

# THE WARSAW CONVENTION IS STILL A USEFUL INSTRUMENT

By

Mr. J. G. THOMKA-GAZDIK, Q. C.

General Counsel of the International Air  
Transport Association(\*)

I am delighted to have been given the opportunity of addressing you today on some aspects of an international treaty which is best known as the Warsaw Convention. In particular, I want to take a look at the present system of reparation for death or injury to passengers resulting from aircraft accidents, and to consider possible future developments in this field.

This subject has been chosen not only because of its intrinsic interest to all concerned with air transportation, but because it is highly topical. May I add that it is especially appropriate to be discussing the Warsaw Convention before a Turkish audience, because your country is one of the relatively small number of States which has not ratified the Convention. Perhaps I can help to indicate some of its merits, while not glossing over its disadvantages.

You are probably familiar with the main principles laid down in the Warsaw Convention of 1929, and as amended in the Hague Protocol of 1955, relating to the liability of air carriers for death and injury to passengers and for loss of, or damage to, cargo, and baggage. This Convention is undoubtedly one of the most widely fol-

---

(\*) Adress at the Institute of International Law and Affairs. Istanbul University, April 18th 1968.

lowed of all international treaties, having been ratified by no less than ninety-two countries. It has two main objects. The first is to provide a uniform code of rules to be observed by all parties to the Convention, designed to avoid the difficult problems that arise, in cases of an international nature, in deciding what court has jurisdiction and what law should be applied. A second perhaps better-known object of the Convention is to limit the liability of air-carriers in respect of passengers, baggage and goods.

This limited liability of the carrier is coupled with provisions reducing the claimant's burden of proof by means of a presumption that the carrier was at fault and hence liable for the damage sustained. It is probably fair to say that in practice, the presumption of fault "can, seldom, if ever, be overcome"<sup>1</sup>. In other words, the difficulties of obtaining redress are greatly reduced but the amount of damages cannot exceed U.S. \$ 8,300. The limit thus imposed nearly forty years ago has not stood the test of time and by the Hague Protocol the amount was doubled to approximately U.S. \$ 16,600, while in other respects also the Convention was amended. Many countries which had ratified the Warsaw Convention did not, however, adhere to the Hague Protocol, which has now been ratified by forty-five States. This means that instead of the Hague amendments replacing the corresponding provisions of the original Warsaw Convention, as would have happened if the Protocol had been ratified by all the States which were parties to the Convention, the two instruments now exist side by side, overlapping in many ways but providing two distinct — though very similar — regimes of limited liability.

In both cases the claimant has the possibility, under article 25, of "breaking the liability limit" and recovering higher damages. The unamended Convention requires him to prove that the damage was caused by the "wilful misconduct" of the carrier or of the carrier's agents acting within the scope of their employment. The concept of wilful misconduct gave rise to considerable difficulty, and in the Hague Protocol article 25 was re-drafted in more precise language so as to exclude the limits of liability "if it is proved that

---

1) **John E. Stephen**, *The Adequate Award in International Aviation Accidents*, *Insurance Law Journal*, December 1966, p. 711.

the damage resulted from an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". The plaintiff must also establish that the carrier's servant or agent acted within the scope of his employment.

Such, in broad outline, are the provisions of the Warsaw/Hague system that are most relevant to my purpose today. The situation has been further complicated as a result of increasing dissatisfaction in many quarters with Warsaw/Hague limits of liability. Since the signature of the Hague Protocol in 1955 the United States, in particular, did not conceal its view that even the Hague limit of \$ 16,600 was unrealistically low. Less than two years ago, in May 1966, an agreement was reached in Montreal among a large number of airlines operating to the United States, the effect of which was to avert, *in extremis*, United States withdrawal from the Convention. Under this so-called "Montreal Agreement" the limit of liability — for carriers which are parties to the Agreement — was raised to U.S. \$ 75,000 inclusive of legal fees. Additionally, the participating carriers agreed to waive any legal defences available to them in terms of article 20 (1) of the Warsaw Convention, which provides that the carrier "shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures". The Montreal Agreement has been signed by some ninety carriers, but there is no reason to believe that the problem has thus been finally solved.

Awareness of this fact prompted the Legal Committee of ICAO to set up a Panel of Experts on limits of liability for passengers<sup>2</sup> under the Warsaw Convention and Hague Protocol. At its first meeting held early last year the Panel examined various possible solutions to current difficulties under the Warsaw/Hague system. These proposals were submitted to States and international organi-

---

2) "The Warsaw provisions relating to baggage and cargo are reasonably well settled. It is the application of the treaty regime to personal injury and death cases—even, on occasion, on domestic commercial flights - which has given rise to continuing controversy", **John E. Stephen, op. cit.** in *The Insurance Law Journal*, December 1966, p. 711.

zations, (including IATA) then reviewed by the Panel in the light of the comments received. At its second meeting last July the ICAO Panel produced two revised solutions.

The first solution would retain the Warsaw/Hague system of liability but increase the limit to \$ 75,000 exclusive of costs and \$ 100,000 inclusive of costs. Moreover, this solution would eliminate the provision of article 3 (2) of the Convention, according to which the carrier lost the benefit of the limitation of liability if he failed to deliver a ticket to the passenger or if the ticket did not include a notice of such limitation. The second solution introduces a system whereby the defences available to the carrier under article 20(1) of the Convention would be eliminated and he would thus be strictly liable for death or injury to a passenger resulting from an accident, however caused, with the exception of war or analogous situations. The carrier's only defence would be contributory negligence under article 21 of the Convention, but he would have a right of recourse against third parties whose act or omission had caused the damage. Liability limits under this solution would be \$ 58,000 exclusive of costs and \$ 75,000 inclusive of costs, as in the Montreal Agreement. To allow for the very wide divergence between different countries in the level of compensation payments for death or serious injury, there would be a two-level system of limits where by States would be able to choose a lower maximum limit corresponding to each of the limits I have just indicated. For Solution I these lower limits would be \$37,000 exclusive of costs and \$50,000 inclusive of costs, while for Solution II they would be respectively \$ 33,000 and \$ 43,000. They would apply only to cases where both the place of departure and the place of destination were located in States which had chosen the lower limits. Present indications are that ICAO is moving cautiously in this field and that the intergovernmental Organization is concerned to secure adequate statistical and economic information on the entire problem, before formally taking steps to convene a Diplomatic Conference for the purpose of revising the Convention and Protocol. Thus the Warsaw/Hague system in its present form is likely to be with us for some time to come.

This cursory explanation of the work currently being undertaken within ICAO illustrates the complexities involved in trying

to improve upon the situation. That there is room for improvement I would not deny, and some of the drawbacks of the present system are apparent from what I have already said. In the first place, a considerable minority of States, including your own country, have not ratified the Convention. Secondly, among the States which are parties to Warsaw only about half have also ratified Hague, resulting in the co-existence of two regimes. Thirdly, while the Montreal Agreement forestalled United States withdrawal from the Convention and largely met the arguments in favour of higher compensation levels, this salvage operation was accomplished at a heavy price, in so far as in practice it has upset the degree of uniformity existing under the Warsaw system and has led to a steep rise in the insurance premiums paid by carriers. A fourth difficulty — in the unamended Warsaw Convention — is the wording of the “escape clause” in article 25, intended to deprive the carrier of the benefits of limited liability in the case of damage wilfully caused. As I have already noted, the Hague Protocol has improved matters in this respect by doing away with the unsatisfactory notion of “wilful misconduct”. Fifth, and much more relevant today, are the difficulties raised by recent judicial pronouncements concerning the provisions of the first and second paragraphs of article 3 of the Convention. Article 3 (1) requires the passenger ticket to contain a notice that the carriage is subject to the system of liability established by the Convention. Article 3 (2) stipulates that the carrier loses the benefit of the exclusion or limitation of liability if he fails to “deliver” a passenger ticket. You have doubtless heard echoes of the litigation in the case *Lisi v. Alitalia*, lately before the United States Supreme Court, which turned on the point of whether or not the plaintiff received adequate notice that the carrier’s liability was limited under the Convention. One possible way out of such problems regarding notice may lie, not through amendment of the existing provisions in the Convention and Protocol, but through revision of the Conditions of Contract in the passenger ticket. A sub-committee of the IATA Legal Committee has been examining ways of abbreviating the Conditions of Contract so that the requisite notices can be printed in large clear type in the ticket. I would venture to suggest, however, that the whole concept of notice may be outdated and will need to be thoroughly scrutinized if and when the Convention is revised.

Having thus drawn attention to the difficulties arising under the Warsaw/Hague system, it is time to say something about its advantages. First, and most obvious, is the fact that despite many imperfections it does constitute a fairly successful attempt to attain uniformity of legal rules, and standardization of practice, in a sphere which by its very nature is international. The distances and speeds travelled by modern aircraft, the frequent crossing of international frontiers, the diverse nationalities of the average complement of passengers on an international flight, the increase in pooling and interchange agreements relating to aircraft operations, all help to explain why commercial aviation tends to suffer more from the multiplicity of national laws than many other activities which usually remain within the boundaries of one State. The Warsaw Convention is not only "one of the most nearly universal of all international treaties"<sup>3</sup>, but also one of the most influential. The ninety-two contracting parties comprise most of the leading aviation nations of the World (including the Soviet Union) and the Convention has formed the basis of national laws on aviation liability in many countries, both parties and non-parties.

Unification and standardization of international air law and practice is advantageous both for the airline and for the passenger. The existence of divergent national laws means that in the absence of an internationally-acceptable code of rules, the carrier would be less able to calculate in advance the risks which he would run in the event of an accident. Similarly, claimants in respect of damage suffered as a result of such accident would have much greater difficulty in determining the jurisdiction in which to institute legal proceedings and the substantive law that should be applied. This points to a second principal advantage of the Warsaw system, namely the avoidance of conflicts. I do not wish to suggest that all such conflicts are automatically disposed of under the present system. Indeed the co-existence of both the unamended Convention and the Protocol-amended Convention has produced a new crop of difficulties derived from possibly conflicting treaty obligations<sup>4</sup>.

3) John E. Stephen, *op. cit.*, p. 715.

4) See J. G. Gazdik, *The Conflict and State Obligations under the Warsaw Convention, the Hague and the Guadalajara Convention*, in XXVIII J.A.L.C., 1961-62, p. 373.

The gist of the problem is that while between many countries the rules applicable will be those of the (unamended) Warsaw Convention, between some the Hague Protocol will apply, and between others neither the Convention nor the Protocol will apply. In every claim brought in respect of death or personal injuries suffered in an aviation accident, the deciding factor is the point of origin and the point of destination shown in each passenger's ticket. The nationality of the aircraft is irrelevant. So is the nationality of the passenger. These propositions may be illustrated by some straightforward examples. The Convention and Protocol will not apply to a voyage from Teheran to Istanbul, as neither Iran nor Turkey are parties thereto. But a passenger bound from Bombay via Istanbul to New York could invoke the Convention, to which India and the USA are parties. And for a journey from Karachi via Istanbul to Rome Hague Protocol rules would apply, as Pakistan and Italy are parties to both Warsaw and Hague. It may be added that although neither of these instruments would apply to a passenger beginning or ending his journey in Turkey, the position would be otherwise in the case of a "round trip" from a "Warsaw" or "Warsaw-Hague" country with a stop-over in Turkey, and the carriage would come within the Convention or the Protocol as the case may be. Even if the accident occurred on a sector between two stopping points within the same country, and on a local airline, the fact that the passenger's ticket showed points of origin and destination in "Warsaw" countries would make the carriage "international carriage" for Convention purposes.

From the passenger's standpoint a further advantage of the Warsaw/Hague system is, of course, the presumption that the air-carrier is liable for the damage sustained. This is not an absolute liability but it does constitute an exception to the principles of tortious liability based on proof of negligence, with full compensatory damages, which are still applied to aviation accident cases (as well as road and rail accidents) in many jurisdictions, at any rate those whose legal systems are derived from the common law of England, such as all but one of the United States of America<sup>5</sup>. Though

---

5) It has been pointed out that the shifting of the onus of proof to the carrier, under the Convention, can be considered an aggrava-

it can be rebutted, the presumption of fault greatly reduces the burden on the claimant of bringing the evidence needed to establish his case in court. This stringent liability regime is balanced by the limitation on the damages recoverable, which in principle operates in favour of the carrier. Yet it is at least arguable that the limit also indirectly benefits claimants, in so far as it contributes to the avoidance of litigation by favouring quick settlements.

To conclude this rapid survey of the strong points of the present system, may I add that while there is perhaps a grain of truth in the charge that the Warsaw rules are "far from simple, far from fair and far from universal"<sup>6</sup>, I prefer to endorse the more positive view expressed in the following assessment of the position after the conclusion of the Montreal Agreement and the appointment of the ICAO Panel of Experts :

The wisdom of those who drafted the original 1929 Convention is being further vindicated now that airlines and governments have taken the first steps to preserve the uniformity of law which the Convention represents and at the same time have adjusted the limits of liability in the manner provided by the Convention in response to modern economic pressures<sup>7</sup>.

The Warsaw/Hague system out of the window, but by securing virtually universal participation in the Convention and protocol, until such time as both these instruments are revised by Governments under the aegis of the International Civil Aviation Organization. In saying this I am merely echoing the view expressed in the Resolution passed by the Twenty-Third Annual General Meeting of IATA held in Manila, Philippines, last December.

I am of course unable to say how soon ICAO will be in a position to set in motion the diplomatic machinery needed to amend the

---

6) **Sune Wetter**, Possible Simplification of the Warsaw Convention of his position only in common law countries, not civil law countries, and then only as regards the carriage of persons, not goods. See **H. Drion**, Limitation of Liabilities in International Air Law, pp. 30-33. *Liability Rules*, in 15 J.A.L.C., (1948), p. 6.

7) **Harold Caplan**, The Warsaw Convention Revitalised, in (1966) J.B.L. 335.



Warsaw/Hague system by means of a new Convention. Nor would I presume to guess what form such revision will ultimately take, although it appears likely that most states would prefer a solution along the lines of the second proposal put forward by the Panel of Experts at its second meeting. You will recall that this involved strict liability, abolition of the defences in article 20 (1) of the Convention, liability limits of \$75,000 and \$58,000 and the option of lower limits in certain circumstances. To all intents and purposes, this is the system enshrined in the Montreal Agreement. In this intervening period, before the talk of revision is translated into reality, it seems most desirable that those countries which remain outside the Warsaw/Hague system should promptly ratify the Convention or the Protocol as the case may be. In due course air carriers in those countries may find it in their interest to join the Montreal Agreement. In my view these steps would be of equal benefit to governments, carriers and users. They would form a fitting prelude to the eventual revision and improvement of the present situation.

---