Analysis of Certain Aspects of the Law of Contracts Relating to International Carriage of Goods by Air

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Air Transportation of goods is carried out on a contractural basis between the carrier and the shipper. This contract may be oral or written, depending upon the law of particular country. It is usual that the rights and liabilities of the parties are determined by the law of the individual country. Such rules sometime operate only if no specific terms exist, but occasionally they might have the strength to exclude the validity of specific undertakings and conditions. In certain States, should the carriers want to limit or exclude by contract, their liability, such limitation or disclaimer must not only be set forth in clear and unmistakable terms, but it must also be called to the attention of the shipper.

The airwaybill used in air transportation both international and domestic is generally considered to be written evidence of the transport contract. Air Transport Undertakings endeavoured to agree to uniform conditions and terms governing the contract of carriage. Shortly after the Warsaw Convention (Convention for the unification of certain rules relating to international air transport) was signed, the carriers entered into am agreement concerning the contract of carriage by air and adopted uniform General Conditions of Carriage of goods and of passengers and baggage. In substance these conditions tempted to make the rules of the Warsaw Convention applicable by contract to all transportation.

The Conditions of Carriage adopted in 1930 were modified in 1949 to meet the needs of the more developed air transportation. The new document is still based, however, on the Warsaw Rules and the new airwaybill consignment note contains only very few material alterations:

The Warsaw Convention specifies the limits of the carriers' liability and provides for the fixing for higher limits in case there has been a special declaration of value. In the new airwaybill, a choice of rates and a valuation charge provision has been inserted to amplify respective articles in the Warsaw Convention, and to comply with the domestic laws of the United States. The Warsaw Convention as far as the United States is concerned is part of the "Supreme law of the land" as long as it involves transportation within the scope of the Warsaw Convention. In case of non Warsaw carriage, American carriers can only limit their liability if a choice of rates is offered to the shipper. That is the reason of the incorporation of specific provisions in the airwaybill.

Certain countries do not recognize that tariffs on file with government agencies at the offices of the carriers can be parts of the contract of carriage.

For this reason, the airwaybill itself contains some of the provisions of the transport contract probably the most important ones called "Conditions of Contract". These conditions are in reality extracts from the more detailed contract, but at least they define generally the rights and obligations of the parties to the contract.

The liability of the carrier for damage caused to the shipper in the new Conditions is regulated as follows:

a) If the transportation is subject to the Warsaw Convention the rules and limitations therein specified apply;

b) if the transportation is non Warsaw transportation with the exception of Great Britain and Ireland, if the national law does not prohibit such act, the carrier may fix the limit of its liability for the carriage of goods in the same amount as that specified in the Warsaw Convention, i.e., two hundred fifty gold francs per kilogram unless the shipper has declared a higher value and has paid a supplementary carrying charge. Damages are recoverable only on proof of the negligence of the carrier and in the amount of the actual damage within the prescribed limits. In cases in which the contract is covered by British or Irish law, carrier declares that it is not a common carrier and does not accept the obligation of liability of the common carrier.

Conception of the Contract

The transport contract is an agreement (declared consenting will) between a carrier and a consignor with the intention to create, and actually creating, a right in personam (obligation) between the contracting parties. In other words, the contract for international transportation of goods similarly to other contracts, consists of the conception of obligation of both parties interwoven with that of the declaration of consenting wills. It is agreed that a legal duty is undertaken by the carrier to carry the goods under the terms of the transport contract, and by the consignor, to pay the charges of the carriage and to comply with mandatory requirements of the contract.

As to the expression "obligation", it should be noted that the word is used here in its proper sense and not in its popular sense where it is equivalent to duty. (This is common to both common law and civil law jurisprudences). In a strict legal usage, an obligation is only one kind of duty, that which corresponds to a right in personam vested in him to whom the duty is owed. This general distinction of obligation is especially true with respect to the transport contracts, where the obligation of both parties is limited to the legal duties arising out of a special relationship governed by the internal (conventional) or external (legal) elements of the transport contract. This obligation is not imposed by the law on all the persons, but it is a special burden imposed upon particular individuals and, as stated above,

is always corresponding to a right in personam and never to a right in rem, the compliance of which the latter would be an officium. The word "obligation" in the sense used as a characteristic of the transport contract, covers not only the duty on the part of the carrier or consignor, but it denotes the entire relationship between the parties. It links the duties with corresponding rights.

As to the second element of the transport contract, the declared will, it should be said, in the first instance, that it does not correspond with the mere intention but it must be the parties' declared and announced will, enabling the Courts called upon to know its contents:

"The law imputes to a person an intention corresponding to the reasonable meaning of his words and actions."

(Leak, Law of Contracts, 8th Edition).

The transport contract is always the expression of the declared will of the consignor and carrier. The clarity of the declared will is especially important in the transport contracts where, many times, it becomes doubtful whether the shipper (consignor) had any access to the Conditions of Carriage incorporating the conditions and undertakings of the contract, which for practical reasons cannot be fully printed on the different types of traffic documents (air-rail waybill, bill of lading, etc.). Inasmuch as the contract is a form of the declared will legally effective, according to its tenor, it follows that an element in that will must be the intention that it should be so effective. The intention to contract must be visible but it is acceptable in the various jurisdictions, if it appears from the circumstances and it follows that its absence will be also generally gathered

from the circumstances rather than be the subject of express declaration.

According to the general concept accepted by both the common law and civil law whereby every agreement is an accepted offer, it might be recalled that in the transport business, the conditions of contract are delivered by the carrier in a document of common form, stating the terms by which the carrier will enter into the proposed contract (tariffs, general conditions of carriage). The carrier is faced, occasionally, with the possibility that the consignor may contend that whatever the carrier may have intended to be the contents of his offer, did not include the questionable term. Consequently, the carrier will not be able to rely upon the conditions or undertaking in the given case.

There is no difficulty whatsoever if there is express evidence that the consignor knew the terms. This might be assessed by either actual examination of it or by reason of previous experience or any other course that satisfactorily proves this knowledge. The acceptance of the terms of the Traffic contract on behalf of the consignor is safely assumed if the consignor may have known that there were terms annexed to the offer and may have been content to accept those terms without further reference. Finally, it is accepted by many Courts, that it is sufficient to prove the consignor's knowledge of terms if the carrier has done what is reasonably sufficient to give the consignor notice of the terms of the contract and the question of reasonability is a question of fact which must be decided occasionally by the jury.

This question of the communication of a carrier's offer to the consignor has been often considered, and has received different interpretations in the different national jurisdictions.

The airwaybill presently in use for international transportation contains the following:

> ".....transportation hereunder, or other services performed by the Carrier(s) in respect of which any liability may attach to the Carrier(s) is also subject to the terms and conditions herein set forth and to the Conditions of Transportation, tariffs, rules, regulations and timetables (but not the times of departure and arrival stated therein) and of the Carrier(s) which are hereby made a part hereof (copies of which are available for inspection at any of the offices of the Carrier(s) and at airports from which it operates regular services.....".

Similar terms are incorporated in the railway bills used in international transportation.

The incorporation, by such reference, of the general terms, conditions and undertakings of the contract of carriage, giving place and notice of the existence of the general terms, did not prove to be entirely satisfactory. This is the reason why the airwaybill repeats many of the provisions of the general conditions of carriage.

The terms of the transport contract must be usual and reasonable. The peculiar character of a transport contract, that the consignor is not often aware of the full text of the agreement he entered into with the carrier, makes this requirement especially important. The courts have to safeguard the consignor's interest and it seems to be quite reasonable that only usual terms can be incorporated in the contract to which the airwaybill makes reference. It should be mentioned here that if the terms are special, the consignor's knowledge of such terms will not be satisfactorily proved by his acceptance of the

contract without protest and such terms of contract might not be accepted as applicable through a reference in the airwaybill to the place where the General Conditions of Carriage are exhibited.

The distinctions between undertakings and conditions have some importance in this study.

Undertakings are those terms by which the obligee undertakes to require the obligor in virtue of the contractural obligation. Conditions are those terms which specify the contingencies from which depends the obligee's right to require the above act or forebearances. The undertakings of a transport contract are commonly subject to express and implied conditions on which the question of contract depends. For example, if a consignor enters into a contract with a carrier to deliver goods,

a) the carrier undertakes to accept for carriage of goods, and,

b) this undertaking is subject to the conditions with which the consignor has to comply; certain requirements relating to packing, marking of the parcels, preparing the airwaybill, e

Further distinction can be drawn between internal and external elements of a transport contract. The external elements of the contract show a large variation according to different systems of private international law. Under internal elements, we understand all the express or implied terms (undertakings, conditions) which are the contents of the contract established by the intention of the parties, whether actually expressed by the parties or eventually implied by law. They may be also called the conventional elements of the contract. Distinct from these conventional elements, there are also external

(legal) elements which are independent of any intention expressed by the parties and are contributed by the law itself. It is, therefore, quite natural that the parties to the contract, apart from their own intention and the implied terms thereto, must also comply with external conditions attached to and imposed on the contractural obligation. The obligation of the carrier to provide safe instruments for transportation is an implied term in any contract whereby an undertaking to accept this obligation of care is constructively attributed to the carrier. On the other side, the obligation of the carrier in the common law countries, to pay compensation for the damages with or without limitation (in case this is not regulated by international convention) has been established by the law independently without recourse to any constructive implication of the conventional term in the contract.

It can also be stated that these two kinds of elements are usually treated strictly analogously. Sometimes it is very difficult to make the distinction and usually it is for the law to decide whether any condition or obligation attached to the contract shall be treated as a legal and external element or as an implied term of the contract:

> "The Law may say, as it pleased, either that the obligation of an innkeeper or of a common carrier for the loss of goods entrusted to him is an obligation attached by the law itself to the status and calling of an innkeeper or common carrier; or that it is the outcome of an implied undertaking contained in the contract which an innkeeper or a carrier makes with his guest or customer".
>
> (Salmond & Williams on Contracts, Page 59).

When a rule of law is peremptory, that is to say, not capable of being excluded or derogated from the express agreement of the parties - the obligation resulting therefrom is normally and naturally regarded as an external consequence of the contract rather than as created by an implied term thereof.

The law may, if it thinks fit, regard the liability of a common carrier for the safety of the goods as a legal incident and consequence of the status of a common carrier, and not as a product of an implied undertaking contained in the contract, even while the law recognizes, at the same time, the right of the parties to exclude or modify this legal incident by an express term to that effect.

The effect of failure of/or non-compliance with a term (undertaking or condition) depends primarily on whether the term is purely an undertaking or purely a condition or both. In the first case, it is quite obvious that the party injured will be entitled to recover damages. But the contract is valid if he can prove no actual loss, and he will be entitled to nominal damages. If a condition is involved, then in virtue of its operation, the failure or non-compliance may result in the voiding of the obligation. In the third case, the same might be the result.

For this reason, the general expression Conditions of Carriage should be very carefully treated. The word "Conditions" is used here in a broader sense than distinugished before and it is understood that it covers both conditions and undertakings.

In a later part of this thesis, special attention is paid to the question of negotiability. It might be useful, therefore, to review here the basic differences in conception between the ordinary transport contract and the negotiable instrument.

A negotiable instrument is one form of a contract, and it is made to operate in many ways different from that in which a simple contract operates. Some rules have been devised, therefore, by means of which the negotiable contract may be identified and distinguished from a non-negotiable or simple contract. In the main, formal differences distinguish the two kinds of contracts, though differences in function are sometimes of importance.

1) A simple contract may call for the payment of money, for the transfer of interests in property, for the performance or non-performance of a variety of acts. The real negotiable contract calls for the payment of money only.

2) A simple contract, of the type which may be assigned, need not affirmatively show that the obligor thereon contemplates the possibility of assignment, but an instrument to be negotiable must contain what are called words of negotiability - such as the words "or order" or "bearer".

3) In a simple contract the time for performance may be fixed with certainty or left uncertain. The time of payment of the negotiable contract must be certain.

4) The promises in a simple contract may be conditional or unconditional, while the promise or the order in a negotiable contract must be unconditional.

The expansion of these ideas and a few related rules constitutes a definition of a negotiable instrument.

The leading differences between the effects of a simple contract to pay money and a negotiable contract to pay money may be briefly summarized. While a simple contract in writing need not be delivered as a condition precedent to its existence as a contract, a negotiable contract must be delivered. The formal aspects of the various kinds of negotiations are more prominent than they are with respect to an assignment of a non-negotiable chose in action. The assignee of a non-negotiable right to receive money takes the right subject to defenses and equities of prior parties, whether he knew of such defenses or equities or not, while the innocent purchaser of a negotiable instrument before maturity takes it free from the defenses and equities of prior parties (Barrow v. Bispham, 1829, 11 N.J.L. 110). This is a principle which characterises the negotiable instruments.

The assignor of a non-negotiable chose in action does not guarantee to his assignee that the instrument will be paid by the obligor, he only warrants against the existence of defenses, much the same as a vendor of goods impliedly warrants, under certain circumstances, that the goods are of a certain quality. The indorser of a negotiable instrument, not only warrants against defenses, as does an assignor, but his warranties, in most cases, run to all

subsequent indorsees, and, what is more important, the unqualified indorser of a negotiable instrument quarantees that the instrument will be paid. The indorser engages that it will be paid, provided that the holder demands payment of the instrument on the day of maturity from the party who should pay it, i.e. the acceptor or drawee, and this latter refuses to pay it, and provided further, that the holder gives due notice to the indorser that payment of the instrument was refused.

The methods of discharge of a negotiable contract, in part, are identical with those which will discharge a simple contract, but there are some methods of discharging a negotiable contract which are not recognized by the law of simple contracts.

Classification

The contract governing international air transportation contains many important elements, such as:

1) the determination of its applicability,
2) the execution of the traffic document (airwaybill), and
3) rules governing during the period of transit of goods including the rights of the consignor, consignee and carrier,
4) provisions relating to the construction of rates and charges,
5) the contractural liability of the carrier.

The problem of contractual liability of air carrier appears to be explored in every important legal system to an extent that it need not be treated in this thesis which is limited only to some of the problems involved in the other three main phases of the contract of carriage. No effort has been made to make a complete study of all the implications of the contract or to cover all the Articles of the Conditions of Carriage published by IATA.

Part I

Applicability of the Contract

The greater part of International Air Transportation is governed by the Warsaw Convention which regulates the contractual liability and many other aspects of the relation between the parties to a contract of carriage by air. The Contract of Carriage drawn up for international use is necessarily different from the one used in domestic air transportation; its terms must comply with the rules laid down in the Warsaw Convention insofar as international carriage is concerned, as defined in the Convention.

As, however, the Convention applies only in substance to carriage performed between territories of two contracting states, and as there are only thirty-five states who ratified the Convention, it is obvious that certain carriage may be freely contracted for. These carriages form the so-called "non-Warsaw Traffic" and will have to be treated separately from the Warsaw Traffic.

It is hardly possible to discuss the scope of the contract or the application to the Warsaw Convention without paying some attention to the different types of carriages which may be performed by the air carriers or individual operators. Distinction might be drawn between:

gratuitous carriage and carriage for remuneration,

state and private carriage,

scheduled and charter carriage,

solely air and combined air surface carriage

The first two of these distinctions are covered by the Warsaw Convention insofar as the scope of this Convention is not extended to gratuitous transportation unless performed by an air transport undertaking, and that it is made applicable not only to carriage performed by private parties but to those performed by States.

The undeveloped status of air transportation is clearly evidenced in the many unsolved problems of air charter operations. It is submitted that this question, because of the lack of occurrences and small amount of business carried out through this type of carriage, is nowhere adequately treated, but deserves the full attention of those who are interested in the future of air transportation.

The combined air and surface carriage is also in an early stage of development. Its history and governing rules will be treated separately because of their implications of different nature, involving rules of the Berne (1924) and Rome (1931) Conventions relating to goods transportation by railroads.

a) International Carriage under the Warsaw Convention

In this connection the definition of "international carriage" involving the scope of application of the whole Convention should be clarified taking into consideration the suggestions advanced during the deliberations of the revisionary attempts. According to the Convention "international carriage" means, roughly, a carriage which, according to the relative contract, is between territories of two contracting states or between two points in the same contracting state with an agreed intermediate landing in another state.

> Article 1, 2) "For the purposes of this Convention the expression "international carriage" means any carriage in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is not a party to this Convention. A carriage without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party is not deemed to be international for the purposes of this Convention.
>
> 3) A carriage to be performed by several successive air carriers is deemed, for the purposes of this Convention, 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 of 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 subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party."

During the discussions of the Legal Committee of ICAO in May, 1948, it was decided that the application of the revised Warsaw Convention

should be extended as widely as possible in order that the rules relating to liability of the air carrier might be applied on the broadest possible international basis.

Early Attempts

The Fourteenth Session of CITEJA held in January, 1946, in Paris, considered the scope of the application of the Warsaw Convention and suggested inserting at the end of Para. 2, Art. 1 of the present Warsaw Convention (ICAO Doc. 1560 A.10 13/4/46) a new sentence reading as follows:

"A 'return carriage' and a 'circular carriage' are considered as one carriage according to the terms of the contract."

The draft Convention prepared after the CITEJA Cairo Meeting (ICAO Doc. 2359 LG/5 29/11/46) contains a new definition of inter-national carriage which defines the carriage as international if a landing is contemplated according to the contract in a state other than the state of departure.

> " 'International Carriage' means any carriage (transportation) (performed by a carrier, as hereinbefore defined) in which, according to the contract of carriage, a landing is contemplated (either at the destination of the journey or at any intermediate point) in any territory which is not subject to the sovereignty, suzerainty, mandate or authority of the State in which the place of departure specified in the contract of carriage is situated. The above definition is applicable whether the places of departure and destination specified in the contract of carriage are situated in different States or in the same State."

In effect, this definition of international carriage covers any carriage performed by a carrier of the contracting state, which involves a contemplated landing in foreign territory. However, if this suggestion is read in conjunction with the new Article 30 of the draft convention, it is evident that many complications and conflicts may arise which might rend this suggestion impracticable.

Article 30, (1) "An action for damages may be brought only in the territory of a Contracting State. Subject to the fulfilment of this condition the plaintiff shall have the option to take action either before a Court having jurisdiction where the head office of the carrier concerned is situated or before a Court having jurisdiction where the contract of carriage was made or before a Court having jurisdiction at the place of destination specified in the contract of carriage.

(2) Questions of procedure shall be governed by the law of the Court trying the action."

In December, 1946, Major Beaumont prepared a new draft which contained a revised definition of international carriage (ICAO Doc. 5102 LC/83 22/1/1948).

" 'International Carriage' means any carriage (transportation) by air in which, according to the contract of carriage,

(a) The carrier is a national of a Contracting State (or a company, corporation, partnership or other undertaking registered, or having its domicile in, a Contracting State), the place of departure or the place of destination is situate in the territory of a Contracting State and any landing is contemplated in the territory of a State other than that in which the place of departure is situate;

or (b) The place of departure and the place of destination are situate in the territories of different Contracting States;

or (c) The places of departure and destination are situate in the territory of the same Contracting State and any landing is contemplated in the territory of another State, whether a Contracting State or not; including contracts of carriage comprised in return tickets and relating to circular tours.

Carriage performed by successive carriers is deemed to be one undivided carriage if it was regarded by the parties to the contract as a single transaction or operation, whether agreed upon in the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts has to be performed entirely within the territories of a Single State. For the purpose of the above definitions the expression "Territory of a (Contracting) State" is deemed to comprise not only the territory of the State concerned but also all territories subject to the Sovereignty Suzerainty, Mandate, Authority or Trusteeship of such State." (This was the new proposal submitted by the Rapporteur in Cairo for further consideration).

Roughly speaking, the convention is applicable, in addition to its present scope, to carriage operated by any national of a contracting state provided that the point of departure or destination was in a contracting state and any landing was contemplated in a state other than the state of departure. Otherwise this draft definition follows closely the principles incorporated in the existing Convention, although in a revised language.

August 1948 Draft

The same definition with only slight modifications has been incorporated in the so-called "August 1948 draft" (ICAO Doc. LC-SC Warsaw Working Draft-1 31/8/1948) and was considered but has found no favour with the Sub-Committee "Warsaw" in Lisbon in 1948. The Sub-Committee propounded three new suggestions; the first is based upon the principle that any of the points of departure, destination, or intermediate landing are in different states, one of which must be a contracting state.

> " 'International Carriage' means any carriage (transportation) by air in which, according to the Contract of Carriage, any of the points of departure, destination or intermediate landing are situate in the territories of different States, provided that at least one of these points is in the territory of a Contracting State. For the purpose of this definition the expression "a point of intermediate landing" shall mean a point motified as such in the Contract of Carriage, either specifically or by reference to the carrier's timetables."

The second is based upon the principle that points of departure and destination are in different states, one of which must be a contracting state or the point of departure and destination being in the same state with an agreed landing in another state.

" 'International Carriage' means any carriage (transportation) by air in which, according to the Contract of Carriage:

(a) the places of departure and destination are situate in the territories of different States, at least one of which is a Contracting State, or

(b) the places of departure and destination are situate in the territory of the same Contracting State and any landing is contemplated in the territory of another State, whether a Contracting State or not, including Contracts of Carriage contemplated in return tickets or relating to circular tours. Landing in the territory of another State shall be deemed to be contemplated if it is motified in the Contract of Carriage, either specifically or by reference to time-tables of the carrier."

The third possibility considered by the Sub-Committee was based upon the idea of including any carriage passing out of a Contracting State over another state or the high seas.

In the first instance all the suggestions appear to create difficulties; the first one, for instance, contemplates the applicability of the Convention on carriage between two non-contracting States if there is a landing in a contracting state and, consequently, the only case where there would be certainty that the Convention would be applied is if action were taken in a Court of the contracting state. Should action be taken in a non-contracting state (of departure or of destination) there is a fair possibility that the rules of the Convention would not apply.

Although the second definition is less extensive than the first one, it would include both carriage from a contracting state to a non-contracting state and from a non-contracting state to a contracting state. In effect, it would cover all carriage which either departed or ended in a contracting state (this proposal is in principle the same as suggested by Judge Alten (ICAO Doc. 6014 LC.11 Pg. 122)

> "International carriage means any transport by air when, according to the contract of carriage or contract of affreightment, the place of departure and the place of destination are situate in the territories of different States, even if only one, is a contracting State where the Convention is in force."

This text would increase the possibility of actions being taken in non-contracting states, the Courts of which might not apply the rules of the Warsaw Convention.

The third suggestion was considered by the Sub-Committee as going too far since it would cover internal domestic operations such as from the U.S.A. to Alaska or Canada, and consequently would be an interference with domestic laws.

Major Beaumont, in his Draft Report (ICAO Doc. 6022 LC.119 6/12/48) submits another alternative for consideration.

> " 'Carriage governed by this Convention' means any carriage by air for remuneration, or operated by an air transport undertaking, performed by an aircraft registered as to nationality in a Contracting State, in which, according to the Contract of Carriage, the place of departure and the place of destination are situate either (a) in the territories of different States or (b) in the territory of the same Contracting State and a landing is contemplated in another State, whether a Contracting State or not; including Contracts of Carriage contemplated in return tickets or relating to circular tours."

This draft is based upon the nationality of the aircraft and of the places of departure and destination being in different states (contracting or not) or in the same contracting state with an agreed landing in another state. It may be noted that this definition is rather discriminatory and although it would open up the scope of the Convention in one direction making it applicable between two non-

contracting states, on the other hand, it would restrict it with respect to those aircraft which are not registered in a contracting state, thus, a Portuguese aircraft (if Portugal is not a party to the Convention) performing air services between France and Britain and carrying in these services mostly French and British passengers, such carriage would not fall under the Warsaw Rules. (It might be, of course, that certain discrimination should be aimed through which the states might be compelled to adhere to the new Convention. Failing to do so, shippers and passengers would boycott their carriers on international routes.) Besides this point, it is highly questionable as to whether or not the non-contracting parties would apply the Convention. Major Beaumont's suggestions do not appear to be new as in Cairo he submitted to CITEJA a draft definition which seems to be on the same principle and which has been found impractical at that time.

Wilberforce's Suggestion

During the discussions of the Legal Committee in Lisbon in 1948, Brigadier R.O. Wilberforce endeavoured to solve the problem based on an entirely new principle. This principle was worded by the Rapporteur as follows:

> "This Convention shall apply to all carriage by air for remuneration, or performed by an air transport undertaking, under any Contract of Carriage which is governed by the law of a Contracting State. Provided that, unless a Contracting State shall otherwise enact, this Convention shall not apply when the contract is for carriage to be performed wholly within the territory of a Contracting State. For the purpose of this definition, and without prejudice to the provisions of Articles 40 and 41 (of the draft of August 1948), "the territory of a

> Contracting State" is deemed to comprise not only the territory of the State concerned but also all other territories for the foreign relations of which that State is responsible."

This means that the Convention should apply to any air carriage under a contract which is governed by the law of the Contracting State. Domestic carriage is excepted expressly unless the state concerned waived this exception. It was advanced that such approach will largely extend the scope of the Convention, as the Convention will apply to any number of contracts provided that the particular law of the state irrespective of the point of departure or arrival is applicable. It is claimed that:

(a) There will be only one law which covers every contract and if that is the law of the Contracting State, it applies.

(b) This system would tie with the already recognized system of private international law, namely, the system which decides upon what law governs contracts of carriage, and further,

(c) The principles of these suggestions are those of the present Warsaw Convention according to which it is almost impossible for international carriage under that Convention not to be governed by the law of the contracting state.

Scope of Application of other International Conventions

The Chicago Convention in Art. 96 appears to contemplate the passage of aircraft from one state through the airspace of another without landing.

Article 96 "For the purpose of this Convention the expression:
(a) 'Air service' means any scheduled air service performed by aircraft for the public transport of passengers, mail or cargo.

(b) 'International air service' means an air service which passes through the air space over the territory of more than one State.

(c) 'Airline' means any air transport enterprise offering or operating an international air service.

(d) 'Stop for non-traffic purposes' means a landing for any purpose other than taking on or discharging passengers, cargo or mail."

Such conception seems to be consistent with the Paris Convention of 1919, the Madrid and Havana Conventions, although none of these contain a definition of international carriage. It was pointed out by John C. Cooper, Rapporteur of the Warsaw Convention Special Committee as early as April 9, 1947, in his memorandum on "Definition of International Air Service", that "as all of these Conventions assumed national airspace sovereignty with its corollary, that no aircraft could fly through the airspace of a foreign state without the permission of such foreign state, all definitions were necessarily made to conform with that basic international theory."

Under the regime of the Chicago Convention the operation of a French aircraft between France and Morocco is necessarily international because the flight cannot be made in a direct line unless the permission of a state other than the state of the flag of the aircraft is obtained, even though its place of departure and place of destination are of the same flag territory and there is no intermediate stopping place contemplated It is understood that under such regime a carriage over the high seas or over contracting states is also international.

There is a possibility of excluding from the territory of each contracting state any carriage or transportation to which the laws of that country cannot be applied. In the Chicago Convention, this conception is not new and has already been applied in the United States with respect to bills of lading. The United States imposed on non-contracting states, not subject to its jurisdiction under the Brussels Convention, the requirement of bills of lading and contracts of carriage in the form required by domestic legislation of the United States.

The International Sanitary Convention for Aerial Navigation of 1933 is applicable when the departure and landing are in different territories, or in the same territories but an intermediate landing in a different territory, or when an aircraft flys without landing over more than one territory.

> Article 1 "The present Convention applies only to aircraft -
> (1) of which the place of departure and place of final landing are situated in different territories;
>
> (2) which, although the place of departure and place of final landing are situated on the same territory, make an intermediate landing on a different territory;
>
> (3) which fly without landing over more than one territory;
>
> whether these territories are placed under the sovereignty, suzerainty, mandate or authority of the same Power or of different Powers."

Thus, it extends the application of this Convention to the widest possible extent.

It may be recalled that Art. 10 of the Brussels Convention of 1924 (International Convention for the Unification of Certain Rules relating to Bills of Lading) states that "the provisions of this Convention shall apply to all Bills of Lading issued in any of the contracting states."

The U.S. Act of 1936 provides that every Bill of Lading by sea to or from parts in the United States, in foreign place, shall have effects subject to the provisions of this Act. The U.S. Act of 1916 (Pomerene Act) applies to all outward Bills of Lading and the Canadian Act of 1936 applies to all domestic water carriage bills of lading besides that it applies to all outward bills of lading.

Thus, if the Convention is both ratified and enacted into domestic law as a statute for commerce inward as well as outward bound, every possible method would seem to have been adopted for preventing the makers of bills of lading from ignoring the statute and continuing the old objectionable diversity of bill of lading contracts.

The Convention on the Transport of Goods by Rail signed at Berne, October 1924, provides that the Convention shall apply, with certain limitations, to all goods traffic which is accompanied with a through Waybill for a journey over the territory of at least two of the contracting states.

Article 1 "Railways and Traffic to which the Convention shall apply -

1. The present Convention shall apply to all goods traffic handed in for transport with a through way-bill for a journey over the territory of at least two of the Contracting States, the said goods being carried exclusively over lines included in the list drawn up under Article 58 of the present Convention.

2. The present Convention shall not, however, apply to:

   (1) Traffic in case where the despatching and receiving stations are both on the territory of the same State and the traffic only passes over the territory of another State in transit:

(a) When the lines over which the Traffic is carried in transit are operated by a railway of the State from which the goods are despatched:

(b) Even when the lines over which the goods are carried in transit are not operated by a railway of the State from which the goods are despatched, should the railways concerned have concluded special agreements under which such traffic not be regarded as international.

(2) Goods carried between stations of two adjacent States, should the whole of the journey have taken place over the railways of one of those States, on condition, however, that the consignor, when choosing the form of waybill to be used, claims the regime laid down in the internal regulations applicable to those railways, and that there is no opposition from either of the States."

The Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels is applicable in each Contracting State when the ship for which the limit of liability is invoked in a national of another Contracting State as well as in any other case provided for by the national laws.

Article 12. "The provisions of this convention shall be applied in each contracting State in cases in which the ship for which the limit of responsibility is invoked is a national of another contracting State, as well as in any other cases provided for by the national laws.

Nevertheless the principle formulated in the preceding paragraph does not affect the right of the contracting States not to apply the provisions of this convention in favor of the nationals of a non-contracting State."

Practical Aspects

In September, 1948, it has been argued by the Legal Committee of ICAO that under the present Warsaw Convention a journey from France to Turkey on a return ticket would give action on the Convention only before a Court in France. Nothing could prevent, however, the plaintiff from taking action in the Court of Turkey and there would be no guarantee that the Turkish Court would apply the rules of the Convention.

The result of widening up the scope of the Convention may be that tribunals of Contracting States might apply their own laws and not those of the Convention in case the carriage is not between two contracting parties. It appears that according to the conception of French Private International Law even the French Court would not necessarily apply the Warsaw Convention, if the plane were of a Turkish Company and the persons carried were citizens of Turkey. If the contract, however, was made in France with a French Company or French citizens, the Turkish Court could apply the Convention as the contract would be subject to the French law.

As a result of the endeavour to apply the Convention according to the suggestions of Major Beaumont and of the ICAO Sub-Committee "Warsaw", it may be said that as far as conflicts of laws are concerned, the widened scope of the application of the Convention is coupled with the widened scope of conflicts of laws.

The authors of the original draft have no doubt seen the difficulties which could arise from the conflicts of laws and it is submitted that one of the reasons of the present restricted scope of application of the Warsaw Convention is to avoid, as far as possible, difficulties of that nature. The attempt to ensure that action arising out of the Convention will be taken in the Courts of the Contracting States is a further evidence of the intention of the draftsmen of the present Convention.

> Article 28 1) "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 is ordinarily resident, 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 seised of the case."

Considering the definition by Mr. Wilberforce which would apply the Convention whenever the contract of carriage is governed by the law of the Contracting State, it is submitted that this definition would not bring the desired result. It is true that this definition would enlarge the scope of the Convention but at the same time, it raises such difficulties as, for example, the determination of the country in which the contract of carriage was made and what are the nationalities of the parties of the contract that may impose undue burden on the parties to the contract of carriage. Generally speaking, private international law for carriage might take into consideration at the same time different jurisdictions:

a) the law contracted expressly by the parties

b) the laws of the parties as to their nationality

c) the law of the place where the carrier has his principal place of business

d) the law of the place of departure

e) the law of the place of destination or delivery

f) the law of the place where the contract was to be fulfilled

g) the law of the place where the litigation arose

h) the law of the place which recognizes the validity of the questionable stipulation.

i) the law of the place where the contract has been drawn up and executed

j) the law of the place where the accident occurs.

The Courts will determine the applicable law on the basis of the contract of carriage. The rules of the private international law, as developed in the state, will, consequently, have a great influence as to the applicability of the Warsaw Convention.

The difficulties will especially arise, under the Wilberforce suggestion, if an accident occurs in the territory of a non-Contracting State. It appears that, in this case, the law of that non-Contracting State would be applicable and, consequently, every carrier intending to engage in international services, is bound to know many important informations regarding the states which he intended to fly over and which are not parties to the Convention, such as

a) what is the law governing the liability of the carrier?

b) could this liability be excluded or not?

c) whether he could, by virtue of the contract, limit his liability before the court of that territory of that particular country, etc.

There is no doubt that some of the difficulties could be overcome through specification of kinds of contracts which were deemed to come under the Convention in the draft revised text of the Convention. It is, however, submitted that the Wilberforce suggestion does not help to solve any of the problems and its real effect is to extinguish the definition of international carriage from the Convention. This understanding was expressed by the Chairman of the Legal Committee of ICAO when he queried Mr. Wilberforce, whether in accordance with the proposal he had made "was it necessary to define international carriage in the text"?

The most recent suggestion was put forward at the Fourth Meeting of the Legal Committee of ICAO in June, in Montreal. A new approach was taken in eliminating the words "International Carriage" and incorporating the scope of the Convention in Article 2 of the revised draft text which reads as follows:(ICAO Working Draft #44 - 6/6/49):

> "(1) The rules of this Convention shall apply to all contracts for carriage by aircraft of passengers, cargo or baggage when the place of departure and the place of destination are situate (a) in the territories of different States, at least one of which is a contracting State, or (b) the places of departure and destination are situate in the territory of the same Contracting State and any landing is contemplated in the territory of another State, whether a Contracting State or not, including contracts of carriage contemplated in return tickets or relating to circular tours. Landing in the territory of another State shall be deemed to be contemplated if it is notified in the contract of carriage, either specifically or by reference to time-tables of the carrier.
>
> "(2) For the purpose of this Convention, and without prejudice to the provisions of Articles 40 and 41, the territory of a Contracting State is deemed to comprise not only the metropolitan territory of such State, but also all other territories for the foreign relations of which that State is responsible.
>
> "(3) Carriage by successive carriers shall be deemed to be a single operation of undivided carriage from the original place of departure to the final place of destination if it was arranged by the parties as a single operation, notwithstanding that there may have been more than one contract or that one or more of such contracts had to be performed entirely within the territory of a single State.
>
> "(4) This Convention shall apply to all contracts falling within the provisions of para. (1) performed by States or public bodies when the carriage is available to the public generally; and it may, at the option of such State or body, be made applicable to any such carriage even when not available to the public generally.
>
> "(5) This Convention does not apply to the carriage of the "mail."

The words "The rules of this Convention shall apply to all contracts for carriage by aircraft of passengers, cargo or baggage" were suggested to take into account the fact that in certain States the Convention would be self-executory. This language would obviate the necessity for any implementing legislation in such States.

The proposal that the Convention should apply to carriage from or to a Contracting State goes further than the present Convention.

The expression "When the place of departure and the place of destination are situate in the territory of different States, at least one of which is a Contracting State", takes care of the difficulty under the present Convention which is not applicable to a one-way trip between a Contracting State and a non-contracting State.

The only carriage to which the Convention could not be applied would be flights between two non-contracting States. For reasons abovementioned such carriage is likely to be small.

It should be noted that the new formula proposed subjects to the Convention rules carriage of the character specified. The present Convention deals only with carriage for remuneration or gratuitous carriage by an air transport undertaking.

The method of determining who is "responsible for the foreign relations" of "territories" as used in this paragraph might present some difficulties. It is submitted, however, that this formula was introduced for the first time in the Convention on the International Recognition of Rights in Aircraft, and since it was the latest formula to determine the conception of State, it would be convenient if it could be adopted.

This paragraph originally contained statements as to two circumstances in which the Convention would not be applicable, (a) in the case of carriage of mail effected under arrangements with Postal Authorities, and (b) carriage performed in extraordinary circumstances outside the normal scope of air carriers' business, including a first flight of an experimental nature over a new route, but not including a series of flights over any such route with a view to the establishment of a regular service if such flights were not authorized by the competent authority or authorities.

The second suggestion would eliminate the principle of Article 34 of the Warsaw Convention and is even contrary to the general idea incorporated in the first suggestion: the States' option to exclude certain carriage from the scope of the Warsaw Convention. The only point which might justify the adoption of this position is that carriers would have, in all cases, the benefit of limitation of liability. In certain countries (the United States) this is of great advantage, but in others where liability of the carrier can be validly excluded, this argument has no significance at all.

Paragraphs 4 and 5 of the draft article 2, incorporate two entirely new conceptions and, thereby, they appear to reverse completely the conception of the present convention. In substance, these paragraphs provide that:

a) carriage performed by States or public bodies, if not available to the public generally, may at the option of such States, not be governed by the Convention, and,

b) carriage performed by carriers outside the scope of their business be also governed by the Convention.

As a result, carriers cannot validly limit or exclude their liability, in countries where it is permissible, for experimental flights.

The first of these two new ideas might invoke undue competition on the part of certain States, notwithstanding the difficulty of interpreting the expression "public bodies". The United States Delegation, the main promoter of this suggestion, wanted only to exclude such State operated flights which, as the airlift in Berlin, carried civic passengers for remuneration, but were generally not open to the public.

Conclusions and Recommendations

The problem involved in the definition of international carriage is extremely difficult and it boils down to the complicated issue as how to make an international convention applicable as broad as possible to private contracts between private individuals.

This is the point which makes it necessary to differentiate between this type of international Convention and the "Chicago Type" Conventions. It is submitted that the former is affecting private interests which are international in their scope, the latter type characterizes those Conventions which regulate relationships between states in the first instance, and are influenced by political considerations rather than contemplation of conflicts of laws affecting individuals. Consequently, while these latter types can be broadened in their scope almost indefinitely, if the contracting states so desire, the Conventions on the different aspects of private international law must be relatively limited in their scope, taking into consideration the many conflict of competing applicable laws which could govern the case.

It is well recognized that there must be a legal tie between the Convention and the actual situation and this legal tie will be the basis on which the different national courts will apply the Convention. From the suggestions so far, it appears that two different approaches create this legal tie and are to be considered:

i) geographical description of the scope of the Convention

ii) attaching the limits of application of the Convention to an aspect of the existing rules of private international law.

It is felt that the present Convention taking the point of departure and of destination as a criterion to define the application of the Convention worked without any practical difficulty in the last sixteen years of operation of the Warsaw Convention and the geographical terms in the present Convention made it rather easy to recognize whether or not the Warsaw Convention applied to a particular carriage.

The difficulties arising out of the efforts of widening the scope of the Warsaw Convention, are the consequence of neglecting the principle according to which two contracting parties cannot bind a third one. It is submitted that when the Warsaw Convention was drafted the intention of the draftsmen was to achieve the widest possible scope of the Convention and, at the same time, the endeavour to achieve uniformity appeared to be more important than to enlarge the scope of the Convention and thereby creating uncertainty. Thus it is recommended that the present definition of International Carriage

should be maintained if the Warsaw Convention is to be revised as this definition secures, automatically, the widest possible uniformity under any size of acceptance of the Convention.

b) Transportation under the IATA Conditions of Carriage

Paragraph 1 of Article 2 of the document issued March 29th, 1949, reads as follows:

> "This tariff shall apply to all carriage of goods, including all services incidental thereto, performed by Carrier; provided, however, that if, according to the contract of carriage made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transshipment, are situated either within the territory of two High Contracting Parties to the Convention, or within the territory of a single High Contracting Party to such Convention if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though such Power is not a party to such Convention, such carriage shall be subject to the provisions of such Convention and to this tariff to the extent that this tariff is not inconsistent with the provisions of the Convention.
>
> "The High Contracting Parties herein referred to include the countries listed below. (The tariffs list here all countries that have ratified or adhered to the Warsaw Convention). The Convention is open to ratification or adherence by additional countries at any time and likewise may be denounced by any High Contracting Party, at any time, on six months' notice. Carrier assumes no responsibility for the accuracy or completeness of this list."

Since the applicability of the Warsaw Convention is restricted to certain type of international carriage, it had to be determined to what carriage the general conditions of carriage would apply.

a) should it be only applicable to international carriage coming under the Warsaw Convention, or

b) to all international carriage but not to domestic carriage, or

c) to all commercial carriage without exception?

It was decided as early as 1930 in Antwerp (Prewar Conditions of Carriage) that the third system be adopted as the others would entail, in the event of an accident, claims of completely different nature regarding goods carried by the same aircraft.

The new Conditions of Carriage settles down that the system of the Warsaw Convention will be rendered applicable to all means of transportation liable to fall within the field of implementation of the convention, and for the international transports not ruled by the Warsaw Convention, they will be dealt with according to the law of the court seized, the carriers relieving themselves outright, -within the limits authorized by the applicable law- from any liability even in case of a major fault or of an act of negligence on their part.

Apart from the inflexible character which this principle bears in its second proposal, it is necessary to underline that it is entirely different from that which had been taken as a basis for the elaboration of the former I.A.T.A. conditions of carriage and whose provisos could as Mr. Lemoine indicates in his "Traite de droit aerien" be summarized as follows:

1) "the first ones regarding international transports according to the terms of the Warsaw Convention reproduce the provisos of this convention in furthering their application to the other means of transportation within the possible limits of the national legislations",

2) "the second ones set down a certain number of regulations regarding non international transports among which the most important regulations concern the liability of the carrier. They lay down as a principle that this liability will be appreciated in the light of the Warsaw Convention. However, it is stipulated that if this system is delcared to be inapplicable by the competent court before which the action has been brought, the liability of the carrier will be excluded within the allowable

limits. If the exemption from liability is not admitted, the carriers will profit of all the limitations admitted by the law of the court seized."

3) "If the carrier is not compelled to abide by a given law, the conditions stipulate that the law of the contract will be the national law of the head office of the company, actions arising out of the contract will have to be brought before the court of the said head office. We are doubtful, as we have stated it above, that this clause would be accepted as valid in all cases by the different courts. In particular in France, the so called "gare principale" legislation would likely bring the judges to refuse to admit the lawfulness of the clause under consideration and to consider the action brought before them as if it were, for instance, an action brought before them by a passenger having taken his ticket in France at the office of a foreign company on whose plane he would have had an accident in France."

It is undeniable that the system thus summarized offered positive advantages compared to the one which is adopted at the present time. On one hand it led to an extension of an international text whose qualities are no more to be proved, and on the other hand, thanks to this conventional development tended in practice to end up in the uniformity of the aeronautical law. Lastly, it revealed itself as being more advantageous for the customer without any important drawbacks for the carrier.

c) Carriage under Charter Contract

The first International Conferences on Private Air Law held at Paris in 1925 decided to put the question of charter and hire of aircraft on the future programme of the then established CITEJA. Two reports were prepared, one by Cogliolu (Italy) in 1937 and one by Maniatropoulos (Greece) in 1946.

The Warsaw Convention of 1929 makes no specific reference to charter operation and the reason for that might be the same as expressed by Cogliolu in his report in 1927, that the charter business was relatively small and, in many of the countries represented in CITEJA, the volume of such business was negligible.

As early as 1938, it became evident that the charter business was rapidly developing and that through the revision of the Warsaw Convention the public should be adequately protected in case the charter contract covers international carriage, as defined in the Convention. In connection with this project, it was felt that the liability toward passengers arising out of charter operation must be coordinated with the liability of carriers in such operations where the owner and operator are the same party and the passenger and shippers are directly in connection with them.

National Legislations

At present, the charter operations and the liability of the charterer, operator, owner regarding passengers and shippers are governed by the different national legislations.

In France, generally, the owner of an aircraft usually remains in control of the aircraft and is liable, in solidarity, with the charterer (hirer) for the violations of obligations undertaken by contract or implied by law. An exception to this rule, however, is made in case the charter party is registered when the hirer is regarded as the operator and the owner is free from liability.

In England, distinction is made between:

i) hire of an airplane without pilot, crew and equipment

ii) hire- purchase

iii) hire of an airplane with pilot and crew:

a) under the control of hirer

b) under the control of the owner

In the first two cases, it is held that the hirer steps into the shoes of the owner for the purpose of statutory liability of the Air Navigation Act, if the period of hire exceeds fourteen days. While in iii) a), it is arguable as to who should be responsible under the terms of the Warsaw Convention, in iii) b), the owner assumes liability with respect to passengers and shippers for damages resulting out of the operation of the chartered aircraft.

The question whether the owner was liable for acts of the captain of the ship depends on whether the owner at the time of charter gave the charterer a power and a right independent of him and without reference to him to do what he pleased with regard to the captain, the crew and the management and employment of the ship.

In such a case, the owner was completely free from any liability and the agreement qualified for a demise of the ship. The test of the case is whether or not the owner has parted with the whole possession and control of the ship (Scrutton on Charter Parties, 15th Edition, Notes, Pg. 5.).

> "Apart from statute, it is submitted that a claim against the owner of an aircraft arising out of damage done by it, for instance, by collision with another aircraft, must be based upon the negligence either of the owner or of his servants or others for whom he may be responsible. Mere ownership cannot give rise to a liability at common law, and no proceedings in rem are available against the aircraft as would lie in Admiralty against a ship" (McNair - The Law of the Air, Pg. 154).

In the United States, three types of carriers are recognized: (a) Common Carrier, (b) Contract Carrier, (c) Private Carrier.

While the liability of the common carrier is strictly regulated in common law, the last two categories, in which are included most charter operations, are left considerably unregulated and it might well be that a charterer could exclude his liability, or could limit his liability, otherwise than described in the Warsaw Convention. The justification for this situation was described by A.W. Knauth in his observations on the question of affreightment in 1946 (CITEJA Document No. 12) as, that the natural development of charters at that stage should not be limited through burdensome rules imposed upon them.

It may be of interest to note that the American Courts, in interpreting the Harter Act, developed a line of cases in sea transportation according to which the carriage of an entire shipload for

for single shipper is "private" carriage and not "common" carriage and, consequently, it is not governed by the Harter Act. The test of the "private" carriage doctrine appears to be whether the cargo was shipped by a single shipper or by two or more. In case there was one shipper only, this shipper and the carrier could make any contract without the consequences of the restrictions incorporated in the Harter Act. (According to this Act, as long as the Bill of Lading issued in connection with charter parties is not negotiated, the makers of a charter party may exclude liability arising out of negligence). It is recognized that there is a freedom of contract in respect of charter parties but it is also well established that the master of the ship has no authority whatever to change or modify the charter party contract by means of the Bill of Lading. The Bills of Lading issued by a charterer on his own forms and signed by the charterer's agent "for the master", in accordance with the master's written authority, bind the vessel, the shipowner and the charterer. (Knauth, Ocean bill of Lading, 1947, Pgs. 145-146).

The review of the national legislations shows a complete lack of uniformity, which is further complicated through the conflicts of applicable laws and the rule of the Warsaw Convention prescribing the compulsory issuing of Traffic documents. This last requirement may present great difficulties, especially when an aircraft is in a foreign airport where no traffic clerks

are at its disposal. It may be, however, that the plane is used by the charterer for the carriage of friends on various journeys, or it may even be used commercially for transportation of passengers and cargo. It seems to be reasonable that in such cases one of the parties should be made uniformly responsible, not only for the issuing of documents required by the Convention but also to give reasonable notice to the public of the terms under which the carriage is performed.

Classification

Prior to giving detailed consideration to the attempts to codify and to adopt uniform rules for air charter transportation, the various kinds of charters should be briefly classified. Similarly to sea transportation, three major categories can be established:

1) Charters by Demise,

2) Time Charters, and

3) Voyage Charters.

The important distinction between categories 1) 2) and 3) is that in the two latter, the owner of the ship remains in possession of his plane (ship) with all the important legal consequences that flow therefrom. (Appendix 2).

1) Charter by Demise

If the charter operates as a demise or lease of a plane with or without the services of the pilot and crew, the charterer becomes, for the time of the charter, the owner of the aircraft. The pilot and crew, if supplied, become for the time the servants of the charterer and through them the possession of the ship is in him. (A charter by demise of a ship without master or crew is sometimes

called, in sea transportation, a "bare boat" or "net" charter, and the ordinary Time Charter is sometimes called a "gross" charter).

2) Time Charter

Time Charter is generally the case when the owner agrees to the charterer that during a certain period he will render services by his pilot and crew to the goods which are put on board his plane by or on behalf of the time charterer (the ownership and possession of the aircraft remaining in the original owner through the pilot and crew, who continue to be his servants).

3) Voyage Charter

Voyage Charter differs from Time Charter primarily in that it is a contract between the owner and charterer to carry specified goods on a defined voyage or voyages.

According to the preliminary draft Convention on Charter and Hire prepared in 1946 by the Rapporteur of CITEJA, charter and hire of an aircraft is defined as follows:

> "There is hire of an aircraft when the apparatus is furnished without crew and without equipment" (Coquenue).
>
> "There is charter of an aircraft when the apparatus is furnished with crew and with the necessary equipment and is ready to be used" (ICAO Doc. LC 11 14/7/47, Pg. 1).

Thus, hire is used here as equivalent to charter by demise; the services of the pilot and crew, however, are always excluded from this conception and the expression "charter" covers the categories "Time" and "Voyage" charters.

Characteristics of the Different Categories of Charter in Common Law.

Although nearly all the cases of demise are old cases and their authority has been somewhat shaken by modern decisions, the chief results of the construction of a charter as a demise in sea transportation, however, are significant:

a) the owner, not being in possession, has no lien at common law for freight;

b) the owner is not liable to shippers even if they do not know of the charter;

c) the owner is not liable to the charterer for acts of the master and crew;

d) the master of the ship becomes the agent of the charterer, etc.

In "Time" and "Voyage" charters:

a) the owner remains liable to the shippers, passengers and he also assumes liability with respect to the charterer for the acts of the master and crew;

b) the master, although employed by the owner, may by agreement between the owner and charterer acquire authority to sign Bills of Lading on behalf of the charterer but he remains in all other respects the servant of the owner and such agreements do not free the owner from liability (to third parties, shippers or passengers);

c) the charterer in these last two categories cannot recover damages for negligence from a tort feasor (who has damaged the ship) for the loss of use of the ship during repairs, for which time, on the Time Charter, he may remain liable to pay "hire".

Attempts for international codification

During the discussions in CITEJA and in the Legal Committee of ICAO in the last three years, much has been done to clarify the problem of charter and hire, and Major Beaumont, Rapporteur of the ICAO Sub-Committee "Warsaw" continuously endeavors to incorporate the different suggestions in the revised draft text of the Warsaw Convention.

The relationship under consideration is the one between the owner, operator of an aircraft on the one side, and the passengers or shippers on the other, to determine who should be regarded as carrier in the charter operations and, consequently, who should be responsible under the Warsaw Convention:

a) in case of breach, non-performance of, or non-observance of the contract of carriage;

b) for claims for damages arising out of death, injury, loss, damage or delay during the performance of the carriage.

The defect of this project is that it does not treat the entire question of charter and hire and such problems as the liability to third parties and the relationship between the charterer and owner and operator, etc., remain unregulated.

The deliberations during the meeting of the Legal Committee of ICAO evidenced that aircraft leases ("bare boat" charters) have clear regulations in common law and the respective charter provisions in the new Warsaw Convention should not extend beyond the scope of Time Charters and Voyage Charters.

The express intention to incorporate provisions regulating charter operations in the Convention is for the following reasons:

a) to provide the public with adequate protection by making the rules of the Warsaw Convention applicable to all sorts of charter operations;

b) to avoid unfair competition on the part of the charter operations by prescribing the same treatment as to liabilities and obligations as if the carrier, owner and operator were the same party.

After the Third Session of the Legal Committee of ICAO in Lisbon, Major Beaumont drafted the following text for incorporation in the Warsaw Convention (ICAO Doc. 6022, LC.119, 6/12/48):

"(1) In the case of a charter, the operator of a chartered aircraft is deemed to be the carrier for all purposes of this Convention, whether or not his name is shown as the carrier under the provisions of Article 3 (2)(b), Article 4 (2)(b) or Article 8 (2)(a), as the case may be; and he shall be responsible for the delivery of passenger tickets and baggage checks under the provisions of Articles 3 and 4, and for furnishing the particulars in Consignment Notes required by Article 8 (2). In cases where the charterer employs the aircraft in carriage for remuneration, he also shall be responsible for the delivery and due completion of the appropriate documents of carriage as aforesaid, and in such cases the operator and the charterer shall be jointly and severally liable for any claims for damages for which both are, or either of them is, liable as carrier under the provisions of Chapter IV of this Convention.

(2) Nothing herein shall be taken to prevent the charterer (a) from undertaking, as the agent of the operator, the obligations of the operator as carrier under the provisions of this Article; or (b) from indemnifying the operator against any claims against or liability of the operator under the provisions of this Article.

(3) The operator of a chartered aircraft, and his employees, shall be entitled (but not obliged) to require from the charterer or his employees particulars of all passengers and of all or any baggage or cargo carried on any journey or

flight during the currency of the charter, in order to establish the names of passengers and consignors concerned, and the number, weight and nature of the pieces of baggage and cargo carried, and their condition at the commencement of any journey or flight.

(4) The charterer of an aircraft shall not be deemed to be the operator merely by reason of the fact that, under the provisions of the Charter Agreement or otherwise, he is entitled to specify the journeys or stages to be performed during the currency of a charter.

(5) For the purpose of a charter, as defined in Article 1, all members of the crew engaged in the operation of the aircraft shall be deemed to be employees of the owner or operator thereof for the purpose of this Convention, notwithstanding that one or more of them is or are not actually employees of the owner or operator under an employment agreement or otherwise".

These provisions should be read in conjunction with the three definitions suggested by Major Beaumont on "Charter", "Operator" and "Owner":

a) "Charter" of an aircraft means the case when an entire aircraft, together with the crew required for its operation (whether or not actually employees of the owner or operator) is hired by the owner or operator thereof to a charterer for a particular voyage or series of voyages (Voyage Charter) or for a specified period (Time Charter)".

b) "Operator" means the party who had the right to control movement of the aircraft from place to place either personally or by means of an employee or employees subject to the overriding control of any Government authority".

c) "Owner" means the party in whose name the aircraft is registered as to nationality".

(a) Regarding the definition of "Charter" it is interesting to note that the entire aircraft must be hired by the charterer, thus charter of half of an aircraft is not regulated by the new rules. This limitation is in harmony with Para. (2) of the Resolution 045 of the IATA Traffic Conferences:

"RESOLVED, (1) that all charter agreements by members of this Conference covering the sale of space for use in the transportation of passengers or cargo shall contain a stipulation that the party to whom such space is sold will not resell or offer to resell it to the general public at less than IATA fares and rates, and no member operating charter service shall sell any space thereof to the general public at less than IATA fares and rates;

(2) that all charter agreements by members of this Conference covering the sale of space for use in the transportation of passengers or cargo shall be with an individual person, company, corporation or government agency, and the charter price shall be on a complete plane-load basis;

(3) that the above provisions shall not apply to the sale of space to governments or government sponsored organizations for use in the transportation of immigrants or displaced persons; provided that the charter price shall in all such cases be on a complete plane-load basis; and

(4) that nothing contained above shall be construed as precluding agreements between IATA members and/or other air carriers with respect to the chartering of aircraft to each other, and the above provisions shall not apply to any such agreement."

(b) The definition of "Operator" is of the greatest importance as it defines the party who qualifies as carrier for the purpose of the Convention, and, consequently, determines the party who is liable to the Passengers and Shippers.

The determining factor in this definition is "the right to control movement of the aircraft". Considering the usual categories of charter operations, this text may offer different solutions.

In Voyage Charter, the charterer, in effect buys transportation between two or more agreed points and has no right whatsoever on the basis of his contract to change the route, or destination. Consequently, in this case, the operator is the party who actually directs the operations of the plane and with whom the charterer entered into agreement.

In Time Charter, the owner of a plane or a party who occupies himself with chartering planes, and who supplies crew and equipment, agrees to make the plane available and ready for use of the charterer who has the freedom:

i) to use it for his own purposes,

ii) to sell space in it to individuals or companies, or

iii) to carry goods for remuneration during a specified period.

Reading the above-quoted definition literally, it appears that he has a right to control the movement of the aircraft from place to place and that he has the right to give orders to the captain, to change the course of a route or the destination, etc. Consequently, according to the definition, he, the charterer, qualifies for the expression "operator".

(c) For the purpose of record, it should be recalled that the definition of "owner" appears satisfactory and needs no comment.

The quoted Charter article should be considered in the light of the above definitions and comments thereupon. For the purposes of the Convention the operator is deemed to be the carrier. The reason back of this consideration is the recognized practice in charter cases, that the owner and the party supplying equipment, pilot and crew are different parties and that the operator controls the operation of the aircraft and its crew, although the charterer is the one who enters into a contract of carriage with the passenger or owner of cargo. The advocates of this suggestion do not feel that it is equitable to saddle the charterer with liability for claims arising from accidents, or from failure to perform the contracted carriage, when operations are under the control of the

operator. Should the operator not provide the chartered aircraft, or if it is unsatisfactory, the charterer would have his remedy against the operator under the Charter Agreement. The controversy arising out of the present definitions of operator has already been analysed.

The official IATA point of view, as expressed in the Minutes of the Second Meeting of the Warsaw Convention Special Committee was that

> "all parties to the charter of aircraft used for transport purposes (either owner, operator, lessee, or charterer - but not including holder of bare legal title as basis for security transaction) should be deemed to be carriers and should be jointly and severally liable under the Convention".

Both positions are arguable and it is believed that it is a matter of policy rather than legal consideration to determine the position of the carriers regarding charter operation in the future.

The second sentence of the first paragraph deals with the case where the charterer himself uses the chartered aircraft for carriage against remuneration and it is intended that, in this case, the charterer be jointly and severally liable with the operator.

The endeavour to protect the passengers and shippers in case of an aircraft being chartered to an individual or organization not financially stable made it necessary to incorporate such a provision, which is expected to ensure that owners and operators of aircraft would exercise special care when chartering aircraft to carriers intending to employ them in carriage for remuneration. It appears

that such provision would not protect large enterprises from claims arising out of operations carried out by companies with very limited financial responsibility (One Plane Company, Limited) should the big enterprise operate on a charter basis through such means.

Para. 2 of the draft quoted above intends to incorporate the possibility of indemnification of the operator by the charterer if so desired.

Para. 3 is necessitated by the requirement of the Convention that the carrier must supply Traffic documents.

Para. 4 intends to make it clear that although the charterer may have the right in Time Charters to specify the journey or flights which should be undertaken, this should not have the effect of constituting him the operator or carrier for the purpose of the Convention.

Para. 5 deals with the case when one or more members of the operating personnel might not actually be an employee of the operator and might, in fact, be servants of the charterer. In the suggestion of Major Beaumont, all members of the operating personnel are employees of the owner and operator.

It should be recalled that as early as April 28th, 1947, Mr. E. Alten, the Delegate of Norway to the First Assembly of ICAO, raised the interesting question whether compulsory provisions concerning the liability of the carrier should be applicable to the relations between the owner (proprietor or lessee, having disposal of the aircraft) and the charterer. In his opinion, at that time,

no compulsory provision should be applicable in this relationship:

"The amount of the freight depends upon transport conditions, and as according to maritime law, the parties to the charter contract - by voyage or by time - should have the right, in my opinion, to freely negotiate and make a contract covering all the conditions affecting transport, including the clauses of exoneration from the liability of the owner, there is no need to protect the charterer in this respect. It therefore follows that Article 23 of the convention (Article 25 of the draft) should not apply either to the charter contract for an aircraft, or to the consignment note delivered to the charterer in as much as the latter remains the holder thereof.

"If, however, the consignment note delivered to the charterer is negotiated, or if the owner issued a consignment note against a charter contract, directly to a Third Party (sub-charterer or consignor) the provisions of the convention relating to the liability of the carrier should apply to the relations between the owner and theThird Party holder of the note, excepting for the claims of the owner against the charterer in the case of his incurring in respect of a Third Party a liability greater than that of the charter contract.

"This regulation regarding liability would correspond to that which has been introduced in maritime law by the Brussels Convention on bills of lading, Article 1, Section B, as follows:

' (b) "Contract of Carriage" shall apply to a contract of carriage supported by a bill of lading or any other similar document giving title to the transportation of merchandise by sea; it shall also apply to the bill of lading or similar document issued against a charter party as from the time this title governs the relations between the carrier and the holder of the bill of lading'.

"... It seems to me that subsequent provisions should include the chartering of an aircraft, entirely or partially, for the transportation of goods, and that it should depend upon the contract whether the owner shall accept several consignment notes or one only including all the cargo contracted for.

"Insofar as carriage of passengers is concerned, passenger and baggage tickets should always comply with the convention". (ICAO DOC. 4072 A1/LE/12 6/5/47.)

According to this suggestion, in substance,

1) the charterer unless otherwise agreed in the charter contract, would be free of obligations;

   a) whether he carries his own goods, or

   b) issues consignment notes to sub-charterers.

2) the owner

   a) would be able to limit or exclude his liability in case of transportation of goods when contracting for a charter party, but

   b) the rule of the Warsaw Convention would be applicable

      i) if the charterer issues consignment notes against the charter contract

      ii) if he negotiates the consignment note covering the charter party, and

      iii) in case of passenger transportation.

Comparing this position with the draft Article 20 of Major Beaumont, three major divergencies appear to be present in the latter:

A) the rules of the Warsaw Convention are made applicable for all charter operations where an entire aircraft is hired by the owner;

B) the charterer is made jointly liable with the operator in case he employs the aircraft in carriage for remuneration (the reason for which has already been analysed);

C) the new conception of operator has been introduced.

To sum up, the present Beaumont draft regarding charter is complicated and, consequently, might become unfair to the public. Further,

a) it introduces the expression "operator" and makes him carrier for the purpose of the Convention;

b) the definition, however, offered for this new term is such that it would undoubtedly receive different interpretations from national Courts;

c) by choosing the "operator" as the party liable under the Convention, the well established rules of common law have been changed, and

d) by bringing all charter operations under the regime of the Convention, the draft shows a complete deviation from the established rules of sea transportation.

It is submitted that there is no need for including such a lengthy article in the revised text of the Warsaw Convention, as it is felt that the definition "Carrier" also included in the ICAO document (Working Draft #1 31/8/48) and which reads:

> "Carrier means the owner or operator of an aircraft who knowingly carries or agrees to carry a passenger, cargo or baggage",

together with the definition of "operator" could be adequately amplified to cover most of the aspects of the transportation carried out through the means of charter. The present definition of carrier, covering both owner and operator, was found suitable in all phases of operations to qualify for "carrier", with the exception of charter operations, and there appears no reason why this general rule could not be extended to the question of charter.

The only point which needs to be covered through the inclusion of a special article is the case when the charterer uses the chartered plane for remuneration.

The Sub-Committee Warsaw adopted in June, 1949, a new text which reads:

> "1. In cases where the charterer employs the aircraft in carriage for remuneration, he and the operator shall be jointly and severally liable under the provisions of Chapter IV of this Convention.
>
> "2. The provisions of Article 25 (1) shall not apply to the relations between the operator and the charterer."

It has been possible to shorten Article 20 of the draft of August, 1948, because of new definitions adopted as follows for insertion in Article 1:-

> " 'Contract of carriage' means any agreement to carry passengers, baggage or cargo by aircraft made by a carrier with a passenger, consignor or charterer."
>
> " 'Charter' means a contract of carriage relating to the whole capacity of an aircraft on a particular voyage or series of voyages (voyage charter) or on voyages to be ordered by the charterer during a specified period (time charter)."
>
> " 'Carrier' means (a) the operator of an aircraft who has made a contract of carriage; and (b) a charterer who has entered into a subcontract of carriage to be performed by the chartered aircraft."
>
> " Operator" - no definition was agreed but the following propositions are under consideration:
>
> "The term 'operator' means the party or parties on whose behalf, directly or indirectly, a person puts an aircraft in motion."
>
> " 'Operator' means the owner, lessee or other party who is in lawful possession of an aircraft and uses it on his own account."

This definition seems to be reasonable but the Representative of the United States suggested the following addition:

> "In case such possession is not in the owner, or where the operating personnel are not his employees, the court concerned shall be free to examine the relationship of the parties having different interests and if the arrangement between such parties has been made with intent to escape liability, the court may decide the party or parties to be considered liable as operator."

As an alternative to this text, the following draft was also submitted:

> "If the name of the operator is not entered on the aircraft register or other official documents, the owner is deemed to be the operator in default of proof to the contrary."

The new charter provisions are very much in line with the suggestion made in the previous paragraph, and although it is not officially adopted by ICAO as yet, it appears to have two great advantages: a) it is short and consequently fair to the public and b) it is consistent with the established rules of sea transportation.

It is suggested that in defining the word "operator", a new description should be introduced characterizing more specifically his activities. An operator has a right: a) to control the maintenance, b) handling, c) traffic, d) publicity, e) employment, f) repairs, etc. of the aircraft, besides "controlling" its movements from place to place, which term appeared to present some difficulty. For the purposes of the Convention, the operator should be defined through his most significant characteristic, that he offers air services to the public whether directly or indirectly:

> "Operator" means the party who directly or indirectly professes to offer air services to the public and is in control of the performance of the aircraft either personally or by means of an agent, employee or employees.

Through this draft text, the difficult conception of "possession" would be eliminated from the international convention.

One other approach to the solution of the problem could be the incorporation of a mandatory requirement in the Convention regarding the charter contracts, similar to the passenger ticket and air waybill.

d) Combined air-rail Carriage

In 1931, representatives of IATA and the U.I.C. commenced the study of the problems affecting a system of combined air-rail shipment of goods. It was indispensable to create a uniform "Contract of Carriage" and adopt uniform "Conditions of Carriage" different from those in use by the air transport and railway companies respectively. A multilateral agreement was adopted by IATA in September, 1932, and by the International Railways Union in March, 1933, which provided for a special form of Consignment Note for combined air-rail shipments and for "General Conditions of Carriage of Goods by Air and Rail".

This agreement was in general use throughout Europe prior to World War II.

Some of the Characteristics of the agreement concerning carriage of goods by air and rail might be recalled here. Rail and air transport undertakings expressed their desire to accept goods for despatch and carriage by combined air-rail transport if the carriage is international. It is important to mention that the regime of this agreement is restricted to international carriage, and in Article 10 of the Agreement, both the railway and air transport companies promised that they would endeavour to extend the application of the agreement to domestic (internal) combined air and rail transportation.

Article 2 of the agreement makes the "General Conditions of Carriage of Goods by Air and Rail" and the "Tariffs" relating to carriage of goods, issued by rail and air carriers, parties to the agreement, applicable to the combined international air-rail transport. Further it expressly

provides for a special transport document/consignment note, which is going to be issued under the regime of the above referred general conditions of carriage of goods by air and rail.

It has been agreed (in Article 5) that the last carrier shall affect recovery of all the sums due arising out of the contract of carriage including rates, miscellaneous charges, customs charges, C.O.D. payments and other charges.

The most important part of the agreement is the one settling the question of liability. It has been agreed that in the interest of all carriers, in case of a claim or of an action for non-performance of the contract of carriage, the carrier against whom the action was taken will represent all the other carriers, notifying them of the existence of such action and requiring their instructions. The carrier who has settled a claim for non-performance of a contract of carriage is entitled to the return of the amount paid in settlement by the carrier or carriers who are actually responsible.

In case it is not possible to decide which of the carriers is responsible for the non-performance of the contract of carriage, the amount of the paid settlement shall be divided in proportion between the participating carriers. Disputes arising out of this agreement will be solved by arbitration.

The scope of the General Conditions of Carriage by Air and Rail to which the Agreement makes express reference is set in Chapter 1, according to which these conditions are applicable to all carriage of goods accepted by Air or Rail Transport Undertakings who participate in the carriage of goods by air and rail by direct combined transport effected partly by aircraft and partly by rail.

The regime of these Conditions appears to be more extended than the scope of "International Carriage" as defined in the "Convention for the Unification of certain Rules Relating to International Air Transport" (Warsaw Convention) and in this respect it follows the concept of the Berne (1924) Convention.

Chapter 2 provides for a special form of the Consignment Note which must be made out in three original parts by the Consignor (the Warsaw Convention is governing here). We find that the consignment note must contain a number of particulars including those prescribed by the Warsaw Convention.

Article 6 evidences the compromise between the different (air, rail) regulations. It provides, in conformity with the Berne rules, that air and rail carriers will accept all kinds of goods admissible to carriage provided that:

a) the consignor complies with the conditions;

b) the carriage is possible;

c) force majeure does not prevent the carriage;

d) the carriage of the goods can be effected immediately.

Since the very beginning of air transportation, air carriers attempted to exclude the heavy burden of the common carrier liability and although these efforts have been ineffective in the United States, it was fully successful in England. It is, therefore, quite natural that British carriers insisted upon the insertion of an adequate provision into the General Conditions of Carriage to which they could avail themselves

before the English Courts. To satisfy this specific need, it is further provided that "air carriers reserve the right to refuse to enter into any contract of carriage without giving any reason". (Para. 4 Art. 2).

Article 7 of the Conditions provides that the Contract of Carriage is made effective when a carrier has accepted goods for carriage with the Consignment note.

The rest of the Articles of the Combined Conditions of Carriage have no importance from the point of view of this Study.

During the war, virtually all the agreements were allowed to lapse.

Subsequent to the war, the matter of combined air-rail shipments has been discussed in various quarters.

a) The International Chamber of Commerce expressed the desire that Article 31 of the Special Warsaw Convention 1946 be modified and that a resolution be adopted drawing attention to "the necessity for provisions for combined carriage effected partly by air and partly by another means of carriage".

b) In November, 1946, CITEJA made the following recommendation:

"Considering the practical advantage that would be offered to international carriage and commerce by the possibility of issuing one single document for the carriage of goods to be effected by various means of carriage, sea, rail, air, road:

"EXPRESSES THE WISH":

"that the Provisional International Civil Aviation Organization (O.P.A.C.I.) should take an initiative for convening a Committee of Experts with practical and juridical qualifications in every branch of carriage, in order to prepare a draft Convention settling the questions pertaining to this kind of international transport; and this, either through its own organs or by applying to any government that might appear interested in the cooperation and unification of the rules in this matter".

c) IATA also considered the question, but up to date, no official

position has been taken; it seems, however, that this organization is not devoting much attention to the matter at this stage. In connection with the revision of the Warsaw Convention there are more important problems to be solved, and the international air carriers are primarily interested in them.

Outside any idea of competition, ground and air carriers have an evident interest in taking up in common the investigations open before the war, to bring the Agreement of 1932 up to the level of the progress realized since that date, and to endow combined air-rail carriages with a unified juridical regulation.

It might be recalled at this point that, under the regime of the Agreement, ground and air carriers each retained their own liability in air and railway law. But, while the ground carriers find, in para. 4, Article 2 of the International Convention for Goods Carriage (C.I.M.) the freedom to act contrary to the scope of the Convention and they might adopt a conventional regime taking into account the specific requirements of combined air-rail traffic, the air carriers are always bound and cannot escape the stringent rule laid down by Article 31 of the Warsaw Convention, and which reads

> "1. In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of Article 1.
>
> 2. Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air."

In these circumstances, the only possibility of the unification of the juridical procedure of combined air-rail carriage would be the adoption for railway traffic the rules binding to air traffic. This solution would amount in fact to a considerable restriction of the contractual liability of railways by bringing it down to the level of the definitely less extensive obligations provided by the Warsaw Convention.

In the opinion of the International Railways Union (I.R.U.) such a ruling would deviate too much from the common law regime incorporated in the C.I.M. and it seems not to be acceptable to the Governments of the countries and the railway companies adhering to the C.I.M., and among I.R.U. Members, "it has become evident that the best solution, in order to arrive at a uniform regulation, would be the establishment of a Convention steering a middle course between air and rail dispositions".

It should be remembered, however, that air carriers, who are opposing all possibilities of the revision of the Warsaw Convention, do not wish to study the question to its full extent until it is connected with the Revision of the Warsaw Convention and, especially, with raising the limits of liability established by the Convention.

Part II

The Airwaybill

Article 3 of the Conditions of Carriage (Rules Tariff) provides for the execution of the Airwaybill.

This airwaybill naturally follows the rules of the Warsaw Convention in complying with the "Warsaw traffic" but it might also be used for domestic transportation.

The most important conditions of the contract between the shipper and the carrier are to be found on the back of the airwaybill and, in a later part of this study, it will be endeavoured to justify the necessity of this usage.

In the course of this study, the airwaybill will be analysed from many different angles, and many difficult problems arising out of the rules of the Warsaw Convention and the undeveloped state of air transportation will be discussed.

One of the outstanding problems today is the question of creating a document of title for use in air transportation. It is submitted that such a document might be drawn up on the basis of the bills of lading used in shipping business. The importance attached to the problem of negotiability of the airwaybill necessitated that the study of the law relating to the airwaybill should be directed by the consideration of the possibility of creating a negotiable document for the purpose of air transportation.

A) Airwaybill - not title to goods

The consignment note/airwaybill, as prescribed in the Warsaw Convention, appears to be an entirely different document from the bill of lading ("Connaissement"). While the airwaybill serves as an important instrument of proof of the contract, it does not symbolize the goods and it is not a document of title. Consequently, its transfer does not affect ownership of the goods or rights and liabilities arising out of the contract of carriage.

It is difficult to trace back the reason for the different conceptions adopted by the draftsmen of the Warsaw Convention. M. Cosentini in his book "International Code of Aviation" (Mexico 1933, Pg. 23) expresses the belief that the reason for non accepting the bill of lading in Air Transportation is due to the fact that the German Delegation at the Conference in Warsaw in 1939 could not find the corresponding term to the French word "Connaissement". The Second Commission of CITEJA, examining the possibility of including a negotiable document of title in the Warsaw Convention, felt that the introduction of a title document into air law would open up many complicated problems. The need for title documents, however, was not unanimously expressed, and it was considered that the tremendous undertaking in solving the problems was not justified. One of the arguments against making the airwaybill mandatorily negotiable, expressed by M. Ripert, was that "the bill of lading represents the goods because the Captain holds them on behalf of the bearer of the bill of lading". Goedhuis in the "National Air

Legislations and the Warsaw Convention", The Hague, 1937 (Pg. 169) writes that "the use of bills of lading in air carriage - in our opinion - cannot be considered before the position of the Commander is regulated, before the question of charter contract is solved and before air traffic is definitely stabilized on all these points" (reference to the Commander means Aircraft Commander, whose powers have not, as yet, been internationally regulated, and a draft Convention on the subject is under study by the Legal Committee of ICAO).

The rapidly growing volume of air cargo, since the termination of hostilities after the second world war, raised, again, the question of making the airwaybill negotiable, and it was suggested that the principles of the Bill of Lading should be introduced in the air transport business.

Carriers, States, national and international organizations variously expressed themselves in favour of, or against this conception. The report of a Committee (on uniformity of documents and practices) of the Banker's Association for Foreign Trade, in 1944, offers an interesting review regarding the situation of air cargo documents at that time. This Committee formed the following conclusion: "International trade is not, as a rule, conducted on a cash-in-advance basis and air transportation of cargo between countries cannot develop fully without bank financing". Such financing normally requires suitable documentation, including an airwaybill giving the consignee clear title to the goods and containing reasonable liability clauses distributing responsibility equitably.

The insurance coverage should be designed to fulfil the needs of all interested parties. The main reason behind this statement lies in the fact that the present airwaybill appears not to define clearly in whom the title to the goods is rested, i.e., who the owners of the shipped goods are, who bears the risks of losses. The consignment to an intermediary could certainly create uncertainty in the event of dispute between the financing bank and the ultimate consignee. It is also feared that the consignment to a bank for account of another may present the first bank who appears on the consignment note as consignee, such responsibility including liability for actions of the shipper that could make air shipments unreasonably burdensome. From the above mentioned report, it should be recalled that "in the opinion of your Committee, the diversity in the present methods of consignment and in conveying title to the goods, and liabilities imposed upon the consignee warrant caution in financing air shipment".

Since the Banker's Association made its initial study, much has been written and argued about the practicability of making the airwaybill negotiable. The arguments advanced against making the airwaybill negotiable are briefly the following:

1) The carrier would not have a definite consignee to whom delivery may be tendered.
2) The carrier would have to undertake appreciable warehousing responsibilities.

3) Air movement being incomparably faster than rail or sea transportation during the period of transportation considerable sales and resales could not be made. This point is, however, arguable. It is true that air transportation is offering speed. It, however, has not yet achieved such stage where air parcels or air cargo could be actually delivered to the consignee within 24 hours. Delivery of air parcels between certain countries in Europe usually takesfrom 4 to 5 days, and Transatlantic shipments commonly take 5 to 10 days to arrive into the consignee's actual possession. Considering the relatively high value of air shipments, it might be useful to create such a document which would give full guaranty to the financing house or the party who is willing to advance money on the shipment.

Against the establishing of a negotiable airwaybill, it has also been expressed:

4) That the use of the negotiable airwaybill will extend the period of transit. The airmailed airwaybill apparently could not even arrive before the despatch of the goods to the place of destination.

The arguments in favour of making the airwaybill negotiable can be summarized as follows:

1) Banks will more readily extend credit upon a negotiable or semi-negotiable paper. This is particularly true in Europe where rediscounting is more common than in the American countries.

2) Carriers need not worry as to the identity of the consignee upon delivery of the goods. They would be authorized to deliver them to the person who presents the negotiable airwaybill.

3) The payment of the price of the goods appears to be fully assured as the goods could not be claimed from the carrier unless the negotiable document has been presented.

4) The goods could be sold in the course of transport and actual transfer of possession could be affected through the mere delivery of the documents to the purchaser.

5) The holder of a negotiable document could easily raise money on the goods in transit, and the document representing the goods would serve as a real security in the hands of the creditor.

The problem of negotiability has also been considered by ICAO.

The Secretariat of the Legal Committee of ICAO suggested two methods for overcoming difficulties arising out of the non-negotiability of the airwaybill (ICAO DOC 5334 LC.96 12/4/48):

1) Either the insertion, in the Warsaw Convention, of a specific and concrete article creating a negotiable airwaybill;

2) drawing up a separate Convention and creating therewith a new and negotiable airwaybill.

The first of these suggestions was discussed repeatedly in the course of the revisionary attempts of the Warsaw Convention. No definite decision was taken, however, by the respective committees of ICAO. The most popular suggestion at this stage is that the revised text should be so drafted that it would not prevent the parties interested in making the so if they so desire. The Rapporteur in

the so-called "August 1948 draft" treats this subject as follows: (ICAO DOC. LC/SC/Warsaw Working Draft - 1/31/8/48)

"Nothing in this Convention shall prevent:-

(a) the consignee from transferring to another party the consignee's copy of the consignment note and his rights thereunder;

(b) the consignor from depositing the consignor's copy of the consignment note with another party as security pending payment for the cargo comprised in the consignment note being made;

(c) the consignor, in the case of a consignment against cash on delivery, from transferring to another party the consignor's copy of the consignment note and his right to receive from the carrier the sum payable on delivery.

Provided that:

(i) No such transaction shall affect the scope or limits of the carrier's liability under the provisions of this Convention, and

(ii) The carrier shall not be bound to recognize any such transaction unless it shall have been notified to him and he shall have agreed to recognize it as valid."

There is no doubt that the text quoted above is not perfect and it is submitted that its second proviso is expressly in contrast to the principle of negotiability. In substance, the proviso means that

the carrier is not bound by the endorsement of the airwaybill; the rights and liabilities arising out of the contract of carriage are not automatically transferable to the endorsee unless the carrier is notified and, further, he agrees to such transaction. In my opinion, such agreement between the carrier and the endorsee would be equivalent to novation. It is obvious that the transferability of the airwaybill would be seriously endangered if such a provision would be left in the Convention. For these reasons, it is suggested that this text should be revised and at least the last proviso should be eliminated from the new draft.

The general opinion of the Sub-Committee "Warsaw" is expressed in the Report of this Committee to the Fourth Session of the Legal Committee of ICAO (ICAO Document Working Draft 44, June 6,1949):

> "Reference to this appears in Article 19 of the draft of August 1948. The present Convention (in Article 8) merely specified that certain essential particulars must be included in the Consignment Note. Provided that these particulars are included, the Consignment Note (which it is the obligation of the consignor to prepare) can take any form whatsoever; and the Rapporteur suggested that it is open for consignors generally (preferably in conjunction with international air carriers) to draw up a form of document which is most convenient for consignors and carriers and which can be made negotiable under arrangements to be made between owners of goods and parties with whom it is intended that the consignors' or consignees' copy of the Consignment Note should be negotiated. It would appear to be merely necessary (as suggested in Article 19) to make it clear that nothing in the Convention shall be taken to interfere with any right concerning negotiability or otherwise which owners of goods may desire to exercise. On practical grounds it is desirable that the I.A.T.A., representing international air carriers generally, should collaborate with owners of goods concerning the formulation of any such documents, because it is the carrier who has to handle the documents for traffic purposes."

B) Bill of Lading

If air transportation would adopt a negotiable document, this document would have to be drawn up on the basis of the Bill of Lading as used in International Sea Transportation. It is for this reason that the Rules applicable to the Bills of Lading will have to serve as a basic measure to determine whether the present conventional regime governing air transportation is or is not in conflict with the principles of negotiability.

Object

The bill of lading has three aspects. It is an instrument of proof, proving the contract of carriage of the goods. It also serves as a document proving circumstances of shipment, and last, it is a document ensuring the circulation of the goods during the period of transport, and permitting the sale, pledge or mortgage of the goods either by the shipper or by the consignee. This aspect of the bill of lading could not be created without difficulty and there are outstanding problems which must be clarified. The evolution of the transfer of ownership and possession must be taken into consideration especially in the French jurisprudence which was mainly responsible for some of its peculiarities.

In French Law, the ownership may pass if the parties concerned agree; Art. 1138 of the Civil Code provides that consent alone gives ownership to the purchaser. The principle is, however, applied only in the case of the sale of specified goods. The right of ownership requires the specification of the article relating to the right, i.e. the sale of the goods must be followed by a material delivery which

specified the object of the contract. This condition is undoubtedly fulfilled by the sale of shipped goods which are clearly specified as such sacks and such cases, crossing on such boat, which sailed from such harbour on such date.

As a general principle, however, the specification by the seller is not sufficient; the purchaser must be in possession of the goods or of an unquestionable document proving the goods and he must be certain that the goods will not be changed by the vendor and that they will not be sold again and delivered to another party. This requirement is also fulfilled in the case of shipped goods. The goods are on the ship, out of reach of the proprietor, who can neither get them out nor change them. They are under the custody of the Captain. The consignor is able to prove with the bill of lading that he sold and shipped certain goods. The consignee, if he has purchased and paid the goods, received a bill of lading and can prove to a third party with whom he negotiates that he is owner of the goods to be received. The third party, however, who wishes to purchase the goods obviously runs several risks; the goods might perish during the transport, owing to unavoidable circumstances or by the fault of the Captain. This purchaser is deprived of any recourse as a consequence either of the application of a common law or as the effect of the negligence clause. There is only one remedy; to ensure the goods when the purchaser may require that the benefit of the insurance be given to him, and is henceforth safeguarded against any sea risks or negligence.

The simple assent of the parties concerned invests the purchaser with ownership. If the seller, however, after this first sale consents a second one and puts a second purchaser in possession of the goods, the first purchaser looses his right to ownership (Art. 1141 civ. C.); if the seller realizes a pledge on the goods sold, the right of the pledgee is objectionable to the purchaser (Art. 2082 civ. C); if the seller consigns the goods to the care of a holder and if the latter sells it to a third party, the third party, bona fide purchaser, becomes owner (Art. 2279 civ. C.); if the seller still ousts the price of the article and retains the goods in a building which belongs to him, the first seller or the lessor, preferential creditors, may exercise their privilege on the article which in spite of the sale is still in the hands of their debitors (Art. 2102-1 & 4° Civ. C.). The risks are such that the purchaser will never be ready to negotiate the acquisition of a specified article, if he is not put in possession of the article. The sale is entirely safe only when the delivery takes place simultaneously. It was necessary to find a means of transmitting the possession of the goods during the period of transit to the purchaser. The use of the Bill of Lading being already an instrument of proof, seemed to be an excellent solution to this very complex problem.

If the consignor is still the owner of the goods and sends them to his agent at the destination, he then finds a purchaser and the mutual agreement of the parties on the article and on the price trans-

fers the right of ownership to the purchaser. But he must still be put in possession of the goods. The consignor is the possessor of the goods; the goods are not materially in his control being in transit on a ship. This possession of the goods is exercised through the Captain who holds the goods on his behalf. This holding by the Captain of the ship needs some clarification. The person who holds goods for the account of another is either an agent of the possessor, servant acting under his orders and on his behalf. In Germany such a person is called "the servant of the possession" and in such a case the possession is called "derived possession" or "indirect possession." Or, the person who holds goods for the account of another may be completely independent of the owner, but is bound to him by an agreement on the custody of the goods, for example, the depositary, the borrower; the French Law calls this person "precarious holder".

The Captain loading the goods aboard his ship is, first of all, the servant of the carrier and the carrier is the "precarious holder" of the goods and is bound to make restitution of it by virtue of the contract of carriage agreed between the parties concerned. On the other hand, the Captain, chief of the marine adventure is, in several aspects of his office, the legal representative of the shippers (consignors) and, consequently, he would be the "servant of the possession" of the shipper. In any case, the Captain is not possessor of the goods, he is in possession of them for the account of the shipper.

In order to give possession of the goods, the shipper must give to the purchaser the means of obtaining delivery of the goods by the

Captain. The handing over of the bill of lading serves this purpose.

The Bill of Lading is, as we said above, the receipt of the goods loaded issued by the Captain in his capacity as such. The purchaser receiving the bill of lading acquires the right to claim the goods from the Captain; he substitutes the consignee who acquires a right against the carrier. The purchaser has not become possessor but he obtained the legal means of becoming possessor at the destination

The result, however, is not sufficient as the seller when handing over the bill of lading is not transmitting to the purchaser the only means of getting possession of the goods, and, consequently, the purchaser is not the only one who may become possessor. The plurality of copies of the bill of lading gives some doubt to the purchaser as to whether he will be able to obtain the actual possession of the goods or not.

Thus, the bill of lading becomes not only the evidence of indebtedness, or the proof of debt, it becomes the symbol of the goods aboard. The shipper when delivering the bill of lading delivers the implementation of the possession and, consequently, the possession itself; he waives his right to ownership. The purchaser consequently acquires ownership by the reciprocal exchange of assents and also obtains possession through the delivery of the bill of lading.

Bill of Lading - not Negotiable Instrument

The law relating to negotiable securities other than bills, notes and cheques, is, as yet, very imperfectly developed. The history of the doctrine of negotiability up to 1875 is reviewed in the judgment of the Exchequer Chamber in Goodwin v. Robarts. The case displays the progressive character of the law; it declared that instruments formerly held not to be negotiable may nevertheless become negotiable

by the usage of the English money market.

Blackburn, J., stated the tests for negotiability in the following terms:

> "It may, therefore, be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it pro tempore, then it is entitled to the name of a 'negotiable instrument', and the property in it passes to a bona fide transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, i.e., if it be either not accustomably transferable, or, though it be accustomably transferable, yet, it its nature be such as to render it incapable of being put in suit by the party holding it pro tempore, it is not a 'negotiable instrument', nor will delivery of it pass the property in it to a vendee, however, bona fide, if the transferor himself has not a good title to it, and the transfer be made out of market overt".

This statement must be qualified in two respects; firstly, an instrument, not otherwise negotiable, may be made negotiable by statute; secondly, foreign Government bonds to bearer may undoubtedly be negotiable, yet the holder cannot sue the foreign Government upon them in the Courts of Great Britain; the explanation may be that the exemption of a foreign Government from suit in England is a personal exemption, not arising out out of any defect of title on the part of the holder.

The qualification of negotiable attaching to instruments which are "accustomably transferable" is an incident annexed by the usage of the English money market, and is not conferred or determined by the law of the place.

Negotiability in the strict sense comprises the two elements:
1) that the delivery of the documents passes property in the money or goods covered by the document to any bona fide holder for value, and
2) the holder of the document has a right to sue the obligee on the instrument in his own name. At common law, bills of lading do not have exactly these elements and consequently the name negotiable should be used

only in the popular sense of transfer. A bill of lading acquired from a thief gives no title to the goods to its holder in common law neither has a transferee from a person entitled to transfer a right to sue the chief owner on his own name except in case he took delivery of the goods. The peculiarity of English law is best illustrated in the case of the St.Joseph 1933, P. 119. In this case it was felt that although the endorsee had acquired no contract right through the transfer of the bill of lading, it thus did acquire those rights through the implied contract which arose on presentation of the bill of lading, which was inherent necessarily in the terms of the bill of lading. Thus, the court came to the same conclusion which could have been reached if the plaintiff could have acquired contract right through the transfer of the bill of lading. It may be noted that to transfer right of suit, Bills of Lading Act, 1855, was necessary. This Act reads:

> "Whereas by the custom of merchants a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner, and it is expedient that such rights should pass with the property; and whereas it frequently happens that the goods in respect of which bills of lading purport to be signed, have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value, should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid: Be it therefore enacted .....as follows:
>
> 1. Every consignee of goods named in a bill of lading and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

> "A bill of lading is not, like a bill of exchange or promissory note, a negotiable instrument, which passes by mere delivery to a bona fide transferee for valuable consideration, without regard to the title of the parties who make the transfer. Although the shipper may have endorsed in blank a bill of lading deliverable to his assigns, his right is not affected by an appropriation of it without his authority. If it be stolen from him or transferred without his authority, a subsequent bona fide transferee for value cannot make title under it as against the shipper of the goods. The bill of lading only represents the goods; and in this instance the transfer of the symbol does not operate more than a transfer of what is represented".

The Bills of Lading Act, 1855, gave a right of action on the bill of lading to the "indorsee to whom the property in the goods shall pass", but it is generally assumed that it did not invest the instrument with any additional degree of negotiability.

It might be of some value to review here the general legal position of the real negotiable instruments.

Curiously enough, there is no definition of negotiability. According to Willis, a negotiable instrument is such that the property in it "is acquired by every person who takes it in bona fide and for value, provided that the instrument is such and in that state that the true owner could transfer the contract, or engagement contained therein, by simple delivery of the instruments".

The expression "not negotiable" in the English Statute was considered by Lewis J., and by the Court of Appeal in Hibernian Bank, Ltd., v. Gysin and Hanson. No reference appears in the reports of that case to the classic exposition of "negotiable" in Lord Blackburn's judgment in Crouch v. Credit Foncier. It might be mentioned, however, that the distinction between a negotiable instrument and a transferable document of title to

goods is illustrated in the case of Mercantile Bank of India Ltd., v. Central Bank of India, Ltd., and Lord Wright's opinion therein.

Our first question is what "bona fide" and "for value" mean in this definition by Willis. There is no doubt that this question is one of fact and whether or not an instrument is negotiable will be decided by the Courts as a matter of law, but if an instrument is such and in such a state that some act other than delivery is required on the part of the true owner to pass the contract of engagement contained therein, the instrument will not qualify as a negotiable instrument.

Another character which is essential to make an instrument negotiable is that the instrument must be in such state that the true owner could transfer by simple delivery. If an instrument cannot be transferred except by an endorsement of the true owner, it seems not to be negotiable as the property in it is not passing by mere delivery. There is another act required, i.e., the true owner's writing of his name upon the instrument which, coupled with the delivery, performs the transaction. Whistler vs Foster shows clearly that an instrument might not be in such state in certain cases that mere delivery passes the property in it, i.e, the instrument is for this purpose not negotiable.

The distinction between transferability by delivery and negotiability is clearly handled in Rumball v. the Metropolitan Bank (Law Reports Second Queen's Bench Division, Page 194) counselled in favour of the defendant; it i argued that a scrip was by virtue of usage negotiable by delivery. According to Willis, if that means anything, it merely means that the scrip was by usage transferable by delivery. When we talk of negotiability, we are

speaking beyond the mere question of transferability from man to many by delivery, or the transfer of any article in usual commerce to which the common law rule applies. Thus, if the goods are acquired by a third party bona fide and for value, if they have been taken without my consent and they are transferred, the third party has to surrender them, as the party who is the true owner shall never cease to be the owner unless lapse of time, forfeiture or bankruptcy, act or conduct has deprived him of his right to the property. In this sense, all kinds of merchandise may be conveyed or transferred; negotiability should, however, be strictly distinguished from such transfers.

The "great element of negotiability" is the acquisition of property by the conduct of the acquirer, not by another's, that is if the holder takes it bona fide and for value, nobody can deprive him of the property. There is no use, nor need, of tracing the title of goods represented in the negotiable instrument or the instrument itself. The true owner of it will not be able to exercise his rights against a bona fide holder for value although this latter acquired it from a non-owner. The instrument, however, is not negotiable if the true owner desiring to do so is unable to pass the property in it by delivery.

In case of the negotiable instrument, the bona fide holder does not claim them by virtue of any estate or interest created by the true owner but by virtue of his having taken the instruments honestly and for value. The conduct of the true owner has but little effect and in many countries no direct effect at all. Anybody would require the instrument honestly relying on a misrepresentation and honestly abstaining from making inquiries and being without any suspicion of an eventual wrong.

There is no requirement that the person who takes a negotiable instrument must make inquiries, nevertheless, in case he does not make inquiries suspecting that there was something wrong, he does not qualify for being bona fide holder. This rule seems to be justified in the nature of negotiable instruments, transactions in which, usually pass rapidly. It would be impracticable to encourage enquiries in any case when the origin of the instrument appears to be doubtful. Even an apparent carelessness on behalf of the vendee may not have any bearing on his good faith.

The question of consideration which has been so often dealt with in respect to contracts has but little influence with respect to the negotiable instrument. A bona fide holder for value, no matter how small that value is or how adequate it is, will be considered as a true holder and fully entitled to the property of negotiable instrument; but the tribunal deciding this question of facts will undoubtedly be influenced by the actual amount of consideration, "sometimes the inadequacies of the price may leave no doubt that the bill was not taken in good faith. Sometimes the adequacy of the conclusion will be alone sufficient to establish bona fides" (Willis). No man shall be deemed bona fide owner of the negotiable instrument in respect of which he has a suspicion at the time he took it that there was something wrong on the part of the person with whom he was dealing. But is is not necessary to prove that the acquirer of a negotiable instrument knew the exact wrong that has been committed.

The question of the person from whom the vendee requires negotiable instrument is unimportant so long as the vendee is bona fide and purchases for value. In case of a purchase from an agent believing in his authority to deal with negotiable instruments although he is fraudulent in disposition of the bills, the acquirer will have perfect title to them.

C) Documents of Title to Goods

The character of transferability of the bill of lading in the sense that property in the goods might be transferred is the consequence of usage, custom of merchants, and not derived of the document itself. Bills of Lading by the law of merchants represent the property for which they have been issued and the endorsement and delivery of the bill of lading transfers a property to the transferee and completes the legal delivery. Bowen L.J., in Sanders v. McClean (1883-11 Q.B.D. 341; 52 L.J.B.Q. 481) says: "It is a key which in the hands of the rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be". The bill of lading is a different type of document from the real negotiable instruments and is an important member of the family "Document of Title to Goods", occasionally called semi-negotiable instruments including Dock Warrant, Warehouse Keepers' Certificates and Warrants or Orders for the delivery of goods and any other document used in the ordinary course of business if proof of the possession, or the control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

This definition was taken from the Factors Act, 1843 (586 Vict. C. 39) with the exception that it includes Warehouse-keepers' Certificates. Similar text is adopted in many provinces of Canada, Australia and the United States.

The negotiability of Documents of Title to Goods has different degrees.

a) A Warrant which is a document issued by the wharfinger or warehousemen states that the goods named in the document are to be delivered to the person whose name appears on the document or to his assigns by endorsement. It is customary that conditions are attached to such warrant and it is held that, if the document is not issued in the form of a warrant, it is simply an acknowledgement of receipt of the goods described in it.

b) The orders for delivery are given by the seller calling on a bailee, agent of the seller being in possession of the goods. The delivery order is not complete until the bailee attorn to the buyer and becomes the agent of the latter in whose name he is going to continue to possess. The remarks of Blackburn (Blackburn on Sale 297, 298, 302, Second Edition, pages 415, 418) clearly show the distinction common law always made between the warrant certificates and orders comparing them to the Bills of Lading:

before :

"when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods....; but when the goods are on land there is no reason why the person who receives delivery order or dock warrant should not at once lodge it with the bailee and so take actual or constructive possession of the goods. Bills of Lading are ancient mercantile documents which may be subject to the law merchant, whilst the other class of document are of modern invention, and no custom of merchant relating to them has ever been established. It is therefore submitted that the endorsement of a delivery order or dock warrant has not, independently of the Factors Act, any effect beyond that of a token of an authority to receive possession".

Before the Factors Act, common law went even further in distinguishing between bills of lading and delivery orders. In the cases (McEwan v. Smith 1849 2 H.L.C. 309; 81 R.R. 166; Griffiths v. Perry (1859), 1 E. & E. 680 28 L.J.Q.B. 208; 117 R.R. 397) it was held that the endorsement of it by a buyer to a sub-buyer was unavailing to oust the possession of the original seller; and that his lien remained unaffected when neither the first buyer nor the sub-buyer has procured the acceptance of the order, nor taken actual possession of the goods before the order was countermanded.

c) Warehouse receipt means any receipt given by any person for goods in his actual "visible and continued possession as bailee thereof in good faith and not as of his own property, and shall include:

(i) a receipt given by any person who is the owner or keeper of a harbour, cove, pond, wharf, yard, warehouse, shed, storehouse or other place for the storage of goods delivered to him as bailee, and actually in the place or in one or more of the places owned or kept by him whether such person is engaged in other business or not;

(ii) a receipt given by any person in charge of logs or timber in transit from timber limits or other land to the place of destination of such logs or timber; and

(iii) a specification of timber."

It was even held in the Bank of British North America v. Clarkson 1869, 19 U.C.C.P. 182, p. 188 and Glass v. Whitney, 1863 22 U.C.R. 290, that the transfer of a warehouse receipt, unlike that of a bill of lading, did not have the effect of transferring the property in the goods to the transferee, at least until the receipt was presented to the bailee and acted upon.

Cash receipts given in place of delivery orders are not documents of title (Kemp v. Falk (1882), 7 App. Cas. 573, at p. 585, per Lord Blackburn.

d) Warehouse-keeper's Certificate is incorporated by Sect. 62 of the Sale of Goods Act, but it does not appear in the Factors Act, 1843 (S. 6 Vict C. 39). The Act of 1825 (6 Geo. 4, c. 94, s.2) included warehouse-keepers' certificates, but the Act of 1842 omitted them, and in a case in 1875, the Lords Justices held that these documents were not documents of title (Gunn v. Bolckow, Vaughan & Co. (1875), L.R. 10 Ch. App. 491; 39 Digest 523, 1387).

It is interesting to note that when the title to goods depends upon a written instrument, English Law ordinarily requires that it should be registered as a bill of sale, for the purposes of the Bills of Sale Acts; Sec. 4 of the Bills of Sales Act, 1818, however, excludes from the scope of the term bill of sale "transfers of goods, in the ordinary course of business of any trade or calling, bills of sale of goods in foreign ports or at sea, bills of lading, India warrants, warehousekeeper's certificates, warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or delivery, the possessor of such documents to transfer or receive goods thereby represented". The Bills of Sale Act, 1890 (53 & 54 Vict. c. 53) as amended by the Bills of Sale Act, 1891 (54 & 55 Vict. c. 35) exempts certain mercantile letters of hypothecation from the application of these Acts.

The reasons for the different treatment of the title documents by English Law are found in the judgment of the case of Meyerstein v. Barber

(1870) which was unanimously affirmed by the House of Lords. Lord Hatherley summarizes the reasons as follows:

> "In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them; therefore the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them. When they have arrived at the dock, until they are delivered to some person who has the right to hold them, the bill of lading still remains the only symbol that can be dealt with by way of assignment, or mortgage, or otherwise. As soon as delivery is made, or a warrant for delivery has been issued, or an order for delivery accepted (which in Law would be equivalent to delivery), then those symbols replace the symbol which before existed. Until that time bills of lading are effective representations of the ownership of the goods, and their force does not become extinguished until possession, or what is equivalent in law to possession, has been taken on the part of the person having a right to demand it."

e) Private Acts

Certain other Private Acts of Parliament contain provisions with respect to the issue and effect of warrants and certificates. By the London and St. Katherine's Dock Act, 1864 (27 & 28 Vict. c. Clxxviii), the company may issue certificates for goods having been warehoused, and warrants for delivery. "Every such warrant for delivery shall be transferable by indorsement, and shall entitle the person named therein, or the last indorsee thereof named in the indorsement, to the goods specified therein, and the goods so specified shall for all purposes be deemed his property". (Blackburn on Sale pg. 897) Certain firms of warehouses have also, by private acts, power to issue transferable certificates and delivery warrants. The effect of this privilege is that "every such certificate or warrant shall be deemed to be a document of title".

D) Financing Goods

The two methods of financing international trade which are commonly employed in the case of goods carried by sea, are:

a) Discounting method where the shipper, being desirous of obtaining reimbursement of part of his purchase price at or soon after shipment, takes the shipping documents, i.e., bill of lading, draft, invoice and insurance policy, to his own bank which then discounts the draft by paying the shipper a percentage of the face value, takes the documents and in due course presents the draft to the purchaser and delivers the documents to him in exchange for payment. In this case the Bank by custom of merchants obtains a pledge over the goods and the documents, but the property does not pass to the buyer till he takes up the documents on presentation.

b) The established credit method where the shipper sells under a contract and requires the buyer to establish a credit (whether irrevocable or not) at a bank in the exporter's country. He then presents the documents, as above, to the buyer's bank at which the credit has been established and obtains payment of the purchase price in full from the buyer's bank. The property in the goods thereupon passes to the buyer and the buyer's bank's security consists of a lien on the documents (probably amounting to a pledge of the goods) (See Gutteridge, Bankers' Commercial Credits, p. 6).

If the banker is dealing with honest and responsible persons, documents of title to goods, such as bills of lading, delivery orders, warehousemen's certificates, dock-warrants and letters of lien or hypothecation, are convenient securities for advances. By means of them, goods can be effectively pledged which obviously could not otherwise be so utilised by reason of their bulk or location. By bills of lading, goods on the high seas can be hypothecated before arrival and, thus, used as cover for bills given for the price or for advances. Naturally, a very large proportion of this business is transacted through brokers and other agents of the owners of the goods, and the Factors Act, 1889, and the Sale of Goods Act, 1893, are praiseworthy efforts to minimize the banker's risk in dealing with such agents, and incidentally, with quasi-owners, such as vendors who have already sold the goods elsewhere and vendees who may not be in a position to pass a good title to a sub-vendee or pledgee.

It is not the scheme of the above Acts to elevate the various documents of title to the position of the fully negotiable instrument, to which the banker acquires an indefeasible title, whatever the customer's position, whether the customer be honest of dishonest, whether the security be the customer's own or he has authority to deal with it or not, and whether the banker takes it for an existing debt or a fresh advance. They really qualify little more than an exposition and possible extension of the principle of holding out by entrusting documents of title to an agent or person in a fiduciary position.

Where the real owner and possessor is the person seeking an advance on the security of the goods, the pledge is not complete unless and until there has been actual or constructive delivery of the goods. Actual delivery to a banker is out of the question. As to constructive delivery, it is incongruous to find that in many of the cases the ideal method of effecting such delivery is stated to be the handing over of the key of the warehouse where the goods are stored, analogous to livery of seisin.

The usual method of creating a security with a bill of lading is exemplified in Banner v. Johnston, L.R. 5 H. of L. 157. The banker has to furnish the customer with a letter of credit, authorising him to draw to a specified amount against shipments or bills of lading, and undertaking to accept bills so drawn, provided the documents accompany the bills.

The customer is enabled to show this letter of credit to those from whom he desires to purchase, and so gets credit for his drafts. But to ensure acceptance, the shipping documents or other documents of title must accompany the bill, or reach the bankers before or at the time when they are called upon to accept. The bills of lading or other documents must strictly comply with the description of them in the letter of credit. (Hansson v. Hamel & Horley, Ltd., (1922) A.C.36; Cape Asbestos Company v. Lloyds Bank, (1921) W.N. 274; Scott v. Barclays Bank (1923) 2 K.B. 1).

In National Bank of Egypt v. Hannevig's Bank, Scrutton, L.J. raised the question as to how far the financing house has to examine the bills of lading:

> "In some cases, the obligation of a banker, under such a credit, may need very careful examination. I only say at present that to assume that for one sixteenth percent of the amount he advances, a banker is bound carefully to read through the policies and to exercise a judgment as to whether the legal effect of the bill of lading and the policy is, on the whole, favourable to their clients, is an obligation which I should require to investigate considerably before I accepted it in that unhesitating form."

The accuracy and truth of the contents of a bill of lading are of equal concern to the banker himself, who may have to reply on his rights as indorsee thereof. The combination of the above stated terms in a letter of credit, shown to the person who parts with his goods on the faith of it, does not constitute any right in him, or any other holder of the bill to the goods. As Lord Cairns in Banner v. Johnston, L.R. 5 H. of L.157 states:

> "The two arrangements are perfectly separate in their nature, namely, the arrangement or promise to accept the bills, which promise to be shown to the parties selling the cotton, and the order from the bankers to those dealing with the cotton at Pernambuco to send home the shipping documents. The order to send home the shipping documents and the condition annexed to the promise to accept, that the shipping documents shall be sent to them, are for the protection of the bankers, and not, as it seems to me, in any way for the protection of the persons who negotiate the bills of exchange."

The degree of property which the banker acquires by possession of the documents would probably depend on the purpose for, and arrangement under, which he received them. In Banner v. Johnston, the expression is that on acceptance "the cotton passes into the hands of the bankers themselves."

Where goods have been pledged, either actually or constructively by means of the documents of title, or where securities have been pledged, as by deposit, with or without a memorandum, the pledgee has on default a power of sale without the necessity of resorting to any Court of Equity.

The authorities for the power to sell on default appear conclusive. In Sewell v. Burdick, 13 Q.B.D. at p. 174, Bowen, L.J., says:

"The pledgee of goods is entitled to sell them upon default".

In re Morritt, 18 Q.B.D., at p. 232, Cotton, Lindley, and Bowen, L.J.J. say:

> "A contract of pledge carries with it the implication that the security may be made available to satisfy the obligation, and enables the pledgee in possession (though he has not the general property in the thing pledged, but a special property only) to sell on default in payment and after notice to the pledgor, although the pledgor may redeem at any moment up to sale".

The difficult question is to determine what is default:

(i) where the debt is repayable at a fixed date, the default occurs on non-payment at that date, but notice to the pledgor of intention to sell is apparently also necessary;

(ii) where the advance is for an indefinite period, demand of payment, with notice that if not complied with within a certain reasonable time, the securities will be sold, is sufficient. In Shillito v. Hobson, 30 Ch. D. at P. 403, Fry, L.J. says:

> "The Pawnee would have a right to sell the chattel pawned, either in default of payment at the time fixed if there be a time fixed, or in default of payment after reasonable notice if no time be fixed".

If the pledgee does not realize sufficient to cover the debt, the balance of the debt is still recoverable.

The pledgee's only remedy is by sale; he is not entitled to apply for foreclosure with a view to acquiring the absolute property in the pledge. (Carter v. Wake, 4 Ch. D. 605).

Analysis of the Warsaw Convention

The scope of this study in relation to the airwaybill is limited by its major purpose to investigate the possibility of a negotiable airwaybill. It was already mentioned that the provisions of the Warsaw Convention raised considerable doubts in legal minds as to whether they are consistent with the principles of negotiability. Studies prepared on the subject by British and American authorities have brought up controversies which resulted in different interpretations. To clarify this position, the specific provisions of the Warsaw Convention need to be analysed in the light of the general comments submitted heretofore regarding the negotiable instruments, bills of lading and air cargo financing.

Against such procedure there might be some objection in the fact that national legislations and jurisprudence have more bearing on the question of negotiability especially since this question is closely related to the Law of Sale, undoubtedly governed by different conceptions in the different legal systems.

It is submitted, however, that reliable information in connection with the problems of negotiability proved that only the British legal system of the different national jurisprudences has serious legal difficulties in accepting a negotiable airwaybill. For this reason, during the course of this study, English Law is discussed primarily in connection with the Warsaw Convention. Reference is made, however, to other legal systems (American, French) if it appeared to be essential, for the purpose of characterizing the controversies in the different conceptions.

ARTICLE 5

1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air consignment note"; every consignor has the right to require the carrier to accept this document.

2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of Article 9, be none the less governed by the rules of this Convention.

Article 5 of the Convention in substance entitles the carrier to require the consignor to furnish him with the air consignment note and, at the same time, every consignor is entitled to require the carrier to accept this document. It is further expressed that the contract of carriage relating to the transportation of goods is not constituted by the consignment note, the absence, loss or irregularity of which does not affect the existence or validity of the contract. It appears that the conception of the Warsaw Convention creates a so-called "consensual" contract, which according to many continental jurisprudences means contract established by the consent of two parties. This conception is contrary to the spirit of real and formal contracts requiring the parties to undertake certain acts before the contract is concluded. This distinction is, undoubtedly, the creation of the French jurisprudence but can be found in many continental jurisprudences. The Anglo-American system makes no such distinction, but it does go occasionally so far that it recognizes the creation of a contract (not only obligation) through the unilateral declaration of will of only one party (such a case has, however, no bearing on this study and serves only as an illustration for the different conceptions of the two jurisprudences).

Difficulty may arise from the qualification of written and unwritten contracts commonly distinguished in the Anglo-American system. Under this system, it is required that negotiable instruments must be made out in writing and if there is no writing, there exists no negotiable instrument. The conception of the Warsaw Convention, it was mentioned, upholds the validity and the existence of a contract in case there is no document, there is no written form. It is questionable, therefore, whether the present conception of the Warsaw Convention, recognizing the validity of the transport contract without the existence of a written form thereof, is or is not contradictory to the principles of the negotiable instrument in the Anglo-American system. The answer to this question comes from the considerations already given to negotiable instruments and bills of lading in this study. It is suggested that the negotiable instruments have their own separate life which starts at the issuing of a properly made out document and continues through a series of endorsements having only a relatively small relation with the original contract. The negotiable airwaybill or air consignment note would be issued on the basis of the contract of carriage, by the carrier. In the hands of the consignor, it would represent only a proving instrument against the carrier, to prove the contract and the receipt of the goods. The endorsement of such a document is an entirely separate problem and creates a new relationship. Two legal issues are really involved. The "assignment" of the contract of carriage as against a "new contract" of sale or pledge (or as the case may be only the assignment of the rights under the original contract of sales between consignor and consignee). Thus the document in its

second capacity serves a separate purpose. Its loss may affect its endorsement, the contract of sale based on which the endorsement has been made, the possession of the goods, the title to the goods, and the right to sue the carrier on the contract of carriage. It has, however, no bearing whatsoever on the existing validity of the original contract of carriage, which nonetheless will entitle the carrier to exercise its lien for the freight or any other of its rights. It seems to be, therefore, that though the Warsaw Convention specifically recognizes the validity and existence of the contract of carriage, even in the absence of a written document, the requirement of English law that negotiable instruments may be in writing does not present any difficulty in making the airwaybill negotiable.

The airwaybill, if accepted as a negotiable instrument, will prove the existence of the contract and its conditions. It will be governed by the rules of the Convention, notwithstanding that it serves as a document in writing as long as it exists. If the document is lost or destroyed, the benefits of the negotiability might also be lost completely but the existence and validity of the original transport contract remains still unaffected.

ARTICLE 6

1) The air consignment note shall be made out by the consignor in three original parts and be handed over with the goods.

2) The first part shall be marked "for the carrier" and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

3) The carrier shall sign on acceptance of the goods.

4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

5) If, at the request of the consignor, the carrier makes out the air consignment note, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

ARTICLE 7

The carrier of goods has the right to require the consignor to make out separate consignment notes when there is more than one package.

Each of the three parts of the air consignment note are original. The question arises as to whether or not the three original parts of the air consignment would constitute any obstacles with respect to making the airwaybill negotiable. There is no doubt that, in the first instance, such practice may present difficulty. It must be noted, however, that the Convention itself (in para. 3 Article 12) contains a restrictive stipulation which will, undoubtedly, have the effect of eliminating many possibilities of frauds.

The practice regarding the issuance of Bills of Lading is very much the same. Bills of Lading are made out in three or more parts; one part being usually retained by the Captain, the others being

handed over to the shipper (consignor). Although this practice gave, at times, rise to frauds, Scrutton (in Charter-Parties, 1948, on page 82) writes:

> "It is an extraordinary proof of the general honesty of business that Barber v. Meyerstein (1870 L.R. 4 H.L. 317) and Glyn, Mills v. E. & W. I. Docks (1882 7 App. Cas. 591) should be almost the only reported cases involving the kind of fraud that the existence of more than one bill of lading would seem to render so easy".

When two or more parts of a bill of lading are transferred to two or more different bona fide transferees for value, the property in the goods passes to the transferee who is first in point of time (Barber v. Meyerstein (1870) L.R. 4 H.L. 317; 41 Digest 371, 2175).

But, nevertheless, the person who has the custody of the goods may safely deliver them to the person who first presents the bill of lading (or a part thereof) to him provided he acts in good faith and without notice of any prior claim (Glyn, Mills & Co. v. East & West India Docks (1882), 7 App. Cas. 591; 41 Digest 394, 2362).

A contract to deliver a bill of lading is complied with by delivering one part, though the others are not accounted for (Sanders v. Maclean (1883), 11 Q.B.D. 327, C.A.; 39 Digest 422, 550).

The practice of issuing a set of three bills of lading is very old. It goes back as far as the year 1539. Malynes in Lex Mercatoria 1686, p. 97, writes the following:

> "of the bills of lading there is commonly three bills of one tenor; one of them is enclosed in the letters written by the same ship; another bill is sent overland to the factor or party

to whom the goods are consigned; the third remaineth with the merchant for his testimony against the master, if there were any occasion or loose dealing."

In American Law, however, we find that the Federal Bills of Lading Act, 1916, (Pomerene Act, U.S. Code Title 49 Sec. 84) expressly forbids order bills to be issued in parts or in sets in a state for the transportation of goods to any place in the United States, on the Continent of North America except Alaska and Panama. The same paragraph provides, however, "that nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation or goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii or foreign countries, or to impose the liability set forth in this section for so doing."

The Warsaw Convention, in para. 3 of the above article, prescribes that the carrier shall sign the bill of lading on acceptance of the goods. This rule appears to be in conformity with the signature of the bill of lading which is signed after the shipment of the goods. The signing of the bill of lading does not give rise to any new contract, but the signature and delivery of the bill of lading establishes the document, the transfer of which may have certain effects on the property in the goods in the custody of the carrier.

No serious objection can be foreseen in Articles 6 and 7 against the possibility of making the airwaybill negotiable, neither from the point of view of the British and American Legal systems.

It must be remembered, however, that the three original copies of the airwaybill might present a serious difficulty, i.e., which of the three copies is to be negotiated? The consignor's, the consignee's or the carrier's copy? Considering the custom of the trade, it is suggested that the consignor's copy be made negotiable and be the only original copy of the transport document. The result of this suggestion could be briefly summarized as follows:

1) the consignee's copy would serve only as a notification, thus it would not enable the consignee to take delivery of the goods if in possession only of this notification;

2) the consignee if wanting to obtain finance would be obliged to prove the title to the goods, thus he would have to present the consignor's copy of the airwaybill. No difficulty is foreseen in such an arrangement as there is no reason for the consignor to keep a negotiable copy of the bill unless to prove the delivery to the carrier. Such proof can be made, however, by a non-negotiable document as well.

While it is true that the Bill of Lading, which is issued in sets to facilitate commerce, is different in its effect from the principle laid down heretofore, it is submitted that when it is recognized that there is a need for legislation to make the airwaybill negotiable under English law, there is no reason why the same legislation could not be adequately used for determining the document which is to be made negotiable.

Further effects of the suggestion are:

3) the carrier would in no case be able to misuse his copy of the airwaybill.

4) the consignor would be evidently in possession of the title document as long as he is the owner of the goods but he would have to submit his copy to the consignee if this latter would be owner. Thus, the airwaybill, if document of title to goods, would always accompany the person who has title to the goods.

The adoption of such procedure might, still, not be without difficulty, and it is submitted that the only proper solution to this problem would be the exclusion of this principle from the Convention should it be revised.

There seems to be no real justification for maintaining the expression "original" in the Convention, and it is submitted that there is no need for three original airwaybills. The trade requires three copies only for purpose of convenience. Thus the consignor might negotiate his copy if he is the one who has the title to the goods, but the consignee may do so with his copy if title is vested in lien. Thus the copies of the bills of lading have little significance to the time they are negotiated; but if one has been negotiated, no other copy appears to acquire the same importance and no other copy serves as title to the goods represented in the document.

Delivery to Carrier

The delivery of the goods to the carrier raises further important questions.

It was settled at common law (Hanson v. Armitage (1882), 5 B. & Ald. 557) that the receipt of goods by a carrier or wharfinger appointed by the purchaser does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers. This was on the ground that an acceptance could not be presumed where the buyer had had no opportunity of inspecting. Although the new theory is that an acceptance is a recognition of the contract, not an acceptance of the goods (Kibble v. Gough, Page v. Morgan) it is submitted that under the Act, the mere receipt of goods by the buyer's carrier or other agent will not constitute an acceptance unless the buyer has done some act in relation to the goods which recognises a pre-existing contract of sale. But giving instructions to a carrier or an agent to collect goods may amount to an acceptance by the buyer himself.

It is well settled that the delivery of goods to a common carrier, a fortiori to one specially designated by the buyer, for conveyance to him or to a place designated by him, constitutes an actual receipt by the buyer. In such case the carrier is, in contemplation of law, the bailee of the person to whom, not of the person by whom, the goods are sent, the seller in employing the carrier being considered as an agent of the buyer for that purpose, (Dawes v. Peck (1799), 8 T.R. 330; 4 R.R. 675; Wait v. Baker (1848), 2 Ex. 1; 17 L.J. Ex. 307; 76 R.R. 469).

It must be noted, however, that the carrier only represents the buyer for the purpose of receiving, not accepting, the goods.

Frequent reference has been made to the rule that delivery of goods to a carrier is prima facie a delivery to the buyer and a performance of the seller's contract which passes both the property and the risk to the buyer. It follows that as a rule, if the goods are lost or destroyed, the buyer or consignee is the proper person to sue the carrier. The most authoritative statement of the principle is in the judgment of the House of Lords in Dunlop v. Lambert, where it was held that if there was a special contract, the consignor might sue the carrier though the goods might be the property of the consignee. Lord Cottenham says:

> "It is no doubt true as a general rule that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is after such delivery the risk of the consignee. That is so if, without designating the particular carrier, the consignee directs that the goods shall be sent by the ordinary conveyance: the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risks of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent.

"But though the authorities all establish the general inference I have stated, yet that general inference is capable of being varied by the circumstances of any special arrangement between the parties, or of any particular mode of dealing between them. If a particular contract be proved between the consignor and the consignee, and the circumstance of the payment of the freight and insurance is not alone a conclusive evidence of ownership - as where the party undertaking to consign undertakes to deliver at a particular place - the property, till it reaches that place and is delivered according to the terms of the contract, is at the risk of the consignor. And again, though in general the following of the directions of the consignee, and delivering the goods to a particular carrier, will relieve the consignor from the risk, he may make such a special contract that, though delivering the goods to the carrier specially intimated to the consignee, the risk may remain with him; and the consignor may, by a contract with the carrier, make the carrier liable to himself. In an infinite variety of circumstances, the ordinary rule may turn out not to be that which regulates the liabilities of the parties."

Blackburn, J., in an instructive judgment in The Calcutta Co. De Mattos, says:

"What was the effect of the contract as regards the property in the goods and the right to the price, from the time of the handing over the shipping documents and paying half of the invoice value? There is no rule of law to prevent the parties, in cases like the present, from making whatever bargain they please. If they use the words in the contract showing that they intend that the goods shall be shipped by the person who is to supply them, on the terms that when shipped they shall be the the consignee's property, and at his risk, so that the vendor shall be paid for them whether delivered at the port of destination or not, this intention is effectual. Such is the common case where goods are ordered to be sent by a carrier to a port of destination. The vendor's duty is, in such cases, at an end when he has delivered the goods to the carrier, and, if the goods perish in the carrier's hands, the vendor is discharged and the purchaser is bound to pay him the price. If the parties intend that the vendor shall not merely deliver the goods to the carrier, but also undertake that they shall actually be delivered at their destination, and express such intention, this also is effectual; in such a case, if the goods perish in the hands of the carrier, the vendor is not only not entitled to the price, but he is liable for whatever damage may have been sustained by the purchaser in consequence of

the breach of the vendor's contract to deliver at the place of destination. But the parties may intend an intermediate state of things; they may intend that the vendor shall deliver the goods to the carrier, and that, when he has done so, he shall have fulfilled his undertaking, so that he shall not be liable in damages for a breach of contract if the goods do not reach their destination; and yet they may intend that the whole or part of the price shall not be payable unless the goods do arrive. They may bargain that the property shall vest in the purchaser, as owner, as soon as the goods are shipped, and they shall then be both sold and delivered, and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving, just as they might, if they pleased, contract that the price should not be payable unless a particular tree fall; but without any contract on the vendor's part in the once case to procure the goods to arrive, or in the other to cause the tree to fall. Where the contract is of this kind, the position of the vendor and purchaser, in case the goods do not arrive, is analogous to that of freighter and ship-owner, in the ordinary contract of carriage on board a ship, in case the goods are prevented from arriving by one of the excepted perils. The shipowner is not bound to carry and deliver at all events; but, though he is excused if prevented by the excepted perils, yet no freight is earned or payable unless the goods are delivered. In the case of freight, also, the question often arises, whether a payment made at the port of shipment is an advance of part of the

freight, returnable if the goods are not delivered and freight earned, or is an absolute payment, leaving only the balance contingent on the safe delivery of the goods - a question very analogous to the one that arises on the present contract". (Calcutta Co. v. De Mattos (1863), 32 L.J.Q.B. 322, at p. 328.

The effect of the ordinary "carriage forward" contract is expressed by Mellor, J.:

"There is evidence in the present case that these goods were, with the consent, or by the authority of the purchaser, consigned by the vendors, as consignors, to be carried by the defendants as common carriers, to be delivered to the purchaser as consignee, and that the name of the consignee was made known to the defendants at the time of the delivery. Under such circumstances the ordinary inference is that the contract of carriage is between the carrier and the consignee, the consignor being the agent for the consignee to make it. It appears to us that there is evidence also that at the time of the delivery there was a specific mention that the freight was to be paid by the consignee. Under such circumstances the inference is almost irresistible that the contract for carriage in the present case was the ordinary contract for carriage at the risk and under the control of the consignee". (Cork Distilleries Co. v. G.S. Railway (1874), L.R. 7 H.L. 269, at p. 277; 8 Digest 33, 187).

Acceptance for Carriage

Para. (3) of this Article prescribes that the carrier shall sign the airwaybill on acceptance of goods. In connection with this rule it must be considered whether or not the carriers have a right

a) to choose between the goods assigned to them,

b) to refuse goods without real consideration, or, as against the theory of such freedom, are bound to accept all kinds of goods of any consignor.

Various legal systems give different considerations to this problem, and air, sea and rail transportation are treated distinctly.

To understand the British point of view, we ought to consider the distinction between common and private carriage. According to Jenks, English Civil Law, Section 9 (Page 209):

"A common carrier is a person who holds himself out as willing to carry for reward, without special terms, the goods generally, or any particular kind or kinds of goods, of any person, who chooses to employ him".

The question whether a man is a common carrier or not is one of fact and to qualify as a common carrier, it must be found that the carrier has professed or held himself out to be such. This profession means a unilateral act and it is the act of the carrier alone having two consequences:

A) "a common carrier is bound to accept and carry the goods of any person who offers to pay his reasonable charge provided that the goods are such as he professes to carry and are to travel by route which he holds himself out to pursue, and that he has no reasonable

use for refusing them" - (Jenks, 523).

B) "and that when he accepts any such goods for carriage and does not by contract with the consignor impose upon himself some other measure of liability, the mere fact of acceptance subjectshim to the severe liability of the common carrier" (Belfast Rope Work Co., Bushell, 1918/1.K.B.210).

The common carrier's obligation under A) means that the carrier, within the scope of his public profession, may not lawfully refuse to carry goods of any person:

a) who tenders them at a reasonable time

b) together with payment or an offer of payment of the usual charge or if that be excessive, a reasonable sum, unless

c) the size or nature of the goods is such that he is unable to carry them,

d) or his conveyance is already loaded.

The consequences of a wrongful refusal are equal to committing a tort (Jackson vs Rogers, 1683) and it was held that the refusal, except under special conditions, to carry goods within the profession is a wrongful refusal (Garten vs Bristol and Exter Railway, 1861). It is the opinion of the British Courts that the refusal to carry is a breach of the duty to perform rightly a public occupation and although there seems to be no case in which a conviction is recorded (except the conviction of an innkeeper for refusing to receive guests) at one time the carrier could, undoubtedly, be indicted for diverse breaches of his duties.

this conception has gone through considerable change and "this can hardly be said to be law now and authority is slight for the survival of the indictment for refusal to carry" (Leslie, Law of Transport by Railway, Page 28(b)).

There are certain conditions imposed on the consignor and the carrier is only bound to carry upon the fulfillment of certain conditions. These are:

a) that the goods must be tendered at a reasonable time; and,

b) payment, or an offer of payment of the usual charge must be made.

The only excuses which justify the carrier's refusal to accept a shipment are that:

i) his conveyance is full

ii) the nature of the goods or the size of the packages is such that he is unable to carry them,

iii) the nature of the goods would render the carriage exceptionally dangerous.

The obligation of the common carrier with respect to the acceptance of the goods is imposed on all Railway Companies in Britain. The construction of the British Common Law permits, however, the carrier to exclude his obligation of this nature. This exclusion has a very curious result. It is held that the carrier who retains his right to refuse goods without giving reason for it, refuses at the same time his character as a common carrier, not holding himself out to the public generally. This exclusion might be absolute, his whole business or specialty limited only to certain

routes or to certain goods. On Private Carriers, the burden of accepting goods for carriage is not imposed and they enjoy a relatively larger freedom to contract than common carriers.

Continental jurisprudence distinguishes between transportation governed or not governed by international conventions. Juridical literature shows some interest in the matter of the acceptance of goods by the carriers, but there are diverging opinions as to the legal value and implications of the British system. The evidence of the influence of this system is shown in the concept of the Berne and Rome Conventions regulating international rail transportation. Article 5 of the Berne Convention provides that:

> "Every railway coming under the present convention is bound, subject to the conditions laid down therein, to undertake the transport of goods accepted under the Convention".

Nevertheless,

a) the consignor must comply with the rules of the Convention,

b) the consignment should be such that it can be carried by ordinary means of transport,

c) the transport be not prevented by circumstances outside the control of the railway.

There are general exceptions having some similarity to those exceptions we have already considered with respect to the British Railways. The Berne Convention contains further exceptions:

i) it is provided that the carrier is not bound to accept articles which require special installation, and,

ii) "Railways are only bound to accept goods for transport when the transport can be undertaken forthwith".

The Conventional regulation of the question of acceptance of goods for carriage is carried on further and should the public interest and the needs of the railway business so require, the competent authorities may decide that

a) the service shall be fully or partially suspended

b) certain consignments shall be excluded from transport or only accepted under special conditions,

c) certain consignments shall be given priority.

The only requirement with respect to the above easement is that these measures must be brought to the notice of the public. Any railway may refuse consignments, the transport of which is prevented by restriction of this nature.

The general principle, the obligation to carry is once more overriden by giving the right to the railways to refuse consignments in cases where the customs seals are insufficient or are damaged.

In Article 3 of the Berne Convention a list of those goods which the railways refuse to carry is contained. Article 4 contains those goods which are accepted for carriage only under certain special conditions. In the first group are classified articles, the carriage of which is postal monopoly, and articles which are not suitable for carriage as a result of their dimension.

Further, articles which are not permitted by law to be carried on account of maintaining public order, explosives, substances liable to spontaneous combustion, and nauseous or evil-smelling substances. In the second group belong:

a) corpses

b) rolling stock running on its own wheels

c) live animals

d) articles, the loading of which would give rise to special difficulties.

The scope of this section does not permit us to go into the details of the many implications with respect to the exceptions and conditions regarding the acceptance of goods by railways described by the Berne Convention. The above is only to illustrate the nature of the exceptions, and, at the same time, to underline the general rule whereby railways with respect to international carriage are bound to accept and to undertake the transport of goods. The conception of the draftsmen of the rail conventions seems to be very similar to those of the Common Carrier in the British Legal System. It seems that the intention was to incorporate in the Berne Convention as many of the Common Law rules as possible and thereby to find a common basis on which the carriers of different nationalities can safely reply.

In Article 6, the carrier is made directly liable should he not comply with the provisions laid down in Article 5, i.e., an action for damages may be brought against the carrier resulting from a breach of his obligation regarding his liability to accept and carry the goods within the limitation of the Convention.

Regarding the position of the air carrier with respect to his obligation to undertake the transportation of goods, it should be noted that English Law makes no distinction between carriers on the ground and carriers in the air and the rules of the Common Law are equally applicable to both. Consequently, if the air carrier is a common carrier, he will be bound to accept goods generally, similarly to the British Railway companies

a) provided that he has room for such goods

b) the goods are of a proper kind, properly packed

c) the person offering the goods is ready and willing to pay a reasonable price

d) the goods are offered at a reasonable time.

Should the common carrier, however, restrict the kinds of goods he is willing to accept for transportation, or restrict its services to routes between particular points only, he is not bound to receive other kinds of goods or for other destinations (MacNamara, Law of Carriers by Land, Pages 23-27).

If the carrier does not wish to become a common carrier, he must exclude without ambiguity the profession to carry goods generally for everybody, which is one of the main characteristics of the common carrier.

The conception of the common carrier differs to a great extent in the English and American jurisprudences. British carriers not willing to become common carriers may exclude their character as such by restricting the kinds of goods they are willing to carry and by reserving the right to refuse goods without giving any reason. The American conception, to the

contrary, does not permit the common carrier, once he qualifies for a common carrier, to contract out of his liability, or to reject goods or to choose between particular goods.

The question of qualifying as a common carrier is also differently treated in the American legal system. It is not left to the discretion of the individual carrier to determine what kind of carrier he wants to qualify for. The test of a common carrier is whether he holds himself out as such, either expressly or by a course of conduct, so that he will carry on the basis of a uniform tariff all goods of all persons brought to him for carriage, unless he has no more space in his conveyance. It was held in the North American Insurance Company vs Pipps case and in the Swiss vs O'Donnell case that although an air carrier has no schedules in its operations, it may nevertheless qualify to be a common carrier if its character is established as such. Generally carriers in the United States who

a) solicit patronage of the travelling public

b) advertise schedules of routes, times of leaving, rates of fare, stipulate the amount of luggage the passenger may carry, and

c) offer transportation for goods regularly

are held to be common carriers professing transportation.

There is no law in France which provides that carriers must accept the goods offered to them for transportation. There is one place in the law of May 31st, 1924, which may indicate that the

legislators might have been aware of the obligation of the carrier to carry away goods. There is special provision in this law excluding the transportation of explosives, munitions and armaments by aeroplanes and restricting the transportation and the use on aeroplanes of photographic machines. Lemoine (Traite de droit Aerienne) approaches the question from an entirely different point of view querrying whether air transportation is not a public service. He feels that:

> "L'obligation de transport est, en effet, de l'essence meme du service du public qui implique l'egalite du public au benefice du service sans que la transporteur puisse y fair echec par ses seules decisions".

M. Hauriou (Droite Administratife et droite public) is of the opinion that this equality, together with the regularity is the big reason for the existence of organized public services. According to these authors, air carriers rendering services to the public are obliged to undertake all kinds of goods for transportation with the only exceptions that

a) when the bulk of the goods offered would require the full capacity of the plane, thereby disturbing the regular transportation of other goods;

b) when parcels are of a kind which are not easily loaded or carried by the plane;

c) when transport cannot be undertaken immediately (i.e., the air carrier should not be obliged to store goods),

carriers may, in these three cases, refuse the carriage of goods. In the opinion of Mr. Lemoine, no other exceptions could be validly sustained before French Courts today.

The relative paragraph in the Warsaw Convention (Article 33) reads:

> "Nothing contained in this Convention shall prevent the carrier either from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention."

The conception here seems to be rather different from Lemoine's and others' interpretations. The acceptance of goods for transportation, to which the legislators of the Rail Conventions paid particular attention, is not regulated at all, the reason for which might be found in the different nature of goods carried by the air carriers and in the influence of the British Common Law on the continental jurisprudences. The fact that it is expressly provided in the Warsaw Convention that the carrier may refuse to enter into any contract of carriage incorporates into the Convention the rule of complete freedom which has never been expressed as such by British Courts. However, today, the argument that this Article was intended to secure an easement with respect to:

a) air transportation

b) which is international, and

c) which is governed by the Convention,

has but little value, and cannot be validly sustained in this age of

developed air transportation when public policies of the United States and several other countries are predominant factors. The interpretation of Article 33, assuring complete freedom to the carrier to refuse the carriage of goods without giving any reason, seems to be unjustified.

The carriers who were members of the International Air Transport Association adopted prior to the war General Conditions of Carriage of Goods. We find that Article 6, under the heading of "Right of Refusal", in the March 1948 edition, provides that:

"carriers reserve the right to refuse to enter into any contract of carriage without giving a reason".

Considering the position of the British carriers under a Common Law system, we may safely say that this provision was inspired by them. It is aimed to achieve uniformity by using uniform general conditions permitting the carrier to exclude their common carrier's obligations by reserving the right to refuse goods without any reason.

The recently adopted General Conditions of Carriage of the International Air Transport Association (published March 29, 1949) shows the influence of the United States carriers. The Provision criticized by Lemoine and others has been deleted and similarly to the Berne and Rome Conventions a paragraph has been inserted

a) restricting the transportation of certain goods

b) limiting the maximum value of acceptable goods, and

c) enumerating the articles excluded from carriage by air.

Although there is no express provision obliging the air carrier to accept any goods from anyone offering it for transportation, the conception underlying these conditions seems to be expressed in Article 5 (Para. 4) of the Conditions of Carriage (IATA) providing that goods, wares and merchandise, and products of all kinds and descriptions are acceptable for carriage unless otherwise excluded. The word "goods" has been enlarged to "wares, merchandise and products of all kinds". There are two more points which need to be mentioned:

i) the highest limit of a consignment is set in $100,000 U.S. Dollars or its equivalent unless special arrangement has been made in advance between the shipper and the carrier.

ii) the limit of the value of the consignment or group of consignments to be carried in one aircraft is limited to $500,000 U.S. dollars or its equivalent if such consignments consists of general merchandise and of $1,000,000 U.S. dollars or its equivalent when the consignment consists of valuables.

It should be emphasized that these limitations have no relation to the limitation of liability incorporated in the Warsaw Convention regarding the liability of the carrier with respect to the consignor in case of loss, damage or delay of the goods transported. These provisions give the carrier the right to refuse goods exceeding this value should the consignor not make previous arrangements.

There is one further requirement in these Conditions (IATA) which may lead to the refusal of the goods, and that is with respect to the packing and marking of the goods:

> "goods must be packed so as to ensure safe carriage with ordinary care in handling and so as not to injure or damage any persons, goods or property". (Para. 3, Article 5).

ARTICLE 8

The air consignment note shall contain the following particulars:

a) the place and date of its execution;

b) the place of departure and of destination;

c) the agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the carriage of its international character;

d) the name and address of the consignor;

e) the name and address of the first carrier;

f) the name and address of the consignee, if the case so requires;

g) the nature of the goods;

h) the number of the packages, the method of packing and the particular marks or numbers upon them;

i) the weight, the quantity and the volume or dimensions of the goods;

j) the apparent condition of the goods and of the packing;

k) the freight, if it has been agreed upon, the date and place of payment and the person who is to pay it;

l) if the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;

m) the amount of the value declared in accordance with Article 22 (2);

n) the number of parts of the air consignment note;

o) the documents handed to the carrier to accompany the air consignment note;

p) the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon;

q) a statement that the carriage is subject to the rules relating to liability established by this Convention.

This Article has been interpreted contradictorily by British and American counsels. In the opinion expressed by William McNair, Article 8 (f) seems to require that unless the name consignor is to be the person entitled to delivery at the destination, the name and address of some person already identified shall be inserted as that of the consignee under pain of depriving the carrier of his right to avail himself of the exclusions or limitations of liability provided in the Convention (Article 9). The provisions of the Convention appear to contemplate that the parties who can have rights of action on the contract against the carrier are either:

(a) the consignor whose name and address have been stated in the consignment note, or

(b) the consignee, if any, whose name must be singularly stated, or

(c) in the scope of Article 12 (3), the person lawfully in possession of the consignor's copy, if the carrier accepted a disposition under Article 12 (1) without requiring the production of the consignor's copy.

It appears, from the foregoing, that an indorsee or another holder of the consignment note, being neither the consignor nor the consignee, has no right of suit except on the basis of Article 12 (3). Thus, the position of McNair briefly is such that the indorsee being unable to sue the carrier on the transport contract directly, is not in any way in the same position as the holder of the negotiable bill of lading and, consequently, in his judgment, the Warsaw Convention precludes the possibility of making the airwaybill negotiable.

To the contrary of this position, Mr. Friendly, in his report on the subject, "Does the Warsaw Convention preclude making negotiable

the airwaybill consignment note required by Article 5 of the same Convention" writes as follows:

"In view of doubts expressed by some writers as to the possibility of making an airwaybill negotiable under the Convention, it may be worthwhile to refer to some provisions in the Warsaw Convention which seem to indicate that the drafters of the Convention contemplated that the airwaybill might be used as a negotiable document. It will be noted that in Article 8, paragraph (f), the name and address of the consignee is required to be placed in the airwaybill 'only if the case so requires' - indicating that the drafters of the Convention foresaw the possibility of institution of a bearer airwaybill or a bill where delivery was to be made to the consignor's order."

ARTICLE 9

If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in Article 8 a) to i) inclusive and q), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability.

This Article, in substance, rends the carrier unlimitedly liable with the shifted burden of proof (lying on him) if

1) he fails to require the airwaybill,

2) he accepts goods with an airwaybill not properly made out.

This conception seems to be one of the biggest defects of the Convention and it is justified to look into the history and development of the drafting of this Article.

Preliminary draft prepared by the French Government, and the deliberations during the first International Conference on Private Air Law.

The first official suggestion for the unification and international regulation of liability of the air carrier was the protocol of M. Raymond Poincare, in 1925, French Prime Minister. We learn from this document that he was proposing the convening of an international conference which should (1) draw up a convention on the subject of the liability of the air carrier, and (2) decide whether the continued study of the unification of international private air law was desired.*

In 1925 this protocol was followed by another by L. Briand, French Foreign Minister. Attached to this protocol was the first draft of the prospective convention on the liability of the air carrier. The short introduction to this draft summarizes the early concept and original

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* Conférence internationale de droit privé aérien. 27 Octobre - 6 Novembre 1925. Paris, Les éditions internationales, 1936. p. 11.

ideas of the experts in 1925. It explains why it was considered necessary to regulate the liability question and what basic problems had to be solved by the proposed convention. In the second paragraph of this report, three of the then existing questions are enumerated: (1) whether air transport should be governed by the law of the state in which the contract was concluded, or the law of the state in which the carriage began, or the law of the state of destination, or the law of the state flown over; (2) whether the national law of the air carrier or the national law of the passenger or consignor should govern the carriage; and (3) whether the parties to the contract should be free to choose the governing law.

This introduction states that general agreement on the above questions could not give sufficient solution and that only a convention providing its own rules for international air transportation would be satisfactory.

As to the method to be followed, the official statement refers to the Berne railway convention of 1890 and the Brussels sea convention of 1910. The following expression: "Les interees reclament une telle Convention" illustrates the intention to follow the concept of these previous conventions.

From the above mentioned preface we can see that the interested parties at this time wanted to regulate internationally the application of different national laws and to form a convention which had its own rules. Although aware of the special nature of air transportation, they intended to use other international transportation conventions as a basis.

In the first preliminary draft there is no mention of the obligatory establishment of the traffic document. This early document is certainly without many confusing problems arising from the changing of original concept and compromising divergent legal systems.

The preliminary draft was submitted to the first International Conference on Private Air Law (1925), which charged its Second Commission with the study of this draft and with the making of such recommendations as they felt to be necessary. M. Pittard, Rapporteur of the Second Commission, points out in his report that it was the unanimous opinion of his commission that the contract of transport was conventional and not formal.* Nevertheless, he felt that there was great practical importance in detailing these conditions for an eventual proof. Further, he admitted that the title of transport provided by Article 3 of the preliminary draft attached to his report (second draft) proved the existence of the contract but did not constitute it. This concept was expressed earlier in the exposé of the French Government also.

It is important to note also M. Pittard's opinion as to the extent to which the establishment of transport documents was obligatory. In his comment "ces lois nationales devront pourvoir, par des prescriptions pénales, à ce que ces exigences soient réelement sanctionnées," he foresaw the necessity of certain penal sanctions provided by national legislations. His following remarks

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* Conférence internationale de droit privé aérien. 27 Octobre - 6 Novembre 1925. Paris, Les éditions internationales, 1936, p. 61.

have certain importance also:

> "Le titre de transport n'est qu'un 'instrumentum', mais il a une importance indéniable.....Comme pour le transport par chemin de fer nous avons admis que l'expérience répond de l'exactitude des mentions inscrites sur la lettre de voiture..."

The comparison of the different draft texts prove again what was stated earlier, namely that the intention of the draftsman was to comply with the customary international law regulations. The drafts themselves seem to incorporate this concept.

During its deliberations the Second Commission of the first International Conference on Private Air Law showed the same attitude and expressed the same concept. They foresaw the necessity of traffic documents as useful instruments, but even the most intensive study of these early documents indicates no intention to include more administrative regulation nor civil sanctioning.

Regarding sanctioning, M. Pittard expressed the view that it is sufficient if international regulations provided by the convention are sanctioned by penalty provisions through national legislations.

Comparing the texts of the relative paragraphs it appears that the deliberations during the two sessions of the International Conference on Private Air Law resulted in the incorporation of provisions for administrative details in the drafts. They agreed on details which should be mentioned in the traffic documents.

Before proceeding with discussion of the deliberations of the CITEJA on this subject, it is necessary to study the relative provisions of the sea and rail conventions. The three conventions which will be considered hereunder are:

Convention on the Transport of Goods by Rail, October 23, 1924, Berne;

Convention for the Unification of Certain Rules relating to the Limitation of Liability of Owners of Seagoing Vessels, August 25, 1924, Brussels;

Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea, August 25, 1924, Brussels.

It has been noted earlier in this report that these conventions influenced to a certain extent the experts of the first International Convention on Private Air Law. It should be emphasized at this stage that any comparison submitted later in this report has no intention of influencing any conclusion with regard to the similarity or divergencies existing between the different types of transportation. It is not in the scope of this study to argue about the above problem. Our intention is to state certain provisions existing in all the above-enumerated conventions and to investigate the extent to which they may have influenced the draftsmen of the first preliminary drafts. (Ref. to Lemoine article in Revue francaise de droit aerien, Vol. I, No. 1, p. 6s).

Let us study these conventions one by one.

In the Convention on the Transport of Passengers and Luggage by Rail there is definite limitation of the liability of the rail carrier in the case of a total or partial loss or damage to luggage. The convention also contains certain details as to the issuance of "Registration Slips" when the luggage is registered. However, a careful examination of the convention discloses no connection whatsoever between the provisions for the issuance of tickets and other

transportation documents and uniform liability of the carrier to each of its passengers.

In other words, the international convention as to carriage of passengers and luggage by rail contains a provision for transportation documents. At the same time the carrier is authorized to limit its liability for loss or damages, but no sanctions are provided against the carrier for failure to issue the type of transport documents contemplated in the convention. As will be noted later, this was one of the conventions which was under consideration by the French government when the original draft liability convention was proposed which eventually became the Warsaw Convention.

In the Brussels Convention for the Unification of Certain Rules relating to Limitation of Liability of Owners of Seagoing Vessels, the liability of the owner of the vessel is generally limited to an amount equal to the value of the vessel, the freight, and the accessories of the vessel. In certain cases the liability shall not exceed the aggregate sum equal to eighty pounds per ton of the vessel's tonnage. This convention also provides in great detail for the carrier's being thus able to limit his liability, but no provision whatsoever is made as to the type of transport document which the carrier must issue, nor is the limitation of liability conditioned on the existence of any type of administrative control of the form of contract entered into between the operator of the seagoing vessel and passengers and shippers.

Simultaneously with the adoption of the above convention, the Convention for the Unification of Certain Rules relating to Bills of Lading for the Carriage of Goods by Sea was adopted. This latter convention provides that the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing certain things. This bill of lading shall be considered prima facie evidence of the receipt by the carrier of the goods. The same convention provides that neither the carrier nor the ship shall be responsible for loss or damage arising from many causes including the act, neglect or default of the master, pilot or servants of the carrier in the navigation or the management of the ship. It also provides that the provisions of the convention should not affect the rights and obligations of the carrier under any statute in force relating to any limitation of liability of owners of seagoing vessels. In other words, although the convention does provide that the carrier shall, on demand of the shipper, issue a bill of lading containing certain things, and also provides for the limitation by the shipowner of his liability, there is no tie between the two provisions. The right of the shipowner to limit his liability either under the convention or under a statute applicable to his operations is not in any manner affected by his failure to deliver the bill of lading or other transport document contemplated by the convention.

The provisions of the ocean bill of lading convention just discussed follow in general the provisions of the so-called Harter Act adopted in the United States in 1893 and which set a model for general maritime acts in other seagoing countries.

The result of the study of other types of transport conventions may be summed up as follows. No convention has been found in which the uniform provisions for responsibility to passenger and shipper or the uniform provision for limitation of liability of the carrier are affected by the failure to use a particular type of transport document. Only the Warsaw Convention is capable of being construed so as to give certain passengers and shippers a greater claim against the carrier than is enjoyed by other passengers and shippers merely because of a difference in the form of the transport documents.

The British proposal and its wide acceptance.

First Session of CITEJA, May 1926:

In 1926 the CITEJA was organized and held its first session in May of that year. A study of the minutes of that meeting show little of importance to the present discussion, with the exception of Resolution No. 3, which established four commissions and charged the Second Commission, among other things, with the study of questions of the air waybill (Lettre de voiture) and the liability of the carrier in respect of the consignor and passenger. The separate regulation of the above two questions is not entirely new. As we have noted from the sea and rail conventions, passengers and goods were usually treated separately.

Second Session of CITEJA, April 1927:

In the first part of the report of the Second Commission to the CITEJA second session held in Paris in 1927, M. deVos, Rapporteur, summarizes the same dominating ideas with regard to the convention on the air waybill which were expressed previously by the French Government draftsmen and later during the discussion of the first

International Conference on Private Air Law.

> "1. La lettre de voiture constate le transport international des marchandises; elle n'est qu'un instrument de preuve. La Convention n'impose pas l'obligation d'une lettre de voiture; mais dès qu'une lettre de voiture existe, les dispositions de la Convention s'y appliquent.
>
> 2. Une garantie pour la protection des intérêts se trouve dans le droit reconnu par la Convention au transporteur de demander à l'expéditeur l'établissement et la délivrance d'une lettre de voiture et dans le droit reconnu à l'expéditeur de demander au transporteur l'acceptation d'un pareil document, cette acceptation entrainant du reste l'obligation pour le transporteur de remettre la lettre de voiture signée par lui à l'expéditeur. ..."

It is interesting that in the above para 2, a new guaranty was introduced, namely, the right of the carrier to require from the consignor the establishment and deliverance of the air waybill and the right of the consignor to require the carrier to accept this air waybill. Paragraph 10 of this report shows an entirely new concept which, we understand, is of British origin and which we shall call "the British proposal". As it seems that this proposal had a wide influence with respect to traffic documents in the later Warsaw Convention, it should be studied in detail.

The above-mentioned paragraph 10 of the report reads:

> "Quant aux sanctions, la difficulté pour certaines conceptions nationales de prévoir des mesures adéquates en vue d'assurer l'observation de certaines dispositions de la Convention a déja été signalée. Elle a admis un système qui apparaît éminemment pratique et qui consiste à sanctionner l'obligation découlant des articles 7 et 8 par la perte éventuelle des avantages qui sont conférés aux parties par certains articles du projet de convention sur la responsabilité du transporteur. Les parties ont donc tout intérêt à faire usage d'une lettre de voiture contenant les mentions essentielles.
>
> "Il a été entendu que dans le cas où les Conventions sur la responsabilité et sur la lettre de voiture seraient distinctes, il y aurait lieu d'imposer une

mention indiquant que le transport est régi par la Convention sur la lettre de voiture aérienne."

This quotation is really only a short introduction to the British proposal which apparently was not considered at the time of the report as too important, but we find further explanation in the minutes of the second session when M. de Vos, during the discussion of Article 3, paragraph 2, of the air waybill draft, made the following exposé:

"M. de Vos, Rapporteur, ... Il a paru impossible à certaines délégations, et notamment à la Délégation britannique, d'introduire l'obligation de la lettre de transport aérien pour tous les transports. Cette Délégation estime très difficile de faire accepter par la législation britannique l'établissement d'une sanction pénale adéquate correspondant à cette obligation. Les exports britanniques ont fait observer qu'en n'imposant pas le principe de l'obligation le résultat pratique serait néanmoins le meme. ...

"En conséquence la Délégation britannique a proposé à la Commission:
a) que la convention stipule que si un contrat de transport est conclu, sans l'établissement d'une lettre de transport aérien contenant les mentions essentielles, le transporteur perdra les avantages qui lui sont confers par les articles 5, 6 et 7 de l'avant projet de Convention sur la responsabilité (sans toutefois porter atteinte aux autres dispositions dudit avant-projet) et qu'un tel contrat, en ce qui concerne les matières auxquelles ont trait les articles précités est régi par le droit commun. La sanction sera de cette façon non seulement automatique, uniforme et universelle, mais elle se trouvera dans la cadre même de la Convention.
b) qu'il soit annexé à la Convention un modèle de lettre de transport dont l'usage serait recommandé."

From this quotation certain conclusions may be drawn:

a) During the deliberations of the Second Commission in Paris in March 1927, some of the delegates expressed the view that the issuance of the air waybill was so important that the failure to issue such document should be penalized.

b) Certain other delegations, especially the British,

felt that the incorporation of penal sanctions into an international convention would raise difficulties when putting it into force in the national legislations. They felt that the same result (namely, to enforce the issuance of the air waybill) could be reached if the conference would accept the following method: If a contract of carriage has been concluded without establishing an air waybill, the carrier will lose the advantages granted to him by the corresponding Articles 5, 6 and 7 of the preliminary draft on liability of the air carrier.

c) In this first proposal only the air waybill was sanctioned, There was still no intention of placing on the carrier the burden of issuing passenger ticket and baggage check.

d) The British proposal intended to regulate by common law those contracts which are concluded without air waybill.

e) The British delegation felt it necessary to attach to the convention a recommended model of air waybill.

f) In this British proposal no other objective reason is given to introduce this sanctioning other than the one mentioned earlier in this report - namely, the fear of future difficulties which might arise when putting penal sanctions into force through national legislations.

g) Even more important, there is no objective reason why the burden was placed on the carrier.

h) When M. de Vos summarized the British proposal, he concluded with the following sentence:

> "Il a paru à la Commission que cette conception,
> les différente évidemment des conceptions latines,
> povait être fort utile et qu'en acceptant ce minimum
> d'obligations, il était possible d'obtenir l'unanimité
> et de faire adopter la lettre de transport aérien ... "

This indicates another reason why, by means of the British proposal, it was possible for the Second Commission to reach unanimity and to adopt

in its present form the air waybill draft.

i) The above-quoted sentence has another interesting concept in that the British proposal contains a minimum obligation. It is surprising that no attention was paid to M. Youpis' (Greece) warnings that the sanctions provided in this article, (which deprived the carrier of all the advantages granted to him by the limitation of liability) might be reasonable for a large company but would seem to be extremely rigorous for those companies only incidentally engaged in international transport.

j) Finally, there is one more comment which seems worthy of note; namely, that the security which was automatically given in the convention to both contracting parties with respect to the issuance of traffic documents seemed insufficient. In contrast to other international conventions, it was felt that the air traffic documents were so important that special treatment was required. It is very difficult to judge twenty years later whether that was a feeling common to all the delegates, or whether they handled this question with a certain negligence. We can, however, reach the conclusion that there was nowhere expressed any objective reason as to why the sanctioning of these documents was of such importance.

The one apparent reason for acceptance of the British idea at this stage of the discussions would seem to have the following explanation. Since international law exists, a very serious problem had to be faced in that of sanctions. The British proposal was certainly and is today a very practical method of sanctioning, and therefore its application must have seemed very favorable to those international lawyers who attended the CITEJA meeting. But the unanswered question at present is

still whether or not its application was appropriate. Experience showed that it was not and we are probably not far from the truth when we assume that the second session of CITEJA accepted this idea without considering further the question whether the traffic documents are important enough to be sanctioned just because there exists a good sanction.

III. To complete the historical study, it should be noted that at this time following the first session of CITEJA in 1926 two drafts existed - one on the air waybill, the other on the liability of the air carrier. During the second session, and probably based on the British proposal, recommendations were made to unify these two drafts not only because they had certain common problems but also because it seemed that in this way the British proposal would be easier incorporated. In this respect Resolution no. 13 charges the Second Commission with the study of the possible unification and the making of the necessary drafting modifications:

> "Le Comité décide que le projet de texte de Convention sur la lettre de transport aérien, tel qu'il est sorti des délibérations du C.I.T.E.J.A., ainsi que les modifications proposées a la Convention sur la Responsabilité du Transporteur Aérien, telles qu'elles ont été examinées par la Deuxième Commission, sont renvoyés à ladite Commission en vue d'envisager la possibilité de rédiger une Convention unique, étant entendu qu'il sera demandé au préalable aux Délégations leur avis sur toute modification à apporter à la Convention sur la responsabilité, ainsi que sur l'opportunité de fusionner les deux Conventions."

As to what extent the members of the CITEJA felt the unification to be necessary. Mr. Ripert's exposé gives some light:

> "M. Ripert (France) indique que la Deuxième Commission a considéré que la Convention sur la responsabilité n'étant pas encore adoptée par les Etats et que des modifications y étant demandées, il convenait d'étudier la question de la lettre de voiture sans se préoccuper de ce projet de convention, étant entendu que si dans

la suite, on estimait qu'il y ait lieu de réunir les deux conventions en un seul texte, il devrait être trouvé des définitions communes.

"Il n'est pas absolument sur, en effet, que les questions qui se poseront à propos de la lettre de voiture internationale soient les mémes qu'en matière de responsabilité. Un problème est déjà différent: celui de la responsabilité vis-à-vis du passager."

It is to be noted from this exposé that he foresaw certain differences between the two subjects. The main difference exists in respect to the liability of the carrier toward the passengers. Although this divergency was expressed at the time by M. Ripert, we shall see later that the draftsmen of the unified draft did not make many distinctions in sanctioning uniformly all the traffic documents.

IV. There was also prepared a report relating to the preliminary draft on the liability of the carrier submitted to the second session of CITEJA, but from our point of view this report has very little importance. To complete our survey the significant paragraphs of this report are quoted below:

"Art. 8. A l'occasion de cet article, la Commission a été d'accord pour reconnaître la nécessité d'indiquer par une disposition spéciale que les règles de la Convention concernant la limitation ne peuvent pas s'appliquer si la victime ou ses ayants drout prouvent qu'il y a eu un acte illicite intentionnel du transporteur.

"Dans le meme ordre d'idées: non applicabilité de la convention sur la limitation, il a été signalé qu'il y avait lieu de prévoir un texte contenant la sanction civile admise en case d'infraction aux articles 7 et 8 de la Convention sur la lettre de transport aérien.

...

"Article 15..... Une observation plus importante a été faite en ce qui concerne la connexité des deux Conventions de la responsabilité et de la lettre de transport aérien: d'apres plusieurs délégations, ces deux Conventions doivent former un seul ensemble, car l'adoption de certaines dispositions d'une Convention dépend de la solution donnée pour certains articles de l'autre Convention..."

These questions were discussed earlier in this report and it is therefore of no use to go further into the matter.

Third session of CITEJA, May 1928:

Following Resolution No. 13 CITEJA prepared the first unified draft in June 1927 and discussed this draft at its meeting in November of that year. We have no documentation for this meeting, but M. de Vos, who was still the Rapporteur during the third session of the CITEJA in Madrid in May 1928, admits that the British proposal incorporated in the unified draft was often attacked in the course of the deliberations of the Second Commission. It is regrettable that when exploring this period we must rely on this one sentence and are not able to study all the deliberations which certainly would give us the opportunity to show that the reaction to the British proposal was not so unanimous as expressed in the later documents.

M. de Vos, in his report, summarizes again the same idea expressed in his earlier report:

Section III

"1. La lettre de transport aérien constate le transport international des marchandises; elle n'est qu'un instrument de preuve.

"2. La convention n'impose pas l'obligation d'une lettre de transport; mais des qu'elle existe, les dispositions de la Convention s'y appliquent.

"3. Quant aux sanctions, la difficulté pour certaines conceptions nationales de prevoir des mesures adequates en vue d'assurer l'observation de certaines dispositions de la Convention a fait adopter un système qui apparait comme eminemment pratique et qui consiste à sanctionner l'obligation découlant des articles 10 et 11 par la perte eventuelle des avantages qui sont conférés aux parties par certains articles du projet de Convention sur la responsabilité du transporteur.

"Les parties ont donc tout intérêt à faire usage d'une lettre de transport contenant les mentions éssentielles."

He gives an explanation for the passenger traffic documents as follows:

Chapter II, Section 1.

"Le document concernant le transport des voyageurs etant difierent de ceux necessaires pour le trafic des marchandises un article special a été prevu a cet effet lors de la fusion des deux matierès: titre de transport et responsabilité."

This latter explanation is of imminent importance in showing that the fusion of the two subjects - title of transport and liability - forced the Second Commission to make a special section for the passenger transport document and for the baggage check. In the draft attached to M. deVos' report, we find detailed provisions with respect to passenger ticket and baggage check, and to our great surprise we see that the British proposal was applied to the passenger ticket and baggage check also. When first discussing the British proposal earlier in this report we have pointed out that even the British delegation did not intend to apply this sanction for the issuing of passenger ticket and baggage check and that their intention was to sanction the issuing of the air waybill. Again no logical reason is given as to how this unfortunate situation occurred, and it seems that it happened as a logical result. Probably after adopting the sanction in case of the air waybill it seemed to them natural to apply the same rules to passenger ticket and luggage check without considering further the necessity of this application. It would appear that the attitude of the delegates was somewhat careless during these deliberations which could be remarked from the first session also when the British proposal was earlier discussed.

When the unified text was explained to the third session of CITEJA, M. Youpis expressed concern on paragraph 4 of Article 3:

"M. Youpis croit devoir signaler que la sanction prevue dans ce paragraphe est trop severe lorsqu'il s'agit d'une simple omission. Il est dit, en effet, 'sans qu'il ait été établi un billet de passage contenant les mentions indiquées cidessus. ..." L'absence de l'indication du lieu d'émission ou de la date par example, retirera au transporteur le droit de se prévaloir des dispositions qui l'exonérent de la responsabilité ..."

M. de Vos in support of the draft:

"Le Rapporteur maintient le texte de la Commission II rappelle que cette disposition, qui a été souvent attaquée au cours des discussions précédentes a toujours été maintenue pour la raison suivante: il s'agit là de la disposition essentielle de la Convention. Ce texte représente, en effet, une transaction entre les diverses opinions des Délégations des Gouvernements au C.I.T.E.J.A. certains délégues demandaient que le titre fut obligatoire, d'autres réclamaient une sanction civile, d'autres encore, une sanction pénale, Le texte finalement adopté est d'inspiration britannique, il constitue une transaction acceptée par tous les membres de la Commission. Si ce texte tombe, il est à craindre que ce soit toute la Convention qu'il faille remettre en discussion."

A weak explanation to support the necessity of sanctioning the failure of issuing the air waybill is enumerated by M. Medeiros do Paco. The reasons given were (a) to locate those responsible in case there is a breach of rules (b) in respect of exporting goods which might be restricted or, (c) where the transportation of such goods by air is not permitted. Another exposé from the same delegate which took place during the discussion of Article 18 indicates that in the opinion of the CITEJA the Paris Convention of 1919 failed to enforce sufficiently the issuance of the consignment note (air waybill). Apparently CITEJA did not wish to make the same "mistake", when regulating the same question on private air law.

"Il semble que cette Convention de droit privé doit se rapprocher de la Convention de droit public du 13 octobre 1919 qui prévoit le connaissement obligatoire. Cette Convention dit, en effet, dans sons

> article 5 que parmi les litres, doit se trouver le connaissement obligatoire avec le manifeste. Dans cette convention de droit public, les Etats ont inscrit que ce document était obligatoire. Il serait dangereux, semble-t-il, de laisser la moindre doute à cette égard dans la convention de droit privé... Il y a un gros intérêt, dans le commerce international, à ce que tout transport international soit accompagné obligatoirement d'une lettre de transport aérien ..."

International Conference on Private Air Law Warsaw, 1929

V. The next and last stage in the development of the said convention was the second diplomatic International Conference on Private Air Law held in Warsaw in 1929. During these deliberations the Greek delegation was again the one which tried to argue against the rigorous sanctions in relation to the traffic documents. As will be seen from the following quotation, efforts were only made to reduce the responsibility insofar as it applied to the irregularity of the traffic documents. Even that would have helped as to the carrier's responsibility had it been accepted. It is easy to understand why it was not accepted. The amendments suggested by the Greek delegation to the draft text would make the relative paragraph and its provisions confusing and would not have improved the convention.

> "Conformément à l'article 22 du projet, dans le cas d'un accident, le transporteur peut dégager sa responsabilité s'il prouve que lui et ses préposés ont pris le mesures raisonnables pour éviter le dommage, ou qu'il leur était impossible de les prendre.
>
> "Toutefois, d'après l'article 3, le transporteur perd cet avantage, si le billet de passage ne contient pas les mentions indiquées dans cet article.
>
> "Il se peut, en effet, que par une simple négligence le transporteur ait omis de mentionner dans le billet de passage le lieu de l'émission, ou le point de départ, ou son nom et son adresse; ou même qu'il conserve dans le billet son ancienne adresse, ou enfin qu'il ne signale pas un arrêt intermédiaire.

"Ce sont là, en général, des omissions sans grande importance pour la partie, parce que il est connu ou facile à établir que le billet a été émis et le départ a eu lieu de l'aérodrome de telle ville, que l'avion appartient à telle compagnie ou parce que l'arrêt intermédiaire peut être sans intérêt pour le contractant.

"On peut se demander pourquoi une telle omission, sans importance pour la plupart des cas, devrait entraîner, dans tous les cas, une sanction aussi grave que celle prévue par l'article 3 paragraphe 4.

"Si l'omission est sand intérêt pour l'autre partie et si elle ne lui cause aucun dommage, comment pourrait-on justifier cette sanction sévère à la charge du transporteur?

"Cette sanction est justifiée seulement dans le cas où l'omission d'une mention aurait engendré un dommage au passager, comme il peut arriver dans certaines circonstances.

"Mais qui jugera s'il y a dommage à cause de cette omission à l'autre contractant, et si ce dommage est tel qu'il faut faire perdre au transporteur la facilité de se dégager par la preuve qu'il a fait le nécessaire pour éviter l'accident? Il n'y a certes que le tribunal, saisi de l'affaire, qui pourra faire cette appréciation.

"C'est pour ces raisons que nous proposons de modifier l'alinéa 4 de l'article 3 du projet comme suit:

> "Si, pour un transport international, le transporteur accepte le voyageur sans qu'il ai établi un billet de passage, le contrat de transport n'en sera pas moins soumis aux règles de la présente convention, mais le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent en tout ou en partie sa responsabilité directe ou dérivée des fautes de ses préposés.
>
> "Si le billet de passage ne contient pas des mentions indiquées ci-dessus, le transporteur sera privé de ce droit dans le cas, où, d'après l'appréciation du tribunal, un dommage serait causé de ce fait à l'autre partie.'

"Pour les mêmes raisons il faudrait modifier dans

le même sens l'alinéa 7 de l'article 4 pour le bulletin de bagages et l'article 17 pour la lettre du transport.

At the end of the second period of study, it seems necessary to draw a few conclusions which may be deduced from the above discussion.

1. Two separate problems - the air waybill and the liability of the carrier - are unified in the Warsaw Convention.

2. Because of this unification certain compromise had to be made (which seemed not to be healthy to the solution of each separate problem). The British proposal won wide acceptance and became applicable to all traffic documents.

3. In our opinion the desire for uniformity influenced the members of both the CITEJA and the international conference at Warsaw when accepting the same sanctioning for passenger ticket, baggage check and air waybill.

4. Through all the deliberations only very weak opposition was raised against the British proposal apparently because it is certainly a practical way of sanctioning in the first of international law.

ARTICLE 10

1) The consignor is responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air consignment note.

2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

This passage must not be neglected if the negotiability of the airwaybill is discussed. The responsibility of the consignor for the particulars on the airwaybill is more important if we consider that, often, the endorsee's only description of the goods is on the face of the waybill and there is no doubt that he will rely on the statements reaffirmed by the signature of the carrier.

It must be mentioned here that, in the new IATA Conditions of Carriage, the right of lien of the aircarriers is extended to those damages which are suffered by the carrier by reason of the incorrectness of the particulars on the airwaybill. This extension and the reasons behind it will be fully treated in the third part of this study.

ARTICLE 11

1) The air consignment note is prima facie evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage.

2) The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are prima facie evidence of the facts stated; those relating to the quantity, volume and condition of the goods do not constitute evidence against the carrier except so far as they both have been, and are stated in the air consignment note to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

The study of this Article in the light of the pertinent legal principles relating to a negotiable bill of lading reveals that the principal difficulty arising from the Warsaw Convention concerns the provisions of Article 11. This difficulty arises from the difference in degree of weight as evidence given by the Warsaw Convention to the airwaybill and that given in law to an order or bearer bill of lading. As against an innocent purchaser for value, a carrier for which a negotiable bill of lading has been issued by an authorized agent acting within the scope of his employment is estopped from contesting the veracity of the receipt of the goods, and from varying the stated quantity (number of packages, if packaged goods), quality and condition of the goods if the carrier did not indicate in the document itself that it was not guarantying the veracity of such statements and if it were in a position to determine the veracity thereof. Further, the negotiable bill of lading, as concerns the terms and conditions of carriage, the route and the rate charged for transportation, constitutes a contract and, as such, is not as a general rule subject to variation by parol or extrinsic evidence.

Article 11 of the Convention provides that the airwaybill shall be prima facie evidence of the conclusion of the contract, the receipt of the goods, the conditions of transportation, the weight, dimensions, packing of the goods, the number of packages, and the apparent condition of the goods. Prima facie evidence clearly is far short of the conclusiveness which the law gives to a negotiable bill of lading. However, the fact that Article 11 provides that the airwaybill "shall be prima facie evidence" of the facts referred to would not seem to preclude the carrier from expressly agreeing that the airwaybill shall constitute more than prima facie evidence. It is submitted that an express provision in the airwaybill that all relevent understandings, agreements, and negotiations made prior to or contemporaneously with the issuance of the airwaybill are merged therein, and that the airwaybill is intended to be conclusive on the same matters as to which the law gives conclusiveness to a negotiable bill of lading would effectively estop the parties from any contrary claims and would not be inconsistent with Article 11. Indeed, it might be argued that the mere use of language of negotiability in the airwaybill would be an implied stipulation to this effect.

To support the above position, the respective part of The Hague Rules as incorporated in the United States carriage of Goods by Sea Act, 1936, Sec. 3, para. 4, should be quoted:

> "Such bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein prescribed in accordance with paras. (3) (A), (B), and (C) of this section, provided that nothing in this Act shall be construed

as repealing or limiting the application of any part of the Act as amended, entitled "an Act relating to bills of lading in inter-state and foreign commerce" approved August 29th, 1916..... commonly known as the Pomerene Bills of Lading Act."

Thus it appears that Sea Transportation recognized the same capacity of the bill of lading as given to the air consignment note by the Warsaw Convention, and consequently there seems to be no difficulty arising out of this Article.

ARTICLE 12

1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expense occasioned by the exercise of this right.

2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

From the point of view of documents representing goods during the period of transportation, the provisions of this Article are of eminent importance.

One of the main objectives of negotiability is to offer reasonable security to the purchaser of goods who might acquire possession through a delivery or delivery and endorsement of the negotiable document.

The Warsaw Convention authorizes the consignor to:

a) withdraw the goods at the airport of departure or destination,

b) stop the goods during the period of transit at any landing place,

c) order the goods to be delivered to a person other than the consignee named in the air consignment note at the place of destination or during the course of the journey,

d) require that the goods be returned to the airport of departure.

The only restrictions governing these rights of disposition on the goods are:

a) that the consignor has carried out all obligations under the contract of carriage,

b) that neither the carrier nor the consignor is prejudice by the exercise of this right, and, finally,

c) that the expenses resulting from the exercise of this right must be met by the consignor.

Paragraph 3 of Article 12 contains an important regulation which has great bearing on the objective of negotiability. It makes the carrier liable, in substance, for any damage caused to any person who is in lawful possession of the consignor's copy of the consignment note, if the carrier delivered goods without requiring the production of that part of the consignment note. It may be concluded that this is the governing rule of the consignor's right of disposition and it will play an important role by determing whether or not it is possible, under the Warsaw Convention, to make the air consignment note a negotiable document.

In the prewar general conditions of carriage of IATA, it was provided that the air carrier has a right to require that instructions regarding disposition of goods be given on a form prescribed by him and such instructions must be written on a document which will be returned to the consignee. The Rules Tariff (Conditions of Carriage for Goods) of the International Air Transport Association, issued March 29th, 1949, repeats the rules of Article 12 of the Warsaw Convention. It contains, however, further restrictions regarding the exercise of the right of disposition by the consignor:

a) The exercise of the right of disposition must be made by the shipper or his designated agent, if any, and,

b) it must be applicable to the whole consignment.

c) Instructions as to disposition must be given in writing and in the form prescribed by the carrier.

d) If it is impossible to carry out the order of the shipper, the carrier shall so inform the shipper promptly.

e) The right of disposition will terminate at the moment when the consignee takes possession or requests delivery of the goods or airwaybill at the destination after arrival of the goods. If the consignee, however, declines to accept the airwaybill or the goods, or if he cannot be communicated with, the shipper is not deprived of his right of disposition.

The right of disposition is a well recognized legal conception. Not only British Law (the rules of which will be duly considered) but also French, American and even Roman Law established this principle.

Civil Law

It was a well-known rule of civil law that on a sale of goods for ready money the property in them did not pass to the buyer, even after delivery, until he had paid or had given security for the price, unless credit was given. The rule was as old as the Twelve Tables: "Venditae vero res et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit, vel alio modo ei satisfecerit veluti expromissore aut pignore dato. Quod cavetur quidem etiam ex lege XII. Tabularum, tamen recte dicitur et jure gentium, id est jure naturali, id effici. Sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri" (Inst. 2, 1, 41. See also Dig. 14, 4, 5, 18; 18, 1, 19.). The unpaid and unsecured seller might pursue and retake the goods as his own property out of the possession of the buyer, or even of third persons who had bona fide given value for them. Even where the sale was on credit (and credit might be presumed from a delivery to the buyer) although the property in the goods passed to the buyer from the time of delivery, the seller might still be protected by a pactum adjectum, an express term in the contract, e.g., a pactum reservati dominii, whereby he retained the property in himself until payment, even after a delivery, and so could bring a vindicatio for the goods on the buyer's default, or

a lex commissoria, which was a resolutive condition making the sale voidable at the seller's option on the buyer's failure to pay at the expiration of the credit. In certain cases, a pactum reservatae hyothecae was made according to which the seller reserved his right as a security over the goods to resume possession in the event of non-payment.

French Law

The unpaid seller's rights, under the modern French law, are now regulated by certain articles of the Civil Code and of the Code of Commerce. His rights of lien (retention and of demanding the rescission of the sale), on the buyer's default in payment, are not in the scope of this study. It must be noted, however, that when the goods have been delivered, the unpaid seller has in certain cases a preferential claim over the other creditors of the buyer (privilege), and also a right to demand redelivery of the goods. These rights are declared by Articles 2101 and 2102 (4) of the Civil Code, but the latter clause has been repealed in cases in which the buyer is bankrupt. The privileged debts are:

1. Those arising out of food supplied to the debtor and his family during the preceding six months by retail traders, or during the preceding year by the landlord of the boarding house (pension) and wholesale traders. (This privilege is, however, subject to certain other debts, such as law court charges (frais de justice) funeral expenses, etc.)
2. Those arising out of purchase of movables if they are still in the possession of the debtor and if they were bought on credit or for case (a terme ou sans terme);

> but subject to the claim of the owner of the house or farm, unless it be proved that such owner knew that the movables and other things furnishing the house or farm did not belong to the tenant.

The seller may also, if the sale be without credit, claim redelivery (revendiquer) of the movable effects so long as they are in the possession of the buyer, and may restrain their resale, provided the claim be made within eight days after delivery, and the effects are in the same state as on delivery.

The seller who reclaims the goods recovers possession of the goods as security for payment, and without prejudice to the sale which is still valid, and may be enforced as well against the seller as against the buyer.

In the case of the buyer's bankruptcy, these general rules are modified. The seller loses both his preferential claim on the goods in the bankrupt's possession, and his right of demanding re-delivery and is in the same position as the other creditors of the bankrupt. If the bankrupt, however, were not the buyer of the goods, but the goods had been consigned to him as bailee (a titre de depot) or for sale on commission, they may be reclaimed as long as they exist in specie (en nature), wholly or in part. If the goods have been sold by the bankrupt, the consignor may intercept as much of the price due from the purchaser to the bankrupt as has not been paid, settled by security, or set off in an account current between the bankrupt and the buyer. If the goods have been forwarded by the seller to the bankrupt buyer, the seller

may stop them as long as they are still in transit, and have not been delivered into the bankrupt purchaser's warehouse, or into the warehouse of his commissioned agent. They cannot, however, be stopped if they have been sold, before arrival, without fraud upon the faith of invoices, bills of lading, or waybills (sur factures, et connaissements ou lettres de voiture) signed by the consignor. The seller, if he exercises the right, must repay to the bankrupt's estate, any sum received on account of the price, as well as all advances actually made by the bankrupt on account of the freight, carriage, commission, insurance, or other expenses and must also pay what remains due on account of these charges. The committee of the bankrupt's creditors (les syndics) have the right, under the authority of the juge commissaire, to demand delivery of, the goods on payment of the price.

American Law

Section 39 of the Federal Bills of Lading Act, 1916, (U.S. Code, Title 49, Section 119) reads as follows:

"That where an order bill has been issued for goods, no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation".

English Law

British Law recognizes, in surface transportation, three securities of the unpaid vendor, such as:

a) stoppage in transitu,

b) reservation of jus disponendi, and

c) conditional endorsement of the bill of lading.

Stoppage in Transitu

The vendor may under certain conditions resume possession of the goods during the period of transit of these goods to the vendee, if only ownership, not actual possession, has passed to the purchaser. Though the goods are made, by the bill of lading, deliverable to the vendee (EX . p. Banner (1876) 2 Ch. D. 278 p. 288) it may be noted that when goods are shipped by a vendor pursuing the buyer's order for delivery to the latter, such shipment passes the property prima facie to the buyer, and the delivery of the goods to the ship is held to be equivalent to the delivery to him (Shepherd v. Harrison, 1871 L.R. 5 H.L. 116, p. 127).

Cotton L.J., in Phelps v. Comber (1885) 29 Ch. D. p. 821) states that the resumption of possession by the vendor is the exercise of his right to insist on his lien for the price. In Kemp v. Falk (1882) 7 App. Cas., p. 581, it is stated that the resumption mentioned above means not the rescission of the contract.

The right of stoppage in transitu can be exercised (according to Scrutton: on Charter Parties and Bills of Lading, 15th Edition, 1948 p. 119):

1) by an unpaid vendor of goods and others in an analogous position
2) on the insolvency of the vendee
3) as against such vendee, all persons claiming under him.
4) except as against an endorsee and/or transferee of the bill of lading or other document of title for such goods (Factors Act) who has given valuable consideration for such endorsement.
5) at any time before the vendee has acquired possession of the goods by himself and so terminated the transit (Lickbarrow v. Mason 1794 1 Smith L.C. 13th edition p. 703).

Before comparing the positions of British Law with the provisions of the Warsaw Convention, it may be of some value to explore some of the details of these qualifications.

THE UNPAID VENDOR

It was mentioned that the unpaid vendor from whom the right of ownership on the goods has passed, is qualified to exercise the right of stoppage in transitu. Feise v. Wray (1802 3 East 93) shows that if the vendor received only part of the price, his right of stoppage is not terminated and the same applies if the payment has been received in not yet mature bills of exchange unless the bills were taken as absolute payment and not as conditional (Benjamin on Sale 7th edition p. 923).

Not only the unpaid vendor can exercise a right of stoppage in transitu but also certain persons in equivalent position with the unpaid vendor. Such persons are:

a) a principal who consigns goods to a factor (Newsom v. Thornton 1805, 6 East 17)

b) a vendor's agent to whom a bill of lading is endorsed (Morison v. Grey 1824, 2 Bing 260). In case, however, there is no such endorsement, the right can be exercised only in the name of the vendor (Whitehead v. Anderson 1842 9 M & W 518),

c) a Commission Agent of the Vendor, though for other purposes treated as a common agent (Cassaboglou v. Gibb 1883 11 Q.B.D. 797) is treated as principal for the purpose of exercising the right of stoppage in transitu,

d) a surety for the buyer who paid the vendor (Imperial Bank v. London & St. Katharine's Docks 1877 6 Ch. D. 195)

e) one partner against another partner (EX. p. Cooper (1879) 11 Ch. D. 68).

f) persons usually not having authority to stop in case vendor expressly ratifies their action prior the transit is ended. In such a case the person exercising the right must purport to act on behalf of the vendor (Keighley Maxted & Durant & Co. 1901 A.C. 240).

Generally the right of stoppage in transitu may be exercised against the vendee and all persons claiming under him. Consequently, a sub-sale by the vendee would only pass to the sub-vendee such equitable interest as his immediate purchaser could convey and not legal property in the goods unless the title of the sub-vendee would not be based on endorsement and delivery of the bill of lading and the price of the goods has been paid. (Kemp & Falk, 1882 7 App. Cas. 573). The

decision of the courts in such cases may be such as to impose on the sub-purchaser the obligation to pay the price to the original vendor as a condition of receiving the goods (Kemp & Falk, 1882 7 App. Cas. 573).

There is one exception, however, from this general rule. If the bill of lading is negotiated for valuable consideration in bona fide with the intention to pass absolutely the property in the goods, such endorsement completely defeats the vendor's right of stoppage in transitu (Lickbarrow v. Mason 1794 1 Smith L.C. 13th Edition, Sewell v. Burdick 1884 10 App. Cas. 74). It follows from the above statement that endorsement for security purposes (mortgage or pledge) does not affect whatsoever the vendor's right to stop the goods in transitu. The valuable consideration for which the endorsement is made might be given in the past or in the present. The transaction must be bona fide and without knowledge of facts that would rend the bill of lading not fairly and honestly assignable. Reference must be made to the part of this study which gives the characteristics of the negotiable instruments (pages) when the questions of consideration bona fide were duly discussed.

INSOLVENCY OF THE BUYER

The unpaid seller's right to stoppage in transitu arises only upon the insolvency of the buyer, and is based on the principle of justice and equity that one man's goods shall not be applied to the payment of another man's debts (Per Lord Northington, L.C., in D'Aquila v. Lambert 1761, 2 Eden, at 77; Amb. 399). If, there-

fore, after the seller has delivered the goods out of his own possession, and puts them in the hands of a carrier for delivery to the buyer, he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession. The seller can only exercise the right against an insolvent or bankrupt buyer.

The Sale of Goods Act (S. 62 (3)) provides that a person is deemed to be insolvent:

a) who either has ceased to pay his debts in the ordinary course of business, or

b) who cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt. A notour bankrupt (Scottish term) is a person who is not only insolvent, but whose insolvency is made known to the public by steps of legal diligence having been taken against him for the recovery of debts.

At common law, by "insolvency" is meant a general inability to pay one's debts (Parker v. Gossage (1835), 2 C.M. & R. 617; 5 L.J. Ex. 4;) and of this inability the failure to pay one just and admitted debt would probably be sufficient evidence (Sm. Merc. Law (ed. 1877) 550 n). In a number of the cases, the fact that the buyer or consignee had "stopped payment" has been considered, as a matter of course, to be such an insolvency as justified stoppage in Transitu (Vertue v. Jewell (1814) 4 Camp, 31).

If the seller stops the goods in transitu before the buyer has become insolvent, he does so at his peril. If, on the arrival of the goods at destination, the buyer is then insolvent, the premature stoppage

will avail for the protection of the seller; but if the buyer remains solvent, the seller would be bound to deliver the goods with an indemnification for expenses incurred (Per Lord Stowell in The Constantia (1807) 6 Rob. Adm. R. 321).

CARRIER'S LIEN

Subject to any agreement to the contrary between the seller and the carrier(U.S. Steel Products Co. v. G. W. Ry. Co., (1916 A.C. 189; 85 L J.K.B.1), the unpaid seller's right of stoppage takes precedence of a carrier's lien for a general balance (Oppenheim v. Russell (1802) 3 B. & P. 42; 6 R.R. 6 4; Richardson v. Goss (1802) 3 B. & P. 119; 6 R.R. 727. Amer, Potts v. N.Y. R.R. Co. (1881), 131 Mass. 445), though not of his lien for the special charges on the goods carried (Morley v. Hay (1828) 3 M. & Ry. 396; 7 L.J. (o.s.) K.B. 104); and he may also maintain his claim as paramount to that of a creditor of the buyer who has attached the goods whilst in transit by process of the Mayor's Court of the City of London (Smith v. Goss (1808), 1 Camp. 282; 10 R.R. 684)

DURATION OF TRANSIT

The transit is held to continue from the time the seller parts with the possession until the purchaser acquires it; i.e., from the time when the seller has so far made delivery that his right of lien is gone to the time when the goods have reached the actual possession of the buyer.

The following propositions are deduced in Benjamin on Sale Pg. 951 - 953, from the authorities on the question of the continuance of the transit:-

"1. Goods are in transit while they are in the possession of the carrier as such (Ex. p. Rosevear China Clay Co. (1879), ante 939, s. 45 (1), ante, 927).

2. They are in the possession of the carrier as such-

(a) while they are in motion on their journey to the appointed destination, that is to say, the destination contemplated by both the seller and the buyer, or

(b) while they are lodged in any place in the course of transmission to such destination, and until they have been actually delivered into the possession of the buyer or his agent. The appointed destination may be specified in the contract of sale itself, or by subsequent directions by the buyer to the seller.

3. When the goods are lodged in any place, the fact that they await fresh orders from the buyer or the seller, as the case may be, is relevant to prove or disprove respectively that they have reached their appointed destination, and have been delivered to the buyer.

4. A destination for the goods contemplated by the buyer may be either the appointed estimation, or a further destination.

In the latter case, the transit between the appointed and the further destination is a fresh transit to which no right of stoppage can apply.

5. The destination contemplated by the buyer will, even though it be unknown to the seller, be identical with the appointed destination, if the seller is to deliver the goods to a carrier as such, who is to convey the goods to that destination by order of the buyer.

6. A destination contemplated by the buyer is not, merely because the seller is aware of it, the appointed destination; nor it is such destination where the seller has no authority to forward, or to instruct the person in possession to forward, the goods to the destination contemplated by the buyer.

7. Shipment on board a ship owned or chartered by the buyer is a delivery to a carrier as such, if the seller reserve the right of disposal, even though he afterwards transfers the bill of lading to the buyer. It is otherwise if the bill of lading is taken out in the name of the buyer. The fact that the master of the buyer's ship, in receiving the goods as carrier only, exceeds his authority, is immaterial.

8. Shipment on board a carrier's ship is a delivery into the possession of the carrier as such, although the bill of lading be taken in the name of the buyer or sub-buyer, or, having been taken to the seller's order, is afterwards transferred to the buyer.

9. Similar principles apply to the delivery of the goods to the buyer's own or hired cart or whole vehicle. The seller may, it is submitted, control the terms of the delivery."

TERMINATION OF TRANSIT

According to the Sale of Goods Act, 1893, (45, 46) the transit of goods ends:

1) by delivery by the vendee or his agents
2) by delivery to a forwarding agent
3) by mutual agreement between the carrier and the vendee whereby the former holds the goods as agent for the vendee.

Where the attornment of the carrier is relied on, that attornment must be founded on mutual assent. If the carrier does not assent to hold the goods for the buyer, or if the buyer does not assent to his so holding them, there is no attornment (See James v. Griffin (1837) 2 M & W 623; 39 Digest 628, 2257)(offer to attorn not accepted by buyer); Kemp v. Falk (1882), 7 App. Cas. 573, at p. 584, 586; 39 Digest 635, 2308 (carrier not agreeing to change his character).

The fact that the freight is unpaid is strong, though not conclusive, evidence that the carrier is in possession of the goods, as such, and not as the buyer's agent (Kemp v. Falk (1882) 7 App. Cas. 573, at p. 584; 39 Digest 635, 2308).

A summary of the law as to the termination of the transit is given by Cave, J., who says:

"When the goods have arrived at their destination, and have been delivered to the purchaser or his agent, or where the carrier holds them as warehousemen for the purchaser, and no longer as carrier only, the transitu is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But, however fixed, the goods have arrived at their destination, and the transit is at an end when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles." (Bethell v. Clark (1887), 19 Q.B.D. 553, at p. 561; affirmed by C.A., 20 Q.B.D. 615; 39 Digest 618, 2164.)

In a case where goods were consigned to South Africa, but were stopped by the buyer at Southampton, Bailhache, J., held that the transitus was at an end:

"Where the original transitus is interrupted by the buyers, I think the test is whether the goods will be set in motion again without further orders from the buyers; if not, the transit is ended, and the right to stop lost." (Reddall v. Union Castle Steamship Co. 1914, 84 L.J.K.B. 360; 39 Digest 621, 2188).

Where goods which, under the contract were to be delivered "Free house, London", arrived in London port, and the buyer directed the carrier to warehouse them and await further instructions, it was held that the transitus was at an end when the goods were collected from the steamer and warehoused in accordance with this instruction, and that in any case sub-sect (2) of the section would operate to terminate the transit (Plischke v. Allison Bros. Ltd., (1936) 2 All E.R. 1009, Digest Supp.)

There are further points which might present difficulties. Where the goods have reached their destination, and it is questionable whether they still remain in the hands of the carrier, or, if landed, whether the wharfinger or warehouseman is the agent of the buyer to receive them and hold them for the buyer's account. Lord Blackburn in Contract of Sale, 248; 2nd ed., offers the following explanation:

> "The question was one of fact, viz., in what capacity did the different agents hold possession? This question becomes still more difficult to answer where the party holding the goods acts in two capacities, as, for instance, a carrier who also acts as a warehouseman, ... or a wharfinger who sometimes received the goods as agent of the shipowner, and sometimes as agent of the consignee.... If the possessor of the goods has the intention to hold them for the buyer, and not as an agent to forward, and the buyer intends the possessor so to hold them for him, the transitus is at an end; but I apprehend that both these intents must concur, and that neither can the carrier, or his own will, convert himself into a warehouseman, so as to terminate the transitus, without the agreeing

v. Griffin, 2 M & W 623),

nor can the buyer change the capacity in which the carrier holds possession without his assent, at least until the carrier has no right whatsoever to retain possession against the buyer" (Jackson v. Nichol, 5 Bing N.C. 508 7 Scott 577).

This view of the law has received full confirmation in subsequent cases (Statement of the law by the C.A. in Ex. p. Cooper (1879), 11 Ch. D. 68; 48 L.J. Bkcy. 49), and is adopted by the Sale of Goods Act, which reads:

"45. - (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee or custodier (A Scottish term for bailee) acknowledges to the buyer, or his agent, that he holds the goods on his behalf and continues in possession of them as bailee or custodier for the buyer or his agent, the transit is at an end, and it is immaterial that a further desination for the goods may have been indicated by the buyer."

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"(4) If the goods are rejected by the buyer, and the carrier or other bailee or custodier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back."

The leading case of Whitehead v. Anderson (9 M. & W. 518; 11 L.J. Ex. 157; 60 R.R. 819) is a direct authority for the principle that the buyer cannot force the carrier to become his bailee to keep the goods without the carrier's assent.

Notice to stop in transitu according to the Sale of Goods Act, must be given while goods are still in transitu, (pg. 213 Scrutton: Charter-Parties).

THE LIABILITY OF THE CARRIER FOR CARRYING OUT THE INSTRUCTION TO STOP

Regarding the duty of carrier on stoppage, The Sale of Goods Act provides:

"S. 46 - (2) When notice of stoppage in transitu is given by the seller to the carrier, or other bailee or custodier in possession of the goods, he must redeliver the goods to, or according to the directions of the seller. The expenses of such redelivery must be borne by the seller."

If the carrier, after a valid notice of stoppage, refuses to redeliver to the seller, or deliver to the buyer, he is guilty of a conversion. This was the rule at common law; and now under section 57 of the Act, the duty of the carrier to redeliver to the seller is enforceable by an action. Such an action, whether technically an action of trover or not, will be founded on tort, and not on contract, and the costs recoverable will be regulated accordingly.

The seller also possesses a remedy by injunction, or by arrest of the ship, if the goods are in the possession of a carrier by water.

The last sentence of section 46 (2), which declares the incidence of the expenses of delivery, is quite in accordance with common law principles, although no decision to the same effect has been found.

The mode of exercising the right of stoppage underwent careful investigation in the Admiralty Court in the case of the Tigress, (1863) a proceeding by the sellers to recover, by the arrest of the ship, damages for the refusal to deliver the goods to them. It was determined that:

A seller's notice to stop makes it the duty of the master of the vessel to refuse delivery to the buyer, the endorsee

(b) All that is necessary to a notice of stoppage is "for the vendor to assert his claim as vendor and owner" and he need not prove that all conditions necessary to stoppage have been fulfilled; consequently, a notice is sufficient without any representation that the bill of lading has not been transferred by the buyer, such not being a matter ordinarily within the seller's cognizance.

(c) Stoppage is at the seller's peril, and the master must give effect to a claim as soon as he is satisfied that it is made by the seller, unless he is aware of a legal defeasance of the seller's claim.

(d) The seller's right includes the right of demanding delivery to himself, and that the carrier has no right to say that he will retain the goods for delivery to the true owner after the conflicting claims have been settled. But the master can always protect himself by interpleading.

(e) The master's refusal to acquiesce in the seller's claim of stoppage is a breach of duty, giving jurisdiction to the Admiralty Court.

The review of these passages relating to bills of lading indicates that the right in the consignor of goods to stop them in transit as given by Article 12 of the Warsaw Convention is not satisfactory. According to the English law of the sale of goods, stoppage in transit is allowed only in the case of insolvency of the buyer (or consignee). No such qualification

is imposed in the case of carriage by air. The unqualified right of the consignor to stop in transit, therefore, is in conflict with his right in the case of carriage by other means. This would seem to be anomalous. Moreover, the provision might well give the consignor rights over goods the property in which has ceased to be his.

The Sale of Goods Act, 1893, provides that unless a contrary intention appears in the contract, property passes when the contract is made. In the absence of a special agreement, goods sold to a consignee would be the property of the consignee in transit. Why then should the consignor, no longer the owner, have such wide powers of stoppage? This is one more example of the differentiation between air carriers on the one hand and other carriers on the other - a differentiation which, it is contended, should no longer be allowed to persist. The only effect of such in the mind of the public will be to convey the idea that air carriage is something abnormal and special, and not the ordinary everyday method of carriage which its advocates would have the public believe it to be.

ARTICLE 13

1) Except in the circumstances set out in the preceding Article, the consignee is entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

In connection with this Article it should be noted that the IATA Conditions of Carriage (Article 8) provides that the delivery of the consignment will be made only to the consignee named on the face of the airwaybill, unless such consignee is one of the carriers participating in the carriage. In this case, delivery will be made to the person whose name is indicated on the face of the airwaybill as the person to be notified. It is also provided that the carrier will only deliver the consignment upon the written receipt of the consignee and upon compliance with other applicable terms of transport contract. There is no doubt that these two provisions of the conditions of carriage would have to be deleted in case it will be decided to make the airwaybill negotiable as these provisions bar the indorsee to some extent of receiving the goods and, therefore, they are admittedly contrary to the principles of negotiability. It is submitted that if a negotiable document exists, the written receipt of the consignee is unnecessary and further the indorsee must not comply with other applicable terms

of the contract but those of which he knows. The elimination of these provisions from the Conditions of Carriage will meet no difficulty since nothing in the Warsaw Convention requires such conditions to be imposed upon the parties to the Contract.

With respect to the position of the consignee, the assertion that the person who is owner of goods immediately after the making of the contract of carriage, must be, apart from special agreement, the only person competent to sue the carrier for a breach of contract at any period of the transit, is too wide a proposition. The ownership of the goods may change during transit. An event upon the happening of which buyer and seller have agreed that the property shall pass may happen during transit; a contract of sale unenforceable by reason of section 4 of the Sale of Goods Act, 1893, may become enforceable during transit; the conditions subject to which a jus disponendi is reserved may be fulfilled during transit. In all these cases the property will pass during transit, and the right to sue on the contract of carriage will also pass, save in respect to accrued damage. These cases, which all relate to the position of the original consignor and consignee, are not strictly those to which this note relates.

If, sometime before the end of the transit the property has passed to the consignee, the consignee cannot, under the present Convention, transfer any rights under the contract of carriage, and in particular the right to delivery, to a third party, by any transaction short of a novation to which the carrier must be a party. It was already pointed out that the documents under which carriage by air is conducted, whether they be waybills or consignment

lading; they do not symbolize the goods;

tle. Their transfer cannot in any

circumstances affect either the ownership of the goods or rights against the carrier.

No doubt, the consignee may sell the goods during transit, and if he is in a position to transfer a document of title to his purchaser, he may effectively defeat the right of stoppage in transitu. But such a transfer can have no greater effect than the endorsement of a bill of lading at common law. That a consignee cannot substitute a third party for himself without a novation appears to have been decided in L.&S.W. Ry. & G.N. Ry v. Bishop (1898) 42 Sol. J. 255). A third party may accept delivery as agent of the consignee. It is submitted that a notice sent out by the air transport undertaking to consignees after the arrival of goods, informing them of such arrival and asking for instructions, may constitute such a document as will, in the absence of notice, justify the carrier in delivering to whosoever produces it. It may even constitute a document of title as being a "document used in the ordinary course of business .... authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented" within section 1, sub-section 4, of the Factors Act, 1889, and section 62 of the Sale of Goods Act, 1893.

With respect to British Railways, the cases: Heugh v. L.&N.W. Ry. (1870) L.R. 5 Ex.51) and M'Kean v. M'Ivor (1870) L.R. 6 Ex. 36, Leslie p. 95) seem to have virtually so decided. In both cases, however, special facts were considered: in the first a delivery order purporting to be signed by the consignee was also produced, and in the second the notice expressly required endorsement as a delivery order. For these reasons the authority of these cases might be contested.

ARTICLE 14

The consignor and the consignee can respectively enforce all the rights given them by Article 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

It was enumerated earlier who are the possible parties who can bring action against the carrier on the basis of transport contract. In Article 14, it is provided that both the consignor and the consignee can respectively enforce all rights under Articles 12 and 13. Thus, the application of Article 14 is limited to the "right of disposition" of the consignor, and the rights of the consignee against the carrier in Article 13. The right of disposition of the consignor terminates when that of the consignee begins. It is, however, questionable whether the consignor, by losing his right of disposition, also loses his right to bring action against the carrier.

Nowhere in this Convention can we find an indication that anybody else but the two parties mentioned in this Article and the bona fide possessor of the consignment note in the case of Article 12 (3), can bring valid action against the carrier.

The right of action on the contract of carriage has great importance in the British Legal System, and it seems to be justified to explore the positions of the transferability of the bills of lading as the only means in international transportation conveying titles to goods.

It will be convenient to review

a) how the transfer of the bill of lading is carried out

b) what are the effects of the transfer

i) on the transport contract

ii) on the contract of sale

iii) on the possession of goods

iv) on the ownership of goods.

Procedure for the Transfer of the Bill of Lading

This procedure depends upon the form of the bill of lading, which might be to a named person or to bearer or to order.

The Bill of Lading is to a named person if it shows the name of the consignee. The consignee may be the shipper himself or his agent if the shipper has found no purchaser for the goods and sends them to himself or his agent. In most cases, however, the consignee is the purchaser of the goods. This consignee becomes the creditor of the carrier, consequently, in French law, if he wants to transfer the bill of lading, he must use the form of transfer of an ordinary civil debt (Art. 1690 of the civ. C). Briefly, before delivery of the bill of lading, he must notify the Captain of the ship of the transaction to protect his interest (Bordeaux 2 Nov. 1891 Algiers 15 Nov. 1892). This difficulty and uncertainty of this form of transfer is evident and, consequently, its use is very limited. Third parties are only affected by this transfer through the notification mentioned before.

The bill of lading to a named person is not negotiable and cannot be endorsed. The Hague rules do not apply to this bill of lading which, consequently, has limited application and almost no importance.

Bill of Lading issued "to bearer" - or where the name of the consignee is left blank appears not to be a perfect solution, although the document is transferable. The carrier fears the risks of theft or loss. Usually, there is no protective legislation for titles to bearer in case of theft or loss. (The Law in France of June 15th, 1872 does not apply to the bill of lading).

The bill of lading to bearer can be transferred by simple delivery; the Captain detains henceforth the goods for the account of the bearer of the bill of lading to whom he is bound to deliver. The holder may at any time fill in the blank, either in the bill or endorsement (Lichbarrow v. Mason 1794).

Every time that the bill of lading shows no name of consignee, it must be considered as to bearer. If the bill of lading shows the clause "to order" without mentioning to the order of whom, it is considered as bill of lading to bearer, transferable by simple delivery.

Bills of Lading "to order" or "to assigns" - The bill of lading may be made either to the shipper's order or to the consignee's order, according to whether the goods are already or not yet sold by the shipper. In these cases, the bill of lading is transmissible by endorsement.

This last form is by far the most currently used; it has the advantage of assuring an easy transmission of the title while safeguarding the interested party against risks of theft or loss. The Supreme Court of Appeal decided, in France, however, that there should be a distinct clause "to order" inserted on the bill in order to facilitate the transmission by endorsement. It has been expressed, at the same time, that the bill of lading is not in itself, by its nature, a title of goods. Certain other French Courts showed more flexibility and, even after the decree of the Supreme Court, admitted the validity of the endorsement without the clause "to order". Consequently, it appears that the stipulation of the Supreme Court of Appeal is not followed generally and the parties are free, in France, to adopt whichever form they find indicates clearly their intention.

In the United States two types of bills of lading are used commonly, known respectively as straight bills and order bills. The Federal Bills of Lading Act, 1916, known as the Pomerene Act (U.S. Code Title 49 para. 81 to 124, sec. 2 and 3) defines two types: "A bill in which it is stated that the goods are consigned or destined to specific person is a straight bill" and "A bill in which it is stated that the goods are consigned or destined to the order of any person named in such a bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is non-negotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper" (Section 3).

It may be noted that the difference between the straight and order bill is such that the straight bill of lading corresponds to all intense and purposes to a bill of exchange which is made out to a named person only; the contrary, the order bill is much similar to the usual type of bill of exchange which is payable to order. Under a straight bill of lading, the carrier is entitled to deliver the goods to the person named in the bill of lading. But the transfer of the bill of lading by the consignor to another person than the consignee, cannot be expected to carry with it extended rights, thus it may be the case that the carrier rightfully delivers the goods to the named consignee notwithstanding that the consignor assigned the goods and the contract to the third party. In case of the order bill, the situation is entirely different. It is intended that the bill will pass from hand to hand and, consequently, special rules had to be created to meet this situation. Greater rights were given to the holder of this bill which became the most commonly used in practice.

An endorsement of a real negotiable instrument in order to operate as a negotiation must comply with the following conditions, namely:

1) it must be in writing on the bill itself and be signed by the endorser. A simple signature of the endorser on the bill, without any additional words is considered to be sufficient;
2) an endorsement may be made in blank or special. It may also contain terms making it restrictive;
3) the entire bill must be endorsed. A partial endorsement, that is to say, an endorsement which purports to transfer to the endorsee a part only of the amount payable, or which purports to transfer the bill to two or more endorsees severally, does not operate as a negotiation of the bill.

4) if there are two or more payees or endorsees who are not partners, they all must endorse. It is, however, possible that one is authorized to endorse for the others;

5) if there are two or more endorsements on a bill, each endorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

Where a bill is negotiable in its origin, it continues to be negotiable until it has been:

a) restrictively endorsed, or

b) discharged by payment or otherwise.

Assignment or Sale of the Negotiable Instruments

A bill may be transferred by assignment or sale on the same conditions required for an ordinary chose in action. Thus, the holder of a note payable to his order, may transfer his title,

a) by a separate writing assigning the note to a certain party, or

b) by a voluntary deed constituting a declaration of trust in favour of this party, or

c) by a written contract of sale.

A bill is a chattel and a chose in action; therefore, it may be transferred as a chattel or a chose in action. It is clear that a subsequent title under the law merchant would override a prior title under a sale or assignment according to the general law, e.g., the holder of a bill payable to bearer, assigns by deed certain property, including the bill, to a party, and parts thereby any property in the bill, but he still holds it, and if he transfers it by delivery to another party who takes it for value and without notice, this latter's title overrides the first buyer's title. It seems now quite settled that a non-

negotiable note cannot be assigned, there being an intention manifest in the instrument to that effect. Notice to a debtor who has given a cheque or other negotiable instrument for his debt assigned by the creditor can be disregarded by the debtor, even if the creditor who has assigned the debt is the holder of the instrument. So much for the rules of the negotiable instruments to illustrate their assignability.

The endorsement of the Bill of Lading is a more involved question and it has to take care of two different contracts:

a) the contract of carriage, and

b) the contract of sale.

The first one governs the relationship of the carrier with the consignor (shipper) and the named or unnamed consignee. The second question covers the relationship between the vendor and the vendee, the consignor and the consignee if any. By reason of the endorsement there is a change in the parties to these contracts. In the first case the new party will endeavour to obtain the goods at the port of destination, and the question arises as to - through what means can this party acquire legal possession, and further what remedies are in his power to force the carrier on the basis of a contract to which he originally is not a party. The important question is whether the endorsement of the Bill of Lading confers to the endorsee right to bring suit against the carrier, and thus in effect it results in a novation of the contract in the favour of the endorsee.

That such transfer of right of action is possible, in case of endorsement, without the full effects of novation, is a well recognized principle of the law relating to Bills of Lading.

The carrier's interest in this second contract is rather secondary. He is not profiting nor losing by the changing personalities of the consignees or the ever uncertain bearer of the document. It is, however, quite possible that unforeseen events may result in dangerous risks for the carrier arising out of this relationship. It is also conceivable that the carrier undertakes a certain amount of risk of warehousing and faces the uncertainty of the person of the bearer of document of title.

(1) Assignment of Contract of Carriage

It is quite obvious that the transfer of the document itself would not transfer rights rising out of the transport contract which nevertheless might be assigned under the general rule: "nemo plus juris in alium transferre potest quan ipse haberet" and provided that there is no special stipulation forbidding such transfer (Josserand).

The specific position of the bill of lading, however, necessitated that endorsement should confer on the endorsee the same rights and liabilities as if the contract evidenced in the bill of lading were originally made with him. (It may be interesting to note that a contract is sometimes of such a nature that one party may be entitled to perform his obligation under it vicariously; such a contract is sometimes called "assignable" which should be more accurately limited to the

transfer of the right not the obligations of the contract. (British Vagon co. v. lea 1880 5Q.B.D. 149)). Thus, under assignable contract, it is understood that although the rights based on the contract have been transferred, the liabilities are still attached to the original obligee, who remains jointly responsible for the obligations under the contract.

As a contract of carriage, a bill of lading is a chose in action and as such is not generally assignable at common law. But as, in American Law, substantially, all choses in action are assignable at present, the transfer of the bill of lading has been held to give to the transferee all the rights under the bill which the transferrer had. (Feeders Supply Co. v. Union Pacific R. Co. MO. APP., 96 SW 2 D 1056).

In England the Bills of Lading Act 1855 (18 & 19 Victoria C. 111) gives the right to the endorsee of the bill of lading to obtain all rights and duties of the original shipper under the contract evidenced in the bill of lading. The endorsee, however does not obtain any rights and duties of the original shipper which are derived from the contract evidenced by the bill of lading (Leduc v Ward 1880 20 Q.B.D. 475) and where the property does not pass to the endorsee by the endorsement, the endorsee does not acquire by the endorsement any right to sue on the contract evidenced by the bill of lading (Delaurier v Wyllie 1889 17 Breppie 167 - is to the iron) (contrast in the same

decision regarding coal).

By the Carriage of Goods by Sea Act 1924, the endorsement to a third party of a bill of lading issued to a charterer may create different contract from the charter party even though the charter party is incorporated expressly in the bill of lading.

(11) Assignment of Contract of Sale

There is no provision in the Sale of Goods Act which deals with the assignment of contracts of sale. Such contracts can therefore be assigned subject to the conditions applicable in the case of other contracts. If the assignment is to be a legal assignment, the provisions of sec. 136 of the Law of Property Act, 1925, (15 Halsbury's Statutes 177), must be complied with. But this section, which replaces sec. 25 (6) of the Judicature Act, 1873, "does not enlarge the class of choses in action, the assignability of which was previously recognized at law or in equity" (Tolhurst v. Associated Portland Cement Manufacturers, Ltd., (1902) 2 K.B. 660, at p. 676; 12 Digest 588, 4907).

The simplest cases arise where the goods have been delivered and the right to receive the price is assigned, or where, the price having been paid, the right to receive the goods is assigned. In both these cases the assignor has performed his part of the contract, and the obligation of the other party to the contract is varied to this extent only, that he must pay the price or deliver the goods to the assignee instead of to the person with whom he contracted. The rule is the same where the price is not due at the date of the assignment; the right to receive it when due can

be assigned (Brice v. Bannister (1878) 3 Q.B.D. 569;7Digest 420, 344). Apparently an assignment of part of a debt or other legal chose in action is not effectual to transfer the legal right to that part which is assigned, but operates in equity only, with the result that the assignee could not sue in his own name (Re Steel Wing Co. Ltd., (1921) 1 Ch.349; 8 Digest 428, 67; Williams v. Atlantic Assurance Co. Ltd., (1933) 1 K.B.81; Digest Supp.).

But the contract may provide for a series of deliveries, or the quantity, quality or the time of the delivery may depend on the wishes or needs of the parties. In these cases, where neither party has performed his part of the contract, there can be no assignment where the duties which were owed to the assignor would be made more onerous by being transferred to the assignee, or where the rights to be assigned are essentially personal. (Kemp v. Baerselman (1906), 2 KB 604 12 Digest 589, 4908; International Fibre Syndicate v. Dawson (1901), 3 F. 32; 12 Digest 593, 4930).

In any case, it is only the benefit of a contract which can be assigned. The assignor cannot get rid of his obligations. The most he can do is to perform them through his assignee, he himself remaining liable (British Waggon Co. v. Lea (1880), 5 Q.B.D. 149, C.A.; 12 Digest 589. 4911).

Novation must be distinguished from assignment and is a matter of agreement between the parties.

It was already noted that bills of lading making goods deliverable "to order" or "to order or assign" are by mercantile

custom megotiable and the property of the goods represented in these instruments may be affected through the endorsement and delivery of the bill of lading. Lickbarrow v. Masson (1794) 5 T.R. 684 and Sewell v. Burdick (1884) 10 APP. CAS. 74.

(111) Right of property in goods may be, however, completely assigned to another without any assignment or delivery of the bill of lading at all;

Per v Parke in Bryans v Nix (4 M. & W. Page 791)

"If the intention of the parties to pass the property whether absolute or special in certain ascertained chattels is established and they are placed in the hands of a depository no matter whether such depository be a common carrier or a ship, master employed by the consignor or a third person, and the chattels are so placed on account of the person who is to have that property, and the depository sensed it is enough and it matters not by what documents this is affected. Nor is it material whether the person who is to have the property be a factor or not, for such an agreement may be made with a factor as well as any other individual."

Lord Grenville in Sewell v Burdick (10 A.C. at page 105) mentions that there is some inaccuracy of expression in the statutes. In his opinion the property does not pass by the endorsement but by the contract in pursuance of which the endorsement is made. There is no doubt whatsoever that the property passes to the vendee on the grounds of the sale contract even without the endorsement or handing over of the bill of lading which does not mean that the consequences of the non-endorsement and non-handing

over would not be burdensome.

The endorsement must take place while the bill of lading is still in force. The bill of lading remains in force at least as long as complete delivery of possession of the goods has not been made to some person having the right to claim them under it. (Willes, Myerstein v Barber, 1866, 2 C.P. Page 53). In the same case it has been said by Willes, J. "there can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them". The person who first gets the bills of lading, gets the property which it represents. There is no act required on his part to assert his title. The transfer of the bill of lading completes his title.

The Statute (Bills of Lading Act, 1855) contemplates the passing of the property in the goods by the endorsement of the bill of lading as a thing which may or may not happen according to the nature and intent of the contract.

It is recognized that the result affecting property rights arising out of the transfer of the bill of lading through delivery and endorsement or by simple delivery, is due to mercantile custom. The endorsement and delivery gives right to the endorsee to claim under the bill of lading the possession of the goods whose shipment is evidenced in the bill of lading, being held that the intention of the parties is to transfer such property (Sewell v. Burdick). It is true that the intention of the party in endorsing the bill of lading may vary according to the circumstances, but the decision in

the Sewell verdict has made it clear that the effect of the endorsement of a bill of lading depends entirely on the particular circumstances of the individual endorsement, and that there is no general rule that the endorsement passes the whole legal property in the goods. This decision consequently out-dated the number of important cases which contended such general rule and others which spoke of assignment of the bill of lading as parting with the "whole and complete ownership of the goods" (Lord Hatherley in Barber v Meyerstein 1870 L.R. 4H. L. 325 335).

The authorities regarding the effects of the transfer of the bill of lading can be thus summarized:

Since the Bills of Lading Act, 1855, as well as before, a bill of lading may be endorsed by way of mortgage, pledge or other security, and not by way of absolute sale (Sewell v. Burdick (1884), 10 App. Cas. 74; 35 Digest 247, 73. But as to Scotland; Hayman v. McLintock (1907), 9 F. 936, at p. 949; 39 Digest 485, 1049 xii).

Where a bill of lading is so transferred, the original seller retains his right of stoppage subject to rights of the incumbrancer, and, further, he may compel the incumbrancer to resort to other goods pledged with him by his debtor, if such there be, before resorting to the goods covered by the bill of lading (Re Westzinthus (1833), 5 B & Ad. 817); 39 Digest 633, 2304; Spalding v. Ruding (1843), 6 Beav. 376); 39 Digest 634, 2305;).

That the right of stoppage in transitu is wholly defeated when the bill of lading is assigned absolutely for a consideration which is wholly paid (Lickbarrow v. Masson (1793), 1 Smith's L.C.

13th Ed., p. 703; 39 Digest 614, 2155; Leask v. Scott (1877, 2 Q.B.D. 376, C.A.; 39 Digest 636, 2316).

That as between buyer and seller, that is to say, the immediate parties to the contract, the endorsement of the bill of lading does not affect the right of stoppage, nor does a further endorsement by the buyer affect the right unless the endorsement be for value (Lickbarrow v Masson (1793) 6 East, 22 n H.L.; 1 Smith's L.C., 13th ed., p 703; 39 Digest 614, 2115), but an antecedent debt may constitute such value (Leask v. Scott (1877), 2 Q.B.D. 376, C.A., 39 Digest 636, 2316).

When the bill of lading is transferred to a Sub-purchaser absolutely and for value, but that value is wholly or in part unpaid, there is probably no longer any right to stop to the extent of the money which is unpaid. Where the buyer re-sold the goods and became insolvent, the bill of lading was made out in the name of the sub-purchaser but not delivered to him, and when the goods were stopped he had not paid the price. It was held, that the original seller was entitled to stop the goods for the original purchase-money. Cotton L. J., said that the case must be decided "as if the bill of lading had been made out in the name of the original purchasers and had then been assigned by them to their sub-purchasers" (Ex p. Golding Davis & Co. (1880), 13 Ch. D. 628, at p. 637, C.A.; 39 Digest 632,2294).

If the holder of the bill of lading re-sells the goods or otherwise disposes of them for value to a third person, who pays the money, such third person acquires his interests in the goods subject to the original seller's right of stoppage in transitu,

unless he gets a transfer of the bill of lading (Kemp v Falk (1882), 7 App. Cas. 573, at p. 582, per Lord Blackburn; 39 Digest 635, 2308).

The voyage is deemed to continue, and the bill of lading to be alive as long as the goods are held on behalf of the master under a lien for freight, even though they have been landed (Barber v. Meyerstein (1870), L.R. 4 H.L. 317; 41 Digest 394, 2371.

Where laws conflict, stipulations in a bill of lading must be construed according to the lex loci contractus, which prima facie only is the law of the place where the contract was entered into (Re Missouri Steamship Co. (1889), 42 Ch. D. 321, at p. 328, C.A.; 11 Digest 389, 646).

When a bill of exchange, with bill of lading attached, is presented for acceptance or payment, the person, who in good faith presents it, is not responsible for the authenticity of the bill of lading (Guaranty Trust Co. of New York v. Hannay & Co., 1918) 2 K.B. 623, C.A.; 6 Digest 161, 1037).

Except for the purposes of the Factors Act and of defeating the right of stoppage in transitu, the transferee of a bill of lading acquires no better title to the goods represented thereby than the transferror had. In this respect a bill of lading differs from a bill of exchange, or rather it resembles an overdue bill of exchange.

which can only be negotiated subject to all equities attaching to it. (Gurney v. Behrend (1854), 3 E. & B. 622; 39 Digest 635, 2314. As for fraud, however, The Argentina (1867), L.R. 1 Adm. 370; 1 Digest 158, 664, should be studied).

It will be noted that the effects of endorsement of the Bill of Lading are different from those of the negotiable instruments, where the rights and powers of the holder of a bill are briefly as follows:

1) He may sue on the bill in his own name;
2) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill;
3) Where his title is defective (a) if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and (b) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.

A defective title must be distinguished from entire absence of title. A person who claims under a forgery has no title, and can give none. He is not the "holder" of the instrument.

The power to negotiate a bill must be distinguished from the right to negotiate it. The right to negotiate is an incident of ownership; the power to negotiate is an incident of apparent ownership. Again,

the right to recover, as distinguished from the mere right to sue, depends on the further question whether the holder is a holder for value, and in some cases whether he is a holder for value without notice.

If the holder of a bill, who is the beneficial owner of it, becomes bankrupt, or if a bill be made payable to a bankrupt for his own account, the title thereto vests in his trustee in bankruptcy; but subject to the next rule (reputed ownership), if the holder of a bill is not the beneficial owner of it, the title thereto does not pass to his trustee in bankruptcy.

The title of the trustee relates back to the commencement of the bankruptcy, the exact time of which is sometimes difficult to determine. When the holder has merely a lien on a bill, his trustee stands exactly in his shoes, as to rights and duties regarding it. Where a bill is endorsed to an undischarged bankrupt, it seems he may sue on it in his own name, unless his trusteee interferes and objects.

The bankrupt holder of a bill, however, who negotiates it before the date of the receiving order can give a good title to a person who takes it in good faith for value, and without notice that such holder has committed an available act of bankruptcy. Further, payment of a bill to a bankrupt holder is valid if made in good faith before the date of the receiving order without notice of any available act of bankruptcy.

ARTICLE 15

1) Article 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

2) The provisions of Articles 12, 13 and 14 can only be varied by express provisions in the air consignment note.

The interpretation of Article 15 is not without considerable difficulty. In the first paragraph, there is an express statement that the Articles of the Warsaw Convention treating the consignor's right of disposition (Article 12), the position of the consignee (Article 13), and the right of action of the consignor and consignee (Article 14) do not affect:

a) the relationship of the consignor or the consignee with each other, and,

b) mutual relations of third parties whose rights are derived either from the consignor or from the consignee.

It is questionable whether this passage means that the Convention does not interfere to any extent with the rights of third parties obtained from the parties (consignor, consignee) of the contract of carriage and that the Convention restricts its application only to the contractural relationship between the carrier and consignor/consignee. If the intention of the draftsmen and the ratifying states were such, however, these Articles would completely justify the position taken by Mr. Friendly in his report referred to previously. This report, in substance, finds that, although the provisions contained in Articles 12, 13 and 14 might be inconsistent with the legal principles relating to negotiable bills of lading, these Articles can be varied by express provision in the airwaybill

It is further submitted that the question of negotiability is very much involved with the elements or relationship between the consignor as seller and a third party as buyer. If this Article 15 is interpreted to the effect that Articles 12, 13 and 14 do not affect such relationship, it is reasonable to state that the Warsaw Convention does not preclude the establishment of a negotiable airwaybill.

On the basis of Mr. Friendly's report, Mr. Crosson prepared a document which is a modification to the airwaybill presently in use by IATA. In condition 9 of this document, the applicability of Articles 12, 13 and 14 of the Warsaw Convention is expressly excluded with respect to any transportation under this Convention. William McNair in his report, already referred to, doubts whether such alteration of the Convention is a permissible variation under Article 15 (2) and, further, he does not consider that such a variation would result in conferring rights of suit or property on an unnamed and unidentified third party. In the opinion of the writer, both positions seem not to be entirely satisfactory. While on one part, if the Convention permits deviation from its provisions at all, it certainly fails to restrict it to minor deviations and, therefore, if the parties to the Transport Contract find it agreeable to make express changes on the airwaybill, they can do so. Considering the statement in para. 1 of Article 15, clearly indicating that the Convention does not interfere with the relations between the consignor and consignee and those between the consignor, consignee and third parties, the validity of such express agreement seems to be justified.

On the other part it is felt that there is no necessity whatsoever for excluding the applicability of Articles 12, 13 and 14 of the Convention as only Article 12 contains such provisions which are really inconsistent, to some extent, with negotiability. If, therefore, in the conditions of the airwaybill, Article 12 of the Convention could be modified to the extent necessary, under British Law, such method would undoubtedly satisfy British Counsels.

Article 15 has one additional purpose. It provides that the rights conferred by Articles 12, 13 and 14 can only be exercised as long as there are no agreements to the contrary, either between the consignor and the consignee, or the consignee and third parties. It appears that the carrier needs to be protected in cases where there is an agreement between the consignee or consignor and third parties. For this reason, Articles 12, 13 and 14 can only be modified by express provision to the conditions of the air consignment note.

ARTICIE 16

1) The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of customs, octroi or police before the goods can be delivered to the consignee. The consignor is liable to the carrier for any damage occasioned by the absence, insufficiency or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.

2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

This article has relatively small importance from the point of view of making the airwaybill negotiable. It is submitted, however, that the two provisions incorporated in this part of the Convention has a practical role which cannot be neglected. Similarly to the C.I.M. it places the burden of furnishing the information and supplying the airwaybill on the shipper and expressly states that the carrier is in no obligation to enquire into the sufficiency and correctness of such information.

Reading these passages in connection with Article 9 of the Convention, depriving the carrier of the benefits of limitation of liability if he accepts goods without a properly filled out airwaybill, a certain inconsistency might be found in the convention. The carrier is not obliged to enquire but is responsible for certain information. The liability of the shipper expressed in the second sentence of the first paragraph presents undoubtedly certain amount of guaranty for the carrier. It is questionable, however, whether the damage resulting from unlimited liability falling upon the carrier could be compensated through action against the shipper.

Protection for the carriers can be found in the provisions of article 3 of the General Conditions of Carriage which can be summarized as follows:

a) the shipper is obliged to make out the airwaybill in a form required by carrier;

b) charges, however, will be inserted by carrier;

c) for more than one parcel, separate airwaybills might be required by the carrier;

d) shipper must describe apparent order of goods if their condition is other than good.

e) carrier is authorized, however, to complete or correct the airwaybill if it is incomplete or incorrect.

f) altered or erased airwaybills need not be accepted by carrier.

g) the shipper is in all cases responsible for damages arising out of the incorrectness of the particulars inserted in the airwaybill even if the carrier is the one who inserts it on his behalf.

If the airwaybill is made negotiable, it is submitted that special attention should be paid to this Article, as the correctness of the particulars of a negotiable document, a written instrument of title, is eminently important.

CONCLUSIONS

Applying the principles of negotiability to the problem of making the airwaybill negotiable, the following conclusions might be drawn:

(1) that, subject to any impediments created by the Carriage by Air Act, incorporating the rules of the Warsaw Convention, an air consignment note would be recognized by the English Common Law as having the attribute of transferability, if

(a) its form were not inconsistent with transferability, and,

(b) it were established by evidence that such a consignment note was in fact accepted by merchants as transferable even though of recent origin; though until the general custom of merchants has been proved and accepted by the Courts, there must be an unsatisfactory interregnum of doubt as to the legal position; and

(2) that legislation would be necessary to transfer rights of suit by or against the holder of the consignment note.

Regarding custom or usage, it must be said that it need not be ancient. Bigham J. in Edelstein v. Schuler (1902) 2 K B 144 pointed out that:

> "in these days usage is established much more quickly than it was in days gone by; more depends on the number of transactions which help to create it than the time over which the transactions are spread".

He continues:

> "the comparatively recent origin of this class of securities (bearer bonds) creates no difficulty in the way of holding that they are negotiable by virtue of the law merchant. The law merchant is not fixed and stereotyped...it is capable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce, the effect of which is that it approves and adopts from time to time these usages of merchants which are found necessary for the convenience of trade".

Though this relates to negotiability and not transferability, English Counsel expressed opinion that the same considerations must apply.

As the negotiable airwaybill would be a document used in international commerce, it is unlikely that any national legislature would initiate legislation giving the attributes of negotiability to a particular document, unless there was a general measure of agreement between States and this was the course to be followed; in other words, after an international convention to this effect had been concluded.

In accordance with English Counsel's Opinion, it might be said that under English law, at present, it is impossible to introduce a negotiable airwaybill without infringing the provisions of the Warsaw Convention.

As a temporary measure in cases where shippers of goods require to arrange finance by raising money on goods consigned by air:

(a) the existing form of Air Consignment Note may be used;

(b) the consignee named in the Consignment Note should be the financing house or its agent at the place of destination. The name and address of the actual consignee should be shown under the rubric "also notify..."

(c) the consignor's copy of the Consignment Note would be deposited with the financing house to ensure that the consignor's rights of diversion could not be exercised.

In order to ensure further protection in this connection, an additional condition could be included in the Conditions on the back of the Consignment Note to the effect that the consignor renounces his rights to dispose of the goods. Such a condition would be permissible under Article 15 (2) of the Warsaw Convention which allows variation of Article 12 by express provision in the Air Consignment Note.

There are clearly practical difficulties involved in such a procedure as owners of goods will not renounce rights of disposition when they are not negotiating Consignment Notes.

(d) additional protection could be given to financing houses by consignors in the way that English Counsel recommends, namely by means of an authority to seel the goods. This, however, would be a matter for arrangement between the consignor and the financing houses and would be the subject of a separate document. It appears, however, that in many European countries, where continental law is applicable, this additional protection is not required.

Such procedure would be in conformity with present banking usage and would not require but the few changes mentioned above on the air-waybill.

When the revision of the Warsaw Convention is being considered the possibility of the introduction of a fully negotiable airway-bill under the terms of the new Convention should be, however, thoroughly explored.

It is suggested that the new Convention should provide that nothing contained therein prevents the negotiation of Air Consignment Notes and that if Air Consignment Notes are negotiated, then such transactions should be governed by conditions set out in the Convention.

Part III

CHARGES

The Contract of Carriage is not complete unless the shipper and the carrier agree to the specific charges of the cargo. The airway-bill, which serves as an instrument of proof of the agreement between the shipper and the carrier, incorporates these charges calculated on the basis of principles determined in the Tariffs of the Carrier.

The word "charges" is a very broad expression; briefly it means an amount to be paid for carriage of goods from the place of departure to the place of destination based on the applicable rate for the specific carriage. Sometimes "rates" and "charges" are used together and it appears to be necessary to define "rate" as meaning generally the amount charged by the carrier for carriage of a unit of weight (or volume) of goods. Rates of different nature might be distinguished as:

a) basic (general commodity) rates

b) class rates (applicable to specifically designated class of goods)

c) specific commodity rates (applicability to carriage of specifically designated goods).

It must be emphasized, however, that all these rates are figured on the basis of weight of the goods.

According to the General Conditions of Carriage three distinctions must be made:

1) charges on goods having an actual value of less than $16.50 are calculated solely on a weight basis. No additional charge or premium has to be paid;

2) charges on goods having an actual value of $16.50 or more but less than $200 are calculated, also, on the weight basis but an additional "valuation charge" must be added to the first charge;

3) goods having a value over $200 are in a category where charges are composed of three separate factors:

   a) on weight basis as in the first group;

   b) with addition of "valuation charges" as in the second group, and

   c) plus the so-called valuation surcharge raising from 25% to 500% of the published cargo rate.

The rates on which the carrier calculates the charges are generally published. The word published means that these rates are made available to the public, but the rates are not necessarily in a printed form. The rule in the Conditions of Carriage prescribes that the applicable rates are those duly published by the carrier. A further requirement regarding rates is that they must be in effect at the date of the issuance of the airwaybill.

The variety of structure rates arising out of the traffic Conference system of the Airlines, to be explored later, necessitated provision for constructing those rates which are not published. It is agreed that such rates will be constructed by combining the rates applicable via the desired routing, producing the lowest charge. This proviso is qualified with respect to two points:

1) that such rates must not be less than a published through rate, and further,
2) that no higher rate shall be charged for a combination of segments of a particular route than is charged for a through rate to a more distant point along the same route.

According to the Conditions of Carriage used by IATA prior to World War No. 2, the consignor had an option to undertake the payment wholly or partially of the charges for carriage or to make the consignee liable for those charges together with custom charges, incidental expenses, duties, taxes, disbursements and the charges of haulage. It was prescribed that those charges which are undertaken by the consignor must appear on the air consignment note in an appropriate place; all other charges which were not assumed by the consignor were considered as liability of the consignee. The carriers had the right to demand the payment of all charges together with incidental expenses and disbursements from the consignor before despatch. The carriers also had the right to demand by way of guarantee the deposit of the sum representing the various expenses, if these expenses cannot be determined properly at the time the goods were handed over for carriage.

The conception of these provisions has been incorporated, to some extent, in paragraph 5 of Article 4 which, however, is very much more extensive and detailed. It is provided that the amount of the charges is payable in any currency acceptable to the carrier. If the payment is made in a currency other than in the currency in which the fare is published, the payment will be made at the rate of exchange established by the carrier which is also agreed upon by the Traffic Conference

and with express reference to the provision of applicable exchange laws and government regulations.

An entirely new conception was adopted in the new conditions according to which the full applicable charge whether prepaid or collect is deemed to be fully earned notwithstanding the fact that the goods may not have arrived at the destination specified in the airwaybill or that they have been lost or damaged during the course of the journey. It is provided that the carrier has a right to all charges from the minute the goods are received by him with the exception that the charges may be collected by the carrier at any stage of the service performed under the airwaybill. This provision is an important deviation from the rules governing the Bill of Lading. The internationally known expression "freight" which in the ordinary mercantile sense is "the reward payable to the carrier for the safe carriage and delivery of goods" (Definition of the Judicial Committee in Kirchner vs. Venus, 12 Moore P.C. 361 at p. 390) is substituted in Air Law by the word "Charges" which, however, has the same meaning.

Contrary to the conception expressed in para. 5(b) of Article 4 of the Conditions of Carriage, in sea transportation under a simple contract "no freight is payable if the goods are lost on the voyage or for any other reason except the fault of the merchant alone are not delivered at the port of destination" (Scrutton, p. 366). The only place where a clause "freight to be considered earned, ship lost or not lost, at any stage of the entire transit" is usual, is in the case of Through Bills of Lading.

While 90% of the freight arising out of carriage by air is paid in advance or after delivery of the goods by the shipper or consignor and not by the consignee, the stipulation as to payment of freight on the bill of lading indicatesin the majority of cases that the payment of freight in sea transportation is collected from the consignee, endorsee or holder of the Bill of Lading. Such stipulation vary and we find that freight is made due and payable "on shipment of the goods" or "in exchange for bills of lading" of "on or before the departure of the vessel". It is customary to add the clause "ship lost or not lost" but it must emphasize that this clause only refers to losses through accepted perils (G. Indian Ry. v. Turnbull, 1855, 53 L.T. 325).

It is an accepted principle in sea transportation that the freight is payable on delivery of the cargo, and that payment and delivery are concurrent acts, and the holder of the bill of lading is not entitled to have the goods unless ready to pay the freight. Similarly, the shipowner has no right to the freight unless he is ready to deliver the cargo (Paynter v. James 1867 L.R. 2 P.C. 349).

The question which is of greatest importance is to determine who is the person who must pay the charges or freight. British Law regarding bills of lading recognizes that freight is prima facie payable according to the terms of the contract by the person with whom the carrier made the contract. The persons who are, in certain circumstances, liable for the freight are:

The shipper whose obligation to pay freight is implied as a contract with the carrier from the period of the shipment of goods (Shepard v. De Beruales 1811, 13 East 565). Express terms in the Bill of Lading may exclude this obligation but the endorsement of the bill of lading by the shipper to pass property does not relieve the shipper of his obligation.

The Consignee named in the bill of lading is liable by the Bills of Lading Act 1855 (188 19 Vict. C111) on the terms incorporated in the bill of lading.

The Indorsee of the bill of lading is liable for freight by the Bills of Lading Act 1855 if by the indorsement the property in goods has passed (Sewell - Burdick (1884) 10 App. Cas. 74).

The Vendor who stops in transitu, who does not become a party to the contract of carriage or liable for the freight eo nomine under the contract is bound to take delivery of the goods and to discharge any lien upon them for freight (Booth S.S. Co. v. Cargo Fleet Co. 1916 2 K.B. 570; 85 L.J.K.B.1577).

The postwar IATA Conditions of Carriage are not inconsistent with this conception of freight. The liability of the shipper to pay charges is expressed in para. 5(d) of Article 4, which, in substance, provides that the shipper guarantees payment of all unpaid charges, advances, costs, etc.

There is no express provision, however, making the Consignee or Indorsee of the Airwaybill liable to pay charges. Although it is provided in para. 5(f) of Article 4 that "Consignments will be accepted by Carrier with charges either prepaid or to be collected at destination" it is understood that the shipper remains liable for any unpaid charges (the drafting of para. 5(d) quoted earlier certainly intends to have that effect). The position of the Indorsee is left wide open and there is no indication in the Warsaw Convention or in the Conditions of Carriage that these instruments contemplate the freight to be paid by a person unknown to the carrier at the place of destination.

By Common Law the carrier has a possessory lien for the freight if the agreed time for payment of the freight is contemporaneous with the time of delivery of the goods. (Allison v. Bristol Marine Insurance Co. 1876). Thus no common law lien exists for advance freight (Kirchner v. Venus 1859, 12 Moore P.C. 361) freight payable after the delivery of the goods.

It is submitted by Scrutton on page 419 that

> "In the absence of express agreement or statutory powers, the owner or captain has no power to sell goods on which he has a lien to realise the freight due on them, unless the goods, having been abandoned by all persons entitled to them, have become his property."

With respect to maintaining and enforcing the liens of the carriers the Merchant Shipping Act (1894 57 & 58 Vict. c. 60) reads:

"497 - (1) If the lien is not discharged, and no deposit is made as aforesaid, the wharfinger or warehouseman may, and, if required by the shipowner, shall, at the expiration of ninety days from the time when the goods were placed in his custody, or, if the goods are of a perishable nature, at such earlier period as in his discretion he thinks fit, sell by public auction, either for home use or exportation, the goods or so much thereof as may be necessary to satisfy the charges hereinafter mentioned.

(2) Before making the sale the wharfinger or warehouseman shall give notice thereof by advertisement in two local newspapers circulating in the neighbourhood, or in one daily newspaper published in London, and in one local newspaper, and also, if the address of the owner of the goods has been stated on the manifest of the cargo, or on any of the documents which have come into the possession of the wharfinger or warehouseman, or is otherwise known to him, send notice of the sale to the owner of the goods by post.

(3) The title of a bona fide purchaser of the goods shall not be invalidated by reason of the omission to send the notice required by this section, nor shall any such purchaser be bound to inquire whether the notice has been sent."

British law recognizes a lien by express agreement in which case the lien will be limited to the specific type of charge for which it was expressly given. The Conditions of Carriage contain in Article 4 (5d) such an express agreement according to which "the carrier shall have a lien on the goods for"

a) all unpaid charges

b) advances and disbursements made by carrier

c) costs, expenditures

d) fines, penalties

e) loss of time

f) damages and other sums which Carrier may incur or suffer

i) by reason of the inclusion in the consignment articles the carriage of which is prohibited by law;

ii) by the illegal, incorrect or insufficient marking, numbering, addressing or packing of packages or description of goods;

iii) by the absence, delay or incorrectness of any export or import license, certificate document;

iv) by improper custom valuation;

v) by incorrect statement of weight, volume.

There is further a stipulation included in the Conditions of Carriage, which in the event of non payment of the above charges, authorizes the carrier to dispose of the goods:

> "Carrier shall have a lien on the goods for each of the foregoing and, in the event of non-payment thereof, shall have the right to dispose of the goods at public or private sale, provided that prior to such sale Carrier shall have mailed notice thereof to the shipper or to the consignee at the address stated in the air waybill and to pay itself out of the proceeds of such sale any and all such amounts. No such sale shall, however, discharge any liability

to pay any deficiencies. No such lien or right of sale, and no right of Carrier to collect any of the foregoing shall be in any way affected, lost or prejudiced by reason of the acknowledgement of payment, if not actually paid or by reason of the delivery of the goods, or the surrender of possession of the goods."

It is submitted that if the "airwaybill is to be made negotiable, two important modifications in the Conditions of Carriage will be necessary:

(1) Provisions will have to be made obliging the consignee and the endorsee to pay the unpaid charges upon delivery of the goods to the Carrier's hands. It is rather difficult, however, to foresee whether the inclusion of such proviso in the Conditions of Carriage will be satisfactory, unless express stipulation to that effect is incorporated in the airwaybill.

(2) Special attention must be paid to every type of charge to which right of lien and disposition is sought as common law which generally does not recognize lien on the type of charges presently employed in air transportation, the bulk of which is whether paid in advance or after the delivery of the goods. It is true that the carrier's right to lien is on the goods carried during the period of transit and is an incident which exists by the rule of law and does not need to be in writing to support it, but it must not be neglected that the possessory lien given by common law relates only to one specific type of freight and to the expenses incurred by the shipowner or master <u>in protecting and preserving</u> the goods (Hingston v. Wendt 1876 1.2.3.D. 367 at pp 372, 373).

Rate Agreements

The review of general rules relating to "Charges" does not answer the practical consideration relating to the procedure for rate construction in international air transportation. In the proceeding paragraphs effort will be made to clarify this question as it has great importance in the days when growing competitions open up ratewars, thereby endangering the normal development of this industry.

It is submitted that international rates were, since 1946, agreed upon by the Traffic Conferences of the Airlines subject to the approval of the individual governments.

The Conferences of the Airlines were established as a result of the Bermuda Conference of the British and American Authorities and they represent a solution between the free enterprise advocated by the United States' agencies and the British view, according to which the air should be controlled, that capacity should be rationed by agreements, and that the most important commercial right, the Fifth Freedom, should be the subject of special bargaining.

This policy of control of the air was a reversal from Britain's usual policy of free competition. William A.M. Burden, in the March, 1945 issue of the Atlantic Monthly, writes:

> "It is interesting to note that the air transport policies advocated by the United States and Great Britain in Chicago represented a reversal of the historic economic policies of these countries. The United States, long an ardent protectionist nation, appeared as an eloquent advocate of free trade in the air; and Great Britain, long identified with the gospel of free trade and freedom of the seas, apparently forgot her bold assaults on mercantilism in the nineteenth century and favoured restriction and control in the air".

THE BERMUDA CONFERENCE, 1946

As a consequence of the failure of the British and American representatives to come to an agreement during the Chicago Conference, an inter-governmental conference of the two powers met in Bermuda in January, 1946, and concluded the Agreement relating to Air Services between the United Kingdom and the United States of America, signed on February 11th, 1946.

The principles expressed in the Resolution of the Final Act of the Conference are well known and it is not within the scope of this study to explore them further than is necessary to show their effect on rates. It was agreed "that the two Governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the cheapest rates consistent with sound economic principles" and "that there shall be a fair and equal opportunity for the carriers of the two nations to operate on any route between their respective territories".

These principles were developed further in Annex II of the Agreement:

> "(h) The rates to be agreed in accordance with the above paragraphs shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers." (Agreement between the Government of the United Kingdom and the Government of the United States of America, relating to Air Services between their Respective Territories, Bermuda, 11 February 1946. (Bermuda Agreement, Annex II, Para.

The Bermuda Agreement was a compromise between the British and American views but, since this is the first time in any air transport agreement that an undertaking appears regarding rates, the Bermuda Agreement represents great progress in the development of international rate making.

Annex II of the Agreement can be considered as a set of rules to safeguard the principles expressed in the Final Act of the Bermuda Conference, and as a guaranty of reasonable rate control over international air carriers, the stipulation that

> "(a) Rates to be charged by the air carriers of either Contracting Party between points in the territory of the United States and points in the territory of the United Kingdom referred to in this Annex shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligations. In the event of disagreement the matter in dispute shall be handled as provided below." (Bermuda Agreement, Annex II, Para. (a)).

expressly reserves the right to each contracting party to disapprove any rate proposed by the other's carriers. Thus the control over any operation between the respective territories is finally exercised by the contracting states.

Application of the Rate Provisions

It is provided in Annex II, Para. (a), of the Bermuda Agreement that the respective regulations concern only rates to be charged between points in the territory of the United States and points in

the territory of the United Kingdom. Thus, it appears that the contracting parties restricted themselves to some extent and, purposely or not, failed to apply the rate provision between the points outside their respective territories. If the structure of rate regulations in the Annex is to be looked at from this rather narrow point of view, the question arises as to what law and regulation are effective in respect of rates which:

a) originate in points in a third country

b) terminate in points of a third country

c) originate in country A, fly through one or both of the contracting parties' territories and terminate in Country B.

Difficulties are bound to arise and, when one of the contracting parties disputes a through rate, there appears to be no procedure in the Agreement for remedial action. Thus, there has recently arisen a situation in which an American carrier filed a competitive rate from London to Sydney via New York which was protested by British and Australian operators providing service between the same two points, but via the Middle East. While there was much comment, there appears to be little opportunity for redress under the terms of either the Bermuda Agreement or the United States-Australian Agreement. Admittedly the route originates in London, under the terms of the Bermuda Agreement, and terminates in Sydney under the United States agreement with Australia, but neither agreement covers the through rate for the whole route. In the same way, British and Australian companies could, if they wished, offer a competitive fare

to Americans from the East Coast of the United States to Sydney, via London. Under the present regime, the situation is such that no single Traffic Conference can dispose of it; agreement on a through rate of this kind must be reached through composite meetings of all three Traffic Conferences.

Approval of the Conference Machinery by the Civil Aeronautics Board

In Annex II, Para. (b), of the Bermuda Agreement, it is declared that:

1) the Civil Aeronautics Board of the United States had announced its intention to approve the rate conference machinery of the International Air Transport Association for a period of one year, and

2) any rate agreements concluded through this machinery during that period, which involved United States carriers, would be subject to approval by the Board.

The approval of the IATA Conference machinery by the United States came as a result of lengthy consideration. To start with it might be noted that any carrier participating in an agreement to fix rates, frequencies, capacities, would be subject to possible prosecution for a breach of the antitrust laws. Nevertheless, the conference method of rate-making had received favourable recognition in respect of surface and sea transport. The Shipping Act of 1916 contains provisions from which it appears that Congress foresaw rate agreements being reached through the conference method, at the same time making such agreements subject to the approval of the Shipping Board (Maritime Commission).

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy ... of every agreement, with another such carrier or other person subject to this chapter ... fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges, or advantages; ... or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements."

(39 Stat. 733 (1916), 46 U.S.C.A. S814 (1944)).

Similarly, although no specific procedure is mentioned for arriving at rate agreement, the Civil Aeronautics Act of 1938 refers to air carriers' agreements and makes these subject to the approval of the Civil Aeronautics Board.

"Every air carrier shall file with the Authority a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications,

or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules and character of service, or for other cooperative working arrangements." (Civil Aeronautics Act of 1938 § 412(a).

This favourable attitude of the government toward conference was further affirmed in 1946 when the House of Representatives gave recognition to the rate associations of the rail carriers.

The Honourable Munroe Johnson, before the Sub-Committee of the Committee on Interstate and Foreign Commerce:

"Rate bureaus and similar carrier organizations have existed and functioned for years. They have, in general, the full support of shippers, regulatory commissions, and regulated carriers alike. They are, in my opinion, a creature of necessity. I cannot conceive of the regulated carriers of the country conforming to the duties and obligations imposed upon them by the Interstate Commerce Act unless they are in a position to consult, confer, and deal collectively with many phases of the matter." (79th Congress, 1st Session (1945) 392-393).

The structure of the conferences, in this case, is similar to that already existing in the Sea and Air Transportation, being under the control of a government agency (the Interstate Commerce Commission).

An important pronouncement of Congressional policy in such matters is incorporated in Section 414 of the Civil Aeronautics

"Any person affected by any order made under Sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in Section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Thus, if the Civil Aeronautics Board fails to find that an agreement entered into by a United States carrier is against the public interest, the Board's approval of the agreement must follow and the carrier is relieved from the operations of the antitrust laws.

This section gives the Civil Aeronautics Board a large discretionary power and, at the same time, is evidence that the legislators foresaw that some measure of relief would be required in the case of certain agreements between carriers; however, such relief is limited, insofar as may be necessary, to the extent of the Board's approval.

It was mentioned earlier in this study that the United States' public policy in air transportation was based on open competition. No attempt will be made here to fully explore this policy, but it should be emphasized that in the light of this consideration, the Civil Aeronautics Act has been interpreted in different ways. The

official point of view is expressed in the following opinion of the Civil Aeronautics Board:

> "The competition contemplated by the Civil Aeronautics Act is not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation but having the power to provoke subsidy wars among nations. The Civil Aeronautics Act as construed by this Board regulated competition which seeks to avoid the stifling influence of monopoly on the one hand and the economic anarchism of unrestrained competition on the other." (Agreement C.A.B. No. 493 Serial 4525 - Feb. 19, 1945, p. 9).

The conception incorporated in the above-quoted opinion is inherent in the Board's opinion approving the Traffic Conference machinery of IATA:

> "We cannot accept without proof the proposition that the present resolution, which establishes the only presently available machinery whereby the United States government through this Board can share and have a voice in the regulation of the rates of our international air carriers, is inconsistent with that policy of controlled competition which the Civil Aeronautics Act contemplates. Now are we disposed to declare without proof that the full benefits of competition, including the gearing of rates in international air transportation to the costs of the most efficient operator, will be realized under the procedure of consultation and agreement between the international

Air carriers. We refrain, therefore, from prejudging on this ground a proposal that is both assailed and supported by only theoretical considerations." (Agreement C.A.B. No. 493 (Serial 4525 - Feb. 19, 1946 PP 9&10).

This position was reaffirmed by the Board in 1947 and in 1948, when the Board again found that participation by American flag carriers in the IATA Traffic Conferences would not be against the public interest or in violation of the Civil Aeronautics Act, thereby continuing its temporary approval which commenced in February, 1946 and terminated in February, 1947, to February, 1948 (Agreement C.A.B. No. 493 (Serial No. E.-269, Jan. 31, 1947) and later to February 28th, 1950 (Agreement C.A.B. No. 1175 (Serial No. 4-1227, Feb. 20, 1948).

The requirement incorporated in Paragraph (b), Annex II of the Bermuda Agreement that agreements concluded through the Traffic Conference machinery need to be approved by the CAB is of great importance. Its purpose is to extend the power of the Civil Aeronautics Board over the international operations of United States carriers.

It was already noted that the Civil Aeronautics Board has no direct control over international transportation, but United States carriers might be subject to the control of other Governments' agencies.

The Civil Aeronautics Act, 1938

a) in section 401, empowered the Board to determine fair and reasonable rates of compensation for the transportation of mail;

b) in section 406B, authorized the Board to fix different rates for different air carriers and different classes of service;

c) in section 1002(f), authorized the Board to remove discriminatory, preferential, or prejudicial rates.

These powers, however, do not represent a direct control over international air transportation or the rates and fares charged. Further in Section 1002 (d) of the Civil Aeronautics Act it is provided that as to rates, fares and charges for overseas air transportation, the authority shall determine and prescribe only a just and reasonable maximum or minimum, or maximum and minimum rate, fare or charge and foreign air transportation is not mentioned at all in this section in which the power of the Board to prescribe Rates and Practices of Air Carriers is incorporated. It is quite obvious that the control of foreign air transportation was excluded from the scope of power of the CAB and that is further evidenced in Section 404 (c):

> "The Authority is empowered and directed to investigate and report to the Congress within one year from the effective date of this section, to what extent, if any, the Federal Government should further regulate the rates, fares, and charges of air carriers engaged in

foreign air transportation, and the classifications, rules, regulations, and practices affecting such rates, fares, or charges."

The only substantial power that the Board possesses over the rates of the United States international carriers is when the United States air carriers enter into rate agreements with each other or with foreign air carriers. Under such circumstances, "the Board may approve or disapprove the rates embodied in such agreements". Thus, because rates became the subject of the agreements, the Civil Aeronautics Board indirectly acquired further power over United States international carriers than had been conferred on the Board by the Civil Aeronautics Act. It should be emphasized, however, that this control over international rate agreements is still not as great as that possessed over domestic transportation (where the power to fix rates is specifically granted), although it is certainly more than is directly granted by the Civil Aeronautics Act.

There is a further effect of the Board's reservation to approve or disapprove the agreements reached by the American carriers through the IATA Conference machinery. It reserves the right to the U.S. government to exercise a final control over the participation of its carriers in an international body without which this latter could validly bind the U.S. carrier, and consequently affect indirectly the U.S. public without any check or balance. It seems that this proviso aims

at conferring upon the Civil Aeronautics Board a control similar to that possessed by other foreign governments' aeronautical agencies.

The international importance of the question lies in the belief that the government, by having control over the rates of its own carriers, will prevent uneconomic rate-cutting and thus avoid international conflicts.

There is no approval of the Conference machinery expressed by British authorities because there is no need for such approval, the United Kingdom not having legislation similar to Section 412 (a) of the Civil Aeronautics Act; nor has the United Kingdom antitrust laws, necessitating a previous approval of the machinery which provides means for rate agreements. However, as previously mentioned, in Paragraph (a), Annex II, of the Bermuda Agreement, it is provided that rates are subject to government approval.

British carriers can participate in conferences without breach of any domestic law. This consideration throws some light on why British authorities found participation in the Traffic Conferences one solution to the problem of unlimited competition; they held the view that the different national carriers, in participating in this machinery would exercise the best control over those efforts which were aimed at the elimination of uneconomic rate-cutting.

To sum up, the United States delegation entered into the Bermuda conversations at a disadvantage. The Government of the United Kingdom

had full authority to regulate the rates of its own flag carriers leaving the United Kingdom for other countries and the rates of the carriers of other flags entering the United Kingdom. But the United States Government had direct authority over the rates of foreign carriers coming into the United States. Except by indirect methods, it could not influence the rates which American international carriers charged.

Thus, when the two governments stated in the Bermuda Agreement that they had the right to approve or disapprove the rates charged by the carriers, this expression actually affected only the United States.

The peculiar character of American legislation had put the Civil Aeronautics Board deliberately in a position where the only way it could have any real check on the rates charged by its own airlines was through its power to approve agreements between carriers, who were, a result, exempted from the operation of the antitrust laws. It might be of some interest to note that in connection with the power conferred upon the Board in Section 404 (c) of the Civil Aeronautics Act, the Board in 1939 recommended against control of rates in foreign air transportation.

Without this power, and without the Traffic Conference as machinery, the Civil Aeronautics Board would have less direct authority over the rate policies of an American flag carrier than any one of a large number of foreign governments.

Period for Filing with Government Agencies

The Bermuda Agreement requires the carriers to file with the aeronautical authorities of the contracting states any new rates at least thirty days before the proposed introduction of the new rate. This thirty-day period has been the subject of some discussion and its purpose should be considered. It will be convenient to make a distinction between the two obligations imposed on the respective air carriers of the contracting parties;

In Annex II, Para. (a) the air carriers must obtain the approval of the government authorities of both contracting parties to all rates to be charged on the respective routes;

In Para. (c) the air carriers are required to file with the government authorities every new rate thirty days prior to their proposed date of introduction.

The effect of Para. (b), Annex II of the Bermuda Agreement has already been explored and it need only be mentioned here that neither the agreement nor domestic regulations set a definite time limit for the filing of rate agreements, nor is there any obligation imposed on the governments to express their approval or disapproval within a definite period. It should be noted, however, that both government authorities recognized the carriers'

interest in quick action and expressed their intention to deal with rate resolutions with the least possible delay.

Regarding Paragraph (c) of the Bermuda Annex II, the question arises as to the meaning and purpose of the thirty-day period. Some opinion has interpreted this period as an obligation of the governments to deal with the rate resolutions submitted to their respective agencies within that period, but this does not appear to be the correct view. The text of the Bermuda Agreement seems to be a little misleading, but the technical distinction between a rate agreement and a new rate clarified the problem. We shall find that the Civil Aeronautics Act, Section 403 (a), prescribes that every air carrier shall file with the Civil Aeronautics Board tariffs showing all rates, fares and charges for air transportation and, no change in rates, fares or charges shall be made except after thirty days' notice of the proposed change filed with the Board.

Thus, it can be recognized that the thirty-day period originated with and was necessitated by Section 403 (c) of the Civil Aeronautics Act. New rates cannot ordinarily be made effective in less time, even though they might not be found to be against the public interest by the Board. Thus, the approval of the Board is a feature entirely separate from the thirty-day filing requirement.

It will be seen, therefore, that the thirty-day clause of the Bermuda Agreement stems from the stipulation of American law that no rate can be changed unless the public is given that much notice. Read in this context, it cannot be considered as a requirement that the Civil Aeronautics Board act on a rate in that time.

Substitution for IATA Traffic Conference

The Bermuda Agreement foresaw certain circumstances, where, if no IATA Conference machinery were available, a rate agreement was not approved within a reasonable time by either contracting party, or, finally, if either contracting party withdrew or failed to renew its approval of that part of the Conference machinery relevant to the provision, it would be necessary for the contracting parties to use a substitute procedure described in Paras. (e) and (f) of Annex II of the Agreement. For the purpose of this substitute procedure two periods are distinguished, one before and the other after the Board has been given the power, by law, to regulate international rates.

The first divergency between the two periods is, that while in the second period it is agreed that each of the contracting parties, if in the judgment of their Aeronautical Authorities a rate proposed by one of its carriers is unfair or uneconomic, shall exercise its authority in such manner as to prevent such rate from becoming effective.

The distinction between these two periods becomes significant if one of the contracting parties is dissatisfied with the way in which the other has exercised its control. In this case, if upon receipt of notification (thirty days before the proposed date of introduction) one of the contracting parties did not agree to the new rate proposed by the air carrier of the other contracting party, it could so inform the other in a given period (before the expiry of the first fifteen of the

thirty days referred to above). Both contracting parties thereupon would try to reach an appropriate rate agreement at a government level and if such an agreement were reached, in the second period both would use their statutory powers to make such agreement effective. In the first period, however, the contracting parties, only agree that they "will use their best efforts to cause such agreed rate to be put into effect by its air carrier or carriers". Thus, because one of the contracting parties has no statutory power over international rates no reference is made to such power.

The distinction between the two periods is still more important if no agreement is reached by the government authorities at the end of the thirty day period.

In the second period, the disputed rate may go into effect and the only party who can prevent its operation is the government authority of the country of the air carrier concerned - the other government authority has no veto right over the temporary introduction of a disputed rate pending the settlement of the dispute. The position is completely reversed in the first period where the objecting party may prevent the inauguration of the service in question.

Thus, in the second case, the party who raised the objection is obliged to permit the provisional operation of the contested rate, whereas in the first case, he may bar the operation of the disputed service.

This distinction already appears not to be negligible but the emphasis in the last paragraph of Annex II on the promise of the Executive Branch of the Government of the United States "to use its

best efforts to secure legislation empowering the aeronautical authorities of the United States" to fix rates relating to international transport comparable to that manner in which the Civil Aeronautics Board at present is empowered to act with respect to domestic transportation, is the best proof that effective government control of international civil aviation was desired, not only by the United States authorities, but as well by the United Kingdom authorities. Both the United States and the United Kingdom were anxious to have the Civil Aeronautics Board acquire effective control over the international operations of American flag carriers.

Disputes

In case the parties fail to reach agreement through direct consultation upon the request of either, both agree to submit the question for an advisory report to PICAO, or its successor, ICAO, and to use their best efforts under the powers available to them to put into effect the opinion expressed. "Advisory report" seems a rather cautious expression of the final result of an international settlement but as no precedent has been created its interpretation cannot be given with any certainty.

This stand of the parties regarding disagreements is of great importance. It reflects the serious differences in concept which existed between some of the European countries and the United States in the Chicago Conference of 1944. The United States, at that stage, was not prepared to accept the economic rule of an international tribunal. In the Bermuda Agreement, however, it

appears that some concession was made toward acceptance of authority of an international agency. The articles regulating disputes in the later bilateral agreements will show whether or not the United States' point of view has advanced further and how the British concept developed.

THE EFFECTS OF THE BERMUDA AGREEMENT

The principles formulated at Bermuda by the United States and the United Kingdom were subsequently applied to agreements with and between other countries as well. The impetus toward their further adoption was provided, in large part, by a joint statement of the United States and the United Kingdom seven months after the adoption of the agreement, to the effect that:

> "Experience since the Bermuda Agreement has demonstrated that the principles enumerated in that Agreement are sound and provide, in their view, a reliable basis for the orderly development and expansion of international air transportation".

The principal ideas incorporated in the rate provisions of the bilateral Air Transport Agreements and the draft Multilateral Agreement can be summarized as follows:

i) stipulation of reasonable and economic rates:

ii) the right of carriers to enter into rate agreements;

iii) governmental control over rates;

iv) recognition of the rate conference machinery of the carriers; and

v) procedure for settling disputes.

Reasonable Rates

The desire for reasonable and economical rates expressed at Chicago and Bermuda is the primary motivation of all of these agreements; the other four factors are means by which this objective is to be reached and safeguarded.

There has been a consistent endeavour on the part of both carriers and governments to put this principle into practice, working by whatever means the various agreements afforded to arrive at rates bearing close relation to costs of operation. This matter will be treated more fully in the last part of this study.

Right of Carriers to Enter into Rate Agreements

The right of individual carriers to enter into agreements is based on the concept of contractual freedom granted to the carrier in common law. It is of great importance in civil air transportation, since it assures to the carrier complete freedom to negotiate and conclude with other carriers, with passengers and shippers of cargo, binding agreements with respect to rates, tariffs, and conditions of carriage.

Regarding rates, this contractual freedom is not without qualification and the amount of unrestricted liberty to make contracts varies as between countries. Most countries expressly grant this right to their carriers in the agreements. While the Bermuda Agreement and others made by the United States make no such express grant, there is an implication of contractual freedom within the limitations already mentioned. Only four countries (Egypt, Australia, Iraq and Ethiopia) of the thirty-four whose agreements have been considered here are silent on the subject.

The Right of States to Control Rates

The right of states to control rates is laid down in the Chicago Convention, Articles 1 and 6, and has been repeatedly expressed in the

Bermuda and other bilateral agreements. The justification of this right is to be found in the principles of national sovereignty of individual states, but the reason for advancing it is rather to be found in the substantial economic interest of the various nations in international air transport. The express inclusion of this principle in the Bermuda Agreement arose more from an economic concern - the fear of disastrous rate wars - than from any overweening preoccupation with political or legal questions of sovereignty.

The problem of state control can be divided into these major phases:

1) The right of an individual government to control the rates of its own carriers
   a) on routes originating or terminating in its sovereign territory, or touching upon it;
   b) on routes which do not touch the sovereign territory;
2) the right of an individual government to control the rates charged by carriers of other nationalities
   a) on routes originating or terminating in its sovereign territory or touching upon it;
   b) on routes lying completely outside its sovereign territory.

As regards 1 (a) and (b), there is no dissension from the general principle that states can exercise sovereign rights over aircraft of their own registry, regardless of whether their routes

begin or end within the national borders or lie entirely outside them. This right, which is well recognized in international law, permits states thus to control the rates charged by their carriers wherever they operate. In the case of the United States, the Civil Aeronautics Board, as the Government's agency charged with the economic regulation of United States-flag carriers, cannot itself exercise this right, but it remains, nevertheless, a right which the United States can legitimately exercise as a sovereign nation and which the Congress can delegate to the Civil Aeronautics Board if it so wishes.

By the exercise of control over the rates charged by its carriers on routes outside its territory, an individual nation can at least influence the general rate situation in the foreign territory concerned. This will be elaborated in the discussion of the Conference machinery.

The right of a nation to control rates charged by foreign carriers serving points within its own territory is recognized and unchallenged. It is expressed in both the Chicago and the bilateral agreements.

The great moot question arises in the consideration of 2 (b) - the right of one nation to control the rates charged by foreign carriers on routes outside the territory of that nation.

It has been argued that there is an inter-relation between routes and rate structures in the complex modern air traffic network, that even though two routes may lie far apart and may be operated by carriers

of different nationality, the rates charged on one may affect the other. Thus, the Turks might argue that the rates charged by an American airline flying to India via the Middle East affect local rates from Istanbul to Baghdad in such a way as to give the Turkish Government some right to intervene in the construction of the rate for the longer route. In similar fashion, Ecuador, which maintains air connections with its two neighbors, Colombia and Paraguay, might feel that the rates its own company charges on routes from Quito to Lima and Bogota would be affected by the rates charged on a direct connection between the latter two cities which did not touch Ecuadoran territory at all.

If there is any economic justification for this contention, it has, however, no basis whatsoever in international law. There is no indication in the Chicago Convention that the sovereign right of a nation can thus be extended beyond the limits of its own territory. The application of all of the bilateral agreements considered in this study is expressly limited to routes between points in the territories of the two contracting parties. Finally, if these bilateral agreements are considered in the light of contractual relations between two parties. It is manifestly impossible in international law for those two to bind a third party to their undertaking.

The aim of these bilateral agreements has, in every case, been a practical one of making commercial operations feasible, and their terms are usually as detailed as the routes, parties and circumstances necessitate. It can further be suggested, therefore, that discussion of the right to control rates of foreign carriers in third countries was omitted from these agreements, not only because the countries concerned had no right to claim it, but also because they felt no

necessity to consider it.

This situation has one more implication in connection with the rate Conferences of IATA. The IATA rate-making machinery produces rate agreements and the states are interested in these agreements insofar as the specific rates affect their carriers or affect services beginning or terminating in their own territory. Only the United States - and occasionally, Brazil - insist upon review and approval of the full Conference agreements to the extent that their own carriers are involved in them.

In practice, the number of IATA Traffic Conferences has been made small and their individual areas made large in order to produce the greatest possible degree of uniformity in traffic practices of all kinds. Thus, a rate agreement covering routes in which United States carriers are directly interested may also cover routes in which they have no direct interest. The fact that the Civil Aeronautics Board reviews the whole of this resolution and approves or disapproves it in toto cannot, however, be construed as an extension of the Civil Aeronautics Board's control over routes and carriers not under the United States flag. It is, at most, an accommodation of the Conference machinery to the peculiar need of the Civil Aeronautics Board for some means to exercise the sort of control outlined in 1 (a) and (b).

The real danger in this situation is not that the Civil Aeronautics Board will come to control rates on routes which are not the direct concern of the United States, for the Bermuda Agreement also contains the undertaking of the government to secure

powers from Congress that will avoid the requirement that they consider rate agreements rather than individual rates. The real danger lies in the fact that any individual government whose airlines are concerned in a Conference agreement can keep that agreement from becoming effective, no matter how many matters not its concern may be included therein, and regardless of whether all other countries involved are favorable to it.

Finally, it should be noted that the Draft Multilateral Agreement of Geneva secures to all parties involved the rights outlined at 1 (a) and (b) and at 2 (a), but goes no further.

Recognition of the Rate Conference Machinery of the Carriers

The ways in which the Traffic Conferences of the airlines operate to reach rate agreements will be explored in a later part of this study. It is sufficient here to point out that twenty-seven of the thirty-four countries which are parties to the various Air Transport Agreements make direct reference to the recommendations of this international agency.

The texts of the agreement regarding the participation of carriers and their conferences in international rate-making, entered into since the Bermuda Agreement in February, 1946, can be divided into the following types:

1) The Bermuda text
   expressly approves the Traffic Conference machinery, permits United States carriers to participate in it, but requires that Conference agreements to which United States carriers are parties be subject to approval of the Civil Aeronautics Board.

In this group belong the United States agreements with the United Kingdom, France, Belgium, Brazil, Australia, New Zealand, China, the Argentine Republic, Chile, Union of South Africa, Italy, India.

2) The most commonly used text provides that tariffs should be agreed in the first instances between the designated airlines, whether or not in consultation with other airlines operating on the routes, but should, in all cases, have regard for the relevant rates adopted by IATA, or rate conferences of the carriers, or should be reached specifically through the rate fixing machinery of IATA.

Such agreements are: the Netherlands-Portugal, India, Brazil; France-India; Canada-Australia, United Kingdom, Ireland, Netherlands; Ireland-Switzerland, Czechoslovakia; United Kingdom-Chile, France; Denmark - Czechoslovakia; Belgium-Portugal; Norway-Brazil, Czechoslovakia; France-Sweden, Ireland, Portugal, Czechoslovakia, Brazil; Czechoslovakia-Sweden, Switzerland; United Kingdom-Peru, Phillipines, Uruguay, Chile; Denmark-Portugal; Norway-Portugal; Argentina-Denmark, Switzerland, Norway, Italy, Portugal, Spain; Spain-Portugal; Netherlands-Czechoslovakia; France-Argentina, Spain; China-Netherlands.

be included in this group.

3) The abbreviated text

prescribes that tariffs to be charged by the airlines shall, in the first instance, be agreed between themselves, with or without consultation with other air carriers interested.

Such agreements are those contracted between Canada-United Kingdom, Sweden; United Kingdom-Argentine Republic, China, Greece, Eire, Netherlands, Norway, Portugal, Sweden, Turkey; Iraq-Turkey; the Netherlands-Union of South Africa, Uruguay.

The Bermuda Agreement and subsequent agreements by the United States refer to the IATA Traffic Conferences in terms which are distinctly different from those employed in the agreements of other nations.

Settlements of Disputes

The procedure adopted by the bilateral agreements for arbitration is duly summarized in ICAO Doc. 4798 AT.526 (23 Oct. 1947) and elaborated by Ludwik Rabcewics-Zubkowski - "Le reglement des differends internationaux relatifs a la navigation aerienne civile." (Revue francaise de droit Aerien No. 4).

The problems of arbitration can be characterized as follows:

1) the nature of the arbitral tribunal;

2) the authority and type of decision of the tribunal, and

3) temporary remedies and sanctions.

With respect to the first, there are three alternatives: the Council of ICAO, a Permanent Tribunal or Ad Hoc Tribunals. As a Council of States, the ICAO Council appears not to be a perfect solution, being neither appropriate nor competent as a judicial body. The individuals serving as representatives on the Council are subject to instructions from their respective states; consequently, the final vote of the Council might be unduly influenced by political considerations.

The establishment of a Permanent Tribunal within ICAO seems to be held inadvisable because of the heavy expenses involved, especially since the volume of litigation to be submitted to such a tribunal is unpredictable at this time. (ICAO Doc. MAC. 111 1947)

The general tendency of the bilateral agreements favors reference of disputes to ICAO, notwithstanding that the idea of Ad Hoc Tribunals composed of one arbitrator named by each party and a third named by the first two, has also been advanced. In the Geneva Draft Multilateral Agreement, this last solution has been adopted as an alternative to the International Court of Justice.

As to the type of decision to be rendered by the Tribunal, it should be recalled that the majority of bilateral air transport agreements accepts the principle that decisions of the arbitral tribunals are binding upon the parties. However, the United States agreements provide for advisory reports which the parties will use their best efforts to put into effect.

In connection with the Draft Multilateral Agreement, the majority of the Air Transport Committee of ICAO felt that the arbitral tribunal

must have power to render binding decisions, not so much in connection with rate agreements, but because of the other important rights conferred by the Multilateral Agreement, which must be fully protected. Certain states felt, however, that only an advisory role should be given any arbitral tribunal.

The same difficulty exists regarding the temporary arrangements and sanctions to be imposed upon the contracting parties. Some of the bilateral agreements incorporate provisional remedies pending decisions of the arbitral tribunals. There is a general tendency to preserve the status quo in case of dispute and some of the agreements go even further by providing sanctions against the party who causes the breach of contract. It has been noted, however, that the article on rates of the Draft Multilateral Agreement incorporates only provisional measures.

The individual countries entering into bilateral agreements were rather consistent in adopting certain types of tribunals and in accepting or avoiding the decisions of the tribunals. According to their treatment of the question of disputes, the bilateral agreements might be divided into four categories:

1) The first category consists of agreements in which the contracting parties not only acknowledge the authority of the Council of ICAO to settle disputes between the parties but also declare that the decision of the arbitral tribunal will be binding upon them. Sometimes the decision of the tribunal is declared final, with the serious consequence that no further appeal to any international or national jury or tribunal or court can be made.

(The bulk of the agreements belonging to this category is made up by the United Kingdom and France, not only with some European countries but also in other countries in other parts of the world).

2) The second category consists of agreements in which the parties agree to refer their disputes to the Council of ICAO for an advisory report, with the undertaking that they will use their best efforts under the powers available to them to put into effect the opinion expressed in such report. (Such agreements are: the so-called "Bermuda type" agreements, in which the United States is always one of the contracting parties).

3) The third category includes those agreements in which the references to arbitration vary from the establishment of an arbitral tribunal to the general submission of arbitration to the rules of international law. (Union of South Africa - United Kingdom, Netherlands; France - Spain, Argentina).

4) Finally, the fourth group comprises those agreements in which no provision has been made for arbitration. In this category belong some United States agreements made prior to the Bermuda Conference, and the United Kingdom-Argentina Agreement.

To sum up, there are a few inconsistencies in the treatment given by the bilateral air transport agreements to the five principal ideas under consideration here. These arise particularly with regard to the machinery by which rate agreements are to be reached, to the way in

As a practical matter, however, it is apparent that the machinery now used to reach rate agreements has successfully fulfilled the expectations of the nations which have, expressly or implicitly approved it. Rate disputes, insofar as they have occurred, have been localized. The process of thrashing out an agreement to increase or decrease a rate has been confined to the Conferences, where the individual interests of the carriers and, indirectly of their governments, can be safeguarded without recourse to open economic warfare.

The successful operation of the Conferences has been recognized, not only by the bilateral agreements negotiated since Bermuda, but also by the text of the Draft Multilateral Agreement. Since the states who would be parties to this agreement have already acknowledged and adopted its principles in their bilaterals, adoption of the multilateral by them should not be difficult.

The difference between the various concepts of settlement of rate disputes has had no practical importance to date, but it might have serious effects upon the goodwill of states, particularly in the case of an advisory report which could not be put into effect because of a lack of "available domestic powers". The solution proposed in the Draft Multilateral Agreement, however, seems sound and, if generally accepted, offers a restatement in international transportation of the principle that every state is equally bound by its contracts and that the undertakings of the states are equally enforceable against all contracting parties.

THE TRAFFIC CONFERENCES

Before the Bermuda Conference, three suggestions to end the open rate situation were discussed. These were:

1) to subject rates to the approval of an international aeronautical agency, on a governmental level;
2) to fix every international rate by means of a bilateral agreement (without creating an international agency)
3) to fix rates by agreement among the carriers operating in a given region.

The first suggestion was not new; it had been considered previously in Chicago where the American representatives objected on the grounds that there were, at that time, no set principles to serve as a guide for such an international agency, and that the decisions of the agency would be ineffective because they would not have the backing of law.

While there was no likelihood at Chicago that such an agency would be established, there was some discussion of how it might operate. It was suggested that it could fix rates on the principle of the "costs of the most efficient operator", but the general reaction seemed to be that it would be improbable that such a governmental agency could determine who the most efficient operator was and what its costs might be.

There were, it was pointed out, quite wide differences in standards of living between countries. Some airlines were government enterprises, either in ownership or control, and might not be required to pay taxes

or to seek their capital in the open market. Airlines might also be assisted by hidden subsidies and benefits, such as free use of airports, radio aids and navigation facilities; government-financed training or equipment purchase; and other cost reducing factors. In the domestic field, these factors might be open to investigation by a national government but before an international tribunal attempting to determine a rate, they might well be closely-guarded secrets whose withholding could unduly influence the international rate structure.

In short, the powers which an international rate-making agency would need in order to operate satisfactorily constituted a yielding of national soveriegnty to an extent which few nations were willing to countenance.

In considering the suggestion that rates be determined at a government level without the establishment of an "International Civil Aeronautics Board", it must be realized that rate-making on an internationa level, even between two countries only, is a complicated matter. It is a highly specialized function, which must be exercised by well-trained specialists, and must take into consideration a great many conflicting points of view, both national and international.

The conflict of these interests could be only solved through the negotiation of further bilateral agreements with countries indirectly interested in the rates on a given route. It is doubtful, however, whether such a system could operate with the elasticity required in the formulation of rate agreements. By the time a series of bilateral agreements could be drawn up and agreed upon, the situation underlying them might be completely changed, thus requiring new rate agreements

e procedure.

The third suggestion, to leave rates to agreement among carriers, had practical advantages. The consideration that the operators are t hose who have the greatest experience in the rate-making field and have the personnel required for the efficient handling of rate questions, led to the conclusion that the practical solution of the unsatisfactory open rate situation was to let the carriers make their own agreements through the already established IATA rate conference machinery. As we have already seen, this position was adopted in Bermuda and has been reaffirmed since by the majority of the countries engaged in international air transport operations.

The principles governing the work of the Traffic Conferences are those established in the Bermuda Agreement.

There are two points which have to be mentioned before discussing the procedures of the conferences: first, the Traffic Conferences have only been working for a few years and their procedures, rules and approach to problems are under constant development. The aim to achieve better transportation at lower rates is coupled with the endeavor to establish more efficient procedures and to achieve these aims in the shortest possible time.

Second, it must be recognized that reasonable uniformity is an important aid to more economical operation. The traffic Conferences have adopted this principle and their resolutions are to a great extent influenced by it. The question of how far uniformity is reasonable is rather arguable and only future experience will prove whether the limits adopted by the Conferences will be practical and what modifications, if any, may be necessary.

Areas, Regulations, Authority of the Conferences

The machinery of the IATA Rate Conferences is set down in the "Provisions for the Regulation and Conduct of the Traffic Conferences".

The world is divided into three Traffic Conference areas, which may be described as follows:

Traffic Conference No. 1. Encompassing all the North and South American Continents and the islands adjacent thereto; Greenland; Bermuda; the West Indies and islands of the Caribbean Sea; the Hawaiian Islands (including Midway and Palmyra).

Traffic Conference No. 2. Covering all of Europe (including that part of the Union of Soviet Socialist Republics in Europe) and the islands adjacent thereto; Iceland; the Azores; all of Africa and the islands adjacent thereto; Ascension Island; that part of Asia lying west of and including Iran.

Traffic Conference No. 3. Including all of Asia and the islands adjacent thereto except that portion included in Traffic Conference No. 2; all of the East Indies, Australia, New Zealand, and the islands adjacent thereto; the islands of the Pacific Ocean except those included in Traffic Conference No. 1.

In addition to rates, the Traffic Conferences are authorized to consider and resolve all traffic matters involving passengers and cargo in their respective areas. Every active member of IATA operating in the territory of each Traffic Conference enjoys the right of a voting membership in that Conference.

The authority of the Conferences is derived from the IATA General Meeting and, according to their Provision, the aims, objectives and purposes of the Conferences are those of IATA: to promote safe, regular and economic air transport, to provide means for collaboration among the air transport enterprises; to foster air commerce and to study the problems connected therewith; to cooperate with the International Civil Aviation Organization and other international organizations.

A great part of the preliminary work of the Conferences is carried out by their permanent Sub-Committees, of whom two should be mentioned here: the Costs Sub-Committee and the Fares, Rates and Charges Sub-Committee.

The duties of the Sub-Committees are usually prescribed at the time of their creation. Their recommendations are considered and acted upon by the Traffic Conferences.

Meetings, Voting

In connection with the formalities of the meetings of the Traffic Conferences, at least thirty days' notice must be given before the date fixed for the meeting, an Agenda must accompany this Notice of Call, and all members have the right to request that matters be placed on the Agenda.

The Traffic Conferences reach their final agreements through voting, which is carried out by the accredited representatives of each member. Regarding rates, action may be only taken upon the unanimous affirmative vote of the members represented at any meeting. The failure of any member present at a meeting to vote is expressly

deemed to be an affirmative vote.

This unanimous agreement appears to be a basic protection for all members concerned and represents a serious guarantee to the governments whose airlines are members of Conferences. Individual Conference members may take independent action, and other carriers cannot bind a dissenting member by their eventual agreements. Perfect protection against actions contrary to its interest is afforded the individual carrier because:

i) no matter can be acted upon unless it has been noticed to all members thirty days in advance of the meeting;

ii) every member has the right to be represented at all Conference meetings;

iii) any individual Conference member can veto a resolution with which it disagrees.

There are detailed provisions incorporated in the regulations of the Conferences for action by mail, for procedures to be followed at signal and joint Conference meetings, for presiding officers, and for voting and non-voting membership. The amendment of these provisions has been left to the Executive Committee of IATA, which has from time to time approved changes to adapt Conferences to the needs of practical experience.

Disputes

It is difficult to determine what remedies are available to the carriers in the courts of various countries for a breach of agreement reached at the Conferences. Certain countries would undoubtedly uphold rate agreements, while others might not necessarily do so. It is, therefore, evident that carriers have been compelled to attempt a system

of self-regulation to safeguard their agreements.

Every member of a Conference may stop Conference action by exercising its right to veto the agreement concerned, but if no such veto is expressed each Conference member expects the others to comply with the agreement. It is evident that a breach of a Conference agreement is not an act of free competition, but an entry into unfair competitive practice, against which other parties to the agreement must be reasonably protected. The machinery of the Conferences would be largely ineffective if no protective regulations were incorporated. The discovery and penalizing of breaches of Conference resolutions has a rather lengthy history in shipping and rail transportation, but only the system adopted by the IATA Conferences will be considered here.

According to the present Provisions, any member or members of a Conference who believes that another member has violated a Conference agreement can demand the appointment of an investigatory commission. This commission, acting under the authority of the IATA Executive Committee, can settle its own procedure. Conference members are required, upon the request of the commission, to furnish it with any relevant information. The commission is then authorized to reach a decision based upon the issues and evidence placed before it and to impose upon any carrier found guilty of a breach of obligation certain penalties prescribed by the Annual General Meeting of IATA. The carriers involved on either side of such a case have the right to appeal a commission decision within sixty days to the IATA Executive Committee. This group is given the final word in approving, disapproving,

reducing or modifying the decision and penalty of the commission. When a case has been finally determined, a full report of the matter is to be circularized to all the members of the Conference concerned.

Although there has been little need for this procedure since its incorporation in the Provisions, its existence as a possible deterrent to breaches of Conference resolutions has a practical value.

Principles affecting rate structure

There are at least two basic principles on which a rate structure could be built:

1) charging the highest rates that the traffic can bear;

2) fixing rates in relation to reasonable cost and profit figures.

The first of these principles has been largely rejected in international air transport practice. While the emergent need for transportation and communications in the years immediately following the war made it possible for the airlines to increase their rates without losing custom, they did not avail themselves of it. Instead, with the encouragement of states and of international organizations, the carriers have concentrated upon improvements in efficiency and reductions in rates to make air transport services available to the broadest possible market.

The effort to bring rates into relationship with costs has been a process of continuous development. When the old North Atlantic Traffic Conference held its first meeting in February, 1946, it was

found that no appropriate cost figures were available for rate-making purposes. It was then necessary to develop a standard form for collecting cost data, but the successful drafting of such a form was not in itself enough to assure their availability. In some cases, some of this data was considered as confidential from either a national or commercial point of view, and special procedure for its confidential disclosure and transmittal had to be developed. In others, the accounting procedures of the airlines themselves had to be expanded or changed to gather the information required.

It was recognized that routes were broadly divided into those which lay entirely inside the boundaries of a single Conference area and those which ran between points in two or more Conference areas - in brief, into intra-Conference and inter-Conference categories.

Since the majority of world routes break down into regional operations, with varying operating characteristics in each region, it was seen that intra-Conference routes must be further sub-divided.

It was decided that the costs of east-west inter-Conference routes would be based on the costs of the round-the-world trunk routes, even though these routes might not, in some cases, follow the exact trunk pattern. Further, since it was evident that carriers who operate only along one sector of the trunk routes were entitled to some voice in the determination of trunk rates, these main routes were divided into three sectors:

i) North American to European gateways;

ii) European gateways to Calcutta; and

iii) Calcutta to the West Coast of North America.

To make cost reports consistent in all three Conference areas, differentiation had to be made between basic factors and secondary considerations in airline operating costs, and it was recognized that there were still other considerations, which, while not entirely predictable, have an important influence on international air transport cost figures.

These include such matters as grounding of equipment, delay in deliveries of new equipment, difficulties in obtaining spare parts, currency fluctuations, changes in wages and commodity prices, alterations in organizational structure, variations in anticipated available payload and other factors which had to be considered in cost calculations.

(a) The major operating factors are: the average number of aircraft, total flight hours, (less non-revenue house), net revenue flight hours, average speed, revenue kilometres (great circle kilometres, course flown) average saleable capacity for full period, saleable metric ton kilometres, flight equipment depreciation. The overall load factor for this purpose is the quotient obtained by dividing revenue ton kilometres flown by saleable ton kilometres.

(b) The elements of cost are:

(1) Flying operations (crew salaries, expenses and insurance, fuel and oil insurance, aircraft and

public liability insurance, flight equipment rental);

(2) Aircraft maintenance (direct labour, including labor expended in aircraft engine maintenance and repair, materials and outside repairs; overhead, including supervisory personnel and all other indirect expenses in operation and maintenance);

(3) Depreciation of flight equipment;

(4) Station and ground operation (landing charges, salaries wages and expenses, other airport and station costs);

(5) Passenger service (cabin attendants' salaries, expenses; passenger liability insurance, meals and accommodation);

(6) Selling and publicity (agency commission, advertising and publicity);

(7) Administrative and general office charges, salaries, expenses, fees;

(8) Capital charges, including interest on debt income taxes, amortization of development expenses and provision for profit.

The Civil Aeronautics Board and the Ministry of Civil Aviation appear to be conscious guardians of the principle incorporated in the Bermuda Agreement that rates should be reasonable. The Civil Aeronautics

Board's Order extending its approval of the IATA Conferences to February 28, 1950, gave detailed consideration to the rate-making process and to the character of the economic data relied upon by the Conference in reaching individual rate resolutions.

The Council of ICAO, in accordance with the provisions of the Chicago Convention (Art. 67, 54) approved Statistical Reporting Forms, specified as Table T.2 (Traffic Summary) and Table F.2 (Operating Summary), and the Civil aeronautics Board requested that the rate resolutions reached at IATA Traffic Conferences be supported by the minimum information provided by these forms.

It is the opinion of the Board that "neither the members of IATA nor the reviewing agencies or their respective Governments can adequately appraise the economic soundness of rate resolutions except upon consideration of such minimum data". It might be suggested that one of the reasons which prompted the Civil Aeronautics Board's request to the carriers lies in the fact that many of the signatory countries to the Chicago Convention and members of ICAO had failed to provide the information on a governmental level.

Primary Questions before the Conferences

While the whole work of the IATA Traffic Conferences cannot be fully examined in the course of this study, it will be appropriate to touch upon the main headings with which they deal.

The most important issues before the Conferences are those of basic rates and specific fares. Rates for scheduled operations are agreed upon by resolution and are recognized as minimum, but not

maximum rates.

These agreements are further complicated by the international character of the Traffic Conferences. Provisions relating to currency questions - in themselves too complicated for exploration here - must be introduced. "Conversion rates" must be established to make possible the translation of rates from the currency agreed upon in the first instance (in Conference No. 1, the United States dollar, and in Conference No. 2, the pound sterling) to the local currencies of the individual carriers. Since international carriers do business in more than one country, there must be provision for further recalculation of rates into other currencies, so that exchange rates must also be agreed upon by resolution. It has been necessary also to introduce some restrictions based upon current complications of international exchange; for example, non-residents of a country in which a ticket is sold must pay their fares either:

a) in Portuguese escudos, Swiss francs or United States dollars;

b) in the currency of the country of residence of the passenger (if not prohibited by law in the country of sale) or

c) in the currency of the country of sale (with the exception of passengers residing in certain countries who must prove that the currency has been obtained at the official rate).

The only exceptions to the rates agreed in the "Specific Fares and Rates" resolutions are in connection with the round-trips, circle trips, open-jaw trips, excursion fares, free and reduced rate transportation for agents and tour conductors, privileges of stop-over, all of which might be considered as discounts, and sleeper surcharges, which call for increase in fare.

In addition to providing for specific rates and fares between certain points, it was foreseen that the carriers would have to establish other rates and fares. So that these unspecified rates would not, either alone or in combination with others, undercut the specific rates, certain precautions were taken. It was provided that unspecified rates would be constructed in conformity with existing Conference resolutions, that their validity would expire with the specific rate resolutions, and that the carrier wishing to establish such an unspecified rate must notify the Secretary of the Traffic Conference concerned in advance of such action.

The Conferences also agreed upon regulations for the construction of inter-Conference rates and for the adjustment of through rates to meet combinations of intermediate rates.

Inter-Conference rate construction is, under present resolutions, governed by the following two principles:

a) establishing rates between specified gateways and adding to them the agreed Conference fares to and from such gateways; and,

b) establishment of through fares on the basis of a distance curve by agreement among the carriers concerned.

The carrier establishing inter-Conference rates may choose between these two principles.

Where there is a discrepancy between the through rate between two points and the combination of rates established for service via intermediate points, the Conference regulations provide that the through rate may be adjusted downward to the sum of the intermediate rates. Should such a reduction be necessary, however, thirty days' notice must be given to other Conference members before its introduction.

All of the arrangements so far mentioned apply to the scheduled operations of the carriers. In charter operations, they are left free to do as they please, with the exception of a safeguard against eventual rate-cutting through such charter operations. It has been agreed by the Conferences that all charter agreements must contain the stipulation that the party to whom the space is sold will not resell it to the general public for less than the IATA rate; that members will not undercut conference rates by operating charter services; and finally, that charter prices charged by members will be calculated on a complete plane-load basis. Governments or government-sponsored organizations are, however, excepted from these regulations in the event the charter concerns the transportation of immigrants and displaced persons. Even in this case, however, the charter price must be calculated on a complete planeload basis.

In the construction of cargo rates, a distinction has been made between low density cargo, which has bulk, but little value, and cargo of particularly high value, which must be given special treatment. Quantity discounts, common to all other forms of transport, were introduced and agreed upon, as were commodity rates for

high value cargo.

These are by no means a complete catalogue of the various kinds of rate resolutions, nor have those mentioned been fully explored. They will, however, give some idea of the complexity of the problems and procedures necessarily treated by the Conferences.

Date of Effectiveness of Rate Agreements

In reviewing the bilateral agreements, it was pointed out that the respective governments reserved the right to exercise a control over the rates the carriers sought to introduce. The mechanics of the Conferences have been seriously affected by this requirement, especially in the light of the Conference rule that no carrier is bound by a resolution if its government disapproves it, or if it is against its national policy.

The purpose of the Conference method is to achieve resolutions which can be subscribed to by all the participating carriers and which are effective and binding on all the members. This aim might be seriously endangered by the facts:

a) that there is no definite time limit set or agreed by the governments for the expression of their approval or disapproval; and

b) that, since it is quite natural that no carrier is willing to make an agreement effective unless reasonably certain that the others will be able to get their government's approval to do the same, a rate cannot be announced as effective before all governments concerned have approved the resolution.

This serious question of the effective date of Conference resolutions is further complicated by the different concepts of European and United States carriers concerning public policy.

United States carriers took the position that their government agency cannot be limited in its action and that every agreement reached by the Conferences could be adopted only "subject to government approval". On the contrary, the European carriers felt that such an expression would render Conference work ineffective, as governments may not express their opinion regarding an agreement in any reasonable time, and they continued the practice of prescribing a date of effectiveness of their resolutions prior to which any government might express its approval or disapproval.

At Rio de Janeiro, where the first composite meeting of the three Traffic Conferences were held in 1947, the opposing viewpoints were brought into sharper focus. It was contended that practical operating experience demonstrated that it was a most undesirable arrangement to make agreements come into effect at an indefinite date in the future. The only practical and realistic approach to the problem, it was argued, was to arrange that agreements affecting the business of air transportation would come into effect at a definite date, as close to the time of agreement as possible.

The record of government action in passing upon IATA resolutions appeared not to have been satisfactory. Sometimes delay was occasioned by one government and sometimes by another, but, in each case, operators suffered the cumulative effect of such delay.

A compromise was finally reached in Rio de Janeiro, which provided

1) Pure rate resolutions were to continue to be "subject to Government approval".

2) Mixed resolutions related to rates were to come into effect on a specified date, allowing governments a reasonable period of time in which to approve or disapprove the resolutions before they became effective.

3) Non-rate resolutions were to come into effect immediately.

This arrangement appeared only to be a partial solution and in 1948 at the Bermuda Meeting of the Conferences, the question was considered again. It was agreed, at this time, to deviate from the three-fold distinction between different subjects and to adopt a uniform procedure for determining the dates of effectiveness of all kinds of agreements.

Generally, the resolutions with respect to effective date provide that the carriers are responsible for obtaining their governments' approval of agreements within a forty-five day period immediately following December 31, 1948 (filing period); that, if during the filing period the respective government neither expressed itself nor requested an extension of the filing period, the machinery would start moving and the announcement and effectiveness dates would be specified by the secretaries of the Traffic Conferences. The announcement date was set at fifteen days following the date of this notification by the Conference secretary and it was agreed that no member would publicly announce the arrangements made by the agreement before that time. The effective date of the agreement is set at forty-five days after the date of notification. There is also provision for the length of time the respective agreements are to

remain effective.

There are,however, differences in the way these effectiveness resolutions anticipate the disapproval of a resolution by governments. The various treatments of this question are:

a) certain agreements, including the one regulating the effectiveness of resolutions, were made void if disapproved by any government authority;

b) certain agreements, although declared to be void if wholly or partly disapproved by a government (thus giving rise to the same open-rate situation which would exist if there were no resolution at all), leave Conference members individually free to put the provision of the agreement into effect, subject to the laws of the countries in which they operate;

c) one resolution is not voided by the disapproval of a government and can be implemented by all carriers whose governments have not disapproved, provided that it is not applied in a country which has disapproved it;

d) the agreement covering Specific Fares and Rates received special treatment; if any of the fares, or rates or charges set forth (in the resolution) "is disapproved by government authority, the fares, rates or charges disapproved shall be ineffective and an open situation shall exist with respect to such fares, rates or charges".

A period of validity is set for every agreement. Some resolutions may be effective for only a few months, while others can be valid for longer terms, depending upon their nature and circumstances.

The Civil Aeronautics Board in Agreement CAB No. 493, made it a condition that no resolution relating to rates for periods extending beyond the period of approval of that agreement would be approved by the Board. It has been also said by the Civil Aeronautics Board that "the right of independent action of any carrier once it has observed the Conference procedures must be "scrupulously preserved".

It is submitted that, insofar as rates are concerned, the bilateral air transport agreements have established a uniform framework for making reasonable rates, have set up within it a system of more or less universally recognized Traffic Conference machinery by which carriers can agree upon rates, have given governments the right to control carriers' rate agreements in the public interest, and have, in most cases, provided for arbitration of disputes.

Undoubtedly, there will always be divergencies and difficulties in the rate-making field. The present system, however, provides a means whereby these can be reconciled and resolved within the operators' Conferences and without the constant danger of resort to expensive and destructive rate wars.

It is interesting to note that, while the present structure was created almost incidentally by the Bermuda Agreement in 1946, it has been so reinforced by subsequent bilateral agreements that it represents today a worldwide network in which great confidence has been placed by all parties concerned.