THE AIR CARRIER'S LIABILITY IN CASES OF UNKNOWN CAUSE OF DAMAGE IN INTERNATIONAL AIR LAW

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws

Institute of International
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April, 1960

PREFACE.

This thesis has been written in Montreal during the academic year 1959/60. The material has been collected from the Institute of International Air and Space Law, McGill University, International Civil Aviation Organization, Montreal, P.Q., the Law Library, Harvard University, Cambridge, Mass., and Library of Congress, Washington, D.C. I want to express my gratitude for the kindness and helpfulness I have met all these places during my research studies.

My stay in Montreal during 1958/60 as a member of the Institute of International Air and Space Law has been made possible through the generosity of The Canada Council, Ottawa, Egmont H. Petersens Fond, Copenhagen, Statens Almindelige Videnskabsfond, Copenhagen, and Reinholdt W. Jorck og Hustrus Fond, Copenhagen.

Finally, I want to thank Miss Edma Stage, Barrister at Law, England, for her valuable suggestions with respect to the linguistic problems in connection with the writing of

this thesis, - problems which are inevitable for writers expressing themselves in a language other than their mother tongue! - In order to fulfil the requirements of the "Regulations concerning Theses" no. 60 (g) I can state that this thesis has been prepared and written without assistance or guidance of any kind from anybody.

Montreal, April 1960, Finn Hjalsted

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THE AIR CARRIER'S LIABILITY IN CASES OF UNKNOWN CAUSE OF DAMAGE IN INTERNATIONAL AIR LAW

Chapter I.

Introduction.

In the law of compensation it is generally recognized that a causal relation must exist between the loss or damage for which compensation is sought and the act or omission of which complaint is made. If the person suffering damage cannot establish such relationship one of the main conditions for receiving compensation is unfulfilled.

In this study, however, the expression "cause of damage" has another causal relation in view. It concerns the chain of causation leading up to the phenomenon, for example an accident, which is the established cause of the damage. The expression refers, in other words, to the answer to be given to the question: Why did the phenomenon, causing the damage, occur? Similarly, "an unknown cause of damage" is a short expression for a situation which is characterized by lack of knowledge of the chain of events leading up to the phenomenon causing damage.

The legal relevance of such knowledge is dependent on the principle of liability to be applied in a given case. If,

for example, the mere fact that damage has been caused by a certain activity entails the liability of a given person, it is of no significance for the imposing of liability to investigate the causes for which the activity did result in damage. Once the causal relation between the activity in question and the damage has been established the conditions for receiving compensation are fulfilled. On the other hand, elucidation of the circumstances around the phenomenon causing damage will be of primary importance if the liability is based on fault (1), or presumption of fault. For in such cases the party upon whom the burden of proof is imposed will naturally try to explore and explain the chain of causation leading up to the alleged wrong in order to satisfy the requirements of his onus. The same is true, of course, if not the liability itself, but certain other legal effects, for example an aggravated form of liability, are conditioned upon the damage being caused by fault (or especially defined faults).

It will be seen that the problems concerning the unknown cause of damage are intimately connected with the question of the burden of proof and the allocation of such burden of proof. Different definitions and understandings have been attached to this onus in theory and in practice. However, it seems

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(1) In this study the term "fault" is preferred to the word "negligence", though the latter expression will appear now and then, for the sake of variation, in the same sense as the former.

justified to state that the essential idea behind the burden of proof is a risk of the impossibility of furnishing sufficient evidence. The person upon whom the burden is imposed and who has not been able to furnish the required proof must bear the risk that his non-furnishing of evidence may have the effect that the court's evaluation of the facts of the case will be to his disadvantage. Also the principles of the allocation of the burden of proof have been a controversial subject and widely divided opinions have been expressed on this topic. If, however, the problem is approached with the view of letting the onus be an instrument to obtain the most practical and suitable results in the application of the law, the burden of proof is to be imposed upon the one who has the facilities of securing proof of the relevant facts (2). In this way evidence is secured in most cases and the number of unexplained cases will be kept to a minimum. Thus - as it has been said (3) - suitable rules of burden of proof are characterized by their ability to render themselves superfluous!

Although the unknown cause of damage is a problem which may occur in many different aspects of the law of compensation, it is however, a characteristic feature of aviation. Total

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(2) See Tybjerg: Om Bevisbyrden (On the Burden of Proof), Copenhagen 1904, p.58 f., in particular p.61.

(3) See Alf Ross in Ugeskrift for Retsvæsen (Denmark) 1930 B p.355-356

losses are more frequent in aviation than in most other kinds of activity, and it is particularly among such losses that the unexplained cases are to be found. Yet, to state with any certainty the ratio of the number of unknown cases to the total number of air accidents (4) seems quite impossible, and different authors give differing percentages. In ICAO's (5) Aircraft Accident Digest No. 9 (6) a table containing 53 reported accidents from 1957 states three of these to have been caused by undetermined reasons (7). But an examination of the reports included in the Digest reveals unknown elements to be found in at least fourteen of the reported cases. These figures are not very informative, however, considering that the reported cases form only part of the total number of known accidents occurring during 1957. But on one thing all concerned agree: the cases of unknown cause of damage constitute a sufficiently great part of the total number of cases in which damage occurs to create a problem of practical importance in air law. And the developments in aviation do not seem to change this state of things. While the technical progress, it is hoped, will continuously add to the safety of flight,

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(4) In this connection it must be remembered that damage may be caused even if no accident has taken place.

(5) International Civil Aviation Organization (Montreal).

(6) ICAO Circular 56 - AN/51 (1959)

(7) Ibid. p.4-6.

the risk of unexplained cause of damage seems to be growing, also. Speed is being increased, altitudes are becoming greater, and as a consequence of the extending cruising range the air services are operating over more and more inaccessible regions of the globe. But with each of these factors the possibilities of <u>total losses</u> are increasing, also.

"The unknown cause of damage" is an equivocal expression. It covers a long scale of different degrees of lack of knowledge of the chain of events leading up to the phenomenon causing damage. At one end of this scale cases of <u>completely</u> unknown cause of damage are to be found. A typical example is the case where an aircraft, having no radio contact with its surroundings, disappears into the ocean without survivors and without eyewitnesses. In such a situation all links of the chain of causation leading up to the disaster are unexplained; the only thing known is that the accident did occur. Further down the scale are cases in which some of the links may be known, while one or more others still remain unknown. It is established, for example, that after the pilot had chosen a certain altitude the aircraft encountered violent turbulences and heavy icing conditions which forced it downwards until it finally crashed. All the manoeuvres of the aircraft from the moment it met bad weather conditions until its final crash may have been explained in detail, but it still remains unknown <u>why</u> the original altitude was chosen. Or it is known,

for example, that a chain of established technical failures led to an explosion, but the causes of the failure starting this chain remain unexplained.

From this scale of cases comprising a higher or lesser degree of unknown elements it appears that even the borderline itself between unknown and known causes of damage is not sharp and definite. The transition is entirely gradual. And it is, of course, impossible to give any criterion for fixing the dividing line. Each individual case must be considered by the Court through an overall assessment of all relevant evidence. In this connection it must be borne in mind that the establishment by technical experts of one or more causes of accident in their investigation reports are not binding on the Court in its decision with regard to the legal consequences of the accident. The assessment of evidence must be the result of an independent legal evaluation.

Systematics.

The subject of this study is the air carrier's liability - contractual as well as delictual - in international air law in cases where the cause of damage remains completely or partially unknown. The purpose is, in other words, to give an answer to the question: What is the effect with respect to the air carrier's liability in international air law of the fact that damage has occurred for reasons unknown?

In the first place, the air carrier's liability towards passengers, or their dependents, and consignors of goods will be examined (Chapter II). The relevant provisions are found in the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw, October 12, 1929, (the Warsaw Convention) (8). A Protocol to amend the Convention was signed at The Hague, September 28, 1955,(9) and one of the provisions therein contained will be considered in furtherance of the examination of the Warsaw Convention (p. 124 to 127).

Thereafter, the problems concerning the unknown cause of damage will be considered in respect of the liability for damage caused to third parties on the surface (Chapter III). The international rules are to be found in the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, October 7, 1952, (the Rome Convention) (10). It will be seen that the question under consideration will raise only minor problems in connection with

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(8) The Convention, the official text of which is drawn up in French only, is one of the most widely accepted Conventions in existence. A list of the States having ratified or adhered to the Convention is found in Annex I, 3.

(9) The Protocol has not yet come into force. Pursuant to its Art. XXII the Protocol will become effective when ratified by at least thirty signatory States; see infra note 325.

(10) The Convention became effective on February 4, 1958; see infra note 330.

this Convention.

Finally, the unexplained cause of damage will be examined with regard to damage caused by aerial collisions (Chapter IV). It is true that no international rules are in existence for the moment in respect of such damage, but a draft convention on aerial collisions has been drawn up (11), and steps have been taken to speed up the efforts to reach to an international agreement in this field as soon as possible (12).

(11) See ICAO Doc. 7601-LC/138, Tenth Session of the Legal Committee, Montreal 1954, p.XVII-XXII

(12) See ICAO Doc. 8010 A12-LE 1, Report and Minutes of the Legal Commission, Twelfth Session of the Assembly, San Diego, Calif., June-July 1959, p.5

Chapter II.

THE UNKNOWN CAUSE OF DAMAGE AND THE WARSAW CONVENTION.

A. Scope of application of the Convention.

The Warsaw Convention applies to certain, geographically restricted, cases of international carriage of persons, baggage and goods performed by an air transport undertaking, or by any person if the carriage is performed for reward. Excluded is, however, carriage performed under the terms of any international postal Convention, see Art. 2 paragraph 2 (13). Also excluded is carriage by air performed by way of experimental trial by air navigation undertakings with the view to the establishment of a regular line of air navigation, as well as carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business, Art. 34 (14).

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(13) In The Hague Protocol of 1955 this paragraph has been deleted and replaced by the following: "(2) This Convention (i.e. the Warsaw Convention) shall not apply to carriage of mail and postal packages", see the Protocol Art. II.

(14) The scope of Art. 34 has been considerably narrowed down in Art. XVI of The Hague Protocol which replaces the present Art. 34 by the following text: "The provisions of Articles 3 to 9 inclusive relating to documents of carriage shall not apply in the case of carriage performed in extraordinary circumstances outside the normal scope of an air carrier's business."

International is, for the purposes of the Convention, any carriage in which, according to the agreement between the parties, the places of departure and destination are situated within the territory of two Contracting States, or within the territory of one Contracting State if there is an agreed stopping place within the territory of another State - be it or not a Contracting State, see Art. 1 paragraph 2 (15). A carriage to be performed by several successive air carriers is deemed - as stated in paragraph 3 of Art. 1 - to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory of the same Contracting State.

At The Hague Conference, 1955, the possibilities of extending the scope of application of the Convention were discussed (16). It was decided, however, to retain the present

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(15) Of great practical importance is the question whether round trip tickets should be considered to involve only one carriage or two operations of carriage. Both British and American Courts have adopted the former view, see Grein vs. Imperial Airways Ltd., United Kingdom, King's Bench Division, October 23, 1935, Court of Appeals, July 13, 1936, U.S.Av.R. 1936 p.184-250; Garcia vs. Pan American Airways, Inc., State of New York, Appellate Division of Supreme Court, May 21, 1945, U.S.Av.R. 1946 p.496-499 (and ibid. 1945 p.39-45); Glenn vs. Cia Cubana de Aviacion S.A., Southern District of Florida, Miami Division, February 1, 1952, U.S.Av.R. 1952 p.182-187.

(16) See ICAO Doc. 7686-LC/140, The Hague Conference 1955 (in the following called The Hague Conference 1955) p.22-24, 29-31.

scope which is, above all, a function of the jurisdictional authority of the Convention (17). Any extension, according to which the Convention would govern carriage giving rise frequently to cases before the courts of non-contracting States, would create uncertainty in practice with respect to the applicability of the Convention.

Art. 1 paragraph 2 presupposes the existence of an agreement concerning the carriage. This agreement is the contract of carriage which is mentioned in several of the provisions of the Convention (18) and which was also stressed in the preparatory works of the Convention as the basis for the application of the rules of the Convention (19). Consequently, carriage of a stowaway, for example, is governed not by the Warsaw Convention, but by national law (20).

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(17) See Art. 28 paragraph 1 of the Convention which runs as follows: "An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier has his domicile or has his principal place of business, or has an establishment by which the contract has been made, or before the Court having jurisdiction at the place of destination."

(18) By way of example, see Art. 3 paragraph 2, Art. 4 paragraph 4 and Art. 5 paragraph 2.

(19) See "Rapport présenté au nom du Comité International Technique d'Experts Juridiques Aériens (CITEJA) par M. Henry de Vos", September 25, 1928, see II Conference Internationale de Droit Privé Aérien, October 4-12, 1929, Warsaw, printed in Warsaw 1930 (in the following called Warsaw Conference 1929) p.160.

(20) Similar Drion: Limitation of Liabilities in International Air Law, The Hague 1954, no.51, and O. Riese: Luftrecht, Stuttgart (Germany) 1949 p.406-407.

More doubtful is the question whether the carriage of the employees of the carrier is covered by the Convention. Employees exercising their functions on board the aircraft seem not to cause any problem. Their relationship to the carrier will clearly fall outside the scope of the Convention. On the other hand, almost every one agrees that the Convention does cover carriage of an employee travelling with a free ticket for his own pleasure or business (21).

Doubt may arise, however, in connection with the carriage of the employee whose travel with the carrier forms part of the performance of his duties for this carrier. The question seems not to have been submitted to the courts for decision. The majority of authors, however, holds the opinion that no contract of carriage exists in such cases and, accordingly, that the Convention will not apply (22). But views to the contrary have also been expressed (23). A natural interpretation of the Warsaw Convention seems to lead to the conclusion that

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(21) The opposite view is held by A. Schweickhardt in Zeitschrift für Luftrecht (Z.f.L.), Germany, 1954 p. 9.

(22) Thus O. Koffka, H.G. Bodenstein, E. Koffka: Luftverkehrsgesetz und Warschauer Abkommen, Berlin 1937, p.268; R. Coquoz: Le droit privé international aérien, Paris 1938, p. 86; Riese op. cit. p. 406; H.Achtnich in Z.f.L. 1952 p. 343-344; Dolk in Z.f.L. 1953 p. 314-317; A. Schweickhardt in Z.f.L. 1954 p. 9.

(23) See D. Goedhuis: La Convention de Varsovie, The Hague 1933 (in the following called Goedhuis 1933) p. 89-90; same author: National Airlegislation and the Warsaw Convention, The Hague 1937 (in the following called Goedhuis 1937) p. 129-130; but compare same author: Handboek van het Luftrecht, The Hague 1943 (in the following called Goedhuis 1943) p. 205, where the author seems to be in doubt; Drion op. cit. no. 54.

such cases are not covered by the Convention. The purpose of the Warsaw Convention is to regulate the relations between the carrier and the passengers or consignors as contracting parties to the agreement of carriage. As soon as a contract of employment exists between the parties, and the employee is travelling to exercise his duties under such a contract, an entirely new element has been introduced. There exists no necessity of applying the Convention in such cases, and it appears advisable not to do so. Such relationships seem not to need, nor to be suitable for, international regulations.

In connection with the requirements for the existence of a contract of carriage, attention must be drawn to the draft convention for the unification of certain rules relating to international carriage by air performed by a person other than the contracting carrier (24). If carriage governed by the Warsaw Convention or any part of such carriage is performed by a person other than the contracting carrier, the rights and obligations of the performing carrier shall, in respect of the carriage which he performs, be those of a carrier under the Warsaw Convention, see Art. III of the draft. In these cases the rules of the Warsaw Convention will be applicable between parties who have no contractual

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(24) The draft convention is reproduced in ICAO Doc. 7921 -LC/143-1, Eleventh Session of the Legal Committee, Tokio 1957, p. XX-XXI.

relationship to each other (25). -

Finally, the carriage must be for reward unless performed by an air transport undertaking, see Art. 1 paragraph 1 of the Convention. In the individual case it may be difficult to judge whether or not this requirement has been fulfilled. It seems natural to let the commercial aspect of the agreement concerning the carriage be the decisive factor (26).

B. The principles of liability; Chapter III of the Convention.

The provisions concerning the carrier's liability are found in Chapter III. They are mandatory in the sense that any provision tending to relieve the carrier of his liability or to fix a lower limit than that which is laid down in the Convention shall be null and void, see Art. 23. As a further safeguard Art. 32 states that any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to depart from the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as

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(25) See, however, the exception made in Art. V of the draft as far as carriage of cargo is concerned.- The draft convention will be reconsidered during the Thirteenth Session of the Legal Committee of ICAO in Montreal, September 1960.

(26) See Drion op. cit. no. 56

to jurisdiction shall also be null and void.

Another characteristic feature of the system of liability laid down by the Convention is the limitation of liability. To a certain degree this limitation may be considered as a counterpart of the mandatory character of the rules of liability (27). Art. 22 limits the liability of the carrier to the sum of 125,000 Poincaré francs (28) (about 8,300 U.S. dollars) towards each passenger, 250 Poincaré francs (about 16.60 U.S. dollars) per kilogram with respect to registered baggage and to goods, and 5,000 Poincaré francs (about 332 U.S. dollars) per passenger with regard to objects of which the passenger takes charge himself. These limits of liability cannot be invoked by the carrier, however, if it is proved that he or his agents have caused the damage by wilful misconduct ("dol") or such fault on their part as, in accordance with the law of the courts seized of the case, is considered to be equivalent to wilful misconduct (29).

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(27) See also Drion op. cit. no. 36.

(28) Poincaré francs are French francs with a fixed fineness, see Art. 22 paragraph 4. In The Hague Protocol Art. XI the sum has been raised to 250,000 Poincaré francs (about 16,600 U.S. dollars).

(29) See Art. 25 of the Convention. The Article, which has been the subject of more litigation than any other provision of the Convention, was amended by The Hague Conference, 1955. The Hague Protocol Art. XIII includes the following new wording: "The limits of liability specified in Article 22 shall not apply if it is proved that 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 probably result; provided that, in the case of such act

According to Art. 17, 18 and 19 the carrier is liable for damage sustained in the event of the death or injury of a passenger, or destruction or loss of, or of damage to baggage or goods, or for damage occasioned by delay in the carriage by air. In Art. 17 and 18 special (and different) periods are indicated to delimit the concept of "air carriage" within which the accident or occurrence causing the damage must have taken place in order to entail the carrier's liability. It will be seen that while liability pursuant to Art. 17 for death or injury of a passenger is conditioned upon the taking place of an accident, such condition is not to be found in respect of liability for damage to or loss of goods in Art. 18 (cf. the words: "the occurrence which caused the damage" (30).

These provisions of liability must, however, be read in connection with Art. 20 of the Convention which runs as follows:

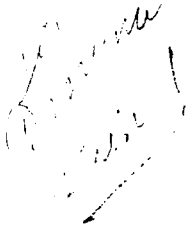
(Note 29 con'd) or omission of a servant or agent, it is also proved that he was acting within the scope of his employment." It will be seen that a concrete description of the acts or omissions entailing unlimited liability has been substituted for references to national law or to traditional legal concepts.

(30) Italics supplied. - Concerning the reasons for which an "accident" is a condition for imposing liability pursuant to Art. 17 but not Art. 18, see ICAO Doc. 6027-LC/124, Fourth Session of the Legal Committee, Montreal 1949, p. 270; ICAO Doc. 7229-LC/133, Eighth Session of the Legal Committee, Madrid 1951, p. 136-137; ICAO Doc. 7450-LC/136, Ninth Session of the Legal Committee, Rio de Janeiro 1953, p. 71-72. See also Drion op. cit. no. 63 and Riese op. cit. p. 443-444.

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

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the steering of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

Thus it appears that the principle of liability laid down by the Convention is to the effect that the carrier is liable unless he proves that he and his servants or agents (31) have taken all necessary measures to avoid the damage or that it was impossible for him and them to take such measures. In addition, as far as carriage of goods and baggage is concerned, the carrier is not to be held liable for the so called nautic faults committed by his servants or agents. The problem to be examined is, accordingly, whether the



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(31) Although the text of the First Schedule of the British Carriage by Air Act,1932, which implements the Warsaw Convention, and the translated text of the Convention as ratified by the United States Senate,1934, only contain the word "agents" as translation of the French "préposés", the expression "servants or agents" is used here and in the following. See also the United Kingdom Civil Aviation Act,1949 Section 54: "Explanation of Carriage by Air Act 1932. For the avoidance of doubt in the construction of the Carriage by Air Act, 1932, whether as forming part of the law of the United Kingdom or as extended to any other country or territory, it is hereby declared that references to agents in the First Schedule to that Act include references to servants."

carrier is able to furnish the required proof pursuant to Art. 20 paragraph 1 and 2 respectively and thus relieve himself of liability in cases where the chain of causation leading up to the phenomenon causing damage - i.e. the accident or an occurrence taking place during the carriage by air - remains unknown. With respect to liability for damage contemplated by Art. 17, it is presupposed that a causal relation between the accident and the damage has been established. With regard to Art. 18 paragraph 1 the existence of a causal relation between an occurrence taking place during the carriage by air as defined in Art. 18 paragraph 2 and the damage is presupposed to have been proved. If Art. 18 implies a causal relationship between the carriage by air and this occurrence the carrier must bear the burden of proof that such a relationship does not exist (32).

After that it remains to be asked whether, still in cases of unexplained cause of damage, the carrier may be held liable in excess of the limitations of liability contained in Art. 22 of the Convention on the grounds that damage has been caused by wilful misconduct, see Art. 25 paragraph 1.

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(32) See further infra p. 126.

C. Article 20 paragraph 1.

The examination of Art. 20 paragraph 1 raises two main questions. In the first place, the meaning of the expression "all necessary measures" must be studied. This is a problem in connection with the interpretation of the provision in general. Secondly, the requirements to satisfy the carrier's burden of proof pursuant to Art. 20 paragraph 1 will be examined. This is a question in close relationship to the problems concerning the unknown cause of damage. It must be borne in mind, however, that the two questions will usually be intimately related in practice. The questions of what to prove and how to prove it will generally be answered collectively by the court on the basis of an overall evaluation.

On the other hand, for analytical reasons, it seems preferable to treat independently of the other questions involved, certain difficulties of interpretation attached to the words "all necessary measures".

1. "ALL NECESSARY MEASURES".

If understood in their literal sense the words of Art. 20 paragraph 1 should not leave much substance to the Article. If all necessary measures had been taken to avoid the damage no damage would occur at all. The article would then be

restricted to apply to cases where it was impossible for the carrier and his servants or agents to take such measures, i.e. in cases amounting to force majeure. It is indubitable, however, that an interpretation according to which Art. 20 paragraph 1 is reduced to comprise force majeure cases only, is contrary to the purposes behind Art. 20 and thus behind the entire system of liability of the Convention of which Art. 20 is the very keystone. An examination of the genesis of the present wording of Art. 20 will reveal what the draftsmen of the Convention had in mind when framing its provisions of liability.

a. Preparatory works.

The rudiments of the present Art. 20 are to be found in the draft convention drawn up by the First International Conference on Private Air Law, held in Paris, October 27 to November 6, 1925 (33). Art. 5 paragraph 1 of the draft held

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(33) See Conference Internationale de Droit Privè Aèrien, October-November, 1925, Paris, printed in Paris 1926 (in the following called Paris Conference 1925) p. 77-83.
The very origin to the Warsaw Convention is found in the "Avant-Projet de Convention international relative à la responsabilitè du transporteur par aèronefs" which was submitted by the French Government to the Governments concerned as a working basis before the Paris Conference 1925, see Paris Conference 1925 p. 10-14. The liability provisions in Art. 3 and 4 of the draft contained, however, a terminology different from the later drafts. The carrier was responsible for personal faults, latent defects in the aircraft, and for "commercial" faults on the part of his servants or agents, but he was not to be liable for force majeure - including "les risques de l'air" - for (non-intentionel) faults committed by his servants or agents in the steering of the aircraft or in additional operations, or for faults on the part of the passenger or inherent defects of the goods.

the carrier liable for accidents, losses, damages and delays, but in paragraph 2 it was added that the carrier was not liable if he proved to have taken "reasonable measures" ("les mesures raisonnables") to avoid the damage. Art. 6 made the carrier liable also for the faults committed by his servants or agents (34).

In his report to the Conference, dated November 2, 1925, M. Pittard, Rapporteur (35), explained the system of liability as laid down in the draft convention and stated in this connection inter alia:

(Note 33 con'd)
The proposed system of liability was, of course, influenced considerably by the principles contained in the French Air Navigation Act of May 31, 1924. Pursuant to Art. 41 of this Act the carrier was not liable for force majeure, and Art. 42 and 48 permitted the carrier to contract out of liability for "les risques de l'air" and faults in the steering of the aircraft committed by his servants or agents on board the aircraft. The notion of "les risques de l'air" seems to have caused great difficulties in France, see for example M. de Juglart: Traité Elémentaire de Droit Aérien, Paris 1952, no. 266. Juglart holds the view that damage resulting from undetermined reasons cannot in general be considered as caused by "les risques de l'air". Lacombe and Saporta (in Revue Générale de l'Air (R.G.A.) (France) p. 3-18), on the other hand, state that this notion in reality is tantamount to the unexplained cause of damage.- During the Paris Conference 1925, however, the terminology of the French proposal was substituted with expressions more influenced by Anglo-Saxon way of thinking.

(34) For the full wording of Art. 5 and 6, see infra p. 52.

(35) See Paris Conference 1925 p. 52-59. M. Pittard, Switzerland, was Rapporteur of the Second Commission of the Conference which dealt with the question of the air carrier's liability.

> "La Commission s'est demandée quel régime de responsabilité il fallait adopter: risque ou faute. L'opinion générale est que...il faut admettre la théorie de la faute.
> .....
> Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille.
> .....
> ...il n'y a pas de responsabilité sans faute, celle-ci étant presumée jusqu'a preuve rapportée de la diligence raisonnable." (36)

From these remarks it appears clearly that the liability of the carrier was to be based on fault. The carrier was exonerated from liability on the proof that neither he nor his servants or agents have committed any faults, i.e. that they have acted with due diligence or the diligence of a bonus pater familias. And this - most well-known - idea of liability found expression in the words that the carrier is not liable "if he proves that he (and his servants or agents) have taken reasonable measures to avoid the damage."

Although not stated directly in the report, there can be no doubt that the expression "les mesures raisonnables" has been inspired by the Anglo-Saxon idea of "due diligence" (37). Moreover, it was not the first time that this notion

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(36) The Paris Conference 1925 p. 55-56.

(37) See G. Ripert in Revue Juridique Internationale de la Locomotion Aérienne, Paris, 1926 p. 1-16, especially p. 7; and the same author in Revue Générale de Droit Aérien (R.G.D.A.), Paris, 1932, p. 251-267, especially p. 264-265. See also Warsaw Conference 1929 p. 31 and 113.

had gained a footing in a French legal text. In the "International Convention for Unification of Certain Rules relating to Bills of Lading", signed at Brussels August 25, 1924, the idea of due diligence has been introduced through the expression "diligence raisonnable" (see Art. 3 paragraph 1 and Art. 4 paragraph 1 of the Convention)(38). And it will be seen that the very same phrase was used by the rapporteur in explaining the meaning of the expression "les mesures raisonnables" in the Paris draft (39).

The words "les mesures raisonnables" were retained in the various draft conventions worked out by CITEJA (40) in the years following the Paris Conference 1925, and they appeared also in the draft submitted to the Warsaw Conference in October 1929 (see Art. 22 of the draft)(41). In his

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(38) The original text of the Convention was drawn up in French only. The text is reproduced in Carver's: Carriage of Goods by Sea, Tenth Edition by R.P. Colinvaux, London 1957, p. 1022-1030.

(39) In Anglo-American maritime law "due diligence" has been described as: "the diligence used or exercised by prudent ship owners and their employees in like circumstances. The ship owner should not be held to a standard of conduct which is impossibly high", see W. Poor: American Law of Charter-Parties and Ocean Bills of Lading, Fourth Edition, Albany, N.Y., New York 1954, p. 163; or "reasonable diligence, having regard to the circumstances known, or fairly to be expected, and to the nature of the voyage, and to the cargo to be carried", see Carver's op. cit. p. 181.

(40) See supra note 19.

(41) See Warsaw Conference 1929 p. 172.

explanation to the Conference of the provisions of liability contained in the draft convention, the Rapporteur, M. de Vos, repeated in all essentials the observations made by M. Pittard in his report of 1925 (42).

The Soviet Union, however, had submitted to the Conference a proposal of amendment to the effect that the words "toutes les mesures necessaires" be substituted for the expression "les mesures raisonnables" (43). This proposal was classified by the preparatory commission - in which also a Russian delegate had a seat (44) - as a "question de redaction" (45). Accordingly, it was not touched upon during the extensive discussions concerning the principles of liability ("questions de fond de première importance"), nor during the examination of "les questions de fond de deuxième importance" (46). At the third and last reading of the draft convention the words "les mesures raisonnables" were still to be found in the new Art. 20 (former Art. 22) (47). At that time the Russian

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(42) See "Rapport présenté au nom du CITEJA par M. de Vos, Rapporteur", dated September 25, 1928, see Warsaw Conference1929 p. 159-166. See also the Rapporteur's oral presentation ibid. p. 15-16.

(43) Ibid. p. 210

(44) Ibid. p. 20 (the members of the preparatory commission).

(45) Ibid. p. 181

(46) Concerning these distinctions, see ibid. p. 22 and the Rapporteur's exposé p. 25-26 (ibid)

(47) Ibid. p. 136

delegate pointed out that it had been decided - presumably in the drafting committee - to insert the expression "toutes les mesures necessaires" in substitution for "les mesures raisonnables". The acting Rapporteur agreed, and no other comments being made, the Article was adopted in the proposed form (48).

Thus it appears unquestionable that the replacement of the words "les mesures raisonnables" with "toutes les mesures necessaires" at the Warsaw Conference was a drafting matter only. Although the U.S.S.R. was generally in favour of making the air carrier's liability more stringent (49), there can be no doubt that the amendment did not intend to touch upon the substance of the system of liability - and was not understood by the Conference to do so, either. The little attention paid to it bear witness thereof. In other words: The interpretation of the expression "toutes les mesures necessaires" must be made in close conformity with the idea behind "les mesures raisonnables" as described in M. Pittard's report of 1925. This is the only conclusion to be drawn from the genesis of the present Art. 20.

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(48) Ibid. p. 136-137

(49) Ibid. p. 25-37

b. National implementation Acts.

The various national Acts implementing the Warsaw Convention contain in general either the same expressions as Art. 20 or a verbatim translation thereof. In some cases, however, it is possible to find expressions in these Acts indicating, to a certain degree, the legislator's understanding of the words "all necessary measures". Thus the Danish, the Norwegian, the Swedish and the Finnish implementation Acts are all referring to the notion of fault instead of "all necessary measures" (the carrier is not liable if the damage has not been caused by fault)(50). The German text of the Warsaw Convention makes use of the expression "erforderlichen Massnahmen" and not "notwendigen Massnahmen" which would have been the direct translation of the original text (51). These examples illustrate the difficulties of the various legislators in transforming the original expression into workable legal terms in the various languages; in all of them an

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(50) See for Denmark: lov nr. 123 af 7 maj 1937 om befordring med luftfartøj § 20 stk. 1; for Norway: lov nr. 6 af 12 juni 1936 om befordring med luftfartøi § 6 stk. 1; for Sweden: lag 5 marts 1937 om befordran med luftfartyg 20 § 1 stk; for Finland: lag 3 juli 1937 om befordran med luftfartyg 20 § 1 stk.
These Acts regulate in principle all carriage: Warsaw carriage, international non-Warsaw carriage, and domestic carriage, cf. § 1 of the Acts.

(51) The German text is reproduced by Koffka-Bodenstein-Koffka op. cit. p. 322. See also Riese op. cit. p. 455.

attempt has been made to avoid the objective elements which a literal understanding of the word "necessary" involves (52).

c. Revision works.

A relatively short time after the coming into force of the Warsaw Convention the question of its revision arose, and Art. 20 was numbered among the Articles requiring amendments. The expression "all necessary measures" had created difficulties and uncertainty when applied in practice and different interpretations had been advanced. Therefore, efforts were made to substitute the words with another expression less susceptable to divergent interpretations. "Les mesures raisonnables" (53), "toutes mesures utiles et normales" (54), "all proper measures" (55), "all prudent

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(52) In this connection it is interesting to note that in some cases the national legislations, in introducing the Warsaw principles into the law relating to non-Warsaw carriage, have tried to give an interpretation of the words "all necessary measures". Thus the Italian Navigation Act of April 21, 1942, Art. 942 and 951 cf. 945 exonerate the carrier from liability upon proof that "egli e i suoi dipendenti e preposti hanno preso tutte le misure necessarie e possibili, secondo la normale diligenza, per evitare il damno". In the United Kingdom the Carriage by Air (non-international Carriage) Order 1952, Art. 20 runs as follows: "The carrier is not liable if he proves that he and his servants or agents have taken all reasonable measures to avoid the damage or that it was not reasonably possible for him or them to take such measures."

(53) See CITEJA Doc. 373, Second Commission, Compte Rendu, January 23, 1939, Paris.

(54) See CITEJA Doc. 394, Second Commission, Rapport sur le Revision de la Convention de Varsovie, presentè par Sir Maurice Amos, April 1940, p. 14.

(55) ICAO Doc. 7450 L.C./136, Ninth Session of the Legal Committee, 1953, Vol.I p.79 and Vol.II p.44.

measures" (56), "all possible and foreseeable measures" (57), "appropriate measures" (58), "all necessary and possible measures" (59) were among the terms suggested in the different phases of the revision work on the Convention (60). And all of them were intended to express the principle which formed the basis of the system of liability laid down by the Warsaw Convention: the duty to show due diligence - or to act as a bonus pater familias.

Art. 20 was not changed, however, at The Hague Conference in 1955. The Article was discussed at some length (61), especially in connection with a Dutch-Norwegian-Australian proposal of amendment which substituted the word "negligence" for the expression "all necessary measures" (the carrier not to be liable if the damage was not caused by negligence)(62). The discussions showed that the vast majority of the delegates considered Art. 20 paragraph 1 to indicate a liability based

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(56) Ibid. Vol.II p. 98.

(57) The Hague Conference 1955, Vol.II p. 145.

(58) Ibid. Vol.I p. 99 and 104.

(59) Ibid. Vol.I p. 95

(60) For other proposals, see ICAO Doc.7450-LC/136, Ninth Session of the Legal Committee, 1953, Vol.I p. 100-101.

(61) See The Hague Conference 1955, Vol.I p. 94-105

(62) Ibid. p. 95 and 101

on the principle of fault (63). But a tendency towards a more stringent interpretation of the words "all necessary measures" was found, also. Thus the delegate of The Federal Republic of Germany, while commenting on the above-mentioned proposal, stated inter alia that

> "...the existing text (of Art. 20 paragraph 1) required all necessary measures to be taken, while the Netherlands Delegation only wished to accept liability in the case where there was fault on the part of the pilot or carrier. But, one could very well say objectively: such and such measures would have been necessary, but the pilot could not be blamed for not having taken these measures, because it was necessary for him to reach a quick decision and he did not have sufficient time to comply with these measures. Consequently, there would be no fault on the part of the pilot although, objectively, it would have been possible for him to have taken the measures if he had understood the situation right away." (64)

It will be seen that an interpretation along these lines is not in conformity with the intentions of the draftsmen of the Convention (see supra p. 21-26).

Also the United States delegate feared that the proposal including the introduction of the notion of negligence could be held to have attenuated the carrier's liability pursuant to the present Art. 20 paragraph 1 (65).

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(63) Such views were expressed - directly or indirectly - by the delegates of Argentine, the Netherlands, Italy, the United States, Greece, France, Norway, Spain, see The Hague Conference 1955 p. 94-101.

(64) Ibid. p. 97-98 (Mr. Riese). These remarks were approved by the United Kingdom delegate (M. Beaumont), see p. 99. They seem not, however, to be in conformity with the opinion expressed by Riese in his Luftrecht p. 455, see infra note 71.

(65) Ibid. p. 96 (Mr. Calkins).

Although many of the delegates seemed to consider the words "all necessary measures" a not very satisfactory expression of the underlying principle of liability of Art. 20, the present text was retained, apparently for lack of any better wording. Furthermore, the question of the requirements to satisfy the carrier's burden of proof was discussed simultaneously with this problem which complicated the issue considerably.

d. Authors.

Also, the overwhelming majority of the authors has construed "all necessary measures" as including a requirement for the exercising of due diligence - or the diligence of a bonus pater familias, see for example Ripert (66), Coquoz (67), Giannini (68), Ambrosini (69), Lemoine (70), Riese (71),

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(66) See G. Ripert in R.G.D.A.1932 p. 264-265.

(67) Coquoz op.cit. p. 136-137.

(68) Giannini: Nuovi saggi di diritto aeronautico, Milano 1940, p. 103

(69) A. Ambrosini in Rivista di Diritto Aeronautico (Italy) 1938 p. 164 f.

(70) M. Lemoine: Traitè de Droit Aèrien, Paris 1947, no. 819-820

(71) Riese op.cit. p. 455-456. See also Riese and Lacour: Prècis de Droit Aèrien, Paris and Lausanne 1951, p. 272, where, however, it is added that "le texte francais de la Convention en utilisant les mot "mesures necessaires" a certainement voulu renforcer les obligations mises à la charge du transporteur puisque le texte originaire parlait de "mesures raisonnables". As has been shown above this is not the case.

Beaumont (72), Picard (73), Chauveau (74), Litvine (75), Salinas (76), Schweickhardt (77) and Perucchi (78). The same view has also been expressed by stating that "all necessary measures" are equivalent to "reasonable measures", see Goedhuis (79), Shawcross and Beaumont (80), and McNair (81), or that the carrier is not liable when no fault has been committed, Ripert (82), Maschino (83), Sack (84), Lupton (85),

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(72) K.M. Beaumont in Journal of Air Law and Commerce 1949 p.404

(73) M. Picard: Le Droit Aérien, Cairo 1949, p.154-155.

(74) P. Chauveau: Droit Aérien, Paris 1951, no. 333.

(75) M. Litvine: Précis Elémentaire de Droit Aérien, Bruxelles 1953, no. 289-290.

(76) Salinas: La Regulacion juridica del Transporte Aéreo, Madrid 1953, p. 246 with note (328).

(77) A Schweickhardt: Schweizerisches Lufttransportrecht, Zürich, Berlin-Köln 1954, p. 48.

(78) Perucchi: Daños en el transporte aéreo internacional, Buenos Aires 1957, p. 71-74.

(79) Goedhuis 1933 p. 192; same author 1937 p. 236-237; same author 1943 p. 241-243.

(80) C.N. Shawcross and K.M. Beaumont: On Air Law, London 1951, (Second Edition) no. 390 note (c) and 411 note (c).

(81) A.D. McNair: The Law of the Air, London 1953,(Second Edition by M.R.E.Kerr and R.A.MacGrindle) p.197, cf. p.208, 222.

(82) G. Ripert in Journal du Droit International (Paris) 1930, p. 97.

(83) Maschino in Droit Aérien (Paris) 1930 p. 21.

(84) A.N.Sack in Air Law Review 1933 p. 368.

(85) G.W. Lupton Jr.: Civil Aviation Law, Chicago 1935, §79.

Schleicher-Reymann (86) and Knauth (87).

Moller says that "in effect the carrier in regard to passengers will be liable for little more than negligence if he has taken reasonable measures to provide for the safety of the person carried"(88). It does not appear quite clear what the meaning is behind this statement.

Koffka-Bodenstein-Koffka seems to hold an opinion differing from that of the majority by stating that "the carrier must...prove...that all measures objectively required for the avoidance of the damage have been taken"(89). According to such an interpretation the diligence to be exercised is not only that of a bonus pater familias, but that of a vir optimus (90).

Finally, Astle writes that the substitution of the word "reasonable" for "necessary" in the United Kingdom Order of Council 1952 is an alteration concerning "the onus of proof upon the carrier in order to gain immunity for loss or damage

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(86) Schleicher and F. Reymann: Recht der Luftfahrt, Berlin 1937, p. 356.

(87) A.W. Knauth in Journal of Air Law and Commerce 1947 p. 45.

(88) N.H. Moller: Law of Civil Aviation, London 1936, p. 304.

(89) Koffka-Bodenstein-Koffka op. cit. p. 322: "...Der Luftfrachtführer muss...beweisen,...dass objektiv alles zur Verhütung des Schadens Erforderliche geschehen ist..."

(90) See also Riese's criticism of Koffka-Bodenstein-Koffka, Riese op. cit. p. 455.

occasioned to cargo"(91). This seems to indicate a distinction of substance between the words in question.

e. Court decisions.

The courts of several countries have been faced with the problem of interpretation of the words "all necessary measures". The question was examined extensively in the Italian case Palleroni vs. S.A. di Navigazione Aeria, Corte di Cassazione, March 31, 1938 (92): Fire breaking out in a hydroplane during its landing on the sea, forced all the passengers to plunge into the water whereby one of them perished. The next of kin sought compensation from the Air Company and the question arose whether "all necessary measures" to avoid the damage had been taken or had been impossible to take. The lower court, having examined the preparatory works of Art. 20 paragraph 1, had made a distinction between "the reasonable measures" and "all necessary measures" to the effect that the former expression indicated a more subjective standard of care than the latter which must be considered more objective and universal in its requirements to the carrier.

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(91) W.E. Astle: Air Carriers' Cargo Liabilities and Immunities, London 1958, p. 91.

(92) Rivista di Diritto Aeronautico 1938 p. 141-150, see also R.G.D.A. 1939 p. 309-318 (French translation). The decision is dealing directly with the Italian Decree of September 28, 1933 no.1733 Art. 36, but may be applied as well to the Warsaw Convention as the Decree reproduces the text of the Convention.

Corte di Cassazione, however, rejected these considerations. The Court stated that the system of liability contained in the text was the following:

> "Presumption of liability against the carrier; recognition of exemtion from liability even in cases other than those of force majeure and cas fortuit; the proof exempting the carrier...consisting in showing that he and his servants or agents have taken the necessary measures to avoid the accident. The presumption of liability...should flow from the omission of the diligence expected of an ordinary man, that is, of bonus pater familias, for the following reasons: (a) the diligence of the ordinary man is the rule which governs, in principle, the fulfilments of all contracts...(b) the text contains no allusion or reference to diligence of a different degree... Consequently, when it is necessary to establish concretely whether the carrier has taken the necessary measures to avoid the accident, the nature of the measures required and the necessity of such nature for the object sought by the law must be determined in relation to the measures which the normal and well-regulated carrier would have adopted and to the necessity which such carrier would have seen. One cannot go any further."

It will be seen that the judgment describes the required standard of care in accordance with the principles advanced in Pittard's report of 1925 (93).

The difficulties of interpretation of the words "all necessary measures" are well illustrated by a comparison of the following two cases. In the French case Csillag vs. Air France, Tribunal civil de Toulouse, February 10, 1938, it was stated that

> "...in order to exonerate himself the carrier has not to prove that he and his servants or agents have

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(93) See supra p. 23.

committed no faults, it being sufficient for him to show - as said the delegate M. Pittard (94) - that he has exercised the diligence of a bonus pater familias and has taken all the reasonable and normal measures to avoid the damage..."(95)

However, in a judgment given by Tribunale di Tripoli, August 14, 1937, in the case Primatesta vs. Ala Littoria (96), the Court stated that the carrier had to prove not only that no fault was committed but also that he and his servants or agents had taken all necessary measures or that it had been impossible for them to take such measures (97).

While the French Court apparently held the proof that all necessary measures have been taken to be a less burdensome proof than that which shows that no fault has been committed, the opposite seems to be true as far as the judgment from Tripoli is concerned. Bearing in mind the intention of the draftsmen of Art. 20 - according to which the liability was to be based on fault - one will see that both decisions fail to hit the meaning of the original idea behind the Article.

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(94) Presumably in his report of 1925, see supra p. 23.

(95) The decision has never been published, but it is reproduced - in extracts - by Lemoine op. cit. no. 825 note (2). See also infra p. 73.

(96) Rivista di Diritto Aeronautico 1938, p. 52-64.

(97) The judgment was reversed on appeal, see infra p. 77, but the question under consideration was not discussed then. However, the views can probably be considered to have been overruled by the above mentioned judgment given by Corte di Cassazione, March 31, 1938.

In the English case Grein vs. Imperial Airways Ltd., King's Bench Division, October 23, 1935, Court of Appeal, July 13, 1936 (98), the meaning of "all necessary measures" was also discussed, and in this regard Greer L.J. stated:

> "...the carrier...is not to be liable if he proves that by his agents or servants he exercised all reasonable skill and care in taking all necessary measures to avoid causing damage by accident to the passenger or proves that it was impossible to take such measures. This seems to me to amount to a promise not to injure the passenger by avoidable accident, the onus being on the carrier to prove that the accident could not have been avoided by exercise of reasonable care..."(99)

In the American case Ritts vs. American Overseas Airlines, United States District Court, Southern District of New York, January 17-18, 1949 (100), the judge instructed the jury that "a very high degree of care is required of an air carrier to protect its passengers from injury and death." And later the jury was asked: "Has the defendant (the carrier) proved...that the defendant and its agents took all reasonable and necessary measures to avoid the damage?"

Another case in which the problem was examined is American Smelting and Refining Company vs. Philippine Airlines Inc., United States, Supreme Court of New York County, June 21, 1954 (101), where it was stated:

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(98) U.S.Av.R. 1936 p. 184-250.

(99) Ibid. p. 230.

(100) U.S.Av.R. 1949 p. 65-71.

(101) U.S.and C.Av.R. 1954 p.221-228.

"The proof adduced upon the trial conclusively establishes that defendant took all possible precautions to insure the safety of the flight and to avoid the crash of its aircraft."

In the case Pierre vs. Eastern Air Lines et al., United States District Court, District of New Jersey, January 27, 1957 (102), the Court stated that the carrier must pay unless it can prove "that it and its servants were free from all fault."

It appears that the Courts in the above quoted cases have found themselves obliged to paraphrase the expression "all necessary measures" when applying Art. 20, and most of them have used terms which are revolving around the idea of fault; - to the contrary, however, is the case from Tripoli. In the French case from Toulouse a distinction has been made, it is true, between proof of the diligence of a bonus pater familias and proof of absence of fault. But the real problem behind this distinction is the one concerning the requirements to satisfy the carrier's burden of proof (103).

Summarizing the examination of the meaning of the expression of Art. 20 paragraph 1 that the carrier must prove that he and his servants or agents "have taken all necessary measures to avoid the damage or that it was impossible for

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(102) U.S. and C.Av.R. 1957 p. 431-435.

(103) See infra p.73.

him and them to take such measures", the following can be stated: The intention behind the original wording including the expression "the reasonable measures" was to introduce the principle that the carrier, his servants or agents, have to show due diligence - to act with the care of a bonus pater familias. In other words, the liability was based on fault. At the Warsaw Conference the expression was changed to "all necessary measures", but the principle behind the terminology remained unchanged. During the revision work on the Convention almost all statements gave expression to a meaning of these words in conformity with the original idea behind them. Also certain national Acts which have paraphrased Art. 20 paragraph 1 when implementing the Convention, have expressed themselves along these lines. An overwhelming majority of authors has held the same views, and the courts of several countries have approved this interpretation.

2. THE REQUIREMENTS TO SATISFY THE BURDEN OF PROOF IMPOSED UPON THE CARRIER IN ARTICLE 20 PARAGRAPH 1.

The consensus of opinion which, on the whole, is prevailing among the courts and writers of different countries concerning the interpretation of Art. 20 paragraph 1 with regard to the expression "all necessary measures", comes to an abrupt end, however, as soon as the question turns upon the requirements to satisfy the carrier's proof that all necessary measures have been taken or were impossible to

take. That is the reason why the discussions concerning Art. 20 paragraph 1, while taking their starting point in the incertitude of interpretation of the words "all necessary measures", usually have merged into a debate about the requirements to satisfy the onus of the carrier (104). This is the main problem with respect to the interpretation of Art. 20 paragraph 1, and it stands out, above all, in cases of unknown cause of damage. For the more the factual circumstances are unexplained, the more significant is the rôle played by the burden of proof. No wonder then that these cases have been les enfants terribles in the interpretation of Art. 20 paragraph 1.

The problem and the different approaches to its solution will be better illustrated, it is believed, by outlining the views and arguments put forward by various authors dealing with this question. The vast majority of authors groups itself around certain chief points of view which will be expounded below. After that, the preparatory works of the Warsaw Convention with respect to the present Art. 20 paragraph 1 will be studied - the more so as these works have often played a decisive rôle in the attitude of the

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(104) See for example CITEJA Doc.495, Compte Rendu de Réunion de la Deuxième Commission, Cairo, 1946, p. 51-59; ICAO Doc. 7229-LC/133, Eighth Session of the Legal Committee, Madrid 1951, p.149-151; ICAO Doc.7450-LC/136, Ninth Session of the Legal Committee, Rio de Janeiro 1953, p. 79-88; The Hague Conference 1955, p.94-101.

courts and authors to the problem. In that connection the revision works on the Convention and the discussions during The Hague Conference 1955 will also be studied. Finally, the court decisions will be examined.

a. Authors.

A number of authors has advocated a so called "liberal" interpretation of Art. 20 paragraph 1 in respect of the requirements for the fulfilment of the carrier's burden of proof. As an exponent for this approach Lemoine (105) may be mentioned. According to this author the carrier has to furnish proof to the effect that he and his servants or agents have exercised due diligence in the execution of their duties, but this proof has to be furnished only within the possibilities allowed by the circumstances of the case in question. It does not rest unconditionally with the carrier to explain the cause of damage or to trace the entire chain of events leading up to the damage in order to show that all necessary measures have been taken up to the very last moment. Only to the extent to which the circumstances permit him to do so, the carrier has to furnish such proof. Otherwise, it will be sufficient for him to furnish a more general proof of the due diligence of his crew. In that case he will have to prove that all required measures aiming at a safe flight have been taken, for example

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(105) Lemoine op. cit. no. 819-821.

that the aircraft in question was airworthy; that all state regulations concerning the exploitation of the aircraft have been observed strictly; that the aircraft has been kept in good order and has been carefully overhauled; that at the moment of departure the aircraft was carrying sufficient fuel and oil; that the crew was well equipped and possessed the necessary licences; that the departure did not take place under weather conditions in which a prudent carrier would have postponed the departure.

Support for this interpretation of Art. 20 paragraph 1 is, above all, derived from the preparatory works of the Convention, and in this respect Lemoine cites the following passage from Pittard's report of 1925 (106):

> "Que peut-on exiger du transporteur aérien? Une organisation normale de son exploitation, un choix judicieux de son personnel, une surveillance constante de ses agents et préposés, un contrôle sérieux de ses appareils accessoires et des matières employées."(107)

This text does not impose upon the carrier - the author states - the obligation of explaining the origin of the accident in order to show that no fault has been committed in connection with every event leading up to the accident. In particular, the text does not require the carrier to trace all the acts of the crew in order to prove that nothing wrong has been done, and that everything that could be required according

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(106) Ibid. no. 819.

(107) See Paris Convention 1925 p. 55, and infra p.53.

to the circumstances has been carried out. A requirement to that effect would mean that the carrier had to reconstruct the accident in order to analyse every phase. In general it is impossible, however, to furnish the negative proof of non-existence of fault. Accordingly, a liberal interpretation has to be adopted - that is the only one compatible with the above cited report (108).

An understanding of Art. 20 paragraph 1 along these lines has been held by several authors, thus Müller (109), Giannini (110), Lacombe (111), Picard (112), Lefebvre d'Ovidio and Pescatore (113), Chauveau (114), Lena Paz (115), Rabut (116), and Litvine (117).

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(108) In this connection Lemoine cites the (unpublished) case Csillag vs. Air France, see infra p. 73.

(109) Müller: Das Internationale Privatrecht der Luftfahrt, Dortmund (Germany) 1932, p. 95.

(110) Giannini in R.G.A.1949 p.342.

(111) Lacombe in R.D.A.1949 p.823.

(112) Picard op. cit. p. 154-155.

(113) A. Lefebvre d'Ovidio and G. Pescatore: Diritto della Navigazione, Milano 1950, p. 277, who state briefly with respect to carriage of goods that damage resulting from an unknown cause is to be borne by the shipper. A similar opinion seems also indicated as far as passengers are concerned, see p. 251-252.

(114) Chauveau op. cit. no. 331-341, especially no. 333.

(115) J.A. Lena Paz: Derecho Aeronautico, Buenos Aires 1951, p. 214-215.

(116) Rabut: La Convention de Varsovie, Paris 1952, p. 23-24.

(117) Litvine op. cit. no. 292, cf. no. 288.

In an examination of the draft convention drawn up in Paris 1925 - which relieved the carrier of liability in the cases of nautic faults of his servants or agents in respect of passengers also - Ripert (118) has stated that the carrier was able to avoid liability even if the origin of damage be unknown. If the carrier showed that no faults have been committed before the departure and that the crew was qualified and duly licenced, nothing further was required (119).

A few years after the Warsaw Conference, however, Ripert confines himself to point out that behind the liability provisions of the Convention the Anglo-Saxon idea of due diligence is to be found (120). The carrier has to show that he has committed no fault, and in England this question is left to the estimation of the court. Ripert seems to hold a general proof sufficient in this respect, but does not mentioned either the responsibility for servants or agents or the case of unknown cause of damage (121).

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(118) Ripert in Revue Juridique Internationale de la Locomotion Aérienne, (Paris), 1926 p. 7. Ripert was a member of the French delegation to the Paris Conference 1925 and to the Warsaw Conference 1929.

(119) This seems to imply the understanding that all faults that are committed, or the effect of which has manifested itself, after the departure of the aircraft, are considered nautic faults, see infra p. 115.

(120) Ripert in R.G.D.A. 1932 p. 264-265.

(121) Concerning the problem of unknown cause of damage in maritime law, see Ripert: Droit Maritime, 1952, no. 1812-8, see infra p. 107-108.

Goedhuis (122) has put forward an interpretation of Art. 20 in which, it is true, he takes his starting point quite opposite to Lemoine, but the result of which in practice will be close to that of the liberal interpretation. Originally - Goedhuis says - the intention behind the liability provisions of the Convention with regard to servants or agents was to hold the carrier liable on the basis of "faute de surveillance" only, and not in general for faults committed by his employees (123). This opinion is based on Pittard's report of 1925, and once more the passage commencing with the words "Que peut-on exiger..." is quoted (124). At a later stage, however, the carrier's liability was made more stringent, the carrier now being held liable towards passengers in cases of nautic faults on the part of his servants or agents (125). Accordingly, pursuant to the present Art. 20 the carrier has to prove that both he and his servants or agents have taken all the necessary measures to avoid the damage. And the author

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(122) Goedhuis 1933 p. 173-195; same author 1937 p. 217-241; same author 1943 p. 240-251.

(123) Goedhuis 1933 p. 176-177; same author 1937 p. 221-222; same author 1943 p. 242, where it is said that originally the carrier's responsibility for his servants or agents was based on "culpa in eligendo".

(124) Goedhuis 1933 p. 173 and 176; same author 1937 p. 218 and 221; same author 1943 p. 241.

(125) See infra p. 56.

continues:

> "But if the cause is unknown what proof has to be given then by the carrier? As a direct proof is impossible, the carrier must be allowed to prove by presumption that his agents took the necessary measures (126). If the carrier shows that the crew held the necessary certificates, he must be relieved from his liability unless the plaintiff rebuts the presumption by evidence to the contrary.
> The Court when applying the rules of the Warsaw Convention should bear in mind that the fundamental idea of Art. 20 is to relieve the carrier of his liability when he has committed no fault.
> The fact of imposing upon the carrier the burden of proving affirmatively that his agents took the necessary measures, would mean imposing an absolute liability upon him in cases where the cause of the accident remains unknown...(But) the authors of the Convention unanimously rejected a liability of the air carrier based on the theory of risk."(127)

This opinion has also been shared by a substantial number of authors, for example Ambrosini (128), Marino (129), (perhaps) Coquoz (130), van Houtte (131), (perhaps) Gay de Montella (132), Sandoval (133), Salinas (134) and Tapia (135).

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(126) See also Goedhuis 1933 p. 195; same author 1943 p.245-246

(127) Goedhuis 1937 p. 237.

(128) Ambrosini in Rivista di Diritto Aeronautico 1938 p.167 f.

(129) Ibid. p. 236-238.

(130) Coquoz op. cit. p. 137.

(131) J. van Houtte: La Responsabilité Civile dans les Transports Aériens intérieurs et internationaux, Paris and Louvain 1940 no. 46.

(132) R. Gay de Montellá: Principios de Derecho Aeronáutico, Buenos Aires 1950, p. 545-546.

(133) N.G. Sandoval: El Contrato de Transporte Aéreo, Bogota 1957, p. 100.

(134) Salinas op. cit. p. 247-248.

Schweickhardt (136) holds an opinion which seems to lead to a somewhat similar result. He states that the carrier has to prove that due diligence was exercised in connection with all the specific circumstances of the accident to which knowledge can be obtained. This interpretation takes into consideration the fact that air accidents are often inexplicable and, accordingly, no strict proof ought to be required either with regard to the cause of accident or as far as the exercising of due care is concerned. In such cases it must be sufficient to furnish the exonerating proof by means of the establishment of a probability based upon the normal development of the events of accidents.

A more restrictive tendency in the interpretation of the requirements to satisfy the carrier's burden of proof has been expressed by Riese (137): In cases of unknown cause of accident the carrier has the possibility of proving that he himself and his servants or agents on the ground have taken all necessary measures to avoid the damage. But how can he show that the crew has exercised due diligence - especially if all persons on board the aircraft have perished in the

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(135) L. Tapia in Studi in onore di Antonio Ambrosini, Milano 1957, p. 113.

(136) Schweickhardt op. cit. p. 47-48.

(137) Riese op. cit. p. 454-461.

accident? In such a case no presumption exists either for negligence or for non-negligence on the part of the crew, and it is inconsistent with the allocation of the burden of proof in Art. 20 to put forward a presumption to the effect that a duly licenced and qualified crew has taken all necessary measures. Nor can the view held by Lemoine, according to which a general proof of due diligence on the part of the crew is considered sufficient in cases of unknown cause of damage, be accepted. That would be an evasion of the burden of proof imposed upon the carrier. Riese admits, however, that the circumstances may justify the presumption that the crew has taken all necessary measures, in particular if the accident is most probably due to force majeure (138); in that case - the author adds - there is, however, no further question of an unknown cause of accident. Also, the carrier may escape liability if he is able to point out all possible causes under consideration and proves that no fault has been committed in connection with any of these possibilities (139). However, in the case of a fully unexplained cause of damage the carrier cannot furnish the exonerating proof.

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(138) See also Koffka-Bodenstein-Koffka op. cit. p.325-326.

(139) See also Sullivan in Journal of Air Law 1936 p.30.

Several writers have expressed views, more or less detailed, along the same lines, thus Koffka-Bodenstein-Koffka (140), Sullivan (141), Schleicher (142), Oppikofer (143), (apparently) Sauveplanne (144), Achtnich (145) and Drion (146).

Also Abraham (147) holds the opinion that lack of knowledge of the origin of the damage (a "non liquet") will entail the liability of the carrier. This conclusion is based upon an examination of the existing court decisions on the question, and it is pointed out that this interpretation corresponds to the prevailing views in maritime law (148).

Calkins has given expression to the same views by

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(140) Koffka-Bodenstein-Koffka op. cit. p. 325-326.

(141) Sullivan in Journal of Air Law 1936 p. 30.

(142) Schleicher in Archiv für Luftrecht (Germany) 1939 p.89 f.

(143) Oppikofer in Zeitschrift für Schweizerisches Recht 1946 p. 217a note 65.

(144) Sauveplanne in Rechtkundige Opstellen aangeboden aan Prof. Cleveringa, Zwolle (the Netherlands) 1952, p. 376 f.

(145) Achtnich in Z.f.L.1952 p. 340.

(146) Drion op. cit. no. 33 note 3.

(147) Abraham in Z.f.L.1953 p. 85; same author in Z.f.L. 1955 p. 261; same author: Der Luftbeförderungsvertrag, Stuttgart (Germany) 1955, p. 60-63.

(148) The author refers to German maritime law, see also infra p. 110-111.

stating that "frequently a non-negligent defendant (carrier) will be held liable because of complete absence of proof to exculpate himself"(149). And the author continues:

> "...in a certain number of situations, of which the Grand Canyon accident (150) may be typical, the law becomes stalled on dead center because of total absence of proof. Society - particularly the air travelling part of it - owes a self-interested obligation to see that in such circumstances the individual does not lose out."

Finally, some authors, although not touching upon the unknown cause of damage directly, have expressed themselves concerning the carrier's possibilities of furnishing the proof required in Art. 20. Hernandez (151) holds the view

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(149) G.N. Calkins in Journal of Air Law and Commerce 1956 p. 256.

(150) Mid-air collision over the Grand Canyon, Arizona, on June 30, 1956, see Civil Aeronautics Board, Accident Investigation Report, ICAO Circular 54-AN/49, Aircraft Accident Digest No. 8, p. 95-111. With respect to the cause of the accident the following is stated in the report: "The probable cause of this mid-air collision was that the pilots did not see each other in time to avoid the collision. It is not possible to determine why the pilots did not see each other, but the evidence suggests that it resulted from any one or a combination of the following factors: (1) Intervening clouds reducing time for visual separation; (2) visual limitations due to cockpit visibility, and; (3) preoccupations with normal cockpit duties; (4) preoccupation with matters unrelated to cockpit duties such as attempting to provide the passengers with a more scenic view of the Grand Canyon area; (5) physiological limits to human vision reducing the time opportunity to see and avoid the other aircraft, or; (6) insufficiency of en-route air traffic advisory information due to inadequacy of facilities and lack of personnel in air traffic control."

(151) J.L.A. Hernandez: Regulacion Juridica del Transports Aéreo Internacional, Mexico D.F., 1957 p. 74-75.

that this proof is very easily established, while Maschino (152) Schleicher-Reymann (153), Sune Wetter (154), and Francais (155) on the other hand consider it very difficult for the carrier to satisfy the requirements of Art. 20. The latter opinion is also expressed by Knauth (156) who seems to place it on an equal footing with proof of force majeure.

The examination of the view points of the authors has revealed differences of opinion to a large extent with regard to the requirements to satisfy the carrier's burden of proof pursuant to Art. 20 paragraph 1. Above all, the schisme stands out in cases of completely, or almost completely, unknown cause of damage in which the court will have (almost) no evidence at all to build upon when considering the questions concerning the crew's due diligence and the efficiency of the measures taken by the carrier's ground staff to secure a safe flight. Is a general proof consisting in furnishing the relevant licences, certificates etc. to be considered satis-

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(152) Maschino in Droit Aérien (Paris) 1930 p. 20-21.

(153) Schleicher-Reymann op. cit. p. 356.

(154) Sune Wetter in Journal of Air Law and Commerce 1948 p. 5.

(155) J.L. Francais in R.G.A. 1954 p. 140.

(156) A,W. Knauth in Journal of Air Law and Commerce 1947 p. 44-45.

factory proof of the due care of the servants or agents in such cases? The partisans of an answer in the affirmative have first of all derived support for their interpretation of Art. 20 paragraph 1 from the preparatory works of the Convention, and in the following these works will be examined.

b. Preparatory works.

As previously mentioned the origin of the present Art. 20 of the Warsaw Convention is to be found in the draft convention drawn up by the First International Conference on Private Air Law in Paris 1925 (157). Art. 5 and 6 ran as follows:

> Article 5: "Le transporteur est responsable des accidents, pertes, avaries et retards.
> Il n'est pas responsable s'il prouve avoir pris les mesures raisonnables pour éviter le dommage; cette preuve est admise même dans le cas où le dommage provient d'un vice propre de l'appareil."
>
> Article 6: "Le transporteur répond des fautes commises par ses préposés. Toutefois, en cas de faute de navigation, le transporteur ne sera pas responsable s'il fait la preuve à l'article précédent"(158).

In his report of 1925, also earlier referred to, Pittard has expounded these provisions as follows:

> "La Commission s'est demandée quel régime de responsabilité il fallait adopter: risque ou faute. L'opinion

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(157) See Paris Conference 1925 p. 77-82.

(158) Ibid. p. 79.

générale est que, tandis que la responsabilité civile à l'égard des tiers, doit comporter l'application de la théorie du risque, en revanche, dans la responsabilité du transporteur à l'égard des passagers et des marchandises, il faut admettre la théorie de la faute.
Ce premier point acquis, on peut se demander à qui incombe le fardeau de la preuve; il a paru équitable de ne pas imposer cette lourde charge au lésé et l'on a admis la présomption de faute à la charge du transporteur. Mais comme ce n'est qu'une présomption, le transporteur a évidemment le droit de rapporter la preuve contraire et l'on doit alors établir nettement la limite de la faute; où commence celle-ci?
Que peut-on exiger du transport aérien? Une organisation normale de son exploitation, un choix judicieux de son personnel, une surveillance constante de ses agents et préposés, un contrôle sérieux de ses appareils accessoires et des matières employées.
Il faut bien admettre que celui qui utilise un aéronef n'ignore pas les risques inhérents à un mode de circulation qui n'a pas encore atteint le point de perfection que cent années ont donné aux chemins de fer. Il est donc juste de ne pas imposer au transporteur une responsabilité absolue et de le dégager de toute responsabilité lorsqu'il a pris les mesures raisonnables et normales pour éviter le dommage; c'est la diligence que l'on peut exiger du bon père de famille.
...
Plus délicate encore est la question de la responsabilité du transporteur pour ses préposés.
Le texte qui vous est soumis comporte l'application de deux principes. Le premier est d'une application générale, à savoir que le maître répond des actes de ses préposés; le second, déjà retenu pour la responsabilité du transporteur, c'est qu'il n'y a pas de responsabilité sans faute, celle-ci étant présumée jusqu'à preuve rapportée de la diligence raisonnable.
On peut se demander si la responsabilité du transporteur ne se trouve pas ainsi plus étendue en ce qui touche les préposés que pour lui-même; mais c'est là une simple apparence. En effet, dans les deux cas, il n'y a de responsabilité que s'il y a faute ou plus exactement si la faute présumée n'a pas été annulée par la preuve que les mesures raisonnables ont été prises pour éviter le dommage; mais, tant que cette preuve n'est pas rapportée, la présomption de faute subsiste et le maître est responsable aussi bien du fait de ses préposés que des siens propres." (159)

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(159) Ibid. p. 55-56.

Several authors have referred to the passage commencing with the words "Que peut-on exiger..." to support the interpretation according to which the carrier need not explain the cause of damage in order to satisfy the requirements for his burden of proof. This is true both in respect of authors putting forward a liberal interpretation of Art. 20 (160) and of those taking a restrictive interpretation as their starting point but permitting a presumption to the effect that due diligence has been shown when the circumstances do not render a direct proof possible (161).

It is correct that the passage referred to does not impose upon the carrier the obligation to prove that up to the moment of damage no faults have been committed by the crew. But this does not justify the conclusion that a "general" proof of - or a presumption of - the diligence of the crew is sufficient or permissable when the circumstances render a direct proof impossible. Pittard's report must be read in its entirety. Then it will be seen that the quoted passage concerns the carrier's liability in respect of his own acts only (Art. 5 of the draft). The question of the carrier's responsibility with regard to faults committed by his servants or agents - including the crew - (Art. 6), is only dealt with

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(160) See supra p. 42.

(161) See supra p. 45.

further down in the report, viz. from the passage beginning with the words "Plus délicate encore est la question de la responsabilité du transporteur pour ses préposés..." And in that part of the report nothing is said which could be taken in support of a liberal interpretation of Art. 20 or of a presumption to the above mentioned effect. In fact, the report, in exposing the principles of liability of the draft convention, does not seem to touch at all upon the specific question of the requirements to satisfy the carrier's burden of proof. The report states that the system of liability is based upon fault; that the burden of proof ("cette lourde charge")(162) is imposed on the carrier, that the carrier is liable for the faults of his servants or agents, that he can escape liability by proving that he and they have taken all reasonable measures, and, finally, that an exception from this system of liability has been admitted to the effect that the carrier is not held liable for the nautical faults of his crew. But nothing has been stated which could serve as a guide with regard to the question of how to furnish the proof required.

During the further discussions in CITEJA on the proposed convention the question of liability was not dealt with in

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(162) See p. 53

detail until the Third Session in Madrid, May 1928 (163). In his report to the Committee the rapporteur, M. Henry de Vos, Belgium, referred extensively to Pittard's earlier report of 1925 with regard to the principles of liability (164). The German delegation, however, wanted the air carrier's liability to be more stringent and proposed therefore principally to delete the provision according to which the carrier might escape liability in cases of nautic faults on the part of his servants or agents, and in the alternative - as a compromise - that the provision should cover carriage of goods and baggage only (165). The Committee adopted the alternative proposal and at the same time another amendment was approved according to which the carrier could never escape liability if latent defect in the aircraft was proved (166). In the new draft convention Art. 22 was drawn up accordingly (167).

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(163) Chapter III (the liability chapter) of the draft convention submitted to the Third Session of CITEJA has been reproduced in Journal of Air Law and Commerce 1959 p. 221f (G.N. Calkins: "The Cause of Action under the Warsaw Convention").

(164) See Rapport présenté au CITEJA au nom de la deuxième Commission par M. Henry de Vos, May 1928, CITEJA, Third Session, May 1928, Madrid, Compte Rendu, p. 103-104, cf.p. 47.

(165) The German proposal was first made to the Second Commission of CITEJA in its meeting in Paris, March 1928, see CITEJA, Second Commission, Compte Rendu, March 1928, Paris, p. 38-41.

(166) A provision to this effect had been included in the "Avant-Projet de Convention sur la responsabilité du transporteur dans les transports internationaux par aéronefs et la

At the Warsaw Conference in October 1929 a new report, dated September 25, 1928 (168), was presented by M. de Vos - once more rapporteur. Again reference was made to Pittard's report of 1925 (169) with regard to the principles of liability of the draft convention. The only changes were the Madrid amendments the reasons for which were explained in the report.

During the discussions in Warsaw two opposite trends manifested themselves with respect to the principles of liability, and an extensive exchange of views took place (170). According to one opinion the air carrier ought to be responsible for all faults committed by his servants or agents, including nautical faults in the carriage of goods and baggage. Other delegates held an opposite view. They proposed to exempt the carrier from being held liable in all

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(166 con'd) lettre de transport aérien (texte modifié conformément aux déliberations de la Deuxième Commission (de CITEJA), Paris, March 21-22, 1928", see this document p.12.

(167) See CITEJA, Third Session, May 1928, Madrid, Compte Rendu p. 125. See also Warsaw Conference 1929 p. 172.

(168) See Warsaw Conference 1929 p. 159-166.

(169) Ibid. p. 164. See also de Vos' oral presentation of the problems ibid. p. 15-16.

(170) Ibid. p. 25-37.

cases of nautic faults committed by his servants or agents, and furthermore to delete the strict liability for latent defects in the aircraft (171). As a compromise between these views the present Art. 20 was drawn up.

The question concerning the requirements to satisfy the carrier's burden of proof pursuant to Art. 20 was, however, touched upon by implication only. Examining the proposal for the compromise from which the existing Art. 20 emanated, the French delegate M. Fladin stated:

> "...en fait on peut classer les accidents d'avions en trois catégories: ceux qui proviennent d'une faute de pilotage; ceux qui proviennent d'un vice de fonctionnement de l'appareil et ceux qui sont désignés comme étant le résultat du cas fortuit, ce qui est la majorité des cas.
> Si nous adoptons la formule transactionnelle, en ce qui concerne les premiers cas, ceux qui résultent d'une faute de pilotage, il y aura responsabilité du transporteur, mais pour les passagers seulement. Pour les autres, ceux qui proviendraient du vice de fonctionnement de l'appareil, il est bien entendu qu'il n'y aurait aucune responsabilité du transporteur.
> Quant à la troisième catégorie d'accidents, ceux qui proviennent du cas fortuit, dès maintenant, par le jeu de la convention, le transporteur est toujours déclaré responsable." (172)

The last remark is surprising. By a number of authors from the Civil Code countries it has been stated that the liability pursuant to Art. 20 paragraph 1 is <u>less</u> burdensome to the carrier than the contractual liability in the Civil

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(171) Concerning the discussions on the carrier's liability for latent defects, see G.N. Calkins in Journal of Air Law and Commerce 1959 p. 234-236.

(172) See Warsaw Conference 1929 p. 36.

Codes (173) according to which the contract-debtor has to prove that the non-execution of the contract was due to "force majeure" or "cas fortuit"(174). M. Fladin's statement might indicate very strict requirements for the fulfilment of the carrier's burden of proof. But no grounds having been given nor any further explanation, the statement seems not to be sufficiently elaborated to form a basis from which support may be derived for a certain interpretation of Art. 20 paragraph 1.

During the examination of "les questions de fond de deuxième importance" the question was also raised indirectly by the Japanese delegate, M. Motono. At M. Motono's request the rapporteur explained the meaning of the then Art. 22, and the following exchange of words took place:

> "M. de Vos...: Il y a les mesures raisonnables que peut prendre le transporteur et il y a les mesures que peut prendre le pilote.
> M. Motono...: Qu'est-ce que vous entendez par "mesures raisonnables"?
> M. de Vos...: Cette expression qui a un sens plus précis en Grande-Bretagne que sur le Continent, sera interprétée par le juge suivant chaque cas.
> M. Motono...: Est-ce que vous entendez dire que le fait de prendre un pilote capable suffit?
> M. de Vos...: C'est une question d'interprétation. Le comité de rédaction pourra peut-être préciser le sens de cette expression." (175)

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(173) See for example the French Code Civil Art. 1148, cf. Art. 1147, and the Italian Codice Commercio Art. 400. See also the Spanish Codigo civil Art. 1105, cf. Salina op. cit. p.244 note (323).

(174) See for example Ripert in R.G.D.A. 1932 p.264-265; Mantle in R.G.D.A. 1936 p. 492-493; Ambrosini in Rivista di Diritto Aeronautico 1938 p.188; Coquoz op. cit. p. 136;

No definition nor clarification, however, seems to have been given during the Conference.—

The examination of the preparatory works of the Convention seems to justify the conclusion that no support can be derived from these works for a specific interpretation of Art. 20 paragraph 1 in one or another direction in respect of the question concerning the requirements to satisfy the burden of proof imposed upon the carrier. The only answer to be found in the preparatory works appears to be the above quoted: "It is a matter of interpretation"!

c. Implementation Acts and domestic carriage by air Acts.

Turning once again to the national implementation Acts it will be seen that in respect of the problem now under discussion, they do not give much guidance, either. By reproducing the original text literally they just take over the problem, without indicating any approach to its solution. Once again, however, the Scandinavian and the Finnish Acts (176) constitute exceptions. In these Acts the Articles

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(174 con'd) Agro in Rivista di Diritto Aeronautico 1940-41 p. 72; Rabut: La Convention de Varsovie, Paris 1952 p. 23; C.S.de Lacerda: Curso de Direito comercial maritimo e aeronautico, Third Edition, Rio de Janeiro 1957 p.512. Compare Goedhuis 1933 p. 192-193. See also the Italian case Palleroni vs. S.A. di Navigazione Aeria, supra p. 35.

(175) See Warsaw Conference 1929 p. 112-113.

(176) See supra note 50.

corresponding to Art. 20 paragraph 1 of the Convention run as follows:

> "The carrier is not liable if it is proved that the damage is not caused by his fault or that of his servants or agents..." (177)

With a wording along these lines the requirements to satisfy the carrier's burden of proof have been specified through the requirement for proof to the effect that the damage was not caused by faults. Thereby the explanation of the cause of damage has been given a leading part in the exculpating proof (178).

It is worth noting, however, that in the Danish proposal for a new Aviation Act (179), in which the Warsaw rules as amended by The Hague Protocol of 1955 are included, a literal translation of Art. 20 paragraph 1 has replaced the above quoted text. The change of wording has been explained in the proposal by a short statement to the effect that the new text is closer to that of the Convention than the existing one. This approximation to the text of the Convention seems to be an advantage. For the sake of the ultimate purpose behind the

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(177) See the Danish Act § 20 subsection 1; the Norwegian Act § 6 subsection 1; the Swedish Act 20 § 1 subsection; the Finnish Act 20 § 1 subsection.

(178) Compare the almost similar wording of the Dutch proposal during the Rio de Janeiro discussions and The Hague Conference, infra p. 69.

(179) See Bill for Aviation Act, March 5, 1959, The Ministry of Public Works, Copenhagen, Chapter 9 § 20.

Convention: the unification of law, the national implementation Acts should follow the wording of the original text as closely as possible. Interpretation of the Convention rests with the courts, not with the national legislator.

In some cases even the domestic carriage by air Acts and their preparatory works may give expression to a certain understanding of Art. 20 paragraph 1 of the Convention. This is true with respect to the recent Acts of France and Australia. In France the Act of March 2, 1957, concerning the air carrier's liability (180) has introduced, by way of a general reference to the Convention, the Warsaw rules into the French legislation governing non-Warsaw carriage, thus superseding the earlier Art. 41, 42, 43 and 48 of the French Act of May 31, 1924 (181). In Art. 6 of the Bill presented by the French Government in 1955, however, the carrier's defences in Art. 20 paragraph 1 and Art. 21 of the Convention were paraphrased into: "force majeure", "vice propre à la chose transportée", and "une faute imputable au voyageur, à l'expediteur ou au destinataire", and the following explanatory statement was added:

> "L'article 6 substitue aux dispositions de l'article 20 paragraph 1 de Convention de Varsovie des regles mieux adaptées aux concepts juridiques francais et dont les

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(180) Loi No. 57-259 du 2 mars 1957 sur la responsabilité du transporteur au cas de transport aérien.

(181) See supra note 33.

> résultats practiques ne devraient pas être sensiblement différents de ceux recommandés par le texte international..." (182)

This seems to indicate a very restrictive interpretation of Art. 20 paragraph 1. Yet, in the present French Act of March 2, 1957, no paraphrasing or explanation of Art. 20 paragraph 1 is to be found.

In the Australian Civil Aviation (Carrier's Liability) Act No. 2 of 1959, an even more restrictive understanding of Art. 20 paragraph 1 has resulted in its deletion altogether as far as domestic carriage of passengers is concerned, see Part IV Section 28 of the Act,(but for the opposite, see Section 29 concerning baggage). In presenting the Bill to the Senate, the Minister for Shipping and Transport and Minister for Civil Aviation (Senator Paltridge) stated in respect of Art. 20 of the Warsaw Convention:

> "The onus of proof is on the carrier, and it is certainly a very narrow defence since, in most foreseeable cases, if the carrier "takes all necessary measures to avoid the damage", the accident would not have occurred.
> ...
> The carrier is strictly liable up to a prescribed limit of 7.400 pounds (183) in respect of death or injury of a passenger, unless he successfully sets up the narrow defence provided in Art. 20...Experience under the international rules indicates that the carrier has

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(182) See R.G.A. 1957 p. 239.

(183) This is the Warsaw limit as amended by The Hague Protocol (250,000 Poincaré francs, about 16,600 U.S. dollars).

> rarely sought to establish this defence and that it would be most difficult to do so successfully. However, it does introduce an element of uncertainty as to passengers' rights and for domestic purposes it is, therefore, proposed to deprive the carrier of this defence." (184)

Other Senators held concurring views (185), and in reply to the only one expressing doubt as to the understanding advanced on Art. 20 (186) the Minister said:

> "...In fact, the defence is so narrow that the Convention is regarded internationally as imposing absolute liability..." (187)

The expressions of doubt seem, however, to have been well-founded considering these categorical statements!

d. Revision works and The Hague Conference 1955.

While the problem of the requirements to satisfy the carrier's burden of proof was touched upon only lightly and indirectly at the Warsaw Conference 1929, it has been discussed at considerable length during the revision works on the Convention and at The Hague Conference in 1955. Being a problem of great practical importance it had presented itself several times in the application of Art. 20 paragraph 1

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(184) See Commonwealth of Australia, Parliamentary Debates, Twenty-Third Parliament, First Session, 1959 (First Period), Senate, February 25, 1959, p. 188-189.

(185) Ibid. p. 320 (March 11, 1959, Senator McKenna); p. 333 (Senator Vincent).

(186) Ibid. p. 339 (Senator Hannan).

(187) Ibid. p. 402 (March 17, 1959).

and had soon caused conflicting court decisions as well as conflicting opinions among writers.

During the meeting of the Second Commission of CITEJA in Paris, January 1939, the problem was discussed in connection with a British memorandum concerning the revision of the Warsaw Convention, dated September 28, 1938 (188), in which the British points of view were exposed as follows:

> "...According to the Convention the carrier has to show not only that it itself has taken all necessary measures, but it must also prove the same as to its servants... including the pilot of the aircraft. It is notorious that most flying accidents are caused by some default or other of the human element; in any event, it is certain that the majority of accidents can be attributed directly or indirectly to some act or omission of the personnel. Considering that in a great number of cases the pilot is himself killed in the accident, it will be understood that the carrier rarely has the opportunity to bear the burden of proof imposed on him by the Convention."

The attitude of the United States delegation to the meeting is reflected in the following passage:

> "...It has been asked whether, in the sense of the Convention, the carrier may be freed from his liability for what have commonly been called the "risks of the air" (as provided in the French Air Law of May 31, 1924), or if the Convention establishes a presumption of liability which the carrier cannot overcome unless he can prove that the accident was inevitable from the practical point of view.
> We suggest that the former proposal is fair; but the results conform to the latter." (189)

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(188) See Report of the American Delegation on Sessions of the First, Second and Third Commissions of the International Technical Committee of Aerial Legal Experts (CITEJA), Paris, January 23-24, 1939,(Report submitted February 11, 1939), Annex "F" p. 39.

(189) Ibid. p. 40-41.

After the second world war CITEJA resumed its activities and the revision of the Warsaw Convention was among the first subjects for its studies. In a questionnaire containing nineteen questions of principle and distributed during the meeting of the Second Commission of CITEJA, July 1946 (190), question no. XV ran as follows:

> "Shall the carrier be responsible in all cases of fault on the part of his servants or agents, and what proof is to be furnished when the aircraft has disappeared with the whole crew?"

Few of the experts from the various States seem to have answered this question. In the reply from the Greek expert (191) it was said that, perhaps, in difficult cases, the carrier should be allowed to prove the non-existence of fault on the part of his servants or agents by a presumption to this effect. The Egyptian expert (192) thought it equitable to make it possible for the carrier to prove, in the case in question,

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(190) The questionnaire has been reproduced in Réponses des Experts Francais au questionnaire présenté par M. Beaumont, et concernant la Révision de la Convention de Varsovie, CITEJA, Deuxième Commission, Doc. 444 (1946).

(191) CITEJA, Deuxième Commission, Doc. 442 (1946), Réponse de M. E. Georgiades, Expert Hellénique, au questionnaire de M. Beaumont.

(192) CITEJA, Deuxième Commission, Doc. 446 (1946), Réponse de M. le Dr. Beheiri, Expert Egyptien au questionnaire présenté par M. Beaumont.

that it was impossible for him to avoid the damage. The Dutch delegation (193) suggested to reconsider an earlier proposal from IATA (194) to the effect that if the circumstances render it impossible for the carrier to prove that all the measures have been taken, the absence of circumstances and facts constituting a presumption of fault on the part of his servants or agents should be sufficient to relieve the carrier of his liability. Finally, the Norwegian expert (195) gave the following answer - which seems to be the most natural one to the question: "In case of an aircraft disappearing with the whole crew" - the expert said - "it must be left to the courts to consider the proof after the circumstances, and it is not possible to formulate specific rules hereon."

During the discussions of the Second Commission of CITEJA, Cairo, November 1946, the problem was brought up again (196). In reply to a question concerning the carrier's possibility of furnishing the required proof in the case of

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(193) CITEJA, Deuxième Commission, Doc. 453 (1946), Réponse de la Délégation Neérlandaise au questionnaire présenté par M. Beaumont.

(194) International Air Transport Association.

(195) CITEJA, Deuxième Commission, Doc. 455 (1946), Réponse du Délégue Norvegien (Judge E. Alten) au questionnaire de M. Beaumont.

(196) CITEJA, Compte Rendu des Réunions de la Deuxième Commission, le Caire, November 1946, Doc. 495 p. 56-59.

an aircraft disappearing into the ocean, the rapporteur, M. Beaumont, answered: "... As far as I am concerned I think that we shall not decide upon the questions which the courts will have to deal with in the different countries", - thus giving expression to the same line of thinking as the one stated by the Norwegian expert. Other members of the Commission seemed to incline towards an understanding according to which the carrier could escape liability in the given case.

On the whole, the answers of the CITEJA experts seem to reflect an attitude according to which the requirements for the carrier's proof should be rather moderate. However, next time the question was raised, the opposite views were prevailing. When discussing the revision of the Warsaw Convention in Madrid, September 1951, the Legal Committee of ICAO touched upon the question of the unknown cause of damage in connection with its examination of Art. 20. On that occasion it was stated both by the French and the United Kingdom delegate that in cases of unknown cause of damage the carrier cannot show that he has taken all necessary measures (197).

In Rio de Janeiro, 1953, - the last preparatory meeting before the revision of the Warsaw Convention at The Hague

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(197) See ICAO Doc. 7229 - LC/133, Eighth Session of the Legal Committee, Madrid 1951, p. 151.

in 1955 - the discussion was focused on the problem of the unknown cause of damage by a Dutch proposal for amendment of Art. 20 paragraph 1 which ran as follows:

> "The carrier shall not be liable if he proves that the damage was not caused by negligence or breach of duty on his part or on the part of his servants and agents." (198)

One of the purposes behind this proposal was to provide for the case of unknown cause of damage to the effect that "the carrier should bear the risk of the impossibility of proving the real cause of the accident, and that meant that, consequently, the carrier would be liable"(199). After a lengthy discussion the Dutch proposal was rejected by a vote of 11 to 8 (200). As the debate in Rio de Janeiro was repeated at The Hague Conference it will not be made subject for further comments here, but the points of view advanced will be dealt with in connection with the examination of The Hague discussions.

At The Hague the Dutch proposal was put forward again, and once again it was rejected, - this time by a vote of 28 to 8,- and Art. 20 paragraph 1 remained unchanged (201).

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(198) See ICAO Doc.7450-LC/136, Ninth Session of the Legal Committee, Rio de Janeiro 1953 p. 80, and the following discussion p. 80-88.

(199) Ibid. p. 81.

(200) Ibid. p. 88.

(201) See The Hague Conference 1955 p. 94-95, 101 and 105. In its final form (the combined Dutch-Australian-Norwegian proposal, voted upon as an Australian proposal) the proposal

This vote, however, does not justify the conclusion that the majority of the delegates was opposed to the idea that the carrier has to bear the risk of the impossibility of explaining the cause of damage. An analysis of the discussion reveals that several delegates, though agreeing in principle with the Dutch proposal as far as liability for unknown cause of damage was concerned, voted against the proposal for other reasons. That was the case, for example, with the United States delegate. While in agreement with the Dutch proposal with regard to inexplicable accidents, he disagreed, on the other hand, with the insertion of the expression "negligence" (202). The German delegate expressed himself, in principle, along the same lines (203), and his remarks were fully endorsed by the United Kingdom delegate (204). A number of other delegates stated that they did not favour any change in the present Art. 20 paragraph 1, the text of which had already had a certain practical application without creating difficulties (205).

(201 con'd) ran as follows:"The carrier is not liable if he proves that the damage was not caused by negligence of himself or his servants and agents", see The Hague Conference 1955 p. 101.

(202) Ibid. p. 96 (Mr. Calkins); see also Ninth Session of the Legal Committee, Rio de Janeiro 1953 p. 86. See supra p. 30.

(203) See The Hague Conference 1955 p. 97-98 (Mr. Riese). See supra p. 30.

(204) Ibid. p. 99 (Mr. Beaumont).

(205) Thus the delegates from Portugal, Israel, Greece and the U.S.S.R., see ibid. p. 96-101.

Only two delegates expressed opposition to the Dutch proposal on the grounds that they disagreed with the views concerning the unknown cause of damage. The Italian delegate stated that with the Dutch proposal

> "the carriers would find themselves in a worse situation than at present, if they had to prove that neither they nor their employees had committed a fault. In fact, it was easier to prove that one had taken the necessary measures than to prove (negatively) that one had not been at fault." (206).

The Spanish delegate "did not think that the liability had to be imposed on the carrier", either pursuant to the present text or to the Dutch proposal, in cases of unknown cause of damage.(207)

What conclusions are to be drawn from the discussions during the revision work and at The Hague Conference? It seems justified to conclude that a tendency towards raising the standard of requirements to satisfy the carrier's burden of proof can be perceived through these discussions. This tendency is undoubtedly influenced by the ever increasing degree of safety under which air carriage is performed.

But one more conclusion can be drawn from the debates,

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(206) Ibid. p. 95 (Prof. Ambrosini); compare, however, Ninth Session of the Legal Committee, Rio de Janeiro 1953 p. 84, where another understanding of the Dutch proposal seems to have been expressed.

(207) The Hague Conference 1955 p. 100; compare, however, ibid. p. 177 where an apparently opposite view is maintained. See also Ninth Session of the Legal Committee, Rio de Janeiro 1953 p. 82.

- and this is unfortunately the most conspicuous one: The present text of Art. 20 paragraph 1 is susceptible of conflicting interpretations, and, having not seized the opportunity to amend the existing wording of the Article, the Conference gave free rein to continuing uncertainty and conflicting decisions in the application of Art. 20. Although it has to be admitted that even the most well-formulated text may give rise to divergent interpretations, in particular with regard to the question of proof, no reason seems to exist why it should be impossible to reach an agreement upon a wording of Art. 20 paragraph 1 which at any rate would have limited, to a certain degree, the possibilities of conflicting interpretations. The Dutch proposal appeared suitable for this purpose. To agree upon the retaining of Art. 20 paragraph 1 is tantamount to an agreement upon a highly ambiguous formula under the cover of which almost any interpretation can be advanced, - - suitable for anyone - but for the efforts of unification of law!

e. Court decisions.

The courts of a number of countries have been confronted with the question of the air carrier's liability in cases of unexplained origin of damage, and their decisions will be examined in the following. First, however, a judgment shall be mentioned which does not concern the unknown cause of

damage, but which nevertheless deals with the requirements for the carrier's proof pursuant to Art. 20 paragraph 1. It is a French decision rendered by the Tribunal civil de Toulouse, February 10, 1938, in the case Csillag vs. Air France (208). On a flight from Spain to France a passenger was hurt by some violent shakings of the aircraft and sued the company for compensation. The Court gave judgment in favour of the defendant company, inter alia on the following grounds:

> "Whereas Art. 20 states...that the carrier is not liable if he proves that all necessary and possible measures have been taken by him and his servants or agents to avoid the damage;
> Whereas the text does not speak about the faults which might have been committed and whereas the text by referring to the necessary and possible measures only, indicates that in order to exonerate himself the carrier has not to prove that he and his servants or agents have committed no faults, it being sufficient for him to show - as said the delegate M. Pittard - that he has exercised the diligence of a bonus pater familias and has taken all the reasonable and normal measures to avoid the damage;
> Whereas the special risk of the air and the conditions of flight, moreover, render it very difficult, in fact almost impossible, to furnish negatively the proof of non-existence of fault;
> Whereas Lady Csillag does not allege any fault in the organisation of exploitation, in the choice and supervision of the personnel or the aircraft which seems, on the contrary, to have been normally executed;
> ..."

It will be noted that the argumentation of the judgment is based, above all, upon the passage starting with the words: "Que peut-on exiger du transport aérien" of Pittard's

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(208) See supra note 95.

report of 1925 (209). Furthermore, it appears that the views stated in this decision and the interpretation of Art. 20 paragraph 1 advanced by Lemoine (210) correspond closely to each other. -

A Hungarian case, F.A. vs. Hungarian Airlines, Royal Court of Appeals of Budapest, April 2, 1936 (211), has been referred to in connection with the question of the carrier's liability in cases of unknown cause of damage (212). The case was about the loss of a coat fallen through an open window over Czechoslovakia during a flight from Budapest to London. In view of the fact that the window could not have opened itself and that the claimant could not establish how, or by whom, the window was opened, the Court admitted that the carrier had taken all necessary measures to prevent the opening of the window, and, thereby, to avoid the damage.

This judgment, however, seems not to have any connection at all with Art. 20 paragraph 1. Concerning an object of which the passenger took charge herself, the case had to be decided in accordance with the relevant national law, not the Warsaw Convention. The Convention confines itself to prescribing a

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(209) See supra p. 53.

(210) See supra p. 41-43.

(211) Archiv für Luftrecht (Germany) 1937 p. 79-81.

(212) See for example van Houtte op. cit. no. 46; Litvine op. cit. no. 294.

limit to the carrier's liability in such cases, see Art. 22 paragraph 3, but contains no provisions concerning the principles of liability to be applied (213). -

In the English case Grein vs. Imperial Airways, Ltd., King's Bench Division, October 23, 1935, Court of Appeal, July 13, 1936 (214), the Court was faced with an accident, the real cause of which remained unknown. On a flight from Antwerp to London an aircraft crashed as a result of a collision with a wireless mast at Ruysselede, Belgium, and all persons on board perished. The weather conditions were bad and foggy when the accident occurred, and it was established that the pilot had been well aware that the wireless mast in question was situated in the vicinity of his route. The aircraft had sent out a message which was received by Haren Airport asking for its bearing. The reply from Haren was to the effect that the signal was weak and that Haren was busy with another aeroplane.

Lewis J. was of the opinion that the pilot was guilty of negligence when, after failing to get a message from Haren and failing to get a landmark, he went on flying in the direction of the Ruysselede wireless instead of adopting other possible courses. Although the judge concludes in

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(213) Similar Riese op. cit. p. 460, and Abraham in Z.f.L. 1953 p. 84.

(214) U.S.Av.R. 1936 p. 184-250. See also supra p. 37.

finding negligence on the part of the pilot - thus presupposing sufficient evidence in support thereof - the view that the cause of the accident actually was unknown seems to suggest itself by the following statement:

> "Perhaps if Gittins (the pilot) or the other occupants of the aeroplane were here they might put a different complexion upon the facts which I have found, and...I feel that it is my duty to decide this case on the evidence which has been given, and I cannot speculate as to what in fact happened on the fatal journey"(215).

With regard to this question the opinion of Mr. Justice Lewis was upheld by the Court of Appeal, one of the judges finding negligence on the part of the pilot, another one stating - more in conformity with the view that the cause of damage was unexplained - that "none of the defences allowed by the Convention is proved" (216). Accordingly, the Court gave judgment in favour of the plaintiff for the equivalence of the maximum amount fixed in Art. 22 of the Convention.

A few years later the question came up in the case Primatesta vs. Ala Littoria, Tribunale di Tripoli, August 14, 1937 (217). During a landing en route at Marsa Scirocco, Malta, on a flight from Rome to Tripoli one of the floats of a hydroplane broke while landing on the sea with the result that some of the passengers suffered damage. The carrier

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(215) Ibid. p. 206.

(216) Ibid. p. 234 and 250.

(217) See supra note 96.

maintained that all the necessary measures had been taken to avoid the damage or were impossible to take. The Court, not satisfied with the carrier's proof in this respect, stated that evidence to the effect that the landing manoeuvres had been perfectly correct should be supported by technical expert opinions. If that were the case the carrier might have a possibility of escaping liability by proving not only that no fault was committed, but also that he and his servants or agents had taken all necessary measures to avoid the damage or that it had been impossible for them to take such measures.

In a judgment of April 28, 1939, the Tribunale di Tripoli reversed the decision of August 14, 1937, and gave judgment in favour of the carrier (218). Having heard the opinions of technical experts, the Court was now satisfied that the pilot had made a correct landing manoeuvre.

In the same period the question was thoroughly considered by Landesgericht in Frankfurt am Main, Germany, in a judgment rendered March 8, 1939, in the case Flohr vs. K.L.M.(Royal Dutch Air Lines) (219). An aircraft crashed in the Alps on a flight from Milan to Frankfurt am Main. It had lost height when passing through a bank of clouds over the mountains,

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(218) Rivisto di diritto aeronautico 1939 p. 127-129.

(219) Archiv für Luftrecht 1939 p. 180-189.

problably as a consequence of icing conditions, and had been forced down into a narrow valley. The pilot had tried a forced landing, and it was established that in connection with these manoeuvres the pilot had acted entirely correctly. The Court considered inter alia the question whether all the necessary measures to avoid the damage had been taken or were impossible to take, and stated in this respect that nothing could be blamed on the carrier with regard to air-worthiness, maintenance and equipment of the aircraft or to the qualifications of the pilot. Furthermore, the pilot was not to be blamed that he had flown directly towards the Alps instead of taking another direction in order to gain the necessary altitude.

The Court had finally to consider the question

> "...whether the pilot, having taken the direct route to approach the Alps and having entered a zone of disturbances, took all necessary measures to avoid the accident. The Court finds itself unable to solve this problem.
> The expert has concluded that the pilot had made up his mind to pass through the bank of clouds at an altitude of approximately 4000 m. It is in any case questionable whether this decision was the correct one, or whether the pilot ought to have chosen another possibility,-for example to return. To this question no reply can be given...It is possible, indeed, that the pilot has acted correctly,-as he did when flying in the valley...This possibility is not sufficient, however, to satisfy the burden of proof imposed upon the defendant (the carrier). When, as in this case, all the persons in the aircraft perished in the accident, it results from the allocation of the burden of proof that it is up to the defendant to bear the consequences flowing from the impossibility of explaining the circumstances of the catastrophe. There are, indeed, cases where experience permits the con-

clusion that the accident would have happened even if the pilot had acted with the greatest caution; for example, an accident caused by an unforseen hurricane. But such is not the case here. It was only at a very late stage, at the moment when he was flying at 4000 m., above the clouds, that the pilot saw the bank of clouds rising to more than 6000 m. As an experienced pilot, familiar with meteorological questions, he should have been aware of the danger presented by a passage through clouds of this kind. Therefore, it cannot be admitted that the icing, considered as the cause of the accident, took the pilot by surprise, particularly since he had found himself in a similar position several days before, when he was engaged in his first flight above the Alps under the control of another pilot. Under these circumstances, the action based on Article 17 and 22 paragraph 1 of the Warsaw Convention is well founded; one can know nothing concerning the attitude adopted by the pilot at the time of his passage through the clouds, the cause of the icing, and the defendant must bear the consequences of this uncertainty..."

In a note to the judgment Schleicher (220) has declared himself in agreement with the decision. If the purpose behind Art. 20 was to give the carrier a more extensive opportunity of exonerating himself from liability, he states, it would have been necessary to give a clear expression to this effect in the German implementation Act.

Agro (221), on the other hand, does not agree with the judgment and holds the view that it would have been more correct to presume non-existence of fault on the part of the pilot, - in other words to state "cas fortuit". Goedhuis (222)

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(220) Ibid. p. 89-92.

(221) In Rivista di diritto aeronautico 1940-41 p. 72.

(222) Goedhuis 1943 p. 449

expresses the opinion that the requirements of the Court with regard to proof of the cause of the accident and of the unexpected and unforeseeable character of the cause ("onverwachtheid en onvoorzienbaarheid") impose, in fact, an objective liability on the carrier.

Also Lemoine has criticized the decision during the discussions concerning revision of the Warsaw Convention in CITEJA (223).

In the United States the question of liability in cases of unexplained origin of damage has been brought before the courts in a number of cases. In the case of Wyman and Bartlett vs. Pan American Airways Inc., State of New York, Supreme Court, New York County, June 25, 1943 (224), almost nothing was known about the circumstances of the accident: Plaintiff's testator had lost his life while a passenger in defendant's airplane on a flight from San Francisco to Hong Kong. The aircraft had left Guam bound for Manila and never arrived at that or any other destination. The last message was sent from a point above the high seas about half way between Guam and Manila and indicated that the aircraft was involved in an unpredicted storm area, in which the pilot had left the

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(223) See Compte Rendu des Réunions de la Deuxième Commission de CITEJA, la Caire, November 1946, Doc. 495 p. 57, (see also M. Goedhuis p. 56-57).

(224) U.S.Av.R. 1943 p.1-4.

direct course and was pursuing a roundabout route.

In his opinion Schreiber J. states:

> "...Plaintiff's testator was lost in the disappearance without trace of that aircraft.
> ...
> There was no proof in this case of "wilful misconduct" (225) on the part of the defendant, and indeed, no proof of any negligence connected with or a proximate cause of the accident...Nor, in view of the circumstances, were defendants able to offer any proof in rebuttal of the presumption of liability (Art. 20)."

Accordingly, the air line was held liable up to the limit of liability of the Convention.

Another case from New York is Ritts vs. American Overseas Airlines, United States District Court, Southern District of New York, January 17-18, 1949 (226). A trans-oceanic aircraft having made a stop at the alternative Newfoundland airport at Stephenville, continued its flight at night, and proceeded after take-off straight due east for seven miles, when it failed to clear a hill not marked with any light. It was established that the pilot had been fully aware of the existence of the hills in the vicinities of the airport. It was dark when the airplane took off, and the pilot apparently did not spiral to attain elevation, but flew for about two and one-half minutes and crashed against the hill which was approximately 1200 feet high. The aircraft hit the hill at about 1160 feet.

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(225) See Art. 25 of the Convention.

(226) U.S.Av.R. 1949 p. 65-71.

One minute after take-off the Stephenville tower control operator talked by radio telephone to the airplane and requested a ceiling check. In reply a message was sent from the aircraft requesting the tower control officers to "wait for ceiling check."

The Court's question whether the air company had proved by a "preponderance of the credible evidence that the company and its agents had taken all reasonable and necessary measures to avoid the damage or that it was impossible to take such measures", was answered in the affirmative by the jury, and a verdict in favour of the air company was returned.

From the very same accident emanated, however, another case, viz. Goepp vs. American Overseas Airlines, State of New York, New York County, Supreme Court, October 25, 1951, and January 7, 1952 (227). In this case the jury had arrived at an entirely opposite result and had returned a verdict for the plaintiff for 65,000 dollars, i.e. above the Warsaw limits. Implicit in the jury's verdict was a finding that the defendant (the air company) was responsible for a violation of the Civil Air Regulations, constituting wilful misconduct. The defendant moved to set the verdict aside as being against the weight of the evidence, or alternatively to reduce the verdict to 8,300 dollars (the Warsaw limits). The Supreme Court denied these motions, stating inter alia that "there

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(227) U.S.Av.R. 1951 p. 527-530.

was evidence from which the jury could have found that the accident resulted from the pilots lack of familiarity with the airport, and that the knowledge he lacked would have been supplied by(certain) qualifying procedures required by the C.A.B. rules."

The decision was appealed, and in the judgment of the Appellate Division (228) it was stated by the majority of the judges that it is "abundantly clear that any failure to make (the qualifying procedures)...bore no proximate causal relation to (the) accident..."(229). The defendant upon this appeal did not question plaintiff's right to recover 8,300 dollars under the Warsaw Convention, and the plaintiff was given judgment for this amount. Thus a balancing of the extreme views taken with respect to the liability arising from this accident was finally arrived at. The Court of Appeals per curiam and without opinion affirmed the judgment of the Appellate Division (230).

Two other decisions from the United States may be mentioned in this connection. Although the principal issue

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(228) State of New York, Appellate Division, December 16, 1952, see U.S.and C.Av.R. 1952 p. 486-493.

(229) Concerning the dissenting opinion of Breitel J., see infra p. 122.

(230) U.S. and C.Av.R. 1953 p. 503.

in these cases is the question whether the accident was caused by wilful misconduct or not, both of them contain considerations which may contribute to the understanding of Art. 20 paragraph 1 also.

The first case is Grey vs. American Airlines Inc., United States Court of Appeals, Second Circuit, November 7, 1955 (231): An aircraft proceeding on a flight from New York to Mexico City had trouble with no. 1 engine which was stopped and its propeller feathered. On approaching Dallas, Texas, a series of events occurred with respect to no. 4 engine which half a mile from the landing field began to fail. The aircraft lost speed, descended to the left of the runway and struck a hangar. A number of passengers was killed.

Before the District Court the jury had returned verdicts in excess of the Warsaw limits of 8,300 dollars per passenger. On motion to reduce the verdicts to the limit the Court held that the evidence did not support a verdict of wilful misconduct, and, accordingly, the verdicts were reduced to 8,300 dollars (232).

The Court of Appeals upheld the opinion of the District Court, and stated that the real cause of the accident remained in doubt. In his examination of the provisions of the Warsaw

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(231) U.S. and C.Av.R. 1955 p. 626-31; see also U.S. and C.Av. R. 1956 p. 140: United States Supreme Court 1956, Certioari denied.

(232) United States District Court, Southern District of New York, February 21, 1955, U.S. and C.Av.R. 1955 p.60-79.

Convention, Harald S. Medina, Ct.J., said inter alia:

> "...Chapter III is the one which concerns us here. Art. 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, "if the accident which caused the damage so sustained took place on board the aircraft". But this liability is excused by Art. 20 paragraph 1, if "the carrier proves" that it "has taken all necessary measures to avoid the damage or that it was impossible" for it to take them. As to this it is plain that the burden of proof is upon the carrier. And, in passing, it may be noted that in most if not all serious accidents, whether or not members of the crew survive, the difficulties in avoiding this presumptive liability would seem to be almost if not quite insurmountable." (233)

The other case, arising from the same accident, is Rashap vs. American Airlines, Inc., United States District Court, Southern District of New York, October 5-13, 1955 (234). The question here was also whether the plaintiffs had proved the damage to have been caused by wilful misconduct. The air company had conceded that it was responsible up to the Warsaw limit provided that losses had been suffered up to such amount.

In the Court's instruction to the jury the following was stated inter alia:

> "...The law provides, in the first place, that in the event of an accident in an international airplane, the passenger can recover what his damages are up to 8,300 dollars without any proof or consideration except the fact that the accident happened and that he was injured, and the extent of his injuries. The only way that the company could avoid paying that amount would be to come in and show that there was absolutely nothing that they could have done that would have prevented the accident.

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(233) Ibid. p. 628.

(234) Ibid. p. 593-625.

> As you can see, that is a most difficult thing to prove and would apply only in unusual circumstances. So the effect is, under the Warsaw Convention, that if there is an accident on an international airplane flight, a passenger recovers his damages up to 8,300 dollars practically automatically just because of the happening of the accident." (235)

After several hours of deliberations the jury found the air company not guilty of wilful misconduct.

These judgments reflect a remarkable development in the attitude to the question of liability pursuant to the Warsaw Convention. In the United States the main interest in connection with the liability has been transposed from the problem: liability or non-liability, to the question of limited - unlimited liability. This appears to be an inevitable consequence of the standard of living in North America. During the debates at The Hague Conference 1955 concerning the raising of the limits of liability of the Convention the United States delegate, Mr. Calkins, stated that in his country "there had been judgments of 160,000 dollars...and there were a great number of judgments in the 40,000 - 50,000 dollars range (236)...The average settlement of claim paid to widows of United States Government employees was 70,000 dollars..." (237). Against this background it

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(235) Ibid. p. 603-604.

(236) See also the verdict for 65,000 dollars in the above mentioned Goepp-case, see supra p. 82.

(237) The Hague Conference 1955 p. 207.

seems quite natural for the parties to concentrate upon the possibilities - or the risks - of the unlimited liability. The Warsaw limit amount seems to have been reduced to a secondary importance. The carrier will be only too willing to offer this amount to settle the case, and the plaintiffs will consider it unsatisfactory. This attitude will also be reflected in the judges' considerations, and as a natural course of development the view will gradually prevail that the liability pursuant to Art. 20 paragraph 1 of the Convention is imposed upon the carrier "practically automatically" in the case of an accident.

It will be seen that in this way the social conditions of life in a country may have a direct bearing on the interpretation of the liability provisions of the Warsaw Convention, and differences in social standards may lead to differences in the understanding of these provisions, - thus counteracting in practice the uniformity of law formally attained through the Convention.

It remains to be seen, however, whether the fact that the Warsaw limits with regard to passengers was raised 100 per cent at The Hague Conference (238) will stimulate interest in the limitation amount and thereby in the carrier's defence pursuant to Art. 20 paragraph 1. Also the advent of

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(238) See The Hague Protocol Art. XI.

aircraft carrying 100-150 passengers may contribute to a revision of the prevailing views.

There is a number of other cases of unknown cause of damage in which the carrier has offered compensation to the plaintiffs up to the Warsaw limits, see for example the Belgium case Pauwel vs. SABENA, Tribunal de première instance de Bruxelles, May 6, 1950 (239), concerning an aircraft which failed to land at Gander Airport, Newfoundland, and crashed 43 km. from the airport; the French case Hennessy vs. Air France, Tribunal civil de la Seine, April 24, 1952, and Cour d'Appel de Paris, February 24, 1954 (240), concerning a crash on the Azores, 60 km. from Santa-Maria Airport; and another French case, Del Vina vs. Air France, Tribunal civil de la Seine, July 2, 1954 (241), a crash in the Persian Gulf. - In Garcia vs. Pan American Airways, New York Supreme Court, Appellate Division, May 21, 1945 (242), the cause of the airplane's crash into the waters of the Tagus River at Lisbon, Portugal, was uncertain, also. The main issue in the case was whether the Warsaw Convention was to be applied at all, This question was answered in the affirmative, and the

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(239) R.F.D.A. 1950 p. 411-427; see also U.S.Av.R. 1950 p.367-381.

(240) R.F.D.A. 1952 p. 199-224 and 1954 p. 45-66.

(241) R.F.D.A. 1954 p. 191-199.

(242) U.S.Av.R. 1945 p. 39-45 and 1946 p. 496-499.

carrier was held liable up to the limits of the Convention. It is, however, difficult to see whether or not the carrier had offered the limited compensation in advance.

Although it is impossible, when contemplating the above mentioned court decisions, to consider them as concurrent exponents of one, and only one, interpretation of Art. 20 paragraph 1 with respect to the requirements for the carrier's burden of proof, it is nevertheless possible to point out a prevailing tendency: The majority of the decisions has given expression to the view that in cases of unknown cause of damage the carrier is to be held liable. This is true with regard to the English Grein-case, the first Primatesta-case from Tripoli (243), the German Flohr-case, the American Wyman-case, and the Goepp-cases. The same understanding has been indicated in the American Grey-case and Rashap-case. Inconsistent with the majority view, on the other hand, are the Csillag-case from Toulouse and the American Ritts-case. The latter seems, however, to have been offset by the Goepp-case. Finally, the second (appeal?) decision from Tripoli in the Primatesta-case is left out of consideration as that judgment was not concerning an unknown cause of damage.

If the court decisions are compared to the opinions

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(243) See, however, infra p. 100.

expressed by the authors it will be seen that a substantial majority of the decisions has approved the restrictive interpretation of Art. 20 paragraph 1. A minority of two cases has inclined towards the liberal interpretation (244). No judgment has approved a presumption of the due diligence of the crew in cases where a direct proof has been rendered impossible by the circumstances.

3. EVALUATIONS.

The starting point for considerations concerning the carrier's liability in cases of unknown cause of damage may naturally be taken in the allocation of the burden of proof in Art. 20 paragraph 1. In this respect the Article is clear: The onus is imposed upon the carrier, - he has to show that he himself as well as his servants or agents have taken all the necessary measures to avoid the damage or that it was

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(244) The Italian Palleroni-case, see supra p. 34-35, has sometimes been invoked in support of a liberal interpretation of Art. 20 paragraph 1. That case is not about an unknown cause of damage, however. With respect to the requirements for the carrier's burden of proof the judgment confines itself to the statement that it is of importance to produce airworthiness certificates etc.: "I certificati di navigabilità e di eseguiti controlli del Registro italiano navale e aeronautico..., pur non esonerando, per sè soli, il vettore da responsabilità, debbono valere quali elementi concorrenti di giudizio nel valutare la condotta di lui", see Rivista di diritto aeronautico 1938 p. 141-150.

impossible for him and them to take such measures. From Pittard's report of 1925 (245) it appears that the allocation of the burden of proof was the question to be determined immediately after the choice of the principle of liability had been made. Thus the authors of the Convention seem to have attached great importance to the allocation of "cette lourde charge", - and have certainly been well aware that this was a decisive element in the entire system of liability laid down by the Convention.

What does it mean that the burden of proof is imposed upon the carrier? It implies that the carrier is held liable unless he furnishes satisfactory evidence, - or in other words: that he bears the risk of the impossibility of producing the required proof (246). The courts are bound to reach a decision in the cases under consideration, and in those cases where "the law becomes stalled on dead center because of total absence of proof" (247) the court has to resort to the burden of proof as the decisive element in solving the problem of liability. In order to confine to a minimum the number of these cases - which are, of course, less satisfactory to the sentiment of justice than the normal cases decided on the basis of a legal evaluation of elucidated facts - the

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(245) See supra p. 53.

(246) See supra p. 4.

(247) See supra p. 50.

burden of proof is imposed upon the one who, on the average, has the facilities of examining the circumstances around the damage and, thereby, of securing the relevant evidence.

Next, it can be maintained that to satisfy the requirements of Art. 20 the carrier must furnish evidence to the effect that he and his servants or agents have committed no faults. This seems abundantly clear from Pittard's report of 1925 and has also been accepted by an overwhelming majority of the court decisions and authors (248). From the generally accepted principles of causal relation in the law of compensation it follows that only faults in causal and adequate (i.e. not too remote) relation to the occurrence of the damage are relevant.

It has been said that a negative proof is normally impossible to furnish (249). It is, of course, true that by nature a piece of evidence can be positive (and concrete) only. But the conclusions to be drawn from a number of pieces of evidence may be formulated positively as well as negatively. "Having committed no faults" is the negatively formulated counterpart to "having exercised due care (due diligence)". Both expressions aim at the same purpose, namely to state that

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(248) See supra p. 38-39.

(249) See for example the Csillag-case, supra p. 73; Lemoine op. cit. no. 819; Litvine op. cit. no. 292. Compare The Hague Conference 1955 p. 99 (Professor Cooper).

a person in a given situation has acted in accordance with a required standard. The standard itself may be described by means of the phenomenon "a bonus pater familias" or "a reasonable man". The proof for compliance with this standard is of course the same whether the conclusions (or the requirements) are expressed in a positive or a negative way. When the various pieces of evidence have been produced they will be assessed by the court, and from this evaluation the court will decide whether or not it has been proved that the required standard has been complied with. Its conclusions may be formulated positively ("has exercised due care") or negatively ("has committed no faults").

It is, of course, impossible to point out what proof and how much proof is required to satisfy the carrier's burden of proof. The court must make an assessment of the evidence of each case on its own merits in order to decide whether the carrier has proved by a preponderance of evidence that no faults have been committed. In this respect the court may base itself also on presumptions, provided that these are justified by the available information concerning the factual circumstances in accordance with the general principles of assessment of evidence.

In cases of completely, or almost completely(250),

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(250) I.e. a very high degree of lack of knowledge of the chain of causation leading up to the phenomenon causing damage.

unknown cause of damage the carrier has no possibilities whatsoever of conveying to the judge a basis for the assumption that the crew has shown due care in exercising its duties up to the moment of damage. Consequently, the carrier cannot be considered to have satisfied the requirements for his burden of proof, and he cannot escape liability. An opposite solution to the effect that the carrier may be relieved of his liability by furnishing a general proof of the due care of the crew members on the basis of their licences and general qualifications, would constitute a flagrant departure from the normal principles for assessment of evidence, - considering that a certificate for certain qualifications or for a certain professional skill can never emperically be regarded as a guarantor for the non-commitment of faults by the person in question. No justification is to be found for such a departure. A presumption of the due diligence of the crew cannot be accepted on that basis, either. In both cases the allocation of the burden of proof in Art. 20 paragraph 1 would be made entirely illusory. For, as has been said before, it is exactly in the cases where the circumstances render the furnishing of evidence impossible, and in these cases only, that the allocation of the burden of proof plays a decisive rôle in the question of liability. The burden of proof would be reduced from a risk of the impossibility of furnishing sufficient evidence to a burden of information only. On the

other hand, the passenger, or his next of kin, and the shipper would automatically be burdened with the risk of the inability of furnishing proof in these cases, - which would be a situation exactly opposite to the intentions of the authors of the Convention as explained in Pittard's report of 1925.

In addition, the result in practice would be entirely contrary to the general purposes behind the allocation of the burden of proof. It is conceivable that in order to avail himself of either the liberal interpretation of Art. 20 or the proposed presumption a carrier might be interested in showing that in a given case the direct proof of absence of fault is impossible to furnish. In such a case his co-operation to the elucidation of the case might be influenced thereof. In other words, a liberal interpretation or a presumption as proposed would create a risk of <u>increasing</u> the number of cases of unexplained damage, whereas the obvious purpose behind the allocation of the onus has been - and must be - to <u>reduce</u> the cases of unknown cause of damage to a minimum.

It has been said that "the fact of imposing upon the carrier the burden of proving affirmatively that his agents took the necessary measures, would mean imposing an absolute liability upon him in cases where the cause of the accident remains unknown" (251), and this would be contrary to the

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(251) See <u>supra</u> p. 46 (Goedhuis).

intention of the authors of the Convention. This point of view cannot be endorsed, however. It is true, of course, that as a consequence of the implied risk attached to the burden of proof a carrier might be held liable in a case where the facts - if known - would have revealed absence of fault. But this is quite another matter than imposing an absolute liability upon the carrier. The principles of liability as laid down in Art. 20 paragraph 1 (subjective liability) become inoperative in certain cases owing to lack of knowledge of the factual circumstances, and, accordingly, such cases have to be decided via the play of the burden of proof. This is a simple consequence of the fact that the acts of the crew escape legal evaluations, but that nevertheless a decision has to be reached. The conclusion to be drawn from the quoted point of view would be, in fact, that whenever a person is to be held liable for his own faults and those of his servants or agents, the legislator or the courts should be debarred from imposing upon him the burden of proving absence of fault. The absolute liability which the authors of the Convention rejected was the traditional objective liability as it is known, for example, towards third parties on the surface (252), but certainly not the liability emanating from the implied risk attached to the burden of proof.

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(252) See Pittard's report, <u>supra</u> p. 52-53.

In cases of partly unknown cause of damage it is conceivable that the carrier might have a possibility of satisfying the requirements for his burden of proof. If, for example, the available evidence in a given case indicates the cause to be one of two or more established phenomenons, the carrier may succeed in showing that no faults have been committed in connection with any one of the established hypotheses (253). Furthermore, if a given cause of damage has been established with a certain (higher) degree of probability, one cannot preclude the possibility that the court on this basis - in connection with further information concerning the acts of the crew members and in particular of the pilot - may arrive at the conclusion that the required proof pursuant to Art. 20 paragraph 1 was furnished, - without finding itself able to lay down in general that the presumed cause with certainty is the cause, or the sole cause, of damage.

These examples, however, are both to be found close to the borderline to the elucidated cases. The more removed a case is from this line the more the possibilities of establishing the proof are fading away.

Summarizing these considerations it can be stated that in a case of completely, or almost completely, unknown cause of damage the carrier can find no basis for the furnishing of

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(253) Similar Sullivan in Journal of Air Law 1936 p. 30, and Riese op. cit. p. 459.

evidence to fulfil his burden of proof pursuant to Art. 20 paragraph 1. In cases of partly unknown cause of damage it is conceivable that the carrier may have a possibility of furnishing the required proof if the case under consideration contains unknown elements to a smaller degree only. In other cases the possibility seems to fade away.

If the adduced considerations are compared to the above examined court decisions it will be seen that the majority of the decisions seems to be in conformity with these views.

This is true, in the first place, with respect to the English Grein-case (254). The pilot had continued the flight at the same low altitude in spite of the fact that the weather conditions were bad and that he had lost his way and must have been well aware that he was in the vicinities of the wireless mast. No explanation could be given of the reason why he proceeded with the flight under such circumstances instead of adopting other possible courses, and the possibility of an error of judgment was thus left open. Against this background it seems quite natural to consider the requirements for the burden of proof not to have been satisfied.

In the German Flohr-case (255) the situation seems to have been somewhat similar, except for the fact that more

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(254) See supra p. 75-76.

(255) See supra p. 77-80.

information concerning the course of actions of the pilot was available. It had been established that the weather conditions in the Alps were bad and that the pilot had acted correctly when flying directly towards the Alps and when trying a forced landing. The last problem to be solved was the question whether the pilot, having entered the zone of disturbances, had exercised due diligence. As in the Grein-case no information could be given concerning the reason why the pilot did proceed with the flight and did not try other possibilities. It could be asked whether the existing information about the pilot's skill and care, for example in connection with the attempt to make the forced landing, could permit the presumption that he had acted correctly also when entering the zone of disturbances. Apparently, the court did not find justification for such a presumption, - and it seems difficult to criticize this attitude. The carrier has not been imposed an absolute liability by the court, but has been held liable for the impossibility of furnishing sufficient evidence as to the correct behaviour of the pilot: "...one can know nothing concerning the attitude adopted by the pilot at the time of his passage through the clouds, the cause of the icing, and the defendant must bear the consequences of this uncertainty". (256)

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(256) See supra p. 79.

In the American Wyman-case (257) the cause of accident was almost completely unknown, - the only information being that the aircraft was involved in an unpredicted storm area. No basis at all is to be found upon which the court could decide whether or not faults had been committed during the flight, and in its decision the court has clearly drawn its conclusions from this uncertainty.

The Primatesta-case from 1937 in Tripoli (258) may be understood to the effect that the court states it to be impossible to give judgment in favour of the carrier unless he explains in details the events leading up to the accident and shows that all necessary measures have been taken. If that be the correct understanding the decision seems to be in harmony with the above considerations (259). On the other hand, the judgment may also be interpreted to the effect that the carrier lost his case because he did not explain the case even to the extent that was possible under the circumstances. In that case the court has not decided the question whether or not the carrier is to be liable in cases which are impossible to explain.

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(257) See supra p. 80-81.

(258) See supra p. 76-77.

(259) However, the distinction made in the judgment between proof of absence of fault and proof that all necessary measures have been taken cannot be endorsed, see supra p. 36.

The American Ritts-case and Goepp-case (260) seem to offset each other. In the Ritts-case the carrier escaped liability although no explanation whatsoever had been given of the fact that the pilot did not spiral to attain sufficient altitude. This decision is inconsistent with the above considerations concerning the burden of proof. The judgment was also totally repudiated by the decision reached in the Goepp-case emanating from the same accident. In that case the majority of the Appellate Division gave a judgment the result of which is in harmony with the above views. But as the carrier did not question the plaintiff's right to recover the awarded limited amount of 8,300 dollars, the decision did not directly treat the problem under consideration.

The only "conclusion" to be drawn from these two cases seems to be a gentle amazement as to how the same accident can give rise to decisions so entirely incompatible (261). An explanation may be found in the fact that the assessment of evidence has been made by laymen (a jury) who are not, as a matter of course, experienced in that field.

Remaining is the Csillag-case from Toulouse. The views

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(260) See supra p. 81-83.

(261) Or, to speak the language of Drion, how "it is possible for courts or juries to leap over the broad river which separates absence of negligence from wilful misconduct", see Drion op. cit. no. 180.

expressed by the court in this case (262) - but not necessarily its conclusions - are completely inconsistent with the above considerations and, indeed, with all the rest of the judgments - except for the Ritts-case. The court has described the requirements for the carrier's exonerating proof in a way which, it is respectfully submitted, would render his burden of proof entirely illusory. To reach this result the court has based itself upon Pittard's report of 1925. However, as has been stated earlier (263), no support can be derived from this report for an understanding to that effect.

Finally, it is worth noting in this connection that also IATA has expressed itself concerning the requirements to satisfy the carrier's burden of proof. "The Warsaw Convention ...gave to the plaintiff the benefit of any doubt by requiring the defendant carrier to assume the burden of explaining the cause of the accident and establishing that it had taken all necessary steps to prevent its occurrence", an IATA observer stated during the revision works on the Warsaw Convention(264). It seems quite natural for the carriers to stress a restrictive interpretation of Art. 20. For, ever since the beginning of the discussions concerning the question of the carrier's

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(262) See supra p. 73-74.

(263) See supra p. 60.

(264) ICAO Doc.6014-LC/111, Second Session of the Legal Committee, Geneva 1948, p. 16; ICAO Doc.6027-LC/124, Fourth Session of the Legal Committee, Montreal 1949, p. 260;

liability towards passengers and consignors, the voices of the partisans for a system of absolute liability - more or less similar to that of the railways - have been heard. By emphasizing the fact that they are always to be held liable whenever the possibility of negligence exists, the carriers seem to have taken out the sting of the arguments for substituting a strict liability for the present system. Those of the users who want to be compensated in any case when damage occurs may easily obtain that through insurance. Of the main arguments for the absolute liability only the wish for clarity and uniformity remains. The question whether or not a need in this respect is felt will, of course, first and foremost depend on the possibilities of reaching a uniform interpretation of Art. 20 and 25 of the Convention.

4. COMPARISON WITH MARITIME LAW.

In connection with the examination of the carrier's liability in cases of unknown cause of damage pursuant to Art. 20 paragraph 1 of the Warsaw Convention it may be of interest to glance, for a moment, at the corresponding problem in international maritime law. The attention will be focused on "Convention internationale pour l'Unification de certaines

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(264 con'd) ICAO Doc.7450 LC/136, Ninth Session of the Legal Committee, Rio de Janeiro 1953, p. 81.

Règles en Matière de Connaissement" (the so called Hague Rules), signed at Brussels, August 25, 1924 (265). Art. IV subsection 2 contains a detailed enumeration of widely different causes of damage for which the carrier is not to be liable, and it finishes with the following "catch-all" provision under paragraph q:

> "(Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from)
> .....
> q. Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

It appears that the carrier is liable unless he furnishes proof to the effect that neither his fault nor that of his servants or agents has contributed to the loss or damage.

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(265) The Convention which governs carriage of goods under bill of lading is ratified or adhered to by the following States: Belgium, Denmark, Egypt, Finland, France, Germany, Hungary, Italy, Monaco, the Netherlands, Norway, Poland, Portugal, Rumania, Sweden, Switzerland, Turkey, the United Kingdom, the United States, and a number of British Colonies or Protectorates,(see for complete list A.W. Knauth: American Law of Ocean Bills of Lading, Fourth Edition, Baltimore 1953 p. 453-495.) The following States have adopted The Hague Rules by domestic legislation although they do not appear to have ratified or adhered to the Convention: Australia, Burma, Canada, Ceylon, India, the Republic of Ireland, Israel, the Federation of Malayan States, New Zealand, Pakistan, the Philippines, the Union of South Africa (not yet in force by 1957), see Carver op. cit. p. 1043 and Knauth op. cit. p. 73.

In other words, the proof to be furnished pursuant to the Brussels Convention Art. IV subsection 2 paragraph q seems to be identical with the proof required by the Warsaw Convention Art. 20 paragraph 1 when correctly interpreted(266). Thus it lies near at hand to ask whether the carrier is held liable pursuant to the Brussels Convention in cases of unknown cause of damage.

According to Scrutton (267) it is not necessary for the carrier to show the exact cause of the loss in order to claim the protection of the rule under Art. IV subsection 2 paragraph q of the British Carriage of Goods by Sea Act 1924, provided that he shows that the loss was not due to his negligence (268). But it is not enough that the loss is unexplained because the onus is on the carrier to show absence of fault or negligence (269).

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(266) See supra p. 38-39.

(267) Scrutton: On Charterparties, Sixteenth Edition by Sir William Lennax McNair and Alan Mocatte, London 1955 p. 486-487.

(268) Cf. City of Baroda vs. Hall Line, 42, The Times Law Reports 717-719: "...He (the Judge) agreed with the view that the onus on a person relying on an exception relieving him from liability did not go so far as to make him prove all the circumstances which could explain an obscure situation. With regard to a shipowner, he took the law to be that applicable to a bailee generally..." This decision is based on The Hague Rules of 1921.

(269) Cf. Heyn vs. Ocean S.S.Co. (1927), 43 The Times Law Reports 358; Pendle and Rivet vs. Ellerman Lines, 33 Commercial Cases (1927-1928) p. 70-79, see in particular the opinion of Mackinnon J. p. 78: "...If I accepted all the evidence for the defendant (the ship owner) it is quite a mystery. In those

In Carver's "Carriage of Goods by Sea" (270) reference is made to Heyn vs. Ocean S.S.Co. and the Ellerman Line case to show that in cases of unexplained cause of damage the carrier is held liable. Astle (271) states that "the interpretation of paragraph q of Art. IV Rule 2, by the Courts of (the United Kingdom) and the United States has placed a very heavy burden upon the carrier", and later reference is made to the Ellerman case.

In the American case Middleton vs. Ocean Dom. S.S.Co.(272) the Court stated that

> "...in a suit for total loss of cargo, the libellant's admission of the fact that the vessel had stranded and thereafter sunk and become a total loss places the carrier in the position of sustaining the burden of showing that the immediate cause of the loss was an excepted peril."

In another American case, Fagundes Sucena Cia vs. Mississippi Shipping Co. (273) the Court held a similar view

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(269 con'd) circumstances, one side or the other must win, and one side must fail. I cannot give victory to both, and I think the only logical result is that defeat must be upon that side on which lies the burden of explaining what would otherwise be inexplicable. In this conflict of evidence on both sides I think I must hold that the defendants have not discharged the burden which is put upon them by Clause q of Rule 2 of Art.IV." See also Herald Weekly Times vs. New Zealand Shipping Co., 1947, 80 Lloyd's List Law Reports p. 596.

(270) See op. cit. p. 200-201; see also Colinveaux: The Carriage of Goods by Sea Act 1924, London 1954, p. 88-89.

(271) W.E.Astle: Shipowners' Cargo Liabilities and Immunities", London 1954, p. 89-91.

(272) 1937 American Maritime Cases p. 1487.

(273) 1953 (Vol.I) American Maritime Cases p. 148.

with respect to unexplained water damage of wheat flour in bags.

The Supreme Court of Canada has emphasized the requirements for the carrier's burden of proof pursuant to Art. IV subsection 2 paragraph q in the Canadian Water Carriage of Goods Act 1936 in the Lady Drake case (274). A cargo of molasses in casks came adrift in heavy weather. The ship owner pleaded that the loss was due to perils of the sea, and that it had satisfied the burden of proving that there was no negligence in accordance with paragraph q. The Supreme Court, affirming the lower courts, stated:

> "...It was very vigorously urged by the counsel on behalf of the ship that he had established a prima facie case of absence of negligence by proving proper stowage. But it will be observed that the burden resting upon the carrier is a very heavy one. He has to show that neither the actual fault nor the privity of the carrier, nor the fault or neglect of the agents or servants of the carrier contributed to the loss or the damage. The carrier does not acquit himself of this onus by showing that he employed competent stevedores to stow the damaged cargo, or that proper directions as to the stowage of the cargo have been given".

In connection with the French Act of 1936 introducing the provisions of the Brussels Convention Ripert (275) states that pursuant to Art. IV subsection 2 paragraph q the carrier is not liable if he establishes the cause of damage and the

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(274) 1937 American Maritime Cases p. 290-292.

(275) G. Ripert: Droit Maritime, Second Volume, Paris 1952, no. 1012-8.

absence of fault. As far as the paragraphs a - p are concerned it is sufficient for him to show that the damage is due to one of the excepted causes and the non-existence of fault is a consequence of the nature of the cause (276).

In Italy the opinions seem to be divided. According to Manca (277) the carrier is to be liable in cases of unknown cause of damage. This is an obvious consequence of his burden of proof pursuant to Art. 422 of the Italian Code of Navigation which contains the principles of Art. IV subsection 2 paragraph q of the Brussels Convention. The author refers in this connection to the concurring view of Ferrarini (278). On the other hand, Lefebvre D'Ovidio and Pescatore (279) hold the opinion - as they did with respect to the Warsaw Convention Art. 20 paragraph 1 (280) - that damage caused by unknown cause must be borne by the shipper. No Italian cases have been cited in support of either of the advanced views.

In Norway the opinions are not quite concurring, either.

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(276) Except for the case of fire, see paragraph b .

(277) Manca: The Italian Code of Navigation, Milano 1958, p. 171-172.

(278) Ferrarini: I contratti di utilizzazione della nave e dell'aeromobile, Rome 1947.

(279) D'Ovidio and Pescatore op. cit. no. 409.

(280) See supra note 113.

Jantzen (281) admits that the text of the Norwegian Maritime Code of February 4, 1938 § 118 (282), if literally interpreted, would result in the carrier being held liable in cases of unknown cause of damage. Basing himself upon the explanatory statements of the Bill, the author states, however, that in case of a ship disappearing without leaving a trace the carrier might be relieved of his liability upon the proof that the ship was seaworthy before the departure (283). In cases of unexplained damage of goods during the voyage the carrier should have a possibility of escaping liability, also. Sejersted (284), however, assumes that the exonerating proof can hardly be established unless the cause of damage is explained.

The Dutch author Schadee (285) states in connection with the new Dutch Act implementing the Brussels Convention that the carrier's burden of proof is a heavy one, and he seems to indicate that the carrier is supposed to explain the cause

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(281) Jantzen: Godsbefordring til Sjøs, Second Edition, Oslo 1952, p. 209-211.

(282) This provision contains, in principle, the rule of the Brussels Convention Art. IV subsection 2 paragraph q. See also the Norwegian Act of February 4, 1938 § 4 subsection 2 (q) implementing the corresponding rule of the Brussels Convention.

(283) Similar Knoph: Nordisk Sjørett, Oslo 1931, p. 202.

(284) Fr. Sejersted: Om Haagreglene,(concerning the Norwegian Act of February 4, 1938, implementing the Brussels Convention), Oslo 1949 p. 73.

(285) Schadee: Het niewste Zeerecht, s'Gravenhage 1956 p. 12.

of damage in order to escape his liability.

With regard to German law, Wüstendörfer (286) and Abraham (287) state that pursuant to § 606 and § 607 in the German Commercial Code (das Handelsgesetzbuch) containing the principles of the Brussels Convention, the carrier has to explain the origin of damage and to prove that no fault has been committed for which the carrier may be liable. If the cause of damage remains unknown the carrier has to bear the consequences of this uncertainty. This is the opinion held by the German courts (288). The courts are, however, inclined to moderate, to a certain degree, the requirements for the exonerating proof in such cases (289). Thus the carrier is considered to have established satisfactory proof if he is able to point out certain possible causes of damage and in addition shows that no faults have been committed in connection with any one of these possible causes (290). Also, it has been

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(286) Wüstendörfer: Seehandelsrecht, Hamburg 1947 p. 258-259.

(287) Abraham: Das Seerecht, Berlin 1956 p. 114-115

(288) See for example R.G.Z. 66, 39 (reproduced in Entscheidungen des Reichsgerichts in Zivilsachen, Schiffahrtsrecht, Berlin 1953 p. 222): "...Vielmehr ist grundsätzlich davon auszugehen, dass ein "non liquet" hinsichtlich der Schadensursache zu Lasten des Frachtführers geht". See also R.G.Z. 141, 315, (op. cit. p. 90).

(289) See Hanseatische Rechts- und Gericht-Zeitschrift 1933 B column 324.

(290) Hanseatische Rechts- und Gericht-Zeitschrift 1931 B column 755.

held sufficient, both in respect of the cause of damage and of the non-existence of fault, that evidence has been furnished on the basis of a sufficient measure of probability (291).

In his comments on the Spanish Act of December 22, 1949 Art. 8 (292) Calero (293) confines himself to state that the provision under paragraph q imposes upon the carrier a burden of proving that he himself and his servants or agents have exercised due diligence.

It appears from this survey of the maritime law - which, by no means, can be considered exhaustive - that the problem of the unexplained causes of damage is a well known phenomenon in sea-borne carriage, also. And it is justifiable to conclude that the majority of the different courts and authors have taken up the attitude that, on principle, the carrier is to be held liable in cases of unknown cause of damage. Thus, it can be stated that the prevailing tendency in the requirements to

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(291) Hanseatische Rechts- und Gericht-Zeitschrift 1931 B column 483

(292) The Spanish Act introduces the provisions of the Brussels Convention. In Art. 8, however, the Act contains the words "las costas de la prueba" instead of the correct "la carga de la prueba", see Art. 8 subsection 1 and subsection 3 paragraph q, cf. Calero: El Contrato de Transporte Maritimo de Mercancias; Secún la Ley de 22 de diciembre de 1949 que introduce las normas del Convenio de Bruselos de 1924, Rome - Madrid 1957 p. 163.

(293) Calero op. cit. p. 165-166.

satisfy the air carrier's burden of proof pursuant to Art. 20 paragraph 1 of the Warsaw Convention corresponds to a similar tendency in the requirements for the sea carrier's proof according to Art. IV subsection 2 paragraph q of the Brussels Convention.

D. Article 20 paragraph 2.

Art. 20 paragraph 2 of the Warsaw Convention deals with the carriage of goods and baggage only. The carrier is not liable in such a carriage if he proves that the damage was occasioned by negligent pilotage or negligence in the steering (294) of the aircraft or in the navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage. As earlier mentioned the present Art. 20 paragraph 2 is one of the results of the compromise of opinions which was reached at the Warsaw Conference (295). The principle behind the provision has been

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(294) Compare the First Schedule of the British Carriage by Air Act 1932 Art. 20 subsection 2, and Art. 20 subsection 2 of the translated text as ratified by the United States Senate on June 15, 1934, both of which contain the expression: "...in the handling of the aircraft", which extends the scope of the provision considerably beyond the limits of the French expression: "...de conduite de l'aéronef". See also Drion op. cit. no. 32 note 1.

(295) See supra p. 57-58; see also the German proposals during the Third Session of CITEJA in Madrid, May 1928, supra p. 56.

taken from the maritime law where a (partly) corresponding rule is found in the Brussels Convention 1924 Art. IV subsection 2 paragraph a, and in the American Harter Act of February 13, 1893 (296).

Art. 20 paragraph 2 has never played a significant rôle in the application of the Warsaw Convention. It has been invoked only in a few cases, and has very often been considered a foreign streak in the Warsaw principles of liability, permitting, as it does, an exception from the carrier's vicarious liability (297). At The Hague Conference 1955 Art. 20 paragraph 2 was unanimously deleted (298) and thus the existing difference in the carrier's liability in respect of passengers and goods will be eliminated from the moment The Hague Protocol comes into force.

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(296) Similar clauses had "from time immemorial...certainly appeared in all British Bills of Lading", see Sejersted op. cit. p. 62 with references. The Harter Act was the result of a compromise between the interests of ship owners and shippers.

(297) It can be mentioned that the United Kingdom Order of Council, 1952, which makes most of the Warsaw provisions applicable to non-Warsaw carriage, has expressly omitted Art. 20 paragraph 2, cf. paragraph 14 of the First Schedule of the Order.
Provisions corresponding to Art. 20 paragraph 2 have also been omitted in IATA Conditions of Carriage (Cargo), April 1, 1954, cf. Art. 14, and in IATA Airway Bill Condition of Contract, April 1, 1954, cf. Art. 4. The same is also true with respect to checked baggage in IATA Conditions of Carriage, Interline International Carriage, May 23, 1958, cf. Art. 4. It must be remembered, however, that the IATA conditions of carriage are effective only when the Warsaw Convention does not apply.

(298) See The Hague Protocol Art. X.

It can be asked whether, in the case of unknown cause of damage, the carrier is able to invoke Art. 20 paragraph 2 with the result that he may be relieved of liability as far as carriage of goods and baggage is concerned. The wording of the provision seems to indicate an answer in the negative. In order to prove that the damage was occasioned by negligent pilotage etc. it seems indispensable for the carrier to prove in the first place how the damage was caused and then that the cause in question constituted one of the excepted causes of Art. 20 paragraph 2 (299). It is conceivable, however, that it might be considered sufficient for the carrier to point out that the damage is caused by one of two or more defined causes, and that no faults but nautical ones have been committed in connection with any one of the established possibilities. On the other hand, it is also possible that the requirements to satisfy the carrier's burden of proof pursuant to Art. 20 paragraph 2 would be considered more stringent than the requirements pursuant to Art. 20 paragraph 1 (300).

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(299) See also Ripert with respect to the excepted causes in the maritime law, supra p. 108.

(300) See in this connection "Indberetning fra de danske medlemmer af den nordiske luftprivatretskomité 1936" (Report from the Danish members of the Nordic Committee on private air law 1936) p. 23 where it is stated that it seems to be reasonable to make the requirements for the burden of proof in paragraph 2 of Art. 20 more stringent than those for the burden of proof in paragraph 1. The reason for this is undoubtedly the special character of the provision in paragraph 2.

To delineate the exact borderline between nautic faults and other faults has caused considerable trouble among the authors (301). In connection with the problem under consideration a scrupulous outlining of the scope of Art. 20 paragraph 2 seems not to be necessary, however. Of importance is only the question whether it can be said that all faults committed by the crew after the departure must eo ipso be nautic faults. If so, the carrier might escape liability in a given case of unknown cause of damage by proving that if fault has been committed at all, it must have been faults committed by the crew during the flight. However, such a view is not acceptable. Whenever the fault in question is not clearly specified, a possibility seems always to exist that a fault which cannot be characterized as a nautic fault might have caused the damage. If, for example, the crew members neglect the fire-alarm on account of the fact that on earlier occasions it had shown a tendency to start the alarm without actual fire, and if an accident is caused owing to such neglect, it seems difficult to maintain that the fault in question is solely "negligent pilotage or negligence in the steering of the aircraft or in navigation".

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(301) See for example Goedhuis 1933 p. 191, same author 1937 p. 233-235, same author 1943 p. 244; van Houtte op.cit. no. 48; Lemoine op. cit. no. 847; Riese op. cit. p. 452-453; Litvine op. cit. no. 307; Kamminga: The Aircraft Commander in Commercial Air Transportation, The Hague 1953, p. 102-103.

Thus it can be stated that in cases of unknown cause of damage occurring in the carriage of goods and baggage the carrier will not in general be able to furnish the proof required in Art. 20 paragraph 2 of the Warsaw Convention and, accordingly, he cannot escape his liability by invoking this provision.

No court decisions seem to exist on this question.

E. Article 25.

The cause of damage is of a decisive importance for the application of Art. 25 of the Warsaw Convention. If the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court seized of the case, is considered to be equivalent to wilful misconduct, the carrier shall not be entitled to avail himself of the provisions of the Convention which exclude or limit his liability, see Art. 25 paragraph 1 (302). Similarly, if the damage is caused as aforesaid by the carrier's servants or agents acting within the scope of their employment, the carrier shall not

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(302) The French original text of Art. 25 paragraph 1 runs as follows: "Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'apres la loi du tribunal saisi, est considérée comme équivalente au dol". Concerning the difficulties encountered in the interpretation of Art. 25, see Drion op. cit. no. 168-191.

be entitled to avail himself of the said provisions, Art. 25 paragraph 2.

It is indubitable that the burden of proof is imposed upon the claimant (303), and it seems indubitable also that he has to explain the origin of the damage in order to fulfil the requirements of his onus. An unknown cause of damage gives no indications whatsoever of wilful misconduct or its equivalence. Even if it be established that the carrier or his servants or agents did commit faults which might be characterized so - for example certain cases of deliberate violation of flight regulations - the proof of the causal relationship between these faults and the damage would still be missing and could never be furnished in cases of inexplicable cause of damage. To assume any wilful misconduct or causal relation under such circumstances would mean to shift the burden of proof from the claimant onto the carrier (304).

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(303) This appears even more clearly from the new wording of Art. 25 adopted by The Hague Conference, see Art. XIII of the Protocol: "The limits of liability specified in Art. 22 shall not apply if it is proved that 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; provided that, in the case of such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment". (Italics supplied).

(304) Similar Drion op. cit. no. 190 note 3.

These view points have been approved by the courts. In the Belgium case Pauwels et al. vs SABENA (305) le Tribunal de première instance de Bruxelles stated:

> "...in order to invoke Art. 25 the claimants must prove:
> (1) That one or more faults had been committed by the carrier,
> (2) That a chain of causation exists between the damage and one or more of the faults proved against the carrier or his servants,
> (3) That the faults causing the damage were committed in such a way as to present the characteristics of dol, or of a fault which, according to the law of the Tribunal, is considered to be equivalent to dol". (306)

An analysis of the evidence available to the Court in this case led to the conclusion that the real cause of accident remained unknown. In these circumstances the Court held that "the claimants had failed to establish any fault on the part of the defendants or their servants, or (a fortiori) any chain of causation between the alleged faults and the accident".

The French Cour d'Appel de Paris faced the same problem in the case Hennessy vs. Air France (307), and expressed itself very clearly on this point:

> "La preuve de l'existence d'une faute lourde incombait à M. Hennessy. Il ne l'a pas faite, il ne pouvait pas la faire, puisque les éminents techniciens qui ont procédé aux enquêtes n'ont pu que formuler des hypothèses".

In the earlier quoted American case Grey vs. American

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(305) See supra p. 88.

(306) U.S.Av.R. 1950 p. 375.

(307) R.F.D.A. 1954 p. 62.

Airlines (308) the District Court gave the following interpretation of Art. 25 - which seems to contain an analysis directly hitting upon the purposes behind the Article:

> "We hold that the trial judge ruled correctly when he charged the jury that plaintiffs could recover no more than 8,300 dollars on account of the death of each accident, unless plaintiffs proved by a fair preponderance of the credible evidence that there was wilful misconduct on the part of defendant's employees, or any of them, which was a substantial contributing factor to the accident. The specific language of Art. 20 paragraph 1 ...and the absence of corresponding words in Art. 25 would seem to make admissible no other interpretation of the Convention. But perhaps of greater significance is the general purpose of protecting international air carriers from the burden of excessive claims connected with the loss of aircraft under circumstances which make it impossible, or virtually so, to determine the mechanical or human shortcomings which caused the disaster, because of the death of all on board and the destruction of the plane. We find implicit in the terms of the Convention an intention to relieve the carrier of this burden of proof whilst at the same time giving the injured parties the opportunities to prove wilful misconduct, if they can". (309)

The same accident from which the Grey-case emanated gave rise also to the Rashap-case (310), and in the latter the Court stated:

> "The plaintiff carries the burden of proof as to his claim that the accident was caused by the wilful misconduct of the air line company and also as to the amount of the damage. Therefore, in order to find a verdict for the plaintiff, you must also find that he has established the cause by a fair preponderance of the evidence, which means that the evidence in support of its contentions outweights, in your judgment, the evidence to the contrary". (311)

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(308) See supra p. 84-85.

(309) U.S.and C.Av.R. 1955 p. 628-629.

(310) See supra p. 85-86.

In the American Wyman-case (312) and the French case Del Vina vs. Air France (313), in both of which the cause of damage remained unknown, the claimants failed to receive compensation beyond the Warsaw limits. This is true also in the case Nordisk Transport vs. Air France (314) which was about a box of watches having disappeared without a trace en route from Paris to Saigon. The lower Court had held that the fact that the air company could give no explanation whatsoever concerning the circumstances of the loss of the box constituted a sufficient basis for a presumption of wilful misconduct. But la Cour d'Appel de Paris stated expressly that wilful misconduct (faute lourde) is never presumed, and the compensation was reduced to the Warsaw limits (315).

Of special interest as far as proof of causal relationship is concerned is the American Goepp-case (316). In the lower Court the judge gave the following explanation to the jury:

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(311) U.S.and C.Av.R. 1955 p. 612.

(312) See supra p. 80-81.

(313) See supra p. 88.

(314) R.F.D.A. 1953 p. 105-121

(315) The Warsaw limit amount constituted but 2.26 per cent of the real loss!

(316) See supra 82-83.

> "The burden of proof on this cause of action (i.e. founded on Art. 25), unlike the burden of proof on the other cause of action (Art. 20 paragraph 1) rests upon the plaintiff. She must satisfy you by a fair preponderance of the credible evidence...that the defendant, acting through its officers, employees or agents was guilty of wilful misconduct. Wilful misconduct is never presumed". (317)

Nevertheless the jury returned a verdict awarding the claimant compensation of 65,000 dollars, i.e. above the Warsaw limits. The defendant moved to set this verdict aside, but in the Supreme Court of New York Botein Ct.J. stated:

> "Implicit in the jury's verdict was a finding that the defendant was responsible for a violation of the Civil Air Regulation, constituting wilful misconduct under the provisions of the Warsaw Convention. The only question to be considered...is whether...this violation was the proximate cause of the decedent's death. The pertinent regulation provides that within a specified period preceding his employment "the qualifying pilot shall have performed in flight...all of the approved instruments procedures at each refueling airport approved for the route".
> ...
> There was evidence in the records from which the jury could have found that the accident was the result of Captain Westerfeld's lack of familiarity with conditions at the Stephenville Airport; and that the knowledge he lacked would have been supplied by qualifying procedures which conformed to the requirements of the Civil Air Regulations. In such event there was sufficient basis for the jury's finding that the violation of the regulation was the proximate cause of decedent's death". (318)

These considerations were rejected, however, by the majority of the Appellate Division (319). The Court held that evidence that the pilot had made only one checkflight to the

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(317) U.S.Av.R. 1951 p. 529.

(318) Ibid. p. 529-30.

(319) See <u>supra</u> p. 83.

alternate airport Gander, with which he had had previous and subsequent familiarity (and not two flights as required by the regulations), did not in law bear any proximate causal relation in respect of the accident in question:

> "...it is abundantly clear that any failure to make two flights to Gander before qualification bore no proximate causal relation to an accident which occurred 167 miles away". (320)

Accordingly, the amount awarded was reduced to 8,300 dollars constituting the Warsaw limits, the plaintiff's right to which the air company upon appeal did not question.

In a dissenting opinion one of the judges expressed quite different views with respect to the requirements for the proof of causal relation:

> "On the matter of proximate cause it was quite reasonable for the jury to find that the pilot's sub-standard familiarity with an instrument landing on the field at Stephenville involved of necessity a relatively sub-standard familiarity with the terrain, resulting in the pilot's ignorance of the hill which, on take-off, the plane struck. This the jury could find, was a proximate cause of the accident. It should be obvious too that with respect to air accidents, because of the mysteries in which the fatal and more serious accidents become shrouded, a liberal approach in finding proximate cause from any kind of misconduct which may lead to multiple fatalities is socially justified, if not required. What may be required as evidence of proximate cause in a trolley car accident would not be a relevant standard in an accident involving a modern transport plane, or the jet liner now at the threshold of air transportation". (321)

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(320) U.S.and C.Av.R. 1952 p. 490.

(321) Ibid. p. 493.

This line of thinking has been strongly criticized by Drion (322), - and criticism is justified, indeed. A "liberal approach in finding proximate cause" would, if generally accepted, mean the ruin of the basic idea of the Warsaw Convention: unification of the law. The more important it is, therefore, to emphasize the analysis of Art. 25 given by the District Court in the Grey-case (323) which reached the heart of the purpose behind the Article.

The unknown cause of damage seems not to create any special problems with respect to other provisions in the liability chapter of the Warsaw Convention than those of Art. 20 and 25. The cause of damage plays, it is true, a decisive rôle in Art. 21 pursuant to which the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability if he proves that the damage was caused or contributed to by the negligence of the person suffering damage (324). But it is beyond any reasonable doubt that in the case of unexplained cause of damage the carrier can find no basis for invoking this Article.

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(322) See Drion op. cit. no. 191.

(323) See supra p. 119.

(324) The British Carriage of Air Act 1932 Art. 21, and Art. 21 of the translated text as ratified by the United States Senate, contain both the words "the injured person" instead of "the person suffering damage"; see also Drion op. cit. p. 357.

The allocation of the burden of proof may, however, cause some problems in connection with the new paragraph 2 of Art. 23 of the Convention as drawn up by The Hague Conference 1955, and although the Protocol has not yet come into force (325), this provision will be examined in the following in relation to the unknown cause of damage.

F. New Article 23 paragraph 2 (The Hague Protocol Article XII).

Pursuant to Art. XII of The Hague Protocol the existing provision of Art. 23 of the Warsaw Convention (326) shall be renumbered as paragraph 1 and another paragraph shall be added as follows:

> "2. Paragraph 1 of this Article shall not apply to provisions governing loss or damage resulting from the inherent defect, quality or vice of the cargo carried".

If the carrier has inserted the permitted clause in the contract of carriage, the following seems to be the result of this new paragraph with respect to the allocation of the burden of proof:

Upon the shipper's proof of damage, the carrier may, at

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(325) As of March 1, 1960, the following States have ratified the Protocol: Australia, Czechoslovakia, Egypt, France, the German Democratic Republic, Hungary, Ireland, Laos, Luxembourg, Mexico, Poland, Rumania, El Salvador, The Union of Soviet Socialist Republics, Yugoslavia. The Protocol will become effective when ratified by at least thirty States, see Art.XXII of the Protocol.

(326) Art. 23 runs as follows: "Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and

first in any case, confine himself to point out that the damage was due to the inherent defect, quality or vice of the cargo. This is where the effect, if any, of the new provision comes in, for, pursuant to the general principles of the Convention (Art. 20) the carrier would have had to show that all necessary measures to avoid the damage had been taken or were impossible to take. If, however, the shipper can prove that the damage in question has been caused wholly or partly by another fact than one of those mentioned in paragraph 2 - for example delay - the carrier must show that he is not liable pursuant to the relevant Articles of the Convention, i.e. that he and his servants or agents had taken all necessary measures, Art. 20, or that the damage was caused or contributed to by the fault of the shipper, Art. 21.

An understanding along these lines seems to be the most natural one, and derives also support from the discussions during The Hague Conference (327). Similarly, it is in accordance with the corresponding rules in international maritime law, see the Brussels Convention relating to Bills of Lading

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(326 con'd) void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention".

(327) Similar Riese in Zeitschrift für Luftrecht 1956 p. 30, but opposite Drion during The Hague discussions, see The Hague Conference 1955 p. 392-393; compare Calkins and Sidenbladh, ibid., who were opposed to the views held by Drion. The discussions in The Hague are found in The Hague Conference 1955 p. 108-110, 157-160, 210-214, 349, and 392-393.

of 1924, Art. IV subsection 2 paragraph m, and subsection 2 *in fine*.

It is conceivable, however, that the carrier's proof that damage has been caused by the inherent defects etc. of the goods, is likely to have the same effect as described above, even if Art. 23 paragraph 2 does not apply or the permitted clause is not inserted in the contract of carriage. This would be the case if a causal relation between the occurrence causing the damage and the air carriage is a prerequisite for claiming compensation. By pointing out that the nature of the goods in question is the cause of damage, the carrier has shown the non-existence of such a causal relationship (328). Considering that the Warsaw Convention lays down rules concerning air carriage for the very reason of the special nature of such carriage and of the special risks created by it, it appears most reasonable to interprete Art. 18 as presupposing a causal relation between the air carriage and the occurrence causing damage.

If the damage of the cargo is inexplicable, the carrier will find no basis for invoking Art. 23 paragraph 2 successfully. If he succeeds, on the other hand, in proving that the damage was a result of the inherent defect, quality or vice of the cargo, but it remains uncertain whether or not *other*

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(328) As earlier stated the burden of proving that such a relationship does not exist must fall upon the carrier, see *supra* p. 19.

causes may have contributed to the loss, it is for the shipper to bear the risk of this uncertainty, and the carrier will not be responsible (329). If, however, the shipper establishes the existence of a contributing cause, but the circumstances do not permit any explanation of the chain of events leading up to this cause, the carrier will be held liable. For, in such a case he has no possibility of furnishing proof to the effect that he and his servants or agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures, see Art. 20 paragraph 1 of the Convention.

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(329) This is where the effect, if any, of Art. 23 paragraph 2 sets in. Pursuant to the interpretation given in this study of the requirements for the carrier's burden of proof in Art. 20 paragraph 1, the carrier would have had to bear the risk for this uncertainty.

Chapter III.

THE UNKNOWN CAUSE OF DAMAGE AND THE ROME CONVENTION OF 1952.

Leaving the carrier's liability towards passengers, or their dependents, and shippers of cargo, and turning to his liability towards third parties on the surface - i.e. persons unconnected with aviation - we leave also the principle of presumed liability as provided for in the Warsaw Convention and enter into the realm of objective, or absolute, liability. The relevant rules are contained in the Convention on Damage caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome, October 7, 1952 (330). The Convention applies to damage caused in the territory of a Contracting State by an aircraft registered in the territory of another Contracting State, see Art. 23. Any person who suffers damage on the surface shall, upon proof only that damage was caused by an aircraft in flight or by any person or thing falling therefrom, be entitled to compensation as provided by the Convention, Art.

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(330) The Convention has replaced the earlier Rome Convention of 1933 and its additional Brussels Protocol of 1938. The Rome Convention of 1952 became effective on February 4, 1958, and has been ratified or adhered to (as of March 1, 1960) by Australia, Canada, Ceylon, Egypt, Luxembourg, Pakistan, Spain and Ecuador.

l paragraph 1. Nevertheless there shall be no right to compensation if the damage is not a direct consequence of the incident giving rise thereto, or if the damage results from the mere fact of passage of the aircraft through the airspace in conformity with existing air traffic regulations, Art. 1 paragraph 2.

It appears that, in principle, the cause of damage is immaterial. It is irrelevant to ask the question why did the incident, giving rise to the damage, occur? Whether the damage was caused by the carrier's negligence, by the negligence of a third party, by force majeure etc., the person having suffered the damage is entitled to claim compensation from the person liable (331). However, in order to protect the operator against catastrophic risks the Convention provides for a limitation of his liability graduated after the weight of the aircraft.

The background for this system of liability is the concept that damage caused on the surface by aircraft constitutes a risk which must be borne by the operator. The third parties, suffering damage, have no relationship whatsoever to aviation and have no means of avoiding the damage. They have been exposed to this risk without any consent, and they cannot be expected to have insured themselves against this risk.

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(331) Pursuant to Art. 2 of the Rome Convention the liability shall be attached to the operator of the aircraft. Concerning the definition of the expression "operator", and its relation to a "carrier", see infra note 339.

The Convention contains, however, certain (very limited) defences for the operator, as well as a possibility of aggravation of his liability, and the application of these special provisions has been conditioned upon certain causes of damage. If the damage has been caused solely or contributed to by the person suffering the damage, the person who would otherwise be liable may escape his liability or have it reduced, Art. 6. If the damage is the direct consequence of armed conflict or civil disturbance, the person otherwise liable shall not be responsible, Art. 5. In cases of unknown circumstances surrounding the damage no possibility will exist of successfully invoking these defences.

On the other hand, an unknown cause of damage will debar the claimants from pleading Art. 12 of the Convention pursuant to which the liability shall be unlimited if the damage was caused by a deliberate act or omission of the operator, his servants or agents, done with intent to cause damage; see in this connection the corresponding problem concerning Art. 25 of the Warsaw Convention (332).

Apart from these special cases, an elucidation of the chain of events leading up to the incident causing damage will be of no interest to the question of liability pursuant to the Rome Convention.

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(332) See supra p. 116-123.

Chapter IV.

THE UNKNOWN CAUSE OF DAMAGE AND THE DRAFT CONVENTION ON AERIAL COLLISIONS.

For the moment there are no international rules in existence concerning the liabilities in cases of aerial collisions. Yet, an international convention is on its way. During its Tenth Session in Montreal, 1954, the Legal Committee of ICAO drew up a draft convention on aerial collisions which was not, however, considered sufficiently developed for submission as a final text to the approval of a diplomatic conference (333). The draft is to be re-examined during the next session (the thirteenth) of the Legal Committee in Montreal, September 1960.

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(333) See ICAO Doc. 7601-LC/138, Tenth Session of the Legal Committee, Montreal 1954, p. 314-315 and 321.
Aerial collisions have for a long time been a subject for studies with a view to having the liabilities flowing therefrom regulated internationally. The item was included in the list of air law problems contained in the report of November 3, 1925, presented by M. de Lapradelle to the First International Conference on Private Air Law, Paris 1925, and to the studies for which the CITEJA was created, see Paris Conference 1925 p. 45. CITEJA worked on a draft convention on aerial collisions from 1930-1936. After the second world war the studies were resumed by the Legal Committee of ICAO.

As, however, the main principles laid down by the existing draft are not likely to be changed during the re-examination, the provisions of the draft will be considered here in connection with the case of unknown cause of damage.

The provisions of the draft convention shall apply to every collision between two or more aircraft in movement provided that the collision has occurred in the territory of a Contracting State and at least one of the aircraft involved has the nationality of another Contracting State, see Art. 1 and 12 of the draft convention. The draft covers (only) claims brought by a person associated with one aircraft, i.e. the operator, his servants or agents, passengers or their dependents, and consignors against the operator of another aircraft (or his servants or agents, see Art. 2 paragraph 3). Claims under contract of carriage or for compensation for damage caused to third parties on the surface fall outside the scope of the draft convention, see Art. 1 paragraph 3. Nevertheless such claims do need to be taken into account when one operator seeks, by way of recourse action against another operator, to reimburse himself for losses sustained in connection with the collision, see Art. 1 paragraph 2 pursuant to which the damage for which an operator may recover compensation under the draft shall include any sums which he has been obliged to pay and has paid as a direct result of the collision.

Thus the following claims are to be covered by the draft:

(1) Claims against the operator (or his servants or agents) brought by another operator in a direct action for recovery of damage or loss of aircraft and consequential losses in connection thereto;

(2) Claims against the operator (or his servants or agents) brought by another operator in a recourse action for compensation paid to persons associated with the latter's aircraft, to persons associated with the former's aircraft, and to third parties on the surface;

(3) Claims against the operator (or his servants or agents) brought by persons connected with the aircraft of another operator.

The liability of the operator of a colliding aircraft is based on fault: The operator shall be liable only when it is proved that damage was caused by his fault or by that of his servants or agents, see Art. 3 of the draft. The reason for introducing this principle of liability with regard to aerial collisions being that the need of protection in such cases seems not to be so strong as in the case of damage to innocent persons on the surface. A collision is one of the risks connected to the use of aircraft, and the operators and the other persons concerned can be expected to be aware of that risk and will frequently have taken out insurance to cover the risk (334).

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(334) See ICAO Doc.7601-LC/138 p. XXIV-XXV.

A modification to the principle of fault has been admitted, however. Art. 4 paragraph 2 provides for a recourse claim to be brought by one operator against another when the collision has occurred without faults of the operators in question and one of them has paid compensation to third parties on the surface. It will appear that this modification cannot be applied in cases of unknown cause of damage (335).

Another principle of primary importance with respect to the operator's liability is found in Art. 6 of the draft convention which provides for limitation of liability. The Legal Committee, however, did not succeed in establishing the principles for and extent of such limitation during its meeting in Montreal, 1954. The problem was then referred to the Air Transport Committee of ICAO, which has submitted a report, dated February 14, 1957 (336), to the Council on the question.-

If damage is caused by the fault of the operators of two or more aircraft, each of the operators shall be liable to the other operators for damage sustained by them in proportion to the degree of fault respectively committed in causing the damage, see Art. 4 of the draft. This pro rata rule corresponds to the rules laid down in international maritime law in the "International Convention for the Unification of Certain Rules

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(335) See infra p. 142-143.

(336) ICAO Council Working Paper 2354.

of Law in regard to Collisions", signed at Brussels in 1910 (337). If the degree of fault cannot be determined, each of the operators at fault shall bear the damage suffered by him. This provision, however, does not correspond to the rules of the maritime law. In cases of undetermined degree of fault the Brussels Convention of 1910 provides for a division of liability in equal shares. A provision to the same effect was found in the Paris Draft on Aerial Collisions drawn up by a sub-committee of the Legal Committee of ICAO in January 1954. During the Montreal discussions, however, the present rule was adopted by a vote of 8 to 7 (338).

It will be seen that the draft convention includes - as does the Brussels Convention of 1910 - specific rules providing for a situation in which the cause of damage is partly unknown: It is established that faults have been committed on both sides; but the degree to which these faults respectively have contributed to the damage remains undetermined. It is, of course, not mere coincidence that provisions in this regard are to be found in legislation dealing with sea or aerial collisions. In both cases experience shows difficulties in explaining the chain of events leading up to the collision. In respect of collisions at sea, each of the ships has

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(337) See Art. 4 of the Convention.

(338) For the discussion, see ICAO Doc.7601-LC/138 p. 127-138.

generally its own explanation of the events, and witnesses without fear and favour are rare. Aerial collisions will often result in total loss of the aircraft involved, thus rendering it extremely difficult to explore the relevant factors in connection with the accident.

On the other hand, it must be borne in mind that the importance of such provisions concerning the undetermined degree of fault is largely dependent upon the extent to which the court is inclined to establish a certain proportion of liability between the operators concerned although all relevant circumstances surrounding the collision may not have been disclosed.

It can be asked what would be the result of an undetermined degree of fault in the case where no rule existed in this respect. The results would probably differ from country to country. Some courts might hold the convention to be based on the idea of proof of fault and proof of the degree of fault. Consequently, absence of proof of such degree would mean that each party would bear his own damages. Other courts might adopt the view that once faults on the part of the operators concerned have been established, each of the parties must be entitled to recovery, and the only natural solution would be to share the liability in equal shares. Thus it seems indispensable to lay down one or the other rule to assure uniform solutions of the problem.

A comparison of the results of the two possible solutions seems to turn the scale in favour of the rule of sharing the liability in equal shares. For such a provision will mean the avoidance of the extreme cases of arbitrariness, i.e. cases in which one of the operators has to bear all the damage, or an overwhelming part thereof, by himself, although it is established that also the other operator has contributed to the damage through his fault - be it to a lesser or higher degree. It appears more equitable - may be even more logical - to put the case of undetermined degree of fault on an equal footing with the situation in which equal degrees of fault have been established on the part of both parties, rather than comparing it to the case in which no faults have been proved.

In the following the various aspects of the carrier's(339)

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(339) According to Art. 2 paragraph 1 of the draft convention the liability shall attach to the operator of the aircraft causing damage, and the term "operator" is defined in Art. 2 paragraph 2 as follows: "The person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived, whether directly or indirectly, that person shall be considered the operator". See also the Rome Convention 1952 Art. 2 paragraph 2 in which the same definition has been included. Normally the concept of "the carrier", whose liability is the subject of this study, will be covered by the expression "the operator". But it need not necessarily be so. If, for example, the carriage is performed by a person other than the contracting carrier, the latter will not be the operator, as the former is the one retaining the control of the navigation. In the following, however, it is presupposed that the carrier is the operator.

liability in cases of collision will be examined especially with regard to a completely or partly unknown cause of damage. For the sake of simplicity a collision with only two aircraft involved is envisaged. Furthermore, claims brought by servants or agents on board an aircraft against their own carrier (employer) are not taken into account. As earlier stated (340) such claims are not considered to be within the scope of the Warsaw Convention, but must be decided upon in accordance with the contract of employment and the applicable national law. Nor will the question of limitation of liability be touched upon.

(I). If it is unknown whether or not the two carriers in question, or their servants or agents, have committed any fault, then, according to the interpretation given in this study of Art. 20 of the Warsaw Convention, each of the carriers shall be liable towards "Warsaw passengers" and "Warsaw consignors" (341). The carriers will find no basis for proving that all necessary measures to avoid the damage have been taken or were impossible to take, see the Warsaw Convention Art. 20, cf. Art. 17 and 18. Whether or not non-Warsaw passengers and -consignors will be entitled to compensation will depend upon the applicable national law.(342)

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(340) See supra p. 13-14.

(341) I.e. passengers and consignors whose contracts of carriage are governed by the Warsaw Convention.

(342) In their legislations concerning non-Warsaw carriage,

Neither of the carriers is to be held liable towards passengers or consignors of goods in the other carrier's aircraft, as no fault on the part of either of the carriers can be proved, see Art. 3 of the collision draft. The same is true in respect of claims brought by servants or agents connected with the other carrier's aircraft.

Both of the carriers will be liable for damage suffered by third parties on the surface as a consequence of the collision, see the Rome Convention Art. 1 and 7. Damages not covered by that Convention must be decided upon in accordance with the applicable national law (343).

Neither of the carriers is liable towards the other for damages on aircraft, consequential losses etc. sustained by him. Nor can either of them bring recourse claims against the other for any sums paid as a consequence of the collision to persons associated with his own aircraft, or to third parties on the surface, see Art. 3 of the draft. Each of the carriers must bear his own losses and damages.

(342 con'd) a substantial number of States have included the principle of presumption of liability on the part of the carrier, thus giving the carrier, in principle, the same defence as provided in Art. 20 of the Warsaw Convention. See further ICAO Doc.7450-LC/136, Ninth Session of the Legal Committee, Rio de Janeiro 1953, Vol.II p. 221-232.

(343) An overwhelming majority of the States has adopted the principle of absolute liability in their national legislations, see further ICAO Doc.7379-LC/34, The Rome Conference 1952, Vol.II p. 63-75.

(II). In cases of partly unknown cause of damage in the sense that fault has been established on the part of one of the carriers in question, but it remains unknown whether or not the other carrier has committed any fault, the result would be the following:

The negligent carrier is liable towards his own Warsaw passengers and Warsaw consignors of goods, see the Warsaw Convention Art. 20, cf. Art. 17 and 18. He is also liable towards passengers, consignors of goods, and servants or agents connected with the other aircraft, as fault on his part has been proved, Art. 3 of the collision draft.

The other carrier is liable towards his own Warsaw passengers and Warsaw consignors, - he can furnish no proof to satisfy the requirements of Art. 20 of the Warsaw Convention. On the other hand, he is not liable as far as persons associated with the aircraft of the negligent carrier are concerned; the circumstances have not permitted them to furnish proof pursuant to the collision draft Art. 3.

Both of the carriers are liable towards third parties on the surface, see the Rome Convention Art. 1 and 7.

The negligent carrier is liable towards the other carrier for all losses sustained by the latter in connection with the collision, i.e. damage or loss of aircraft, consequential losses, and damages including compensation paid to persons and consignors of goods in his own aircraft, and to third parties

on the surface. In other words: the negligent carrier will be held liable for all damages and losses arising from the collision - subject to the applicable limits of liability - either through direct claims or through recourse claims.

It will be seen that the only difference between the situation now under consideration and the case in which it is established that one carrier is negligent, the other one without fault, is the fact that in the former situation the Warsaw passengers and Warsaw consignors of goods in the aircraft of the carrier who may or may not have taken all necessary measures, will be entitled to receive compensation from their own carrier also, while in the latter case they can bring a claim against the negligent carrier only.

(III). If it has been established that no fault has been committed by one of the carriers involved in the collision, but it remains in doubt whether or not the other carrier has been negligent, the former will not be liable towards his own Warsaw passengers and Warsaw consignors, see the Warsaw Convention Art. 20, nor towards persons associated with the other aircraft or towards the other carrier, the collision draft Art. 3. The other carrier will be liable towards his own Warsaw passengers and Warsaw consignors, but not towards persons and consignors of goods in the aircraft of the non-negligent carrier, see the Warsaw Convention Art. 20, cf. Art. 17 and 18, and the collision draft Art. 3. That means

that the Warsaw passengers and Warsaw consignors connected to the aircraft of the innocent carrier will receive no compensation from either of the carriers.

Both of the carriers will be liable towards third parties on the surface, see the Rome Convention Art. 1 and 7.

Neither of the carriers will be entitled to bring claims against each other pursuant to Art. 3 of the collision draft, neither directly nor in recourse action, as none of them can furnish proof of fault on the part of the other. Furthermore, - and this is remarkable - the non-negligent carrier cannot recover from the other carrier a proportion of any compensation he might have paid to third parties for damage on the surface by invoking Art. 4 paragraph 2 of the draft pursuant to which it is a condition that "a collision occurs without the fault of the operators of the aircraft concerned". The innocent carrier (operator) A is entitled to bring a recourse claim against the innocent carrier (operator) B for compensation paid to third parties on the surface. But the innocent A is <u>not</u> entitled to do so in cases where it is unknown whether or not B has been negligent! The situation may be well illustrated if it is presupposed that B has been held liable towards Warsaw passengers and consignors because of the fact that the unknown circumstances surrounding the collision did not permit <u>him</u> to prove that all necessary measures had been taken or were impossible to take, see Art. 20 of the Warsaw Convention.

The same lack of knowledge will also debar A from furnishing the proof required by Art. 3 of the draft convention to the effect that B has been negligent. On the other hand, a recourse action against B as provided for in the draft Art. 4 paragraph 2 would be inconsistent with B's liability towards passengers and consignors pursuant to Art. 20 of the Warsaw Convention. The result will imply, in reality, the imposing upon the innocent A the burden of proof that B is either negligent or without fault. Such a rule seems not to be reasonable. It would appear more natural to include in Art. 4 paragraph 2 of the draft a provision according to which a non-negligent operator is entitled to bring a recourse claim for a pro rata share of the compensation paid for damage on the surface against the other operator in all the cases not covered by the general rule of Art. 3 (344).

(IV). If, finally, the collision has taken place under circumstances which - although revealing that faults have been committed by both parties involved in the collision - nevertheless do not permit the degree of the fault to be determined, then each of the carriers will be held liable towards his own Warsaw passengers and consignors, see the Warsaw Convention Art. 20, cf. Art. 17 and 18. Each of the carriers will also be liable towards persons associated with

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(344) See the discussions concerning the present Art. 4 paragraph 2 of the draft convention, ICAO Doc.7601-LC/138, p. 141-142, 146-150, 263, 304.

the aircraft of the other carrier, the collision draft Art. 3, and to third parties on the surface, the Rome Convention Art. 1 and 7.

On the other hand, although fault on each side has been established, neither of the carriers will be entitled to bring claims against each other, neither directly nor in a recourse action, see the present Art. 4 sentence 3 of the collision draft, pursuant to which each of the carriers shall bear the damage suffered by him. According to the rule supported by the minority during the discussions in Montreal (and contained in the Brussels Convention concerning Collisions at Sea of 1910) the liability shall be shared in equal shares in such cases. Accordingly, each carrier would be entitled to bring claims, directly or in recourse actions, against the other carrier for one half of all the losses and damages sustained in consequence of the collision. In this connection, however, attention must be drawn to Art. 5 of the draft convention pursuant to which an operator shall not be liable, in any recourse action, in respect of passengers or property carried on his aircraft, for the payment of any sum which would result in his total liability with respect to such passengers or property exceeding any applicable limitation of liability, specifically prescribed by national law, which he is entitled to invoke. This provision would limit considerably each carrier's possibility of bringing recourse actions against the other in order to recover one

half of compensation paid to passengers and consignors connected to the other carrier's aircraft.

Finally, for the sake of completeness, it ought to be mentioned that the collision draft includes provisions providing for unlimited liability in cases where it has been proved that the damage has been caused through certain, very serious, acts or omissions on the part of an operator or his servants or agents, see Art. 7. In cases of unknown cause of damage these provisions cannot be invoked by the claimants, compare the corresponding problems concerning the Warsaw Convention Art. 25 and the Rome Convention Art. 12 (345).

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(345) See supra p. 116-123 and p. 130.

ANNEX I.

THE WARSAW CONVENTION, signed at Warsaw, October 12, 1929.

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Chapter III

Liability of the carrier.

Article 17.

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18.

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an occurrence which took place during the carriage by air.

Article 19.

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or goods.

Article 20.

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

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the steering of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21.

If the carrier proves that the damages was caused by or contributed to by the negligence of the person suffering damage, the Court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22.

(1) In the carriage of passengers the liability toward each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by a special contract with the carrier, the passenger may establish a higher limit of liability.

(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.

Article 23.

Any provision tending to relieve the carrier of his liability or to establish a lower limit than that fixed in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the contract, which shall remain subject to the provisions of this Convention.

Article 24.

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Article 25.

(1) The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his intentional misconduct (dol) or such fault on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to intentional misconduct (dol).

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.

Article 26.

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Article 27.

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Article 28.

(1) An action for damages must be brought, at the option of the plaitiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier has his domicile or has his principal place of business, or has an establishment by which the contract has been made, or before the Court having jurisdiction at the place of destination.

(2) Questions of procedure shall be governed by the law of the Court seized of the case.

Article 29.

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Article 30.

(1) In the case of carriage to be performed by various successive carriers and falling within the definition set out in the third paragraph of Article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far the contract deals with that part of the carriage which is performed under his supervision.

(2) In the case of carriage of this nature, the passenger or his estate can take action only against the carrier who performed the carriage during which the accident or the delay occurred save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor and the consignee.

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LIST OF STATES HAVING RATIFIED OR ADHERED TO THE WARSAW CONVENTION
(as of January 1,1960)

Argentine

Australia, including Nauru, New Guinea, Norfolk Island and Papua

Belgium, including all territories subject to the sovereignty or authority of Belgium

Brazil

Bulgaria

Burma

Byelorussian Soviet Socialist Republic

Cambodia

Canada

Ceylon

The People's Republic of China

Czechoslovakia

Denmark and the Faroe Islands

Egypt

Ethiopia

The Federation of Malayan States

Finland

France, including all territories whose external relations are under French authority

Germany

Ghana

Greece

Guinea

Hungary

Iceland

India

Indonesia

Ireland

Israel

Italy, including all territories under Italian administration

Japan

Laos

Liberia

Liechtenstein

Luxembourg

Mexico

Morocco

The Netherlands, including all territories subject to the sovereignty or authority of the Netherlands

New Zealand, including Cook Islands, Tokelau Islands and Western Samoa

Norway, including all territories subject to the sovereignty or authority of Norway

Pakistan

The Philippines

Poland

Portugal, including all territories subject to the sovereignty or authority of Portugal

Rumania

Spain, including all territories subject to the sovereignty or authority of Spain

Sweden

Switzerland

Ukrainean Soviet Socialist Republic

The Union of South Africa and South-West Africa

The Union of Soviet Socialist Republics

The United Kingdom

- Aden
- Bahamas
- Barbados
- Basutoland

Bechuanaland (Protectorate)
Bermuda
Brunei
Channel Islands
Cyprus
Falkland Islands
Fiji
Gambia (Colony and Protectorate)
Gibraltar
British Guiana
British Honduras
Hong Kong
Isle of Man
Jamaica, including Turcs, Caicos and Caymen Islands
Kenya (Colony and Protectorate)
Leeward Islands
Malta
Mauritius
Nigeria
North Borneo
Northern Rhodesia
Nyasaland Protectorate
Sarawak
Seychelles
Sierra Leone (Colony and Protectorate)
Singapore
British Somaliland (Protectorate)
Southern Rhodesia
St. Helena and Ascension
Swaziland
Tanganyika
Trinidad and Tobago
Uganda (Protectorate)

Western Pacific (British Solomon Islands Protectorate, Gilbert and Ellice Islands Colony and Tonga)

Windward Islands

Zanzibar (Protectorate)

The United States, including all territories subject to the sovereignty or authority of the United States

Venezuela

Viet-Nam

Yugoslavia

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