the burden of drawing up the consignment note, should answer for the correctness of this document.

The air consignment note as instrument of proof

> **Article 11.**
>
> 1) The air consignment note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.
>
> 2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been checked by him in the presence of the consignor, or relate to the apparent condition of the goods".

As has been said, the contract of carriage according to the Warsaw Convention, is concluded by the consensus of the parties. Even without a consignment note, there exists a contract of carriage subjected to the rules of the Warsaw Convention.

The raison d'être of article 11 is that it determines the legal scope of the air consignment note, when drawn up.

Concerning the responsibility with regard to the statements in the air consignment note, the Second Committee of the C.I.T.E. J.A. took into consideration three systems:

a. first system: the air consignment note serves as evidence, nevertheless the carrier can declare that it shall not serve as evidence. It was not found desirable to use this system, because, if the carrier is authorised to use a clause such as "without any guarantee" on the consignment note, he will always make use of such a clause.

b. the second system: the air consignment note shall always serve as evidence against the carrier. It was pointed out, however, that this would entail serious inconveniences in so far as statements which cannot be verified in practice, are concerned.

c. the third system: the statements on the consignment note are evidence only in so far as they can be verified.

The third system was accepted in the second paragraph of article 11.

The provisions of article 11 correspond for the most part with the provisions of the C.I.M. concerning liability with regard to the statements in the consignment note. There is the difference that, according to the Warsaw Convention, the carrier *must* verify the weight and number of the goods, while the C.I.M. stipulates in article 7, that the laws and rules of each State will determine the conditions under which the railway has the right or is held to ascertain or control the weight of the goods or the number of packages. With regard to the other particulars the railway bears the burden of proof if it has accepted the consignment without reserve, whilst in carriage by air, according to the Warsaw Convention, the burden of proof, with regard to the quantity, the volume or the state of the goods, falls on the consignor, unless the carrier has verified it in the presence of the consignor, or unless it concerns statements relating to the apparent state of the goods.

When the consignment note does not contain the particulars obligatorily prescribed in article 9, should it be considered that the consignment note has lost all probative force? We do not think so, the air consignment note can always be an instrument of proof with regard to the particulars inscribed on it.

With regard to the wording of article 11, we do not understand why this article should first mention the "Condition of the goods" and later the "*apparent* condition of the goods". Article 8 only mentions the apparent state of the goods (under letter *j*): the possibility of mentioning the condition of the goods in the consignment note being provided, article 11 does not fall in with article 8.

The expression "apparent conditions of the goods" does not exist in the C.I.M. Nevertheless, a similar statement can be found in other international Conventions dealing with carriage.

The International Convention for the unification of certain rules relating to bills of lading provides, in article 3 (3), that the bill of lading must show:

a. The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases of covering in which such goods are contained, in such manner as should ordinarily remain legible until the end of the voyage:

b. Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;

c. The apparent order and condition of the goods.

These stipulations are not, however, of much value to the shipper, because the carrier has the faculty of not declaring or mentioning in the bill of lading marks, a number, a quantity or a weight which he has a serious reason to doubt that they do not represent exactly the goods actually received by him, or that with reason he had no means of verifying.

The burden of the proof falling on the carrier by reason of the statements made by the consignor is, according to the Warsaw Convention, heavier than that falling on the maritime carrier according to the Brussels Convention, but is less heavy than that falling on the carrier by rail according to the C.I.M.

Article 12.

"1. Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2. If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3. If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the consignment note.

4. The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition".

Article 13.

"1. Except in the circumstances set out in the preceding Article the consignee is entitled, on arrival of the goods at the place of

destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

2. Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

3. If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage".

Articles 12 and 13 therefore determine:

a. the beneficiary of the right of disposition of the goods and

b. the demarcation line between the two successive phases of the operation of carriage, firstly that under the control of the consignor, and then that under the control of the consignee.

Consignor's right of disposition

The Warsaw Convention authorises the consignor, subject to the performance of certain formalities:

a. to withdraw the goods at the aerodrome of departure or destination;

b. to stop the goods in the course of the journey on any landing;

c. to cause the goods to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note;

d. to require the goods to be returned to the aerodrome of departure.

These rights of the consignor correspond to those given to the consignor by the C.I.M. Nevertheless, article 21 of the latter Convention goes further and expressly gives the railway consignor the right to postpone delivery and to modify the place of destination originally agreed upon in order to prolong the journey.

The consignor cannot exercise the right of disposition unless three conditions are fulfilled.

1. That he carries out *all* the obligations under the contract of carriage, as stated in article 12.

Let us take for example the consignor who has changed the consignee: the original consignee was to pay the accessory

charges. Article 12 regards *all* the obligations resulting from the contract of carriage; should it therefore be concluded that the consignor must carry out also this obligation? There is nothing to prevent this obligation to be incumbent on the new consignee.

2. That the exercise of the right of disposition does not prejudice the carrier or the other consignors.

It is evident that it could not be admitted, for example, that a consignor should be able to unload an aeroplane completely to withdraw one package, thus making the aeroplane run the risk of a delayed departure. The exercise of the right of disposition should not disturb regular operation.

3. That he must refund the expenses resulting from the exercise of this right.

Seeing that according to paragraph 3 of article 12, the carrier will be liable if he conforms to the orders for the disposition of the goods without requiring the production of the air consignment note, he would be well advised to take great care not to modify the contract of carriage without the production of the consignment note by the consignor: the carrier must be sure of the identity of the person giving the order.

We consider that it would have been better to have made it obligatory in the Convention for the order of disposition *to be written* on the consignment note produced by the consignor.

In the General Conditions of Carriage of the I.A.T.A. it is provided that the carrier has the right to require that the instruction as to disposition be given on a form prescribed by him and that the instruction as to disposition must be written on this document which will be returned to the consignor.

These stipulations correspond to those of article 12 of the C.I.M. it being necessary for the instructions as to disposition to be mentioned on the duplicata of the way bill. There is here a similarity between the consignment note delivered to the consignor and the railway duplicata. We have already pointed out above that the value of these documents is not the same.

Transference of the right of disposition

Till when can the consignor exercise his right of disposition?

Paragraph 4 of article 12 stipulates that his right ceases when that of the consignee begins, in conformity with article 13.

Three cases are regarded in this article.

a. When the consignee, on arrival of the goods at the point of destination, asks the carrier to hand over to him the consignment note and to deliver the goods to him. In this case the consignor loses his right of disposition.

This provision is quite clear when one bears in mind that the consignor stipulated for the consignee, that he made for him a stipulation which is the condition of a stipulation made for himself [1].

It is the confirmation of the principle contained in article 1121 of the French Civil Code. The right of the consignee begins when the contract is concluded; but, although he may have, from the conclusion of the contract, a direct right against the carrier, this right can be invalidated by the revocation of the benefit of the stipulation made for him by the consignor; nevertheless, the consignor's right of revocation ceases when the consignee states that he wishes to benefit from the stipulation made in his favour, which he does by requiring the carrier to hand over the air consignment note to him and to deliver to him the goods.

b. If the loss of the goods is admitted by the carrier, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. In accordance with paragraph 4 of article 12 the right of the consignor ceases when that of the consignee begins [2]. But what occurs when the consignee does not exercise his right? Article 13 paragraph 3 only regards the case where the consignee is entitled to put into force his rights.

Paragraph 4 of article 12 stipulates that the consignor *resumes* (that is to say keeps) his right of disposition only when the consignee declines to accept the consignment note or if he cannot be communicated with, but this does not solve the problem of what occurs when the consignee does not exercise his right in the event of the loss of the goods.

Nevertheless, bearing in mind the principle that the consignor made a stipulation for the consignee, the former keeps his right

1. Such an explanation is given of the right of the consignor amongst others by: Josserand, op. cit. No. 383; Seligsohn, op. cit. p. 237; Cleveringa, "Het Nieuwe Zeerecht", p. 317.
2. We do not consider correct the opinion expressed by Ripert in his article "L'Unification du Droit Aérien" (Revue Générale de Droit Aérien 1932, p. 264) which is that in the Warsaw Convention, the right of disposition is maintained by the consignor till the handling over of the consignment note to the consignee.

of disposition so long as the latter has not made known his intention of availing himself of the stipulation.

The drafting of article 13, paragraph 3, combined with article 12 paragraph 4 should be modified to show *that the consignor only loses his right of modifying the contract in the event of the loss of the goods, when the consignee has put his rights into force.* It should be pointed out that the words *"the consignor resumes his right of disposition"*, used in paragraph 4 of article 12, are not correct. Seeing that the consignee, whether he wished to or not, has not adhered to the contract, the consignor has remained in possession of his right *and cannot thus resume it.*

Is the right to bring action connected with the right to modify the contract of carriage?

There is another lack of precision in paragraph 3 of article 13. It can be concluded, from this paragraph, that in articles 12 and 13, no clear distinction has been made between the right of modifying the contract of carriage and the right of bringing an action which the consignor and consignee have against the carrier. Was it intended to connect the exercise of claims for damages with the right of disposition? Articles 12, 13 and 14 cannot give a positive answer to this question.

Article 12 only considers the right of disposition of the consignee; paragraph 3 of article 13 considers the rights resulting from the contract of carriage, which necessarily implies the right to bring an action.

Article 14 (to which we will return later) stipulates that the consignee and the consignor can respectively enforce all the rights given them by Article 12 and 13, each in his own name. Neither in article 12 nor in article 13 is there any question of a right to bring action against the carrier by the consignor, but it would be difficult to admit that the Convention did not intend to consider this right of the consignor [1].

The question arises of whether the right to bring action against the carrier is admitted to belong to the consignor and consignee in proportion to their interest or whether this right is admitted to

1. See nevertheless the report presented to the Warsaw Conference: "With regard to the rights of disposition and delivery, art. 12, 13, 14 and 15 are more precise than the former texts on the conditions of exercise of these rights". (Minutes, p. 163).

belong to him who is entitled to modify the contract of carriage, whether consignor or consignee.

The first system is that recognised in France, in carriage by rail, the second is that stipulated in the Bern Convention, article 41 [1].

Let us first examine which of the two systems is preferable. Against the first, the objection may be made that it can give rise to several suits being judged simultaneously by the courts of different countries, and perhaps resulting in several sentences or in contrary decisions on the same question. It is for this reason that the Bern Convention rejected this system [2].

With regard to the second system, which connects the right to bring action with the right to modify the contract of carriage, objections may equally well be made. Let us take, for example, that a package for Batavia was handed in at the airport of Schiphol near Amsterdam. If the package was lost before the departure of the aeroplane and if the carrier admits this loss, the consignee in Batavia can bring an action against the carrier (article 13 paragraph 3 of the Warsaw Convention). The consignor at Amsterdam, on the other hand, will be deprived of all right of action according to this system. Owing to the fact that the consignor has lost his right of disposition, should it be concluded that he has withdrawn from the contract, and from then forward is no longer interested in its performance? [3].

Nevertheless, the objections to be made against the first system are, in our opinion, of greater weight. We consider that it should not be recognised that the right to claim for damages should simultaneously belong to the consignor and the consignee and we believe that, though the Warsaw Convention is not clear on this subject, the draftsmen of the Convention were of the same opinion. We base this statement on the fact that when the draftsmen were wording articles 12 and 13, which deal with the right of modifying the contract of carriage, they based themselves on the Bern Convention. Seeing that in this Convention the right to bring action is connected with the right to modify the contract of carriage, one is justified in believing that the draftsmen of the

1. See on this subject Brunet, op. cit. No. 403 et seq.
2. Lyon Caen, op. cit. III, p. 863.
3. Cf. Josserand, op. cit. No. 648, note 1.

Warsaw Convention, in default of stipulations to the contrary, had the same principle in view.

It is, however, indispensable that at the next revision of the Convention, the system of the Bern Convention be expressly confirmed in the Warsaw Convention. In the present drafting, articles 12, 13 and 14 lead to completely divergent interpretations.

c. Two cases where the right of disposition of the consignor ceases, have been considered under letters *a* and *b*. There remains still one other. If, at the expiration of seven days, the goods have not arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage. The remarks made under *b* are equally applicable to this case. To this provision a further objection of a practical nature must however be made.

The seven days after which a presumption of loss of goods can be made, is much too short for consignments on long distance lines; the position of the air carrier is very difficult by virtue of this provision.

In article 30 of the C.I.M., the plaintiff can consider the goods as lost, when they have not been delivered within 30 days following the expiration of the time provided in article 11. To these 30 days are added as many time 10 days as there are States flown over, though this latter figure cannot exceed thirty. The days of departure and arrival are not counted.

Several air lines fly over deserted regions and land at places which are not as yet organised as well as railway stations. In order to permit them to make a proper search in the event of a consignment being lost, a lapse of time corresponding *at least* to that stipulated for the railways should be allowed before the consignor may bring an action.

In the minutes of the Conference it is found *that a proposal tending to prolong the lapse of time of seven days provided in the draft convention was adopted by 14 votes against* 9 [1] and that later it was decided to return the article to the drafting committee and to leave to it to decide the increase of the lapse of time. Notwithstanding this decision of the Conference, the first draft of the paragraph in question was maintained, probably by error of the drafting committee. This error should be remedied.

1. See Minutes of the IInd International Conference for Private Air Law, p. 65.

Article 14.

"The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another provided that he carries out the obligations imposed by the contract".

We have seen that article 12 only regards the right of disposition of the consignor without alluding to the right to bring an action against the carrier. Article 13, which determines the rights of the consignee, regards, on the contrary, in paragraph 3, the rights resulting from the contract of carriage, which necessarily implies the right to bring action against the carrier. The right of disposition of the consignor ceases when that of the consignee begins, in conformity with article 13. By losing his right of disposition, does the consignor also lose his right to bring action in liability against the carrier? The Warsaw Convention does not answer this question, and as we have already pointed out, it is indispensable to complete the Convention regarding this subject [1].

Article 15.

"1) Articles 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

"2) The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air consignment note".

With regard to the wording of this article, it should be pointed out that the text was proposed by the British delegation at the meeting of the Second Committee of the C.I.T.E.J.A. in 1927. Owing to a mistake in translating the English text into French, the word "transporteur" was used instead of the word "expéditeur", in the 1st paragraph. The British Government, when preparing a draft law concerning the ratification of the Warsaw Convention, noticed this mistake and proposed to the Government of the Polish Republic, in its capacity of depository of the original and of the instruments of ratification of the Warsaw

1. As regards the right of the consignor and consignee to enforce these supplementary matters in their own name respectively under English law, see Moller, The law of Civil Aviation (1936) p. 333.

Convention, to substitute in the official text of article 15 paragraph 1, of the Warsaw Convention, the word "expéditeur" for the word "transporteur". The Polish Government did not consider that it was authorised to introduce any modification whatsoever in the Warsaw Convention on its own initiative, and referred the matter to the C.I.T.E.J.A., which examined the question at its 7th Session held in September 1932. Further to a long discussion, the C.I.T.E.J.A. expressed the wish that in paragraph 1 of article 15 of the Warsaw Convention, the word "transporteur" should be replaced by the word "expéditeur" [1].

The following procedure has been adopted. The Governments which have adhered to the Warsaw Convention already, informed the Polish Government that they approve the alteration of the words by paraphing the rectification made on the original text of the Warsaw Convention. The other Governments will paraph, as they ratify, the alteration made in the original text.

Object of article 15

While articles 12, 13 and 14 fix the rights of the consignor and the consignee against the carrier, article 15 provides that the rights conferred by these articles can be exercised only as long as there are no agreements to the contrary, either between the consignor and the consignee or between the consignor or the consignee and a third party. For example, the consignor or the consignee who wishes to meet the obligations resulting for him from an agreement which he has concluded with a third party, can transfer the rights which the contract of carriage has conferred upon him against the carrier: article 15 recognises that the consignor or the consignee is free in this regard. In order to protect the carrier in such cases, the second paragraph of the article stipulates that all clauses contrary to the stipulations of articles 12, 13 and 14 must be written on the consignment note.

Article 16.

"1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or

1. See Minutes of 7th Session of the C.I.T.E.J.A. p. 15 to 26.

irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

"2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents".

The contents of this article, which corresponds to article 13 of the C.I.M., does not call for any remarks.

SECTION III

LIABILITY OF THE CARRIER

Article 17.

"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".

Article 18.

"1. The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

2. The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome in any place whatsoever.

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

Period of carriage

The question of the fixation of the period of the carriage to which the Warsaw Convention is applicable, was keenly discussed at the Sessions of the C.I.T.E.J.A.

Before considering the solution of the problem obtained by the Warsaw Convention, the provisions relating to it in the drafts should be examined.

a. Article 1, paragraph 2 of the "Avant-projet sur la responsa-

bilité du transporteur dans les transports internationaux par aéronefs et la lettre de transport aérien" read as follows: "The carriage of goods begins at the moment of the reception of the goods and ends in their delivery; the carriage of passengers begins at the moment when the passenger enters the aerodrome of departure and ends at the moment when he leaves the aerodrome of destination".

b. The Second Committee of the C.I.T.E.J.A. changed the article given above under *a* as follows: "The period of the carriage, within the meaning of this Convention, begins at the moment when the passengers, goods or baggage enter the aerodrome of departure, and ends at the moment when they leave the aerodrome of destination; it does not include any carriage whatsoever outside the boundaries of the aerodrome, other than by aircraft. If loss, damage or delay occur during carriage of which a part falls under the régime of the Warsaw Convention, this loss, damage or delay shall be presumed subject to proof to the contrary, to have occurred during that part of the carriage which falls under the régime of the Warsaw Convention.

c. During the 3rd Session of the C.I.T.E.J.A. (May 1928) the text under *b* was modified to read as follows: "The period of carriage, within the meaning of this Convention, begins at the moment when the passengers, goods or baggage enter the aerodrome of departure, and ends at the moment when they leave the aerodrome of destination; it does not include any carriage whatsoever outside the limits of the aerodrome, other than by aircraft. Any loss, damage or delay, subject to proof to the contrary, is presumed to have occurred during carriage falling under the régime of the Warsaw Convention, if the performance of the Contract for carriage by air comprises carriage performed otherwise than by air, for the purpose of loading, delivery or transshipment".

The IInd International Conference for Private Air Law was seized with the text under *c*.

In examining the period of the carriage within the meaning of the Warsaw Convention, it must be taken into consideration:

1. that the Convention has instituted a special régime of liability owing to the fact that the carrier by air bears a risk of a special nature inherent in the element of which he makes use.

2. that in the present state of air navigation, aerodromes are nearly always a certain distance away from the town, for which reason the carriers undertake not only carriage by aircraft but also the accessory carriage between the town and the aerodrome and vice versa.

The draftsmen of the Warsaw Convention were put before the question of whether the rules of the Convention should apply to accessory carriage performed by the carrier as well as to carriage by aircraft.

Let us consider the provisions of the articles under *a*, *b* and *c*.

a. The carriage of passengers begins at the moment when they enter the aerodrome of departure, and ends at the moment when they leave the aerodrome of destination.

It did not seem practical to adopt the same system for goods, seeing the difficulty the consignor would have to establish when the goods were lost or damaged, that is, whether during accessory surface transport or during the journey by air. For this reason it was admitted that the régime of liability should apply from the reception of the goods till their delivery, thus including cartage [1].

b. In accordance with the proposal of the British delegation at the Second Committee of the C.I.T.E.J.A. the text of the above article was modified, by establishing a single régime for passengers and goods, the liability for goods as in the case of liability for passengers only beginning at the moment of entry into the aerodrome of departure and ending on leaving the aerodrome of destination. To overcome the difficulties of the consignor in establishing the moment when the damage occurred, the British delegation proposed to add to the article a paragraph containing a presumption, subject to proof to the contrary, according to which all loss, damage or delay were to be considered as having occurred during that part of the carriage which falls under the régime of the Warsaw Convention.

We will see later that it is impossible to provide the same formula for the carriage of passengers and that of goods, as is done in this article, for the two questions are absolutely distinct.

c. At the IIIrd Session of the C.I.T.E.J.A. a delegate pointed out, correctly, that the text considered under letter *b* covered the case where the carriage of goods was performed by several

1. See Annex B p. 2 of the Minutes of the IInd Session of the C.I.T.E.J.A.

means of carriage, only a part of which was by air and the others, for example, by rail, whilst the article should only consider the case of carriage of trifling importance (cartage) to the aerodrome of departure or from the aerodrome of arrival[1]. To satisfy this objection, the wording was modified by limiting the presumption in favour of the consignor to carriage taking place for the purpose of loading, delivery or transhipment.

Consequently, within the meaning of the modified article, when the carrier directly or by a substitute undertakes to perform surface transport to reach the aerodrome of departure or the point of destination or to tranship the goods, it is for the carrier to prove that the damage occurred during carriage on the surface.

What is the attitude of the Warsaw Conference regarding the subject of the definition of the period of the carriage?

With regard to goods, most delegates agreed with the principle of the article quoted under letter *c*.

Period of the carriage of passengers

With regard to passengers on the other hand, the definition of the period of carriage was met with very great difficulties. The Conference was seized with two proposals on this subject:

1. from the British delegation, which proposed to define the period of the carriage as follows:

"The period of the carriage by air, for the application of this Convention, shall include all lapse of time during which the passengers, goods or baggage are on board the aircraft or within the boundaries of an aerodrome in the course of the performance of international carriage, with the reserve that, in the event of a landing outside an aerodrome, the period of the carriage by air can only be considered broken with regard to the passengers, from the moment when they leave the immediate vicinity of the place of landing and with regard to the goods and baggage from the moment when their carriage continues by a means of carriage other than aircraft.

The period of carriage by air cannot be considered to include any other means of carriage outside the boundaries of an aerodrome, other than by aircraft".

It is strange to note that the delegation on the proposal of

1. See Minutes of the IIIrd Session of the C.I.T.E.J.A., p. 42.

which a single régime was established for passengers and goods in the article quoted under letter *b*, should propose to the Warsaw Conference an article in which the two periods were clearly separated. This proposal shows the difficulties of attempting to give a precise definition of the period of the carriage. When is a passenger "in the performance of the contract for carriage" or "within the boundaries of an aerodrome?" What is "the immediate vicinity?" If a definition is to be given which is acceptable from all points of view, these questions must also be elucidated.

2. The Brazil delegation proposed that the liability of the air carrier should be engaged from the moment when the passenger embarks in the aircraft.

In their opinion, the carrier could not be made liable for the death of a passenger before he embarks in the aircraft.

After a discussion on these two proposals, the President of the Conference put to the vote the text of the draft convention regarding the carriage of passengers (liability of the carrier from the moment of entry of the passenger into the aerodrome). This text was rejected by 14 votes to 11, and it was decided to return the article to the drafting committee [1].

When the Chairman of this Committee presented to the Conference the final text of the Convention, he said, on the subject of the period of the carriage falling under the régime of liability of the Warsaw Convention: "Many amendments were proposed and under these conditions, the drafting committee considered the possibility of keeping the system of the C.I.T.E.J.A. draft, that is, to begin with article 21: when does the liability of the carrier begin and when does it end. But seeing that there are entirely different cases of liability: death or injury, disappearance of goods, delay, we considered that it would be better to begin by establishing the causes of liability for persons and then for goods and baggage and finally liability for delay. This comes to saying that the matter contained in the articles of which I spoke a short time ago, is again taken up, but in a different order to that which I just showed you. All the questions to be considered are divided in three articles. You will find the contents of articles 20 and 21 distributed amongst three articles. I should like to add

1. See Minutes of the IInd International Conference for Private Air Law, p. 57.

immediately, *that we are always in the same position.* There are no new articles, but a new numbering of articles" [1].

Though, with regard to the goods, it was possible to say that the situation was the same, it was quite a different matter with regard to passengers. As we have pointed out, the text of the draft regarding the liability of the carrier from the moment the passenger enters the aerodrome was rejected. The President of the Conference then asked whether the rejection of the text proposed in the draft Convention should not be considered as carrying with it the acceptance of the other proposal (that is to say the liability of the carrier beginning at the moment when the passenger embarks in the aircraft). One of the delegates pointed out that, in his opinion, if the text of the draft was voted against, it meant that the proposal of returning the text to the drafting committee was accepted [2]. The Conference agreed with this point of view. Consequently, with regard to the period of carriage of passengers, the drafting committee was seised not with a simple question of wording, *but a question of principle.*

It is to be regretted that the solution proposed by the committee was adopted without any discussion. As we will see, the interpretation of the term, accepted by the committee, gives rise to divergent opinions and since this expression was not discussed, the minutes cannot therefore give any explanations on this subject.

Within the meaning of article 17, the carrier is liable for damages sustained in the event of the death, or wounding of passengers 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.*

Interpretation of the term "operations of embarking or disembarking"

Let us consider the various interpretations which can be given to the term "in the course of any of the operations of embarking or disembarking".

a. the operation of embarking begins at the moment when the passenger steps in the car of the carrier which conveys him to the

1. See Minutes of IInd International Conference for Private Air Law, p. 135.
2. See Minutes of IInd International Conference for Private Air Law, p. 57.

aerodrome of departure; the operation of disembarking ends at the moment when the passenger leaves the car which has taken him to the town of destination.

b. the operation of embarking begins at the moment when the passenger enters the aerodrome of departure, the operation of disembarking ends at the moment when the passenger leaves the aerodrome of destination.

c. the operation of embarking begins at the moment when the passenger goes from the airport buildings to the aircraft on the tarmac; the operation of disembarking ends at the moment when the passenger enters the buildings of the airport of destination.

d. the operation of embarking begins when the passenger has placed his first foot on the steps of the aircraft; the operation of disembarking ends at the moment when the passenger, leaving the aircraft, places both feet on the ground.

The interpretation given under letter *a* cannot be admitted. The drafts of the Convention as well as the minutes prove that it has never been desired to extend the régime of the Convention to the accessory carriage of passengers.

The interpretation given under letter *b* cannot be accepted either, seeing that this system of liability, stipulated in the draft Convention, was rejected by the Conference, because it was not found desirable to admit that the carrier would be liable, if a passenger, who for example was waiting the departure of the aeroplane, went to the aerodrome restaurant and there suffered injury [1].

The following objection could be made to the interpretation given under letter *c*, which engages the liability of the carrier if the passenger sustains an accident on his way to the aeroplane on the tarmac. The running of aerodromes is usually in the hands of the Government or of the municipality in whose territory the aerodrome is situated, and therefore does not depend on the carrier who has no authority on the aerodromes. It would consequently be illogical to apply the rules of the Convention to

1. See nevertheless L. A. Wingfield "Liability of an International Air Carrier", in the Minutes of the 5th International Air Navigation Congress, Vol. II, p. 1187: "A carrier's liability, at first sight, then, would appear to start from the time the passenger's first foot is off the ground at the commencement of the journey until both feet are upon the ground at its end. It may even go further and comprise the passenger's entrance of the station of departure and exit from the aerodrome of arrival, but this is doubtful".

the carrier before the passenger is on board the aircraft. We will return to this question after having examined the interpretation given under letter *d*.

With regard to the interpretation given under letter *d*, a remark made during the session of the 5th International Air Navigation Congress by the chairman of the Legal Section who collaborated in the drawing up of the Warsaw Convention, should be quoted:

"Toutefois, la Convention de Varsovie établit d'abord le cas général que la réception du passager par la compagnie commence au moment où le passager met le pied sur la machine" [1].

Should the interpretation given under letter *d* be accepted? We do not think so. Although at first sight this interpretation seems to have practical advantages, the term "in the course of *any* of the operations of embarking or disembarking" is contrary to a conception such as that accepted by the Chairman of the Legal Section of the 5th International Air Navigation Congress [2]. Had the Warsaw Conference really desired to admit this solution, it could have adopted the proposal of the Brazilian delegation regarding the liability of the carrier as soon as the passenger has put his foot on the lowest step leading into the aeroplane. As it has been said, the Conference did not wish to admit this proposal, nor that of the liability being engaged as soon as the passenger penetrates into the aerodrome.

Notwithstanding the objection given under *c*, it seems to us that the solution proposed under this letter appears to be the best. Two cases which arise in practice should be examined.

I. An aeroplane which has to leave the aerodrome at a certain time is on the tarmac. Some minutes before its departure, the passengers who were waiting in the airport buildings, are lead to the aeroplane by an employee of the carrier. While crossing the tarmac, a passenger is injured by an aeroplane which has just landed.

We are of opinion that in such a case it should be admitted that the accident occurred during the operation of embarking, since ac-

1. See Minutes of 5th International Air Navigation Congress, Vol. II, p. 1173. See also Blanc-Dannery "La Convention de Varsovie", p. 13.
2. Generally speaking, the moment when the passenger steps into the machine can be considered as the time when the carriage begins to be performed, and that it ends as soon as the passenger has put his foot on the ground.

cess to aeroplanes on the tarmac should be considered as an operation inherent in carriage by air properly speaking. Consequently the urles of the Warsaw Convention should apply in such cases.

In the case given as an example above, if the rules of the Warsaw Convention were not applicable, the rules of common law would have to be applied. In one country the carrier — unless he proves a case of force majeure — would be declared liable as the passenger has been injured by an accident which occurred in the course of the operation of the aircraft, and in another country the carrier would be declared liable only if the plaintiff shows that the mishap was a consequence of the negligence of the carrier. It seems illogical to us to regulate an operation which cannot be separated from carriage by air and which carries with it certain risks inherent in air navigation, by laws other than those provided for actual carriage by air. We therefore consider that the rules of the Warsaw Convention should be applied. If one accepts this point of view, the carrier will not be liable if he proves that he has taken the necessary measures.

II. Under I we took the example of a passenger conducted to the aeroplane by an employee of the carrier. In the present state of air navigation, it may well happen that on certain aerodromes, for example on those on the India route, the passenger must go to the aeroplane unaccompanied, because the carrier has not enough employees in these places. Will a passenger injured while going to the aeroplane on the tarmac by himself, come under the régime of the Warsaw Convention? For the same reasons as those given under I, the rules of the Warsaw Convention should apply. When the Courts consider whether the carrier has taken all necessary measures, they will take into account that the situation of the carrier by air at aerodromes, is different to that of the carrier by rail at railway stations, operated by the carrier himself. Furthermore, it is evident that the measures which can be taken by the carrier on large modern aerodromes, are different to those which he should take in countries where the aerodromes are not yet well equipped.

By placing his aeroplane on the tarmac in such a way as to minimise the danger to an embarking passenger, that is, by placing the aeroplane as near the airport buildings as possible, the carrier, on badly equipped aerodromes, would have done all he

could to avoid the damage occurring in the course of the operation of embarking.

We have considered the cases which may occur at the aerodromes of departure. The remarks made are equally applicable to aerodromes of destination. However, what is the position in the event of a transit passenger walking about for a moment at the aerodrome? If he suffers injury, can the Warsaw Convention be applied? One could say that such a case does not occur in the performance of the contract for carriage. However, the minutes of the meetings of the C.I.T.E.J.A. bring out that one did not want to consider only embarking or disembarking at the aerodrome of departure and of destination, but also the operation during a stop *en cours de route*. For that reason "during *any* operations" was used in article 17 [1].

M. Sullivan considering the interpretation to be given to the expression "in the course of the operations of embarkation or disembarking" arrives at the conclusion that these operations commence where embarkation takes place at an airport operated with a restraining barrier of passengers about to go aboard, when passage is made through such gate, and vice versa, on disembarking [2]. This seems to us a practical solution. In other situations, M. Sullivan proposes that such operations shall be deemed to have commenced when the passenger is exposed to the particular hazards of transportations by air. But when is a passenger exposed to the particular hazards of transportation by air?

Let us take for example a passenger sitting on a terrace in front of the aerodrome buildings and waiting for his plane to leave. An aeroplane makes a faulty landing, because of the pilot misjudging the distance and having crashed into the terrace injures the passenger.

Taking into consideration the fact that as statistics prove that the accident frequency at places where departures and landings are regularly made, is higher than at other places, a passenger sitting in front of a building at an aerodrome, waiting for his aeroplane to leave, can be said to be exposed to the particular

1. See Riese in "Zeitschrift für ausländisches und internationales Privatrecht" 1933, IV, p. 980. Contra, Blanc-Dannery "La Convention de Varsovie", p. 64. See also Lincoln Cha "Air Carrier Liability", Air Law Review, January 1936, p. 44.
2. "Codification of Air carrier Liability by International Convention", Journal of Air Law, January 1936, p. 22.

hazards of transportation by air. According to M. Sullivan the passenger in such a case should fall under the régime of liability of the Warsaw Convention. However, in the case of there being a barrier between the terrace and the aerodrome through which the passenger must go to board the aeroplane, then the passenger injured while waiting for his plane to leave, would not fall under the régime of the Warsaw Convention.

Such an illogical situation cannot in our opinion be accepted. If one accepts the principle that the liability under the Warsaw Convention starts at the moment when the passenger passes through the gate to go aboard the aeroplane, one must accept, in the case of there being no barrier, the principle that the liability under the Warsaw Convention starts at the moment when the passenger steps on the tarmac in order to go aboard the aeroplane.

As regards the case of a landing outside an aerodrome, M. Sullivan rightly points out that if, in such a case, the passenger disembarks and walks away from the aircraft, his passing out of the custody of the carrier breaks the continuance of the latter's responsibility.

Relation between the Warsaw Convention and the Rome Convention

It should be pointed out here that the IIIrd Conference for Private Air Law, held in Rome in May 1933 adopted a "Convention for the unification of certain rules relating to damage caused by aircraft to third parties on the ground".

Article 2 of this Convention stipulates that the damage caused by an aircraft in flight to persons or property on the surface gives a right to compensation if it be proved only that the damage exists and that it results from the aircraft. This liability can be diminished or set aside only when the damage has been caused or contributed to by the fault of the injured party (article 3). Whilst the liability provided in the Warsaw Convention is based on the theory of fault, the liability provided in the Rome Convention admits the application of the theory of risk [1].

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1. The principal reasons justifying the adoption of this principle are the following:
   a. the imminent position of the aircraft, which while not open to any danger from the ground, exposes those on the ground to any damages which owing to the risks inherent in the aircraft can be brought about by jettison or by the fall of the aircraft on departure or on landing.
   The equality of position between the author and the victim of the damage, which

This liability falls on the operator of the aircraft, that is to say the person at whose disposal it is and who makes use of it for his own account (article 4).

As a corrective to the principle of objective liability, article 8 of the Rome Convention has established a legal limitation of liability. The operator will be liable for every accident up to a sum of 250 francs for each kilogramme of weight of the aircraft. Nevertheless, the limit of the operator's liability shall not be less than 600.000 francs, nor greater than 2.000.000 francs.

In the preceding pages we examined cases in which a passenger was injured on the aerodromes in the course of an operation of embarking or disembarking. The question arises of whether a passenger injured in the course of an operation of embarking or disembarking — therefore being on the ground — by an aircraft belonging to his carrier, can bring an action against the carrier by virtue of the Rome Convention. Article 22 of this Convention stipulates that it does not apply to damages caused on the surface, compensation for which is governed by a contract of carriage or a contract of employment between the injured person and the person upon whom liability falls under the terms of this Convention. In the example given above, the passenger is therefore not under the régime of the Rome Convention, because the compensation for the damages sustained by him is governed by the contract concluded with his carrier.

This principle seems to us very just. The objective liability provided by the Rome Convention is based on the idea that those who are extraneous to air navigation must be compensated in any case. A passenger on an aerodrome is not extraneous to air navigation. Even if he is injured by an aeroplane operated by an

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theoretically creates between them an eventual reciprocity of damages, is, as it is known, a presumption of the theory of fault. Seeing that the equality of position and possible reciprocity in damages between aircraft and persons on the ground does not exist, it is right that the classical theory of fault be rejected and that the objective theory be adopted.

b. The almost absolute impossibility, in most cases, for the victim of the damage to provide the proof of the fault of the pilot. The cause of the prejudiciable event must generally be attributed to negligent pilotage, to the bad working of the engine or of the controls of the aeroplane, to atmospherical conditions, that is to say, in all cases, to events which happen in the air, and therefore outside any possibility of verification by persons on the ground.

c. The use of a machine which creates new dangers for the public and special risks, makes it necessary for the operator to give a guarantee to the public extraneous to it. (See Minutes of 4th Session C.I.T.E.J.A. p. 105).

air carrier other than the one with whom he had concluded the contract of carriage, contrary to the stipulation in the Rome Convention, he should not fall under its régime. The basic principle of the Rome Convention leads logically to making a legal distinction between the persons on the aerodrome and those outside an aerodrome. A study of this question is, however, outside the scope of this work [1].

Facts to be established by the passenger

By virtue of article 17, the carrier is liable if the passenger establishes

a. the damage.

b. the accident.

c. the causal connection between *a* and *b*.

Let us take for example that two passengers fight on board the aircraft, and one of them is injured. This passenger can establish that he has sustained damage caused by an accident which occurred on board the aircraft. Should it be admitted that this proof is sufficient to make the carrier liable (unless, of course, the carrier succeeds in the proof of article 20)?

In this connection, attention should be drawn to the fact that French jurisprudence, in several cases, only required the proof that the accident occurred during carriage, because the carrier had undertaken to carry the passenger safe and sound to his destination and that consequently when the person carried arrives injured, he need do no more than prove the existance of the injury [2]. Such jurisprudence should be contended.

Though recognising the correctness of the opinion according to which the contract of carriage of passengers obliges the carrier to take all necessary measures for the safety of the passengers, it is the liability *ex contractu* of the carrier which is engaged in the event of an accident, and we certainly do not consider that it is sufficient for the passenger to say that he was injured, to establish the fact that the carrier failed in his obligation. If this system was admitted, it would allow a passenger injured before the carriage took place, to claim against the carrier and only have to

1. See on this subject Goedhuis: "Observations sur le régime de la Convention de Rome du 29 mai 1933", Revue de Droit International et de Législation Comparée 1935 no. 3, p. 574.

2. See Mazeaud op. cit. No. 155.

prove the existance of this injury to render the carrier liable, under the pretext that the carrier was obliged to carry him safe and sound to his destination.

The safety to be guaranteed by the carrier should not, in our opinion, be considered as an absolute notion. The carrier does not *guarantee* safety; he is only obliged to take all the measures which a good carrier would take for the safety of his passengers. The carrier has not accepted "the risk of compensating passengers for damages caused by themselves" [1].

In the example given above, in which a passenger is injured in a fight with another passenger, it would be unjustifiable to declare the carrier liable by virtue of article 17, because the accident which caused the damage had no relation with the operation of the aircraft.

Interpretation of the word "accident"

It seems to us that article 17 should be interpreted in such a way that the only accidents which can be considered as being regarded by article 17 are those which are related with the carriage. It will then be for the passenger to establish the connection between the accident and the operation of the aircraft. In the above example, the carrier will not be liable because there is no such connection.

It is doubtful whether all Courts will accept such an interpretation of the word accident used in article 17. Attention should be drawn to the discussion on article 17 which took place during the 5th International Air Navigation Congress. M. Giannini, one of the authors of the Convention, observed "if the accident occurred on board the aircraft, then evidently there is a connection with the carriage" [2].

In order to avoid uncertainties on this subject, it is desirable to modify article 17 at the next revision of the Convention, by adding that the accident which caused the damage must have arisen from the carriage.

It is of importance to note that in the Dutch Law of September 10th 1936, by which the rules of the Warsaw Convention are made applicable to all carriage by air performed in the Netherlands, the article which corresponds with article 17 of the Con-

1. Chavegrin, note Sirey 1896, 226.
2. Minutes of 5th International Air Navigation Congress, p. 1168.

vention, states that the carrier is liable if the accident which caused the damage, took place *in connection with the carriage by air*. In the preliminary report on the Law, the reason for the addition of these words is given. The reporters considered that one could think of many accidents which occur on board aircraft or in the course of operations of embarking or disembarking which have no connection with the carriage. The carrier should not be declared liable for such accidents.

Interpretation of the word "occurrence"

It should be pointed out that in the first paragraph of article 18, dealing with the carriage of goods, the expression "*occurrence* which caused the damage" is used. The word "occurrence" has evidently a wider meaning than the word *accident* used in article 17. While in the carriage of passengers the carrier cannot guarantee absolute safety owing to the independance of passengers, it is a different matter with regard to the carriage of goods. Here, since the carrier is held to keep and look after the goods, alone the fact of the discovery of the damage is sufficient to establish a presumption of non-performance of the obligation of the carrier. He is the apparent author of the damage [1].

Period of carriage of goods

Contrary to the provisions of the C.I.M. for carriage by rail, the liability of the carrier by air according to the Warsaw Convention is not engaged for any occurrence between the acceptance of the goods for carriage and their delivery. The period of carriage falling under the régime of the Warsaw Convention does not comprise the whole period during which the goods are under the care of the air carrier. The goods must also be either

a. on an aerodrome,

b. on board an aircraft,

c. or in any place whatsoever in the case of a landing outside an aerodrome.

1. In the revised text of the C.I.V. (23rd November 1933) art. 25 paragraph 1 stipulates that "The responsibility of the railway for the death of a passenger or for injuries resulting from an accident to the train and for damage caused by delay of the train or its cancellation, or by missing a connection, shall be subject to the laws and regulations of the state in which the event took place". Such a provision would of course be impossible in aviation. One of the many reasons is that aviation does not only cross land but sea as well.

In most cases the period of the carriage within the meaning of the Warsaw Convention begins at the moment of the entry of the goods into the aerodrome of departure and ends at the moment when the goods leave the aerodrome of destination. The loading and unloading operations and also operations of transhipment fall under the régime of the Warsaw Convention, if these operations are performed on an aerodrome.

Transhipment

Let us take the case of an aeroplane which made a forced landing outside an aerodrome and cannot continue its journey. Another aeroplane is sent to take up the goods and carry them to their destination. During the transhipment of the goods from one aeroplane to the other, the goods are damaged. Is the Warsaw Convention applicable?

On the one hand, it can be maintained that the goods are in the care of the carrier in a place regarded by paragraph 2 of article 18. On the other hand, paragraph 3 has stipulated that the period of carriage by air does not cover any surface carriage outside an aerodrome. Since the transhipment can only be carried out on the ground, it seems to us that in the case under consideration the provisions of the Warsaw Convention cannot be applied and the case is ruled by common law.

Transhipment of goods outside an aerodrome will occur only very exceptionally, and it can be said that in general the period of the carriage falling under the application of the Warsaw Convention begins at the moment of the entry of the goods into the aerodrome of departure and ends at the moment when the goods leave the aerodrome of destination.

In comparing the Warsaw Convention with the C.I.M. and with the Brussels Convention on this subject, it will be seen that the period of the carriage within the meaning of the Warsaw Convention is less extensive than the period of the carriage within the meaning of the C.I.M., which includes the entire period between the acceptance of the goods and the delivery of the goods, but more extensive than the period of the carriage within the meaning of the Brussels Convention, which only comprises the time between the loading of the goods on board the ship and the unloading of the goods.

Presumption in article 18 paragraph 3.

The presumption in paragraph 3 of article 18 was provided in order to avoid the difficulty which would arise for the consignor if he had to establish the moment when the goods were lost or damaged, whether during surface carriage or during carriage by air.

What then is the position when a consignment has been lost during cartage?

The consignor proves the contract of carriage and the damage sustained by him owing to the loss of the consignment. The régime of the Convention cannot be applied to a carrier who proves that the damage occurred during cartage, but it is the *ex contractu* liability of the carrier which will be engaged in this case, according to the internal law regulating cartage.

In the General Conditions of Carriage of Goods of the I.A.T.A. article 19 paragraph 4 provides that:

"Goods are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorised agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the consignor renounces for himself and his representatives all claims for compensation for damage in connection with the carriage caused directly or indirectly to goods, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based".

From this it results that the members of the I.A.T.A. have excluded all liability with regard to damages occurring during cartage.

In the first chapter of our study, we gave the reasons why, in our opinion, exoneration clauses should in principle be declared valid, except in cases of wilful misconduct on the part of the carrier. We have seen, however, that in some countries exoneration clauses are not permitted. In these countries, the provision in the Conditions of Carriage that the carrier will not be liable for

damages which occurred during cartage, will be of no avail to the carrier [1].

It is to be noted however that, though the law in some countries may not permit the carrier to exonerate himself completely of his liability they may permit him to exclude his liability within certain limits (for example in the case of accidents due to negligent pilotage).

At the XXXVIIth Session of the I.A.T.A. which was held in Paris in July 1937, it was therefore decided to insert a condition on the back of the congigment note stating "in the event of the General Conditions of Carriage being declared by the competent Courts to be inapplicable, all liability of the carrier is excluded *in so far as permissible, and in so far as this is not permissible is accepted only up to the limits fixed by the national law applicable*".

Text of article 18

In the first paragraph of this article it is provided that "the carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to any registered luggage..." In the official American translation of the Convention the words "bagages enregistrés" have been translated by "checked baggage", which in our opinion has the same meaning as "registered baggage".

We have seen that if the carrier accepts baggage without a baggage check having been delivered or if the baggage check does not contain certain particulars, the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability.

Though one of the textwriters on the Warsaw Convention maintains that in such a case the carrier is subjected to the régime of the national law, we have given the reasons why we consider that this opinion should be rejected [2]; all provisions of the Convention apply to the carrier except the ones which exclude or limit his liability. Therefore the purpose of the Convention is to

1. It should be pointed out that in art. 2 of the C.I.M. it has been provided that regular automobile in navigation services which complete a journey by rail and carry international traffic under the responsibility of a connecting State or of a railway, may by their own volition, make their undertakings subject to all the obligations and rights conferred on railways by the Convention.
2. See page 155.

apply the provisions of art. 18, whether or not baggage accepted by the carrier is registered.

M. Sullivan very rightly remarks that in view of this, the limitation of art. 18, par. 1, to *checked* baggage is misleading. He thinks that what was probably meant was baggage which the carrier takes into his custody in the transport of passengers, as distinguished from articles which the passenger takes charge of himself [1].

If one considers baggage as registered only in the event of a baggage check being delivered one arrives at the following result. Art. 18 only states the liability for registered (or checked) baggage. In the case of the carrier not having delivered a baggage check there is no provision in the Convention on which to base his liability in the case of loss of or damage to such baggage.

If one accepts such interpretation, will the carrier in the above case incur no liability at all? As we will see art. 24 states that *in the cases covered by art. 18 and 19* any action for damages, however founded, can only be brought subject to the conditions and limits of the Convention. As the case in question is not covered by article 18, we think it therefore possible for the passenger whose baggage is damaged, to base his action on the general rules of liability which, according to private international law in force for the court seized of the case, apply to contracts. It is possible that these rules are more favourable to the carrier than the rules of the Warsaw Convention [2]. The principle in the mind of the authors of the Convention that the carrier who has not delivered a baggage check, should be in a less favourable position than the carrier who has delivered such a check, can for that reason be rendered completely illusory.

The question arises whether it would not be possible to consider baggage as registered even though no baggage check has been delivered.

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1. "Codification of Aircarrier Liability by International Convention", Journal of Air Law, January 1936, p. 24.
2. In art. 18 (paragraph 5) of the I.A.T.A. Conditions of carriage of passengers and baggage it has been stipulated that, except in so far as liability is expressly provided for in the Conditions, no liability whatsoever is accepted by the carrier. As the conditions only take into account registered luggage, liability for luggage which is not registered is excluded. If the law to be applied permits the carrier to exonerate himself of all liability, the passenger will receive no compensation at all in the case of a carrier having omitted to deliver a baggage check.

It is to be pointed out that in order to know the total load to be carried by an aeroplane, the carrier is obliged to enter the weight of the baggage he is going to carry in certain documents [1].

One might consider this entering of the baggage in the documents of the carrier as registration of the baggage. By putting such an interpretation to registered (or checked) baggage one would be able to prevent a situation from arising which is contrary to the very spirit of the Convention. However, as it is not to be expected that such interpretation will generally be accepted by the Courts, we share M. Sullivan's opinion that it is necessary to revise art. 18, par. 1 so as to bring out the fact that the carrier incurs the liability stated in this article in all cases where the baggage is in his custody.

Dutch Law of 10th September 1936

In this connection attention should be drawn to the Dutch law of 10th September 1936, which, as we have seen, applies the rules of the Warsaw Convention to all carriage performed in the Netherlands. In art. 25 of this law, the contents of which correspond to those of art. 18 of the Warsaw Convention ,it has been stated that the carrier is liable for *baggage*, the word registered being omitted. In art. 6 of the Law it has been stipulated what is to be considered as baggage viz. all things belonging to or in the custody of the passenger, which the passenger before undertaking a journey by air, offers for carriage. Small objects for the personal use of the passenger and of which the passenger takes charge himself, are not to be considered as baggage.

In order to avoid uncertainties, it would be of importance if the States which are preparing a law by virtue of which the rules of the Warsaw Convention are applied to internal air traffic, would follow the example of the Dutch law on this subject.

Article 19.

"The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods".

Delay in the carriage of passengers

Let us first consider the case of delay in the carriage by

1. According to the international conventions on air navigation every aircraft engaged in international navigation shall, if it carries passengers, be provided with a passenger list. On this list the weight of the luggage has also to be entered.

air of passengers. For the passenger's claim to succeed, he must:

a. establish the material fact of the delay;

b. establish that the delay occurred during carriage by air;

c. prove damage which was directly occasioned by delay.

With regard to the proof provided under *b*, the question of the interpretation of the term "carriage by air" arises.

We have already quoted the words of the Chairman of the drafting committee of the IInd International Conference for Private Air Law regarding the period of carriage falling under the régime of liability of the Warsaw Convention [1]. The Chairman pointed out that seeing that there are entirely different cases of liability: death or injury, disappearance of the goods, delay, the drafting committee considered that it would be better to establish the causes of liability first for persons and then for goods and baggage and to fix last the liability for delay.

Although these words cannot make much clearer the question of the interpretation of the term "carriage by air" in article 19, it can in any case be concluded from them that the period of carriage considered in article 17 and article 18 is different to the period of carriage considered in article 19. The following reasoning must however be followed. Logically, the Warsaw Convention treats in the first place carriage by *aircraft*. In drafting articles 17 and 18, the necessity for extending this period in certain cases was felt. For this reason article 17 provides for the damage occurring on board the aircraft *and* the damage occurring in the course of any of the operations of embarking or disembarking, and for this reason paragraph 2 of article 18 expressly declares that carriage by air *within the meaning of the preceding paragraph* comprises etc.....

In article 19 such an extension of the term "carriage by air" has not been made. It therefore should be concluded that article 19 only comprises carriage by air as such, and that article 19 does not regard any of the operations necessary to reach the aircraft.

If this point of view is accepted, the passenger, in order to win his case, must establish that the delay occurred while the aircraft was in flight. The minutes of the Warsaw Conference bring out that such a restriction of the liability for delay was in no way considered by the delegates. If the principle of liability for delay

1. See p. 191.

is to be maintained in the Convention, the period of carriage for which the liability of the carrier can come into consideration, must in any case be defined. One could then use as basis the official German explanation of articles 17, 18 and 19. It is said under point 2: "Eine Verspätung bei der Luftbeförderung ist stets dann gegeben, wenn das Luftfahrzeug nicht rechtzeitig am Bestimmungsort eintrifft, gleichviel, ob die verspätete Ankunft auf nicht rechtzeitigen Abflug, auf ungenügender Geschwindigkeit oder auf unzulässiger Fahrtunterbrechung beruht".

The liability for delay imposed by the Warsaw Convention has been the subject of numerous objections on the part of the I.A.T.A. The draftsmen of the Warsaw Convention nevertheless considered that these objections were not justified, because in their opinion, it would be illogical to state that for a means of carriage, the essential commercial character of which is speed, passengers are not able to claim for delay.

The objections of a practical nature opposing liability for delay in carriage by air should be considered. Let us take for example that three hours flying time have been provided by the time-table for a certain journey. By reason of weather conditions, the flying time may vary greatly. If the aeroplane has a strong tail wind, the journey may be completed in two and half hours; if, on the other hand, there is a strong head wind, the aeroplane may take three and half hours to reach its destination.

If the aeroplane does not arrive at the time stated in the time-table, the passenger who, in consequence, has sustained an injury, can claim against the carrier by virtue of the Warsaw Convention. There is evidently a way in which the carrier can avoid such claims: by showing in the time-table the maximum time which might be taken by the aeroplane to perform the carriage. The fact that the carriers did not want to make use of this means should not lead to astonishment. To obviate the difficulties of the air Companies to guarantee the times in the time-tables, the British delegate made the following suggestion to the Companies: "It would be reasonable for the air navigation Companies to state, as all the railway companies do: here is our time-table, but we do not guarantee that our aeroplanes will arrive exactly at the time provided. If the air navigation Companies put this condition into the contract, there can be no question of delay, except of

course, when the delay is quite exceptional and unreasonable" [1].

The I.A.T.A. in its General Conditions of Carriage based on the Warsaw Convention, followed this advice and stipulated in article 6 of the Extract from the General Conditions of Carriage of Passengers and Baggage:

> "The time-tables of carriers furnish indications of average times without these being in any way guaranteed. The carrier reserves the right to decide if the meteorological and other conditions of the normal performance of a flight are suitable, if especially the times of departure and arrival should be modified, and if a departure or landing should not be made at any particular time or place. The carrier reserves the right to arrange at landing places such periods of stoppage as may be necessary to ensure connections without accepting any responsibility for making connections".

Does this clause exclude all liability of the carrier arising from delay, since he does not guarantee a fixed time of carriage? In article 23 of the Warsaw Convention, it has been stipulated that any provision tending to relieve the carrier of liability shall be null and void. Consequently, for this clause to have effect, it must be interpreted so as to still leave the liability for delay stipulated in the Warsaw Convention.

What then is the raison d'être of the clause? The fact of the time provided in the time-tables for the carriage being exceeded does not constitute in itself a delay, because the carrier brought to the knowledge of the passenger that the time given only shows the average time. Consequently, only in the case where the time given in the time-table is exceeded *in an exceptional way*, can the passenger claim against the carrier for delay, and the carrier will be liable unless he proves that he and his agents took all the necessary measures to avoid the damage or that it was impossible for him or them to take such measures [2].

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1. See Minutes of the IInd International Conference for Private Air Law, p. 37.
2. The International Air Traffic Association at its 30th Session took the following resolution on statistics of regularity: "Journeys in which the plane has reached its destination with a maximum delay not exceeding 50% of the scheduled time are described as regular. These arrangements will be applied to the successive stages considered separately. Journeys in which the plane reaches its destination with a delay at the most of two hours, will be considered as regular, whatever may be the length of time scheduled in the time-table".

Extent of damages to be compensated in the case of delay in the carriage of passengers

The question arises of how the extent of the damages to be compensated by the carrier to the passenger in such cases shall be determined. The Warsaw Convention has no answer to this question: it has only stipulated in its article 22 that the liability for each passenger is limited to the sum of 125.000 French francs. In order to find out what are the damages subject to reparation, recourse must be made to the national law of each country.

As a general rule, it can be said that the damages in the case of actionable delay are such as may be considered as either arising naturally (that is according to the usual course of things) from the breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time when they made the contract, as the probable result of the breach of it [1].

From this it follows that the damage sustained by a passenger owing to the fact that he missed an important conference due to the aeroplane being late, is not to be indemnified by the carrier. "Le voiturier se trouve en effet dans l'impossibilité de prévoir et de mesurer l'intérêt que présente pour chaque voyageur pris individuellement, l'arrivée du convoi à l'heure réglementaire et il serait injuste de procéder à une évaluation entièrement subjective qui présentait pour lui des aléas redoutables" [2].

It must, however, be expected that opinions on this matter differ. In the event of the Court considering that the damage sustained by the passenger could have been foreseen, the liability of the carrier may reach the amount of 125.000 French francs.

Such a liability seems to us disproportionate when compared with the liability of other carriers for delay [3].

The revised text of the Bern Convention (C.I.V.) submits the question of the liability of the railway for damages resulting from delay or from the cessation of the running of a train or of a missed connection, to the laws and regulations of the state where

1. See Leslie, "The Law of Transport" London 1928, p. 519.
2. Mazeaud, op. cit. No. 2390.
3. It is interesting to see that the proposed Brazilian Aircode which broadly follows the terms of the Warsaw Convention has made a special provision regarding the amount of damages in case of delay. Art. 81 of the Code provides that in the case of delay in the carriage of passengers, the carrier will be liable to an amount of 10% of the damage suffered by the passenger.

the event occurred. An analysis of the laws of different states shows that in no country does the carrier incur liability as heavy as that imposed by the Convention [1].

With regard to maritime carriage, these carriers also do not generally incur liability for delay, owing to the usual clauses in the passenger ticket stipulating the non-liability of the carrier in the case of delay [2].

Delay in carriage by air of baggage and goods

For the suit of the passenger or the consignee to succeed, he must:

a. establish the material fact of the delay;

b. establish that the delay occurred during carriage by air;

c. prove that the prejudice was directly occasioned by the delay.

With regard to the condition under letter *b* how should the term "carriage by air" be interpreted? It has been provided in article 19 that carriage by air comprises the period during which the baggage or goods are in the charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome in any place whatsoever.

Should the term "carriage by air" in article 19 be given the same meaning as in article 18? Certainly not, because in article 18 it is expressly stipulated that "the carriage by air within the meaning of the preceding paragraph comprises" etc. Seeing that

1. In the Regulations for the exploitation of railways in Germany, Austria, Hungary, Poland and Serbia it is stipulated that no indemnity is due in the case of delay at departure or at arrival or in the case of a train being cancelled.
In France, there are no special provisions in the regulation of railways regarding an indemnity due to passengers in the case of delay. The carriers nevertheless exclude all liability for delay by agreement.
In England the position is the same. The railway carriers "do not undertake that the trains shall start or arrive at the time specified in the Time-Tables, nor will they be accountable for any loss, inconvenience or injury which may arise from delay, or detention unless upon proof that such loss, inconvenience, injury, delay or detention arose in consequence of the wilful misconduct of the Company's servants".
In article 5, para. 3 of the Netherlands General Railway Regulations it has been stipulated: 3 (1): "If the connection is missed consequent on the train being late, a passenger having a through ticket who returns, without breaking his journey, by the next train to the station of departure, can demand from the station master of his station the refund of the price of the return ticket of the same class as he had on the outward journey. This refund is made against a receipt and the restitution of the ticket". In the case of delay, only the rights given in this article can be used by the passenger against the railway company.
2. Ripert "Droit Maritime" 2.001, Benedict on Admiralty 5th Edition (1925) p.415.

the extensive interpretation of "carriage by air" has not been stipulated in article 19, it can only be question in this article, of carriage by aircraft as such. The liability for a delay which occurred during accessory carriage, during loading or unloading, will not be regulated by the rules of the Warsaw Convention.

The fact that the different stages of the carriage are taken separately does not seem justifiable to us. How can the person entitled to delivery establish that the delay occurred during carriage by aircraft? Without interfering in the interior affairs of the air company, he will almost never be able to do this; there is no need to say that such interference will not be welcomed by the transport company. Presumption in favour of the person entitled to delivery in article 18 in the event of damages resulting from loss, destruction or injury to goods, has not been stipulated in the event of damage resulting from delay. Nevertheless, had such a presumption been stipulated in article 19, it would not invalidate the objections which must be made against the division of the different stages of carriage.

Extent of damage to be compensated in the case of delay in the carriage of goods and baggage

The Warsaw Convention does not answer the question of how the amount due to the plaintiff in the case of delay should be calculated. In Article 22 it is only stipulated that the liability of the carrier in the carriage of baggage and goods is limited to a sum of 250 French francs per kilogramme. Although it is possible to agree to this maximum in the case of loss or damage to baggage or goods, for only delay it seems exorbitant when compared with the maximum compensation for delay by virtue of the C.I.M. in carriage by rail [1].

Why did not the draftsmen of the Warsaw Convention copy the system adopted by the C.I.M., the value of which has been proved in practice. By virtue of article 33 paragraph 1 of the C.I.M., the delay is characterised by the exceeding of the total delays in delivery. It is not necessary for the delay to be effectively prejudiciable. Mathematical delay is sufficient [2]. The railway is held

1. In the proposed Brazilian Air Code which, as has been observed, broadly follows the terms of the Wars. Conv. the carrier by virtue of art. 88 is liable in case of delay, to the amount of 10% of the value of the goods.
2. See Brunet op. cit. No. 363.

to pay $^1/_{10}$ of the cost of carriage if the delay does not exceed $^1/_{10}$ of the time fixed for delivery and so on per tenth of delay up to a maximum of half the cost of carriage for all delay over $^4/_{10}$ of the time fixed for delivery. If the plaintiff can prove a direct prejudice resulting from the delay, compensation up to the complete refund of the cost of carriage may be given.

This system has advantages over that of the Warsaw Convention both from the point of view of the person entitled to delivery and from the point of view of the carrier.

a. from the point of view of the person entitled to delivery, in so far as he has the right of disposal, because the simple fact of the delay in carriage being exceeded, gives him the right to compensation, while to obtain compensation by virtue of the Warsaw Convention, he must prove that he has sustained damage owing to the delay and that this delay occurred during carriage by air, this last proof being almost impossible to provide. What difference does it make to the plaintiff whether the delay occurred during cartage or during carriage by air? According to the system at present in force for the air companies members of the I.A.T.A., the person entitled to delivery will be in a far more favourable position in the latter case than in the former. If delay occurs during cartage, he cannot obtain indemnity, since the Conditions of Carriage of the I.A.T.A. exclude all liability which is not expressly provided for in the Warsaw Convention. The great disadvantages arising from a division of the different operations of carriage in separate stages, do not exist in the system of the C.I.M., in which the entire journey is taken into consideration.

b. From the point of view of the carrier, because a system similar to that of the C.I.M. will enable him to find out exactly the sums he would have to pay in case of delay, while it must be expected that the present system will be a source of claims against him.

Attitude taken by the International Chamber of Commerce concerning the liability of the air carrier for delay

At the meeting of the Committee for Air transport of the International Chamber of Commerce on the 20th November 1934, a report presented by M. Beaumont on the modification of the Warsaw Convention relative to liability for delay was accepted,

it being understood that the question remains on the agenda of the Committee. Though being in agreement with the Reporter's opinion that the rules concerning liability for delay in the Warsaw Convention should be altered, we consider that objections should be made against some of the principles proposed by the Reporter to be used as a basis for the revision of the Convention on this subject. In the first place the Reporter proposed that by "period of carriage by air" must be understood the entire period included in the contract from the beginning of the journey by air to its end (from airport to airport). Whereas for delay in the carriage of passengers such a definition can be accepted, it is open to serious objections with regard to the carriage of goods. It has been pointed out that to avoid the consignor or consignee interfering with the internal service of the air company, a system by which the different stages of the carriage are calculated separately has to be rejected. The reasons why we consider the system of the Bern Convention advantageous to both contracting parties in carriage by air have been explained above.

A second objection must be made against the Reporter's proposal according to which in the case of carriage being performed by successive carriers, each carrier is responsible for a part of the damage caused by the delay which occurred during the carriage performed by him.

The question arises whether it is desirable to regulate this question in the Warsaw Convention. It seems to us preferable to leave it to the air companies to decide amongst themselves the proportions of the damages to be paid by each. However, in case one would consider it desirable to regulate this question in the Convention, it will be necessary to specify to what extent each carrier is responsible. Let us take for example that on the line Moscow–Stockholm–London operated by the A.B.Aerotransport and the K.L.M. a passenger has been delayed for three hours. During the journey Moscow–Stockholm there occurred a delay of two hours while during the journey Stockholm–London a delay of one hour occurred. In such cases should the indemnity for delay be divided as follows: the A.B.Aerotransport to pay $^2/_3$ of the amount, the K.L.M. $^1/_3$?

This method does not seem right. It often happens that the delay in carriage by the second carrier has really been caused by

the delay in carriage by the first [1] and in such cases it would be unfair to divide the amount of the liability in proportion to the mathematical delay. Liability ought to be divided between the carriers in accordance with the gravity of the faults committed by them.

The last and strongest objection to be made against the reporter's proposal to insert in the Warsaw Convention the principle that the air carrier is not liable for damages caused by delay if such delay is due to "un cas fortuit ou à un cas de force majeure". When discussing article 20 we will see the reasons why the authors of the Warsaw Convention unanimously rejected the insertion of the notion "force majeure" in the Convention. To make an exception for delay would be contrary to the very policy of the Convention and would moreover result in uncertainties of interpretation which, as far as one possibly can, should be avoided.

Deviation of the Dutch law of September 10th 1936 from the Warsaw Convention

Before terminating the analysis of article 19, attention should be drawn to article 28 of the Dutch law of September 10th 1936 containing provisions regarding carriage by air. It has already been mentioned that by this law the rules of the Warsaw Convention were made applicable to internal air carriage in the Netherlands. Article 28 is worded as follows: "In so far as it is not stipulated to the contrary, the carrier is liable for damages occasioned by delay in the carriage of passengers, baggage or goods". As we will see article 23 of the Warsaw Convention stipulates that any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention shall be null and void. A carrier falling under the rules of the Warsaw Convention will therefore not be permitted to exonerate himself from liability for delay. Article 28 of the Dutch law by adding the words *"in so far as it is not stipulated to the contrary"* leaves the carrier free to exonerate himself for delay.

It is interesting to examine the reasons which made the Dutch Government deviate from the rules of the Warsaw Convention on

1. For example, owing to delay during the carriage performed by the first carrier, the second carrier is forced to operate after sunset, and to take a route lightened by beacons which is longer than the ordinary route.

the question of delay. The permanent committee for Private Law of the Dutch Parliament, in their report on the draft law, made the following remarks: "It is not clear to the Committee for what reason no exemption of liability for delay can be stipulated. In the present state of technical development air traffic is still subject to unfavourable weather conditions which make an *absolute* regularity impossible. The Committee in principle does not consider it proper to impose on the carrier the entire risk of such circumstances without the carrier being able to exclude or even limit his liability. Such a regulation will moreover result in the carrier permitting flight to be carried out under unfavourable weather conditions or even when the aeroplane or the engines are not in suitable condition, in order to avoid as far as possible the obligation of indemnification for delay. It is true that the carrier, by virtue of art. 20, is not liable for damages 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, but it is still quite possible that he will not succeed in this proof because of the judge's opinion differing from the carrier's as to what the carrier should have done. In any case the proof in question to be made by the carrier will give rise to many difficulties.

The carrier is certainly able to exonerate himself to a certain extent from his liability, by inserting a clause in the contract of carriage such as is stipulated by art. 10 of the General Conditions of Carriage for Passengers fixed by the I.A.T.A.

By the insertion of such a clause art. 19 loses so much of its practical meaning that as far as *normal* delays are concerned the article could as well not have been included. The article retains its value for abnormal delays. However, as far as such delays are concerned, the Committee can not understand why the air carrier, in contrast with other carriers, can not exclude or limit his liability in such cases. The Committee can see no reason to maintain the immutable character of the article in question even if by doing so, the harmony between the law and the Warsaw Convention is broken".

Proof to be furnished by the carrier in order to exonerate himself from liability

Article 20.

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

2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage".

The capital point of the Convention of Warsaw is found in this article. As regards the rules concerning the liability of the air carrier, the authors of the Convention of Warsaw were supporters of the theory of fault. "General opinion considers that while the civil liability towards third parties should necessitate the application of the theory of risk, the theory of fault should be admitted with regard to liability towards passengers and goods".

The draftsmen of the Convention, before determining the idea "fault of the carrier" considered the question of on whom should fall the burden of proof.

Burden of proof

The analysis of the provisions of the French Civil Code concerning contractual liability showed that, as a general rule, when a passenger is injured consequent on an accident which occurred in connexion with the carriage, this event must be considered as constituting a presumption of breach of the obligation incumbent on the carrier of taking all reasonable measures for the safety of the passenger. The burden of proof falls therefore on the carrier [1].

We have seen that at Anglo-Saxon law it is, as a general rule, necessary for the plaintiff to give affirmative proof of the negligence of the defendant. In some aviation cases in the United States however the Courts arrived at imposing the burden of proof on the aircarrier by applying the res ipsa loquitur doctrine [2].

The draftsmen of the Convention did not think it equitable to impose on the injured party the burden of proving the negligence

1. See p. 44.
2. See p. 105.

of the air carrier. This opinion must be fully endorsed. When an aviation accident has happened the injured party is so situated that it is, as a rule, impossible for him to discover what went wrong and resulted in his injury. To give one example: The safety factor in aviation is improving with the constant perfection of the instruments such as are necessary for instance for blind flying. In certain circumstances it can be negligent of the carrier to continue using his old instruments when more perfected ones are available. It is of course impossible for the average passenger to have enough technical knowledge to be able to prove that an air carrier, not using certain instruments, has committed a fault.

Taking into account the special character of aviation we consider it just that by virtue of the Warsaw Convention in the event of death or wounding of a passenger or in the event of destruction, loss or damage to goods, the carrier has "the burden of proving that he has not failed in the obligation put upon him by the contract".

Contents of the contract

What is the obligation of the carrier flowing from the contract of carriage? It has been seen to what difficulties the determination of the contents of a contract gives rise [1]. In some countries it is concluded that the carrier by the contract of carriage guarantees the safety of the passenger. We explained the reasons why, in our opinion, it is impossible to attribute to the carrier the intention of guaranteeing the safety of the passenger and we therefore are in agreement with the conclusion at which arrived the Second Committee of the Ist International Conference for Private Air Law. The Committee considered that from the air carrier could be required:

"A normal organisation of its operation, a careful choice of its personnel, a constant supervision over its agents, a rigorous control of its machines and accessory materials used" [2].

The Committee reasoned as follows: "It must be admitted that the person making use of the aircraft does not ignore the risks accompanying a form of locomotion which has not yet reached the perfection that a hundred years have given to the railways. It

1. See page 47.
2. Minutes of the Ist Intern. Conf. for Private Air Law, p. 45.

is therefore right not to impose on the carrier an absolute liability and to exempt him from all liability when he has taken reasonable and normal measures: the care that can be required from a *"bon père de famille"*.

The Conference agreed to this opinion and fixed in the draft convention the principle *that the carrier is not liable if he has taken reasonable measures to avoid the damage.*

Special attention must be drawn to the great importance of the Conference accepting this principle which clearly brings out that a carrier having taken "reasonable measures" has committed no fault and therefore has not failed in the obligation the contract put upon him.

Reasonable measures and due diligence

The draftsmen of the Convention when using the expression "reasonable measures" were inspired by the maxim of "due diligence" used in English maritime law and in The Hague Rules of 1924 [1]. Article 4, paragraph 1 of this Convention stipulates that neither the carrier nor the ship shall be liable for the loss or damage arising or resulting from a state of unseaworthiness, unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating, and cool chambers and all others parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article 3. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption in accordance with this article.

It follows that the ship-owner is not obliged to provide a ship in good condition, but simply to take "due diligence" that the ship is in good condition. "This is to be understood as meaning not a maximum vigilance or precaution that cannot be asked of anybody, but an average care that a good ship-owner will not fail to take in maritime shipping" [2]. *The ship-owner only guarantees*

1. Ripert "L'Unification du Droit Aérien", Revue Générale de Droit Aérien 1932, p. 264.
2. Ripert: Droit Maritime, No. 1809.

his own personal activity which he exercises before the departure of the ship. The draftsmen of the Convention of Warsaw wished to follow the same principle in carriage by air. "If the carrier has verified the airworthiness of his machine under the official regulations, if he has chosen a pilot and a crew provided with the normal certificates, if he has laden his ship or received the passengers under the conditions and at the places fixed by rule, the carrier has done all in his power to avoid the damage and no more can be asked of him" [1].

The carrier, by proving that he had, *before the departure of the aeroplane*, taken reasonable measures, was not liable. It is to be regretted that the régime fixed by article 20 of the Convention of Warsaw is different from the régime originally intended by the draftsmen. In order to arrive at a clear understanding of the Convention in its present form, it is necessary to examine the reasons why the authors of the Convention deviated from the original rules. It will be seen that this deviation was due to difficulties which arose in connexion with the responsibility of the carrier for his agents.

Responsibility of the carrier for his agents

In article 20 it is stipulated that the carrier is not liable if he proves that he *and his agents* have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

If the agent has not taken all the necessary measures, he has committed a default for which the carrier is liable. Sub-paragraph 2 of article 20 allows an exception to this rule: "The carrier is not liable if he proves that the damage was occasioned by negligent pilotage". This exception is, however, only applicable to the carriage of goods and baggage.

Let us consider the development of the principle of the responsibility of the carrier for his agents according to the various draft conventions.

A. In the first draft there appeared an article 19 which read as follows:

"Le transporteur répond des fautes commises par ses préposés.

1. Ripert in the "Revue Juridique Internationale de la Locomotion Aérienne" 1926, p. 7.

Toutefois en cas de faute de pilotage, le transporteur ne sera pas responsable s'il fait la preuve prévue à l'article précédent".

The proof mentioned in article 18 was that of reasonable measures (article 18 [2]) "Il (le transporteur) n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage". From article 19 it must be concluded that the fact of the carrier proving that he has taken all reasonable measures, will not be sufficient to exonerate him from his liability on account of his agents in general; because otherwise this faculty should not have been stipulated only for the negligent pilotage of his agents.

The Reporter on the Convention, in presenting his final report at the Warsaw Conference, pointed out the following: "As regards the agents, the first text of the Convention included the application of two principles: the master is responsible for the acts of his agents, but he is not liable without fault, although fault is presumed until proof of due diligence is provided. A restriction to this liability has been allowed. If, as regards handling of the goods, liability of the carrier could be admitted, it did not seem logical to maintain this liability for the negligent pilotage of his agents, if he proves that he himself took the reasonable measures to avoid the damage".

It seems to us that there is an inconsistency in this explanation, which would naturally arise from the two articles in question. What then was the basis of the responsibility of the carrier for the actions of his agents?

Let us quote the Reporter for the Draft Convention presented at the Paris Conference.

"It is right not to impose an absolute liability on the carrier and to exonerate him from all liability when he has taken the reasonable and normal measures to avoid the damage .... What can be demanded from the air carrier? A normal organisation of his operation, a careful choice of his personal, *a constant supervision over his agents*, a rigorous control over his machines and materials used" [1].

These words clearly show that it was intended to base the responsibility of the carrier, as regards his agents, on a "faute de surveillance". The authors of the draft Convention seemed to consider that persons being in principle independent, there would

1. See Minutes of Ist International Conference for Private Air Law, p. 45.

be no explanation for the responsibility for agents, except in the case of faulty choice or insufficient control [2].

But how then to explain the second phrase of article 19 which says that the carrier shall not be liable for negligent pilotage if he gives proof of having taken the necessary measures? If the basis of the responsibility for the agents in general has to be found in a faulty choice or insufficient control, this provision becomes entirely superfluous. If a pilot was guilty of negligent pilotage, the carrier according to the general principle which makes him responsible for his agents, could exonerate himself from liability by proving that he took reasonable care. Such proof can be made by showing that the pilot had the normal certificates [1].

According to article 19 he should give exactly the same proof. How then to consider article 19 as a limitation made on the general responsibility of the carrier concerning his agents?

B. The Second Commission of the C.I.T.E.J.A. modified article 18 (2) als follows:

> Article 23: "Le transporteur n'est pas responsable, si lui et ses préposés ont pris les mesures raisonnables pour éviter le dommage ou qu'il *lui* était impossible de les prendre . . . ."

and article 19 was modified to:

> Article 24: "Le transporteur répond des fautes commises par ses préposés. Toutefois en cas de faute de pilotage, de conduite de l'aéronef ou de navigation, le transporteur n'en est pas responsable s'il fait la preuve prévue à l'article précédent".

There is again a contradiction between the two articles. On the one hand, in article 23 it is stipulated that the carrier is able to exonerate himself by proving that it was impossible to take the necessary measures, a confirmation of the principle according to which the carrier is not liable for the faults of his agents if he took reasonable care; on the other hand, article 24 appears to show that the carrier, as regards his responsibility for the acts of

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1. Ripert in his article "La responsabilité du transporteur aérien d'après le projet de la Conférence Internationale de Paris de 1925" writes "If the carrier has verified the navigability of his machine under the regular conditions, if he has chosen a pilot and a crew provided with the certificates usually issued . . . . the carrier has done all in his power to avoid the damage and not more can be asked of him". See Revue Juridique Internationale de la Locomotion Aérienne 1926, p. 7.

his agents, cannot exonerate himself by proving that he exercised reasonable care, which is in complete contradiction with the basic principle of the Convention".

C. At the 3rd Session of the C.I.T.E.J.A. article 24 was abolished and article 23 was changed as follows:

> "Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris les mesures raisonnables pour éviter le dommage ou qu'il *leur* était impossible de les prendre ....
>
> Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable des fautes de pilotage, de conduite de l'aéronef ou de navigation, s'il prouve qu'il a lui-même pris les mesures raisonnables pour éviter le dommage".

In comparing the first line of this article to article 23 under the letter *B*, one finds that the word "lui" is changed into "leur".

It is interesting to note that in the minutes this modification was not the subject of a discussion and that nobody noticed that this change resulted in giving to the responsibility for another person's action, a basis completely different to that of the preceding drafts. The explanation of this silence will probably be found in the contradiction between the articles 23 and 24, which makes it difficult, if not impossible, to discover the original idea of the first draftsmen of the Convention.

As we have pointed out, the principle taken as basis was always *that the carrier should not be liable if he had exercised reasonable care in choosing his agents and in controlling them.*

By virtue of the new article, to exonerate himself from all liability, it will no longer be sufficient for the carrier to prove that he made no fault in the choice or in the supervision of his agents; even without making such fault he will be liable if he cannot prove that his agent took all the necessary measures to avoid the damage.

Before considering the idea on which responsibility, within the meaning of the new article, is based (the terms of which are reproduced in article 20 of the Convention of Warsaw) the interpretation of the word "agent" must be examined.

Interpretation of the word agent

The question of interpreting the word agent within the meaning of article 20 of the Convention of Warsaw, was discussed during the 3rd Session of the C.I.T.E.J.A.

The following definition proposed by the Reporter on the Convention of Warsaw was adopted.

> "Toute personne ayant un lien avec l'employeur en vertu d'un mandat quelconque, le plus général possible, agissant au nom et pour le compte du transporteur" [1].

By virtue of this definition, for a person to be considered as the agent of the carrier, two conditions must be fulfilled:

a. the person acts under mandate,

b. the person acts in the name of and on behalf of the carrier.

We consider that this definition is entirely insufficient. It seems to have been forgotten that even the most general mandate does nevertheless constitute but a part of a much more comprehensive kind of "préposition".

"Tout mandataire est un préposé, mais la réciproque est loin d'être exacte; un domestique, un ouvrier sont des préposés, cependant, il n'ont pas par rapport au maître ou au patron la position juridique de mandataires, car ils ne sont pas leur représentant, ils n'agissent pas en leur nom et en vertu des pouvoirs juridiques qui leur auraient été confiés" [2].

The definition adopted by the C.I.T.E.J.A. does not cover the persons with whom the carrier has concluded a labour contract, for such a contract has normally force on material acts but not on legal acts. Consequently, if this definition was admitted, the liability of the carrier for the acts of his agents by virtue of the Convention of Warsaw would become practically illusory.

In our opinion, the persons to whom the carrier has the right to give orders regarding the functions for which they are employed, should in the very first place be considered as agents. A connection of subordination must exist between the principal and the agent before the liability of the principal can be engaged.

This category of persons excepted, are there any other persons which are to be included in the notion of agents?

Operational contracts

In this connection, it should be pointed out first of all that

1. Minutes of 3rd Session of the C.I.T.E.J.A. p. 48.
2. Josserand: Cours de Droit civil p. 761. See also Mazeaud No. 946, who considers subordination is indispensable to the existence of the "lien de préposition".

several air companies in Europe have concluded between themselves operational contracts in which it is stipulated that each of the contracting companies will put at the disposal of the other in his country its administrative and technical services. The services which one company must render to the other, include amongst other things, the maintenance of the service bringing the passengers to the airport, the putting into service of the aeroplane, the preparations for the take off etc. Let us take the example of a company A having concluded an operational contract with company B. An employee of company B, in preparing an aeroplane of company A for flight, committed a default owing to which the goods carried by the aeroplane were damaged. Must this person be considered an agent of the company A? There is no connection of subordination between this company and the person making the default; the company B and not the company A has the right of giving orders to this person regarding the acts for which he is employed. On the basis of the theory of subordination it is impossible to consider this person as an agent of the company A. Can the Company B itself be considered as an agent of the company A? There is also no connection of subordination. Should it be admitted that by virtue of the Convention of Warsaw the liability of the Company A shall not be engaged because it can prove that it and its agents took all the necessary measures? Let us suppose that this is in fact the case. The liability of this company by virtue of the Convention of Warsaw, shall not be engaged but this does not mean that its contractual liability shall not be engaged at all.

In those countries where the liability of the principal for the acts of his agents is found to be in the confusion of the principal with his agent, the default of the employee of company B constitutes a default on the part of the company B itself. The Courts of those countries will not hesitate, by virtue of the common law, to make company A contractually responsible for the non-performance of the contract due to the fault of company B which is regularly charged by A to perform a part of the contract of carriage [1].

Consequently, if the company B is not considered as the agent

1. See further on this subject Goedhuis: La Convention de Varsovie, p. 18 and p. 36.

of the company A, the carrier, in the given case, will be placed between two régimes of liability.

a. that of the Convention of Warsaw;

b. that of Common Law.

There is no need to insist on the disadvantages of such a situation. For this reason, it is desirable to give to the notion of agent, within the meaning of article 20, a wider interpretation than an interpretation which requires subordination as condition. It should, we think, include *all persons employed by the carrier for the performance of the carriage which he undertakes.*

It is, all the same, probable that the interpretation of article 20 will give rise to very divergent opinions. In the first place because it is possible that the definition given by the C.I.T.E.J.A. will be used as basis, which, as we have pointed out, is insufficient and also because it is possible that, for a person to be an agent, the condition of subordination may be required, deeming that if a wider meaning was desired to be given to the word "agent", it would have been stated. For this reason it seems to us indispensable that art. 20 should be modified so as to make clear that the term "agent" includes all the persons that the carrier uses for the execution of the carriage which he undertakes.

Explanation of the word "agents" given by the British Air Navigation Act 1936

The British Air Navigation Act 1936 made already an important step in this direction. Section 29 of this Act reads as follows: "For the avoidance of doubt in the construction of the Carriage by Air Act 1932 (giving effect to the Warsaw Convention), whether as forming part of the law of the United Kingdom or as extended to any other country or territory, it is hereby declared that references to agents in the First schedule to that act include references to servants [1].

Basis of the responsibility of the carrier for his agents

Seeing that, within the meaning of art. 20, the carrier can no longer exonerate himself from liability by proving that he has

1. Sullivan in his article on the "Codification of Air Carrier Liability" in Journal of Airlaw, January 1936, recommends the word "agents" to be replaced by "servants or "employees" to give a clearer meaning to the article in Anglo-American Courts.

exercised reasonable care, this liability can no longer be based on default of choice or control on his part.

Should then the theory of risk-profit be used as basis, according to which the master is liable for the acts of his servants because the employment of servants is for the master's benefit? This theory can neither be used as basis because it results in the master always being liable even for acts which are not imputable to the agents, whereas in article 20 it is stipulated that the carrier can exonerate himself by proving that it was impossible for the agent to take the necessary measures.

The basis of the liability must be sought in the "confusion" of the personality of the carrier with that of his agent [1].

Must the agent have acted within the course of his employment?

In article 20, it is not expressly stipulated that the agent is to have acted in the course of his employment for the liability of the carrier to be engaged. Should it be admitted that, if the wrong of the agent was not committed in the course of his employment, the carrier should be liable for it?

We consider that the contractual liability of the carrier will not be engaged in such a case, because the analysis of the contract will not show the existence of an obligation to which the injurious act can be attached.

It is nevertheless not sufficient only to consider the contractual liability of the carrier. As we will see later in article 24 it is provided that in the case stipulated in articles 17, 18 and 19 *any action for damages however founded*, can only be brought subject to the conditions and limits set out in the Convention.

Consequently, even if the victim wished to base his action on liability *ex delicto* of the carrier, it would be subject to the rules of the Convention of Warsaw.

According to Anglo-Saxon jurisprudence for the tort liability of the master to be engaged, the wrong committed by the agent must be closely connected with the work he is entrusted with [2]. French jurisprudence on the contrary assimilates the damages caused in the course of the employment to those caused "on the

1. Cf. Mazeaud op. cit. No. 992; see also Pollock "The Law of Torts" p. 97.
2. See Pollock, op. cit., p. 86. In Germany and Holland the Courts have come to the same conclusion.

occasion" of the employment. This jurisprudence is rightly criticised by French doctrine [1].

It is to be expected that, whereas the Courts in some countries will only declare the air carrier liable by virtue of article 20, if the wrongful act of the agent was committed in the course of his employment, the Courts in other countries will give an extensive interpretation of the liability of the air carrier for his agents and will render him liable even when the agent has abused the functions entrusted to him by the carrier.

We consider however that to give an extensive interpretation to the liability of the carrier for his agents, would be contrary to the spirit of the Warsaw Convention. Although we critisized the definition of the word "agents" given by the C.I.T.E.J.A., this definition does in any case bring out that in the opinion of the authors of the Convention, a close connection must exist between the act of the agent and his employment, for the master to be liable for it. The definition requires as criterion of the relation master to agent, the fact that the agent acted on behalf of the master. When there is a departure from the course of the master's business, the agent can not be considered as acting on behalf of the carrier and will in such a case no longer be an agent within the meaning of the Convention.

Nevertheless it is possible to find in the Convention an argument militating in favour of an extensive interpretation of the liability of the acts of the agents within the meaning of article 20. In the second sub-paragraph of article 25 of the Convention of Warsaw it is stipulated that:

> "The carrier shall not be entitled to avail himself of the provisions of the Convention of Warsaw limiting or excluding his liability, if the damage is caused as aforesaid (wilful misconduct or grave default) by any agent of the carrier acting in the course of his employment".

Why has the Convention of Warsaw expressly stipulated in this article that the agent must have acted within the scope of his employment? This provision is completely superfluous if one

1. Mazeaud op. cit. No. 911 remarks: "Si l'on consulte les travaux préparatoires du Code Civil l'hésitation n'est pas permise; dès que le dommage a été causé non plus dans l'exercice des fonctions, mais seulement à l'occasion des fonctions, le commettant ne doit pas être déclaré responsable".

considers that an agent acting outside the scope of his employment is no longer an agent within the meaning of the Convention of Warsaw. Owing to the restriction stipulated in article 25 not being made in article 20, should it be concluded that the meaning of the word "agent" in the latter article is wider than the meaning in the former article? We do not believe that that was the intention of the drafters of the Convention of Warsaw [1].

It seems to us indispensable to modify the articles 20 and 25 so that the wording should not give place to uncertainties on this subject.

Negligent pilotage or negligence in the handling of the aircraft or in navigation

As we pointed out, it was decided in the first drafts of the Convention that the carrier was not liable for negligent pilotage, if he proved that he himself had taken all reasonable measures to avoid the damage. At the IInd Session of the C.I.T.E.J.A. [2] (May 1928) the German delegation proposed to modify the liability of the carrier for accidents due to negligent pilotage in so far it concerned accidents occurring to passengers. Whereas in the opinion of this delegation the theory of fault should be applied to the carriage of goods, for the carriage of passengers on the contrary the theory of risk ought to be recognised.

The amendment proposed by the German delegation was accepted by 9 votes against 7, and article 22 of the final draft presented to the Warsaw Conference was drawn up as follows:

> "The carrier is not liable if he proves that he and his agents took all the reasonable measures to avoid the damage or that it was impossible for him or them to take such measures, unless the damage was caused by an inherent defect of the aircraft.
>
> "In the carriage of goods and baggage, the carrier is not liable for negligent pilotage, or negligence in the handling of the aircraft or in navigation, if he proves that he himself has taken reasonable measures to avoid the damage".

The Reporter, in presenting the final report to the Warsaw Conference made the following remarks on negligent pilotage:

1. Cf. Minutes of the IInd International Conference for Private Air Law, p. 43.
2. See Minutes of the IInd International Conference for Private Air Law, p. 43.

"If for commercial manipulations the liability of the carrier could be admitted, it did not seem logical to maintain this liability for the negligent pilotage of his agents, if the carrier proved that he himself took measures to avoid the damage. The question has arisen of whether the theory of risk should not be taken as basis of the régime of liability in the case of death or bodily injury. If the liability for negligent pilotage were excluded, the former régime in practice would only provide a very limited guarantee from the point of view of passengers".

The French, as well as the English delegation at the Warsaw Conference both proposed to suppress in the second sub-paragraph of the article quoted above the words: "in the carriage of passengers and goods", because they considered that the system originally stipulated by the C.I.T.E.J.A., according to which the sub-paragraph in question also applied to passengers, was preferable [1].

The two delegations further demanded the suppression in the first sub-paragraph of the same article of the words "unless the damage is caused by inherent defect of the aircraft".

After a long discussion on these two proposals, the Chairman, as a compromise, made the proposal of accepting the amendment in the first sub-paragraph, and rejecting that in the second sub-paragraph [2]. This proposal was accepted; consequently the carrier is responsible for negligent pilotage in the carriage of persons but is not responsible in the carriage of goods [3].

First of all has to be considered the opinion of the Reporter, according to which the liability of the carrier, by virtue of the Convention of Warsaw is based on the theory of fault with the exception of the liability of the carrier for negligent pilotage, which is based on the theory of risk. It has been observed that the

1. See Minutes of the IInd International Conference of Private Air Law, p. 15.
2. See Minutes of the IInd International Conference of Private Air Law.
3. M. Cha in his article on "The air carrier's liability to passengers in international Law", Air Law Review January 1936 p. 64 thinks that the air carrier is *probably* liable for death or personal injuries arising out of faults of navigation because the language of art. 20 par. 1 is very obscure. We do not share Mr. Cha's opinion that this liability is doubtful. Even if one does not take into account the history of the article, the actual wording clearly brings out that as a general principle the carrier is liable, if he cannot prove that he and his agents have taken the necessary measures. When an agent has made a nautical fault the carrier will not be able to prove that his agents have taken the necessary measures and he therefore will be liable. An exception on this general rule has been made in par. 2 of art. 20 for the carriage of goods and luggage.

first theory which is that which the authors of the French Civil Code have recognised, is based on the principle of there being no civil liability without fault. The second theory, born at the end of the XIXth century, on the other hand, rejects the necessity of fault for the civil liability of the debtor to be engaged. "La condamnation civile étant débarrasée de tout caractère de punition, elle estime qu'il n'y a aucune raison de maintenir la notion de faute" [1].

In the present system of the Convention of Warsaw it seems to us inexact to pretend that the liability of the carrier for negligent pilotage is based on the theory of risk. The development of the liability of the carrier for the acts of his agents in the different drafts of the Convention has been examined above. Originally this liability was based on the default of choice or control by the carrier, who was then able to exonerate himself by proving that he had taken reasonable care. Seeing that this proof was not allowed him, in cases of negligent pilotage, one could attempt to maintain that the basis of the liability for such defaults was based on the theory of risk.

Nevertheless, the basis of the liability of the carrier with regard to his agents, *in general*, within the meaning of article 20 of the Convention of Warsaw, can no longer be the default of choice or control, seeing that the carrier cannot exonerate himself from this liability by proving that he has exercised reasonable care. Is this liability based then on the theory of risk? We do not think so, for this theory leads *to the carrier being always liable even for faults which are not imputable to agents*. Now, by virtue of article 20, the carrier can exonerate himself by proving that it was impossible for the agent to take the necessary measures.

By admitting that the liability of the carrier for agents in general is not based on the theory of risk, can one say that the liability for pilots and navigators is based on this theory? Certainly not. The basis of the liability of the carrier for the defaults of the pilots or navigators is the same as the liability for other agents. The carrier will be liable unless he proves that it is impossible for pilots or navigators to take the necessary measures. He is therefore not liable for faults not imputable to these persons. If, by rejecting the thesis put forward by us, one would still

1. Mazeaud op. cit. no. 63.

pretend that the liability for negligent pilotage is based on the theory of risk, it would in any case be indispensable to admit that the liability of the carrier concerning all his agents is based on the theory of risk and not, as said the Reporter, only the liability concerning pilots and navigators.

The difference of régime between passengers and goods is unjustifiable

It is very regrettable that the proposal of the German delegation to make a distinction in negligent pilotage between carriage of passengers and carriage of goods was accepted by the Conference.

Juridically there is no reason at all to make a difference on this subject between passengers and goods. The non-liability of the ship-owner for negligence in navigation in common law was considered right, seeing that the captain and the crew enjoy complete independance in the management of the ship, the ship-owner not even having the right to give orders on this subject [1]. This reason, admissible *a fortiori* for the pilot and the crew on board the aircraft, has exactly the same force as regards passengers and as regards goods. That is why in maritime carriage the "negligence clause" has generally been made to have the same absolute effect in the carriage of passengers as in the carriage of goods [2].

The German delegation upheld their proposal by the following argument: "If liability for nautical faults is excluded in the carriage of passengers by air, nothing remains. For goods it is different for there still may be fault in the handling of the goods" [3].

It is true to say that the character of air navigation is such that, if the liability of the carrier as regards negligent pilotage is excluded, the carrier will almost never be liable? An analysis of the statistics published on the causes of aviation accidents will prove that this opinion is not correct. The accident report on scheduled airline operations published in the Air Commerce Bulletins of the U.S. Department of Commerce (Vol. 7, nos. 7 and

1. See Ripert Droit Maritime, no. 1783 and authors quoted in note 1 no. 1744.
2. See Ripert Droit Maritime, no. 2003; Mazeaud op. cit. no. 2533.
3. See Minutes of IIIrd Session C.I.T.E.J.A. p. 47.

9) shows that less than 20% of all the accidents were due to negligent pilotage [1].

It is therefore incorrect to say that if negligent pilotage excludes liability, no liability subsists. All the more so since, even if there is negligent pilotage, the carrier must prove that in all other respects he has taken all necessary measures to avoid the damage. In the case of engine failure where the carrier cannot prove that his agents examined and tested the engines for a certain length of time before departure, the carrier will be liable.

The argument which made the Warsaw Conference accept the German proposal is therefore in no way conclusive [2].

As Mr. Ripert said at the Conference: "The consequence of the régime adopted in art. 20 is that the air carrier at the moment is under a régime infinitely harder than the régime under which maritime navigation is operating". In this connection, the principle which, in the opinion of the C.I.T.E.J.A. should regulate the Convention, should be recalled. "The liability of the air carrier must be submitted to rules less rigorous than those imposed on other carriers".

It is most desirable that at the next revision of the Convention of Warsaw the difference of régime between passengers and goods be abolished and that the second sub-paragraph of article 20 be drawn up so as to liberate the carrier from the liability arising from negligent pilotage, whether relating to the carriage of passengers or to the carriage of goods [3].

Interpretation of the term "negligent pilotage or negligence in the handling of the aircraft or in navigation"

On the subject of negligent pilotage, negligence in the handling of the aircraft or in navigation, the Reporter on the draft Convention made at the Paris Conference in 1925 the following remarks [4]:

1. See also the statistics of the "Bureau Veritas" published by Prochasson in "Le Risque de l'Air" p. 38, where the percentage of accidents due to negligent pilotage is even much lower.
2. We recall that article 42 of the French Air Law of 31st May 1924, permitting the carrier to exonerate himself from liability arising from nautical defaults very rightly makes no distinction between passengers and goods, see p. 51.
3. Maschino in his article "La Convention de Varsovie", Droit Aérien 1930, p. 4 and BlancDannery in her book "La Convention deVarsovie et les Règles du Transport Aérien International" also critisize the present system.
4. See Minutes of the Ist International Conference for Private Air Law, p. 46.

"In all transport the technical manoeuvres relating to the flying of the aircraft, must be considered and the commercial manipulations not connected with air law (packing, loading, stowage, unloading, reserving goods before carriage, during break of journey, or at arrival until delivery)".

After an exchange of views at the Meeting of the Second Commission of the C.I.T.E.J.A. in November 1927, it was decided that the words "negligent pilotage or negligence in the handling of the aircraft or in navigation" were to apply to the three categories of personnel employed in flying an aeroplane: the commander captain, the pilot and the navigator [1].

In the Minutes we were only able to find these two remarks on which to base the interpretation of the words in question.

Let us point out first of all that the Convention of Warsaw in making a distinction between negligent pilotage on the one hand, and defaults which cannot be considered as such on the other hand, was clearly inspired by maritime law. The distinction between defaults committed by the commander or the crew "in navigation or in management" and other defaults was made for the first time in the Harter Act of the United States in 1893, and passed first of all into the legislations of the countries which adopted the American legislation, and then into the types of bill of lading concluded between the ship-owners and the freighting Companies, and finally into the Hague Rules of 1921 and in the international Convention for the unification of certain rules relating to bills of lading.

Article 4 (2) of the latter Convention stipulates that:

> "Neither the carrier nor the ship will be liable for the loss or damage resulting or arising from: the acts, negligence or default of the captain, sailor, pilot or the agents of the carrier in the navigation or management of the ship".

As regards the interpretation of the term "in the navigation" in maritime law it is generally agreed that the defaults committed in navigation are the nautical defaults properly speaking, such as faulty direction of the ship, etc.

The interpretation of the term "in the management" gives rise

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1. See Minutes of Ist International Conference for Private Air Law, p. 46.

to greater difficulties. From the cases reviewed by Lord Hailsham in Gosse Millard Ltd. v. Canadian Government Merchant Marine (1929) it appears that a want of care of the cargo is one thing and that the want of care of the vessel indirectly affecting the cargo is another thing. When applying this idea to aircraft in relation to the exception provided by the rule under consideration, the former breach of duty would not be covered by the exception while the latter would be [1].

In examining closer the remarks on this subject appearing in the Minutes of the Warsaw Conference, one would expect that the application of the distinction between nautical defaults and commercial defaults would give rise to difficulties in practice. For example, according to the Reporter, the loading is a manipulation which does not fall under air law. Nevertheless the manner in which an aeroplane is loaded is of the greatest importance for the safety of the aeroplane. Consequently, if an accident occurs owing to faulty loading, jeopardising the stability of the aeroplane, we consider the default in such a case as negligence in the handling of the aircraft [2].

Further it has been said that the words "negligent pilotage, negligence in the handling of the aircraft or in navigation" must apply to the commander, to the pilot and to the navigator. How then, must the default of a wireless telegraphist on board and aircraft be considered when, for instance, on receiving a message stating that the aeroplane cannot land at a certain aerodrome owing to the bad state of the ground, he reproduces this message incorrectly and owing to this causes an accident. In our opinion this default should be considered as a nautical default.

Proof of necessary measures

It has been observed that in view of the special character of aviation it is proper that the injured party should be relieved of the burden of proving that the aircarier has failed in the obligation put upon him by the contract.

We have seen that the original idea of the draftsmen of the Convention was to exonerate the carrier from liability when he

1. Cf. Moller, The Law of Civil Aviation p. 306.
2. Contra, Riese in "Zeitschrift für ausländisches und internationales Privatrecht", 1933, p. 981.

proved that he took, before the departure of the aeroplane, the reasonable measures. This proof could be furnished by the carrier by showing that the certificates of the aircraft and the personnel were in good order, that the engines had been properly controlled, that the aircraft had the necessary fuel on board to perform the carriage, that all possible meteorological information had been supplied to the pilot, that the aircraft had not been overloaded.

The great advantage of this system for the air carrier was that it avoided divergencies on the subject of the proof to be made by the carrier in the case, where the real cause of the accident could not be discovered. The analysis of the common law in different countries has shown that opinions differ as to whether the defendant, in order to exonerate himself from liability, must prove affirmatively the cause of the accident or whether it is sufficient for him to prove negatively that he is not guilty of fault. As in aviation it often happens that the cause of the accident remains unknown, it is clear that a heavy liability would be put on the shoulders of the carrier if he was required to prove the cause of the accident [1]. The authors of the Convention based themselves on the principle that the air carrier should be submitted to less rigorous rules than those imposed upon maritime and surface carriers. They were of opinion that a person making use of air navigation accepted the risks accompanying this form of locomotion.

It is to be regretted that the original intention of the draftsmen of the Convention has become obscured in the present text of art. 20, owing to the modification concerning the liability of the carrier for his agents. Moreover it is unfortunate that the term "reasonable measures" which was always used in the draft conventions was changed into "necessary measures". The

1. Sullivan in his article "Codification of Aircarrier Liability by International Convention" (Journal of Air Law, January 1936, p. 31) draws the attention to the fact that in the analysis of causes of accidents compiled by the Bureau of Air Commerce in the year 1933, only 3,77% of the total were classified as undetermined or doubtful, and in 1934, none was so classified. When considering these statistics it must be borne in mind that owing to the excellent ground-organization, wireless services etc. in the U.S.A., the connection between the aeroplane and the people on the ground is much stronger there than in the great majority of other countries. The chance of the cause of an accident remaining unknown in the case of an aeroplane crashing in a deserted region is of course infinitely greater than in the case of an aeroplane crashing in a country the groundorganization of which is well organised. Moreover the statistics to which M. Sullivan refers, do not bear upon accidents happening to aeroplanes flying over large tracts of water.

substitution of the word necessary for the word reasonable was made by the drafting committee at the Warsaw Conference. As the change was not discussed at a plenary meeting, it must be recognised that it was a modification of pure form and that the original idea remained exactly the same. But why make at the last moment such a modification which can only result in uncertainties?

The carrier, by virtue of the final text of art. 20, has not only to prove that he himself has taken the necessary measures but also that his agents have taken the necessary measures. How is the carrier to prove that his agents have taken the necessary measures when for instance an aeroplane has disappeared in the sea? When the cause of the accident is known and this cause excludes any fault of the agents *in casu* the crew of the aeroplane, the carrier will have no difficulty in exonerating himself from liability. But if the cause is unknown what proof has to be given then by the carrier? As a direct proof is impossible, the carrier must be allowed to prove by presumption that his agents took the necessary measures. If the carrier shows that the crew held the necessary certificates, he must be relieved from his liability unless the plaintiff rebuts the presumption by evidence to the contrary [1].

The Courts when applying the rules of the Warsaw Convention should bear in mind that the fundamental idea of article 20 is to relieve the carrier of his liability when he has committed no fault.

The fact of imposing upon the carrier the burden of proving affirmatively that his agents took the necessary measures, would mean imposing an absolute liability upon him in cases where the cause of the accident remains unknown. As we have seen, the authors of the Convention unanimously rejected a liability of the air carrier based on the theory of risk.

The air carrier, by virtue of article 20, will also not be liable if he proves that it was impossible for him or for his agents to take the necessary measures. This does not denote an absolute inability. It means that if the carrier or his agents were unable to prevent the damage complained of by reasonable means, no

1. It is of course possible that in spite of the licence the pilot or another member of the crew may be incompetent for some reason, intoxication for instance.

liability will exist. Attention should be drawn to the fact that the words "or that it was impossible for him or them to take such measures" used in the first sub-paragraph of article 20, have not been reproduced in the second. As there is no reason for the suppression of these words, we think this must be due to an omission which has to be rectified at the next revision of the convention.

Jurisprudence regarding art. 20

There is as yet no jurisprudence concerning art. 20 of the Convention. However, the judgment of Greer L.J. in the case Grein v. Imperial Airways [1] indicated the lines along which future construction of the proof of necessary measures in England will probably go. Greer L.J. indicated that *necessary* in art. 20 must be construed as meaning *reasonable.*

Doctrine regarding art. 20

It is important to note that M. Schreiber [2] who used to be the German expert in the C.I.T.E.J.A., observes in an article that one cannot require from the carrier the proof that all his agents have taken the necessary measures as such proof would be absolutely impossible for him to furnish and that it should be sufficient for the carrier to prove that he took the measures necessary for a normal operation of the service.

M. Müller expresses the same opinion in his book "Das internationale Privatrecht der Luftfahrt".

M. Maschino [3], though afraid that on the subject of the proof of necessary measures the Courts will often differ, thinks that in general the Courts will accept a liberal attitude with regard to allowing the carrier to prove necessary measures by presumption. He does not base his opinion, as we do, on the argument that by not accepting proof by presumption one arrives of necessity at a conflict with the fundamental idea of the Convention, but he considers the general tendency to indulgence towards the air carrier as an indication of the Courts accepting a liberal attitude on this subject.

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1. Judgment of the English High Court of Justice of July 13th 1936.
2. Zeitschrift für Luftrecht I p. 43.
3. "La Convention de Varsovie" Droit Aérien 1930, p. 21.

M. Ripert [1] thinks that in view of the strict regulation of air traffic and the control by official organisations, it will not be difficult to find out whether the prescribed measures have been taken.

M. Blanc–Dannery [2] considers that the carrier can exonerate himself from his liability by establishing that he has not deviated from the course of his normal activity in the operation of the air service.

M. Sack [3] expresses the opinion that it may very well happen that practically the burden of affirmative proof (of fault of the carrier or of his agents) would be, in many cases, shifted on the plaintiff.

M. Cha [4] thinks the system of the Warsaw Convention a good solution, as it is, in his opinion, unjust to impose the burden of proof on the carrier who must incur liability whenever he cannot prove the presence of force majeure or a fortuitous event.

M. Moller thinks that in effect the carrier in regard to passengers will be liable for little more than negligence if he has taken *reasonable measures* to provide for the safety of the persons carried [5].

M. Sullivan expresses the opinion that while art. 20 does not expressly require the carrier to ascertain the cause of the accident, a strict interpretation of this article would indirectly do so since the nature of the accident would determine the extent of defendant's proof. He thinks that the carrier, to be adequately prepared to give the necessary proof, should know the cause, as without such knowledge he would have to run the whole gamut of possible causes and show that he had taken necessary measures with respect to each [6].

We cannot share M. Sullivan's opinion that the carrier, to relieve himself of liability, will have to prove affirmatively the cause of the accident. As we already remarked, by such inter-

1. "L'Unification du Droit Aérien" "Revue Générale de Droit Aérien" 1932, p. 265.
2. "La Convention de Varsovie et les Règles du Transport Aérien International", p. 51.
3. "Air Transportation and the Warsaw Convention", Air Law Review, October 1933, p. 369.
4. "The Air carrier's Liability to Passengers in International Law", Air Law Review, January 1936, p. 35.
5. "The Law of Civil Aviation", p. 304.
6. "Codification of Aircarrier Liability by International Convention", Journal of Air Law, Jan. 1936 p. 30.

pretation of art. 20, one arrives per force at a conflict with the fundamental idea of the Convention. It has never been the intention of the authors of the Convention to require from the carrier the proof of having taken the necessary measures with respect to all possible causes of the accident. As M. Schreiber has pointed out, the idea of the authors was to relieve the carrier of liability if he proved that he had taken the measures necessary for a normal operation of the service. The analysis of the minutes of the meetings of the C.I.T.E.J.A. and of the International Conferences of Private Air Law removes all doubt which might have existed on this point. With the exception of M. Sullivan all other textwriters on the Warsaw Convention are in agreement on the general principle of requiring from the carrier the proof that he has taken the measures which a good carrier has to take for a normal operation of his service.

Comparison between the proof of necessary measures and that of "force majeure"

We have seen that in the countries in which the civil law is based on the Code Napoléon, if a passenger is injured consequent on an accident in connection with the carriage, it must be considered as a presumption of breach of the obligation of the carrier. The carrier, to exonerate himself, will have to prove a case of force majeure.

In the first Chapter the divergencies of interpretation to which the term "force majeure" gives rise, have been pointed out. The two theories which oppose each other in this domain are the theory of exteriority which requires the event constituting a case of force majeure to be outside the undertaking of the defendant, and the theory according to which force majeure is synonimous with absence of fault. The reasons why, in our opinion, the first theory, which implies an absolute liability, should be rejected, have already been explained *in extenso* [1]. If, however, one would accept this theory it must be admitted that an air carrier who is permitted to exonerate himself from liability by the proof of necessary measures, is in a more favourable position that an air carrier who has to exonerate himself by proving a case of force majeure.

1. See page 42.

If one accepts the thesis that force majeure is synonimous with absence of fault it must be recognised that there is no fundamental difference between the proof of force majeure and that of necessary measures. Nevertheless we are of opinion that in practice it will be easier for the air carrier to exonerate himself from liability by the proof of having taken the necessary measures than to exonerate him by the proof of force majeure. Though theoretically force majeure can be proved by presumptions, the Courts in different countries have the tendency to require of the carrier to prove affirmatively the cause of the accident. The Warsaw Convention, when rightly interpreted, allows the carrier to prove negatively that he has committed no fault.

Comparison between the proof of necessary measures and the exoneration proof to be furnished by the carrier at Anglo-Saxon law in the carriage of passengers

It has been observed that according to the fundamental principle of Anglo-Saxon law of evidence, a plaintiff, in order to render the defendant liable for negligence has to give affirmative proof thereof. We have seen that to help the plaintiff some Courts in the U.S.A. shifted the burden of proof on the shoulders of the carrier by the application of the res ipsa loquitur doctrine.

In view of the strong objections made against the application of this doctrine and in view of the fact that it is not to be expected that the advocates of the system will apply the doctrine in *all* cases, it must be admitted that the plaintiff under the régime of the Warsaw Convention is in a much more favourable position than he would be under the Anglo-Saxon Common law régime, for under the first régime the plaintiff only has to prove the damage sustained and the causal connection between the damage and the accident.

At Anglo-Saxon common law of passengers, the carrier has the duty to furnish a vehicle for the carriage of passengers as fit for the purpose as skill and care can render it and to exercise reasonable care and skill in carrying the passengers. The obligation to take the necessary measures under the régime of the Warsaw Convention cannot impose upon the carrier a lesser duty than the duty flowing from the Anglo-Saxon common law.

In view of the preceding we do not share the opinion of those

writers who pretend that the air carrier, under the régime of the Warsaw Convention, is in a better legal position than under the régime of American or Anglo-Saxon common law. This does not mean that the Warsaw Convention as a whole does not offer advantages to the air carriers of passengers. We will see that the Convention limits the liability of the carrier to certain specified amounts. In addition the advantage for the carriers of knowing exactly when and to what extent their liability will be engaged counterbalances the disadvantage of having the burden of proof shifted from the shoulders of the plaintiff to their shoulders.

Comparison between the proof of necessary measures and the exoperation proof to be furnished by the carrier at Anglo-Saxon law in the carriage of goods

We have seen that in the U.S.A. as well as in England [1] the air carrier operating regular lines is generally considered to be a common carrier. A common carrier, to exonerate himself from liability for any loss or damage happening to goods, must prove that the loss or damage resulted from the act of God, the Kings enemies, inherent vice or defect of the goods or the negligence of the owner of the goods.

It is clear that this liability is much heavier than a liability from which the carrier can relieve himself by proving that he has taken the necessary measures to avoid the damage.

Comparison between the exoneration of liability of the carrier provided for in the Warsaw Convention and the exoneration of liability of the carrier provided for in the C.I.M.

In article 27 of the C.I.M. it is stipulated that the railway is liberated from all liability in the case of total or partial loss or damage, if the railway proves that the damage was caused by an act of the claimant, an order of the claimant not arising from default of the railway, inherent vice of the goods or force majeure. In the case of delay the railway will not be liable if it proves that the delay was caused by circumstances that the railway could not avoid and which did not rest with the railway to remedy.

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1. It has been observed that in England the carrier can repudiate the status of common carrier by an express clause.

The question of whether a carrier, who to exonerate himself from liability, must prove that he has taken the necessary measures, is in a more favourable position than the carrier who must provide the proof stipulated in article 27 of the C.I.M., is really a question of the interpretation of the principles of force majeure. One must therefore first refer to the considerations already given on this subject. Nevertheless it must be pointed out that, in the special domain of the C.I.M. the writers tend to give a restrictive interpretation of force majeure.

Brunet [1] observes that it is generally agreed that an element exterior to the enterprise must be present, the suddeness and violence of which are such as to make it possible for the carrier to avoid it or to foresee it.

Seligsohn [2] gives the following definition of force majeure in connection with the C.I.M.:

"Ein von aussen auf den Betrieb einwirkendes und aussergewöhnliches (elementares) Ereignis, dass nicht hervorgesehen und auch durch die zweckmässigsten Massnahmen nicht abgewendet oder in seinen Folgen unschädlich gemacht werden kann".

If one requires as a distinctive characteristic of force majeure within the meaning of the C.I.M., the fact that the event is exterior to the enterprise [3], it will have to be admitted that the air carrier, who, in accordance with the Warsaw Convention can exonerate himself from liability by proving that the necessary measures were taken, no matter whether the cause of the damage was outside or inside the enterprise, is in a more favourable position than the railway carrier.

As regards the proof of the circumstances which the railway could not avoid and circumstances which do not rest with the railway to remedy, which he must make to exonerate himself from liability in the case of delay, one finds in the preparatory work of the C.I.M. [4] that the drafters of the C.I.M. were unanimously of the opinion that the liability for delay should be less rigorous than that for loss of or damage to goods. Brunet [5]

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1. Brunet op. cit. p. 227.
2. Seligsohn op. cit. p. 368.
3. For the objections to be made to the exteriority theory see p. 43.
4. See Seligsohn op. cit. p. 369.
5. Brunet op. cit. p. 228.

considers nevertheless that the railway, also in the case of delay, must establish that the case was exterior to the railway enterprise, in order to exonerate himself of liability. We do not understand how he arrives at this conclusion; nevertheless, if such a point of view is accepted, it must be admitted that in the case of delay the proof that must be given by the air carrier to exonerate himself from liability is less difficult than that which must be provided by the carrier by rail.

Comparison between the proof provided for in article 20 of the Warsaw Convention and that in article 4 of the Brussels Convention, giving the cases of non-liability of the maritime carrier

Three cases must be considered separately in making this comparison:

I. The case where loss or damage arose from the state of unseaworthiness of the ship and from the state of unairworthiness of the aircraft.

By virtue of the Brussels Convention, the maritime carrier shall not be liable in such cases, if he proves that he has exercised due diligence to make the ship seaworthy. By virtue of the Warsaw Convention the air carrier shall not be liable if he proves that he has taken the necessary measures to avoid the damage, which is equivalent to proving that he has exercised due diligence. On this subject there is therefore no difference between the Brussels Convention and the Warsaw Convention.

II. The case of loss or damage arising from negligent navigation or negligence in the management of the ship by the agents of the carrier, and the loss or damage arising from the negligent pilotage or negligence in the handling of the aircraft or in navigation by the agents of the air carrier.

By virtue of the Brussels Convention, the maritime carrier shall not be liable in such a case, if he proves that the loss or damage is due to negligent navigation or negligence in the management of the ship.

By virtue of the Warsaw Convention, the air carrier shall also not be liable, if he proves that the loss or damage is due to negligent pilotage or negligence in the handling of the aircraft or in navigation, if in all other respects he and his agents took all necessary measures to avoid the damage. It seems to us that

also on this subject there is no difference between the two Conventions.

III. The case where the loss or damage arose from one of the following causes, figuring in sub-paragraph 2 of article 4 (the point under letter *a* has already been treated under II).

> (*b*) Fire, unless caused by the actual fault or privity of the carrier.
>
> (*c*) Perils dangers and accidents of the sea or other navigable waters.
>
> (*d*) Act of God.
>
> (*e*) Act of War.
>
> (*f*) Act of public enemies.
>
> (*g*) Arrest or restraint of princes, rulers or people, or seizure under legal process.
>
> (*h*) Quarantine restrictions.
>
> (*i*) Act or omission of the shipper or owner of the goods, his agent or representative.
>
> (*j*) Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general.
>
> (*k*) Riots and civil commotions.
>
> (*l*) Saving or attempting to save life or property at sea.
>
> (*m*) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods.
>
> (*n*) Insufficiency of packing.
>
> (*o*) Insufficiency or inadequacy of marks.
>
> (*p*) Latent defects not discoverable by due diligence.
>
> (*q*) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of the proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

The above list can be divided into three categories:

1) Act of the shipper and inherent defect or vice of the goods mentioned under *i*, *m*, *n*, and *o*.

By virtue of the Brussels Convention, the maritime carrier shall not be liable in the case of loss or damage if he proves that the loss or damage is due to one of these causes. In the Warsaw Convention, the air carrier shall not be liable in such cases if he proves that the necessary measures have been taken, though in practice this will often mean that the carrier proves the fault of

the shipper or the vice of the goods, excluding all possibility of default on his part. It is clear that the possibility for the air carrier of proving *negatively* that he has committed no fault puts him in a more advantageous position than the maritime carrier who has to prove *affirmatively* the cause of the accident.

2) The cases coming under force majeure are mentioned under the letters *b*, *c*, *d*, *e*, *g*, *h*, *j*, *k*, *p*, and *q*.

By virtue of the Brussels Convention, the maritime carrier shall not be liable for loss or damage if he proves that the damage is due to one of these causes. We consider that by virtue of the Warsaw Convention the carrier will also not be liable in all these cases because it will be possible to prove that he has taken the necessary measures. Nevertheless, as we pointed out with regard to the Warsaw Convention, difficulties may arise on the subject of the proof concerning necessary measures taken by the agents, if by the force of circumstances, this proof cannot be made directly. Let us take for example that damage is caused by fire. The maritime carrier by virtue of the Brussels Convention can exonerate himself from liability by merely proving that the damage resulted from fire. He only will be liable if the shipper proves that the fire was caused by the actual fault or privity of the carrier. In the case of damage resulting from fire on board of an aircraft it certainly will not be sufficient for the carrier under the Warsaw Convention only to prove the fact of fire in order to exonerate himself of liability. He will have to prove that he and his agents have taken all necessary measures to avoid the danger of fire. In such cases the air carrier under the Warsaw Convention will be in a more difficult position than the maritime carrier under the Brussels Convention.

3) The act of the carrier, mentioned under 1, and mentioned in paragraph 4 of article 4 of the Brussels Convention, that is deviation in saving or attempting to save lives or property or any other reasonable deviation. By virtue of the Brussels Convention, the carrier will not be liable if he proves that the loss or damage is due to one of these causes.

In air navigation would the carrier be liable for the loss or damage of goods resulting from salvage or deviation? For humane reasons, it would be right not to impose a liability on the carrier because otherwise the carrier might be tempted not to save or not

to change his route to save persons because of the grave liability he might incur in such a case [1].

Since there is no special stipulation we believe that by virtue of the present system of the Warsaw Convention, the carrier under the Warsaw Convention will be liable in such cases for, since the damage is due to his action, he will be unable to prove that he has taken all the necessary measures to avoid the damage. In this respect the Warsaw Convention puts a heavier liability on the shoulders of the carrier than does the Brussels Convention.

It is desirable to insert, at the next revision of the Warsaw Convention, an article in which it is expressly stipulated that *the carrier shall not be liable for damage resulting from a reasonable deviation.* What is meant by "reasonable deviation" will thus be left to the free appreciation of the judge.

General remarks on inherent defect of the carrier's vehicles

Before ending the remarks on article 20 the much debated question of the inherent defect of the vehicle used by a carrier should be taken into consideration. At anglosaxon law it is now well settled that in the carriage of passengers there is no absolute warranty of the fitness of the vehicles [2]. However, although the carrier does not warrant the absolute safety of the vehicle, it is conceded that he does warrant that the vehicle is as safe as care and skill on the part of anyone can make it and that he therefore would be liable for a defect which could have been avoided by the maker of a vehicle by reasonable skill, even though he, the carrier, could not have discovered it by reasonable skill [3].

In relation to carriage of goods by sea there is at common law an absolute warranty of seaworthiness of the carrying vessel. We have seen however that this absolute warranty of seaworthiness has been broken into by the adoption of the Hague Rules by the British Carriage of Goods by Sea Act.

In relation to carriage of goods by land it cannot be asserted that a carrier of goods by land is bound by so strict a condition

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1. Ripert, as member of the C.I.T.E.J.A. has elaborated a convention on the assistance and salvage of aircraft. See the reports of the I.A.T.A. on this subject, in I.A.T.A. Bulletins No. *22* p. 40; no. *24* p. 27.
2. Lindley L. J. in Hyman v. Nye (1881), 6 Q.B.D., 685, at *b* 687.
3. See Hughes, "The Law of Transport by Rail", p. 134.

as the warranty of seaworthiness which binds a carrier by sea. The authorities are inconclusive as to whether the carrier warrants the vehicle free from defects which cannot be discovered [1].

In the countries in which the rules of liability are based on the Code Napoléon, the question of responsibility for inherent vice is connected with the question of the interpretation of force majeure. If one accepts the theory which requires as a characteristic of force majeure the fact that the event is outside to the enterprise, it is clear that hidden defects being not "outside to the enterprise" cannot be considered as a case of force majeure exonerating the carrier of his liability. The reasons why in our opinion the theory of exteriority has to be rejected have been explained in the first chapter. If one accepts the theory adopted by the draftsmen of the Code Napoléon, according to which force majeure is synonimous to absence of fault, the carrier will not be responsible for inherent defect if he uses a vehicle constructed by the average type of good constructors and if he has exercised a thorough control in using the vehicle.

It has to be pointed out however, that the French Cour de Cassation in different decisions has declared that the constructional defect of a machine engages the liability of the carrier, notwithstanding the hidden character and even if the fault of the constructor is proved. How has one to explain this attitude by a Court which always recognises the necessity of a fault as element of contractual liability? Radouant explains the attitude as follows: "If there is no fault in not discovering the constructional defect since it was hidden, its evidence proves that the person declared liable was wrong to apply to a constructor being capable of making faults in his constructions" [2].

This explanation does not seem very satisfactory to us. One must require from the carrier to use a vehicle constructed by the average type of good constructor. To require more of the carrier means to impose on him an absolute liability.

The short survey of the liability of the carrier for inherent defect at common law shows that there is in practice much uncertainty on this subject.

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1. See Leslie, op. cit. p. 32.
2. Radouant "Du cas fortuit et de la force majeure", p. 206.

Inherent defect of aircraft

In considering the question of vice propre with regard to carriage by air, the following must be taken into consideration:

a. "in the present state of aeronautical science mechanical defaults may arise which the most scrupulous care or the greatest professional ability can neither foresee nor avoid.

b. the air transport undertakings are almost never constructors of their own aircraft.

c. the respective Governments exercise intensive control over the construction of aircraft in their country".

In article 23 of the draft convention of which the Warsaw Conference was seized, it was stipulated that:

> "The carrier is not liable if he and his agents have taken reasonable measures to avoid the damage or that it was impossible for him or them to take such measures, *unless the damage arose from the inherent defect of the aircraft*".

In the first draft convention it was stipulated that the proof of the reasonable measures being taken was recognised, even in the case where the damage arose from the inherent defect of the aircraft.

In accordance with an Italian proposal, made during one of the Sessions of the second commission of the C.I.T.E.J.A. this system was modified and the above words in italics were added to the text of article 23.

At the Warsaw Conference the English and French delegations requested the abolition of the liability of the carrier for the inherent defect of the aircraft. Sir Alfred Dennis, the English delegate, rightly pointed out that the clause concerning inherent defect was contrary to the fundamental principle of the draft convention as it introduced the theory of risk [1]. Some delegates considered that, on the contrary, the carrier should be answerable for the hidden defect, because air navigation technique could profit considerably from the experience of many years of maritime navigation and carriage by rail. These delegates seemed to forget that air navigation deals with a three dimensional problem, which carries special risks, the extent of which can only be determined by completely new experience.

1. See Minutes of the IInd International Conference for Private Air Law, p. 27.

It would be impossible to admit that, thanks to the experience gained by maritime navigation and by rail carriage, air navigation accidents could be avoided [1].

Besides the amendment relating to inherent defect, the French and English delegations also proposed an amendment on the subject of negligent navigation, which we have already treated. As a compromise the first amendment was accepted and the second rejected. Consequently, by virtue of the present text, the carrier can exclude his liability in a case of inherent defect of the aircraft, if he proves that he and his agents have taken all the necessary measures or that it was impossible for him or them to take such measures [2].

What are the necessary measures? It seems to us that the carrier, in the case of damage caused by an accident due to the inherent defect of the aircraft, can exonerate himself from liability by proving that:

a. the aircraft was provided with a certificate of airworthiness;

b. that he had constantly exercised a careful control over the aircraft.

Taking into consideration that at common law different authorities have concluded that a carrier is liable in case the constructor of the vehicle has not exercised reasonable skill, it is not impossible that some Courts will require a further proof of the carrier than that of showing a certificate of airworthiness in good order [3].

1. The mémoire of the Technical Section of the British Air Ministry gave the following reasons why the air carriers could not be made responsible for inherent defect:
   1. Defective method of construction — Human knowledge of Aerodynamics is inadequate. It is difficult to calculate the exact amount of air force supporting an aircraft and the amount of resistance which an aircraft must overcome. Hence defective methods of construction are inevitable.
   2. Use of defective material. — It is a well recognized fact that structural material can often stand trials but will show defects after much use. The burning of structural steel after long use is a good example. As regards wood, it is impossible to be assured of uniform quality in the same piece. Structural materials often show defect after the most minute inspection.
   3. Insufficient knowledge of the quality of the material used. — This cause produces the greatest number of accidents. It produces the phenomenon which is generally known as "bris par fatigue"; see also the journal "Les Ailes" of 26th Febr. 1931 on the phenomenon of "buffeting" of an aeroplane.
2. The opinion expressed in M. Wingfield's report presented to the 5th International Congress of Air Navigation (see p. 1190 of the minutes of this Congress), that under the Warsaw Rules the carrier is under an absolute warranty as to airworthiness, is not right.
3. See f. i. Demogue "Traité des obligations", IV p. 600 as regards French law: "Le fait que le débiteur a été autorisé par l'administration à employer un certain matériel ne suffit pas à le faire considérer comme non responsable".

The requirement of such proof would in our opinion be contrary to the spirit of the Convention. The carrier has to prove that he himself and that his agents have taken the necessary measures. He has taken such measures when he uses an aircraft constructed by the average type of good constructor.

It is not for the carrier to furnish as a further proof that the constructor has taken the necessary measures [1].

Comparison between the Convention of Warsaw and the Harter Act, the Brussels Convention and the C.I.M. as regards inherent defect in the material

In the United States, from the passing of the Harter Act the owner's duty was to exercise due diligence to make the vessel seaworthy and he would thereby be exonerated in the case of a latent defect proving to be the cause of the damage. There is in our opinion in principle no difference between that rule and the rule of the Warsaw Convention by which the carrier is relieved by proving to have taken the necessary measures [2].

In the Brussels Convention it is stipulated in article 4 that neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness, unless caused by want of due diligence on the part of the carrier. The carrier, by virtue of this convention, will therefore not be liable for hidden defects if he proves that he himself has exercised reasonable care. It can be concluded that in shipping the absolute warranty of seaworthiness and in aviation the absolute warranty of airworthiness have been cut down in favour of the carriers.

In article 27, paragraph 2 of the C.I.M. it is stipulated that the carrier is exempt from all liability in the case of total or partial loss or damage if he proves that the damage was caused by the default of the claimant, an order of the claimant not arising from the default of the railway, inherent vice of the goods or *a case of force majeure*. The question of wether the railway is liable for hidden defects in the material used by him, depends on the interpretation given to the notion of force majeure. If, like

1. We have seen that in the Brazilian Air Code by which the principles of the Wars. Conv. are applied to internal carriage in Brazil, a liability for defect of the aircraft is imposed on the carrier.
2. See Canfield and Dalzell "The law of the sea" New-York 1921, p. 122.

Brunet [1] and Seligsohn [2] one sees in force majeure an element exterior to the enterprise the suddeness and violence of which are such as to make it impossible for the carrier to avoid or to foresee it, the railway will be liable for inherent defects.

In this case the liability of the railway will therefore, by virtue of the C.I.M., be heavier than the liability of the air carrier by virtue of the Convention of Warsaw.

Negligence of the injured person

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

The basis of this article which confirms the principle of the liability being divided in the event of the common fault of the victim and the carrier, is without doubt very reasonable. Many of the accidents which occur in carriage are due, either entirely or in part, to the imprudence or negligence of passengers or consignors. To give two examples: during the carriage of some merchandise, the carrier loses a package; it appears, however, that the consignor has placed in this package objects which are excluded from carriage in the conditions of carriage fixed by the carrier.

An aeroplane carrying passengers, having landed at its destination, comes on to the tarmac; notwithstanding the fact that it is forbidden to open the door of the cabin, a passenger steps out of the aeroplane of his own accord; the pilot without looking to see if there is any danger in doing so, again moves the machine in order to be nearer the station, and the passenger is injured.

With regard to the text of the article, the question arises why it is said *"the Court may in accordance with the provisions of its own law....."* etc. The minutes of the Warsaw Conference show that the British delegation had asked for the insertion of these words because English law does not include a system of attenuation of liability in the event of the fault of the victim. According to

1. Brunet, op. cit. No. 314.
2. Seligsohn, op. cit. p. 368.

English law, contributory negligence makes the injured party lose his remedy. "That is to say he is not to lose his remedy merely because he has been negligent at some stage of the business, though without that negligence the subsequent events might not or would not have happened; but only if he had been negligent in the final stage and at the decisive points of this event, so that the mischief, as and when it happens, is immediately due to his want of care and not to the defendants" [1]. "Though the plaintiff may have been guilty of negligence and although that negligence may have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him" [2].

In the U.S.A. it is generally held that even though the carrier be negligent, if the injury was contributed by the passenger's fault, recovery is completely defeated [3].

In France, jurisprudence in the matter of liability *ex delicto*, has recognised the system according to which, in the event of both the victim and the defendant being at fault, the liability is divided according to the gravity of the faults.

With regard to liability *ex contractu*, Mazeaud writes that the Courts do not hesitate in this special domain to apply their general system, which is the division of the liability according to the extent of the faults of the plaintiff and the defendant.

In Germany paragraph 254 of the B.G.B. stipulates that if, at the time when the damage occurred, there has been on the part of the injured person, a fault which contributed to the damage, the question of the obligation of making reparation, and the extent of the reparation, depend on the circumstances and in particular to what extent the damage was caused more by the one party than by the other.

Although in most cases this degree of causality will coincide with the extent of the fault, the basic principle is different to that adopted in France.

Because of the differences in the national legislations in this

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1. Pollock, The Law of torts, p. 475.
2. Lord Penzance in Radley v. L. & N. W. R. (11876) 1 A. C. 759.
3. Cf. Sullivan "The Codification of Aircarrier Liability by International Convention", Journal of Air Law, January 1936, p. 36.

domain, serious objections against the application of the *lex fori* have to be made. The following example will illustrate this. An English passenger concludes a contract of carriage with an English company regarding carriage between London and Paris. This carriage comes under the Warsaw Convention. The aeroplane, having left the aerodrome at Croydon, and while still above English territory is forced to land owing to engine failure. The landing is made without accident, but the passenger is injured because he jumped out of the aeroplane before it had stopped. The passenger wishes to claim against the carrier, basing his claim on article 17. Seeing that he is of English nationality and that the accident occurred in England, the passenger should logically lodge his claim before the English court, which is declared competent in article 28 of the Warsaw Convention (court where the carrier is resident). This article, however, declares the court of the place of destination also competent. Bearing in mind that English jurisprudence deprives the victim of any recourse in the event of contributory negligence, it would be very much in the interest of the passenger, not to bring the action before an English court, but to claim against the carrier before a French court, which will divide the liability in proportion to the gravity of the faults of the passenger and the carrier by virtue of article 21 of the Warsaw Convention (*in conformity with the provision of its own law*). The principle by which the victim can exercise a decisive influence on material legal provisions by his choice, is to be combatted. Furthermore, the application of the *lex fori* will often result in laws being applied which have no relation with the accident which caused the damage.

It is to be pointed out that in the draft Convention relating to the liability for damages caused to third parties on the surface, the second paragraph of article 1 reads as follows: "This liability may be diminished or set aside only in the event of the fault of the injured party and in conformity with the provisions of the law of the court seized of the case". Mr. Kosters, the Netherlands delegate to the IInd International Conference for Private Air Law drew attention to the fact that according to the principles of private international law, which are generally adopted, the question of the fault of the injured party is regulated by the law of the country where the fault is committed. The reason is that to

appreciate a fault, the social *milieu* of the perpetrator should be considered.

Mr. Kosters considered that the application of the *lex fori* should be rejected and proposed to suppress in the article the words "in conformity with the provisions of the law of the court seized of the case"; the courts of the various countries would then only have to interpret and apply one same text: the terms of the Convention. This amendment was accepted and article 3 of the Rome Convention was drawn up as follows:

> "The liability imposed by the preceding article can be diminished or set aside only when the damage has been caused or contributed to by the fault of the injured party".

It is most desirable that, on the revision of the Warsaw Convention, a text similar to that of the Rome Convention, should be accepted.

Limitation of the liability of the carrier

> **Article 22.**
>
> "(1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125.000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125.000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.
>
> (2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.
>
> (3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5.000 francs per passenger.
>
> (4) The sums mentioned above shall be deemed to refer to the French franc consisting of $65\frac{1}{2}$ milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures".

In Article 22, the Warsaw Convention provides a legal limitation of the liability of the air carrier.

The principle of limited liability was adopted for two reasons:

a. to avoid the situation which arose in maritime navigation before the International Convention of 1922, that is to prevent the carriers under pretence of limiting their liability, from abolishing their liability in reality [1].

b. it was considered that the carrier should know the extent of the risk he assumes, which would enable him to insure against this risk.

Passengers

In the carriage of passengers, the liability of the carrier towards each passenger is limited to the sum of 125.000 French francs, consisting of 65 1/2 milligrams gold of millesimal fineness 900.

The passenger can fix a higher limit of liability by special agreement. In practice, the passenger can generally take out a supplementary insurance through the air company.

In the draft convention, a limit of 10.000 gold francs was provided; consequent on a proposal by the German delegation the limit was increased to the present figure [2].

Registered baggage and Goods

In the carriage of registered baggage and goods, the liability is limited to the sum of 250 French francs per kilogram, unless the passenger has made, at the time when the baggage was handed over to the carrier, a special declaration of the value at delivery and has paid such supplementary charge as is required.

In the first draft a limit of 500 gold francs per package was provided. The I.A.T.A. drew the attention of the C.I.T.E.J.A. to the fact that it would be better to use the weight (1 kilo) rather than the number of packages as basis. By using the first method, the carrier can always find out in advance the total sum for

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1. See for a short survey of the rules in different countries on limitation of liability in Maritime Transportation: Sack "Air Transportation and the Warsaw Convention", Air Law Review, October 1933, p. 371.
2. Sullivan in "Codification" of Air Carrier Liability, Journal of Air Law Jan. 1936, p. 37, observes that the maximum amount for passengers is considerably lower than what is usually recovered in death cases in the U.S.A.

which he could be liable for every aeroplane, while by using the second method, he would not be able to do so, seeing that the number of packages carried by any same aeroplane may vary greatly.

The draft convention presented to the Warsaw Conference provided a limit of liability of 100 gold francs per kilogram.

The air companies considered that this figure would prove too high in practice. According to calculations made on a great number of goods carried, the average value was found to be approximately 130 French francs per kilogram. (This figure was obtained by dividing the declared value by the weight carried). For this reason the French delegation proposed that the figure should be reduced from 100 gold francs to 250 French francs. This proposal was accepted.

It should be pointed out that at the last revision of the C.I.M. the limit of 50 goldfrancs provided in art. 29 has been highered to 100 goldfrancs on the proposal of the International Chamber of Commerce.

Hand baggage

With regard to the objects of which the passenger takes charge himself, article 22 limits the liability of the carrier to the sum of 5.000 French francs. Let us point out, however, that the régime of liability of the Warsaw Convention is not applicable to these objects, because the baggage check does not cover these objets, and it was decided to base the régime of the Warsaw Convention only on traffic documents [1]. Why then has the Warsaw Convention stipulated a maximum liability, although this liability does not fall under its régime? It was felt that the carrier should know the extent of the financial risks which he runs, so that he may insure against them.

Whether the carrier's liability will be engaged in the event of loss or damage to hand baggage will be decided by common law. The question arises of whether in the event of loss or damage the liability *ex contractu* or the liability *ex delicto* of the carrier will be engaged. On the one hand, it can be maintained that the fact alone that the passenger kept the baggage with him, implies that he assumes due care of it and excludes it from the contract. On

1. See Minutes of the IInd International Conference for Private Air Law, p. 16.

the other hand, by considering that the carriage of hand baggage is an accessory operation to the principal operation of carrying the passenger, should not the former kind of carriage be ruled in so far as possible by the same principles as those ruling the latter, that is, by the principles of liability *ex contractu?*

It is interesting to note that in the new Dutch maritime law it is stipulated that, in general, the rules applicable to maritime transport of goods are also applicable to maritime transport of baggage, whether the baggage is registered or whether it is in the care of the passenger. With regard to the baggage in the care of the passenger, paragraph 2 of the article 533 of the Commercial Code stipulates however, that the carrier will no be liable for damage to these objects, unless it is proved that the passenger exercised the necessary care to avoid the damage. This proof being made, it will however always be the liability *ex contractu* of the carrier which will come into play and not his liability *ex delicto*.

By applying the rules of common law, to the carriage by air of hand baggage, we consider that a similar situation should be reached as that provided in the Dutch Commercial Code with regard to maritime carriage. We consider that in the event of the hand baggage being destroyed, the passenger at common law can bring an action in liability *ex contractu* against the carrier [1]. Nevertheless there is a fundamental difference between an action brought by a passenger for loss of hand baggage and that brought for loss of registered baggage. In the latter case, it will be sufficient for the passenger to prove the following in order to show that the carrier had failed in his obligation:

a. the contract of carriage;
b. the loss of the registered baggage;
c. the damage sustained by him owing to this loss.

In the carriage of hand baggage, on the other hand, this proof will not be sufficient for him, because the carrier has not an absolute right over the hand baggage as he has over the registered baggage. He has not taken them in his charge and it is therefore impossible to guarantee absolute safety because this depends to a great extent on the passenger himself.

In order to engage the liability *ex contractu* of the carrier concerning hand baggage, the passenger must establish:

1. Contra Josserand No. 964; Mazeaud No. 162.

a. the contract of carriage;
b. the loss of the hand baggage;
c. that he sustained damages owing to this loss;
d. that this loss was caused by the carriage.

It is only by proving these facts that the passenger can prove the non-performance of the obligation falling on the carrier.

It is to be observed that also at Anglo-Saxon common law there is a tendency to assimilate the liability for a passenger's luggage to the liability for the passenger himself. Articles which a passenger carries about his person have been held to be carried under the same liability as the carrier undertakes towards the passenger himself, and in respect to articles which are carried, at his request, with him, and under his control, there is an implied condition that he shall use due care to preserve them, so that the carrier will not be liable for loss or damage which due care on his part would have prevented [1].

There is still a question, which arises in the Warsaw Convention in relation to the limitation of liability provided for objects of which the passenger takes charge. Does this limitation refer only to the liability of the carrier during carriage by aircraft, or does it also refer to the liability during the whole period covered by the contract of carriage, therefore also to the liability in accessory carriage? On the one hand, it can be maintained that the Warsaw Convention mentions the liability of the carrier without any restriction and that the limitation should therefore be considered as referring to any liability whatever which the carrier may be subject to owing to these objects. On the other hand, taking into consideration that the carriage of hand baggage is inherent to the carriage of the passenger himself and that the period of carriage of the passenger within the meaning of the Warsaw Convention only covers the operations of embarking and disembarking, and the carriarge by the aircraft itself, it seems to us that the limitation of liability can only refer to the liability of the carrier during the same period. This question is of certain importance for the following reason. The limitation provided in the Warsaw Convention implies the impossibility for the carrier to conclude non-liability clauses with passengers. If the limitation refers only to a certain period of carriage, the carrier

1. See Leslie "Law of Transport by Railway", p. 301.

will be free to exclude all liability for the rest of the carriage, unless he is prohibited by common law.

Value at delivery

The principle of the "declaration of value at delivery" stipulated in paragraph 2 of article 22 has been adopted from the C.I.M. (article 35). The legal effect of this declaration is an automatic increase of the compensation limited to 250 francs per kilogram at the declared maximum, unless the carrier can prove that the sum declared is greater than the actual value to the consignor at delivery.

Let us first consider this question in relation to the C.I.M. Let us suppose that during carriage by rail some goods were lost [1]. The consignor not having made a declaration of value at delivery, the railway, by virtue of article 29, only owes the consignor the value of the goods at the place or at the time when they were accepted by the railway. "The C.I.M. therefore abolishes all the special characteristics of the goods carried, for example, its sentimental or collection value, only to retain its commercial elements" [2].

On the other hand, if the consignor makes a declaration of value at delivery, the railway must not only compensate the objective value of the goods, but also the particular value, whatever its nature, that the consignor attaches to its accurate delivery [3].

The same principle was to be adopted in the Warsaw Convention, but if the minutes are consulted, it will be seen that no clear distinction has been made, as in the C.I.M. between:

a. the value of the goods;

b. the value at delivery above and besides the value of the goods.

In the drafts discussed by the Second Commission of the C.I.T.E.J.A. at its sessions in Brussels in 1927, and in Paris in 1928, there was an article 25 of which the second paragraph read as follows:

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1. By virtue of the C.I.M., if there has been delay, distinction should be made whether it is prejudiciable or not, see p. 216.
2. See Brunet, op. cit., p. 252.
3. See Seligsohn, op. cit., p. 491.

"In the carriage of goods as well as of baggage, the liability of the carrier is limited to the sum of one hundred francs per kilogram, unless a special declaration of value at delivery is made by the consignor on handing over the package to the carrier and a supplementary sum is paid if the case so requires. In that case, the carrier will be held to pay the sum declared unless he proves that the sum is greater than the actual value to the consignor at delivery".

At the Paris Session [1], one of the delegates proposed that the words "economic, material or real" should be added to the word "value", in order that the Courts should not be lead to consider the moral value which the consignor might put on the delivery. This proposal was rejected, the Commission being of opinion that the interpretation of the term "value at delivery" (intérêt à la livraison) should be left to the appreciation of the judge as has been done in the C.I.M.

Seeing that the judge, in interpreting the notion of the question according to the C.I.M. does not take into account only the value of the goods at the place or the time they were accepted, but also the particular value to the consignor at their delivery, it should be concluded that the judge, in interpreting the corresponding notion, according to the above article 25, should act in the same way. An argument to support this opinion can be found in a remark made by one of the delegates during the debates: "The designation of the value of the goods may be a too narrow formula, for the value at delivery is sometimes greater than the value of the goods [2].

There is, however, the question of why it has been stipulated in the second phrase of paragraph 2 of article 25 that the carrier will not be held to pay the declared sum if he proves that it is greater than the *real value* of the goods at the point of destination.

Considering that the declaration has precisely the object of obtaining supplementary damages above and besides the objective value of the goods, its purpose is rendered practically illusory by the provision considered in the second paragraph.

1. See Minutes of the Session of the 2nd Commission of the C.I.T.E.J.A., held in Paris in 1928 (p. 28).
2. See Minutes of the Session of the 2nd Commission of the C.I.T.E.J.A. (Paris) 1928, p. 11.

In the final text of the Warsaw Convention, the words "real value" (valeur réelle) were withdrawn, and it was stipulated that the carrier would not be held to pay up to the sum declared if he proved that the sum was greater than the *actual value* (intérêt réel) to the consignor at delivery. On the other hand, article 8 of the Warsaw Convention, giving the particulars which must be shown on the consignment note considers under letter *m*: "the amount of value declared (valeur déclarée) in accordance with article 22 (2)". The present drafting of this particular is all the more remarkable as in the draft proposed at the Warsaw Conference the following text was used: "the amount of the sum representing the value at delivery declared in conformity with article 25 paragraph 2" (= article 22 (2) Warsaw Convention). ("le montant de la somme représentant l'intérêt à la livraison déclarée conformément à l'article 25 alinéa 2). This text which, besides corresponds with the text under consideration of the C.I.M. (article 6 under letter *k*) seems to us the only logical text, and we do not understand why the Conference modified it, thus increasing the uncertainties that arise in the determination of the meaning of the declaration of value by virtue of the Warsaw Convention. With regard to the proof to be provided by the carrier that the sum declared is greater than the actual value to the consignor, how does one think the carrier can give this proof, if it is a question of a purely personal value, such as the value that a lady has placed on a dress ordered for an evening not arriving late, a value which *ab initio* has been put at a given sum?

Did the Warsaw Convention, by using the term "actual value", intend to show that the declaration could not include "the moral value" to the consignor, thus making use of the proposal made by one of the delegates at the session of the Second Commission of the C.I.T.E.J.A., to which we have already alluded?

A definite answer to this question will not be found either in the Warsaw Convention or in the minutes of the preparatory sessions. It seems to us that it is indispensable that, at the coming revision of the Warsaw Convention, it should be clearly brought out whether the notion of "value at delivery" should be interpreted in the same way as the corresponding notion in the C.I.M. or whether the former notion should be given a less extended meaning than the latter notion. Before any modification is made

on this question, it seems to us that the best solution with regard to the interpretation of this notion by virtue of the Warsaw Convention, is by considering the declaration of value as covering all prejudice, of whatever nature, which the consignor sustains, owing to the improper delivery of the goods [1].

Differences between the Warsaw Convention and the C.I.M. as regards the declaration of value at delivery

The following differences should be pointed out with regard to the effects of the declaration of value at delivery of the Warsaw Convention and the effects of the corresponding declaration under the régime of the C.I.M.

I. By virtue of the C.I.M., in the event of a delay, distinction must be made with regard to whether this delay was effectively prejudicial or not.

a. the plaintiff, without having to prove that he has suffered damage from the delay, will receive an indemnity at the most equal to the amount of the declared value, and at the least equal to an indemnity fixed in article 35 paragraph 3 under the letter *a* of the C.I.M.

b. if the plaintiff furthermore provides proof of a prejudice arising from the delay, the indemnity can attain the amount of the declared value.

This distinction has not been made in the Warsaw Convention. For the liability of the carrier to be engaged by virtue of the Warsaw Convention, it will always be necessary for the plaintiff to establish that he has sustained damage. Nevertheless, in the event of a declaration of value at delivery, the proof of the damage is established by the fact alone of the delay.

II. The Warsaw Convention does not contain any articles determining what damages are to be indemnified in the event of loss or damage. The C.I.M. on the contrary, fixes the indemnities due in such cases in article 29 and 32. The question of whether the declaration of value regards the indemnification of *all* damage sustained by the plaintiff or only the indemnification of the damage above that considered in articles 29 and 32, which arises

1. However, it should be pointed out that the Companies affiliated to the I.A.T.A. have decided not to accept, until further order, consignments for which the consignors have made declarations of value at delivery.

in the C.I.M. [1], does not arise in the same aspect with regard to the Warsaw Convention. In this Convention, the declaration of value *must* include also the value of the goods.

III. In the event of wilful misconduct or grave default on the part of the railway, the indemnity by virtue of the C.I.M. is limited to double the indemnity provided in article 35. In the event of wilful misconduct or default on the part of the carrier by air equivalent to wilful misconduct, article 25 of the Warsaw Convention stipulates that the carrier will not be able to avail himself of the provisions of the Warsaw Convention which exclude or limit his liability. The declaration of value at delivery entails the *extension* of the liability of the carrier, *not a limitation;* consequently, in the cases under consideration, the amount declared will be the maximum of the damages payable by the carrier.

There remains this last question: are the carriers under the régime of the C.I.M. and the Warsaw Convention always held to indemnify the plaintiff if there is a declaration of value at delivery? The legal effect of the declaration in the two Conventions is an automatic increase in the indemnification. The question of whether or not an indemnification is to be paid by the carrier is nevertheless subject to the general rules of liability fixed in the two Conventions.

Now, if the carrier by virtue of the Warsaw Convention, has proved that he has taken the necessary measures to avoid the damage, he will be relieved of all liability whether a declaration of value at delivery has been made or not. The position is the same by virtue of the C.I.M.; if the carrier, in the case of loss or damage, proves that the damage was caused by a fault on the part of the plaintiff, inherent vice in the goods, or *force majeure*, and also in the case of delay, if he proves that the delay was caused by circumstances which he could not avoid, and which it did not depend on him to remedy, he will be relieved of all liability [2].

Westminster Bank Ltd. versus Imperial Airways Ltd. [3]

In this case the Westminster Bank sued the Imperial Airways Ltd. in respect of the loss of three bars of gold which were

1. See Seligsohn, op. cit. p. 491.
2. See Seligsohn, op. cit., p. 489 and 491.
3. High Court of Justice, Kings Bench Division, 26th June 1936.

consigned to the defendant for carriage from London to Paris on 5th March 1935. This carriage was subject to the rules relating to liability established by the Warsaw Convention. The Plaintiffs alleged that a special declaration was made of the value of the said goods and a supplementary payment made, which facts the plaintiff contended, deprived the defendant of the limit of liability contained in the Warsaw Convention.

Mr. Justice Lewis observed that in the consignment note used by Imperial Airways Ltd. there was a space labelled "Special declaration of value at delivery" but that that space was blacked out.

Evidence was called before Mr. Justice Lewis to the effect that Imperial Airways Ltd. refused to accept any special declaration of value at delivery. It is to be observed here that Imperial Airways Ltd. is a member of the I.A.T.A. and that the members of this Association, at its 29th Session held the 22nd and 23rd February 1933, decided not to accept the declaration of value at delivery because the significance of such a declaration still appeared insufficiently clear [1].

It seemed to Mr. Justice Lewis therefore clear that not only was no special declaration of value at delivery made, but that if in fact such a declaration had been made, the consignment in this case would not have been accepted. Mr. Justice Lewis did not however inquire as to the effect of the carrier's refusal to accept such a special declaration. As we will see, art. 33 of the Warsaw Convention stipulates that nothing will prevent the carrier from refusing to enter into a contract of carriage. No objection can be made therefore to the carrier's refusal to accept consignments with a special declaration of value at delivery. It is clear however that this situation is undesirable and that therefore at the next revision of the Warsaw Convention it should be clearly brought out how the notion "value at delivery" should be interpreted.

Nullity of clauses relieving the carrier of liability

Article 23.

"Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention

1. See Information Bulletin No. 19 of the I.A.T.A., p. 45.

shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention".

In Chapter I we pointed out that the exoneration clauses inserted in the traffic documents used by the majority of the air carriers from 1919 to 1933 were declared valid by the Courts of many countries.

In order to prevent the carriers from unvalidating the legal rules of the Warsaw Convention by the insertion of such clauses in their traffic documents, article 23 expressly forbids them. In the countries in which the Courts permitted the carriers to stipulate exoneration clauses, the régime of liability of the Warsaw Convention is therefore more rigorous for the carriers than the régime under which the carrier used to operate his services before the Convention came into force.

On the other hand it must not be forgotten that though in some countries exoneration of liability was possible, in others an absolute liability was imposed on the carrier. The uncertainty as regards his exact liability resulted in the carrier having to pay high insurance rates to cover this risk. The system of the Convention limiting the liability of the carrier to a certain sum offers the great advantage to the carrier of his being able to cover these risks by insurance for a reasonable premium.

Though the non-liability clauses or clauses fixing a lower limit of liability than that provided in the Warsaw Convention are null and void, clauses in which the carrier assumes a more extensive liability than that provided in the Warsaw Convention, are, on the other hand, allowed.

Action for damages

Article 24.

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

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

It is to be observed that in several countries [1] the victim is granted a right of option between liability *ex contractu* and liability *ex delicto*, if the damageable act, though a violation of a contractual obligation, can be considered as also being the result of a delict. To prevent the carrier from falling under a régime of liability other than that of the Warsaw Convention, in the event of the victim bringing an action against him for liability *ex delicto*, the first paragraph stipulates that any action for damages, however founded, can only be brought subject to the conditions and limits of the Convention. Also in the case where the national law has provided an objective liability for the operator of the aircraft, article 24 prevents the carrier, who is at the same time the operator according to the national law, from being liable by virtue of this law [2].

It is to be observed that the International Air Traffic Association in its Conditions of Carriage (article 18 par. 5) has stipulated that passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorised agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based. This article prevents a passenger from bringing an action against the pilot or any other employee of the carrier. It further brings out that the carrier does not accept any liability except the liability established in the Warsaw Convention. In this connection attention should be drawn to a judgment of the Handelsgericht of Vienna.

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1. For instance in France, Germany, the Netherlands.
2. See Riese in "Droit Aérien" 1930 p. 216.

Judgment of Handelsgericht of Vienna of 21st November 1934

In Steiger v. Nordisches Reisebureau (with intervention of the Oesterreichische Luftverkehrs A.G.) the defendant as agent of the Oesterreichische Luftverkehrs A.G. had sold to the plaintiff on March 18th an undated ticket for a journey by air from Reval to Helsingfors. The plaintiff arriving at Reval on March 23rd found out that in winter the line Reval–Helsingfors was not operated. The plaintiff, having suffered damage because he did not arrive in time for a business transaction at Helsingfors, claimed compensation of damage from the Nordisches Reisebureau which had misinformed him.

The Court considered first that in the Conditions of Carriage, to which the air ticket of the plaintiff referred, it was stipulated that the ticket was only valid for the date and service marked on the ticket. An undated ticket does not therefore confer a right on the passenger to claim the use of an aeroplane on a day to be determined later by the passenger. Further the Court observed that according to art. 19, par. 1 of the Conditions of Carriage the carrier reserves the right to decide if the meteorological and other conditions for the normal performance of a flight are suitable and if a departure or landing should not be made at any particular time or place. Finally the Court considered art. 18, par. 5 of the General Conditions of Carriage which stipulates that except in so far as liability is expressly provided for in the Conditions, no liability whatsoever is accepted by the carriers, or their employees or parties or undertakings employed by them in connection with their obligations, or their authorised agents.

Art. 19 of the Conditions of Carriage [1] establishes to what

1. "*Article* 19: *Extent of liability.*
Paragr. 1: (1) Within the limits prescribed by Article 18 carriers are liable for damage sustained during the period of the carriage as defined in Article 18, paragraphs 2 and 3:
a) in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger;
b) in the event of destruction or loss of or damage to registered baggage.
(2) So far as concerns international carriage, as defined by Article 1, paragraph 2, the carriers are likewise liable, within the same limits, for damage sustained during the period of the carriage as defined by Article 18, paragraph 4, in case of delay of passengers and baggage.
The time-tables of carriers furnish indications of average times without these being in any way guaranteed.The carrier reserves the right to decide if the meteorological and other conditions for the normal performance of a flight are suitable, if especially the times of departure should not be made at all at any particular time or place. In addition the carrier reserves the right to arrange at landing places such periods of

extent the carrier accepts liability. This liability does not include liability for damages in the case of an air service being suspended.

According to the Court the most essential point of the Conditions is that the plaintiff concluding the contract of carriage was able to know that the use of the aeroplane was not unconditioned, that this use was made dependant on the question of whether there really was a service on the line in question.

The suit of the plaintiff was therefore met with a refusal.

Persons entitled to claim and quantum of damages to be compensated

The Warsaw Convention did not wish to determine the persons who have the right to bring an action in the event of the death, wounding or any other bodily injury suffered by the passenger, or to what degree the carrier should indemnify.

The Reporter of the Warsaw Convention stated the following on presenting his report to the Warsaw Conference:

"The question has arisen of whether it should be determined who are the persons who can bring an action in the event of death and what damages are subject to reparation. It has not been possible to find a satisfactory solution to this double

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stoppage as may be necessary to ensure connections, the maximum duration of which periods of stoppage will be mentioned in the time-tables; no responsibility concerning the making of connections can be accepted.

(3) Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. In the carriage of baggage the carriers are not liable if they prove that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, they and their agents have taken all necessary measures to avoid the damage.

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

Paragr. 2: (1) In the carriage of passengers the liability of carriers for each passenger is limited to the sum of 125.000 francs unless a larger sum has been agreed upon. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125.000 francs.

(2) In the carriage of registered baggage the liability of carriers is limited to the sum of 250 francs per kilogram, unless the passenger has made, at the time when the baggage was handed over to the carrier, a special declaration of the value at delivery and has paid such supplementary charge as is required. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the passenger at delivery.

(3) As regards articles of which the passenger takes charge himself, the liability of the carrier is limited to 5.000 francs per passenger.

(4) The sums mentioned above shall be taken to refer to the French franc consisting of sixty five and a half milligrams gold of millesimal fineness 900".

problem and the C.I.T.E.J.A. has considered that this question of private international law should be regulated independently of the present Convention" [1].

In the draft Convention presented to the IIIrd Session of the C.I.T.E.J.A. there was an article 27 which reads as follows:

"In the event of the death of the plaintiff, any action for damages, however, founded, may be brought subject to the limits of this Convention, by persons having a right to this action in accordance with the national law of the deceased, or that law failing, in accordance with the law of his last domicile".

The last part of this text was withdrawn because it was relative to international private law.

In article 28, it has been determined before what courts the action for damages is to be brought. The question of whether the plaintiff has in fact a right of action, and if in the affirmative, the extent of the obligation to be indemnified, will be decided by the court, using as basis the international private law in force for the court seised of the case.

"If a right to an indemnity is based on the contract of carriage and on the Convention, the principles which — according to private international law, in force for the courts seised of the case, apply to contracts — will generally be taken as basis. But there is much doubt with regard to the rights of third parties to an indemnity in the event of the death of a passenger, for it can be argued that these rights do not flow from the contract, but only from the fact that the death occurred during the carriage, that their legal basis is found in the national law which gives form to the obligation to indemnify provided in article 17 of the Convention. It can therefore happen that the courts of several States, for example, in actions by members of the deceased's family, will determine the national law to be applied by virtue of the provisions of their private international law applicable to actions based on liability *ex delicto*, while perhaps the courts of other States will treat these actions, in this regard, as actions based on liability *ex contractu*" [2].

As regards the persons entitled to claim in the event of the death of a passenger, M. de Visscher at the Academy for Inter-

1. Minutes of the IInd International Conference for Private Air Law, p. 166.
2. Riese in Droit Aérien 1930, p. 224.

national Law has propagated the application of the national law of the deceased [1].

As this law regulates the relations within families and in a general way, the obligations of the deceased towards certain persons, it does in fact seem the most competent.

As regards the extent of the damages to be compensated, it is clear that the determination of the law to be applied is dependant on the nature of the liability. As the Convention is founded on the contractual relationship between the carrier and his passengers or consignors, it is to be expected that the Courts will generally admit a contractual basis to the claim.

However, especially in cases where damage is caused by an agent of the carrier, M. de Visscher thinks it possible for the judge to consider the carrier's liability to be *ex delicto*. It will be the Court seized of the case which will have to decide the nature of the action. If the Court considers the action to be based on liability ex delicto, the *lex loci*, i.e. the law of the place where the accident happened, will generally be applied.

The law of the carrier's principal place of business must be applied

If the Court considers the action to be based on liability *ex contractu*, M. de Visscher is of opinion that normally the law of the carrier's principal place of business is to be applied. We agree with M. de Visscher's opinion. The application of the law of the carrier's principal place of business will in practice give the best results. The application of the *lex loci contractus* which has been propagated by others would, in aviation, give rise to great difficulties because of the fact that contracts of carriage by air are often concluded in uncivilised countries.

In this connection it should be pointed out that in international maritime carriage, the application of the law of the flag of the ship (or, what in most cases comes to the same, the law of the place where the carrier is resident [2]) is rapidly gaining ground [3].

1. Recueil des Cours de l'Académie de Droit International 1934 II. p. 333.
2. As regards aviation, most States which subsidize their national air traffic companies have stipulated that these Companies are only allowed to use aircraft possessing the nationality of the State granting the subsidy. In these countries the law of the flag will therefore *always* be the law of the carrier's principal place of business.
3. Since 1865 this is the fixed English jurisprudence. (Lloyd v. Guibert) Cf. Cheshire, Private International Law (1935), p. 194; authorities in different countries coming to the same conclusion are: Ripert, "Droit Maritime" II, No. 1468, Fromageot in

The "Institut de Droit International" at its session in 1908 (Florence) decided that "En matière de contrat de transport de personnes ou de choses par chemins de fer, voiture ou bateau, avec une société ou un particulier en faisant sa profession .... la loi du siège de cette société ou celle de l'établissement commercial du transporteur, voiturier .... est applicable" [1].

The same rule should be applied to contracts of carriage by air [2].

It is to be observed that M. de Visscher also considered the possibility of applying the law of the Court seized of the case *in all cases*.

In his opinion the whole mechanism of the Convention favours such solution as in art. 22, 25, 28, par. 2, 29, par. 2 the Convention refers to the *lex fori* [3].

This would mean — as the Convention stands at present — that if an English passenger travelling to Paris in an English aeroplane is injured consequent on an accident which occurred in England, the French Court which, by virtue of art. 28, can be seized of the case, would have to apply French law. Such a point of view cannot of course be accepted. English law, being the law of the carrier's principal place of business should be applied in such a case.

Wilful misconduct or fault equivalent to wilful misconduct on the part of the carrier or his agents

Article 25.

"(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability,

Revue Internationale du Droit Maritime XVIII, p. 742. Frankenstein, International Privatrecht II, p. 535; Meili, International Zivil- und Handelsrecht II, p. 301; Nussbaum, International Privatrecht (1932) p. 286; Oser, "Das Obligationenrecht I" (1929) p. LXXXIV, Kosters, Internationaal Burgerlijk Recht, p. 760; van Slooten, "Dutch International Law relating to the carriage of goods by sea" (1936), p. 84.

1. Annuaire de l'Institut de Droit International 1908, p. 106.
2. Nussbaum, International Privatrecht (1932) p. 286 is of the same opinion. As to jurisprudence it is to be observed that in the case Carrol v. Messageries Aériennes concerning the death of a Franch passenger who had taken a ticket in London for a journey London–Paris in a French aeroplane, French law was applied, see Droit Aérien 1930, p. 563. In the case K.L.M. v. Baudart concerning the death of a French passenger travelling in a Dutch aeroplane from Siam to Marseilles, the Court applied Dutch law being the law of the carrier's principal place of business: judgment of 28th Febr. 1935.
3. See also Sack "Airtransportation and the Warsaw Convention" in Air Law Review 1933, p. 386, who remarks that the words used in art. 24 (2) "without prejudice as to the determination of persons who have the right to bring suit and of their respective rights" probably means that these questions are left to the lex fori.

if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seised of the case, is considered to be equivalent to wilful misconduct.

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

It is necessary to consider first what is meant by the terms "wilful misconduct" and "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".

On examining the text of article 25 in the draft conventions, it will be seen that "intentional illegal act" was always used. The draftsmen of the Warsaw Convention were of the opinion that when there was an intention to injure some one, the limitation of liability provided for in the Warsaw Convention should not apply. As the term "intentional illegal act" shows, a positive notion was considered: the carrier had to have intended causing the damage that occurred.

M. Sullivan in his article "Codification of Air carrier Liability by International Convention" [1] considers the question of whether violation of government regulations by the carrier or his employees constitutes wilful misconduct. He thinks that the answer is almost certainly in the affirmative, where such violation contributed in a causative way to the accident. We cannot share M. Sullivan's opinion. Let us take the example that contrary to the Government regulation which stipulates that every aircraft following an air traffic route which has been officially recognised, shall keep such route at least 300 metres on its left [2], a pilot has kept this route at only 200 metres on the left. Is such violation if it contributed to the accident, to be considered as wilful misconduct and will the liability of the carrier therefore be unlimited? In such a case, when through carelessness the pilot has kept too much to the left, he has not taken the necessary measures to avoid the damage, but he has not intended to cause the damage. To declare the carrier liable without limitation in such a case

1. Journal of Air Law, January 1936, p. 44.
2. Cf. art. 31 (*b*) of Annex D of the Convention relating to the regulation of Aerial navigation, dated 13th October 1919.

would be contrary to the fundamental principles of the Convention. There can only be question of wilful misconduct if the plaintiff proves that the carrier or his agents *had the intention to cause the damage.* We therefore do not think it possible to accept M. Sullivan's interpretation.

As regards the term "such default on his part, as, in accordance with the law seized of the case, is considered to be equivalent to wilful misconduct" it is to be observed that during the discussions on this subject at the Warsaw Conference [1], the German delegation proposed to insert in the additional protocol of the Warsaw Convention the following:

"It is understood that for the application of the second paragraph of article 24 (corresponding to article 25 in the Warsaw Convention), grave default is assimilated to wilful misconduct". On the other hand, the British delegation considered that the application of this paragraph should be restricted to the case in which the act is designed deliberately for the purpose of inflicting injury. This opinion was shared by the French delegation and furthermore, corresponded to the meaning originally given to the article.

M. Ripert pointed out the following on the subject of the German proposal: [2]

"Agreement would be reached if a formula could be found sufficiently precise not to engage the liability of the carrier *except when he voluntarily caused the damage.* But the German proposal goes further, and intends grave default to be assimilated to wilful misconduct. The German delegation proposes to make the carrier liable when he has committed grave default. This is a very dangerous proposal".

After a long discussion, the Conference decided to refer the article to the Drafting Committee. On presenting the new text, the Chairman of this Committee observed the following: [3]

"We have succeeded in finding a formula (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) which has contented also our friends of Great Britain, and in which we have

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1. See Minutes of the IInd International Conference for Private Air Law, p. 40.
2. See Minutes of IInd Int. Conf. for Private Air Law p. 41.
3. See Minutes of IInd Int. Conf. for Private Air Law p. 139.

succeeded in adapting the expression "faute lourde" and "dol", which are difficult to translate into English".

The conclusion to be drawn from these words is that one wished to assimilate "faute lourde" to "dol" but that this word had not been used because the English delegation considered that it could not be translated so as to give it a legal meaning in the English language. The minutes, however, bring out that this difficulty in translation was not the principal objection which several delegations considered should be made to the assimilation of wilful misconduct to grave default. That which the delegations feared was, that the carrier might be prevented from availing himself of the limitation of his liability, if he had committed a seriously wrongful act.

That this fear was fully justified is proven by the interpretation of article 25 given by the President of the Legal Section of the 5th International Congress of Air Navigation as well as by the interpretation given by M. le Goff in his "Traité Théorique et Pratique de Droit Aérien".

M. Wolterbeek Muller, the President of the Legal Section of the 5th International Congress of Air Navigation and one of the authors of the Warsaw Convention, declared that in the event of a "faute grave" of the carrier or one of his agents, the carrier would not be able to avail himself of the limitation of liability established in the Warsaw Convention [1].

M. le Goff goes even further, observing that article 25 "revient manifestement à dire que s'il y a dol, fraude, faute des préposés du transporteur, celui-ci ne pourra bénéficier des clauses qui limitent sa responsabilité à 125.000 francs par voyageur" [2].

If the Courts accept this interpretation of article 25 and declare the carrier liable without limitation in the case of a simple fault on the part of his agents, the whole idea of limiting the carrier's liability established in the Convention would become illusory.

But even if one rejects this interpretation and one requires a *grave* default in order to declare the carrier liable without limitation, much of the original meaning of the Convention would be lost. On examining the jurisprudence in different countries on railway cases in which "grave default" of the railway was assimil-

1. See Minutes of the 5th International Congress of Air Navigation p. 1173.
2. Le Goff op. cit. p. 817.

ated to "wilful misconduct", it will be seen that the Courts do not generally examine whether there is mischievous intention of the carrier, but only whether the default is a serious one. It was judged for instance that the fact of a crate containing pictures not being sufficiently protected against rain was grave default [1].

It has been judged that a delay greater than one month was grave default if no plausible explanation could be given by the carrier. It has been judged that though the consignor is in principle responsible for the insufficiency or irregularity of the documents, the railway company which, clearing customs, deposits a declaration in conformity with the terms of the consignment note, commits nevertheless a grave default, if it results from other documents and special circumstances that the goods did not correspond to the designation given [2].

We are of opinion that this jurisprudence should be combatted. How to explain legally the necessity of assimilating grave default to wilful misconduct? In practice it is often difficult to distinguish. "In an extreme case, reckless omission to use care, after notice of the risk, may be held, as a matter of fact, to prove a mischievous intention or in terms of Roman Law *culpa lata* may be equivalent to *dolus*" [3]. The question to be asked is: does the default committed make on a normal person the same impression of immorality as wilful misconduct? It seems to us indispensable always to bear in mind these principles, which must necessarily lead to a far more restricted interpretation of the notion of grave default than that given in the above cases.

Furthermore, with regard to air navigation, if faults such as a very long delay were assimilated to wilful misconduct, the system of the Warsaw Convention would be overthrown. It must not be forgotten that the limitation of the liability provided for the carrier in the Warsaw Convention is a kind of compensation for the fact that he has lost under the régime of the Warsaw Convention certain advantages which he would have had under a contractual régime. Now, if jurisprudence considered the above cases as faults equivalent to wilful misconduct, there would result, that, in a great number of cases, the liability of the carrier would

1. Judgment of the Court of Utrecht (Netherlands) of 22nd January 1908.
2. Judgments quoted by Brunet op. cit. p. 307 note 1.
3. Pollock, op. cit., 1929; see also Mazeaud op. cit. no. 414.

be unlimited, especially as the effect of the limitation is not only refused in the case of wilful misconduct or grave default of the carrier himself, but also in the case of wilful misconduct or grave default on the part of one of his agents.

In this connection it should be pointed out that in articles 36 of the C.I.M. and the C.I.V., a maximum liability has been established ,even in the case of the wilful misconduct or grave default of the railway. Originally, in the Bern Convention of 1890, there was no limitation of liability for wilful misconduct or grave default, but this system was modified in the C.I.M. and the C.I.V., because — we draw special attention to this fact — it was conceded that since the new convention allowed the carriage of precious goods without exception, an unlimited liability of the railway could not be stipulated, for this might come to an enormous sum, if for example, one of its agents committed a grave default. This argument can equally well be applied to the air carrier under the régime of the Warsaw Convention.

Wilful misconduct or default equivalent to wilful misconduct on the part of agents

We consider that the Warsaw Convention, in stipulating an unlimited liability in the event of wilful misconduct or grave default on the part of the carrier's agents, has laid too heavy a burden on the carrier. "Care must be taken not to confound intentional or grave default on the part of the principal, and intentional or grave default on the part of the agent. Intentional or grave default of the agent most often occurs without grave default or wilful misconduct on the part of the principal" [1].

It should be pointed out that in the Rome Convention of 29th May 1933 (for the unification of certain rules relating to damage caused by aircraft to third parties on the surface) [2] it has been stipulated in article 14 that the liability of the operator of the aircraft will be unlimited if it is proved that the damage results from the gross negligence or wilful misconduct of the operator, or his agents, *except where the operator proves that the damage results from negligent pilotage or negligence in the handling of the aircraft,*

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1. Mazeaud op. cit. No. 2527.
2. See p. 92 note 1.

or in navigation, or, where his agents are concerned, that he had taken all proper steps to prevent the damage.

In Germany by virtue of article 278 of the B.G.B. wilful misconduct or grave default of the agent does not imply wilful misconduct or grave default of the principal. In Switzerland, the same principle has been confirmed by article 101 of the Swiss Federal Code of obligations (Code Fédéral Suisse des obligations). In the Netherlands, in the new Maritime law, the liability of the maritime carrier is unlimited in the event of wilful misconduct or grave default of the carrier himself but not in the event of wilful misconduct or grave default on the part of his agents.

The arguments making for the rejection of an unlimited liability of the carrier for his agents in general, are true *a fortiori* with regard to the agents in charge of the flying of the aircraft. In maritime carriage, the validity of the negligence clause has been generally recognised, even in the event of wilful misconduct or grave default on the part of the captain or crew."The intentional character of the fault of agents cannot redound on the shipowner" [1].

The limits of liability fixed in the "International Convention for the unification of certain rules concerning the limitation of the liability of ship-owners" (Brussels, October 1923) are admissible even in the event of an intentional or grave nautical fault.

On the other hand, by virtue of the present system of the Warsaw Convention, the liability of the air carrier towards passengers, will be unlimited in the event of intentional negligent pilotage, and in the event of grave default in piloting.

In conclusion it can be said that article 25 imposes on the carrier a much greater liability than that falling on other carriers in similar cases. It is to be hoped that at the next revision of the Warsaw Convention, this article will be modified either by making a distinction between intentional faults on the part of the carrier himself on one side, and those of his agents on the other in the same way as in the Rome Convention, or, if both cases are to be confounded, in providing for a system as in the C.I.M. and the C.I.V., that is by fixing an increase of liability in the event of intentional fault up to the double of the maximum of liability provided for in the Convention.

1. Ripert Droit Maritime No. 1758. See also Mazeaud op. cit. No. 2551.

Translation of article 25 given by the U.S.A. Department of State

In the translation of the Warsaw Convention given by the U.S.A. Department of State [1] the word *dol* has been translated by *deception*. In the official British translation we gave, which is to be found in the British Air Navigation Act of 1932, the term "wilful misconduct" is used. As during the discussion on article 25 at the Warsaw Conference the term "wilful misconduct" was always used, which term, in the opinion of the English delegates, was the equivalent of the French *dol*, it would for uniformity's sake be of importance if the American translation could be modified by substituting wilful misconduct for deception [2].

Time within which complaint may be made by the person entitled to delivery

Article 26.

"(1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

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

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

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

The article brought before the Warsaw Conference read as follows:

"Collection of the luggage without complaint by the person

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1. See Bulletin of Treaty Information No. 7, September 1929, Supplement published by the Treaty Division of the Department of State, Washington D.C.
2. Knauth however, in "Aviation and Admiralty" Air Law Review October 1935 p. 331, thinks it better that the clauses relating to denial of the statutory right to limit liability under any aviation statute should connect the French word "dol" with the English maritime phrases "actual fault or privity" and "design and neglect".

entitled to delivery is *prima facie* evidence that the same has been delivered in good condition and in accordance with the document of carriage. Nevertheless, in the case of non-apparent damage, or delay, the person entitled to delivery must complain to the carrier or his agent at the place of delivery within 7 days from the date of the receipt of the goods. Every complaint must be made in writing upon the document or by a separate notice in writing despatched within 7 days of the reception of the goods.

The same *prima facie* evidence and the same times in which complaint can be made are applicable to the delivery of luggage to the passenger".

As regards the first paragraph of this article, the Japanese delegation made a proposal to the Warsaw Conference tending to consider the acceptance of the goods not as *prima facie* evidence, but as a definite recognition that the goods arrived in good condition [1]. Only in the event of damage which was not apparent could the person entitled to delivery have the right of making a complaint to the carrier.

The English delegation agreed with this point of view, being of the opinion that in the event of apparent fault, the acceptance of the goods should not be *prima facie* evidence, but a definite recognition that the goods arrived in good condition. The proposal was rejected by the Meeting; as one of the delegates said, it is possible that the default is apparent to a principal in the particular trade interested in the goods, but not apparent to the employee who fetches the goods. To accept the proposal would be to require the most competent person in the trade to fetch the goods.

In examining the minutes of the Warsaw Conference, one finds that during the discussions no clear distinction was made between

a. the time within which the complaint should be made.

b. the time within which an action may be brought against the carrier.

The Article brought before the Conference — corresponding to article 3 paragraph 6 of the Brussels Convention — did not consider the right of the person entitled to delivery to bring an action; *it only regarded the burden of proof*. If the person entitled to delivery had accepted the goods without complaint within the

1. See Minutes of the IInd International Conference for Private Air Law p. 71.

time stipulated, it was for him to prove that the goods were not in good condition. Reasoning *a contrario*, it must therefore be admitted that if the goods were accepted with complaint by the person entitled to delivery, the carrier would have to prove that he had delivered the goods in good condition. In principle, the complaint would have to be made on the reception of the goods. Nevertheless, in the event of not apparent damage, the person entitled to delivery would still have seven days after the reception of the goods in which to make his complaint.

The Japanese delegate, defending his proposal, pointed out that by virtue of article 27, one could make complaints for any length of time afterwards. This remark was not correct. For apparent damages, the *complaint* would have had to be made when the goods were collected, and for not apparent damages, within seven days. It would have been a different matter if the delegate had pretended that the two years in which the person entitled to delivery has the right of *bringing an action* against the carrier (stipulated in article 28 of the draft) was too long. But, as we have said, this question has been confused with that of the burden of the proof.

The Japanese proposal was rejected. The Conference considered nevertheless that a time within which the complaint should be made, should be provided, and recognised in the cases of apparent damage the same periods of time as those provided for complaints regarding cases where the damage was not apparent. When these principles were admitted, the article was returned to the Drafting Committee, which proposed the following article in its final report [1]:

Article 26.

(1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

(2) Complaint must be made within three days in the case of luggage, within seven days in the case of goods and within fourteen days in the case of delay in the carriage of goods or luggage.

(3) Every complaint must be made in writing upon the docu-

1. See Minutes IInd International Conference for Private Air Law p. 141.

ment of carriage or by separate notice in writing despatched within the times aforesaid.

The basis of the proposed article was the same as that brought before the Conference originally, corresponding to article III, paragraph 6 of the Brussels Convention; the modifications made, only dealt with the time within which the complaints could be made. As has been said, the plaintiff, by making a complaint, was in a more favourable position than if he had not made a complaint within the times provided. The right of bringing an action against the carrier remained the same in the two cases.

The Chairman of the Drafting Committee remarked: [1]

"I would like to know the opinion of the Conference as clearly as possible. I ask you: what system do you wish to adopt? Does the Conference decide to maintain this discrimination between apparent damage and not apparent damage, which was in the old draft? Is there a practical reason for making this distinction? If the time within which complaint should be made for not apparent damage is maintained at seven days and if on the other hand, the times provided in the new article are of three days, seven days, and 14 days, should this discrimination be made, when the times are in fact the same?"

In the opinion of the Chairman, the question still giving rise to difficulties, was therefore that of fixing the times within which complaints could be made. After the above words, the Chairman put to the vote the maintenance of the article as it was presented with the exception of a new drafting by the Drafting Committee. This proposal was adopted by the Meeting. It is astonishing to find that article 26 as it figures in the Warsaw Convention, contains a paragraph 4 reading as follows:

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

The meaning of the article adopted by the Warsaw Conference is completely changed by this paragraph. The principle recognised originally and which corresponds to that regarded in article III paragraph 6 of the Brussels Convention, has been replaced by a

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1. Minutes of the IInd International Conference for Private Air Law p. 143.

principle corresponding to that provided in article 105 of the French Code de Commerce:

> "Receipt of the objects carried and the payment of the price of carriage extinguish any action against the carrier for damages or partial loss, if ,within the three days, not including holidays, following the receipt and payment, the person entitled to the delivery has not notified the carrier, by extrajudicial act or by registered letter of his motivated complaint".

and to article 44 of the C.I.M. stipulating that the acceptance of goods extinguishes any action against the railway, arising from carriage, apart from the exceptions provided in paragraph 2 of the same article.

By virtue of paragraph 4 of article 26 the person entitled to delivery who has not made a complaint, is not only in a less favourable position from the point of view of making a proof — as was the case by virtue of the article adopted by the Conference — but if the person entitled to delivery does not make his complaint within the times provided, he will be completely disarmed as all rights of action will be extinguished.

Is the system at present adopted in article 26 preferable to the system first adopted by the Conference? We believe it is. If the person entitled to delivery was allowed to make a claim two years after the receipt of the goods, as was proposed in the draft, the carrier would be put in a too difficult position. The longer the person entitled to delivery postponed bringing an action, the more difficult it would become for the carrier to make the necessary investigations.

From the point of view of the person entitled to delivery, the times provided in paragraph 2 of the article in question in which he is allowed to formulate his complaints, give him sufficient guarantees. He is in a more favourable position than the person entitled to delivery under the régime of the C.I.M., because, even if the damage of the goods is apparent, he is not compelled, as is the latter, to make his complaint on receiving the goods. The addition of the last paragraph to article 26 seems to us, therefore, an improvement.

In examining the present article in its entirety, it is nevertheless impossible for us to understand how the first paragraph can be

conciliated with the last. According to the first paragraph of article 26 in the official French text, the receipt of the goods without complaint "constituera présomption *sauf preuve contraire*" etc.

Seeing that in the last paragraph the bringing of an action by the person entitled to delivery is connected with the right of making a complaint, it results that the person entitled to delivery who has received the goods without having made a complaint within the times provided, will not be able any more to make a "preuve contraire", since all action against the carrier is extinguished. According to the present system, the first paragraph in its present drafting has therefore no meaning.

The meaning of this paragraph in the system which was first recognised should be recalled. The provision in question then brought out that if the consignee had accepted the goods without complaint, he still had the right of bringing an action against the carrier for two years, but in this case it would be for the person entitled to delivery to prove that the goods were not delivered in good condition. Reasoning *a contrario*, if he had made a complaint, it would be for the carrier to prove that he had delivered the goods in accordance with the contract of carriage. Therefore only the question of the burden of the proof was considered. The first paragraph in its present drafting can no longer give an answer to this question.

Let us consider the following example. The consignee has accepted the goods from the carrier. Two days later he discovers a damage. Since the time provided in article 26 for making a complaint has not expired, he makes his complaint. Is it sufficient for him to prove the damage, or has he still to prove that the damage did not occur after receipt? Although according to the system first recognised, the proof of the damage alone obliges the carrier to prove that the goods were delivered in good condition, it seems to us that there is a strong objection to be made to such

1. Sullivan in his article "Codification of Aircarrier Liability by International Convention", Journal of Air Law, January 1936, p. 45 is of a different opinion because failure of the consignee to complain within the time prescribed may take away his cause of action against the carrier, but it does not take away his right to set up the damage as a defense to an action by the carrier for the cost of the transportation. Sullivan overlooks the fact that the provision of art. 26 can only be considered in relation with the other rules of the Warsaw Convention. Actions by the carrier for the cost of transportation fall outside the scope of the Convention.

a regulation of the proof. A dishonest consignee would always be able to make a complaint even when the damage occurred after receipt in the hope that the carrier will not be able to succeed in his proof that the goods were in good condition, proof which often will be extremely difficult for the carrier.

For this reason, before at the next revision of the Warsaw Convention a special stipulation is made in article 26 concerning the burden of the proof, it should be required that if the person entitled to delivery does not make a complaint on receipt, he should prove that the damage did not occur after delivery.

Wit regard to the wording of article 26, still two remarks should be made:

1. In paragraph 1 it is said in the official French text:

> "La réception des bagages et marchandises sans protestation par *le destinataire* constituera présomption, sauf preuve contraire que les marchandises ont été livrées en bon état et conformément au titre de transport".

In the second paragraph:

> "En cas d'avarie *le destinataire* doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie, et au plus tard, dans un délai de trois jours pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition".

Seeing that the article does not consider alone the carriage of goods, but also the carriage of baggage, it follows that with regard to the latter, the holder of the baggage check should also be able to make a complaint.

Furthermore, with regard to the carriage of goods, the word "*destinataire*" used in the French official text does not cover all the persons who should have the right of bringing an action against the carrier. If, for example, the goods have been refused by the consignee, the consignor has a right of action against the carrier. Consequently, in the above case, the consignor should also be able to make a complaint. By reason of the preceding, it is desirable to replace the word "destinataire" by the term

"ayant-droit", which is used in article 44 of the C.I.M. and article 3 paragraph 6 of the Brussels Convention.

It should be pointed out that whereas in the translation of the Warsaw Convention published by the Treaty Division of the Department of State of the U.S.A. the word "consignee" is used in article 26, in the translation given in the British Air Navigation Act of 1932, the expression "person entitled to delivery" occurs. Though the word *consignee* is of course the literal translation of the French *destinataire*, it is clear that the translation given in the British Air Navigation Act of 1932 meets the objections we made against the use of the word "*destinataire*".

2. In the second paragraph only the case of damage to luggage or goods has been considered. The words "partial loss" should be added to "damage".

If for example, the person entitled to delivery accepts the goods, and on counting them notices that one parcel is missing, he should have the right of making a complaint.

In conclusion, we consider that it is desirable to make three modifications in article 26:

a. The first paragraph should be abolished and replaced by a new paragraph in which is regulated the proof falling on the carrier and that on the person entitled to delivery.

b. The word "destinataire" should be replaced by the word "ayant-droit";

c. In paragraph 2, the words "perte partielle" ("partial loss") should be added to the word "avarie" ("damage").

Courts declared competent

> **Article 28.**
>
> "1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court 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.
>
> 2) Questions of procedure shall be governed by the law of the Court seised of the case".

This article determines the jurisdictions within which actions for damages must be brought. They are either:

a. 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.

b. the Court having jurisdiction at the place of destination.

Originally, the Court having jurisdiction at the place of the accident was also declared competent in the Convention. The British delegation wished to suppress the competence of this Court and pointed out that on long distance lines, such as from London to India, countries are crossed where the courts are not at all organised. In its opinion, formidable difficulties would be met, for example, before the courts of Persia or Mesopotamia, in the conduct of the action [1].

The proposal was supported by the French delegation which considered it dangerous to declare competent the Court having jurisdiction at the place of the accident which would only be competent if the State has ratified the Convention.

The Conference decided to accept the above proposal and to omit the court having jurisdiction at the place of the accident, in the Convention. We consider that this was reasonable, because, as one of the delegates said, whenever there is an accident, the police immediately intervenes; if there is no police, not much can be expected from the courts; on the other hand, if there is police the facts discovered by it will be brought before the courts chosen by the parties.

It should, however, be pointed out that the difficulties which lead the court having jurisdiction at the place of the accident to be omitted, also prevail with regard to the competence of the court having jurisdiction at the place where the carrier "has an establishment by which the contract has been made".

It must be admitted that the word "establishment" also includes the agencies of the carrier, for the latter expression was used originally and was replaced by the word "establishment" in order to include the branch offices of the carrier.

A passenger who has bought a passenger ticket from Imperial Airways at Baghdad for London is injured in an accident. By virtue of the Warsaw Convention, he can bring an action before the Court at Baghdad, as the court having jurisdiction at the place where the carrier has an establishment (in this case an

1. See Minutes of the IInd International Conference for Private Air Law, p. 78.

agency) by which the contract was made. In order to avoid actions being brought in far off countries where the courts may not be well organised (the British delegate gave Mesopotamia as an example) the Conference abolished the competence of the courts having jurisdiction at the place of the accident.

As regards the place of destination it is obvious that that place also can be situated in a country where jurisdiction is not well organised.

Take for example an English passenger travelling by Imperial Airways from London to Baghdad. Consequent on an accident which occurred when the aeroplane took off from Croydon the passenger is injured. By virtue of art. 28 the passenger has a right to bring action before a Court in Baghdad, which the authors of the Convention wanted to avoid [1].

Serious objections are to be made against such a situation. It must not be forgotten that the tendency of air traffic is towards the operation of world airlines. Such airlines will often fly over countries in which jurisdiction is not organised in such a way as to give the necessary "Rechtssicherheit" to passengers as well as to the carriers. We are convinced that in view of the special character of aviation it will be felt in practice that too many courts have been declared competent in art. 28. It would in our opinion be of much importance if at the next revision it could be stipulated in art. 28 that all actions must be brought before the court of the principal place of business of the carrier.

When we discussed art. 24 of the Convention, we maintained that in the case of an action being based on the contractual liability of the carrier, the law of the carrier's principal place of business should be applied. If the Convention could be modified as to declare only competent the Court of the carrier's principal place of business, this will also have the advantage that the Court will generally apply its own law. Sir Alfred Dennis, delegate of the United Kingdom at the Warsaw Conference observed during the Conference: "Le mieux serait de décider que le for devait

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1. M. Sack in his article on the Warsaw Convention in Air Law Review, October 1933, asks what tribunal of the place of destination means, in case the person or property have never been as a matter of fact carried to that place, because of an accident in another State or for another reason. It is clear that with "place of destination" is meant the place of destination *according to the contract of carriage*. This place is not changed by the fact that the person or property has not reached it.

être le siège principal du transporteur, parce que c'est là que vous trouverez tous les biens de la Compagnie de transport et le moyen de faire exécuter le jugement".

„Judgments have not the force of res judicata in other contracting States"

At the meeting in Paris (1928) of the Second Committee of the C.I.T.E.J.A., the German delegation proposed an addition to article 28 [1]: "The judgments of a competent court of a Contracting State will have force of *res judicata* and will be made executory in other Contracting States". Some delegates, notably those of the British delegation, considered that they were not able to accept the obligation of giving force of *res judicata* to a judgment which might be contradictory to national law [2]. The supporters of the German proposal referred to the Berne Convention which contains an article concerning the execution of judgments [3].

There is, nevertheless, a difference between this Convention and the Warsaw Convention which was given as an argument against the reciprocity of the enforcement of judgments given by virtue of the provisions of the Warsaw Convention.

The Berne Convention has an article 52 which reserves the possibility for the contracting States to oppose the admission of new States. "A State which intends to become a party to the Berne Convention must have its law so organised as to permit the enforcement of its judgments in the other countries party to the Convention". The Warsaw Convention is, on the other hand, open to adhesion by any State. It can therefore happen that a State, the law of which is not sufficiently organised, adheres to the Convention. This may give rise to great difficulties if the judgments of the courts of this State are to be executed in the other countries.

What is the result of the system at present in force in the Warsaw Convention?

1. Minutes, p. 34.
2. It is to be observed however that in England procedure may be shortly introduced by which a foreign judgment, when registered, can be enforced as if it were the judgment of an English Court. The Foreign Judgments (Reciprocal Enforcement) Act 1933 is to come into force by an Order in Council in respect to these countries to which its provisions are extended by the order following upon the grant of reciprocity by those countries to judgments given in the superior Courts of the United Kingdom.
3. See Brunet on this subject, op. cit. p. 325.

Let us take for example, a consignment lost during carriage between Amsterdam and Athens. The consignee brings an action against the carrier before the Court of Athens, which is the court having jurisdiction at the place of destination, as provided in the Warsaw Convention. The carrier is condemned to pay indemnification and the consignee asks the consignor to carry the judgment into effect in Amsterdam where the carrier has property. By virtue of article 431 of the Netherlands Code of civil procedure, the judgment of the Greek court cannot be carried into effect in the Netherlands.

The consignee could, in accordance with Netherlands common law, bring another action before the Dutch Court. Nevertheless, if Amsterdam is not the place where the carrier is ordinarily resident, nor his principal place of business, nor the place in which the contract was made, the consignee, in accordance with the Warsaw Convention, will not be able to bring an action in Amsterdam and he will be deprived of any possibility of compensation.

It must be admitted that such a case will occur very rarely in practice, but the possibility exists. Any person who wishes to bring an action would do well to make sure if the legislation in force before the court chosen will give him the means of enforcing the judgment. In general he will chose the court of the country where the carrier has his principal place of business.

Persons claiming in different courts in the event of the death of a passenger

The case should also be considered where several plaintiffs bring an action against the carrier in the event of the death of a passenger.

As regards the extent of these rights, the Warsaw Conference rightly adopted the point of view that these rights cannot be greater than those of the deceased. Let us give an example. A parent of a passenger killed in an air accident, claims compensation of the damage which he personally has suffered. Although he is a third party with regard to the contract of carriage, the limitation of the contractual liability provided in the Convention and the other rules contained therein will nevertheless be applied to him. This principle seems reasonable to us. Though the parent

invokes liability *ex delicto* he nevertheless bases his action on the consequences of a contractual situation. It is logical that he should take this situation as it is.

In the draft Convention there appeared in article 28 a paragraph which read as follows: "In the event of death all actions will have to be brought before the first Court to be duly seised of the case and the judgment given will have force of *res judicata* in all contracting States".

Since the Conference had rejected the reciprocity of enforcement of judgments, it considered indispensable also not to establish the exclusive competence of the first court duly seised of the case in the event of the death of a passenger. Consequently, in accordance with the present system of the Warsaw Convention, the plaintiffs may, in such a case, bring actions before the different courts declared competent in the first paragraph of article 28. The liability of the carrier being limited in the Warsaw Convention to 125.000 French francs per passenger, in what way can the carrier be prevented from being condemned in different countries to indemnification which may total an amount greater than the limit fixed in article 22? Should it be admitted that the Courts must agree reciprocally on the amount to be granted to each of the plaintiffs?

In the British "Carriage by Air Act 1932" a provision has been made which makes it possible for English Courts to cooperate with foreign Courts in death cases.

Art. 4 of the Second Schedule of this Act stipulates that

> "The Court before which any such action[1] is brought may at any stage of the proceedings make any such order as appears to the Court to be just and equitable in view of the provisions of the First Schedule to this Act limiting the liability of a carrier and of any proceedings which have been, or are likely to be, commenced outside the United Kingdom in respect of the death of the passenger in question".

The principle of this provision is right but it cannot obviate the difficulties which in practice are bound to arise in the event of the representatives of a passenger bringing actions before the Courts in different countries. In country A the civil procedure will only

1. I.e. in the event of the death of a passenger.

take some months, in country B the procedure may take some years. The Court of country A would have to wait all the time till the Court in country B has come to a decision.

In this connection it is to be observed that in the Rome Convention of 29th May 1933 for the unification of certain rules relating to damage caused by Aircraft to Third Parties on the surface, the same sort of difficulty arises. Art. 9 of this Convention stipulates that if several persons have suffered damage in the same occurrence and if the total sum payable by way of compensation exceeds the limits fixed in the Convention, the compensation due to each of such persons shall be reduced proportionally so that the total does not exceed the limits of the Convention. The Dutch delegation rightly considered that to execute this system in practice, it was necessary to establish in the Convention a "procédure en liquidation" to be held before the judicial authority of the defendant's ordinary place of residence [1]. The IInd International Conference for Private Air Law did not however accept this proposal as it was of opinion that questions of procedure ought to be regulated in a separate Convention. When a future International Conference for Private Air Law will consider the possibility of arriving at an international Convention regulating the questions of procedure connected with the Warsaw Convention, it would be desirable to take into consideration the proposal concerning a "procédure en liquidation" made by the Dutch delegation at the Rome Conference.

Translation of art. 28 given by the U.S.A. Department of State

Whereas in the official British translation the words "tribunal du domicile du transporteur" have been translated by "Court having jurisdiction where the carrier is ordinarily resident", the translation given by the U.S.A. Department of State uses the words: "Court of the domicile of the carrier".

M. Sullivan observes that in any High Contracting Party which is composed of federated States the question must arise whether the domicile referred to in art. 28 extends to the whole territory of the contracting party, or means the component state in which the carrier has his residence, if an individual, or is incorporated,

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1. See Minutes of the IIIrd International Conference for Private Air Law I, p. 168.

if a corporation [1]. This difficulty could be solved if in the American translation the same wording was used as that of the British translation.

Extinction of the right to damages

Article 29.

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

2) The method of calculating the period of limitation shall be determined by the law of the Court seised of the case".

The corresponding article in the drafts of the Convention read as follows:

"The action for damages must be brought within two years, reckoned from the date of arrival at the destination or from the date on which the carriage stopped.

"The method of calculating the prescription and the reasons for suspension or interruption of the prescription shall be determined by the law of the court seised of the case".

We should like to quote the reporter on the draft presented at the Ist Conference for Private Air Law (Paris 1925): "The French draft provided a prescription of one year and this appeared normal; but the diversity of legislation concerning interruption and suspension and the possible and presumable distances in the case of carriage by air and also the necessity of permitting the extent of liability as regards the injuries and incapacities of the victim to be rightly appreciated, all these elements have led the Commission to increase the duration of the prescription to two years" [2].

These arguments do not seem very convincing to us. How can the diversity of legislation with regard to the suspension and interruption of the prescription necessitate a longer duration of the prescription than that originally proposed and which cor-

1. "Codification of Air Carrier Liability by International Convention", Journal of Air Law, January 1936, p. 47.
2. Minutes of the 1st International Conference for Private Air Law p. 48.

responds generally to the duration of the prescription provided for carriage over land and sea? [1]

By virtue of the system stipulated in the draft, the prescription could be prolonged almost indefinitely, because the reasons for suspension and interruption were to be determined by the court seised of the case. With regard to the other arguments, the position of the victim in carriage by air, is in no way different to that of a victim in maritime or land transport.

In principle, it seems to us that a prescription should not be stipulated for carriage by air which is longer than that stipulated for maritime or land transport. On the contrary the prescription should be shorter.

What was the fundamental idea of the shortened prescription with regard to carriage? In the preamble to a French decree in 1681, the shortened prescription was justified as follows:

"The interests of maritime commerce and navigation require it for the peace of those engaged in this business. The more their operations are numerous and rapid, the prompter and quicker should be their liberation" [2].

Air transport being the most rapid means of carriage in existence, and the communications becoming faster and faster, the two years within which the passenger can bring an action, do not seem to us at all necessary. The International Chamber of Commerce at different meetings also expressed the opinion that the period of two years within which the passenger can bring an action is excessive [3].

Up to the present we have only considered the contents of the article as it has been in the drafts. Only on one point is article 29 less rigorous than the article in the draft convention. The Italian delegation at the Warsaw Conference proposed that the word "déchéance" should be substituted for "prescription" [4]. This delegation was of the opinion that it was not desirable to subject the determination of the reasons for suspension or interruption

1. In the C.I.M. and C.I.V., article 45 stipulates a prescription of one year, with certain exceptions; article 3 paragraph 6 of the Brussels Convention stipulates that the carrier and the ship are relieved of all liability for loss or damage unless an action is brought within the year of the delivery of the goods or within a year of the date when they should have been delivered.
2. Quoted by Lyon-Caen Traité de Droit Commercial III no. 812 (Paris 1923).
3. Blanc Dannery op. cit. p. 80 and Le Goff op. cit. p. 820 are of the same opinion.
4. See Minutes of the IInd International Conference for Private Air Law p. 77.

of the prescription to the law of the court seised of the case, according to which the prescription might be prolonged indefinitely. The Conference agreed to this proposal and modifiep the article by providing a "délai de déchéance", which cannot eb suspended or interrupted. By virtue of the second paragraph of article 29, the court seised of the case shall decide whether the action has been well begun.

It is desirable that at the next revision of the Warsaw Convention the period within which the passenger can bring his action be shortened to one year.

Successive carriage

Article 30.

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

(2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or 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 destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee".

In successive carriage, distinction must be made between two cases:

a. the passenger or the goods are carried to the point of destination by a series of successive carriages. The passenger or the consignor makes a contract with each of the carriers.

b. The passenger or the consignor only deals with the first carrier who undertakes to perform the carriage from end to end by successive carriers. In this case there is only one contract.

The first sub-paragraph of article 30 refers to carriage as

defined in the third paragraph of article 1, in which it is provided that carriage performed by air by several successive air carriers, is deemed 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.*

It must be concluded that the two kinds of successive carriage mentioned under *a* and *b* come under article 30. But how to conciliate this point of view with the last part of sub-paragraph 1 of article 30 which appears to consider one contract of carriage alone regulating successive carriage?

In the minutes of the Warsaw Conference the reporter points out the following on the subject of article 30 [1]. "The question is of successive carriage and *not of successive contracts of carriage.* Only one contract enters into consideration. Article 1 states this precisely. When there is successive carriage, there is one contract performed by several carriers".

We do not share the opinion of the reporter. Article 1 only concerns the case where the successive carriage was regarded by the parties as a single *material* operation. *Legally*, the operations may remain clearly distinct. Even if the carriage is concluded in the form of a series of contracts (as under *a*) it can be called successive carriage within the meaning of article 1. In our opinion, there is an inconsistency in the first sub-paragraph of article 30. If the intention was to apply this article to successive carriage regulated by one contract, then the article should not refer back to the successive carriage considered in sub-paragraph 3 of article 1. If the intention was to make the article applicable also to successive carriage regulated by several contracts, then, in this case, the last part of sub-paragraph 1 of article 30 should be changed.

For reasons which will be later explained, it seems to us that in principle it is better that article 30 should only apply to successive carriage regulated by only one contract.

Before considering the provisions of sub-paragraphs 2 and 3, it should be pointed out still that article 30 only deals with successive carriage *by air* and therefore refers in no way to successive carriage performed partly by air and partly by another means of carriage.

1. Minutes of the IInd International Conference for Private Air Law p. 89.

Responsibility of the successive carriers with regard to goods and baggages

I. *First carrier.*

In the case of loss, damage or delay, the consignor will have recourse against the first carrier who is responsible even if the cause of the loss, damage or delay is manifestly attributable to the subsequent carriers.

In maritime and land successive carriage, the same principle is found. Although the exact reason for this responsibility is controverted, most text writers [1] explain it by saying that the first carrier undertook to send the goods to their destination, and as he has in this way guaranteed the entire carriage he is therefore held to perform it. This also was the idea of the reporter on the first draft convention who, when presenting his report at the first Conference for Private Air Law (Paris 1925) [2] pointed out that, on the subject of successive carriage ".... there is a mandate of which goods are the object".

If one wishes to take as basis the point of view that article 30 is also applicable to successive carriage agreed upon in the form of several contracts, how to explain the integral responsibility of the first carrier? Each carrier has concluded a contract with the consignor and can only guarantee his own activity. That is one of the reasons for which the first sub-paragraph of article 30 should be modified.

II. *Intermediary carrier.*

The consignor and the consignee may both take action against the intermediary carrier, if the accident which caused the loss, damage or delay occurred during carriage performed by him.

When examining articles 12 and 13 of the Warsaw Convention, we said that the determination of the conditions under which action may be taken by the consignor and consignee gives rise to uncertainties [3]. Let us take for example that the loss of the goods has been admitted by one of the intermediary carriers. By virtue of article 13 sub-paragraph 3 combined with article 30 sub-paragraph 3, the consignee has the right of taking action against the carrier. The third sub-paragraph of article 30 states "*one or the*

1. See Josserand op. cit. no. 735: Ripert op. cit. no. 2019.
2. Minutes of the Ist International Conference for Private Air Law, p. 48.
3. See p. 181.

other"; the question arises of whether the consignor in the given case, can also bring an action. In article 12 sub-paragraph 4, it has been provided that the right of the consignor ceases at the moment when that of the consignee begins. However, this article only considers the right of disposition of the goods, and as we have pointed out, it is not clear from the Warsaw Convention whether the right of bringing an action should be connected with the right of disposition of the goods.

Nevertheless, we do not think that the draftsmen of the Warsaw Convention wished to grant a right of action against the carrier, simultaneously to the consignor and the consignee [1], and we consider that in the case of loss, only the consignee should have the right of bringing an action against the carrier performing the carriage during which the accident causing the damage occurred.

III. *Last carrier.*

In the case of loss, damage or delay, the consignee being entitled to delivery shall have recourse against the last carrier. Did the Warsaw Convention wish to impose on the last carrier a responsibility with regard to the consignee as great as that of the first carrier with regard to the consignor?

To be able to answer this question, it will be necessary to examine what the Warsaw Convention wished to be understood by "entitled to delivery". In the first sub-paragraph of article 13 it is stipulated that the consignee is entitled, except in the circumstances set out in article 12, on arrival of the goods at the place of destination, to require the carrier to deliver the goods to him. In this case one can say that the consignee is "entitled to the delivery of the goods".

What is the position of the consignee if the loss of the goods has been admitted by the carrier? He is entitled to enforce the rights which flow from the contract of carriage (sub-paragraph 3 of article 13); that is to say, that he has a right to the reparation of the damages caused by the loss of the goods. Can it be said that in the case of loss, he is entitled to delivery? If the loss has been admitted, there is nothing further to be delivered; it seems to us that the rights considered in sub-paragraph 3 of article 13 are rights for bringing an action and not rights for claiming delivery. Nevertheless, if the point of view is adopted that in the case of

1. See for example Minutes of IInd International Conference for Private Air Law p. 88.

loss the consignee has a right to bring an action, but is not entitled to delivery, one will arrive at declaring that the consignee, within the meaning of article 30, will not have recourse against the last carrier in the case of loss. This does not mean to say that within the meaning of article 30 he will be unable to bring any action against the last carrier. He can bring an action against the last carrier, if he proves that the loss occurred during the carriage performed by him.

What will happen when, at the end of seven days after the goods should have been delivered, they have not yet arrived at their destination? By virtue of article 13, the consignee is in this case authorised to enforce the rights flowing from the contract of carriage against the carrier. If there are successive carriers, against which carrier should the consignee enforce his rights? Article 30 only gives the consignee recourse against the last carrier when he is entitled to delivery. Will he be deprived of all action if he cannot state which was the carriage during which the loss or delay occurred? It is evident that this state of affairs cannot be admitted from the point of view of the consignee.

Should the words "entitled to delivery" be interpreted so that all the rights of the consignee considered in article 13 are included? In so doing, does one impose a too extensive responsibility on the last carrier? It should here be pointed out that the English delegation made a proposal to the Warsaw Conference with a view to giving the two parties entitled, that is the consignor and the consignee, recourse against the first as well as the last carrier. This proposal was rejected above all on the grounds that the consignor would be given a right of action against the last carrier *although the last carrier may never have received the goods* [1]. The same objection can be raised with regard to the right of the consignee, if this right can be exercised against the last carrier, in the case of loss occurring during carriage either by the first carrier, or by one of the intermediary carriers. On the other hand it could be argued that it would be unjust to refuse the consignee entire recourse against the last carrier because the consignee would be in a difficult position if he had to plead his case a long way away or if he had to prove the fault of the intermediary carriers. As regards carriage by rail, it has been stipulated, for this

1. See Minutes of the IInd international Conference for Private Air Law p. 88.

reason, in paragraph 3 of article 42 of the C.I.M., that an action may be brought against the railway of the place of destination, *even if it had not received the goods.*

As regards air navigation, the same solution seems the most practical [1].

The question of whether the words "entitled to delivery" should be interpreted so that these terms include *all the rights of the consignee regarded in article 13*, in our opinion ought to be answered in the affirmative. To disperse any doubts regarding these words, it is nevertheless desirable to modify the third sub-paragraph of article 30 so that it refers to the rights of the consignee considered by article 13 of the Warsaw Convention.

The joint and several liability of the carriers

By virtue of the last phrase of sub-paragraph 3, the first carrier, the last carrier, and the carrier who performed the carriage during which the loss, damage or delay took place, will be jointly and severally liable to the consignor or the consignee. Let us take the example of an action brought against the first carrier by the consignor, which did not succeed. By virtue of the provision under consideration, the consignor can again bring an action, this time against the last carrier. However, it is expressly provided in the second sub-paragraph, that the consignor can only bring an action against the first carrier and the carrier having performed the carriage during which the loss occurred. As we have pointed out, a proposal to give the consignor a right to take action also against the last carrier was rejected, because it was not desired to make the last carrier responsible with regard to the consignor if he had not received the goods. The last phrase regarding the joint and several liability of the carriers seems to us in complete contradiction with this principle.

In carriage by rail, the plaintiff by virtue of article 42 of the C.I.M., may choose between the first railway, the railway of the place of destination or that on the lines of which the accident causing the damage occurred. However, once the right has been used against the chosen carrier, it is exhausted. A joint

1. As far as air carriers members of the International Air Traffic Association are concerned, the definite repartition of liability in the domain of successive carriage cannot fail to be rightly effected by the intermediary of this Association.

and several liability therefore does not exist in this domain [1].

Text of sub-paragraph 3 of article 30

As regards the official French text of the third sub-paragraph of article 30, a deficiency should be pointed out. Although this sub-paragraph also deals with baggage, the rights of the consignee and consignor alone have been mentioned. Provision should be made for an action in favour of the person having a right to the baggage (passenger or holder of the baggage check) against the first carrier, the last carrier or the carrier performing the carriage during which the loss or damage or delay of the baggage occurred. The English text used in the Carriage by Air Act of 1932, makes use of the word passenger.

Successive carriage of passengers

Up to now we have only considered the liability of the successive carriers with regard to the carriage of goods and baggage.

"While the integral responsibility of the first carrier is made indispensable by the fact that it is often impossible for the person interested in the goods to find out on which line the accident causing the damage occurred, the passenger who is a conscious parcel, will usually be able to discover and denounce the carrier responsible for the accident; whether it is a question of derailment, shipwreck, stranding, collision, delay or lack of seats, there will be no doubt regarding the identity of the guilty person, and the victim will be able to make a certain choice amongst the agents co-operating successively in the carriage" [2].

The second sub-paragraph of article 30 justly stipulates that the passenger cannot have recourse against a carrier other than the one performing the carriage during which the accident or the delay occurred.

To summarise our remarks on article 30:

a. the first part of the first sub-paragraph does not agree with the last part.

b. the first phrase of the third sub-paragraph does not agree with the second.

c. the interpretation of the term "entitled to delivery" gives rise to uncertainties: it would be desirable to be more precise.

1. See Brunet op. cit., p. 276.
2. Josserand op. cit., no. 928.

SECTION IV

PROVISIONS RELATING TO COMBINED CARRIAGE

Combined carriage

Article 31.

"(1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

(2) Nothing in this Convention shall prevent the parties in the case of combined carriage from inserting in the document of air carriage conditions relating to other modes of carriage provided that the provisions of this Convention are observed as regards the carriage by air".

The consequence of this article is as follows:

a. only that part of the whole carriage which is made by air is and should be regulated by the régime of the Warsaw Convention.

b. the document covering this part of the carriage can contain conditions relating to other means of carriage.

In the first it has to be considered what forms combined carriage can take.

Air carriage can be combined with

a. carriage by rail.

b. carriage by water.

c. carriage by road.

Of these three methods of collaboration, that considered under letter *a* has already produced various agreements between transport Companies [1]. That considered under letter *b*, though in

1. For the development of this carriage in Europe see I.A.T.A. Information Bulletins: no. VII, p. 15–17; no. IX p. 10–12; no. X p. 13–13; no. XI p. 20–22; no. XII p. 79–82; no. XIII p. 7–13; no. XIV p. 9–14; no. XVI p. 48–52; no. XVII p. 16–21; no. XVIII p. 36–41.

existence, is not much practised yet. Combined air-sea carriage is mostly made use of for mail. In order to hasten the carriage of mail, the great French and German lines carry a seaplane on board, which is catapulted from the deck of the liner when it is at a certain distance from the coast; M. Ripert, in an article which appeared in the "Droit Aérien" [1] considered the legal questions arising from such carriage.

As regards collaboration with the means of carriage by road, we have already pointed out that transport between towns and airports and vice versa, is performed, in most cases, by car. Nevertheless, there is no question here of combined carriage. It is accessory carriage performed by the air carrier.

In order to judge whether the provisions concerning combined carriage contained in the Warsaw Convention are sufficient, the manner in which this problem has been solved in practice, should be examined.

At the present moment only air-rail traffic has been made the subject of a general agreement between the air transport companies and the railway companies. As long ago as 1926, the League of Nations and the International Chamber of Commerce recommended the I.A.T.A., representing the air Companies, and the I.R.U., representing the railways, to study the possibility of introducing a system of combined carriage.

Combined air-rail carriage of passengers regulated nationally

Since 1928 several air navigation companies affiliated to the I.A.T.A. began to make agreements with the railway companies of their countries [1]. These agreements were made principally with a view to facilitating the carriage of passengers unable to continue their journey by air owing to the flight being broken for one or other reason. Two systems were applied:

1. the German system, by which the passengers carried by a Deutsche Lufthansa aeroplane which has had an accident, could exchange their tickets against a ticket of the Deutsche Reichsbahn to the station shown on the air ticket;

2. the Belgian system, according do which the pilot had in his

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1. "Les Hydravions au service des Paquebots" Droit Aérien 1931, p. 353.
2. See Döring in Droit Aérien 1932 p. 42 et seq.

possession requisition bulletins against which he could ask for railway tickets for any place in Belgium.

International regulation

In order to arrive at an international agreement on this question, negociations between the I.R.U. and the I.A.T.A. were begun, in 1929. In the draft form of contract to be entered into between the railway administrations, affiliated to the I.R.U. and the air companies affiliated to the I.A.T.A. for passenger and baggage traffic, the Belgian system was advised. In 1930, a form of contract was approved by the I.A.T.A. and the I.R.U.

By reason of the form of contract, the I.A.T.A. elaborated an agreement containing provisions concerning the legal relation between the air companies themselves. This agreement came into force on 1st March 1932 for all the members of the I.A.T.A. having, at that time, signed the agreement and concluded the contract adopted by the I.A.T.A. and the I.R.U.

Basis of the form of contract

a. On the requisition of the air navigation company, the railway stations issue tickets and despatch baggage without payment in cash. The tickets are issued on the production of requisition bulletins (the form of which is determined in the agreement). These bulletins can be established for a destination different to that on the air ticket [1].

b. The contracts will be signed in each country by an air company of the same nationality as the railway company or companies, and this air company warrantees all the air companies affiliated to the I.A.T.A. and operating in the country in question, with regard to the settlement with the railway company or companies for debts arising from the contract.

c. In the Agreement made between the members of the I.A.T.A., it is stipulated that every air company must pay to the railway administrations in its respective country the costs of carriage arising from the requisitions of another air company adhering to

1. The requisition bulletin has the advantage of leaving the passenger with the air ticket and allowing him by virtue of article 21 of the General Conditions of Carriage of the I.A.T.A. to get back, if necessary, the money from the air company having issued the ticket.

the Agreement; the air companies which have made these requisitions must pay the sums in question to the air company which paid the railway administrations.

From what is said under *a*, one sees that as regards carriage by rail, its own legal régime is maintained; the passenger, in accepting a railway ticket issued on a requisition bulletin, concludes a new contract of carriage, to which the ordinary conditions of carriage by rail are applicable. The only difficulty which may arise from the point of view of the liability of the air carriers or carriers by rail is that of the delimitation of each régime. It is, however, certain that for the rules of the Warsaw Convention to be applicable, the victim must prove, by virtue of article 17 of the Warsaw Convention, that the accident which caused the damage took place on board the aircraft or in the course of any of the operations of embarking or disembarking [1]. In the case of damages resulting from delay, he will have to prove that this delay occurred during carriage by air [2].

Seeing that the passenger, in accepting the railway ticket, issued on the production of the requisition bulletin, has concluded a new contract of carriage, he could never bring an action against the railway company owing to an accident arising from carriage by air.

Combined air-rail carriage of passengers in the U.S.A.

When due to weather or other conditions it is necessary for an airservice to be cancelled at some intermediate point, some airtraffic companies in the U.S.A. give the passenger a check for the proportion of the total fare paid by him for the portion of his trip over which he is not carried by air due to the cancellation. These companies have made arrangements with railroads to cash these checks.

Certain other airtraffic companies follow a different practice in that they have arrangements with the railroads by which, when their planes are cancelled en route, they issue to the passenger an order for railtransportation to destination, which order is presented to the railroad station in exchange for a rail ticket.

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1. For the interpretation of these words see p. 192.
2. See p. 207.

Combined air-rail carriage of goods

Also in this domain, national regulation of air-rail carriage preceded international regulation. Since 1927, in several countries, notably in Belgium, England, France, Germany, Hungary, Sweden and Switzerland, agreements concerning combined air-rail carriage of goods were concluded. There were again two systems:

a. the German system, by which the railway, as agents or servants of the air company, took their place. In this system, carriage was performed only on the basis of the conditions of carriage of the I.A.T.A.

b. the Belgian system, by which each carrier maintained the rules of liability relating to his mode of carriage, the railway administrations and the air companies both acting as contracting parties with regard to the consignor.

In 1931, the representatives of the I.R.U. and of the I.A.T.A. met to study the elaboration of a convention for the introduction of a system of combined air-rail traffic for goods. While in the agreement concerning air-rail passenger and baggage traffic, there was only the question of elaborating a simple accountancy method, which did not give rise to any great difficulties, it was quite another matter as regards air-rail goods traffic, because in this domain, it was indispensable to create a uniform contract of carriage.

The I.A.T.A. reporter presented to the competent Sub-Committee of the I.R.U. two different draft agreements concerning air-rail goods traffic, of which the first was based on the system of agents and the second on the system of contracting parties.

The second system was the more favourably received during the discussions. In this system, the air companies and the railway administrations are both regarded as contracting parties with the consignor.

"It must be admitted — Dr. Döring points out [1] — that this system satisfies not only the railway companies because it takes into account their various regulations, but also the clients because the presentation of their complaints and claims is considerably simplified. And this system could also satisfy the air companies.

1. See Revue Générale de Droit Aérien 1932 p. 49.

The system of agents had on several occasions proved to be unfortunate for the air companies, because under this régime they were obliged to accept every complaint, whereas every refusal, however well justified, of paying indemnity, drew exclusively on them the dissatisfaction of the injured person".

The agreement was therefore based on the system which had already given proof of its effectiveness in practice in Belgium. The definitive text was adopted by the I.A.T.A. in September 1932, and by the I.R.U. in March 1933 [1]. In article 2 of the Agreement, it is provided that in air-rail carriage of goods

a. the general conditions of carriage of goods by air and rail annexed to the agreement;

b. the tariffs for the air-rail goods traffic of the railway administrations and air transport companies adhering to the Agreement, would be valid.

The consignment note drawn up in conformity with the Conditions of Carriage of goods by air and rail would be the only valid traffic document. This consignment note is very similar to the air consignment note drawn up by the I.A.T.A.; the only differences are some supplementary remarks which were considered necessary by the I.R.U.

International combined carriage of goods

The agreement applies to all international air-rail carriage of goods. International carriage is here considered as all carriage performed in the territory of two States, even if the carriage by air or the carriage by rail considered separately is performed within the frontiers of one State. Carriage by air performed only within the frontiers of one State does not fall under the régime of the Warsaw Convention as this Convention only regards international carriage. If, however, such carriage by air is combined with carriage by rail, the principles of the Warsaw Convention are applicable by virtue of the Conditions of Carriage for goods in air-rail traffic in which the provisions of the Warsaw Convention are incorporated.

During the Session of the Second Committee of the C.I.T.E.J.A.

1. The text of the Agreement concerning air-rail goods traffic and the text of the General Conditions of Carriage of goods by air and rail can be found in I.A.T.A. Information Bulletin no. XVIII p. 63 and following.

on 20th July 1932, the Reporter on the Warsaw Convention pointed out [1] that in his opinion, the Warsaw Convention should be completed with regard to the scope of the word "international" in the second paragraph of article 1 as follows:

"In the case of combined carriage, "international carriage" is understood to mean the carriage by air of by rail where the place of departure and the place of destination are situated within the territories of two High Contracting Parties, even when, taken separately, each part of the carriage is performed within the frontiers of one State".

If this modification was accepted, one would derogate from the general point of view recognised by the draftsmen of the Warsaw Convention of not considering internal carriage in order not to infringe on national laws. We have already said that the non-application of the provisions of the Warsaw Convention to internal carriage give rise to serious disadvantages, which have led several countries to apply the rules of the Warsaw Convention also to internal traffic. Consequently, any derogation from the rule that the Warsaw Convention can only apply to international carriage seems to us fully justifiable.

Liability of the carriers by virtue of the General Conditions of Carriage of goods by air and rail

Paragraphs 2 and 3 of article 19 of the above Conditions, provide that the liability of the air carrier, in the case of loss or damage of goods, or in the case of delay, covers the periods defined in articles 18 and 19 of the Warsaw Convention. The liability of the railway for loss or damage of goods or when the delay in delivery has been exceeded, covers the period during which the goods are in the charge of the railway. Where it is impossible to determine when the damage occurred, paragraph 6 of article 19 stipulates that the liability is governed entirely by the provisions relating to air carriage.

"Since it will often be impossible to determine when the damage occurred, one could not do other than create *a régime of uniform liability* for railways and air companies for such a case. For this the provisions relating to liability valid for air carriage were chosen".

1. Minutes p. 55.

For creating a régime of uniform liability when it is impossible to determine when the damage occurred, paragraph 6, which only refers back to the provisions valid for carriage by air, seems to us insufficient. The provisions valid for carriage by air provide that the air carrier can exclude his liability by proving that he and his agents have taken all the necessary measures to avoid the damage. In the case regarded in paragraph 5 of article 19, would the proof mentioned above be sufficient to exonerate the *railway* as well as the air carrier from all liability. It is evident that the proof of non-attributability for the non-performance of the contract of combined carriage on the part of the air carrier does not entail the non-attributability for the non-performance of the contract of carriage on the part of the railway. Should the air carrier also prove that the railway had, too, taken the necessary measures? It is clear that it is not for the air carrier to make this proof. The General Conditions of Carriage by air and rail do not answer these questions, and it is indispensable, if for certain cases a régime of uniform liability is to be set up, that the basis for this régime should be stated precisely, the reference to the provisions valid for carriage by air not being sufficient.

Another objection must be made to the provision in article 19, paragraph 6 of the General Conditions of Carriage by air and rail. Why should a presumption of liability be stipulated with regard to the *air carrier* in all cases where it is not possible to determine the period during which the damage occurred? When the carriage performed by rail is the greater part of the complete carriage, the presumption of liability with regard to the air carrier is absolutely unjustifiable.

Combined carriage of goods in the U.S.A.

Before concluding our remarks on art. 31 mention should be made of the system of combined carriage of goods as it is practised in the U.S.A.

The principal airlines in the U.S.A. carry goods only under a contract with the Railway Express Agency, which agency handles the pick up, delivery, drawing up of consignment notes (the so-called "air way bill"), collection of charges etc. Revenue and expenses are pooled for all of the lines participating in this arrangement and each line receives its proper proportion of the

revenue after deducting expenses incurred by the Railway Express Agency in the handling of this cargo. The Railway Express Agency is also the agent for the handling of express on the raillines in the U.S.A. In the case of a combined carriage air-rail, the Railway Express Agency issues one way bill, this being the "air way bill" which is also used when the entire carriage is by air. In such cases of combined carriage both the railroad company and the air company are operating as agents of the Railway Express Agency, which handles any adjustments due to damage of the goods. If the injury to the goods is one which can be ascertained by an examination of the goods at the time of transfer from air to rail (or vice versa), it is easy to determine whether the air carrier or the rail carrier is responsible. If, however, the damage is concealed and is not detected by an examination of the goods when they are transferred from the aircarrier to the railcarrier, the Railway Express Agency makes the adjustment with the patron and charges the cost of the adjustment proportionately between the aircarrier and the railcarrier in proportion to the revenue derived by each carrier.

The question arises of whether the Warsaw Convention at its next revision should be completed by provisions regulating combined carriage. We consider that the answer to this question should be in the negative. Though air-rail carriage, especially in the U.S.A. has in the last years developed to a great extent, the other ways of combined carriage, i.e. carriage by air combined with carriage by water and carriage by road, are not yet much used in practice. Before the question of combined carriage is regulated by law, it would be preferable to wait till practice has given us more experience in this domain.

SECTION V

GENERAL AND FINAL PROVISIONS

Infringement of the rules as to jurisdiction fixed in the Warsaw Convention

Article 32.

"1) Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28".

The reason for the first paragraph of this article being inserted is easy to understand. Seeing that the Warsaw Convention has determined limits of liability, that it has rejected the non-liability clauses and that it has determined the competent courts, it is evident that the contracting parties should be prohibited in the Convention to modify one of these provisions by private agreement.

With regard to the second part of the article relating to arbitration clauses, examination should be made of the contents of the corresponding article in the draft Convention presented to the Warsaw Conference, which read as follows:

"Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. Nevertheless, arbitration clauses are recognised within the limits of the present convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 26 above".

By virtue of this article, the arbitration clauses in the carriage of passengers, as well as in the carriage of goods, are therefore recognised.

The German delegation proposed to the Conference to suppress the faculty of arbitration [1]. It considered, with regard to the carriage of passengers, that it was dangerous to permit the insertion of such a clause, because the important transport companies would always make use of this clause and would, in this way, infringe on the competence of the courts.

The Conference agreed with this point of view, but considered that commercial arbitration for goods should be recognised and added to the article in question, the words "for the carriage of goods".

Consequently, in the carriage of passengers, the transport undertaking is prevented from imposing arbitration in advance. It is evident that, the difficulty between the passenger and the undertaking once arisen, the possibility of regulating the difference by arbitration always exists.

Refusal to conclude a contract of carriage

> **Article 33.**
> "Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Convention".

Contrary to the provision in the Bern Convention in which an obligation to carry is imposed [2] on the railway carrier, the Warsaw Convention has confirmed in article 33 the principle of contractual freedom.

It must be admitted that this difference in régime is fully justified.

The railway has a monopoly. "Since the railway is the only channel through which all goods between two given centres may pass, it is indispensable that all products should do so without any distinction being made regarding their nature, their place of

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1. See Minutes of the IInd Conference for International Private Air Law, p. 85.
2. See article 5 C.I.M. and article 4 C.I.V.

departure or their destination; the theoretical point of view of the objective universality of carriage must become a reality as complete as possible" [1].

The situation of the carrier by air corresponds rather to that of the maritime carrier. Neither the first nor the second have a complete monopoly [2].

The fact that air companies generally need a concession to be able to operate regular air lines, cannot be considered as entailing a general monopoly of traffic. There can therefore be no objection to the right given to the carrier to refuse to conclude a contract of carriage.

Although in practice some cases where the air carrier has exercised his right for political reasons have arisen, it is evident that such cases will happen only very rarely.

Experimental carriage and carriage performed in extraordinary circumstances

> **Article 34.**
> "This Convention does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business".

This article is a consequence of a French proposal made at the Warsaw Conference. Its object is to provide for exceptional carriage, notably when an aeroplane is put on a new line which has been created, for example, as an experiment.

On this subject, the reporter pointed out the following:

"It is evident that the first aeroplanes that are flown on a new line may carry not only mail but also goods and perhaps even passengers. It is logical enough to make an exception in their favour since this carriage is not normal. The case is similar for carriage performed in exceptional circumstances: e.g. a regular air line machine is forced to land during its journey: a second

1. See Josserand op. cit. No. 94. It is to be observed however, that through the development of airservices the character of the monopoly of the railways is being changed.
2. For maritime law in agreement with this point see Ripert, Droit Maritime, No. 1980.

machine is sent by the carrier to take the passengers and goods of the machine that broke down. This carriage cannot be made under normal conditions and it is right that the régime of liability should not necessarily apply to such cases".

The Conference, by a great majority, adopted the French proposal. In our opinion many arguments militate in favour of this principle. Air navigation will still be for a long time in an experimental phase [1]. It would not be right to impose on a carrier performing such experimental flights a liability such as provided by the Warsaw Convention. The Convention should also not be applicable when carriage is performed outside the normal scope of the carrier's business, such as carriage performed for scientific, religious etc. purposes. The Convention provides for the drawing up of traffic documents containing *inter alia* the agreed stopping places, etc. It is evident that with regard to the carriage prescribed above taking place, for example, in Central Asia, the carrier will never be able to comply with these provisions.

Ratification and accession

With regard to ratification, article 37 provides that the instruments of ratification of the Convention shall be deposited in the archives of the Ministry for Foreign Affairs of Poland.

In article 38 it is provided that the Warsaw Convention shall remain open for accession by any State. Accession shall be effected by a notification to the Polish Government.

In Appendix B will be found a list of the States which have ratified the Convention and a list of the States which have adhered to it.

Denunciation

In article 39 it is provided that each of the High Contracting Parties may denounce the Convention by a notification made to the Polish Government. This denunciation will take effect six months after the notification of denunciation. The Convention, up to the present, has not been denounced by any of the High Contracting Parties.

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1. To give an example. Experiments on flight in the stratosphere have only just begun.

Faculty given to States to exclude the application of the Convention to certain of their territories

Article 40 allows States the faculty of excluding the application of the Warsaw Convention to all or any of their colonies, protectorates, territories under mandate or any other territory subject to their sovereignty or their authority, or any territory under their suzerainty, either at the time of signature or by separate denunciation. The contents of this article, which was proposed by the British delegation, corresponds to article 13 of the Brussels Convention. It will be seen from the list in Appendix B that only Great Britain has declared that His Majesty's acceptance of the Convention in respect of the United Kingdom does not apply to any of His Colonies, Protectorates, Territories under mandate or any other territory under His suzerainty.

Revision

In article 41 the faculty is provided for each of the High Contracting Parties, not earlier than two years after the coming into force of the Convention, to call for the assembling of a new international Conference in order to consider any improvements which may be made in this Convention. To this end, the State in question will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such Conference.

Additional Protocol

We have already seen that up till now only the U.S.A. has made use of the reserve contained in the protocol.

CONCLUSION

In the foregoing Chapters an effort has been made to demonstrate the necessity of a uniform regulation of the liability of the air carrier, not only in international but also in national air commerce. The fact that 28 States have already ratified the Warsaw Convention and that in 15 States the rules of this Convention either are or in the near future will be applied to internal carriage, is sufficient proof of the importance this Convention presents for air traffic in general.

Taken as a whole the Convention has given that degree of unification which the most urgent needs of air commerce demanded. The recognition of different *lacunae* in the Convention does not alter the fact that its adoption has already proven to achieve in practice most beneficial results. It has effected a compromise between anglo-saxon and continental law and has arrived at a right balance of the opposing interests of the carrier and his contracting parties.

By shifting the burden of proof on the shoulders of the carrier, the Convention has provided for the interests of the passengers. The interests of the carrier have been taken into consideration in so far the Convention allows the carrier to prove negatively that he has committed no fault and limits the liability if he cannot furnish such proof.

Air commerce was born less than two decades ago and the real development only started in the last decade. The efficiency with wich this rapid development is followed by adequate legislation, deserves universal appreciation.

CONVENTION

FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR [1]

CHAPTER I

Scope — Definitions

Article 1

1) This Convention 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.

2) For the purposes of this Convention the expression "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 High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.

3) A carriage to be performed by several successive air carriers is deemed, for the purposes of this 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 merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

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1. The translation of the French text of the Convention given here is taken from the British Carriage by Air Act of 1932.

Article 2

1) This Convention applies to carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1.

2) This Convention does not apply to carriage performed under the terms of any international postal Convention.

CHAPTER II

Documents of carriage

SECTION I. — PASSENGER TICKET

Article 3

1) For the carriage of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

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, and that if he exercises the right, the 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 this Convention.

2) The absence ,irregularity or loss of the passenger 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 this Convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this Convention which exclude or limit his liability.

SECTION II. — LUGGAGE TICKET

Article 4

1) For the carriage of luggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a luggage ticket.

2) The luggage ticket shall be made out in duplicate, one part for the passenger and the other part for the carrier.

3) The luggage ticket shall contain the following particulars:

a) the place and date of issue;

b) the place of departure and 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 amount of the value declared in accordance with Article 22 (2);

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

4) 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 this 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 Convention which exclude or limit his liability.

SECTION III. — AIR CONSIGNMENT NOTE

Article 5

1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.

2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.

Article 6

1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

3) The carrier shall sign on acceptance of the goods.

4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

Article 8

The air consignment note shall contain the following particulars:

a) the place and date of its execution;

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, and that if he exercises that 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 value declared in accordance with Article 22 (2);

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 this Convention.

Article 9

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 Article 8 *a*) to *i*) inclusive and *q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

Article 10

1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

1) The air consignment note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *prima facie* evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

Article 13

1) Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

Article 14

The consignor and the consignee can respectively enforce all the rights given them by Article 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

1) Article 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2) The provisions of Articles 12, 13 and 14 can only be varied by express provision in the air consignment note.

Article 16

1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

CHAPTER III

Liability of the carrier

Article 17

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.

Article 18

1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or trans-shipment, 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.

Article 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

Article 20

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

2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

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

Article 22

1) In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the

said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

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

3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

4) The sums mentioned above shall be deemed to refer to the French franc consisting of $65\frac{1}{2}$ milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.

Article 23

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

Article 24

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

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

Article 25

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

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

Article 26

1) Receipt by the person entitled to delivery of luggage or goods without complaint is *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of carriage.

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

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

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

Article 27

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

Article 28

1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court 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.

2) Questions of procedure shall be governed by the law of the Court seised of the case.

Article 29

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

2) The method of calculating the period of limitation shall be determined by the law of the Court seised of the case.

Article 30

1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph

of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

2) In the case of carriage of this nature, the passenger or his representative can take action only against the carrier who performed the carriage during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or 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 destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.

CHAPTER IV

Provisions relating to combined carriage

Article 31

1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Convention apply only to the carriage by air, provided that the carriage by air falls within the terms of Article 1.

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

CHAPTER V

General and final provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction shall be null and void. Nevertheless for the carriage of goods arbitration clauses are allowed, subject to this Convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of Article 28.

Article 33

Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage, or from making regulations which do not conflict with the provisions of this Convention.

Article 34

This Convention does not apply to international carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, nor does it apply to carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this Convention means current days not working days.

Article 36

The Convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

1) This Convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which will notify the deposit to the Government of each of the High Contracting Parties.

2) As soon as this Convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties who shall have ratified and the High Contracting Party who deposits his instrument of ratification on the ninetieth day after the deposit.

3) It shall be the duty of the Government of the Republic of Poland to notify to the Government of each of the High Contracting Parties the date on which this Convention comes into force as well as the date of the deposit of each ratification.

Article 38

1) This Convention shall, after it has come into force, remain open for accession by any State.

2) The accession shall be effected by a notification addressed to the Government of the Republic of Poland, which will inform the Government of each of the High Contracting Parties thereof.

3) The accession shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

1) Any one of the High Contracting Parties may denounce this Convention by a notification addressed to the Government of the Republic of Poland, which will at once inform the Government of each of the High Contracting Parties.

2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the Party who shall have proceeded to denunciation.

Article 40

1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of accession declare that the acceptance which he gives to this Convention does not apply to all or any of his colonies, protectorates, territories under mandate, or any other territory subject to his sovereignty or his authority, or any territory under his suzerainty.

2) Accordingly any High Contracting Party may subsequently accede separately in the name of all or any of his colonies, protectorates territories under mandate or any other territory subject to his sovereignty or to his authority or any territory under his suzerainty which has been thus excluded by his original declaration.

3) Any High Contracting Party may denounce this Convention, in accordance with its provisions, separately or for all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or to his authority, or any other territory under his suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this Convention to call for the assembling of a new international Conference in order to consider any improvements which may be made in this Convention. To this end he will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such Conference.

This Convention done at Warsaw on the 12th October, 1929, shall remain open for signature until the 31st January 1930.

(Here follow the signatures on behalf of the following countries:

Germany, Austria, Belgium, Brazil, Denmark, Spain, France, Great-Britain and Northern Ireland, the Commonwealth of Australia, the Union of South Africa, Greece, Italy, Japan, Latvia, Luxembourg, Norway, the Netherlands, Poland, Roumania, Switzerland, Czecho-Slovakia, the Union of Soviet Socialist Republics, and Yugoslavia).

Additional protocol

(With reference to Article 2)

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of accession that the first paragraph of Article 2 of this Convention shall not apply to international carriage by air performed directly by the State, its colonies, protectorates or mandated territories or by any other territory under its sovereignty, suzerainty or authority.

(This additional Protocol was signed on behalf of the same countries as those above mentioned).

LIST OF STATES WHICH HAVE RATIFIED THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR SIGNED AT WARSAW ON 12th OCTOBER 1929

As on 1st October 1937

	Date of deposit of instruments of ratification.	Instrument of ratification contains.
Spain	31st March 1930	Convention Add. Prot.[1]
Brazil	2nd May 1931	Convention Add. Prot. Final Prot.
Yougoslavia	27th May 1931	Convention Add. Prot. Final Prot.
Roumania	8th July 1931	Convention Add. Prot.
France	15th November 1932	Convention Add. Prot.[2]
Latvia	15th November 1932	Convention Add. Prot.
Poland	15th November 1932	Convention Add. Prot.
Great Britain and Northern Ireland	14th February 1933	Convention Add. Prot.[3]

1. The Spanish Government has confirmed that its colonies and the Spanish zone of the Maroco Protectorate are also Parties to the Convention.
2. The French Government makes no reserve regarding the application of the Convention to Colonies, Protectorates or countries under French mandate.
3. With the following declaration:
   "In accordance with the provisions of Article 40 of the Convention for the Unification of Certain Rules relating to International Carriage by Air I hereby declare, at the moment of depositing the ratification of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, in respect of the United Kingdom of Great Britain and Northern Ireland, that His Majesty's acceptance of the present Convention in respect of the United Kingdom does not apply to any of His Colonies, Protectorates, Territories under Mandate, or any other territory under His suzerainty".

	Date of deposit of instruments of ratification.	Instrument of ratification contains.
Italy	14th February 1933	Convention[1]
Netherlands (including Dutch East Indies, Surinam and Curaçao	1st July 1933	Convention Add. Prot.
Germany	30th September 1933	Convention Add. Prot.
Switzerland	9th May 1934	Convention Add. Prot.
U.S.S.R.	20th August 1934	Convention Add. Prot.
Czekoslovakia	17th November 1934	Convention Add. Prot.
Commonwealth of Australia (including Papua, Norfolk Island and the territories under Mandate of New Guinea and Nauru)	1st August 1935	Convention Add. Prot.[2]
Belgium	13th July 1936	Convention Add. Prot.
Norway	3rd July 1937	Convention Add. Prot.
Denmark	3rd July 1937	Convention Add. Prot.

LIST OF STATES WHICH HAVE ADHERED TO THE CONVENTION

	Date of notification of accession	
Mexico	14 thFebruary 1933	Convention Add. Prot.
Lichtenstein	9th May 1934	Convention Add. Prot.
United States of America	31st July 1934	Convention/ Add. Prot.
India	20th November 1934	Convention Add. Prot.
Bahamas Barbados Bermudas British Guina British Honduras	3rd December 1934	Convention Add. Prot.

1. The Italian Government has declared that the Convention extends also to Italian insular possessions in the Egean Sea and to Italian colonies.
2. With the reserve stipulated in the Additional Protocol.

	Date of notification of accession.
Ceylon	3rd December 1934 Convention Add. Prot.
Cyprus	
Falkland Isles and dependencies	
Fiji	
Gambia (colony and protectorate)	
Gibraltar	
Gold Coast	
a) Colony	
b) Achanti	
c) Northern Territories	
d) Togo under British Mandate	
Hong-Kong	
Jamaica (including the Turks and Caicos Isles and the Cayman Isles	
Kenya (Colony and protectorate)	
Leeward Isles	
Antigua	
Dominica	
Montserrat	
St. Christopher and Nevis	
Virgin Isles	
Malta	
Mauritius	
Nigeria	
a) Colony	
b) Protectorate	
c) Cameroon under British Mandate	
Northern Rhodesia	
Nyasaland Protectorate	
Palestine (with the exception of Transjordania)	
St. Helen and Ascension	
Seychelles	
Sierra Leone (Colony and protectorate)	
Somaliland Protectorate	
Straight Settlements	
Tanganyika Territory	
Trinity and Tobago	
Protectorate of Uganda	
Western Pacific, Islands of the	
Protectorate of the British Salomon Isles	
Colonies of the Gilbert and Ellice Isles	
Windward Iles	
Grenada	
St. Lucia	
St. Vincent	
Zanzibar Protectorate	

	Date of notification of accession.	
Southern Rhodesia	3rd January 1935	Convention Add. Prot.
Free City of Dantzig (through the intermediary of Poland)	18th March 1935	Convention Add. Prot.
Irish Free State	20th September 1935	Convention Add. Prot.
Hungary	29th May 1936	Convention Add. Prot.
Malay States *a*) Federated Malay States: Negri Sembilars Pahang Perak Selanger *b*) Non-Federated Malay States: Jehore Kedah Kelantan Perlis Trengganu Bimel Northern Borneo Sarawak Tonga	2nd July 1936	Convention
Finland	3rd July 1937	Convention Add. Prot.
Sweden	3rd July 1937	Convention Add. Prot.

The date of the coming into force of the Convention for Brazil, France, Latvia, Poland, Roumania, Spain and Yougoslavia was the thirteenth February 1933; for the States which deposited their instruments of ratification at the Polish Government after the 15th November 1932 (or which notified their accession), the Convention came into force on the 90th day after the date of these deposits (or these notifications of accession made to the Polish Government).

No High Contracting Party has, up to the present, denounced the Convention.

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ABBREVIATIONS

Brussels Convention	=	Convention for the unification of certain rules relating to Bills of Lading (August 25th 1924).
C.I.M.	=	Convention on the transport of Goods by Rail (Berne Convention, 23rd November 1933).
C.I.V.	=	Convention on the transport of passengers and luggage by rail (Berne Convention, 23rd November 1933).
C I T E J.A.	=	Comité International Technique d'Experts Juridiques Aériens.
I.A.T.A.	=	International Air Traffic Association.
I.R.U.	=	International Railway Union.
Rome Convention	=	Convention for the unification of certain rules relating to damage caused by Aircraft to third parties on the surface (Rome, 29th May 1933).
Warsaw Convention	=	Convention for the unification of certain rules relating to international carriage by air (Warsaw, 12th October 1929).

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