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COMMENTS ON ARTICLE 20 OF THE ROME CONVENTION OF 1952

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ARTICLE 20 of the 1952 Convention on Surface Damage caused by Foreign Aircraft to Third Parties presents a new approach to the solution of some of the most difficult problems in the field of private international law.

In substance the Article deals with so many international, political and legal problems that great credit must be given to the ICAO Legal Committee for their success in completing such an undertaking. Even if we find here and there in the Article provisions which do not satisfy our expectations, we must bear in mind that on an international level workable agreements are based on compromises which are by nature often not so properly drafted as they might be.

Before turning to comment on Article 20, it seems necessary to express a point of view on the basic question of interpretation in regard to the Article we are dealing with. Interpretation in the real sense is needed only if the legal document is not clear enough, or if its consequences with reference to a particular situation cannot be exactly determined.¹ International law has at its disposal a set of rules of interpretation, which originated historically in Roman Law and later on in Civil Law. The Permanent Court of International Justice, now the International Court of Justice, repeatedly applies interpretation rules typical of Civil Law if it is faced by lack of such rules in the Law of Nations itself. This development will be seen as a natural product of the Civil Law, if one realizes that the overwhelming majority of national legal bodies all over the world follow this type of legal thinking.² Furthermore the character of Civil Law interpretation is in itself more advantageous than the traditional Common Law method.³

The whole Rome Convention of 1952 contains so much substantive and procedural law unified on an international level that it should be interpreted from an international point of view and not from the point of view of national laws, in order to obtain real unification. On an international basis however, the most advantageous technique of interpretation seems to be, as previously indicated, the Civil Law tech-

¹ Hudson, *The Permanent Court of International Justice 1920-1942*. (New York, 1943) p. 640.

² Schnitzer, *Vergleichende Rechtslehre* (Basel, 1945), pp. 127-274.

³ Gutteridge, *Comparative Law* (2d ed., Cambridge, 1949).

nique. In this connection it might be pointed out, that at the Hague on March 27, 1931 a Protocol was signed, recognizing the competence of the Permanent Court of International Justice to interpret the Hague Conventions on Private International Law.⁴

Thus a very important step was taken in the direction of greater unification, and it is suggested that in the future a similar step should be taken in regard to the Rome Convention for the sake of a real international private law: namely international facts governed by real international private law, and not only by the old private international law which is nothing more than national law applied to international facts. If the above proposal is regarded as too far reaching for the time being, at least the possibility of advisory opinions of the International Court of Justice should be used, as suggested by Drion.⁵

From this short introductory outline of our approach we turn to an analysis of Article 20, paragraph by paragraph.

ARTICLE 20 (1) (ORIGINAL ENGLISH TEXT)⁶

"1. Actions under the provisions of this Convention may be brought only before the courts of the Contracting State where the damage occurred. Nevertheless, by agreement between any one or more claimants and any one or more defendants, such claimants may take action before the courts of any other Contracting State, but no such proceedings shall have the effect of prejudicing in any way the rights of persons who bring actions in the State where the damage occurred. The parties may also agree to submit disputes to arbitration in any Contracting State."

In this paragraph there are three provisions which must be taken into consideration; first the provision for a single forum, second the provision for agreement, and third the provision for arbitration.

i Single Forum:

The Conference in Rome favored the single forum solution for many reasons. The most important reason for not giving the injured party a free choice as among several fora was the fact that the limit of liability established by the Convention had to be protected. If claims had to be reduced, then obviously one court should deal with that reduction. Other arguments in favor of a single forum are the following: if an aircraft caused damage in a particular country, it is obvious that the damage would affect persons in that country and the property of such persons. The case of damage caused in airports to persons of many nationalities is always to be considered as an exceptional one. Therefore, in most of the cases, the injured party would find it advantageous to bring his action in a court of his own country.

So we admit that the victim would generally prefer to have the forum at the place where the accident occurred but the same may not

⁴ Hudson, *International Legislation*, vol. V., p. 933.

⁵ Drion "Towards a Uniform Interpretation of the Private Air Law Conventions," 19 *JRL OF AIR LAW & COM.*, 423, 1952.

⁶ ICAO Doc. 7364.

always apply to the operator. The operator might consider it more advantageous to have the suit brought in a court of the country where he has his assets. He might also decide that his national judge might give him a more favorable decision than elsewhere; at least a better decision than a judge of the place where the damage occurred. There is also the case where the claims presented to the operator are less than the limits provided for in the Convention. In this case the operator would have no special interest in going before the judge of the place of the accident. Nevertheless, it was pointed out during the discussion in the ICAO Legal Committee⁷ that an operator engaging in air navigation within the territory of a certain state accepts the protection of the law of that state, and makes use of its navigational aids and facilities; therefore it would not appear unreasonable that he should be subject to the decision of the court of that state. Even if those thoughts are not expressly mentioned in Article 20 (1), they are nevertheless implicitly contained and no interpretation must overlook them. Furthermore, the single forum solution has the advantage of reducing legal costs and of facilitating the production of evidence.

Very wise is the provision in paragraph (1) "that actions may be brought only before the courts of the Contracting State," because the selection of the competent national court must be left to the national laws of each state in order to make it easier for them to adhere to the Convention. But nothing done by man is so perfect that one cannot find objections to it and here too we can point out some difficulties. If we look at Article 30 of the Convention we read: "territory of a State means the metropolitan territory of a State and all territories for the foreign relations of which that State is responsible." Now, comparing Art. 30 with the above mentioned provision of Art. 20, one can get the impression that it would be quite possible to sue the operator in far distant courts, even in the same territory. This situation can only be avoided if such a state has a national procedural law according to which the court in that part of the state where the accident happened has an exclusive competence of jurisdiction. It is even possible to think of cases in which surface damage by one aircraft can be caused in two states which severely endangers the idea of the single forum. Further, it is perhaps doubtful where the operator must be sued, if the incident giving rise to the damage and the damage itself occur in different jurisdictions; Art. 20 says: the courts of the Contracting State where the damage occurred have jurisdiction, whereas according to Art. 19 the date of the incident is the beginning of the period of notification and obviously incident and damage is not the same. To us the following interpretation seems to be the best one in order to avoid any trouble; Art. 19 deals only with the question of the time during which an action is to be brought, or the notification of such claims is to be made. This Article has nothing to do with the question of jurisdiction. On the other hand, Art. 20(1) settles in relation to the national law

⁷ ICAO Doc. 7157 LC 130, p. 362.

which court has jurisdiction in a particular case. Therefore the Articles need not be regarded as mutually contradictory.

ii. Agreement:

As an alternative to the primary provision of Art. 20, namely, to bring an action before a court of the state where the damage occurred, it is possible by agreement between any one or more claimants and any one or more defendants, to sue the operator in another Contracting State. However, if we read this provision in connection with Art. 20(9) which says "the court to which application for execution is made shall refuse execution of any judgment rendered by a court of a State other than that in which the damage occurred until all the judgments rendered in that State have been satisfied," we must admit that this provision of para. (9) can cause long delay in grant of a remedy to such victims as claim before the courts of states other than that in which the damage occurred. We speak here intentionally in the plural because it can happen that there are several agreements which makes the problem much more complicated. Because of these possibilities, it may be in some cases correct to state that the provision for agreement is practically worthless. From the operator's point of view, the provision seems not to be too bad, because it depends always on his consent whether an agreement comes into effect and so he is in a position to prevent situations unwelcome to him.

A very far-reaching compromise in favor of the supporters of the multiple fora solutions is the provision that by agreement actions can be brought before the courts of *any* other Contracting States. This provision goes far ahead even of the old Rome Convention,⁸ in which there was only a choice between the place where the damage was caused and the defendant's ordinary place of residence. In our opinion, this new provision is not only contrary to the whole idea of the single forum, it is also contrary to the general provisions of jurisdiction in some states and can involve a negative competence conflict if the court selected by the parties refuses jurisdiction. Only the fact that after ratification each state is bound by the Convention and has the duty to bring its national law into accordance with the provisions of Art. 20 can solve the problem in practice. But nevertheless the clause goes far beyond the limits of practical necessity and will moreover invoke considerable difficulties in some states, it therefore seems to be unreasonable and out of place.

iii. Arbitration:

Beside the court where the damage occurred or an agreed other court, the parties have the choice of submitting the dispute to an arbitral tribunal in any Contracting State. This provision has its origin in

⁸ Article 16; cf. Shawcross and Beaumont on Air Law, London II. ed. (1945).

a Brazilian proposal which was considered as of such importance that a special committee⁹ on arbitration was established for its settlement.

As to the effect of this clause it may be said that the meaning of it can only be that nothing in the Convention prevents the parties from making an agreement to settle their disputes by arbitration. There is no provision for any recourse to judicial proceedings in a Contracting State in which enforcement of an arbitral award is refused, besides the general provision of Art. 20 (8) for a new action, but this is a matter which all the parties can take into account in deciding whether or not to submit a dispute to arbitration. Another problem is the question whether all the parties must consent to the agreement for arbitration or not. The wording of the clause in this respect is not clear. Professor John C. Cooper (IATA) pointed out that the only arbitration the operator could reasonably agree to, is one where all parties participate, but he refers only to the practical policy of the air carriers, from a legal point of view it is quite obvious that arbitration can take place between a single party suffering damage and an operator because the agreement between them cannot prejudice other actions. There seems to be much preference for arbitration since this procedure is often cheaper and faster and has therefore perhaps a hopeful future.

Last but not least, we want to refer to the Geneva Conventions¹⁰ of 1923 and 1927 concerning arbitration clauses and the execution of foreign arbitral awards which are ratified by most of the European and some extra-European States. The experience with these Conventions can give us important indications in regard to the workability of the arbitration clause under Art. 20(1).

ARTICLE 20(2)

"2. Each Contracting State shall take all necessary measures to ensure that the defendant and all other parties interested are notified of any proceedings concerning them and have a fair and adequate opportunity to defend their interests."

Each Contracting State obviously means, in addition to the state where the suit is brought, all the states where a party interested in the process is living.

No particular clause has been provided to make this provision effective. It is up to the Contracting States to see that notice is given to every party in accordance with the national procedural law. There is no doubt that the various national laws in this matter are different and the whole question is far from being well established. One can argue that the mere submission of a state to the Convention by ratification is worthless in this particular respect, unless there is introduced some arrangement for communication between the Contracting States. However, it must not be forgotten that there exists a so-called international standard in these matters for all civilized states; and if there is given, in accordance with this standard, firstly notice of any proceed-

⁹ ICAO Doc. 7379 LC/34, Vol. I, p. 212.

¹⁰ Hudson, International Legislation, Vol. II, p. 1062. Hudson, International Legislation, Vol. III, p. 2153.

ings and secondly a fair and adequate opportunity for defense, it seems to us that no more need be required. It follows from the wording of Art. 20 (2) and (5) (a), that this notification is not to be understood as formal legal notification; the defendant must get factual knowledge of the proceedings. Another point is this: if a state did not provide possibilities for adequate notification and adequate opportunity for defense, this attitude would be against justice and therefore contrary to "public policy." Moreover, it could provoke a dispute between the Contracting States themselves on the ground of a violation of the Convention.

Summarizing the whole problem, we would suggest an agreement for an international communication service in this particular field. For some examples we refer to the relevant Hague Treaties, namely, the Convention Relative à la Procédure Civile 1896 and the additional Protocol 1897, as well as the Convention Internationale Révisée Relative à la Procédure Civile 1905 with additional Protocol of 1924;¹¹ and to the seventh session of the Conference on Private International Law at the Hague 1951.¹²

ARTICLE 20(3)

"3. Each Contracting State shall so far as possible ensure that all actions arising from a single incident and brought in accordance with paragraph 1 of this Article are consolidated for disposal in a single proceeding before the same court."

As we have seen before, Art. 20(1) provides competence only for the Contracting State itself and leaves the selection of the court to the state concerned. Therefore it depends on national procedural law which court has final jurisdiction in a certain case. Now, the aim of Art. 20(3) is to ensure that all actions out of the same accident are consolidated in a single proceeding before the same court. The introduction of the noteworthy phrase "so far as possible" could not be prevented because under the procedural law of some states actions arising from a single incident have to be brought before different courts. That is to say, if the value of the damages is different, some actions may be brought before a lower court, others before a higher one. Moreover in some countries the consolidation of actions depends upon the motion of a party to the action. Thus one might form the impression that in this paragraph nothing is done for the limitation of liability; if however we read in this connection para.(9), we shall see that, at the time of execution, the liability limits are sufficiently protected.

ARTICLE 20(4)

"4. Where any final judgment, including a judgment by default, is pronounced by a court competent in conformity with this Convention, on which execution can be issued according to the procedural law of that

¹¹ Hudson, International Legislation, Vol. II., p. 1291.

¹² American Journal of Comparative Law, Summer 1952, p. 282 of seq.

court, the judgment shall be enforceable upon compliance with the formalities prescribed by the laws of the Contracting State, or of any territory, State or province thereof, where execution is applied for:

(a) in the Contracting State where the judgment debtor has his residence or principal place of business or,

(b) if the assets available in that State and in the State where the judgment was pronounced are insufficient to satisfy the judgment, in any other Contracting State where the judgment debtor has assets."

The phrase, "competent in conformity with this Convention," only means competent in conformity with Art. 20(1) and not competent in conformity with national laws. Here it is only a question of the international competence of the court.

That the judgment must be final and enforceable means that there cannot be any appeal or provisional execution.

The wording "laws of the Contracting State, or of any territory, State or province thereof" refers to Art. 30 and to some federal states like the U.S.A. and Canada where private law comes under the competence of the provinces.

Further the paragraph gives an order of priority in which execution can be levied; so that the plaintiff is not allowed to levy execution immediately on the defendant's assets anywhere.

ARTICLE 20(5)

"5. Notwithstanding the provision of paragraph 4 of this Article, the court to which application is made for execution may refuse to issue execution if it is proved that any of the following circumstances exist:

(a) the judgment was given by default and the defendant did not acquire knowledge of the proceedings in sufficient time to act upon it;

(b) the defendant was not given a fair and adequate opportunity to defend his interests;

(c) the judgment is in respect of a cause of action which had already, as between the same parties, formed the subject of a judgment or an arbitral award which, under the law of the State where execution is sought is recognized as final and conclusive;

(d) the judgment has been obtained by fraud of any of the parties;

(e) the right to enforce the judgment is not vested in the person by whom the application for execution is made."

Each clause of paragraph 5 contain a *conditio sine qua non*, in the absence of which, most states would not be prepared to adhere to the Convention. The wording "may refuse" indicates that para. 5 is only permissive.

Clause (a): this provision pays regard to the basic principles of due process or denial of justice. "Acquire knowledge," is to be understood as factual knowledge.¹³

Clause (b): this clause also falls under the basic principles mentioned above; but deals with different aspects. It can happen that this provision runs into conflict with Art. 20(6) in a country where "fair and adequate opportunity" comes under the merits of the case. Besides

¹³ ICAO Doc. 7379 LC/34, vol. I. p. 236 et seq.

what about "fair and adequate"? Can we give these words a proper meaning on an international level or is it only a question to be answered by national laws? It seems to us to be both. The interpretation must be on the level of an international standard of justice and if it is, then the exact meaning can be settled from the national point of view.

Clause (c): the exception, *res judicata*, spreads out all over the world in national laws. It seems that a settlement in court between the parties should also be treated as *res judicata*; the words "arbitral award" must not only be understood to refer to arbitration under Art. 20(1), but must have a more extensive interpretation which includes settlements in court. However, settlements outside the courts are simple obligations *ex contractu* and must always be converted by a court into a judgment which can be executed, to get the benefit of the exception *res judicata*.

Clause (d): a judgment obtained by fraud is so contrary to justice that no court will venture to execute it.

Clause (e): execution can only be asked for by the person in whom the claim is vested. So this provision will protect the defendant from paying twice when the claim has been assigned, or will cover the case in which the plaintiff is not permitted to execute in another state where he would be considered a minor.

It is understood that the court to which the application was made for execution of the judgment should apply its own law (including its rules of private international law) in deciding whether or not the right to enforce the judgment was vested in the person by whom application for execution was made.¹⁴

In the French text the word "qualité" is used which seems to refer to both the capacity and right to bring an action for execution, while the English text refers only to the right and not to the capacity to bring such an action.¹⁵

ARTICLE 20(6)

"6. The merits of the case may not be reopened in proceedings for execution under paragraph 4 of this Article."

This provision expresses the point of view of most states in regard to the enforcement of foreign judgments. Only a few, for instance the French courts with their "système de la revision au fond" extends examinations even to the facts of the case.

ARTICLE 20(7)

"7. The court to which application for execution is made may also refuse to issue execution if the judgment concerned is contrary to the public policy of the State in which execution is requested."

¹⁴ ICAO Doc. 7379 LC/34, vol. I, p. 242.

¹⁵ ICAO Doc. 7379 LC/34, vol. I, pp. 242 and 539.

The Convention aims at permitting courts of execution to refuse enforcement when, to grant it, would go against the justice, morality, or laws of the country. The terms "public policy" or "ordre public" can only be understood in connection with a particular legal order; their meaning differs from country to country, and can even change in a state with the growing up of a new ideology. To give a common analysis which covers all the variations of these terms is quite impossible in the scope of this paper. Broadly speaking "ordre public" under Art. 20(7) can be invoked if the foreign judge has applied the Convention in a manner contrary to normal legal thinking in the state of execution or if some basic questions of law are involved, such as remoteness of causation or the problems under Art. 12.

The wording "may also refuse" indicates that para. 7 is only permissive.

ARTICLE 20(8)

"8. If, in proceedings brought according to paragraph 4 of this Article, execution of any judgment is refused on any of the grounds referred to in sub-paragraphs (a), (b) or (d) of paragraph 5 or paragraph 7 of this Article, the claimant shall be entitled to bring a new action before the courts of the State where execution has been refused. The judgment rendered in such new action may not result in the total compensation awarded exceeding the limits applicable under the provisions of this Convention. In such new action the previous judgment shall be a defense only to the extent to which it has been satisfied. The previous judgment shall cease to be enforceable as soon as the new action has been started.

The right to bring a new action under this paragraph shall, notwithstanding the provisions of Art. 21, be subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment."

If on the grounds referred to in clause (a), (b) or (d) of para. 5 or in para. 7 of Art. 20, execution of any judgment is refused, then the plaintiff is entitled to sue the operator in a new action before a court in the state where the execution has been refused. The first clause of para. 8 is a safety provision for situations in which execution is refused but nevertheless the victim has an unsatisfied claim against the operator. In a situation which clause (c) or (e) of paragraph 5 covers, the victim cannot bring a new action under paragraph 8, because his legal rights have already been satisfied. Thus paragraphs 5 and 8 are alternative and not supplementary.

Another provision is that the new judgment may not increase the total compensation above the limits of liability under this Convention and that the previous judgment shall be a defense to the extent to which it has been satisfied.

As soon as the new action has been started, the previous judgment is no longer enforceable. What does that mean? Must the previous judgment be withdrawn or can it be recognized and only not be

executed? The Convention gives no answer and so the problem must be decided according to the national laws.

The period of two years under Article 21¹⁶ does not apply in this particular case and the right to bring a new action becomes subject to a period of limitation of one year from the date on which the claimant has received notification of the refusal to execute the judgment. The grounds for suspension or interruption of the period shall be determined by the law of the court trying the action.

ARTICLE 20(9)

"9. Notwithstanding the provisions of paragraph 4 of this Article, the court to which application for execution is made shall refuse execution of any judgment rendered by a court of a State other than that in which the damage occurred until all the judgments rendered in that State have been satisfied.

The court applied to shall also refuse to issue execution until final judgment has been given on all actions filed in the State where the damage occurred by those persons who have complied with the time limit referred to in Article 19, if the judgment debtor proves that the total amount of compensation which might be awarded by such judgments might exceed the applicable limit of liability under the provisions of this Convention.

Similarly such court shall not grant execution when, in the case of actions brought in the State where the damage occurred by those persons who have complied with the time limit referred to in Article 19, the aggregate of the judgments exceeds the applicable limit of liability, until such judgments have been reduced in accordance with Article 14."

First clause: this clause strengthens considerably the position of the single forum because no judgments from other courts than that of the state where the damage occurred can be executed until all the judgments in that state have been satisfied. This can go so far that an arbitral award rendered in the state where the damage occurred ranks before any judgment issued by a court in another state.

Second clause: if several plaintiffs have claimed against the operator in the state where the damage occurred, within six months according to Art. 19, execution cannot be given until all these judgments have become final. However this provision applies only if the operator proves that the total amount of compensation which might be awarded, might exceed the limit of liability; in other words a motion on behalf of the operator is required.

Third clause: this clause applies if the aggregate of the judgments, pronounced in all actions brought within the time limit referred to in Art. 19, exceeds the limit of liability. In this case no execution can be granted until the judgments have been reduced in accordance with Article 14. This reduction must be made by the courts of the states where the actions were brought.

¹⁶ Art. 21 (1) Actions under this Convention shall be subject to a period of limitation of two years from the date of the incident which caused the damage.

ARTICLE 20(10)

"10. Where a judgment is rendered enforceable under this Article, payment of costs recoverable under the judgment shall also be enforceable. Nevertheless the court applied to for execution may, on the application of the judgment debtor, limit the amount of such costs to a sum equal to ten per centum of the amount for which the judgment is rendered enforceable. The limits of liability prescribed by this Convention shall be exclusive of costs."

Costs can be enforced up to ten per cent of the value of the judgment. The limitation of the costs, however, depends on a motion of the judgment debtor. The costs are not included in the limits of liability of this Convention. Costs are equally executable as the corresponding judgments are.

ARTICLE 20(11)

"11. Interest not exceeding four per centum per annum may be allowed on the judgment debt from the date of the judgment in respect of which execution is granted."

Although the provision does not expressly say so, it seems to be obvious that the court of execution has a right to collect the interest too without further action.

ARTICLE 20(12)

"12. An application for execution of judgment to which paragraph 4 of this Article applies must be made within five years from the date when such judgment became final."

The Convention distinguishes clearly between the original judgment and its execution. The paragraph does not apply to an execution obtained for a new judgment under paragraph 8. In that case, the period for execution seems to be governed by the domestic laws.¹⁷

Finally the question arises of the nature of this time limit; should it be regarded as a prescription or a foreclosure? The English text speaks of "must be made within 5 years," the French text of "délai de cinq années, the Spanish text of "del plazo de cinco anos." The correct French wording in case of a prescription would have been "prescription," and in case of a foreclosure "délai de déchéance"; neither version is adopted in the text. This text is somewhere between these alternatives and so are the English and Spanish texts.

The travaux préparatoires¹⁸ seem to indicate that prescription was intended, although Mr. Garnault (France) advocated foreclosure.

Accepting the point of view of prescription we are faced with the problem of who determines the validity of claims to suspension.

In the absence of any special provision, the court involved shall determine this question according to its law.

¹⁷ ICAO Doc. 7379 LC/34, vol. I, p. 259 et seq.

¹⁸ ICAO Doc. 7379 LC/34, vol. I, p. 259 of seq. p. 489 et seq. p. 540.