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See table of contents

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The Warsaw Convention

by: René H. MANKIEWICZ

TABLE OF CONTENTS

REASONS AND DIMENSIONS OF NON-UNIFORM APPLICATION OF CONVENTIONS, FOR THE UNIFICATION OF PRIVATE LAW. Re: WARSAW CONVENTION OF 1929, A CASE IN POINT.

International conventions for the unification of private law aim at, and hold out high hopes for certainty and uniformity of the law. Experience shows however, that they tend to become "disunited" by the decisions of national courts applying and construing a given uniform law. One of the oldest and most widely applied of these conventions, namely the *Warsaw Convention* of 1929 dealing with the air carrier's liability provides striking examples of this phenomenon. Since its scope and interpretation have been the basic issues in a great number of law suits brought before the courts of many countries, even a cursory study of some of the legal decisions rendered shed an interesting light on, and permit to pinpoint some of the frustrating factors of the judicial disruption of internationally uniform law.

I – THE WARSAW CONVENTION AND ITS AMENDMENTS: THE UNIFORM LAW OF INTERNATIONAL CARRIAGE BY AIR

a) Scope and content of the original Convention

The *Warsaw Convention* unifies the regime of liability of air carriers with respect to international carriage of passengers and goods. Signed on the 12th of October 1929, at a time when commercial aviation was still in its infancy, it has proved nevertheless to be one of the most successful uniform law conventions! Prior to the Second World War it was in force in 27 countries[1]; today, it applies practically throughout the entire world[2]. In addition, many countries also apply its rules to domestic carriage by air.

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1 As well as in the colonies, mandates and other dependent territories covered by the ratification of the metropolitan State. *See* complete list in *Yearbook of Air and Space Law* (1965).
The international character of the carriage is determined not by the origin and destination of the aircraft but by that of the passengers or the goods (see article 1(2) of the Convention).

2 *Ibid.*

In 1929, the success of civil liability claims (in all major countries) depended on the proof of fault. The *Warsaw Convention* departed from that regime and accomplished a noted breakthrough by establishing a presumption of fault or negligence in the case of accidental injuries to, or death of international air passengers; of damage to, or loss of international cargo; as well as to cases of delay in the transportation of such passengers or cargo. As *quid pro quo* for that presumption, the carrier's liability was limited to fixed maximum amounts. The Convention's drafters also attempted to link these limits of liability to the rising cost of living by expressing its amount in gold francs. Their aim, however, was frustrated in 1933 when the United States of America froze the price of gold.

The air carrier could escape his presumed liability only by proving that he and his agents had taken all necessary measures to avoid the damage, or else that the said damages would have occurred anyway (article 20 of the Convention)[2a]. On the other hand, the traditional rules of liability would apply and the carrier's liability would remain unlimited if the plaintiff proved that the damage resulted from the carrier's or his agents' willful misconduct, or from "such default on 'their' part as, in accordance with the law of the court seized of the case, is considered to be equivalent to willful misconduct". Article 25(1) of the Convention provided that in the case "of damage caused by any agent of the carrier, the agent was acting within the scope of his employment" (article 25(2))[2b].

Moreover, it was provided, in articles which have given rise to contradictory legal decisions and which have been amended as described below, that the carrier could not avail himself of the Convention rules which limited his liability if he has accepted the passenger, baggage or cargo without delivering the prescribed document, or if certain specified rules relating to their content were not complied with; (see article 3(2), article 4(4), article 9 of the Convention).

Of interest as regards the problems examined hereunder, are also the rules which stipulated that any action for damages covered by the Convention, "however founded", could only be brought subject to the conditions and limits set out in the Convention (article 24(1)), namely "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

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2a This provision has been diluted by the Protocol signed at Guatemala City on the 8th of March 1971, which establishes strict liability and an "unbreakable" limit in case of death or delay of, or injury to the passenger and loss or delay of, or damage to his luggage whether registered or not provided certain additional conditions are fullfilled. The Protocol will come into force upon the deposit of its thirty instruments of ratification. The liability rules in case of carriage of goods have not been attested at Guatemala City.

2b *Supra*, 2-a.

establishment by which the contract has been made or before the Court having jurisdiction at the place of destination" (article 28(1))[2c].

b) The Hague Protocol

A Protocol to amend the *Warsaw Convention*, entered into at the Hague on September the 28th 1955, has raised by one hundred per cent, i.e., to United States $16,000.00 the limits of liability which had been frozen through the pegging of the price of gold. It also modified the rules relating to the content of the traffic documents by simplifying them to a very great extent as well as by substantially mitigating the unlimited liability of the carrier in case of non-delivery of the required documents or of delivery of incomplete documents. It also spelled out what is to be considered as willful misconduct; (*see* article XIII of the Protocol). Moreover, it provided that a "servant or agent" of the carrier being sued for damages could avail himself of the rules of the Convention which limited the former's liability[3].

c) The so-called "Montreal Agreement" and thereafter

The drafters of *The Hague Protocol* were afraid that a limited number of ratifications of said Protocol would lead to the destruction of the uniform regime of liability of the air carrier, because certain carriages would then continue to be governed by the original *Warsaw Convention* while others would be subject to the Convention as amended at The Hague. Therefore, they provided that the Protocol would come into force only after its ratification by thirty states which were parties to said Convention, in the hope that the remaining states would soon follow suit. This hope was frustrated when one of the major parties, namely the United States of America, which had been instrumental in the framing of *The Hague Protocol*, later refused to ratify it[4]. This country was dissatisfied with the new limit of liability. Thus, in 1966, they served notice of denunciation of the *Warsaw Convention*. However, this notice was withdrawn after a number of international and American air carriers had agreed under the so-called *Montreal Agreement* to abide by a decision of the United States Civil Aeronautics Board which, in effect, provided for strict liability and a limit of United States $75,000.00 (lawyers' and court costs included) for all cases of

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2c Under article 28 as amended at Guatemala City (note 2a *supra*). The action can also be brought "in the territory of the high contracting Parties, before the court within the jurisdiction of which the carrier has an establishment if the passenger has his domicile or permanent residence in the territory of the same high contracting party".

3 For a more complete description of The Hague Protocol, *see* R.H.M. *Hague Protocol to Amend the Warsaw Convention,* (1956) 5 *American Journal of Comparative Law,* 78.

4 For the reasons of the non-ratification, *see* A. Lowenfeld and A. Mendelsohn, *The United States and the Warsaw Convention,* (1967) 80 *Harvard Law Review,* 497.

international air carriage which originated, terminated or had an agreed stopover in the United States of America[5]. Thus, the uniformity of the law applying to "Warsaw flights" had effectively been destroyed by the unilateral administrative action of one country. Consequently, international air carriage falling within the ambit of the *Warsaw Convention* may now be governed either by the original Convention or by the Convention as amended at The Hague, or, finally, by the regime established unilaterally by the United States Civil Aeronautics Board[6].

Since 1966, repeated efforts have been made within the framework of the International Civil Aviation Organization to achieve agreement on a revision of the *Warsaw Convention* which would re-establish a single uniform system[7]. However, since the parties to the Convention could not agree on the new limit of U.S. $100,000.00 proposed by the United States of America, these endeavors have remained unsuccessful for many years. Nevertheless, an agreement on a limit of approximately $100,000.00 (U.S. funds), and an optional scheme for supplementary indemnity was reached finally at Guatemala City on the 8th of March 1971 [7a].

d) Matters not covered by the Convention

While establishing a comprehensive uniform regime of liability for damages caused by an accident occurring during international carriage by air, the Convention does not unify related matters such as formation, validity, breach or non-execution of the contract of carriage, legal basis (contract or tort) of the carrier's liability, etc., which remain governed by the applicable domestic law. Thus, litigation involving these questions will not necessarily result in uniform decisions.

Moreover, there are cases where the drafters of the Convention have specifically stipulated the application of domestic law. Thus, the Convention

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5 *See* text of the C.A.B. decision, the "Montreal Agreement" and the list of airlines parties thereto as of the 7th of October 1968, in I.C.A.O., Doc. 8839, vol. II, pp. 29, 25 and vol. I, p. 153.

6 On the problems arising from the application of the C.A.B. decision and the "Agreement" both with respect to its scope and implementation and with respect to the general international law of treaties, *see* R.H.M., *L'Accord de Montréal et la décision du Civil Aeronautics Board* in (1967) *Annuaire français de Droit international,* 512.

7 The following I.C.A.O. meetings dealt specifically with that question: Special meeting on the revision of the limits of the Warsaw Convention and The Hague Protocol (February 1966) (I.C.A.O. doc. 8584), Panel of experts on limits for passengers under the Warsaw Convention and The Hague Protocol (First session, January 1967, Second session, July 1967; I.C.A.O. Doc. 8839), Sub-Committee of the I.C.A.O. Legal Committee (First session, November 1958; Second session, November 1968; Second session, September 1969, I.C.A.O. Doc. 8839). Certain draft revised articles were recently approved by marginal majorities at the seventeenth session of the I.C.A.O. Legal Committee (March 1970); *see* I.C.A.O. Doc. 8865.

7a See note 2-a, *supra*

leaves to national law the decision as to which persons are entitled to compensation in the case of the death of a passenger (article 24(1)). These, as all other questions (generally) which remain governed by national law, will evidently be solved differently by the various national courts, except where the all-embracing conditions of carriage adopted by the International Air Transport Association (I.A.T.A.), which apply to both international and domestic carriage, manage to fill some of the gaps. But even the rules of the original or amended *Warsaw Convention* are not applied in a uniform manner by the courts of states which are parties to said treaty. The following section analyzes some striking examples thereof, and will be followed by a review of possible means of ensuring the uniformity in the application of uniform private law conventions.

II — ITS JUDICIAL DISRUPTION

The "judicial disunification" of the uniform rules has many reasons and causes; of which some are inevitable, others are due to deliberate efforts of judges, and still others reflect the unconscious working of national, legal and judicial traditions and thinking. In the case of the *Warsaw Convention*, they may be classified roughly under the following headings: Congenital defects of uniform law; diversity of the legal systems in which the uniform rules operate; diversity of judicial traditions in the application and interpretation of the law; deliberate efforts by the judges to "gloss over", or avoid the application of the limits of liability.

A selected number of decisions will illustrate the havoc caused to uniform law by the national courts in deciding specific cases.

Because they are most spectacular and at the same time least justifiable, we shall first turn to those decisions which manifest the deliberate effort of the judge to "manipulate", or "get away" from the uniform law.

a) Finding of "willful misconduct" or "equivalent default"

If a judge wishes to accord the plaintiff full compensation for the damage caused by the death or injury of a passenger, the normal way for overcoming the limitation of the carrier's liability (as provided by the Convention itself), is to find that the accident falls within the ambit of article 25 of the (unamended) Convention which provides for unlimited liability in case of willful misconduct or an "equivalent default" by the carrier or any of his agents or servants acting within the scope of their employment. While reserving for a later discussion the discrepancy in the meaning of the authentic French text of the said article 25 of the Convention and its English translation[8], it suffices to note the general consensus of opinion among the delegates to the 1955 Hague Conference that

8 See hereunder sections f), 1).

both American and European judges were prone to find willful misconduct or an "equivalent default" where their traditional case law would not justify such conclusion. Indeed it was largely with the intention of closing the door to such endeavors that *The Hague Protocol* adopted a new, stricter wording of article 25 and abolished "equivalent default" as a case of unlimited liability[9].

In this context, it is noted that courts of the United States of America would give differing descriptions as to what constituted willful misconduct and did admit that there was a case of willful misconduct or even of "equivalent default"[10] even in situations in which courts could not have discovered *"dol"*, the concept used only in the authentic French text of the Convention and vice versa[10a].

On the other hand, European courts did differ on the question as to whether *"faute lourde"* (gross negligence) is equivalent to *"dol"*. While German and Swiss[11-12] courts held in the affirmative, French courts finally agreed – and the French legislator in 1957 decided – that only a *"faute inexcusable"* (inexcusable faulty behavior) would result in unlimited liability under article in the original and the amended Convention[13-14].

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9 See note 3 *supra*. Thus, in the interest of uniform case law, instead of using a legal concept for which there is no equivalent in all legal systems, as did the original convention, the drafters of The Hague Protocol took the pragmatic approach of describing the act excluding limited liability.

10 For instance, *Ritts v. American Airlines,* U.S. District Court S.D.N.Y., (1949) U.S.A.v.R. 65; *Glen v. American Airlines,* U.S. Distr. Ct., D. of Columbia (1949) U.S.A.v.R. 1949.338; *Grey v. American Airlines,* U.S. Distr. Ct., S.D.N.Y.,(1950) U.S.A.v.R. 507; *Pekelis v. Transcontinental and Western Airlines,* U.S.C.A. 2nd Circ., (1951) U.S.A.v.R. 1; *American Smelting and Refining Co. v. Philippines Airlines,* N.Y. Supr. Ct., Appellate Div. (1955) U.S.A.v.R. 1955. 385, affirming Supr. Ct. New York County (1954) U.S.A.v.R. 1954.221; *Goep v. American Overseas Airline,* State of New York Court of Appeal, (1953) U.S.A.v.R. 503 affirming without opinion, State of New York, Appellate Div. (1952) U.S.A.v.R. 486; *Philios v. Transcontinental and Western Airlines,* State of New York, Queen's County, City Court, (1953) U.S.A.v.R. 479. For an English case, *see Horabin v. B.O.A.C.*

It will be noted that the *Rashap* and *Grey* cases above deal with the same accident and come to the same result, but only after the *Grey* case had gone through several courts.

10a On the other hand, the same accident was dealt differently by French and American courts in *Leroy v. Sabena,* U.S.C.A., 2nd circ., 344 F 2d, 266 (1965) and *Emery v. Sabena* (1968) R.F.D.A. 184; for the various successive decisions in *Emery v. Sabena,* see note 16 *infra.*

11 Tribunal of Frankfurt (1939) Archiv fuer Luftrecht 180.

12 *See* article 10 of *Air Transport Regulations.*

13 For the history of French case law prior to the Act of 1957, *see,* for instance, Tribunal de la Seine (1952) R.F.D.A. 199; (1953) R.F.D.A. 107; (1956) *Revue générale de l'Air et de l'Espace* (R.G.A.E.) 67; Cour d'Appel de Paris (1953) R.F.D.A. 105; (1956) R.F.D.A. 291; (1957) R.F.D.A. 67. *See* also Chauveau (1952) R.F.D.A. 239-b). The law of the 2nd of March 1957 by providing that the equivalent default within the meaning of article 25 is the *"faute inexcusable"* also provides an indicative description thereof which differs from the traditional definition given by French courts (in another context) of the *"faute inexcusable"*, but makes the latter, in air

The faulty behavior described in the amended article 25, giving rise to unlimited liability, was believed by the drafters of *The Hague Protocol*, to be a correct description of the concept of willful misconduct as applied by American courts[15]. It was, however, pointed out that such behavior on the part of a pilot would practically involve his making up his mind to commit suicide and was therefore criticized by a noted French scholar as describing a *"faute introuvable"* (undiscoverable negligence).

There are no reported decisions given under *The Hague Protocol*. Still, some French courts dealing with accidents which occurred before the coming into force of that Protocol but which were adjudicated upon thereafter, have found *"faute inexcusable"* in terms similar to the words used in article 25 of the Convention as amended by article XIII of *The Hague Protocol*[16].

b) Setting aside of the Convention

When the stretching of the meaning of the original article 25, or of other provisions of the Convention (see hereunder Section i), is of no help for adjudicating unlimited compensation in cases of bodily injury or death of a passenger, American Courts may sometimes resort to other techniques in order to bypass the limits which they consider unduly low. Here is one of the devices used, while others will be discussed later.

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transport matters, for all practical purposes, the behaviour described in article 25 as amended by The Hague Protocol which France had ratified by that time but which did not come into force until the 1st of August 1963; *see* in particular Lindon in (1968) R.F.D.A. 184 (187-8). For "Warsaw Cases" dealing with that fault, see *Tribunal de grande instance,* Seine (1967) R.F.D.A. 88; *Cour d'Appel de Paris* (1967) R.F.D.A. 68; de Reims (1967) R.F.D.A. 222. Add, recently, *Tribunal de Grande Instance de Grenoble,* (1970) R.F.D.A. 107; and other cases cited by Georgiades in (1968) R.F.D.A. 457.

14 Opinion is divided in Belgium; *see Tribunal de Bruxelles* (1958) R.F.D.A. 114 and 418 and *Cour d'Appel de Léopoldville* (1959) R.F.D.A. 179; also M. Litvine, *Précis de Droit Aérien,* 205. For a more detailed survey of cases and writings on that question in civil law countries, see R.H.M. *"Le sort de la Convention de Varsovie en droit écrit et en Common Law",* Mélanges Paul Roubier, 1961, II, 125, 131.

15 See note (3) *supra.*

16 *Cour d'Appel de Paris* J.C.P. 1967.15.261; (1968) R.F.D.A. 198. For the successive decisions in *Enery et al v. Sabena, see Tribunal de Grande Instance de la Seine* (1960) R.F.D.A. 421; *Cour d'Appel de Paris,* (1965) R.F.D.A. 457; Cass. civ. (1968) R.F.D.A. 184, (1969) R.G.A.E. 446; 1969 *Gazette du Palais* I, 81; *Cour d'Appel d'Orléans* (1969) R.G.A.E. 439 (following "renvoi" by *Cour de Cassation);* and the very significant commentary by P. de la Pradelle, (1969) R.G.A.E. 446; and *Diop v. Air France,* Cass. civ. (1968) R.F.D.A. 457 and D.1968.569 which refers to, but does not apply the Hague Protocol. On these cases, *see also* J. G. Verplaetse, *From Warsaw to the French Cour de Cassation* (1970) 36 J.A.L.C. 50. It has been held by French courts that The Hague Protocol does not apply to claims which had arisen before its coming into force in France; *see* for instance, Cass. civ. (1967) R.F.D.A. 4. The present writer feels that a good case could be made for the contrary view, based on the argument that the international air carriers' liability is statutory and, therefore, the limit of liability can be increased retroactively for evident reasons of public policy; *see also Tribunal, Grande Instance,* Seine (1966) R.G.A.E. 42. Finally it is noted that the accident litigated in the *Emery* case (above) was also litigated in the United States of America where the U.S. District Court Southern New York held Air France liable without limits; see note 10-a *supra.*

After similar attempts made in 1944[17] and 1955[18] before Federal Courts had failed, another plaintiff successfully pleaded before an Illinois (U.S.A.) tribunal that the whole of the *Warsaw Convention* was inapplicable as being contrary to the Constitution of the United States of America. In *Budley v. Canadian Pacific Airlines*[19], the Court of Cook County, which has jurisdiction in Chicago, held *inter alia* as follows:

> (1) "The Court finds that the venue provisions and damage limitation provisions of the Warsaw Convention Treaty are unconstitutional, as applied to this case; that such provisions deny to the plaintiffs due process and equal protection of law guaranteed to them by their constitution. . .
>
> (2) The Court further finds that the provisions of the Warsaw Convention Treaty which would restrict damages in this case to approximately $8,300.00 are unconstitutional and therefore not enforceable because they violate the due process and equal protection clauses of the United States Constitution. The Court finds that such provisions are arbitrary, irresponsible, capricious and indefensible as applied to this case, in that such provisions would attempt to impose a damage limitation of considerably less that the undisputed pecuniary losses and damages involved in this case.
>
> Such unjustifiable, preferential treatment of air lines is unconstitutional. The Courts finds that such preferential discrimination to airlines does not apply to manufacturers or even to the United States government. As pointed out by the plaintiffs, this could result in an absurd situation, in which, in this case, Douglas Aircraft Company, if liable under either the strict liability rule or because of common law negligence, might be required to pay damages to $591,700.00, if a verdict of a jury were $600,000.00. . .
>
> The Government enjoys no immunity or restriction of liability. Thus, in a similar situation involving the Government as an additional defendant, the United States Government would be required to pay damages similar, comparatively, to that of the manufacturer. The Court considers that there is no basis for this unequal and discriminatory treatment of common carrier airlines, engaged in international travel, and that there is no legal or rational basis for this discriminatory treatment".

No similar decision has been reported in any other jurisdiction either within or without the United States of America. Still the above judgment was very much in the mind of several of the delegates to the 17th Session of the I.C.A.O.

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17 *Indemnity Insurance Company of North America v. Pan American Airways,* U.S. Dist. Ct., S.D.N.Y. (1945) U.S.A.v.R. 52. (exercise of Commerce Power).

18 *Da Costa v. Carribean International Airways,* U.S. Distr. Ct., S.D. Florida (1955) U.S.A.v.R. 1956, 67. On the relationship between the Warsaw Convention and the U.S.A. domestic law, *see* also *Salomon v. K.L.M.,* Supr. Ct., New York County (1955) U.S.A.v.R. 80 (Convention substituted to local law); *Garcia v. Pan American Airlines,* New York Supr. Ct. Appl. Div. (1945) U.S.A.v.R. 39 (limits not contrary to public policy) and *Egan v. Kolsman Instruments Corp.* New York Supr. Ct. App. Div. (1967) U.S.A.v.R. 271 (Convention not contrary to equal protection clause). For a Norwegian case, *see* Tribunal of Oslo (1969) *Journal de Droit International,* 434.

19 10 Avi. 18.151.

Legal Committee which had formulated draft amendments to certain articles of the *Warsaw Convention*[20]. For the sake of completeness, and also as a contribution to the study of the "judicial process" it should be reported that the Court of Cook County issued on an amended judgment in the case of *Budley v. Canadian Pacific Airlines*[21]. In this amended version the above quoted passages of the earlier judgment have disappeared and are replaced by the following text:

> "The plaintiff has argued at great lengths that the limitation of liability found in article 22 of the Warsaw Convention and the jurisdiction provisions of article 28 are unconstitutional for the reason that they are a denial of due process and equal protection of the laws provided for by the United States Constitution.
>
> The Court has reviewed these arguments, as well as the reply thereto by the defendant, and it has found plaintiff's contentions to be persuasive. However, in light of the Court's finding that there is no 'international transportation' as defined in article 1 of the Warsaw Convention[22], the Court feels constrained to forego ruling on any arguments regarding the Convention's constitutionality".

c) Differing approaches to the interpretation of certain articles dealing with traffic documents: limited or unlimited liability in case of non-compliance with the rules relating to the delivery and content of traffic documents.

The problems of interpretation of uniform rules of the Convention are dealt with differently by the courts, depending on whether they agree or disagree with the limitation of liability in a given case. While in situations involving bodily injuries or accidental death of passengers, the courts, particularly in the United States of America, are willing to go quite some length in construing the relevant articles of the Convention so as to be able to find a violation, say, of article 3 and to declare the carrier liable without limitation; the same courts are equally prepared to decide in favour of unlimited liability in actions for damages to or loss of goods even though under a strict interpretation of the relevant provisions of the Convention, the carrier's liability is limited.

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20 *See* Report of the Session in I.C.A.O. doc. 8865. Minutes of the meetings will be issued later. Those draft articles became the basis for the work of the Guatemala Conference: see note 2a *supra.*

21 11 Avi. 17.351.

22 This finding is based on the finding that Singapore was not a party to the Warsaw Convention at the critical date. That decision itself is at variance with doctrinal writings and some French decisions equally concerned with the status, with respect to the Warsaw Convention, of a new independent country where that Convention applied before independence; *see* Tribunal civil de la Seine (1954) R.F.D.A. 184 and (1960) R.F.D.A. 214; also R.H.M. *Air Law Convention And The New States* J.A.L.C. 52.

i) Finding of unlimited liability in cases of bodily injuries to or death of passengers: alleged violation of article 3 of the Convention.

Article 3(1) of the Convention, which still applies in its unamended form in the United States of America (but not in Canada if the carriage is governed by *The Hague Protocol),* provides that the passenger ticket shall contain "a statement that the carriage is subject to the rules relating to liability established by this Convention". Article 3(2) stipulates *inter alia:*

> "The . . . irregularity. . . of the passenger ticket does not affect the existence or the validity of the contract of carriage which shall nonetheless 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".

The rule in article 3(1) has been construed to mean by Courts in the United States of America, that the ticket must contain a "notice" or "warning" to the passenger regarding the limitation of the carrier's liability, in order that the passenger may take out additional flight insurance if he so wishes. This, the argument goes, he can do only if the ticket is delivered at a time when there is still a possibility of making out an insurance policy, i.e., before the passenger boards the aircraft. It also follows from this "constructive" interpretation of article 3(1) that the passenger must have been aware of the "notice", i.e., that it must be easy to read. If one of these conditions is not complied with, the courts of the United States of America may hold the carrier liable without limitation in accordance with article 3(2) of the Convention.

aa) In *Mertens v. Flying Tigers*[23], *Warren v. Flying Tigers*[24] and, more recently, in *Dermanes v. Flying Tigers*[25], in which American soldiers, travelling to the United States under travel orders, were given tickets or boarding passes when already embarking on a civil aircraft chartered by the Military Air Transport Command; it was held that they were not given *timely* notice of the limitation of liability established by the *Warsaw Convention* although the tickets and boarding passes referred to that Convention[26].

The reasons, legal and real upon which these decisions are based, are stated as follows in *Mertens v. Flying Tiger Line*[27]:

> "The jury decided that plaintiffs had failed to prove that there was a 'willful misconduct' on the part of the carrier and that plaintiffs had failed to prove

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23 U.S.C.A., 2nd circ. 341, F. 2d, 851; 9 Avi. 17.475; cert. denied 382 U.S. 816, 933.

24 U.S.C.A., 9th circ. 352, F. 2d, 494; 9 Avi. 17.848.

25 10 Avi. 17.611. For a discussion of the cases, *see* 19 *Vanderbilt Law Review,* 979.

26 For a previous contrary decision, *see Froman et al v. Pan American Airways,* U.S. State of New York, Court of Appeal, (1949) U.S.A.v.R. 168; and, Appellate Div., (1954) U.S.A.v.R. 400.

27 9 Avi. 475.

> that no ticket was ever delivered to the decedent. The damage award was therefore confined to the limitation of the Warsaw Convention. We are of the opinion, however, that as a matter of law, the delivery of the ticket was not adequate and that the limitation on damages of the Convention is inapplicable.
>
> We read article 3(2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, for example, could consist of deciding not to have the flight, entering a special contract with the carrier, or taking out additional insurance for the flight. The Convention specifically provides that 'the carrier and passenger may agree to be little reason to make this provision, to require that the ticket state that the liability of the carrier is limited (article 3(1)(e)), and to require that such a ticket be delivered to the passenger unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures. The delivery requirement of article 3(2) would make little sense if it could be satisfied by delivering the ticket to the passenger when the aircraft was several thousand feet in the air. The specific language of article 3(2), making the limitation of liability unavailable 'if the carrier *accepts a passenger* without a passenger ticket having been delivered', lends substantial support to our position".

bb) In *Lisi v. Alitalia*[28], the United States District Court for the Southern District of New York and the United States Court of Appeal for the Second Circuit held that although article 3(2) provided for unlimited liability of the carrier only if it accepts a passenger "without a passenger ticket having been *delivered*", it also applies when the ticket does not include a statement that the carriage is subject to the rules of liability established by the Convention; and that as regards the case at hand, that statement must be considered as having been omitted since it was printed in "Lilliputian characters" which made it, for all practical purposes, impossible for the passenger to read.

This decision has been widely criticized as violating the letter and spirit of article 3 (and analogous articles 4, 8 and 9) of the *Warsaw Convention*[29]. Judge Moore, dissenting in the United States Court of Appeal, had already stated [30]:

> "The majority does not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. . .
>
> The original limitations in the Convention may well be outmoded by now. Substantial revisions upward have been made but they have been made, as they should be, by treaty and not by the courts. Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Government even though this

28 370 F. 2d, 508; 9 Avi. 18.378.

29 For a review of the criticism of that decision, *see* (1967) *Notre-Dame Lawyer* 806; also A. Kean, *Strict liability... and the Warsaw Convention* (1970) 19 International and Comparative Law Quarterly 125.

30 9 Avi. 18.378.

result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice".

When Alitalia filed an appeal with the United States Supreme Court, several countries party to the Convention, including the United Kingdom[31], filed *amicus curiae* briefs. They argued, *inter alia,* that all that is required under article 3(1) is a "statement" (for the purpose of ascertaining the application of the Convention to the carriage in question) and not a "notice" or "warning". Moreover, nothing in the Convention deals with the size of the lettering to be used in traffic documents. In this connection, it is recalled that it was only at the Hague Conference that the "statement" required by article 3(1) (and article 4(3)(h) and 8(q)) was transformed into and called a "notice" and that the conference, after a lengthy debate of the problem, decided that the amended articles should not contain provisions on the size or colour of the lettering to be used for that "notice"[32].

The appeal to the United States Supreme Court failed following a four to four tie vote, Judge T.H. Marshall abstaining because he had filed an *amicus curiae* brief on behalf of the United States of America in his previous capacity of Solicitor General[33-34].

It is rather piquant to note that the Supreme Court denied certiorari also by a tie vote, occurring for the same reason, in a case when it had been held that the Convention did apply in spite of the microscopic point of the "notice"[34a].

More justifiable appears the decision of *Nejat c. B.O.A.C.* which refused to apply the Convention because the notice on the ticket bought by an Iranian citizen was in English only, a language foreign to the traveller[34b].

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31 The case also came up in the House of Commons; see H.C. 740 *Official Rep.* 139, col. 1569.

32 *Minutes and documents of the International Conference on Private Air Law,* The Hague, September 1955, I.C.A.O. doc. 7686, vol. I, 46, 59.

33 10 Avi. 17.785.

34 For contrary decisions *see* in the U.S.A. *Grey v. American Airlines,* 227 F. 2nd, 282; 4 Avi. 17.572; cert. denied 350 U.S. 889; in the United Kingdom: *Preston v. Hunting Air Transport* (1956) I.Q.B. 454; *Budd v. Peninsular and Oriental Steamship Navig.*, Q.B. 26 June 1969, I.A.T.A. cases no. 297; in Belgium *Pawles v. Sabena* (1950) U.S.A.v.R. 367.

34a *Berguido v. Eastern Airlines,* U.S. Court of Appeal, 3rd Circuit, 23 November 1966, 10 Avi. 17.311, cert. denied 1968, 88 Sup. Ct. 1194; see also the dissent of Judge Moore in the Lisi case.

34b In an obiter in *Nejat v. BOAC,* the Supreme Court of California, San Francisco County, 28 April 1966, 9 Avi. 18.154, has stated that the clause printed in English, a language barely known by the Iranian plaintiff, was not binding on the latter. It is rather remarkable that none of the many decisions on the Warsaw Convention rendered in various countries deals specifically with the validity or otherwise of the clause when printed in a language unknown or little known by the passenger. Still, the question is a moot one for all those courts when, contrary to the courts of the United States of America, do not consider the "statement" required by articles 3, 4 and 8 to be a "notice".

On the other hand, the American courts had no difficulty in "distinguishing" the *Lisi* case and therefore applied the Warsaw rules when the notice "printed twice the size of that contained in *Lisi* and *Egan* was easily readable and quickly noticeable"[34c].

While the rule established in the *Lisi* case is widely followed in the United States of America[35] (but nowhere else), it is remarkable that the same American courts have also held that the real or "constructive" non delivery of a proper traffic document does not prelude the application to such case of other provisions of the Warsaw Convention, specifically article 28 relating to jurisdiction[36-37], and article 29 establishing a period of limitation[38].

ii) Limited liability in case of damage to or loss of luggage or goods in spite of non-compliance with articles 4 and 8 respectively.

Articles 4 and 8 of the Convention prescribe the particulars to be inserted in the luggage ticket while article 9 further provides that, if specific particulars listed in articles 4 and 8 have been omitted from the traffic document, "the carrier shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability". One of those particulars is "a statement that the carriage is subject to the rules relating to liability established by this Convention"[38b]. It so happens that the standard forms of luggage tickets and air consignment notes adopted by I.A.T.A., and universally applied by its member carriers, are drafted in such a way that they cover "Warsaw carriage" and international carriage by air not covered by the *Warsaw Convention*, as well as domestic carriage. The reason is that "it may be beyond the wit" of the clerk issuing the document to decide whether a given carriage is "international" within the meaning of article 1 of the Convention (see Lord Denning in *Samuel Montague & Co. v. Swiss Air*[39] and previously, Minutes and Documents of The Hague Conference, 1955)[40]. Hence, instead of a statement "that the carriage is subject to the rules relating to liability established by this Convention", the I.A.T.A, conditions provide that "carriage hereunder is subject to the rules relating to liability established by the Convention unless such carriage is not 'international carriage' as defined by said Convention".

34c *Milliken Trust Co. v. Iberia Lineas Aereas de Espana,* N.Y. Supreme Court, N.Y. County, 21 November 1969, 11 Avi. 17.331.

35 *Egan v. American Airlines,* 10 Avi. 17.651; *Bayless v. Varig Airlines,* 10 Avi. 17.881; *Stolk v. Air France,* 10 Avi. 18.247; *Bergman v. Pan American Airlines,* 10 Avi. 18.383.

36 *Biggs v. Alitalia,* 10 Avi. 18.354; *Rosen v. Lufthansa,* 10 Avi. 17.314.

37 For the "liberal" interpretation of article 28 by courts of the U.S.A., *see* Section F) iii hereunder.

38 *Bergman v. Pan American Airlines,* 10 Avi. 18.363.

38b See article 4(h) and article 9 of the Convention.

39 (1966) 2 Q.B. 314.

40 I.C.A.O. doc. 7686, vol. I, 46.

It has been held repeatedly that this "I.A.T.A. Clause" does not satisfy the requirements of articles 4 and 8 of the Convention, since it does not tell the passenger or shipper in no uncertain words that the carriage involved is governed by the liability rules of the *Warsaw Convention*, according to the King's Bench Division in *Westminster Bank v. Imperial Airways Limited* (Lewis, J.)[41]:

> "In my opinion, the statement that the carriage is subject to certain general conditions of carriage of goods which general conditions are based upon the Convention is, in my opinion, a very different matter from saying that the Convention governs a carriage. Mr. Miller, for the defendants, argued that the statement on the consignment note was sufficient compliance with the act. . .(1) that the consignment note was a business document and should therefore be construed liberally and in a commercial sense; (2) that both the parties to the contract knew the laws; and (3) that the consignment note was applicable, both to internal and international carriage. I am unable to accede to any of these arguments. The direction given in the Schedule (to the Carriage by Air Act, 1932, reproducing of the Warsaw Convention in English) is a statutory obligation imposed upon the carrier to incorporate in his consignment note a perfectly simple statement, namely, that the carriage is subject to the rules relating to liability established by this Convention, and I am unable, in spite of the arguments of Mr. Miller, to hold that the statement on the back of the consignment note is a compliance with that statutory obligation. . . In my view, therefore, . . . the consignment note does not satisfy the requirement of article 8(2) of the Convention."

However, American courts have held that the above mentioned "I.A.T.A. clause", being generally accepted, was unambiguous inasmuch as it made clear the fact that the carriage was governed by the *Warsaw Convention* under certain circumstances, the existence of which could be easily ascertained by the shipper. Therefore, they held that it complied with the requirements stipulated in articles 4(h) and 8(q) of the *Warsaw Convention* and did not entail application of articles 4(4) and 9, with the result that the liability of the carrier was limited in accordance with article 22(2) and (3) of the Convention. In *Seth v. B.O.A.C.*[42], where the "statement" required by article 4(h) had been replaced by the said I.A.T.A. condition on a luggage ticket, the court held that the ticket was in conformity with the requirements of article 4 of the Convention: the judgment reading in part as follows:

> "The argument in a nutshell is that the 'unless' clause destroys what otherwise would constitute compliance with sub-paragraph (h) because considered as a whole, the statement on the 'luggage' ticket does not categorically inform the passenger that his transportation is subject to the Convention. We do not agree".
>
> "The statement on the ticket quoted above gives the passenger clear notice that limitations on the carrier's liability for the loss of checked baggage are

41 (1936), 2 All. E.R. 890. at p. 896.

42 8 Avi. 18.183.

> provided by the Warsaw Convention and that the carrier will avail himself of these limitations if he can. The ticket does not leave the passenger in the dark as to a hidden risk he might not appreciate. It gives him fair warning of the existence of limitations on the carrier's liability. . . This gives the passenger blunt warning to find out the nature of his carriage and if covered by the Warsaw Convention to declare excess value and pay the price for increased liability in the event his baggage is lost. We think this constitutes compliance with sub-paragraph (h) of article 4 of the Warsaw Convention. . .".

Referring to the English decision in *Westminster Bank Ltd. v. Imperial Airways Ltd*[43], the American judge notes that the English court "in reaching its conclusions did not mention the in so far clause which is relevant to the issue before us", but found a statement on the part of the shipping document insufficient (for the reason previously quoted in this paper); he concludes: "we are not persuaded by these authorities. . .".

Similarly, it was held by various United States' courts that the omission of the agreed stopping places in violation of article 3 and 8 of the Convention did not result in unlimited liability, whenever the international character of the carriage could be ascertained from other information, on the ticket, on the air consignment note, or from related documents; see for example, *American Smelting and Refining Co. v. Philippine Airlines*[44]; *Grey v. American Airlines*[45] etc.

When, in 1966, Donaldson, J., in *Corocraft Ltd. and another v. Pan American Airways*[46], refused to accept this "robust approach" taken by the American courts with respect to the interpretation of the *Warsaw Convention*, the English Court of Appeal, in *Samuel Montague & Co. Ltd. v. Swiss Air*[47], had already bypassed the finding of the King's Bench in *Westminster Bank v. Imperial Airways*[48] and agreed with the American judges that the insertion of the "I.A.T.A. clause" in the air consignment note satisfied the requirement of article 8(q) of the *Warsaw Convention.* Reversing the lower court's decision, Lord Denning, who delivered the leading speech in that case, said[49]:

> ". . . I do not think that we should give a strict interpretation to article 8(q) in the Convention. We should not give it so rigid an interpretation as to hamper the conduct of business. I do not interpret the article as meaning that the way-bill must contain the statement *verbatim.* It is sufficient if it contains a statement to the like effect. Moreover, the carriage cannot be subject to *all* the rules relating to liability established by the Convention: for some relate to

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43 (1936) 2 All. E.R. 890.

44 (1954) U.S.A.v.R. 221.

45 (1950) U.S.A.v.R. 507; (1955) U.S.A.v.R. 60.

46 (1968) 3 W.L.R. 714; (1968) 2 All. E.R. 871; (1969) 1 Q.B. 616. The House of Lords refused to grand leave to appeal (1969) 1 W.L.R. 546.

47 (1966) 2 Q.B. 314.

48 (1936) 2 All. E.R. 890.

49 (1966) 2 Q.B. 314.

> goods, others to passengers, others to luggage. It follows that (q) is satisfied if the statement says that the carriage is subject to the rules *so far as the same are applicable* to the carriage. If that is sufficient, it must also be sufficient to say that the carriage is subject to the rules *except in so far as the same are not applicable* to the carriage. The next step is plain. If that is sufficient, it must also be sufficient to say that the carriage is subject to the rules *except in so far as it is not international carriage.* Hence, it is sufficient to say unless such carriage is not international carriage as defined by the Convention. This is just another way of saying that the carriage is subject to the rules so far as the same are applicable. . . Everyone concerned with the waybill knew that the carriage from London to Zurich was international carriage. To those persons (and no one else matters) the words unless such carriage is not international carriage as defined by the Convention were surplussage. . . So I hold on the true interpretation of article 8(q) that this statement in the waybill is sufficient. Any other result would lead to great inconvenience".

Lord Denning then points out that the general I.A.T.A. formula is more convenient than the wording of article 8(q) and gives various examples to show that it "may be beyond the wit of any clerk to know in some cases where the carriage is international carriage or non-international carriage".

Another visibly very strong argument for the Master of the Rolls to hold as he did was that this decision would align the English courts with those of the American courts in *Seth v. B.O.A.C.*[50] where the United States Court of Appeal for the First Circuit had confirmed the judgment of the District Court while the Supreme Court had refused an application for a writ of certiorari. He not only endorsed specially some of the arguments put forward by the judge of the United States Court, he also suggested, as he would repeat vigorously in the *Corocraft* case (see hereunder) that "the courts of all the countries should interpret this Convention in the same way"[51].

Corocraft Ltd. and another v. Pan American Airways[52] was another English case under article 9 of the *Warsaw Convention.* However, in that instance, the question was not whether the air consignment note complied with article 8(q) but whether it fullfilled the requirements specified in article 8(e). In accordance with its translation in the Schedule to the *Carriage by Air Act* (1932), this provision requires that the air consignment note indicate "the weight, the quantity and the volume or dimensions of the goods". Since the authentic French text of the Convention has a comma instead of the word "and", thereby inducing doubt as to the "cumulative nature" of the enumeration, the question

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50 8 Avi. 18.183.

51 An eminent French lawyer, *Avocat Général* Lindon, presenting his conclusions on behalf of the government in *Emery v. Sabena* (1968) R.F.D.A. 193, held the opposite view, declaring that while international uniform case law is desirable, there is no reason for French courts to align themselves with American courts if they feel that they did not give a correct interpretation of the Convention. For more on that problem, see hereunder Section III (a) and note 59 below.

52 (1968) 3 W.L.R. 714; (1968) 3 W.L.R. 1273; (1969) 1 All. E.R. 82.

arose before the English courts whether the air consignment note must indicate three of the four particulars as it seemed to result from the Schedule to the 1932 Act, or whether the indication of any one of them would be sufficient as could be surmised from the authentic French text. The air consignment note, covering a carton of jewelry valued at £1,194, 13s, 8d, contained the *weight* but not the *volume* or *dimensions*. If the carrier's liability was limited, the plaintiff would recover only £19 2s,10d.

After a careful analysis of various approaches to, and solutions of that question, Donaldson, J., in Queen's Bench Division[53] discarded the cited American decisions, as distinguishable and unconvincing and found that he must apply the wording appearing in the Schedule to the *Carriage by Air Act*. Consequently, he held the carrier liable without limitation since the air consignment mentioned only two of prescribed particulars.

The Court of Appeal[54], speaking through Lord Denning, M.R., found that interpretation of article 8(i) given by Donaldson, J., was neither reasonable nor consonant with the interpretation which American courts were likely to place on that provision. Pointing out that the decision in the case at hand should be the same whether the action was brought in London or in New York (where the plaintiff could also have sued under article 28 of the *Warsaw Convention)*, the Master of the Rolls stated[55]:

> "Seeing that the French text is ambiguous and uncertain I should have thought that it should be interpreted so as to make good sense amongst commercial men. This is how I would interpret it: the sender should give the weight whenever that is appropriate (as it usually is). He will not give the volume or dimensions except when it is necessary or useful to do so. . . On my interpretation of the French text, article 8(i) is satisfied in this case.
>
> Assuming that I am wrong in giving priority to the French text, I turn to consider the English text. . . taken literally, we should give full force to the word 'and'. This means that three out of four must be given. The weight must be given. The quantity must be given. But the literal meaning of the words is never allowed to prevail that would produce manifest absurdity or consequences which can never have been intended by the legislator. I think that article 8(i) should be read as saying that the particulars are to be given *so far as applicable*. . .
>
> In support of this view I would refer to the case in the New York courts of *American Smelting and Refining Co. v. Philippine Airlines*[56], (where the "agreed stopping places" were omitted from the air consignment note). But Judge Wasservogel, the Special Referee, held that this omission was 'of no consequence' and does not constitute a failure to comply with article 8(c). And his decision was affirmed by the Appellate Division, and afterwards by the

53 (1969) 1 Q.B. 616, at 629 and 633.

54 (1969) 1 All. E.R. 82; (1968) 3 W.L.R. 1273.

55 (1969) 1 Q.B. 632 at 655.

56 (1954) U.S.A. v. R. 221.

> Court of Appeal of the State of New York. The decisions of those courts are entitled to the highest respect. I find myself in entire agreement with them[57]. Even if I disagreed, I would follow them in a matter which is of international concern. The courts of all the countries should interpret this Convention in the same way[58].
>
> . . . There is a very practical reason too for so doing. The plaintiffs in this case could bring the action against the defendant either in New York or in London; see article 26 of the Convention. The results should be the same in either case. It would be absurd if they could recover £ 1, 194, 13s. 8d. by suing New York and only £ 19 2s. 10d (or its dollar equivalent by suing in New York). We avoid this absurdity by following the United States approach...
>
> Both senders and the defendants knew the approximate volume and dimensions of the carton and, in any case, they could be inferred from the particulars that were given. So there was no need to state them. I hold that article 8(i) was complied with and that the defendants are entitled to the limitation of liability. . .".

Depending on whether one favours a literal or liberal interpretation of a convention for the unification of private law, one will either congratulate the Court of Appeal for having unified, at least as between their country and the United States of America, the implementation of important articles of the Convention by adopting a rather "robust approach"; or one will regret that they did not uphold the lower court decision, thereby inviting implicitly their American brethren to convert themselves to their views which are more likely to be shared by courts in other states party to the Convention[59]. Indeed, it has been shown that Lord Denning's arguments in the *Corocraft* case are not entirely convincing, a view which is shared by the present writer[60]. It is also noteworthy in the present context that the delegates assembled at The Hague in 1955 found it necessary to drastically recast articles 3, 4, 8 and 9 of the Convention in order

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57 And, therefore, without further ado, Lord Denning pushes aside a Swiss and two Malaysian decisions which were to the opposite effect, namely *Black Sea and Baltic General Insurance Co. Ltd. v. Scandinavian Airlines System* (1966) Zurich High Court, Second Civil Chamber, Mar. 4; *The Borneo Co. Ltd. v. Braathens South American & F.E. Air Transport A.S.* (1960) 26 M.L.J. 201; *Shrico (China) Ltd. v. Thai Airways International Ltd.* (1967) 2 M.L.J. 91.

58 For a contrary view, see note 51 *supra.*

59 This is indeed the attitude recommended to French judges by the *Avocat Général,* M. Lindon (see note 51 *supra*) when, dealing with one of the arguments of the defendant, he stated: "Il peut paraître néanmoins souhaitable que l'octroi ou le refus de la réparation du dommage dû à une faute unique ne dépende pas simplement du lieu du domicile de la victime". He answered: "Sur ce dernier point, on pourrait observer que s'il est vrai qu'une certaine unité est souhaitable, donc l'application de la Convention de Varsovie, on ne voit pas pourquoi ce serait aux juridictions françaises de s'aligner sur les juridictions américaines". See also note 132 *infra.*

60 R.W.M. Dias (1969) Cambridge L.J. 40; C. Schmitthoff (1968) Export Management 465; K.J. Keith, *Treaties and Legislation* 19 International and Comparative Law Quarterly 127 (1970), R.H.M. *Conflicting Interpretations of the Warsaw Air Transport Treaty* 1970, 18 Am. J. Comp. L. 177.

to make them mean what the above judgments declared they meant in their original version[61].

In any event, it is remarkable, albeit regrettable, that none of the above cases, though they deal with a basic feature of the *Warsaw Convention*, has had occasion to be reviewed by the highest court in either country. As did the United States Supreme Court in the *Lisi* and *Mertons* cases, the House of Lords denied granting leave of appeal in the *Corocraft* case. Their Lordships' attitude may be less surprising if it is recalled that article 8(i) has been deleted and article 8(q) redrafted by The Hague Protocol to which the United Kingdom had become a party.

d) Judicial disunification due to congenital defects of the Convention: differences of legal systems and the absence of like concepts.

i) Meaning of "willful misconduct", "dol", and "equivalent defaults".

Judicial disunification of a uniform law convention is practically unavoidable where the convention is based on, or uses, concepts of a legal system for which no exact equivalent exists in other legal systems. Thus, even if judges were not prone to stretching and twisting the meanings of "willful misconduct", "*dol*", and "equivalent default" in order to avoid limitation of liability by using *ipsissima verba* of article 25 of the *Warsaw Convention*, it is highly unlikely that even close adherence to that article would have resulted in like decisions in common law and civil law countries and indeed, even within the family of French-speaking civil law countries. As Sir Alfred Dennis told the Warsaw Conference when they discussed the draft of what was to become article 25 and which used the word "*dol*", there is no equivalent in the common law for the civilian concept of "*dol*"[62]. According to Sir Alfred, "willful misconduct" means not only "deliberate acts but also reckless acts done without regard to their consequences". Therefore, "willful misconduct" differs from "*dol*" because it does not require an "intention to cause damage" and, on the other hand, implies an element of wantonness or recklessness which may be, and is indeed often absent in the case of "*dol*". Willful misconduct appears, therefore, to be halfway between the civil law concepts of "*dol*" and "gross negligence" *(faute lourde)*, the latter being distinct from "*dol*" by the absence of intention.

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61 See note 3 *supra*. It should be noted that the Guatemala Protocol (8-a note 2-a *supra*) did not amend articles 8 and 9 it does not deal with the carrier's liability with respect to cargo.

62 v. *IIe Conférence internationale de droit privé aérien*, Warsaw, 1929 p. 40. For an analysis of the discussion of this point at Warsaw, and on that is believed a correct construction of the French and English texts of article 25, see R.A.M. *Le sort de la Convention de Varsovie en droit écrit et en common law*, in *Mélanges en l'honneur de Paul Roubier*, Paris, 1961, vol. II.

Having been appraised of the situation, the Conference established a special Drafting Committee which proposed the following wording[63]:

> "Si le dommage provient de son dol ou d'une faute, qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol".

There is little doubt, considering the history of article 25, that the Conference, in adopting that proposal, intended the limits to be inapplicable when the carrier or his *"préposé"* had committed an act which, in the civil law, is qualified as *dol* and which, in countries where the concept of *dol* is unknown, constitutes a "default considered to be equivalent" to *dol.* This intention, however, did not materialize because they omitted to add the words *"si ce concept n'existe pas dans la loi du tribunal saisi"* (if the concept of *"dol"* is unknown in the law of the court seized of the case), or similar language, between the words *"ou"* and *"d'une faute".* As a consequence of that omission, the strict interpretation both of the authentic French text and its English translations permits one to exceed the limitations of liability as follows:

a) **In civil law countries:** not only in the case of *"dol"* but also in the case of "the fault considered to be equivalent to *"dol"*, and

b) **In common law countries:** not only in the case of a default equivalent to *"dol"* but also in the case of willful misconduct and of default which the court seized of the case considers to be equivalent to willful misconduct.

Moreover, as previously shown, the rule of the original article 25 has produced similar contradictory decisions in civil law countries, and indeed in countries which use the same French text, since the non-Warsaw Convention case-law differs on what is meant by default equivalent to *dol*[64].

ii) Limitation of action, foreclosure and "déchéance".

Article 29 of the Convention, which has not been altered by The Hague Protocol, provides that "the right to damage shall be extinguished if an action is not brought within two years" (reckoned from a certain date) while paragraph two of that article specifies that "the method of calculation of the period of limitation" shall be determined by "the law of the court seized of the case". Legal opinion had differed for a long time on the question of whether that article provides for a mere limitation of action (*prescription*) which may be interrupted or suspended, or for a foreclosure (*délai préfixe*). The question is even more involved because of the lack of consistency between the French authentic text and its English translations, which is due, apparently, to the absence or the possible unwareness of the existence of a common law concept corresponding to *"déchéance"*. In fact, the French text does not say that the "action shall be extinguished" but provides that "the action for damages must be

63 v. *IIe Conférence internationale de droit privé aérien,* Warsaw (1929) p. 139.

64 See Section II a) *supra.*

brought" within a period of two years "*sous peine de déchéance*"; moreover, paragraph two of the French text does not mention "the period of limitation" but uses only the expression "*délai*" which already appears in paragraph one.

French courts had held consistently[65], and legal writers had generally agreed[66], that article 29 provides for a foreclosure of the action[67]. The *Cour de Cassation,* civil side, has adopted that view in a decision of the 14th of October 1969[68]. Still, less than three months previously, the *Cour de Cassation,* commercial side, had overruled the *jurisprudence constante* of the lower courts and held that article 29 establishes a mere period of limitation[69].

In France, the strict and uniform application of that article was further confused, until recently by the fact that an action for damages could also be brought before the criminal court in connection with the trial of the wrong-doer and that the period of limitation of criminal offences is longer than the two-year period established by article 29. The French Supreme Court, criminal side, has held that the civil action, when brought before the criminal court in connection with a criminal prosecution, is not extinguished with the expiration of the delay established by article 29 of the *Warsaw Convention* but only with the expiration of the period of limitation for the criminal action[70]. However, under a later decision of the *Cour de Cassation,* criminal side, the carrier cannot be sued in the criminal procedure against the plaintiff and must, therefore, be sued in a civil procedure before the end of the period of limitation established by article 29 of the Convention[71].

The courts of the United States of America, probably on account of the rather loose translation of article 29 into English, have had little difficulty holding that that article sets forth a period of limitation of action and does not establish a "condition precedent" [71a].

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65 See, more recently, Cour d'Appel de Rennes (1967) R.F.D.A. 222; Cour d'Appel de Dijon (1968) R.F.D.A. 82; Cour d'Appel de Paris (1968) R.F.D.A. 72; Tribunal, Grande Instance Paris (1969) R.F.D.A. 417; also Georgiades (1970) R.F.D.A. 87.

66 P. Chauveau, note D. 1966, 518; M. Litvine, *Droit aérien,* p. 1263.

67 D. 1968 745 (24/6/68). This view is also held, for instance, by *Tribunal de Bruxelles* (1966) R.F.D.A. 353; *Tribunal de Zurich* (1959) R.F.D.A. 189; of Geneva (1959) R.F.D.A. 405; the Tribunal of Beirut (1970) R.F.D.A. 109 and Appeal Court of Cotonou (Dahomey) (1967) R.F.D.A. 229.

68 (1970) R.F.D.A. 93.

69 (1970) R.F.D.A. 86; Gaz. Palais 1969, 2, 188; see also note in (1969) *Rev. critique de Droit international privé,* 262.

70 Cass. crim., D.1966.518 (with comment by P. Chauveau) and (1970) R.F.D.A. 81 (with comment by Georgiades).

71 (1970) R.F.D.A. 81.

71a In a recent case, The French Cour de Cassation has held, quite surprisingly, that the delay can indeed be interrupted, the claimant being a minor, i.e. that the article establishes a limitation of action, not a condition precedent (déchéance). Cass. 2 March 1971, *Vallade v. Aéro-Club de Bride,*(1971)RFDA with comments; see also Grenoble, 10 February 1971, (1971) RFDA 313.

iii) Agent, servant, independent contractor and "préposé".

The lack of equivalent legal concepts in the civil law and common law systems is the cause not only of different interpretations of certain articles of the *Warsaw Convention,* but also of the disunification of its scope of applicability.

The seed of this disunification is paragraph two of article 25 which provides for the vicarious liability of the carrier for willful misconduct or "equivalent default" of his *préposé* acting within the scope of his employment. The word *"préposé"* has been translated by "agent" in the English and American translations of the Convention (see United Kingdom *Carriage by Air Act* (1932); and the text as ratified by the United States Senate on the 15th of June 1934), and by "servant and agent" in the authentic English text of article 25 as amended by The Hague Protocol. However, the concept of *"préposé"* covers a broader category of persons than the concept of "servant and agent" since it embraces the "independent contractor" [72].

It follows that under the authentic French text of the Convention the carrier can be vicariously liable for persons who are not his "servants" or his "agents" within the meaning of the common law. Hence, the scope of vicarious liability is not the same under the authentic French text and its various translations into the English language.

The problems arising from this discrepancy in legal concepts is of major importance in the cases of charter, hire and interchange of aircraft. For instance, in the case of a charter party, does article 17 which establishes the liability of "the carrier" apply to the owner of or to the charterer of the aircraft; in other words, does the word "carrier" in article 17 mean the contractual carrier or the actual (*de facto*) carrier? Civil law scholars and courts agree that it refers to the former, with the result that he is also liable for the actual carrier because the latter is his *préposé,* whether or not he be an independent contractor[73]. A different view has been consistently expressed by the United Kingdom delegate to the I.C.A.O. Legal Committee, who argued that article 17 applies to the actual carrier only, irrespective of whether he has made a contract with the passenger or consignor[74]. Under this construction of article 17, the liability of the contractual carrier would not be governed by the *Warsaw Convention*[75] in the case of charter or interchange.

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72 See R.H.M. *Charter and Interchange of Aircraft and the Warsaw Convention* (1961) 10 International and Comparative Law Quarterly 707.

73 See note 14 *supra* and references in the article cited in the preceeding note, pp. 708 - 712.

74 See, for instance, A. W. G. Kean at the Tokyo meeting (1957) of the I.C.A.O. Legal Committee. I.C.A.O. doc. 7921, p. 1455; also statements by Riese, *ibid,* p. 24 and Ambrosini, p. 25. But see *Grein v. Imperial Airways,* 5 Avi. R. 176. The question is discussed extensively with reference to the Warsaw *travaux préparatoires,* in *Block v. Air France,* U.S.C.A. 5th circ. 10 Avi. 518.

75 On the general question whether an action under the Warsaw Convention is an action in contract or in tort, see note 73 *supra;* with respect to the respective consequences, see Section III g) *infra.*

This, indeed, may have been one of the points which Sir Alfred Dennis had in mind when he told the Warsaw Conference that the rules of the draft convention did not always fit the common law system but that his country would take the necessary measures to make it fit[76]. The difficulties arising from the vicarious liability provision in article 25(2) in connection with article 17 of the Convention, could be solved if common law courts would agree to construe the expressions "agent" or "servant and agent" as applying to all persons considered to be a *préposé* in accordance with the French authentic text and the civil law systems, as we had suggested elsewhere[77]. However having regard to the fact that that question of construction has gained great importance with the steady increase of charter, hire and interchange of aircraft, the parties to the *Warsaw Convention* have decided to settle the matter in a new supplementary Convention, formulated in 1961 at Guadalajara (Mexico). This Convention has the effect of making liability rules of the *Warsaw Convention* applicable both to the contractual and the actual carrier, whatever may have been the proper construction of the original treaty[78].

e) Further disunification due to congenital defects of the Convention: "renvoi" to national law.

Disunification results not only from the occasional absence of equivalent concepts in the common and civil law systems. It emerges as of necessity whenever the uniform law convention refers explicitly or implicitly to national law. An example is furnished by paragraph two of article 24 of the Convention, which even at Guatemala City, has remained unaltered. That provision specifies that the Convention does not determine "who are the persons who have the right to bring suit and what are their respective rights" in case of death of, or any bodily injury to a passenger. This was done because no one could expect that countries would be prepared to amend the laws relating to these questions, basic to the laws of tort and contract, and therefore, of a wide-reaching significance, for the sole purpose of unifying and accommodating all matters relating to the law of the air carrier's liability. Any lawyer even slightly familiar with comparative law is aware that these questions are dealt with quite differently by national laws not only with respect to "the persons who have the right to bring suit" but also with respect to the "heads of damage", which may range from purely material damages to moral damages, loss of service or companionship, exemplary damages etc. There is also the question of entitlement of, and the kind and amount of damage due to the employer of the victim and the possible bystander.

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76 See note 62 *supra.*

77 See article cited in note 72, at p. 719.

78 The Guadalajara Convention is the subject matter of the *Carriage by Air (Supplementary Provisions) Act* (1962).

In civil law countries, these questions are normally settled by general rules in the civil codes and only occasionally by special statutes dealing with the liability of carriers in general[78a]. Elsewhere, the common law and special statutes such as the *Lord Campbell's Act* and the *Fatal Accident Acts* apply. The gap thus left by article 24(2) of the *Warsaw Convention*, in the law of the United Kingdom and of certain Commonwealth countries, was filled by Schedules II to the *Carriage by Air Act (1932) and (1961)* and similar Commonwealth legislation. They in fact make *Lord Campbell's Act* applicable to damage claims in the case of death of a passenger under the *Warsaw Convention.*

The situation is entirely different in the United States of America which did not enact provisions similar to the said Schedules giving effect to the *Warsaw Convention*. There being thus an important gap left with respect to the application of the Convention in that country, its courts had no other choice but to hold that the carrier's liability under the Convention sounded in tort[79]. Indeed, contrary to the civil law systems, the common law as still applied in the United States of America is to the effect that the contractual claims of a deceased passenger are extinguished with his death and, therefore, in the absence of special legislation, his family and dependents can bring an action against the carrier only in tort. The Courts of the United States of America were to hold to this reasoning even more firmly since they have held that the *Warsaw Convention* does not create a cause of action[80]. As a consequence thereof, if none of the various *Death on the High Seas Acts* are applicable to the case in hand, they are compelled to apply the rules of conflicts of law and thus to apply foreign law for the determination of the persons entitled to damages and their respective rights [81].

The foreign law so applied however may be the law of the place of the accident even though this country is not a party to the *Warsaw Convention.* It is noteworthy in this context that the drafters of the *Warsaw Convention* had done everything possible, in framing article 28 dealing with jurisdiction, to avoid

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78a *See* the various common law versions of the Lord Campbell Act and art. 1056 Q.C.C. and, for a summary view of the particularities of other national laws in the matter, our article *Le sort de la Convention de Varsovie. . . Mélanges Paul Roubier,* Paris, 1961, vol. II, p. 105 et ss. (139-143). For two recent decisions on the interpretation of the relevant German law by the West German Supreme Court, see BGH, 24 juin 1969 (two cases), 1969, *Neue Juristische Wochenschrfit* 2005 sq. and 2007 sq.

79 The question was controversial for some time; see for instance, *Salamon v. K.L.M.* (1950) U.S.A.v.R. 505; (1951) 378; (1955) 80; *Komlos v. Air France,* 4 Avi. 17. 969; *Froman v. Pan American Airlines* (1948) U.S.A.v.R. 47; (1949) 168; (1954) 400; *Wyman v. Pan American Airlines* (1943) U.S.A.v.R. 1.

80 For a relatively recent decision see *Notarian v. TransWorld Airlines* (1965) U.S.A. v. R. 739.

81 See for instance, *Komlos v. Air France,* 4 Avi. 17.969; *Werkeley v. K.L.M.* (1952) U.S.A.v.R.. 1; *Supine v. Air France* (1951) U.S.A.v.R. 365; *Noel v. Linea Aeropostal Venezuelas,* 5 Avi. 18.176 and *Froman v. Pan American Airlines* cited in note (cc) *supra: Demanes v. Flying Tiger Line,* 10 Avi. 17.611.

the application of that law[82]. More recently, a U.S.A. court held that the applicable law is "the law of the States containing the people or estates that will receive the recoverable damage" [83].

In civil law countries and in the United Kingdom, as well as in Commonwealth countries having similar legislation, this does not occur because the said persons and their rights are determined by the national law of the court, and not by the rules of conflict of laws, the avoidance of which is one of the major objectives of a uniform private law convention[84]. Also, the situation in which the American courts find themselves with respect to claims for death is quite unsatisfactory and has been criticized as contrary to the letter and the spirit of the *Warsaw Convention.*

Partly in order to overcome the difficulties encountered by their courts and also in order to avoid undesirable decisions which follow from the application of a foreign law, the United States of America have proposed to the I.C.A.O. Legal Committee, certain amendments to the *Warsaw Convention* which would give jurisdiction to the courts of the State of the domicile or permanent residence of the claimant [85].

f) Distortions of the uniform law by the effect of differing judicial traditions and precedents (judge-made, jurisprudence).

i) Previously mentioned examples

The difference in the views held by American judges, Donaldson, J., and Lord Denning on the proper approach to the interpretation of written law which are discussed in the above mentioned judgments of the *Montague* and *Corocraft* cases have already provided two examples of the influence which differing judicial traditions and approaches have on the application and, indeed, the disintegration of internationally uniform rules. Similarly, the recourse to the *travaux préparatoires,* permitted in some jurisdictions and generally forbidden in others, is not without effect shaping the decision on a given point. The general refusal on the part of the courts in the United States of America, to examine the

82 R.H.M. *Conflits entre la Convention de Varsovie et le Protocole de la Haye* 1956, R.G.A.E. no. 3.

83 *Manos v. TransWorld Airlines,* 10 Avi. 18.375.

84 M. Matteucci, Introduction à l'étude systématique du droit uniforme, *Recueil des cours de l'Académie de La Haye,* vol. 91, pp. 383 at 401, 406 (1957).

85 See for instance, I.C.A.O. doc. 8839, vol. I, p. 293 (295) and p. 311, paragraph 7. For more on this amendment, see hereunder Section iii). Although the American Government highly assumes that under that amendments which have been incorporated in Article XII of the Guatemala Protocol, all claims by persons domiciled or residing in the U.S.A. will be brought before American Courts and adjudicated under their own law, the amendment will not fill the gap left by article 24(1) of the Convention.

preparatory drafts and reports, and the debates of the Warsaw Conference[86] may partly be blamed for their particular behavior[87] in deciding who is entitled to compensation and what compensation is due in the case of bodily injuries to or death of a passenger. If they were willing to concern themselves with the clear intentions of the authors and with the spirit of the *Warsaw Convention,* they would probably have avoided criticism by a distinguished American legal scholar for "offering their gifts at the wrong altars"[88].

Another example of the influence of judge-made law and judicial traditions on the construction of certain provisions of the Convention are found in the case law of civil law countries dealing with what is "a default to be considered as equivalent to *dol*", which has been described above. Likewise, the belated decision of the French *Cour de Cassation* which, as recorded above, has overruled a well-established line of decisions of lower courts and the generally held views of legal writers on the question of whether article 29 of the *Warsaw Convention* establishes a *délai préfixe* or a mere limitation, has lengthened the life of claims under the Convention by permitting the two-year period to be interrupted or suspended and, thereby has brought the application of that article in line with some foreign judgments.

ii) Claimants and their rights.

The judicial determination of the persons and rights mentioned in article 24(2) of the Convention furthermore documents the influence of judicial precedents and traditions on the fate of a uniform law convention. It is not only the already described differences in national statutes and common law rules which lead to discrepancies in the identification of those persons and their rights. Indeed, many of the rules relating to the "right to claim" and to compensation for moral damages, for loss of alimony, services and companionship etc., are judge-made law and, like statute law and codes, vary from country to country, both within the civil law and the common law systems.

Moreover, much depends on whether the national case law allows the damage action against the carrier to be based on contract or in tort. While this question, as previously mentioned, does not arise in common law countries, the judge-made law of some civil law countries permits members of the family and certain dependents of the injured or deceased passenger to sue in contract or in

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86 See however *Block et al v. Air France,* 10 Avi. 17.518; and *Mertens v. Flying Tiger Line,* 9 Avi. 17.475 (at 17.477) which discuss extensively certain parts of the Warsaw proceedings. See also Donaldson J., and Lord Denning in the afore mentioned *Corocraft* case.

87 See especially G. Nathan Calkins, *The Cause of Action under the Warsaw Convention* (1959) J.A.L.C. 217 and 323.

88 For the claimants and their rights in contract under French law, see Cass. Civ. (1959) R.F.D.A. 260; 1964.D.304 (with comments by Rodière) and recently Cass. Crim. (1970) R.F.D.A. 81. *Cour d'Appel de Paris* (1954) R.F.D.A. 80 (1956) 285 and under Belgian law, *Tribunal de Bruxelles* (1950) R.F.D.A. 411.

tort, or both[89]. Some courts, moreover, compel the plaintiffs to choose between an action in tort and an action in contract[90]; others may allow both actions to be brought concurrently. Needless to say that the persons and rights in question are not always or necessarily the same in a tort and a contractual action [91].

In this connection, notice must also be taken of a peculiarity of the French *jurisprudence* regarding carriage of persons. French courts have established, and consistently applied, the rule that the passenger is reputed to have stipulated in favour of his family and dependents; and the carrier to have promised a safe journey. Therefore, in case of injury or death of the passenger, the former can claim either under that *stipulation pour autrui* or, after renouncing their contractual rights, bring suit under the applicable court rules[92]. Again, the plaintiffs and their rights are not always the same in either action.

The drafters of the *Warsaw Convention* intended its liability rules to apply in a uniform manner, irrespective of whether a given court held the carrier's liability to be contractual or tortious. Hence, they provided in article 24(1) that in all cases covered by the Convention "any action for damages, *however founded,* can only be brought subject to the conditions and limits set out in this Convention". Furthermore, it will be recalled that in order to insure uniformity, they excluded recourse to the possibly different law of the place of the accident in a country which was not a party to the Convention, by providing in article 28 that the damage action must be brought "in the territory of one of the High Contracting Parties".

While this barrier against avoidance of application of the Convention rules is effective with respect to the limitation of liability, it follows from the foregoing that it is incapable of preventing diversification of the right to claim and the kind of damages being awarded[92a]. Frequently, a claimant who has a perfect entitlement under his own law will find out that he is not entitled to

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89 See preceeding note.

90 *Cour d'Appel de Paris* 1954) R.F.D.A. 45.

91 This is not the place for a detailed study of the statute and case law applied in this respect in even the leading air transport countries. A general survey of the law in some major European civil law countries is made in *Le sort de la Convention de Varsovie,* note 14 *supra.* The German Federal Supreme Court has held recently that now, compensations cannot be claimed for the loss of the child of the other spouse nor for loss of services of a child. (1969) N.J.W. 2007 and 2005. For an interesting French case on moral damages, see (1956) R.F.D.A. 67.

92 For an example, see note 90 *supra.*

92a Nothing, as is submitted, has been changed in this respect by the amendment made in articles 22 and 24 by the Guatemala Conference. Article 24, as then amended, provides that the limit applies to the "aggregate of the claims", which article 24 was amended by inserting after "however founded" the explanatory words "whether under this Convention or in contract or in tort or otherwise", and by adding the following sentence: "such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability".

claim damages under the law applied by the court having jurisdiction under the *Warsaw Convention,* or that he cannot claim the kind or heads of damages which would be allocated to him under his national law. The reverse is also true. Hence, in spite of the precautions built into article 29 and also in article 24(1), the *Warsaw Convention* permits and invites "forum shopping" – a state of affairs which is contrary to the very purpose of uniform law conventions[93].

iii) Place of business (establishment) and jurisdiction

The rules of procedure and the practices of the Courts of the United States of America with respect to venue have led these courts to construe article 28(1) of the *Warsaw Convention* in a manner which is considered incompatible with its wording, and contrary to the stand taken by courts in other countries[93a]. According to that article, one of the jurisdictions where the action can be brought "at the option of the plaintiff", and provided it is "in the territory of one of the High Contracting Parties" is the court where the carrier "has a place of business through which the contract has been made". It will be noted that the words "place of business" is an interpretation of the French word *établissement,* which is translated in the *Carriage By Air Act (1932),* by "establishment". It is generally admitted that that expression does not comprise travel agencies or the offices of another airline which has issued the ticket on behalf of the carrier. This opinion was shared by Judge Pilcher in *Rotterdamsche Bank v. B.O.A.C.*[94] and by American courts in *Dunning v. Pan American Airlines*[95] and *Woolf v. Aerinovias Guest*[96]. However, contemporary American case law is to the effect that the carrier can be sued in any court of the United States of America if the ticket has been sold by whomever it may be, within the United States, and that that court must not necessarily be the court having jurisdiction at the place where the ticket has been sold. One of the first cases was *Berner v. British Commonwealth Pacific Airlines and United Airlines*[97] where it was held that B.C.P.A. could be sued in New York because the B.C.P.A. ticket had been sold in New York by B.O.A.C. which had an interest in the B.C.P. Airlines. While agreeing that the much stricter interpretation adopted in *Dunning v. Pan American Airlines* was the one intended by the drafters of the *Warsaw Convention*, the New York Court of Appeal in *Eck v. United Arab Airlines*[98] held that article 28 must be construed in the light of the greatly changed conditions of modern

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93 See note 83 *supra.*

93a See in this respect for example, the debates during the 17th session of the I.A.C.O. Legal Committee; note 20 *supra,* the debates of the Guatemala Conference which also dealt with this question have yet to be published.

94 (1953) L.I.L. Rep. 154.

95 (1954) U.S.A.v.R. 70.

96 (1954) U.S.A.v.R. 399.

97 5 Avi. 17.169.

98 9 Avi. 17.364.

international air transportation and, therefore, permitted the United Arab Airlines to be sued in New York because the office of the Scandinavian Airline System (S.A.S.) in Oakland, California, had issued an S.A.S. ticket which provided for part of the carriage to be performed by United Arab Airlines. It should be noted that Judge Bergan filed a strong dissent in favour of a strict interpretation of article 28, in which Judge Dye concurred.

The dissent reads, in part, as follows:

> ". . . The ratification of the Warsaw Convention by any of its high contracting parties necessarily took into account the domestic court system of each signatory when it came to providing for jurisdiction over actions arising in pursuance of the Convention. . .
>
> . . . Article 28 . . . does not authorize actions in any court within that territory. Jurisdiction is expressly limited to a specified court. An action must be brought in 'the court' where he (the carrier) has a place of business through which the contract has been made' . . .
>
> In some countries, this might well mean any court in the nation where the same national court has local jurisdiction everywhere. But the jurisdictional condition prescribed by article 28 is not met in New York unless the contract is made by the carrier through its office in this State. . .
>
> . . . What would have been the consequence had plaintiff made the contract in New York is irrelevant. The contract was not made here, but in California. *Nor is the growth of air travel a new or decisive factor in deciding the jurisdictional question. The careful language of the Convention in respect of jurisdiction means the same thing now that it meant in 1929 when it was drafted and in 1934 when adopted by the United States. . .".**

The "progressive interpretation" of article 28 appears to reflect a tendency by American courts to believe that American citizens and residents, and their families, must be given the right to sue in any American court which provides them with a convenient forum. Indeed, the Government of the United States of America, realizing that such[99] "judicial treaty revision" meets with resistance from other states party to the *Warsaw Convention*, have introduced proposals before the I.C.A.O. Legal Committee and its sub-committee to the effect that article 28 be amended by adding a new jurisdiction so as to permit the claimant to sue the carrier in the court of the country of his domicile or permanent residence[100]. At the 17th session of the I.C.A.O. Legal Committee, a majority of delegates met the American wishes in part and agreed that article 28 might be

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* *emphasis supplied*

99 See also *Chankalian v. Aeronavias Quiseyana,* 10 Avi. 17.353 where a mere listing of a telephone number established jurisdiction, and *Gordon v. Braniff Airways* (jurisdiction at the place of the travel agent) 10 Avi. 17.830; *Hoffman v. Air India,* 10 Avi. 17.139. For a French case on that problem, see (1958) R.F.D.A. 190. For a general discussion of the case law on article 28, see for instance, Robbins, *Jurisdiction under article 28,* 9 McGill Law Journal, 352 (163).

100 *The United States Government position on review of the Warsaw Convention*, I.C.A.O. doc. 8839, vol. I, p. 293 (295).

amended by the addition of a new paragraph which would provide that "the action may also be brought in the territory of one of the High Contracting Parties before the court where the carrier has an establishment, if the passenger has his domicile or permanent residence in the territory of the same High Contracting Party".

g) Clear and ambiguous language

i) General

That one and the same wording in a statute, a convention or contract is considered as "clear language" by some courts, and as ambiguous by other courts of the same country, is not an infrequent occurrence. One of the functions of a national Supreme Court is, indeed, to give authoritative rulings in order to preserve the uniformity and certainty of the law as applied by the courts.

Of course, the same judicial disagreement on the "clearness" of the meaning of words and sentences arises with respect to the provisions of a uniform law convention. Thus, expert French lawyers differed on the meaning of the authentic French text of article 8(i) of the *Warsaw Convention* when cross-examined during the pleading of the *Corocraft* case before the Queen's Bench Division[101].

Also, without referring to the extreme cases which actually set aside the provisions of the Convention, the many judgments already referred to, which deal with the completeness of the traffic documents prescribed by articles 3, 4 and 8 of the Convention bear witness to the fact that the very same article of the Convention or clause in a document can mean different things to different judges.

ii) "Necessary measures to avoid the damage"

In the same manner, without there being any special or external reason for diverging judgments, the provisions of article 20(1) of the *Warsaw Convention* have been understood in a different manner by different courts.

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

The question, therefore, arises whether the carrier can discharge his burden of proof and, consequently, escape liability for an aircraft accident by establishing that the aircraft had the necessary airworthiness certificate, radio licenses, etc., and was properly maintained, that the crew had all the required

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101 See section III, b), ii).

qualifications and licenses etc. Evidently, this proof could be discharged in all but the most exceptional cases, with the result that the carrier would seldom be found liable. This view is held by many writers[102] and is implicit in the American decisions in *American Smelting and Refining Co. v. Philippine Airlines*[103], and *Philios v. Transcontinental and Western Air Inc.*,[104].

Other courts have, however, adopted a different construction of article 20(1) which makes it more difficult, if not impossible in most cases, for the carrier to escape liability. Under that construction with which agree many legal scholars[105] and the present writer, it is only after the cause of the accident has been established that the carrier will be permitted to prove that he and his agents have taken all measures to avoid the damage or that the damage would have occurred anyway[106]. In other words, the carrier is always presumed to be liable if the cause of the accident remains unknown, as is frequently the case. Thus, the presumed liability of the *Warsaw Convention* is paramount to strict liability since a person can avoid such liability only by showing that the damage resulted from an act of God or the intervention of a third person, a defence which, indeed, presupposes that the cause of the damage is known.

iii) Operation of embarking and disembarking

Under article 17 the carrier is also liable for damage to the passenger if the accident which caused that damage, occurred "in the course of the operations of embarking and disembarking". This "clear" wording has produced different judgments not only in different countries but also amongst the French Courts and the French *Cours de cassation.*

In the Federal Republic of Germany it was held that the said operations commence in the airport waiting room[106a]. An American court decided that article 17 applies to an accident at the airport during a stop-over in *Chutters v. Canadian Pacific Airlines*[106b]. This was also the view of the *Tribunal* of Paris

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102 For a rather complete listing and survey of writings pro and contra, as well as the history of article 20(1), see Hjalsted, *The Air Carrier's Liability in Cases of Unknown Damage in International Law,* (1960) 27 J.A.L.C. 1 and 119 and H. Zogbhi, *La responsabilité aggravée du transporteur,* Beirut, 1960.

103 (1954) U.S.A.v.R. 221.

104 (1953) U.S.A.v.R. 479.

105 See note 102 *supra.*

106 *Grein v. Imperial Airways* (1936) 2 All. E.R. 1258; Tribunal of Frankfurt/M (1939) *Archiv. f. Luftrecht,* 180; *Palleroni v. Sociéta di Navigazione aera* (1938) *Revista di Diritto aeronautica* 155; Cour d'Appel Paris (1937) R.F.D.A. 444; *Ritts v. American Overseas Airlines* (1949) U.S.A. v. R. 65; also *Goepp v. American Overseas Airlines* (1949) U.S.A.v.R. 527, dealing with the same accident but arriving at the opposite result. See also *Dunning v. Pan American Airlines,* U.S.D.C. Distr. of Columbia (1954) U.S.A.v.R. 70; *Woolf v. Aeriovias Guest* (1954) U.S.A.v.R. 399; *Rotterdamsche Bank v. B.O.A.C.* Q.B. (1953) Lloyds's L.R. 154; Cour d'Appel de Paris (1968) R.F.D.A. 168, and *Cour d'Appel Aix-en-Provence* (1968) R.F.D.A. 201.

106a (1962) *Zeifschrift fur Luftrecht* 78.

106b (1955) U.S. and C.A.v.R. 250.

and the Appeals Court of Paris in a case involving a passenger being injured by falling in a manhole while the air hostess led him with other passengers from the aircraft to the airport buildings during a stop-over[106c]. The *Cour de cassation* however, held that this walk was not within the meaning of "operation of embarking and disembarking" since it took place outside the apron *(aire de trafic)* and, consequently the plaintiff could only make claim under French civil law[106d]. They referred the case for further decision to the Court of Appeal in Rouen which was bound on this point to follow the ruling of the Supreme Court, but decided to apply the defendant's standard exception and limitation clause which plaintiff was supposed to be aware of, and which made the Warsaw limitations applicable even though the Convention itself was not applicable to the claim[106e]. In a further judgment the *Cour de Cassation* agreed with this decision which (to a very large extent) was based on findings of fact[106f] – [106g].

iv) Negotiability of the air consignment note

The *Warsaw Convention* is silent on the question whether the air consignment note is, or can become, a negotiable instrument. Hence, the answer depends on the national law which is far from being uniform. In some countries, indeed, any document which fulfills certain conditions is, or may be made a negotiable document. Elsewhere, particularly in most civil law countries, only certain nominate instruments are negotiable, including the Maritime Bill of Lading. Could these countries make the air consignment note an equally negotiable instrument, and do countries which adhere to the other system, have the right to treat it as a negotiable instrument? The question was very much debated by legal writers[107] and by the delegates to the 1955 Hague Conference[108]. The latter, without taking sides, decided (article IX) to add to article 15 of the Convention, a third new paragraph reading as follows:

> "Nothing in this Convention prevents the issue of a negotiable air waybill"[109].

106c (1961) *Revue Générale de l'Air et de l'espace* R.G.A.E., 292 and (1963) R.G.A.E. p. 275; also (1963) *Revue française de Droit Aérien* (R.F.D.A.) 353.

106d (1966) R.F.D.A. 228; (1966) R.G.E.A. 32.

106e (1967) R.F.D.A. 343; (1967) R.G.A.E. 289.

106f (1970) R.G.A.E. 300.

106g See also Comments by E. du Pontavice and G. Cas, respectively in (1966) R.F.D.A. 228 and (1968) R.G.A.E. 117 and (1970) p. 365.

107 See in particular, the report by Professor H. Drion, I.C.A.O. doc. 7450, vol. I, p. 71; M. de Juglart, *Traité élémentaire de droit aérien*, p. 354; O. Riese, *Luftrecht*, p. 432; Shawcross and Beaumont, *On Air Law*, 3rd ed., p. 460; A. Schweickhardt, (1951) R.F.D.A. 19; E. Huber and A. Cuenod (1956) *Bulletin de l'Association suisse de droit aérien*, no. 13.

108 Minutes and documents of the 1955 Hague Conference, I.C.A.O. doc. 7686, vol. I, p. 150, 326, 382, 414; and vol. II, pp. 29, 106, 125, 132, 145, 220, 236.

109 "Air Waybill" is the expression used in the American translation of the Warsaw Convention for the French words *"lettre de transport aérien"* translated in the Schedules to the *Carriage By Air Act (1932) and (1961)*, by "air consignment note". One of the difficulties of drafting the Hague Protocol in the three languages of

The foregoing are but some instances of the disunifying influence of national law, decisions and traditions on the application of the *Warsaw Convention*. Many others could be given, and the phenomenon considered here is not particular to that Convention but affects all conventions for the unification of private law[109a]. However, because the *Warsaw Convention* is the most widely applied of these treaties and has produced, it appears, the largest number of reported cases, it is a particularly attractive field for investigation by comparative lawyers.

III. POSSIBLE MEANS TO OVERCOME JUDICIAL DISUNIFICATION OF A UNIFORM PRIVATE LAW CONVENTION

Having regard to the pitfalls inherent or embodied in any uniform private law convention, however carefully they might have been drafted, one may wish to look for existing and proposed ways and means of insuring their uniform application and interpretation throughout the world.

a) Importing foreign case law

One way to reach that goal (i.e. uniform interpretation of uniform law rules), has been shown by the British Court of Appeal which, in the interest of harmony, has aligned itself with decisions of the courts of the United States of America. However, such uniform judge-made law through the importation of foreign jurisprudence is likely to materialize on a wide basis only if and to the extent that the arguments of the foreign judge are both persuasive and compatible with the tradition of the importing courts. While the Master of the Rolls is prepared to "pay the highest respect" to decisions of American courts, Donaldson, J., had refused to follow American precedents, considered by him to be distinguishable because he was "not wholly convinced of the correctness of this approach. . . which seems to me to involve the rewriting of article 8 in a form which may well be more sensible, but is quite different"[110].

I.C.A.O., namely English, French and Spanish, was the fact that English and Spanish translations of the authentic French text used different terminologies. In drafting the English authentic text of The Hague Protocol the American usage was preferred, with the result that the English text of the amending articles uses expressions which are different from those in the English text of unamended portions of the articles in the said Schedule. As a safeguard against interpretation difficulties, which could arise from that situation, the second sentence of the penultimate Final Clause of The Protocol provides: "In the case of any inconsistency, the text in the French language in which language the Convention was drawn up, shall prevail". Incidentally, it is this Clause of The Hague Protocol which is the basis of Section I (1) of the *Carriage By Air Act (1961)*, which was used by Lord Denning in the *Corocraft* case to say that "(it) makes explicit in the Act of 1961 what was implicit in the Act of 1932.

109a See *infra* at note 130.

110 It will be recalled that this view was also held by the dissenters in some of the wide-reaching American decisions (see notes *supra*); and that M. Lindon saw no ground why, even in a litigation arising out of the same aircraft accidents, French judges should bow to their American colleague.

As mentioned elsewhere[111], and having noted that the Court of Appeal has not been apprised of certain writings, and has agreed to disregard without specific reasons the Swiss and the Malaysian precedents, it is believed that the most they have achieved so far is a "regional" unification, limited to two English-speaking countries. There is no indication whatsoever that they will be followed by courts on the European continent or elsewhere[112].

One might also wonder whether any foreign court would be willing to accept the *ratio* and findings in the *Mertens, Eck* and *Burdell* cases as well as in the *Lisi* case which, according to the dissent of Judge Moore, amounts to a judicial amendment of the treaty.

b) Proposals to provide an international machinery for their uniform interpretation

The main difficulty in insuring world-wide uniformity in the application and interpretation of private law conventions stems, indeed, from the absence of an international supreme court. This also makes undesirable any "trial balloon" interpretation of a given rule since, lacking the possibility of its being punctured by a supreme court, it might become, in fact, a respected and leading precedent, as evidenced in the foregoing pages.

Both C.I.T.E.J.A. and I.C.A.O. have considered the problem of preventing judicial disintegration of the *Warsaw Convention* and have suggested various solutions, none of which have been given effect.

i) Steps taken by C.I.T.E.J.A. (Comité International Technique d'Experts Juridiques Aériens)

Barely four years had passed since the signing of the *Warsaw Convention* when C.I.T.E.J.A. had before it, a proposal by the French delegation[113] to make arrangements with a view,

> "to (giving) its opinion or its interpretation on international texts on private air law if it is requested to do so through a public administration or an international organization, provided that this activity shall not interfere with the right of the judiciary to give its own interpretation when confronted with a difference".

This proposal was adopted by the Third International Conference on Private Air Law held in Rome in 1933, which finalized and adopted the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*[114].

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111 (1969) R.F.D.A. no. 2.

112 See comments cited in note 59 *supra.*

113 C.I.T.E.J.A. doc. 239.

114 See preceding note.

Consequently, the eminent French Internationalist, Professor A. de La Pradelle, was asked to prepare draft rules on the interpretation of private air law conventions which were approved in 1934 by the First Commission of C.I.T.E.J.A.[115]. These draft rules provided, *inter alia* that requests for interpretation might be presented only by states that are members of C.I.T.E.J.A. or by international bodies, and that C.I.T.E.J.A. would give an opinion in the form of a "statement of what it believes to have been the intentions of the Parties to the Convention" but such statement would not be binding upon the judicial authorities of the member states. Under these proposed rules C.I.T.E.J.A., in accordance with the wishes of the delegation of the United States of America[116], was not to assume judicial functions in the interpretation of private air law conventions nor to admit requests for a legal opinion from private individuals.

These rules were embodied in a draft convention which was studied by C.I.T.E.J.A.[117] in September 1937 and again in January 1939[118]. At that time, it was decided that in view of strong opposition to the project, the draft convention need not be pursued any further.

ii) Action by I.C.A.O.

When C.I.T.E.J.A. was dissolved and its functions taken over in 1947 by the Legal Committee of I.C.A.O.[118a], the Assembly of I.C.A.O. decided to include in the work program of that Legal Committee the following item:

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115 C.I.T.E.J.A. doc. 298, 347, 355 and 357.

116 C.I.T.E.J.A. doc. 230.

117 Extract from the *Preliminary Draft of a Convention on the Collaboration of C.I.T.E.J.A. in the Interpretation and Execution of International Private Air Law Conventions.*

118 C.I.T.E.J.A. doc. 381.

118a See R.H.M. *L'Unification du droit aérien* (1970) 16 McGill Law Journal 419.

ARTICLE 1

If the C.I.T.E.J.A. is consulted by any person concerning the meaning of the terms and provisions of an International Convention on Private Air Law, the preparations of which it has participated, it shall restrict itself to transmitting all documents which, within the limits of its activity, deal with the question asked.

The Secretary general shall ensure the transmission of such documents under the authority of the Chairman, or of the member to whom the Chairman has delegated his powers.

ARTICLE 2

(1) If the C.I.T.E.J.A. is consulted by one or more of the states represented therein concerning the meaning of the terms and provisions of an International Convention on Private Air Law, in the preparation of which it has cooperated, it shall give, if it considers it possible to do so, by making use of work in which it has cooperated through itself or its members, as well as of all elements of interpretation, a reasoned opinion, which shall have no other authority and weight than that of a mere legal advice.

(2) The request to the Committee shall be transmitted by the Secretary General to a permanent Commission appointed by the C.I.T.E.J.A., the commission shall prepare the draft reply.

"authority of judgments by competent tribunals on conventions in force on air matters. . ."[119]. In a more precise manner the International Conference on Private Air Law held in Rome in 1952, which adopted the new *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface,* resolved to ask the Council of I.C.A.O. to:

> "instruct the Secretariat and the Legal Committee to study a system of settlement, at least in appeal proceedings, of international private law disputes that might arise either from the conventions signed this day, or from any other aviation convention" [120].

The following alternative systems were suggested at that occasion:

i) the establishment of a special permanent tribunal;

ii) the establishment of a special *ad hoc* tribunal;

iii) the designation of arbitrators acting under uniform rules of procedure, and

iv) Recourse to an existing international institution.

While the I.C.A.O. Legal Committee, at its session held at Rio de Janeiro in September 1953, decided "to defer inclusion of this subject among those for current study by the Committee", it requested the following year (September 1954)[121] the Council of I.C.A.O. to insert in part "A" of the work program of the Committee the subject: "Settlement of international private air law disputes arising in connection with civil aviation" together with the item "Authority of judgments by competent tribunals on conventions in force on air matters and distribution and allocation of awards". However, after an inquiry amongst contracting states has shown that eight favoured such a study and five were against it, the Council of I.C.A.O. rejected the request of the Legal Committee (March 1955) [122].

The question was taken up again by the Conference held in The Hague in September 1955 for the purpose of formulating and signing a Protocol to amend the *Warsaw Convention*. In Resolution "E" the Conference[123] recommends that such international bodies and organizations, which are responsible for, or interested in the development of international private air law, undertake, as soon

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(3) The Committee, on receipt of the Report of that Commission, shall take a decision by the majority of the members present.

(4) The reply shall give reasons; it shall be transmitted not only to the author of the request, but also to all states represented in the C.I.T.E.J.A.

(5) Any dissenting opinion which shall also give reasons, may if its author so desires, be annexed to the reply.

119 I.C.A.O. doc. 4382.

120 I.C.A.O. doc. 7379, vol. II, p. 278.

121 I.C.A.O. doc. 7601, vol. I, p. 14.

122 I.C.A.O. doc. 7555-18, and C-WP/1897.

123 Final Act of The Hague Conference, I.C.A.O. doc. 7686, vol. II, p. 19.

as possible, the study of the problems involved in the promotion of uniform interpretation of international private air law conventions, as well as in the international settlement of disputes arising under said conventions. In order to give effect to that recommendation, the Council of I.C.A.O. decided (November 1955)[124] to ask the Chairman of the Legal Committee to set up a sub-committee to make a preliminary study, *inter alia,* of Resolution "E" of The Hague Conference. That sub-committee met during the assembly of I.C.A.O. held in Caracas in 1956, but no further action was taken[125].

iii) Resolutions of private organizations on that matter

The Third Congress of Comparative Law[126] held in London in 1950, adopted the following resolutions:

> "Dans la mesure où l'unification conventionnelle du droit sera réalisée, il est recommandé aux Etats contractants d'insérer dans les traités d'unification une clause compromissive permettant à chacun d'eux, au cas de divergence des jurisprudences nationales, de saisir une cour internationale composée de juristes de droit privé et dont la décision s'imposera aux tribunaux de tous les Etats contractants".

Whether or not as a result of that Convention, the *Universal Copyright Convention* signed at Geneva in September 1952, provides in its article XV, for the promotion of its uniform interpretation. This article reads as follows:

> "A dispute between two or more contracting States concerning the interpretation or application of this Convention, not settled by negotiation, shall, unless the States concerned agree on some other method of settlement, be brought before the International Court of Justice for determination by it".

It is clear that both the Statute of the International Court and the above article XV, only states, and not private individuals have access to the Court.

The question of insuring uniform interpretation of air law conventions was also considered by the Air Law Committee of the International Law Association. In February 1955, it asked Dean P. Chauveau to prepare a report on the establishment of an international court for the solution of the difficulties arising from the interpretation and application of international conventions on air law[127].

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124 I.C.A.O. doc. 7633-14.

125 The Legal Commission at that Assembly decided to put that question, together with related items, in Part "B" of the work program of the I.C.A.O. Legal Committee, with the result that no further study of the question need be undertaken, except on special of the question to be undertaken, except on special of the question then be undertaken, except on special instruction; see I.C.A.O. doc. 7712, pp. 5 and 20.

126 I.C.A.O. LC/SC/Res. WD no. 2.

127 For previous resolutions of the I.L.A. on the matter of uniform interpretation of uniform private law conventions, see *Reports of the Conferences held in Stockholm* (1924), London (1925) and Budapest (1934). For similar resolutions adopted by the Institut de Droit international, see reports on its Lausanne (1927) and Paris (1929) meetings.

At the 47th Conference held in Dubrovnik in 1956, Dean Chauveau submitted a *Report on the Establishment of an International Court for the solution of difficulties arising from the interpretation and application of international air law convention,* together with a draft convention dealing with the jurisdiction, organization, procedure and legal status of decisions of that court.

The court would be designated as *"Cour arbitrale internationale de droit privé"*. It would have original and appeal jurisdiction with respect to any international private law dispute arising from the application of an international convention and would be opened to any person or legal entity (articles 2, 4 and 5). Parties to a convention can also agree to seize the court of any dispute described above (article 3(2)).

The divisions of the court exercising original jurisdiction *(juridiction du premier degré)* are established within the territory of each of the contracting Parties and are composed of judges designated by that Party (articles 5 and 6). Judges of the Appeal Division are appointed for a first term of seven years and must be judges in their own country, or lawyers who have practiced law for at least ten years (article 6). Each Party to the Convention and member of the I.C.A.O. Council may nominate two candidates from amongst its own or foreign nationals. From the candidates so designated, the President of the I.C.A.O. Council, who has also the right to nominate two judges, appoints the judges of the Division, provided that no more than two judges are citizens of the same country (articles 7 and 8). Decisions of the court are binding on the parties to the proceedings but may not be executed without an *exequatur* by the authorities of the country where they are to be enforced (article 24) [128].

POSSIBLE ROLE FOR THE COUNCIL OF I.C.A.O. AND THE INTERNATIONAL COURT OF JUSTICE.

For the sake of completeness, mention should be made of a very intriguing suggestion by Professor H. Drion, which, however, was never studied actively by I.C.A.O. [129].

Professor Drion's suggestion made in 1952 is based on the proposition that any question arising in connection with a private air law convention is within the scope of activity assigned to I.C.A.O. by the *Chicago Convention*, and also within the advisory jurisdiction of the International Court of Justice. Since article X of the Agreement between the United Nations and I.C.A.O. authorizes the Council of the latter to request, in accordance with article 96 of the Charter of the United Nations, an advisory opinion of the Court "on legal questions

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128 Report on the 47th Conference (I.L.A.), 1957, p. 181.

129 (1952) J.A.L.C. 423 and in French, (1953) R.F.D.A. 299.

arising within the scope of its (I.C.A.O.) activities", Mr. Drion submits that any member of I.C.A.O. could ask the I.C.A.O. Council to request such advisory opinion by the International Court of Justice on any problem of interpretation of the Warsaw, and other air law conventions. Such requests should be scrutinized by the I.C.A.O. Legal Committee, in order to insure that "no questions should be submitted to the Court which are so tied with the facts on a specific case that it would be asking the impossible to request an opinion *in abstracto*".

If I.C.A.O. would ever accept to proceed along the lines suggested, it would be for the Assembly of that Organization to prescribe the rules of procedure and to set forth the conditions under which the I.C.A.O. Council may ask an advisory opinion of the International Court with a view to insure the uniform application of a uniform private air law convention.

The need for international air law reports

If harmonization of the interpretation of international air law conventions is to be achieved by national courts via the path set out by the British Court of Appeal, taking into account considered opinions of foreign judges, means must be provided for keeping judges and lawyers informed on decisions rendered outside their country. In other words, there is a definite need for "international air law reports".

Up to now, that need is fulfilled very incompletely. Of course, the leading American, French and German air law periodicals do analyze or summarize, and sometimes translate foreign judgments dealing with common air law problems; however, their useful endeavours are rather sporadic and sometimes very belated since they depend essentially on the alertness of voluntary contributors who have neither the technical nor the financial means to provide regular and complete coverage of foreign air law cases.

The *United States Aviation Reports* had become at some time the *United States and Canadian Aviation Reports* and did not disdain to include some English decisions. It is regrettable that after the death of their founder, they have reverted to the status of United States Reports.

A more clearly international survey is provided by the *European Air Transport Review* which publishes in several languages important air law decisions. Still, the reporting is selective and covers the Common Market countries only.

A welcome step towards a more comprehensive international law reporting was taken in 1958 by the International Institute for the Unification of Private Law (UNIDROIT) in Rome. In an annual series entitled *"Uniform Law Cases" (Jurisprudence de droit uniforme),* they publish leading decisions from various countries on the interpretation and application of four uniform law conventions,

including the *Warsaw Convention*[130]. Inevitably, since the publication is an annual one, there is quite a time lapse between the date and the international dissemination of the judgment.

I.A.T.A. provides in loose-leaf form reports on air law jurisprudence, including "Warsaw cases", from various countries, but this service, regrettably, is only available to member airlines.

In the early days of its existence, it had been suggested that I.C.A.O. was the proper organ to collect and publish leading air law decisions rendered in its member states, by starting a series comparable to the *Annual Survey of Legal Decisions in Labour Law* published before the war with great success by the International Labour Office[131]. For various reasons, I.C.A.O. abstained. However, there is little doubt that the work of I.C.A.O., including its Legal Committee, as well as that of its member States and their courts could greatly benefit from having available, in the three official languages of the Organization, important legal decisions on questions relating to air law, including the application and interpretation of air law conventions [131a].

iv) Send-off

Two suggestions may finally be offered by way of a conclusion to this survey of the fate of the *Warsaw Convention* at the hand of the judges:

First, while a liberal and reform-minded attitude is generally welcome with respect to the construction of rules of national law, the absence of a supreme court that can contain and direct such judicial adventure into the unknown, makes it desirable, nay imperative, that judges adhere as closely as possible to the intention of, and the meaning given to the text by the parties to a uniform law convention[132]. With this in mind, if one delves into the drafting history of the *Warsaw Convention* and takes into account the state of air transportation in

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130 The other conventions covered are: 1924 Brussels *Convention on the Maritime bill of lading,* 1930 Geneva *Convention for the unification on the law of bills of exchange and promissory notes,* and 1931 Geneva *Convention for the unification of the law of cheques.*

131 *Notes sur l'utilité d'un recueil international des décisions judiciaires intéressant l'aviation civile internationale* (1949) Revue du Barreau 1.

131a

132 As Dean P. Chauveau has pointed out repeatedly: "Une interprétation plus stricte et plus ou moins exigétique, d'après la lettre du texte et la commune intention des Hautes Parties, est seule de mise" D.S. 1970.82, and this is also the opinion of a former President of the French Cour de Cassation, M. P. Lescot, in his remarkable article entitled *L'interprétation judiciaire des règles de droit privé uniforme. Juris Classeur Périodique* (La Semaine Juridique) 1963,I,1756. Similarly, Donaldson, J., said in the *Corocraft* case (1969) 1 Q.B. at page 640: "In my judgment, it is not for a court, or indeed a single legislature to vary the Convention, and I am not prepared to do so under the guise of interpretation"; for similar reasons the United States District Court, E.D.NY. refused to take into account the devaluation of moneys since the coming into force of the Convention; *Kelly v. Sabena* (1965) U.S.A.v.R. 739; see also reference in note 110 *supra.*

the 1920s, it would have been very plausible to hold that the word "and" in the English text of article 8(i) of the Convention, instead of being an illicit "gloss of the translator", does indeed clarify what the British Parliament, as well as other States parties to that Convention, understood that provision to mean[133].

Secondly, there appears to have occurred a definite change in recent years in the approach to the unification of private law. In the early days of the unification movement, and until the eve of World War II, the belief prevailed that though "One World" was an unrealistic hope on the political level, it might be possible for legal scholars to achieve a common understanding with respect to certain adequate and just, albeit imperfect but perfectable, rules of private law which might be generally, even universally acceptable[133a]. Through a scholarly approach to old and new legal problems and by a give-and-take with respect to national rules, traditions and customs, there in fact, evolved many uniform rules in various fields, which proved to be capable of fitting into the major legal systems[134].

Today, however, the approach is different both at the stage of formulation and of implementation of uniform law rules. Certain governments appear to have adopted the attitude that unification of law means world-wide application of their own national law, and by grouping and blocking various types of pressures, exert themselves with a view to reach that goal. Of course, such an attitude increases the stubborness on the part of their bargaining partners. As a result, basic features of a uniform convention are frequently no longer the result of scholarly debates and of weighing the ingredients of distributive justice, but instead, reflect a compromise achieved by power politics. Governments, like other human beings, occasionally have second thoughts and will sometimes renege on the undertaking given during the conference which adopted the convention; or may find inacceptable the rule agreed to by their plenipotentiaries[134a]. This, it is believed, is one of the reasons of the relatively few ratifications of some major air law treaties evolved since World War II.

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133 R.H.M., *Conflicting Interpretations of the Warsaw Air Transport Treaty,* A.J.C.L. vol. 18, no. 1.

133a See in particular, H. C. Gatheridge, *Comparative Law,* London 1949, and among the numerous writings on that subject by the founder of modern Comparative law, Edouard Lambert, his *Sources du Droit Comparé.* Législation uniforme et jurisprudence comparative dans Recueil en l'Homme de François Giny, Paris 1934, t. III, and *Le Recueil International de Jurisprudence de travail,* in 1936 *Bulletin de la société de législation comparée* 354.

134 For an overall view of the scope of unification of private law through conventions, and of the efforts of some international organizations, see the *Yearbooks of the Rome Institute for the Unification of Private Law.*

134a This was foreseen by H. C. Gatheridge (see preceding note) and has become very evident not only during the I.C.A.O. meetings preparing the Guatemala Revision, but also during the preparatory work leading to the 1970 Hague Convention for the suppression of unlawful seizure of aircraft and 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation, see also following note.

The "power approach" to uniform law-making is[135] also the reason why the *Warsaw Convention,* which has established a scholarly-built and coherent system of the air carrier's liability will become, after the coming into force of the 1971 *Guatemala Protocol* (if revised along the lines now emerging from the I.C.A.O. work on the subject), a modernistic patchwork of rules which are "convenient", not always logical; and sometimes unheard of rules which surely protect certain interests but are somewhat less concerned with the well-being and the ideal of distributive justice. The Convention so amended will not be a *chef d'oeuvre* of legal science,

Similarly, on the implementation level, judges increasingly appear inclined to look after and to take into account the interests of their "constituents" (whoever they may be) rather than to look at, and to implement to the best of their ability, the provisions of a uniform law convention ratified by their government. Judges in the United States of America have done so openly in the *Lisi, Mertens* cases and have been, therefore, taken to task by their brethren, as well as by foreign legal scholars. This, also may have been the not so "inarticulate premises" (Holmes) of Lord Denning's speech in the *Corocraft* case.

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135 The non-ratification of recent air law treaties by a great number of states has been of serious concern to I.C.A.O. over many years. Its efforts to discover the reasons of, and remedies for that regrettable state of affairs, have been largely unsuccessful; for a recent survey, see for instance, I.C.A.O. doc. 8724 and Supp. also A16-WP/15, LE/2 and add.; discussion of the question by the Legal Commission of the I.C.A.O. Assembly (16th session) A-16-Min. LE/1 and 3; report of the Commission and Resolution of the Assembly, doc. 8774, p. 7, paragraph 29:1, and p. 8.

136 This was actually done when I.C.A.O. published for The Hague Conference 1955, a document entitled *Cases on the Warsaw Convention, 1929-1955.*