Articles

THE DEVELOPEMENT OF NEW LIABILITY RULES GOVERNING INTERNATIONAL CARRIAGE BY AIR

Introduction

The liability rules governing the international carriage by air of passengers, baggage or goods are, at present, under revision. These rules were established by the Convention for the Unification of Certain Rules Relating to International Transportation by Air, commonly known as the "Warsaw Convention." This Convention was signed at Warsaw on October 12th, 1929, by the representatives of twenty-three (1) countries, and came into force as regards Canada on September 8th, 1947, following the deposit of an instrument of accession (2) by this country with the Polish Government. As the Convention has been ratified, or adhered to, by upwards of forty countries, (3) it governs by far the greater portion of air transportation conducted on an international basis.

There is much international carriage by civil aircraft which originates or ends in Canada and most of this carriage is subject to Warsaw rules. The movement towards the revision of these rules will, therefore, interest those who may be called upon to advise on aviation matters.

Description of the Warsaw Convention

A short description of the main provisions of the Warsaw Convention will give the background against which the new liability rules are being drawn.

The present Convention applies (article 1) to the international carriage of persons, baggage, or goods performed by aircraft for hire or to gratuitous carriage performed by an air transportation enterprise.

As used in the 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 trans-shipment, are situated either within the territories of two contracting parties, or within the territory of a single contracting party, if there is an agreed stopping place within a territory subject to the sovereignity, suzerainty, mandate or authority of another State even though that State is not a party to the Convention. (4)

(1) No Canadian representative was present at the Second International Conference on Private Air Law, held at Warsaw in October 1929.

(2) See, for the procedure followed by Canada in acceding to the Convention and in proclaiming the Carriage by Air Act, 1939 of which the text of the Convention constitutes the First Schedule, FitzGerald, **Liability Rules in the International Carriage of Passengers, Luggage or Goods by Aircraft — Warsaw Convention — The Carriage by Air Act, 1939**, (1948), 26 Canadian Bar Review 861-867.

(3) The continent of South America presents a marked exception to the widespread acceptance of the Convention. There, Brazil is the only party.

(4) The two main types of Warsaw carriage would be where the place of departure is in State A and place of destination is in State B, both being parties to the Convention, or where both places are in State A, a party to the Convention, with an agreed intermediate stopping place in State C, even though State C may not be a party to the Convention.

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According to the most important provisions (articles 17 and 18), 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 causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. Similarly, the carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air. In the latter case, the transportation by air comprises the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

The Convention rules are thus distinguished from the normal rule applied to accidents. The normal rule in many jurisdictions is that the claimant in an aviation case has the burden of proving negligence in the operation of aircraft before the carrier can be held liable for damages. The drafters of the Convention, in 1929, took into account the difficulty which the passenger or shipper would have in establishing the cause of an accident in air transportation and decided to create a presumption of liability against the air carrier on the mere happening of an accident causing damage as above described. This presumption is subject to certain defences allowed the carrier under the Convention. The burden is then on the carrier to show that the injury or death has not been the result of negligence on the part of him or his agents.

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 (articles 20 (1)). In the carriage of baggage and goods the carrier is not liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage (article 20 (2)). 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 21).

If the Convention gives the passengers and shippers certain definite rights in international air transportation to the disadvantage of the air carrier, it contains a quid pro quo whereby the carrier gets the benefit of a limitation of liability in contrast with the system of unlimited liability to which he might otherwise be subjected in many jurisdictions. (5)

(5) In some jurisdictions the carrier is not permitted to exclude or even limit his liability. Until recently, Canadian air carriers could, by a provision in the contract of carriage, exempt themselves from liability. See, **Ludditt v. Ginger Coote Airways, Ltd.**, (1947) A.C. 233. Now, domestic carriers are not permitted to deny or limit their liability for loss of life or injury to passengers below $20,000 per passenger, while those engaged in international carriage subject to Warsaw rules cannot go below the passenger limit of $8,291 established by the Convention. See Air Transport Board General Order No. 1/51, (1951) Canada Gazette (Part II) 199.

Under the Convention, the liability of the carrier for damages is limited to the following amounts: 125,000 Poincare gold francs (6) ($8,291 U.S.) for each passenger; 250 gold francs ($16.58) per kilogram (2.2 pounds) for checked baggage and goods, unless there is a special declaration of value made by the consignor and an additional sum paid by him if the case so requires; and 5,000 gold francs ($331.67) for objects taken care of by the passenger himself.(article 22).

The carrier is not entitled to avail himself of the provisions of the Convention that exclude or limit his liability if the damage is caused by his wilful misconduct (article 25), or if he fails to comply with certain formalities in relation to traffic documents (articles 3-16).

Any provision in a contract of carriage tending to relieve the carrier of liability or to fix a lower limit than that laid down in the Convention is void (article 23) although the nullity of any such provision does not involve the nullity of the whole contract, which remains subject to the provisions of the Convention.

History of the work on revision

After the Convention had been in operation for a few years it was agreed that, although the general principles were sound, the test court cases in various countries and the actual application of the Convention to air transport brought out a number of obscurities in its wording. The revision of the Convention has been under consideration since 1935, with an interruption of six years (1940-1945) during the recent conflict. At various times the question of revision has been studied by the International Chamber of Commerce, the Comite international technique d'experts juridiques aeriens (7) and the International Air Transport Association. (8) In 1946, the CITEJA, in anticipation of its early dissolution, recommended that further study of the revision should be undertaken by the provisional International Civil Aviation Organization (PICAO) or its sucessor, the International Civil Aviation Organization (ICAO). (9)

In 1947, the newly established Legal Committee of ICAO decided to include the revision of the Warsaw Convention on its work program. In 1948 and 1949, and, again, in 1951 (10), the

(6) This is a standard franc consisting of 65½ milligrams of gold at the standard of fineness nine hundred thousandths.

(7) The CITEJA, as this body was known, functioned from 1926 to 1947 for the purpose of developing conventions on private air law. It was a body of air law experts named by various States. The CITEJA had no power to adopt conventions, but sent its final drafts to International Conferences on Private Air Law.

(8) An association of scheduled international airlines. See, (1951) Volume 8, **Minutes and Documents — ICAO Legal Committee**, 233 for the statement: "IATA....feels that revision of the Warsaw Convention is not at this time advisable."

(9) A specialized agency of the United Nations, established pursuant to the Chicago Convention on International Civil Aviation of 1944 and having its headquarters in Montreal. Fifty-seven states belong to ICAO.

(10) The ICAO Legal Committee suspended its work on the revision of the Warsaw Convention during 1950 and, instead, concentrated its efforts on developing a draft convention on damage caused by foreign aircraft to third parties on the surface. It is expected that this draft will be finalized and opened for signature at a special conference to be held in Rome in September of this year.

Committee made substantial progress on the preparation of principles to be included in the revised Convention. In January of this year a special subcommittee met in Paris and, acting under the instructions of the ICAO Legal Committee, drew up a new draft Convention for the unification of rules relating to the liability of the air carrier in international carriage by air.

New draft convention for the unification of rules relating to the liability of the air carrier in international carriage by air.

In the work of revision by far the most contentious item has been the amount of limits to be included in the new Convention. The replies (11) of States to ICAO questionnaires on this subject have ranged all the way from favouring the retention of the present limits to their increase by 100%. Canada has gone on record as favouring double the present limits in the case of passengers, but states that the present limits for baggage and goods should be retained. Nevertheless, in the interest of unanimity and of obtaining the widest acceptance of the revised Convention as soon as possible, Canada has indicated that she would accept the majority vote on the question of limits. (12)

At its session in Madrid, in September 1951, the ICAO Legal Committee decided to defer any further discussion on the limits until it received from the ICAO Council, necessary information of an economic character. This information will probably be placed before the Committee at its next session in January 1953.

The prime argument given for not distrubing the limit is that to disturb them may reduce the possibility of a widespread acceptance of the revised Convention. Discussions concerning an increase in the limits have tended to raise the following questions to which no universally acceptable answers have as yet been given: Are the present limits in relationship or not with the present purchasing power, cost of living and standard of living? What figure representing the economic value of a human life can be included, with some hope of acceptance, in an international convention, given the fact that national ideas as to the value of a human life vary widely? Would an increase in the limits give rise to a greater number of lawsuits and bring about an increase in court awards?

Although a study of the limits presents many mixed legal-economic problems, the broad background of the Convention is strictly legal and that is the setting into which the new limits will have to be placed. To what extent then, have the revisers changed the purely legal provisions of the Warsaw Convention in preparing the new draft? This may best be shown by taking the latest draft (13) prepared at Paris, and comparing it with the existing Convention. Even this brief comparison will be useful as showing the trends in the development of new liability rules in international carriage by air.

(11) (1951) Volume 8, **Minutes and Documents — ICAO Legal Committee**, 233-234. The questionaires referred to were sent to the States in 1948 and 1949.

(12) **Idem.**

(13) **Report of the Sub-Committee on the Revision of the Warsaw Convention to the Legal Committee, Appendix "A"** — ICAO LC/Working Draft No. 391 30/1.52.

First of all, the scope (14) of the Convention has been enlarged. Carriage can now be "international" even if it takes place between two States one of which is not a party to the Convention. This would increase the amount of international carriage subject to standard international rules. The second (15) type of carriage remains substantially the same as in the present Convention.

The new draft follows the Warsaw Convention in retaining detailed provisions concerning traffic documents (passenger ticket, baggage check, air waybill). However, some important changes in detail have been made.

The Warsaw principle that the carrier must deliver a passenger ticket remains; but the Paris draft modifies that principle in specifying that a separate ticket need not be issued for a child for whom no separate seat is allocated and that members of a family travelling together in the same aircraft may be included in one ticket. (16)

The revisers have had some difficulty in establishing the sanctions to be imposed under the Convention if the ticket is issued without containing the required particulars concerning the place and date of issue; the places of departure and destination; the names and addresses of carriers, and the agreed landing place or places. The Paris draft provides that, if the ticket is issued without these particulars, the carrier will be liable to the passenger for any damage which the latter proves he has sustained by reason of the omission of any one or more of such particulars.

The Warsaw Convention, in dealing with the familiar question of the notice to be given concerning a clause limiting liability, specifies that the ticket must contain a statement "that the transportation is subject to the rules relating to liability established by this Convention." The new draft avoids the vague reference to "rules relating to liability" and requires that the ticket give specific notice of the **limitation** factor. Thus the ticket would have to state "that the carrier's liability may be subject to the limitations established by this Convention." As a corollary to this, if a passenger is carried without the ticket containing such a statement, the carrier will not be entitled to avail himself of those provisions of the Convention that limit his liability unless he proves that the passenger had knowledge that the liability of the carrier might be subject to the limitations established by the Convention.

In the case of the baggage check and air waybill, (17) the number of particulars required has been much reduced.

(14) Warsaw Convention, Article 1; Paris draft, Article 2.

(15) I.e., between points in a Contracting State with an agreed stopping place in another State. C.F. **supra**, Note 4.

(16) Warsaw Convention, Article 3; Paris draft, Article 4.

(17) See for provisions on the baggage check and air waybill: Warsaw Convention, Articles 4-16 and Paris draft, Articles 4-11.

The present sanctions applicable if the carrier fails to issue these documents, or issues them in incomplete form, are rather severe, as the carrier is liable to lose the benefit of the provisions of the Convention excluding or limiting his liability. The Paris draft contains less severe sanctions. Failure to issue the documents or their issuance in incomplete (18) form will render the carrier liable to the passenger or shipper, as the case may be, for the damage which these parties have sustained due to the absence of, or omissions from the documents.

Many countries recognize the negotiability of shipping bills of lading and, on this continent at least, the railway bill of lading (19) is negotiable. Hitherto, air waybills have not been negotiable and, for some time past, there have been discussions as to the advisability and possibility of making these documents negotiable. The new draft Convention provides for the negotiable air waybill, but instead of trying to lay down uniform rules on this matter, it specifies that the negotiability of this document will be governed by the law of the place where the air waybill is issued, except where the consignor and the carrier have agreed that a different law shall be applicable and such agreement is included in the air waybill. Under certain circumstance the national laws relating to shipping bills of lading may be applicable to negotiable air waybills.

As not all air waybills would be negotiable, the draft defines the rights of the consignor and consignee under non-negotiable documents in accordance with the general principles of the Warsaw Convention.

The key provisions of the existing Convention which define the extent of the carrier's liability have not undergone radical changes. Rather, there has been an attempt to clear up certain obscurities in the language. The effect has been to make the provisions somewhat broader in scope. As explained earlier, 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 causing the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The expression "accident" has been replaced by the broader concept of "occurrence," while the vague expression "operations of embarking and disembarking" has been replaced by a provision that the occurence must take place at any time from the moment when the passenger leaves the surface to embark in the aircraft until the moment when he reaches the surface upon leaving the aircraft at any place. (20)

(18) The Paris draft (Article5) lessens the carrier's responsibility for the completion of the air waybill. He is now required to fill out only certain particulars and is not liable for the omission of particulars which, under the new draft, the consignor is required to supply.

(19) E.g., in Canada and the United States; but not in Europe where, although twelve States have signed an agreement for the introduction of a negotiable railway bill of lading, the agreement has not yet come into force.

(20) Warsaw Convention, Article 17; Paris draft, Article 12 (1).

The Warsaw Convention states that the carrier is liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods, but it does not specify what is meant by a delay. In case of passengers the new draft spells out what is meant by a delay when it makes the carrier liable if the passengers do not arrive at their place of destination by the time agreed. (21)

The new draft retains the old defence whereby the carrier can avoid liability if he proves that he and his agents have taken all necessary measures to avoid the damage. But the alternative defence that it was **impossible** for him and his agents to take such measures has been made less rigid, because the carrier might never be able to prove that he had found it impossible to take the measures. Therefore, he would, under the new provisions, only have to prove that it was not practicable for him or his agents to take such measures. (22)

Special defences are now made available in cases of legitimate delay or deviation. It is provided that any delay in the carriage or deviations from the agreed or normal routes, for the purpose of saving life, or for reasons of safety or on account of meteorological conditions, or other reasonable deviation on technical grounds will not constitute a breach of the agreements to carry and the carrier will not incur any liability merely by reason of such delay or deviation. (23)

The object of a novel provision is to prevent employees or carriers from being subjected to suits for unlimited amounts. Otherwise the carriers might indirectly be subjected to unlimited liability by reason of being required by law or agreement to indemnify the employees. (24)

The existing Convention deprives the carrier from availing himself of the provisions of the Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct. The expression "wilful misconduct" is the nearest English expression that could be found to render the French expression "dol" found in the French text of the Convention, the French text being the only authentic one. (25) This provision of the Convention has caused serious difficulties. There has been a tendency in the courts of some countries to construe "wilful misconduct" as something less than what is normally understood to constitute "dol." (26) In pre-

(21) Warsaw Convention, Article 19; Paris draft, Article 12 (3).

(22) Warsaw Convention, Article 20 (1); Paris draft, Article 16 (1).

(23) Paris draft, Article 16 (1) (b).

(24) Paris draft, Article 13.

(25) See IV Hackworth, **Digest of International Law** (1942), pp. 372-373, for a note on official correspondence between Ambassador Cudahy, United State Ambassador to Poland and Secretary Hull dated July 31st, 1934 and relating to the translation of "dol" by "wilful misconduct."

(26) Some recent cases involving "wilful misconduct" in relation to the Warsaw Convention are **Ulen v. American Airlines**, (1948) United States Aviation Reports 161; **American Airlines v. Ulen**, (1949) U.S. Av. R. 338; **Lee v. Pan American Airways**, (1950) U.S. Av. R. 290; **Pauwels et al v. Sabena**, (1950) U.S. Av. R. 367 and **Pekelis v. Transcontinental & Western Air Inc.**, (1951) 3 Aviation Law Reporter 17, 440.

paring a new provision, ICAO legal experts have made an effort to find a formula acceptable in English, French and Spanish, since the new Convention will be authentic in the three languages. Those familiar with a fairly lengthy line of decisions on the expression "wilful misconduct" even in non-aviation (27) cases, will appreciate the origin of the new formula. It is now provided that the carrier will not have the benefit of the limits if it is proved that the damage resulted from a breach of duty committed by him, or by a servant or agent of his, acting within the scope of his employment, which breach of duty involves a deliberate act or omission committed either with intent to cause damage or recklessly, not caring whether or not damage was likely to result. (28)

Conclusion

The foregoing presents only some of the principal changes made in the Warsaw Convention. A word of caution is necessary. These changes are not final and there still remains much work on revision to be done. After careful consideration by States and interested international organizations, the Paris draft will be studied by the ICAO Legal Committee at its next session in January 1953.

Meanwhile, at this stage of the work, it may be permissible to draw the tentative conclusion that the architects of the new Convention have recognized the intrinsic worth of the present Convention and that, whenever the new rules governing international carriage by air are finally adopted, they will include the best elements of the present rules.

(27) Some of these cases are **Lewis v. Great Western Railway Company**, (1877) 3 Q.B.D. 195; **Forder v. Great Western Railway Company**, (1905) 2 K.B. 532; **In re City Equitable Fire Insurance Co., Ltd.**, (1925) Ch.D. 407.

(28) Warsaw Convention, Article 25; Paris draft, Article 15 (7).

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